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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

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JUDGES OF THE HIGH COURT.

1927.

1ST JANUARY TO 31ST DECEMBER.

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ACCUSED CHARGED WITH MURDER AND THEFT—*Unexplained possession of stolen property, only circumstance in evidence—Conviction for murder—If legal—Indian Evidence Act, section 27—Statement under—If whole of statement admissible.*] Where unexplained possession of stolen property belonging to a deceased person is the only circumstance appearing in the evidence against an accused charged with murder and theft, he cannot be convicted of murder unless it is satisfactorily proved that possession of the property could not have been transferred from the deceased to the accused except by the former being murdered. If an accused makes a statement under section 27 of the Indian Evidence Act, the whole of the statement which leads to the discovery of the stolen article is admissible and it should not be cut up so as to confine it only to the actual words which the accused may use to express the fact that he had hidden the properties. *Queen Empress* v. *Sami*, (1890) I.L.R., 13 Mad., 426, and *Moyila Kurmiah* v. *Emperor*, (1913) M.W.N., 145, referred to. *In re Nainamalai Konan*, (1921) 14 L.W., 418, and *Manjunathaya* v. *King-Emperor*, (1914) 26 M.L.J., 852, followed.
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CATTLE TRESPASS ACT (I OF 1871), SEC. 20—*Criminal Procedure Code (V of 1898), ss. 4 (c), 29—Magistrate authorized to receive and try charges—If special authorization necessary regarding offence under sec. 20.*] Section 20 of the Cattle Trespass Act empowers any Magistrate, authorized under the Criminal Procedure Code by the District Magistrate to take cognizance of offences, to take cognizance of an offence under that section. *Emperor* v. *Vishwanath Vishnu*, (1920) I.L.R., 44 Bom., 42, approved. *Budhan Mahto* v. *Issur Singh*, (1907) I.L.R., 34 Calc., 1926, referred to.

Deenadayalu Naidu v. *Ratna Padayachi* ... (1927) I.L.R., 50 Mad., 841

CERTIORARI—*Writ of—Jurisdiction of High Court—Jurisdiction derived from Supreme Court of Madras—Jurisdiction and powers of High Court, similar in scope to those exercised by Court of King's Bench in England—Objection to jurisdiction not taken by the applicant before the lower Court—Bar to issue of writ—Power exercised by High Court, discretionary—Objection, whether based on law or facts, not taken before lower Court, bar to obtaining writ.*] In the issue of a writ of certiorari, the High Court exercises a jurisdiction which has devolved on it from the old Supreme Court, and stands in the same position as the Court of King's Bench in England, and ought to follow the rules laid down by that Court in the decided English cases as to the scope and limitation of that jurisdiction. Under the

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English decisions, the Court exercises, in such cases, a purely discretionary power, and will not exercise it in favour of a person who has not taken before the lower Court an objection to its jurisdiction but has taken the chance of its decision on the merits in his favour. Failure to object to jurisdiction before the lower Court is a bar to obtaining a writ of certiorari whether the objection to jurisdiction is based on a pure point of law or based on facts which were or should have been within the knowledge of the applicant during the proceedings in the lower Court. *Rex* v. *Williams* [1914] 1 K.B., 608, and other English cases, relied on.

Lakshmanan Chettiar v. *Commissioner, Corporation of Madras*. (1927) I.L.R., 50 Mad. (F.B.), 130

CHIT FUND PROMOTION OF—"*Lottery*" *within sec. 294-A, Indian Penal Code*—"*Wagering contract*" *within sec. 30 of the Contract Act.*] The promotion of a chit fund wherein the number of subscribers is determined beforehand and in which every subscriber is entitled by its rules to get from the promoters of the fund the whole of the capital subscribed for by him either before or at the closing of the fund at a fixed time is neither an offence within section 294-A of the Indian Penal Code nor a "wagering contract" within section 30 of the Indian Contract Act, even though some of the subscribers become by the rules entitled to get much more than they paid and such persons are determined by the drawing of lots. *Shanmuga Mudali* v. *Kumaraswami Mudali*, (1925) I.L.R., 48 Mad., 661, approved. *Veerannan Ambalam* v. *Ayyachi Ambalam*, (1925) 49 M.L.J., 791, overruled. Loss of interest for those who get paid only their capital at the closing of the fund is no loss in law.

Narayana Ayyangar v. *Vellachami Ambalam* (1927) I.L.R., 50 Mad. (F.B.), 696

CITY MUNICIPAL ACT, MADRAS (IV OF 1919), ss. 59 AND 347—"*Elections*" *in sec. 59, meaning of—Rule 4, whether* ultra vires:—*See* "PROCEDURE CODE (ACT V OF 1908), SEC. 115" 121

——————————ss. 233, 357 AND 392,—*Essence of an offence under sec. 233—Maintaining an already constructed building without licence—Conviction under sec. 233 read with sec. 357 if legal—Omission to take out licence—Limitation under sec. 392.*] The essence of an offence under section 233 of the Madras City Municipal Act is the act of constructing or reconstructing and not merely that of maintaining an already constructed building in existence. Hence the period of limitation under section 392 for a prosecution in respect of an omission to take out a licence under section 233 is twelve months from the date of construction or reconstruction. Where a complaint was made against the accused that he had a shed of inflammable material without a licence contrary to section 233 and the magistrate recorded the plea of the accused as guilty and added that the accused explained at the same time that he had had the shed of inflammable material for the last eight years without paying any fee to the Corporation, *held* that in view of the explanation of the accused it was impossible to conclude that the accused could have pleaded guilty to an offence which contained the factors required by section 233.

Razack v. *King-Emperor* ... ... (1927) I.L.R., 50 Mad., 760

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CITY MUNICIPAL ACT, MADRAS (IV OF 1919), SEC. 288—*Operation of—If proof of nuisance a prerequisite to—Person to determine what constitutes nuisance—Interpretation by reference to marginal notes.*] Under section 288 of the Madras City Municipal Act the question whether the machinery is or is not a nuisance is for the Commissioner alone, and it need not be proved that the machinery is a nuisance before any part of the section comes into operation. Any one erecting machinery, whether it constitutes a nuisance or not, has to obtain the permission of the Commissioner. The construing of a section of a statute by referring to the marginal note is not a legitimate method of construction. *In re Smith* (1925) 45 M.L.J., 731, dissented from.

Natesa Mudaliyar v. *King-Emperor* ... ... (1927) I.L.R., 50 Mad., 738

CITY TENANTS PROTECTION ACT, MADRAS (III OF 1922), SEC. 9.—*"Service of summons" must be personal—15 days' limitation not applicable, if no personal service.*] Service of summons on the defendant under section 9 of the Madras City Tenants Protection Act (III of 1922) should be personal and not by any other means. Hence where the summons was said to have been served on him by its being affixed to the outer door of his house, he is not bound to apply within 15 days of the affixture of the summons for the sale to him of the landlord's land.

Thayammal v. *Rathnavelu Nadar* ... ... (1927) I.L.R., 50 Mad., 88

CIVIL COURT, JURISDICTION OF—*Suit for declaration that election to Panchayat Court void:—See* "VILLAGE COURTS ACT, MADRAS (I OF 1889), SEC. 78" ... 91

CIVIL COURTS ACT, MADRAS (III OF 1873), SEC. 12—*Suit for mere declaration of adoption, with no consequential relief as to lands, houses, etc.—Valuation for jurisdiction.*] A suit for a mere declaration of the factum and validity of an adoption, without any consequential relief regarding lands or houses likely to be affected by the declaration has, for purposes of jurisdiction, to be valued, according to section 12 of the Madras Civil Courts Act, on the basis of the market value of the lands or houses likely to be affected by such declaration and not either according to plaintiff's pleasure or according to the valuation under the Court Fees Act as if it were a suit for possession of such lands or houses. *Rachappa Subrao* v. *Shidappa Venkatrao*, (1919) I.L.R., 43 Bom., 507 (P.C.), applied.

Vasireddi Veeramma v. *Butchayya* ... ... (1927) I.L.R., 50 Mad., 646

——— SEC. 13.—*Appeal, forum of, whether High Court or District Court—Change in Court Fees Act between date of suit and date of appeal—Retrospective effect.*] If the value of a suit at its institution exceeds Rs. 5,000 according to the Court Fees Act then in force, an appeal from a decree therein lies (with reference to section 13 of the Madras Civil Courts Act) only to the High Court and not to the District Court though on the date of filing the appeal the suit would have had to be valued at less than Rs. 5,000 owing to an amendment of the Court Fees Act in the interval. *Colonial Sugar Refining Company* v. *Irving*, [1905] A.C., 369, followed.

Daivanayaka Reddiyar v. *Renukambal Ammal* ... (1927) I.L.R., 50 Mad., (F.B.), 857

——— SEC. 11—Res judicata—*Suit by reversioners—Plea of* jus tertii *in his father set up by defendant—Plea negatived and decree passed for plaintiffs—Subsequent suit by defendant, based on title vested in his father as the nearest reversioner—Question covered by plea of* jus tertii—*Decision in previous suit, whether* res judicata—*Pedigree, proof of—Name of common ancestor, not known—Whether proof of relationship, necessarily fails.*] In a suit by certain persons as reversioners to recover an estate, the defendant set up a plea of *jus tertii* in his father as the nearest reversioner who was alive at the time of the suit but was not joined in the suit; the plea was negatived and decree passed for the plaintiffs. Subsequently, the then defendant, after his father's death instituted the present suit to recover the estate from the then plaintiffs, tracing his title through his father in whom he alleged the estate had vested in his life-time as the nearest reversioner; on the latter pleading

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the bar of *res judicata, held*, that the decision in the previous suit on the reversionary right of the plaintiff's father raised by the plea of *jus tertii*, was not *res judicata* on the same question in the present suit, based on the title of the father as the nearest reversioner. In proving a pedigree although a person claiming as heir must show all the stages of relationship from a common ancestor, it is not the law that, if the name of the common ancestor is not known, it must be held that the relationship is not proved. *Kedarnauth Doss* v. *Protab Chunder Doss*, (1881) I.L.R., 6 Calc., 626, explained. *Roe. d. Thorne* v. *Lord*, (1776) 2 Bl.W. 1099; 96 E.R., 649, referred to.

Jagannadham v. *Venkatasubba Rao* ... ... (1927) I.L.R., 50 Mad., 877

CIVIL PROCEDURE CODE (XIV OF 1882), SS. 458 AND 459—*New Code*, 1908, *O. XXXII, r.* 11—*Guardian* ad litem—*Refusal to act as such, whether amounts to automatic removal—Order of Court, whether necessary—Execution proceedings—Notice served on guardian after refusal to accept but without removal by Court—Sale held, whether void for want of representation of minor in execution proceedings.*] The guardian *ad litem* of a minor duly appointed by the Court in a suit, by his declining to act as such, does not automatically cease to be the guardian, without an order of Court removing him from guardianship under sections 458 and 459 of the old Code, 1882, and the minor is consequently not unrepresented in the proceedings in the suit. Where therefore a guardian *ad litem* appointed in a suit declined to accept service of notice for the minor in the execution proceedings in the suit, but the Court did not remove him from guardianship and notice was again served on him as such, *Held*, that a sale held in execution was not void on the ground that the minor was not legally represented in the proceedings. C.M.As. Nos. 188 and 224 of 1920 and *Narendra Singh* v. *Chatrapal Singh*, 94 I.C., 340, referred to. *Krishna Pershad* v. *Moti Chand*, (1913) I.L.R., 40 Calc., 635 (P.C.), distinguished.

Kuppusamy Ayyangar v. *Bavaswami Rao* ... (1927) I.L.R., 50 Mad., 357

——— **(ACT V OF 1908)**—*Party added as defendant—date on which suit deemed to have been instituted against added party:—See* "LIMITATION ACT, SEC. 22" 372

——— SEC. 13 (*b*)—*Foreign judgment—Judgment passed on default of appearance of defendant—Defendant duly served with summons—Judgment passed without trial on evidence—suit on such judgment in a Court in British India—Whether maintainable—Decision on the merits of the case, in sec.* 13 (*b*), *Civil Procedure Code, meaning of.*] A foreign judgment, passed on default of appearance of the defendant, duly served with summons, on the plaint allegations without any trial on evidence, is not one passed on the merits of the case within the meaning of section 13 (*b*) of the Civil Procedure Code; and a suit cannot be brought on such a judgment in any Court in British India. *Keymer* v. *Visvanatham Reddi*. (1917) I.L.R., 40 Mad., 112 (P.C.), followed. *Hassan* v. *Mahamad Ohuthu*, (1924) I.L.R., 47 Mad., 877, overruled.

Janoo Mahomed Kassim & Co. v. *Seeni Pakir Bin Ahmed.* (1927) I.L.R., 59 Mad. (F.B.), 261

——— SEC. 19:—"*See* SMUGGLED GOODS" 449

———, SEC. 48—*Combined decree against mortgaged property and the person of the mortgagor—Application for execution, filed more than twelve years from the date of the decree but less than twelve years from the date of sale of hypotheca—Bar—Limitation.*] Where a combined decree against the mortgaged property and the person of the mortgagor was passed under the Transfer of Property Act, an application for execution of the decree against the person of the mortgagor, made more than twelve years from the date of the decree but within twelve years from the date of the mortgagee's failing to get relief by the sale of the mortgaged property, is barred under section 48 of the Civil Procedure Code. *Khulna Loan Company* v. *Jnanendra Nath Bose*, (1917) 22 C.W.N. 145 (P.C.), relied on.

Swaminatha Odayar v. *Thiagarajaswami Odayar* ... (1927) I.L.R., 50 Mad., 5

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CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 64 AND O. XXI, R. 53 (6)—*Attachment of a decree, when complete and effective—Notice to judgment-debtor under rule* 53 (6), *whether necessary for completion of attachment—Service of notice on Court which passed the decree, necessary for completion of attachment*—Bona fide *payment by judgment-debtor without notice of order of attachment, whether valid.*] Notice under Order XXI, rule 53 (6), Civil Procedure Code, to the judgment-debtor of an attached decree, is not necessary for the purpose of completing the attachment of the decree; the attachment is effectuated by the service of notice on the Court which passed the decree. Rule 53 (6) merely provides, in cases of *bona fide* transactions by judgment-debtors, an exception to the general rule embodied in section 64, which invalidates alienations, payments and adjustments as against claims enforceable under the attachment. If, therefore, the judgment debtor of the attached decree had no notice of the order of attachment at the time when the payment and adjustment pleaded were made, then even though the attachment had already become complete and effective, the payment and adjustment should be recognized by the Court.

Lakshminarasimham v. *Lakshminarasimham* ... (1927) I.L.R., 50 Mad.,(F.B.), 677

——————————— SEC. 80—*Suit against public Officer—Suit for injunction—Notice of suit—Future acts and past acts—Notice, whether necessary for a suit for injunction in respect of threatened acts—"Act purporting to be done" in section* 80, *meaning of—Whether includes future as well as past act.*] In respect of acts of public officers purporting to be done in their official capacity, section 80, Civil Procedure Code, requires notice of suit prescribed therein to be given only in the case of past acts completed or begun but incomplete, and not in the case of threatened acts; the expression "acts purporting to be done" in the section should be construed as meaning past acts and not future or threatened acts. Where therefore an Official Receiver in insolvency advertised the sale of certain properties on a future date as belonging to the insolvent, a person claiming the properties can maintain a suit for a declaraion and an injunction against the Official Receiver, although he did not give the two months' notice prior to the institution of the suit as prescribed by section 80 of the Civil Procedure Code. *The Superintending Engineer, II Circle, Bezwada* v. *Chituri Rama Krishna*, (1920) 39 M.L.J., 151, distinguished. Case law reviewed.

Arunachalam Chetty v. *David* ... ... (1927) I.L.R., 50 Mad., 239

——————————— SEC. 92—*Applicability to suit for removal of head of mutt and a scheme:—See* "HINDU LAW" 567

——————————— SEC. 115—*Revision petition to High Court—Court—Madras City Municipal Act (IV of* 1919)—*Rule* 4 *of the rules made under the Act by Governor-in-Council—Objection petition before election as to qualification of candidate for election, before Commissioner of Corporation—Revision before Chief Judge of Presidency Small Cause Court—Nature of order—Chief Judge, whether a Court or* persona designata—*Revision to High Court from his order, whether competent—Jurisdiction—Extent of jurisdiction before Commissioner and Chief Judge—Madras City Municipal Act (IV of* 1919), *ss.* 59 *and* 347—"*Elections*" *in section* 59, *meaning of—Rule* 4, *whether* ultra vires.] The Chief Judge of the Presidency Small Cause Court at Madras, in deciding a revision petition preferred to him under rule 4 of the rules made by the Governor-in-Council under the Madras City Municipal Act, 1919, acts as a *persona designata* and not as a Court; and consequently the High Court has no jurisdiction to entertain a revision petition against his order in such a case. *The Municipal Corporation of Rangoon* v. *M. A. Shakur*, (1925) I.L.R., 3 Rang. 560 (F.B.), followed; and *Parthasarathi* v. *Koteswara Rao*, (1924) I.L.R., 47 Mad., 369 (F.B.), distinguished. The word "Elections" in section 59 (2) (*b*) of the Madras City Municipal Act means completed elections and does not cover disputes *before* such elections and the section does not authorize the Governor-in-Council to make rules in respect of such disputes; but rule 4, though it purports to have been made under section 59, is rendered valid by the generality of the powers conferred on the Governor-in-Council by section 347 of the Act. *Quaere*: Whether the jurisdiction of the Commissioner of the Corporation of Madras, and of the Chief Judge of the

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Presidency Small Cause Court, is not confined to questions of form, or extends to an enquiry as to the disqualifications of the candidate, which do not appear on the face of the nomination paper but would involve an enquiry into facts. Desirability of an amendment of the Madras City Municipal Act, so as to make it clear whether the limited or extended jurisdiction is conferred by the Act pointed out.

Lakshmanan Chetty v. *Kannappar* ... (1927) I.L.R., 50 Mad. (F.B.), 121

CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 151, O. IX, R. 9, O. XLVII, R. 4 (2) (*a*)—*Application for execution—Dismissal for default of appearance of pleader for decree-holder—Restoration of petition—O. IX, r.* 9, *applicability of, to execution proceedings—Review notice to judgment-debtors, necessity for—Review granted without notice—Validity of order—Irregularity or illegality—Right to set aside order on becoming aware—Inherent power under sec.* 151, *Civil Procedure Code—Jurisdiction under sec.* 151, *when can be invoked—Other remedies—Bar of limitation of another petition, whether a ground for invoking jurisdiction.*] An application for execution of a decree was dismissed owing to the absence of the decree-holder's pleader on the day of the hearing; on the same day the application was restored on the application of the pleader without notice to the judgment-debtors; a petition for amendment of the execution application in certain particulars was filed and notice of this petition was issued to the judgment-debtors; when the petition came on for hearing, the judgment-debtors objected that the order of restoration of the execution application, passed without notice, was illegal and invalid and that it should be set aside: *Held*, (1) that Order IX, rule 9, Civil Procedure Code, did not apply to execution proceedings and that the Court had no jurisdiction under Order IX, rule 9, to restore the execution application which had been dismissed for default; *Kaliakkal* v. *Palani Goundan*, (1917) 23 L.W., 227, followed; (2) that the order of restoration should not be considered as a valid order passed on review under Order XLVII of the Code, as issue of notice to the opposite party was imperative under Order XLVII, rule 4, clause 2 (*a*), and no notice was issued to the judgment-debtors in this case; *Abdul Hakim Chowdhury* v. *Hem Chandra Das*. (1915) I.L.R., 42 Calc., 433 followed; (3) that the order passed without notice was not merely irregular but illegal, and the judgment-debtors were not bound by it but could object to it when they became aware of it; *Surajpal Pandey* v. *Ultim Pandey*, (1921) 63 I.C., 99, referred to; (4) that the *ex parte* order restoring the application, could not in its nature be considered a final order, and the opposite party, on coming to know of it, could object to it on any ground open to him if he had notice of the application for restoration; see *Krishnaswami Panikondar* v. *Ramasami Chettiar*, (1918) I.L.R., 41 Mad., 412 (P.C.), relied on; (5) that the order of restoration was not based on grounds prescribed for review under Order XLVII of the Code; *Chajju Ram* v. *Nekhi*, (1922) I.L.R., 3 Lah., 127 (P.C.); and (6) that the Court had no jurisdiction to act under section 151 of the Act and restore the application for execution to its file, even though the filing of another application for execution would be barred by limitation; *Neelavani* v. *Narayana Reddi*, (1920) I.L.R., 43 Mad., 94 applied; and *Bholu* v. *Ramlal*, (1921) I.L.R., 2 Lah., 66, dissented from.

Narayana Chettiar v. *Muthu Chettiar* ... ... (1921) I.L.R., 50 Mad., 67

——————————— SEC. 146 AND O. XXII, RR. 3, 4, 10 AND 12 AND O. XXI, R. 16—*Application by transferee decree-holder for execution of the decree—His death during the pendency of the application—right of his legal representative to be substituted in the application and to continue it—Whether general principles or the Code, applicable.*] The legal representative of a decree-holder who died during the pendency of an execution petition filed by him, cannot be substituted in his place in the execution petition and be allowed to continue it. The question must be decided by reference to the specific terms of the Code of Civil Procedure and not on general principles. SEC. 146, O. XXI, r. 16 and O. XXII, rr. 3, 10 and 12, referred to.

Palaniappa Chettiar v. *Valliammai Achi* ... ... (1927) I.L.R., 50 Mad., 1

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CIVIL PROCEDURE CODE (ACT V OF 1908), O. II, R. 10 (2)—"*Necessary*" and "*proper*" *parties—Suit by A against B—Application by C to be made a party defendant—No relief prayed against C—Opposition of plaintiff to application.*] The Secretary of State for India applied to be made a party to a suit filed by the head of a mutt against the Commissioners appointed under the Madras Hindu Religious Endowments Act, for a declaration that the said Act was invalid and *ultra vires* and for an injunction to restrain the defendants from doing certain acts under the Act. The application was opposed by the plaintiff who prayed for no relief against the applicant. *Held*, that the application must be dismissed as the applicant was neither a "proper" nor a "necessary" party within Order I, rule 10 (2), Civil Procedure Code. *Moser* v. *Marsden*, [1892] 1 Ch., 487, and *Norris* v. *Beazley*, (1877) 2 C.P.D., 80, followed.

Sri Mahant Prayaga Doss v. *Board of Commissioners for Hindu Religious Endowments, Madras* ... ... (1927) I.L.R., 50 Mad., 34

——— O. XXI, R. 2—*Uncertified oral agreement to vary a decree and to execute the decree as varied—Agreement whether an adjustment—Sec. 92, Evidence Act (I of 1872), bar to proof of such oral agreement—Sec. 6, Impartible Estates Act (II of 1904)—Decree against impartible estate without objection—Public policy—Maintainability of objection in execution.*] An agreement which does not extinguish a decree as such but which substitutes a varied or modified decree capable of execution is not an adjustment of the decree within Order XXI, rule 2, Civil Procedure Code. Moreover if the so-called adjustment is not certified and recorded by Court it is no bar to further execution of the decree. An agreement to adjust is equivalent to an adjustment. By reason of section 92, Evidence Act, an oral agreement varying or modifying the decree cannot be pleaded in answer to an application for execution of the decree. Second Appeal No. 62 of 1920 (unreported), followed, *Debendra Narain Sinha* v. *Sourindra Mohan Sinha*, (1914) 24 I.C., 391, dissented from. Section 6 of the Madras Impartible Estates Act (II of 1904) enacts a rule of public policy. Hence even if a decree had been passed, without objection, for the sale of an impartible estate, the objection that the section prohibits the sale can be taken in execution. *Raja of Vizianagram* v. *Duntivada Chelliah*, (1905) I.L.R., 28 Mad., 84, followed.

Rajah of Kalahasti v. *Venkatadri Rao* ... ... (1927) I.L.R., 50 Mad., 897

——— O. XXXIII, RR. 5 (*a*), 6, 7 AND 15—*Application to sue in forma pauperis—Summary rejection by Court under r. 5 (a), without enquiry under r. 6—Effect of rejection—Second application to sue in forma pauperis, whether barred under rule 15 of the same Order.*] When an application to sue in *forma pauperis* is summarily rejected by the Court under Order XXXIII, rule 5 (*a*) of the Civil Procedure Code, without an enquiry under rule 6 and a consequent order under rule 7, a second application for the same purpose is not barred under rule 15 of the same Order. *Chinnammal* v. *Parathi Ammal*, (1925) 85 I.C., 982, followed; *Atul Chandra Sen* v. *Peary Mohan*, (1926) 33 I.C., 812, dissented from; *Bal Kaur* v. *Shib Das*, (1920) 56 I.C., 207, and *Hawa* v. *Sit Shein*, (1917) 42 I.C., 803, referred to

Krishnamoorthy v. *Ramayya* ... ...(1917) I.L.R., 50 Mad., 63

———, O. XXXIV, R. 1:—*See* "MORTGAGE" 180

——— O. XXXVIII, R. 1—*Arrest before judgment—Security for appearance—Order for—Conditions precedent to.*] A Court before exercising the powers conferred by Order XXXVIII, rule 1, Civil Procedure Code, has to be satisfied that (1) the plaintiff's cause of action is *prima facie* unimpeachable, i.e., the plaint on the face of it does not reveal any matter which is obviously doubtful and arguable and (2) there is reason to believe on adequate materials that unless the jurisdiction is exercised there is a real danger that the defendant will remove himself from the ambit of the powers of the Court.

Seth Chand Mull Dudha v. *Furnsholtham Doss* ... (1927) I.L.R., 50 Mad., 27

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CIVIL PROCEDURE CODE (ACT V OF 1908), O. XLI, R. 33—*Appeal dismissed—Right of some respondents to urge disputes against other respondents—Power of Court under rule 33—rule 33, limitation of its applicability—Mortgage bond—Interest at 24 per cent payable in six months—On default 24 per cent compound interest with six monthly rests, whether penalty.*] Rule 33 of Order XLI, Civil Procedure Code, should be limited to cases, where in interfering on behalf of the appellant it becomes necessary to alter the decree in favour of some respondent against other respondents, lest injustice should result; it is only then that the Court should act under the rule. The rule does not give a right to a respondent to urge something in his favour against another respondent which has nothing to do with the result of the appeal, without his filing an appeal or memorandum of objections himself. *Rangam Lal* v. *Jhandu*, (1912) I.L.R., 34 All., 32 (F.B.); *Gangadhar* v. *Banabashi* (1915) 22 C.L.J., 390, and *Abjal Majhi* v. *Intu Bepari*, (1915) 22 C.L.J., 394, followed. A stipulation in a mortgage bond that the principal together with interest at 24 per cent per annum shall be paid in six months' time from the date of the bond, but that, on default of such payment, the principal shall be payable, on demand, with *compound interest at the same* rate, with six monthly rests, from the date of the bond, is not by way of penalty and should not be relieved against. *Sundar Koer* v. *Rai Sham Krishen*, (1907) I.L.R., 34 Calc., 150 (P.C.); *Malli Chettiar* v. *Veeranna Thevar*, (1921) 41 M.L.J., 470; and *Aziz Khan* v. *Duni Chand* (1918) 23 C.W.N., 130 (P.C.), relied on

Ramalingam Chettiar v. *Subramaniam Chettiar* ... (1927) I.L.R., 50 Mad., 614

——— O. XLI, R. 22—*Decree, meaning of:—See* "HINDU LAW" 866

——— O. XLIII, R. (1) (*w*), O. XLVII, R. 7, SEC. 115—*Appeal—Order granting review on ground of new evidence—Order not stating that the new evidence was important—Appealability of—Revision of.*] Although Order XLIII, rule (1) (*w*) of Civil Procedure Code allows an appeal against an order under rule 4 of Order XLVII, granting an application for review yet the Order XLIII, rule (1) (*w*) is subject to the restrictions and limitations placed by Order XLVII, rule 7. Hence no appeal lies against an order granting review of the appeal is not on any of the grounds mentioned in Order XLVII, rule 7. If a Judge grants a review on the ground of discovery of new matter or evidence, the fact that he does not state in the order granting review that the new matter is important within the meaning of Order XLVII, rule 1, is no ground for revising the order under section 115, Civil Procedure Code.

Srinivasa Ayyangar v. *Official Assignee, Madras* ... (1927) I.L.R., 50 Mad., 891

COERCION—*Ratification:—See* "INDIAN CONTRACT ACT (IX OF 1872), SEC. 15." 786

COMPANIES ACT (INDIAN) (VII of 1913), SEC. 4, CLS. 1 AND 2—*General Clauses Act (X of 1897), sec. 3, cl. 39—Partnership—Four unregistered firms forming a partnership—Total number of members of all the firms exceeding twenty—Partnership, not registered under the Companies Act—Whether illegal—Business, meaning of, under sec. 4 (2)—"Persons" under section 4 (2) whether denotes only individuals or includes unregistered body of persons—Definition of "persons" under General Clauses Act, whether applicable to sec. 4 (2) of the Indian Companies Act—Suit for dissolution of illegal partnership and for accounts, whether maintainable.*] Where four unregistered firms entered into a partnership to purchase certain goods, to sell them at different times and divide the profits and it appeared that the total number of members of all the firms together came to twenty-two, but the partnership was not registered under the Indian Companies Act: on a suit instituted by three of the firms against the fourth for dissolution of partnership and taking of partnership accounts, *Held*, that the transaction was a business within section 4, clause 2 of the Indian Companies Act, and not a single venture falling outside the section; that for purposes of registration required by section 4, clause 2 of the Act, each of the unregistered firms cannot be regarded as a single legal entity; that "persons" under section 4, clause 2, denotes individuals and does not include bodies of individuals; consequently the suit partnership, being composed of more than twenty persons, was an illegal partnership for want of registration

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under the Act; *Akola Gin Combination* v. *Northcote Ginning Factory*, (1915) 26 I.C., 613, followed; and that, where a plaintiff comes to Court on allegations which on the face of them show that the contract of partnership on which he sues is illegal, he is not entitled to any relief and his suit should be dismissed.

Pannaji Devichand v. *Senaji Kapoorchand* ... (1927) I.L.R., 50 Mad., 175

COMPENSATION—*Apportionment of*:—*See* "LAND ACQUISITION ACT" 706

CONTRACT ACT, INDIAN (IX of 1872), SEC. 15—*Coercion—Ratification—Agent for a term—Refusal to give up accounts, bonds, etc., at the end of his term to a new agent, unless release was given by principal—Release so given, whether voidable for coercion—Authority of counsel to bind clients by making statement ratifying release—Special authority, whether necessary—General authority, whether can be implied and sufficient.*] An agent for a term refused to hand over the account books, bonds, etc., of the business at the end of the term to a new agent sent in his place, unless the principal gave him a release from all liability in respect of his agency; such a release had to be and was given, and the new agent got the account books, bonds, etc., from him. As some of the mortgage bonds relating to property in the foreign State of Johur, stood in the agent's name, a suit had to be brought, under the law of Johur, to get a transfer to the principal's name and was instituted in the Supreme Court of Straits Settlements; the defendant agreed not to contest the suit, on the plaintiffs' ratifying the original release. Counsel for the plaintiffs therein made a statement embodied in the order of that court to the effect "that the said release was and is in full force and of full effect," and a consent order was passed by the court transferring the bonds to the names of the plaintiffs. On a suit being instituted by the principals to set aside the release deed and for directing the defendant to render an account of his agency, *Held*, that the release deed was given by the plaintiffs under coercion of the defendant within the terms of section 15 of the Indian Contract Act, and was voidable at their instance; but that there was a valid ratification of the release by the plaintiffs by reason of the statement made by the plaintiffs' counsel in their suit in the Supreme Court; that counsel should, under the circumstances, be held to have been specially authorized to make the statement; that, even if counsel was not specially authorized, the circumstances of the case fully justified the conclusion that acted within his authority in making the statement; and that, consequently, the plaintiffs were not entitled to set aside the release deed and call on the defendant to account. Rules regarding competency of counsel to compromise suits, make admissions, or confess judgment, so as to bind their clients, discussed.

Muthiah Chettiyar v. *Karuppan Chetti* ... ... (1927) I.L.R., 50 Mad., 786

——— SEC. 73—*Interest Act* (*XXXII of 1839*)—*Contract to supply goods—Payment of advance—Breach—Right to interest on advance.*] *Held by the Full Bench* (RAMESAM, J., *dissenting*) that in the absence of any demand or of any stipulation as to interest, a person who has advanced money to another for supply of goods at a certain time is entitled on default to recover only the advance and damages, viz., the difference in price between the contract rate and the market rate, and not also interest on the advance by way of damages for the period between the date of breach and the date of suit. *Per* RAMESAM, J.: In such a case, interest also is recoverable by way of damages, under section 73 of the Indian Contract Act.

Kandappa Mudaliar v. *Muthuswami Ayyar* ... (1927) I.L.R., 50 Mad. (F.B.), 94

COURT FEES ACT, MADRAS (V OF 1922)—*Review—Change in the Court Fees Act before date of review—Subject matter of review and court-fee thereon—Articles 4 and 5 of Schedule I of the Court Fees Act (VII of 1870).*] A petition for review of an original or appellate decree must be valued on the reliefs prayed for in the petition as if the petitioner were then filing a plaint or memorandum of appeal for those reliefs. (1872) 7 M.H.C.R. (Appendix, page 1) and *In re Manohar G. Tambekar*, (1880) I.L.R., 4 Bom., 26, followed; *Nandilal Agrani* v. *Jogendra Chandra Dutta*, (1923) 28 C.W.N.,

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403, not followed. If between the date of the plaint or the appeal and the date of filing the petition for review, there has been a change in the Court Fees Act increasing the fee payable *ad valorem*, the petitioner must pay at the increased rate. A defendant who wishes to file a review of a decree in a second appeal filed by the plaintiff, which allowed in favour of the plaintiff a suit for land and three years' mesne profits prior to date of suit must pay Court fee not only on the same but also on mesne profits between the date of the plaint and the date of filing the second appeal. *Brahmayya* v. *Lakshminarasimham*, (1893) I.L.R., 16 Mad., 310, and *Balarama Naidu* v. *Sangan Naidu*, (1922) I.L.R., 45 Mad., 280, followed.

Punya Nahako, In re ... ... (1927) I.L.R., 50 Mad., 488

COVENANT TO RENEW—*If apportionable*:—*See* "LEASE FOR 99 YEARS" ... 595

CRIMINAL PROCEDURE CODE (V OF 1898), SS. 4 (*c*), 29:—*See* "CATTLE TRESPASS ACT (I OF 1871), SEC. 20" 841

——— AS AMENDED BY SEC. 72 OF ACT XVIII OF 1923—*Accused unrepresented by legal practitioner—Required to state forthwith if he wishes to cross-examine prosecution witnesses—Magistrate recording no reason—If mere irregularity—Sec. 256, if applicable to summary trials.*] Under section 256 of the Criminal Procedure Code (Act V of 1898) as amended by section 72 of Act XVIII of 1923, a magistrate must record his reasons, where he asks an accused, who is not represented by a legal practitioner, forthwith to state whether he wishes to cross-examine the prosecution witnesses, and failure to so record his reasons is not a mere irregularity curable under section 573 of the Criminal Procedure Code. When the legislature specially amplifies a mandatory section, no rule of construction will allow the courts to treat it as directory. *Subrahmania Ayyar* v. *King-Emperor*, (1902) I.L.R., 25 Mad., 61 (P.C.), followed; *Mussamat Ghasiti* v. *The Crown*, (1925) I.L.R., 6 Lah., 554, dissented from; *Phuman Singh* v. *The Crown*, (1925) All. I.R. (Lah.), 339, referred to. Section 256 is applicable to a summary trial. *Umaji Krishnaji* v. *King-Emperor*, (1926) 93 I.C., 159, dissented from.

Raju Achari, In re ... ... (1927) I.L.R., 50 Mad., 740

——— SEC. 174—*Inquest under—Copies of statements made at—Accused's right to obtain—Same procedure as under sec. 162—Post-mortem certificate—Inquest report—Accused's right to copies of.*] Statements made at an inquest under section 174 of the Code of Criminal Procedure are statements made to a Police Officer "in the course of an investigation under the chapter" under section 162 and not being public documents, an accused is not entitled to copies of such statements. An accused is entitled to copies of the *post-mortem* certificate and of the inquest report (excluding statements therein). In re *Peramasami Naidu*, (1924) 22 L.W., 784, referred to.

Maruthumuthu Kudumban v. *King-Emperor* ... (1927) I.L.R., 50 Mad., 750

——— SEC. 239—*Persons separately engaged in fishing in prohibited waters—No common object or common intention—Joint trial under ss. 379 and 447, Indian Penal Code—Same transaction—Applicability of.*] Where a number of persons were all separately engaged in fishing, and were merely several poachers gathered in the same place at the same time and there was no evidence of a common object or a common intention, and the said persons were tried together for offences under sections 379 and 447 of the Indian Penal Code as having been committed in the course of the same transaction, and convicted, *held*, that the accused ought not to have been tried together and that such joint trial was not a mere irregularity. Whenever the applicability of section 239 of the Criminal Procedure Code is doubtful, it is far better that the accused should be tried separately. *Maal Makalakati Subbadu* v. *King-Emperor*, (1915) 28 M.L.J., 381, followed; *Emperor* v. *Rafuz Zaman Khan*, (1926) I.L.R., 48 All., 325, *Choragudi Venkatadri* v. *King-Emperor*, (1910) I.L.R., 33 Mad., 502, referred to.

Samiulla Sahib v. *King-Emperor* ... ... (1927) I.L.R., 50 Mad., 735

——— SEC. 476—*Nature of—Enquiry under.*] In a proceeding under section 476 of the Criminal Procedure Code, the nature, method and extent of the preliminary enquiry being at the

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discretion of the Court holding it, the enquiry need not be such as to satisfy the Court that an offence has actually been committed, the Court only having to decide (*a*) whether an offence of the kind contemplated by the section appears to have been committed and (*b*) whether in the interests of justice it should be further enquired into. *Abdul Ghafur* v. *Raza Husain*, (1912) I.L.R., 34 All., 257, approved; *Pahraj* v. *King-Emperor*, (1921) 6 Patna L.J., 146, dissented from; *In re Perumallu Venkatasubbiah*, (1923) 44 M.L.J., 74, dissented from.

Raja Rao v. *King-Emperor* ... ... (1926) I.L.R., 50 Mad., 660

CRIMINAL PROCEDURE CODE, SEC. 488—*Maintenance order—Duration of—Cancellation by Court—Wife returning to live with husband—If order automatically cancelled.*] The general principle of law that an order whose term is not fixed, and whose currency is not made expressly dependent upon the continued existence of some circumstance or set of circumstances, remains in force until it is cancelled, is *prima facie*, applicable to maintenance orders passed under section 488 of the Criminal Procedure Code. The husband may, on proof of circumstances specified in section 488 (5) or section 499, obtain the cancellation or modification of the original order, as the case may be; and until he does that, the original order must be deemed to be still in force. The mere fact that a wife has returned to live with her husband will not bring the order to an end automatically and on her separating from him again, she can enforce it. *Shah Abu Ilyas* v. *Ulfat Bibi*, (1897) I.L.R., 19 All., 50, and *Parul Bala Levi* v *Satish Chandra Bhattacharjee*, (1923) 75 I.C., 579, referred to; *Phul Kali* v. *Harnam*, (1888) 8 A.W.N., 210, dissented from.

Kanyammal v. *Pandara Nadar* ... ... (1927) I.L.R., 50 Mad., 663

———————————, SEC. 520—*Seized property—Title doubtful—To whom to be returned—"Court of Appeal, confirmation, reference or revision"—Meaning of—If specifies nature of application to such Courts—Provisions regarding appeals—If applicable.*] Where the title to seized property is doubtful, it should be returned to the person from whom it was seized, unless there are special circumstances which would render such a course unjustifiable. *The Collector of Salem*, (1873) 7 M.H.C.R., 235; *In re Pandharinath Pundlik Revankar*, (1916) I.L.R., 40 Bom., 186, referred to. The phrase "Court of appeal, confirmation, reference, or revision" in section 520 of the Code of Criminal Procedure designates only the Courts, which can "modify, alter or annul" an order passed under the preceding sections of the Code, and does not specify the nature of the application which has to be made to them. Such an application cannot be treated as an appeal attracting all the provisions regarding appeals.

Srinivasamoorthi v. *Narasimhulu Naidu* ... ... (1927) I.L.R., 50 Mad., 916

CRIMINAL TRIBES ACT (VI OF 1924), SEC. 23—*Conviction under sec.* 23 (1) (*b*)—*Second and third convictions—If should be after accused's tribe is declared or accused registered as member of criminal tribe—Reduction of sentence—"Special reasons to the contrary"—Character of.*] For the conviction of an accused person under section 23 (1) (*b*) of the Criminal Tribes Act (VI of 1924) it is not necessary that both the second and the third convictions should be after the tribe to which the accused belongs had been declared a criminal tribe or after the accused was registered as a member of a criminal tribe. The mere fact that the offence is not of a very serious nature cannot form a "special reason to the contrary" for reducing the sentence. Such a special reason must be something apart from the nature of the offence such as, youth, age, illness, or sex. Criminal Appeals Nos. 318 and 367 of the 1925 followed. Reference No. 17 of 1924 dissented from.

Mayandi Theran, In re ... ... (1927) I.L.R., 50 Mad., 474

DAMAGES—*Decree for—Breach of contract against insolvent—Appeal—Adjudication during pendency of—Official Receiver—If can continue*:—*See* "PROVINCIAL INSOLVENCY ACT, SS. 2, 20, 33, 49, 50" 161

DEBT OF DECEASED FATHER—*Decree against son—Liability of son to be adjudicated*:—*See* "PROVINCIAL INSOLVENCY ACT, SEC. 2 (*a*) (*d*)" 981

DEFAMATION—*Lawyer making statements in course of professional duty*:—*See* "INDIAN PENAL CODE, SEC. 499" 667

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DISCHARGE—*Order refusing—Effect of*:—*See* "PROVINCIAL INSOLVENCY ACT, SS. 28 AND 42" 977

DISTRAINT:—*See* "ESTATES LAND ACT, SEC. 212 (*b*)" 329

DISTRICT MUNICIPALITIES ACT, MADRAS (V OF 1920), SS. 93 (3) AND 354 (2) AND RULE 28, SCH. IV—*Levy of profession-tax in two municipalities for the same half-year, legality of—Right of suit for refund when.*] If a person who becomes successively liable in a single half-year to pay profession-tax in two municipalities pays it in one, although it be the second he acquires exemption, under section 93 (3) of the Madras District Municipalities Act, from liability to pay it again in the first. Rule 28 of Schedule IV of the Act bars a suit for refund of tax paid, only if the municipality is empowered to make the demand and not otherwise.

Municipal Council, Cuddalore v. *Krishnan Nambiar.* (1927) I.L.R., 50 Mad., 987

———————————, SEC. 249—*Machinery likely to be dangerous to human life—Outside public, if limited to—Madras Local Boards Act (XIV of 1920), sec. 193—Effect of—One statute cancelling another—Test of.*] Machinery likely to be dangerous to human life within the term of Schedule V (*q*) of the Madras District Municipalities Act is not confined to machinery dangerous to the outside public. Human life means the life of any person whether he be within or without the premises of the factory. Section 249 of the Act has not been impliedly repealed by section 193 of the Madras Local Boards Act, as the two are not mutually destructive.

Public Prosecutor v. *Ranganayakulu Chetty* ... (1927) I.L.R., 50 Mad., 845

———————————, SS. 249 AND 250—*Permission under sec. 250 obtained—If licence under sec. 249 necessary.*] Permission obtained under section 250 of the District Municipalities Act (Act V of 1920) to construct or establish a factory or instal machinery does not absolve a person from taking out a licence under section 249 to work the same. The object and scope of the two sections are entirely different. Section 249 contemplates an annual payment for the use of the machinery, while section 250, a payment once for all, for installing it. *In re Smith*, (1920) 45 M.L.J., 731, approved, *In re Ramachandra Rao*, (1920) 45 M.L.J., 555, referred to. Criminal Revision Case No. 503 of 1925, dissented from.

Muthu Balu Chetty, In re ... ... (1927) I.L.R., 50 Mad., 467

ELECTION—*Only one candidate nominated—Deemed elected—If election petition lies*:—*See* "LOCAL BOARDS ACT, MADRAS (XIV OF 1920)" 86

ESTATES LAND ACT, MADRAS (I OF 1908), SEC. 3, CL. (2) (*c*) AND (*d*), SEC. 6—*Regulation XXV of* 1802—*Jagir—"Unsettled jagir," meaning of—Unsettled jagir, whether an estate under the Estates Land Act, sec.* 3, *cl.* (2) (*c*)—*Enfranchisement at inam settlement, effect of—Tenants of ryoti lands in a jagir—Tenants in possession of lands at the time the Estates Land Act came into force—Tenants, whether acquired occupancy right under sec.* 6 *of the Act.*] A jagir is a grant of land for life or for a definite number of lives in consideration of services, usually military, rendered to Government, in order that the grantee may maintain a certain dignity and state. Where in respect of certain villages granted by the East India Company in 1829 to a person as a jagir for three generations, the deed of grant styled the villages a jagir, the Officers of the Company consistently adopted that nomenclature in their documents such as the Inam Commissioner's Report, and the grant included the villages as a whole including waste lands and poramboke as well as the cultivated ayakut, *Held*, that the grant was not merely of the land revenue and the villages were therefore not an inam falling under section 3, clause (2) (*d*) of the Madras Estates Land Act; that, even though merely calling a village a jagir will not constitute it a jagir, still the terms of the grant and the circumstances abovementioned showed that the grant in this case was a jagir, and there was no foundation in statute or authority for the view that the term "jagir" in section 3, clause (2) (*c*) of the Act, must be limited to jagirs granted before the advent of the East India Company; that the word "unsettled" in section 3, clause

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(2) (c) of the Act, qualifies jagir as well as palaiyam, and the jagir referred to therein means only an unsettled jagir, as a settled jagir would be included in "permanently settled estate" under section 3, clause (2) (a); that a jagir which has not been settled either under the permanent settlement regulation or under the Inam Rules is an unsettled jagir, and mere confirmation by the Inam Commissioner as an inam would not amount to a settlement; and that an unsettled jagir is consequently an estate, and the cultivating tenants in possession of ryoti land and not old waste, in an unsettled jagir, at the time the Madras Estates Land Act came into force, acquired occupancy rights therein under section 6 of the Act, even though they had no occupancy rights before the Act.

Ramasami Kavundan v. *Tirupathi Kavundan* ... (1927) I.L.R., 50 Mad., 10

ESTATES LAND ACT, MADRAS (I OF 1908), SEC. 3 (4) (a) AND (f)—*Wells dug at very small cost and planting coconut gardens, not improvements.*] Wells constructed by digging small pits in sandy soil at a very small cost, in which underground and surface water naturally collects are not "improvements" within section 3, clause (4) (a) of the Act. Coconuts are not "fruits" and planting coconut gardens is not planting "fruit gardens" within section 3 (4) (f) of the Act and hence it is not an improvement within the section. Second Appeal 571 of 1916 explained and dissented from.

Vellayappa Chetty v. *Subramaniam Chettiar* ... (1927) I.L.R., 50 Mad., 482

——————, SS. 3 (10), (16), 6, 8 AND 185—*Conversion of ryoti lands into private lands by a zamindar before the Act—Lease of such lands after the Act for a period—No occupancy right—Sec. 8, not retrospective.*] Before the Estates Land Act (Madras Act I of 1908) it was competent for a zamindar to convert what were once ryoti lands into private or *kamatam* lands and to hold them as such; and if after the Act a person is let into possession of such converted lands either as ijaradar (lessee for a period) or as the agent of the zamindar, he does not thereby acquire occupancy rights therein. Section 8 of the Act is not retrospective.

Veerabhadrayya v. *Zamindars of North Vallur* ... (1927) I.L.R., 50 Mad., 201

——————, SEC. 212 (b)—"*Distraint duly made*"—*Distraint—Essence of—When complete.*] The essence of a distraint is the act of taking out of the possession of the real owner and such act is not completed until the taking out of the possession of the real owner is complete. Where cattle seized for arrears of rent under the Estates Land Act were still in the owner's pen and the person distraining was proceeding to drive them out of the pen, and the owner prevented him from so doing, *held*, that the distraint was not complete, and that such interference constituted resistance to a distraint duly made within the meaning of section 212 (b) of the said Act. *Narayana Reddi* v. *Dyvadeenachar*, (1925) I.L.R., 48 Mad., 505, distinguished.

Satyanarayanamurti v. *Ramayya* ... ... (1927) I.L.R., 50 Mad., 329

EVIDENCE ACT (INDIAN), SEC 27:—*See* "ACCUSED CHARGED WITH MURDER AND THEFT" 274

—————— **(I OF 1872),** SEC. 92:—*See* "CIVIL PROCEDURE CODE, O. XXI, R. 2" 897

EXECUTION—Ss. 21, 37, 38, 150, *Civil Procedure Code (V of 1908)—Preliminary mortgage decree—Transfer of territorial jurisdiction thereafter to another Court—Passing of final decree by the first Court without objection—Right of the first Court to order sale of mortgage properties.*] After the passing of a preliminary mortgage decree, the Court that passed it ceased to have territorial jurisdiction over any of the mortgaged properties. After a final decree was passed by the same Court without any objection by the mortgagor, the mortgagee applied to that Court for sale. *Held* (1) that that Court had no power to order a sale of the properties, though it can receive an application for sale and transmit it to the Court having territorial jurisdiction and (2) that omission to object to the jurisdiction of that Court

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to pass the final decree estops the mortgagor only from disputing the validity of the final decree but does not estop him from objecting to the jurisdiction of that Court to order a sale.

Sivaskanda Raju v. *Raja of Jeypore* ... ... (1927) I.L.R., 50 Mad., 882

EXECUTION—*Application for—Dismissal for default—Restoration—O. IX, r. 9—if applicable:—See* "CIVIL PROCEDURE CODE, SEC. 151" 67

——————*Application for, of decree—Application by judgment-debtor to record satisfaction—Statement by decree-holder objecting—Subsequent application for execution more than three years from last application for execution—Step in aid of execution—Pendency of application if necessary—See* "LIMITATION ACT, ART. 182" 49

——————*Application for—Filed more than twelve years from the date of the decree but less than twelve years from the date of sale of hypotheca—Combined decree against person and property—Limitation—Bar of:—See* "CIVIL PROCEDURE CODE, SEC. 48" 5

——————*Sale of property not belonging to judgment-debtor and purchased by decree-holder and satisfaction—Art. 166, Limitation Act (IX of 1908)—Application by decree-holder to set aside sale and for further execution, after thirty days after sale—Maintainability of.*] A decree-holder got the properties of some one other than the judgment-debtor sold in execution of his decree, purchased them himself and entered up satisfaction. More than thirty days after the sale, he found out his mistake and applied for further execution by setting aside the sale. *Held*, that the application for further execution was unsustainable as the sale though of a stranger's property was not void and as the prayer for setting it aside, which was a necessary preliminary for further execution, could not be granted, being barred by article 166 of the Limitation Act. *Thakur Barmha* v. *Jiban Ram Marwari*, (1914) I.L.R., 41 Calc., 590 (P.C.), and *Tirbuwan Bahadur Singh* v. *Rameshar Baksh Singh*, (1906) I.L.R., 28 All., 72 (P.C.), distinguished.

Muthukumaraswami Pillai v. *Muthuswami Thevan.* (1927) I.L.R., 50 Mad., 639

EXECUTOR—*Removal of:—See* "SUCCESSION ACT, SEC. 301" 956

FACTORIES ACT, INDIAN (XII OF 1911), SS. 2 [(2), (3)], 41 AND 46—*Groundnut decorticating room in a building—Drying yard five or six yards away from wall of building—If part of "factory"—Children employed in drying, cleaning and sorting kernels—If incidental to or connected with article subject of process—Liability of occupier.*] Where a drying yard was situated about five or six yards from the wall of a building in which a groundnut decorticating machine was installed, but the said yard had no connexion with machinery, and children were employed in the yard for cleaning, drying and sorting the groundnut kernels, *held*, that the drying yard was part of the factory within the meaning of section 2 (3) of the Indian Factories Act, and that the occupier (or manager) was liable under section 41 as having employed children in work incidental to a manufacturing process or connected with the article, subject of the process, within the mischief of the Act. *Law* v. *Graham*, [1901] 2 K.B., 327, *Paterson* v. *Hunt*, (1909) 101 L.T., 571, referred to.

Ramanatham v. *King-Emperor* ... ... (1927) I.L.R., 50 Mad., 834

FOREIGN JUDGMENT:—*See* "CIVIL PROCEDURE CODE, SEC. 13 (b)" 261

FORMA PAUPERIS—*Application to sue in—Summary rejection without enquiry—Effect of—Second application—If barred under r. 15:—See* "CIVIL PROCEDURE CODE, O. XXXIII" 63

GENERAL CLAUSES ACT (X OF 1897), SEC. 3, CL. (39)—*Partnership:—See* "INDIAN COMPANIES ACT (VII OF 1913), SEC. 4, CLS. (1) AND (2)"... 175

GIFT—*Registration—Gift of immovable property by Hindu—Acceptance of gift—Adoption by donor before registration—Indian Registration Act (III of 1887), sec. 47—Transfer of Property Act (IV of 1882), ss. 122 and 123.*] A Hindu executed a deed of gift of part of his immovable property and delivered it to the donee. On the following day he adopted a son. Three days later the deed was registered. *Held*, that the gift was valid against the adopted son. On delivery of the deed to the donee, there was an acceptance of the transfer

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within section 122 of the Transfer of Property Act, 1882, and thereupon the gift became effectual, subject to its registration as required by section 123. *Venkati Rama Reddi* v. *Pillati Rama Reddi*, (1916) I.L.R., 40 Mad., 204 (F.B.), and *Atmaram Sakharam* v. *Vaman Janardhan*, (1925) I.L.R., 49 Bom., 388 (F.B.), approved.

Kalyanasundaram Pillai v. *Karuppa Mooppanar*. (1927) I.L.R., 50 Mad. (P.C.), 193

GIFT TO THE ALMIGHTY—*Whether gift to a living person*:—*See* "HINDU LAW" 687

GOODS:—*See* "INDIAN PENAL CODE, SEC. 294 (*a*)" 479

GOVERNMENT OF INDIA ACT, SEC. 106 (2):—*See* "SMUGGLED GOODS" ... 449

GUARDIAN *ad litem*—*Refusal to act—Effect of*:—*See* "CIVIL PROCEDURE CODE, (XIV OF 1882), SS. 458 AND 459" 357

GUARDIANS AND WARDS ACT (IX OF 1890), SS. 29, 30, 31 (2), 47 AND 48 —*Alienation by guardian—Mortgage—Sanction by District Court, effect of—Necessity and benefit of minor—Validity of mortgage, whether can be questioned—Sanction, whether conclusive as to necessity for the mortgage—Sanction order, not reciting necessity, whether invalid.*] Where an alienation by way of mortgage or sale has been made by the guardian of a minor, appointed under the Guardians and Wards Act, with the sanction of the District Court, the alienee can rely upon it and the alienation must be upheld unless the alienee has been a party to a fraud or collusion or has been guilty of any underhand dealing: *Gangapershad Sahu* v. *Maharani Bibi*, (1885) I.L.R., 11 Calc., 379, followed; *Venkatasami* v. *Viranna*, (1922) I.L.R., 45 Mad., 429, dissented from. The fact that the order granting sanction did not recite, as required by section 31 (2) of the Act, the necessity for the loan does not render the sanction invalid, as this defect is nothing more than a mere irregularity; the Court must be taken as having adopted the grounds set forth in the petition and affidavits, even though the grounds are not reproduced in the order: *Rameshwar Singh* v. *Dhanput Singh*, (1910) 5 I.C., 334, and *Buddhoo* alias *Gulab Dass* v. *Sheo Charan*, (1924) 22 A.L.J., 851, followed.

Raman Chettiar v. *Tirugnanasambandam Pillai* ... (1927) I.L.R., 50 Mad., 217

——————, SS. 41 (3), (4)—*Minor attaining majority—Discharge of Guardian by Court—Accounts, filed by guardian—Application to Court by quondam minor to enquire into the correctness of accounts filed by guardian—Court, whether competent to inquire in proceedings under the Act—Remedy by suit—Scheme of the Act—Court, not bound to declare guardian discharged from liability to minor—Disputes between minor and guardian to be determined only by suit and not by proceedings under the Act.*] Where a minor, to whom a guardian had been appointed under the Guardians and Wards Act, 1890, attained majority and the guardian was discharged and filed his accounts, the Court should not hold an enquiry under the Act into the correctness of the accounts and determine what amount or property was really accountable by the guardian to the minor. The whole scheme of the Act seems to provide for matters of this kind, i.e., disputes between the minor and the guardian, by way of a suit by the minor against the guardian and not by way of proceedings under the Act. Under section 41 (4), the Court is not bound to declare the guardian discharged from his liabilities and so is not bound to make an enquiry into the correctness of the accounts filed by him. *Nabu Bepari* v. *Sheik Mahomed*, (1900) 5 C.W.N., 207; *Jagannath Panja* v. *Mahesh Chandra Pal*, (1916) 21 C.W.N., 688; and *Abdul Hasim* v. *Maleka Khatun*, 29 C.L.J., 44, followed; *Sita Ram* v. *Musammat Govindi*, (1924) I.L.R., 46 All., 458, dissented from.

Subbarami Reddi v. *Pattabhirami Reddi* ... ... (1927) I.L.R., 50 Mad.,

HINDU LAW—*Adoption by a Jain widow—Consent of husband or his sapindas, whether necessary—Hindu Law of adoption, whether applicable to Jains—Custom—Onus.*] It is concluded by the authority of a series of decisions, extending over several years, that the presumption is that the Jains are governed by the ordinary Hindu Law, unless it is shown that by custom a different law prevails among them. *Sheo Singh Rao* v. *Dakho*, (1878) I.L.R., 1 All., 688 (P.C.) and *Chotay Lall* v. *Chunno Lall and others*, (1879) I.L.R.,

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4 Calc., 744, relied on. A Jain widow is not competent to adopt a son to her husband without the authority of her husband or the consent of his sapindas, in the absence of proof of a custom to the contrary. The onus of proving such a custom among the Jains in derogation of the ordinary Hindu Law, is upon the party setting it up; the fact that among certain special sects of Jains in the other Presidencies such a custom has been upheld by Courts, does not warrant a general presumption of the prevalence of the custom in the Madras Presidency in the face of the decision in *Peria Ammani* v. *Krishnaswami*, (1893) I.L.R., 16 Mad., 182, which negatived such a custom.

Gettappa v. *Eramma* ... ... (1927) I.L.R., 50 Mad., 228

HINDU LAW—*Adoption—Rights of adopted son—Will—Diversion of property from adopted son—Ante-adoption agreement by natural father—Custom—Consensus of judicial decision.*] Having regard to consensus of judicial decision, excepting that in *Jagannadha* v. *Papamma*, (1893) I.L.R., 16 Mad., 400, an arrangement made on the adoption of a Hindu whereby the widow of the adoptive father is to enjoy his property during her lifetime, or for a less period, that arrangement being consented to by the natural father before the adoption, is to be regarded as valid by custom. But an agreement or consent by the natural father is not effectual in law or by custom to validate any other disposition, taking effect after the adoption and curtailing the rights of the adopted son as a co-sharer. Consequently, a will by which a testator gave part of his property to his intended adopted son, part to his widow for life, part to kindred, and part to charity is not binding upon the adopted son, although before the adoption took place the natural father executed a deed by which he consented to the provisions of the will and gave his son in adoption subject thereto. Review of the authorities in Madras and Bombay. *Balkrishna Motiram* v. *Shri Uttar Narayan Dev*, (1919) I.L.R., 43 Bom., 542, approved. Observation in *Bhasba Rabidat Singh* v. *Indar Kunwar*, (1883) I.L.R., 16 Calc., 556 (P.C.); 16 I.A., 53, 59, followed.

Krishnamurthi Ayyar v. *Krishnamurthi Ayyar*, (1927) I.L.R., 50 Mad., (P.C.) 508

——————*Alienation by a co-parcener—Suit by another co-parcener to recover property alienated or his share therein—Right of alienee as defendant to demand a general partition in that suit—Proper course for alienee, to institute a separate suit for general partition—Decree in co-parcener's suit, whether res judicata as to share of co-parcener in a suit by vendee for general partition—Form of decree to be given in co-parcener's suit.*] In a suit instituted by a co-parcener of a joint Hindu family against a vendee for setting aside an alienation of a certain item of family property by another co-parcener and recovering his share in it, it is not competent to the Court to direct a general partition of all the family properties at the instance of the alienee-defendant. *Subba Goundan* v. *Krishnamachari*, (1922) I.L.R., 45 Mad., 449, followed. *Ramasami Ayyar* v. *Venkatarama Ayyar*, (1923) I.L.R., 46 Mad., 815, explained. A decree in the suit of a co-parcener to have his share of the alienated property partitioned between him and the alienee, is not *res judicata* in a subsequent suit by the alienee for general partition, including the share in the property decreed to the co-parcener by the previous decree. *Sourimuthu* v. *Pavadai Pachia Pillai*, (1925) 49 M.L.J., 679, dissented from. When a suit is instituted by a co-parcener to recover his share in the alienated property, the proper course to be followed by the alienee is to institute a separate suit for general partition so that the two suits may be tried together and the Court may be in a position to consider whether the property alienated to him should be allotted to the alienor's share or not. Form of the decree in a suit by a co-parcener, to recover his share in property alienated by another co-parcener, considered. *Hanmandas Ramdayal* v. *Valabhdas*, (1919) I.L.R., 43 Bom., 17, followed.

Kandasamy Udayar v. *Velayutha Udayan* ... ... (1927) I.L.R., 50 Mad., 320

——————*Joint family—Self-acquisition—House built on ancestral site—No co-parceners at the time of building—Use of self-acquired funds for building—Adoption of a son, subsequent to construction—Son and father living in the house—Superstructure, whether joint family property—Mixing*

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of funds, effect of—Intention to make it joint family property, necessity for—Evidence—Presumption.] Where a Hindu, who had no co-parceners, built a house worth about forty thousand rupees, with his self-acquisitions, on an ancestral site worth a few rupees, and several years thereafter adopted a son and lived with him in the house but did not otherwise evidence an intention of treating the house as joint family property, on a creditor of the son claiming to attach and sell the son's share in the house and site. *Held*, that the mere fact that the superstructure, which was built out of self-acquired funds, was raised on the ancestral site, did not render it joint family property; that the presumption was that the father intended it to be his self-acquired property, especially when there were no other co-parceners; that it would not become joint family property unless he had intended to make it such property, and the mere fact that he allowed his major son to live in the house along with himself, did not disclose an intention to make it joint family property; and that consequently, the father was solely entitled to the superstructure and to a half of the site, and the son's creditor was entitled to attach and sell the son's half share only in the site and not the superstructure: *Vithoba Bava* v. *Hariba Bava*, (1869) 6 Bom. H.C.R., 54 (A.C.J.), followed; *Lala Muddun Gopal Lal* v. *Khikinda Koer*, (1891) I.L.R., 18 Calc., 341 (P.C.), referred to; *Subbiah* v. *Gundlapudi*, (1923) I.L.R., 46 Mad., 104, distinguished.

Periakaruppan Chetty v. *Arunachelam Chetty* ... (1927) I.L.R., 50 Mad., 582

HINDU LAW—*Joint family—Suit for partition by a son against his father and his other sons, impleading alienees of the share of one of the sons—Personal debt of the father incurred prior to suit for partition—Debt neither illegal nor immoral—Liability of sons' shares for the father's debt incurred prior to partition suit—Right of alienees of son's share—Alienees' rights, whether subject to liability for father's debts—Suit by creditor pending suit for partition—Decrees exonerating alienees—*Res judicata.] Where a personal debt, not being of an illegal or immoral character, was incurred by a Hindu father, and subsequently a suit for partition was instituted by one of his sons against the father and his other sons impleading also alienees of the share of one of the sons, and it appeared that the father's creditor had, pending the partition suit, sued to recover his debt from the father, his sons and the alienees and obtained a decree against the father personally and the joint family estate, the alienees being, however, exonerated. *Held*, that the liability of the alienees of the sons share for the father's debt was not *res judicata* by the judgment in the creditor's suit; that, in the suit for partition, the Court should provide for the payment of the father's debt which was incurred prior to the suit, out of the joint family estate of the father and his sons, before directing partition of the estate by metes and bounds, and that the alienees of the son's share were entitled to their vendor's share, only subject to such liability.

Venku Reddi v. *Venku Reddi* ... ... (1927) I.L.R., 50 Mad. (F.B.), 535

——— *Maintenance—Illegitimate son, right of—Right of illegitimate daughter to maintenance—Right to maintenance, whether a charge on joint family property of putative father in the hands of his co-parceners—For what period, if at all, right to maintenance extends.*] Among Nattukottai Chetties, who have been held to be Sudras, illegitimate sons, born of a woman kept as a continuous and exclusive concubine, are entitled to maintenance for their life, out of the joint family property of their putative father in the hands of his co-parceners. The fact that the woman kept is a dancing girl is immaterial. *Subramania Ayyar* v. *Rathnavelu Chetty*, (1918) I.L.R., 41 Mad., 44 (F.B.), and *Ananthaya* v. *Vishnu*, (1894) I.L.R., 17 Mad., 160, relied on. An illegitimate daughter is not entitled to maintenance out of the joint family property of their putative father in the hands of his co-parceners. There is no basis in the Hindu Law for the view that the father is bound to maintain his illegitimate daughter, nor is she a member of the family of her putative father's coparceners, so as to be entitled to a charge for maintenance on the joint family property. *Parvati* v. *Ganpatrao Balal*, (1894) I.L.R., 18 Bom., 177, referred to.

Vellaiyappa Chetty v. *Natarajan* ... ... (1927) I.L.R., 50 Mad., 340

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HINDU LAW—*Minor—Suit by minor for partition—Preliminary decree—Division of status, whether from date of plaint or of preliminary decree—Manager, accountability of—Nature of liability of manager to account—Difference as to nature of accountability, prior to and after suit—Civil Procedure Code (Act V of 1908), O. XLI, r. 22—"Decree" in r. 22, meaning of—Respondent's right to support decree on other grounds, in what cases permitted, without filing an appeal or memorandum of objections.*] In a suit for partition instituted on behalf of a Hindu minor, if the Court holds that a division is necessary in the interests of the minor and passes a preliminary decree for partition, it must be deemed that the divided status of the plaintiff dates from the date of the plaint and not from that of the preliminary decree; and the fact that the preliminary decree was passed on a consent statement of the parties does not make any difference; *Krishnaswamy Thevan* v. *Pulukaruppa Thevan*, (1925) I.L.R., 48 Mad., 465, followed; *Chelimi Chetty* v. *Subbamma*, (1918) I.L.R., 41 Mad., 442, distinguished. In an ordinary suit for partition, in the absence of fraud or other improper conduct, the only account the kartha or manager is liable for is as to the existing state of the property divisible and the parties have no right to look back and claim relief against past inequality of enjoyment or other matters; but it is open to the plaintiff to prove specifically fraud, misappropriation or other improper conduct on the part of the manager with respect to such management; the same rule of accountability of the manager applies in a suit for partition by a minor, as regards his management prior to suit; but subsequent to the date of suit, the plaintiff and the defendant (the manager) are only tenants-in-common or co-sharers, and therefore the manager is strictly bound to account for all receipts and expenses and can take credit only for such expenses as have been incurred for the benefit or necessity of the estate, and the net income after deduction of such expenses will have to be divided among the shares according to their shares. Though the word "*decree*" has been used in rule 22, Order XLI, Civil Procedure Code, what the rule contemplates really is the *decision* by the Court below, and it merely enables the decision arrived at to be supported on grounds other than those on which the lower Court proceeded; and under that rule it is not open to a respondent to have adjudicated by the Appellate Court rights or causes of action which have been decided against him in the Court below and in respect of which he has filed no appeal or memorandum of objections.

Sri Ranga Thathachariar v. *Srinivasa Thathachariar*. (1927) I.L.R., 50 Mad., 866

——— *Mutt—Head of mutt, whether a trustee—Some properties in question belonging to the mutt—Civil Procedure Code (Act V of 1908), sec. 92, for removal and for a scheme, whether competent.*] Where the properties in question belong to a mutt, the head of the mutt is answerable for mal-administration as a trustee in a general sense though he may not be an express trustee in the English sense. Section 92, Civil Procedure Code, is applicable to such a case, and a suit can be instituted for removal of the head of the mutt and for a scheme, after obtaining the sanction prescribed by the section. *Ram Parkash Das* v. *Anand Das*, (1916) I.L.R., 43 Calc., 707 (P.C.), and *Vidya Varuthi* v. *Balusami Ayyar*, (1921) I.L.R., 44 Mad., 831 (P.C.), relied on; *Nataraja Thambiran* v. *Kailasam Pillai*, (1921) I.L.R., 44 Mad., 283 (P.C.), explained.

Nelliappa Achari v. *Punnaivanam Achari* ... (1927) I.L.R., 50 Mad., 567

——— *Religious endowment—Math—Loan contracted by Mahant for purpose of math—Liability of succeeding Mahant—Receiver of math income.*] Where the deceased head of a math has borrowed money for the purpose of discharging duties for which he is responsible as head, and the money has been legitimately applied to that purpose, it can be recovered from the succeeding head of the math. The decree should provide, as in *Niladri Sahu* v. *Mahant Chaturbhuj Das*, (1927) I.L.R., 6 Patna, 139; 53 I.A., 253, that on default in payment by the successor a receiver be appointed of the income of the math so that his beneficial interest therein may be applied to discharge the decree. Cases as to the validity of permanent alienations of math property, such as *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara*, (1917) I.L.R., 40 Mad., 709 (P.C.); 44 I.A., 147, are distinguishable.

Vibhudapriya v. *Lakshmindra* ... ... (1927) I.L.R., 50 Mad. (P.C.), 497

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HINDU LAW—*Religious endowment—Power of karta to dedicate family property — Evidence of dedication—Application of profits of property.*] The fact that the deceased karta of a Hindu joint family regularly paid the expenses of a choultry out of the profits of a family property, the expenses not however exhausting the whole of those profits, does not establish a dedication of the profits to the charity. Consideration of the powers of a karta to dedicate property of the joint family to a religious charity.

Gangi Reddi v. *Tammi Reddi* ... ... (1927) I.L.R., 50 Mad. (P.C.), 421

——— *Right of husband in distress to take his wife's stridhanam—Text, meaning of.*] The word "take" in the text of Yagnavalkya, that "a husband is not liable to make good the property of his wife *taken* by him in a famine or for the performance of a duty or during illness or while under restraint" does not mean "physical taking" but means "taking and using." Hence if the husband taking his wife's property in such circumstances does not actually use it, the wife still remains its owner.

Nammalwar Chetty v. *Thayarammal* ... ... (1927) I.L.R., 50 Mad., 941

——— *Trusts for public religious purposes—Gift to God—Almighty—Agreement, reciting creation of gift and appointment of trustee and providing for making of a formal document—Necessity for registration of the agreement—Indian Registration Act (XVI of 1908), sec. 17 (2) (v)—Indian Trusts Act (V of 1882), ss. 1 and 5—Gift to the Almighty, whether gift to a living person—Transfer of Property Act (IV of 1882), ss. 5 and 123, applicability of, to such gifts.*] Where a Hindu executed an agreement, which recited that a person had been constituted trustee and certain lands had been dedicated to God Ramachandra Moorti, and also provided that he would execute a formal conveyance and put him in possession of the lands, whenever the trustee required, and would meantime be accountable for the rents, on a suit instituted by a creditor of the donor to establish his right to attach the property as that of the donor on the ground that no trust or gift was validly created for want of a registered document, *Held*, that, as the document was merely one which recorded a past transaction and gave another party a right to call for a formal document, it was exempted from registration under section 17 (2) (v) of the Registration Act: *Rajangam Aiyar* v. *Rajangam Aiyar*, (1923) I.L.R., 46 Mad., 373 (P.C.), referred to; that the document, constituting a trust of property for a public religious purpose, falls within the saving clause of section 1 of the Indian Trusts Act, and that consequently section 5 of the Act which relates to creation of trusts and requires registration of deeds of trust, does not apply to the document; that a gift to God—Almighty, (as in this case), is not a gift to a *living* person within the meaning of the Transfer of Property Act, and that, consequently, section 123, read with section 5 of the Act, does not apply to such a gift, so as to require a registered document for its creation. Though an idol is considered by a fiction of law a juristic person clothed for some purposes with rights of persons, yet a juristic person is not a living person for all purposes. *Pallayya* v. *Ramavadhanulu*, (1903) 13 M.L.J., 364; *Ramalinga Chetty* v. *Siva Chidambara Chetty*, (1919) I.L.R., 42 Mad., 440, *Tammi Reddy* v. *Gangi Reddy*, (1922) I.L.R., 45 Mad., 281 followed; and the principle of *stare decisis* applied.

Narasimha Swami v. *Venkatalingam* ... (1927) I.L.R., 50 Mad. (F.B.), 687

IDENTITY OF THUMB-MARK—*Judge taking thumb-mark of accused—If objectionable—Conviction based on comparison of thumb-marks—If proper.*] The question of identity of a thumb-mark is a question of fact to be decided as any other question of fact. There is no objection in law to a Judge taking the thumb-mark of an accused person, if the Judge thinks it relevant; and a conviction based on a comparison of the thumb-mark of an accused person with the thumb-mark on the document in question is not improper. *Bajari Hazam* v. *King Emperor*, (1922) I.L.R., 1 Pat., 232, dissented from. *Public Prosecutor* v. *Veerammal*, 23 Cri. L.J., 695, referred to.

Public Prosecutor v. *Kandasami Thevan* ... ... (1927) I.L.R., 50 Mad., 462

IMPARTIBLE ESTATES ACT (II OF 1904), SEC. 6—*Objection to sale—if can be taken in execution*:—*See* "CIVIL PROCEDURE CODE, O. XXI, R. 2" 897

IMPROVEMENTS:—*See* "ESTATES LAND ACT (MADRAS), SEC. 3 (4) (*a*) and (*f*)." 482

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INAM—*Unenfranchised personal—Suit for division—Alienation—Effect of prohibition—Inam Rules, r. 5, cl. (3)—See* "PENSIONS ACT, SEC. 4" 441

INCOME-TAX ACT (XI OF 1922), SEC. 2 (1)—*Land leased for manufacture of salt—Profits derived from manufacture of salt on the lands leased—Licensee, whether liable to assessment to income-tax in respect of such profits—Lands so used, whether used for agricultural purposes—"Agricultural purpose," meaning of.*] Income derived from manufacture of salt in agricultural lands is *not* agricultural income within the meaning of section 2 (1) of the Income-tax Act (XI of 1922); and consequently the licensee of a salt factory is liable to be assessed to income-tax in respect of profits derived from manufacture of salt on such lands.

Commissioner of Income-tax, Madras v. *Linga Reddy* ... (1927) I.L.R., 50 Mad. (S.B.), 763

INCOME-TAX ACT (INDIAN) (XI OF 1922), SEC. 2 (1) (*b*)—*Agricultural income—When income derived from toddy is such income.*] Income derived from toddy is agricultural income when it is received by the actual cultivator, whether owner or lessee of the land on which the trees grow. If the income is obtained by a person who has not produced the trees from which the toddy is tapped, or has not done any agricultural operation whereby those trees have been raised, it is not agricultural income within the meaning of the Act.

Commissioner of Income-tax, Madras v. *Yagappa Nadar* ... (1927) I.L.R., 50 Mad. (S.B.), 923

———, SS. 4 (1), (2), 10 AND 13—*Loan advance made by a person owning a business at Rangoon, to his partnership business in Penang—Interest on advance credited in Rangoon accounts, though no cash was received from Penang—Mercantile basis of accountancy adopted in the Rangoon accounts—Income, whether accrued without or within British India—Liability to income-tax, whether under sec. 4 (1) or sec. 4 (2).*] An assessee, who had a business of his own in Rangoon and a partnership business at Penang, advanced a sum of money from the Rangoon funds to the Penang business; it appeared that interest on that advance was credited in the account of the Rangoon business, though no amount was actually received from Penang; the assessee had chosen to adopt the mercantile basis in his accounts. On his being assessed to income-tax in respect of such interest, the assessee contended that he was not liable, as it was not income which accrued, arose or was received in British India; *Held*, that the interest in question was not profit or gain arising without British India, but was income which properly accrued or arose in British India within section 4 (1) of the Indian Income-tax Act (XI of 1922). The assessee, having chosen to adopt the mercantile basis of accountancy in keeping his accounts, it is upon that basis, and upon that basis alone, that he was to be assessed to income-tax, under sections 10 and 13 of the Act.

Commissioner of Income-tax, Madras v. *Subramania Chettiar* ... (1927) I.L.R., 50 Mad. (S.B.), 765

———, SEC. 4 (2)—*Resident in British India, meaning of—Test of residence of firm—Residence of partners, whether relevant in determining residence of firm—Central control and management of the whole business necessary—Possibility of two or more places of residence of firm—Delegation of a portion of the business, insufficient, but one of a portion of the management as a whole, necessary.*] A firm or partnership resides for the purposes of income-tax at a place where its real business is carried on; and the real business is carried on where the central management and control of the whole of its business actually abides: *De Beers Consolidated Mines, Ltd.* v. *Howe*, [1906] A.C., 455, followed. There may be two such places of residence but the suggested second residence must not merely have a delegation of management of some portion of the partnership business, however extensive, but a delegation of some portion of the management of the business as a whole: *Swedish Central Railway Company, Ltd.* v. *Thompson*, [1925] A.C., 495, followed. The question as to where the individual partners actually had their places of residence is a wholly irrelevant consideration in determining the place of residence of

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the firm. Where, therefore, it appeared that a firm of partners were carrying on business as bankers, money-lenders and cloth merchants in several places inside and outside British India, that the partners regularly resided at a place within the foreign State of Pudukkotai, wherefrom they exercised a general supervision and direction of their whole business inside and outside British India, that they had several branches in British India generally controlled from Madras and also branches outside British India but no part of the control of the overseas branches ever passed through Madras or any other branch in British India, and that profits earned outside British India were remitted to the Madras branch, *held*, that the firm had for purposes of income-tax its place of residence only outside British India and at no place within British India, and was consequently not liable to assessment of income-tax, for profits remitted into British India from outside, under section 4 (2) of the Income-tax Act (XI of 1922).

Commissioner of Income-tax, Madras v. *T. S. Firm* ... (1927) I.L.R., 50 Mad. (S.B.), 847

INCOME-TAX ACT (INDIAN) (XI OF 1922), SS. 4 (2) AND 66—*Reference by Commissioner—Profits earned or accrued outside British India—Remitted into British India—Profits accrued both beyond and within three years of remittance—Presumption, whether remittance related to earlier or later profits—Burden of proof on assessee.*] When a man has profits earned more than three years before the year of assessment and also profits earned within that period, to his credit, in a trade carried on by him outside British India, there is no presumption that a remittance made to him in British India, of a sum which might fall in either set of profits, is made from the earlier profits and not from the later. The effect of section 4 (2) of the Income-tax Act (XI of 1922) is to cast upon the assessee the burden of proving that the profits accrued or arose outside British India more than three years before the ywere received or brought into British India.

Commissioner of Income-tax, Madras v. *S. K. R. S. L. Firm,* (1927) I.L.R., 50 Mad. (S.B.), 853

——————————, SEC. 10 (2) (vi)—*Assessee leasing his machinery and plant to another for rent, himself undertaking to bear loss due to depreciation—Assessee entitled to deduction on account of depreciation.*] If *A* leases to *B* his buildings, machinery and plant for a certain rent and undertakes himself to bear the loss arising from depreciation on account of *B* working the machinery, etc., the lessor *A*, if assessed to income-tax on his rent, is entitled to a deduction allowable under section 10 (2) (vi) in respect of loss caused by such depreciation. In order to claim this deduction it is not necessary that the assessee himself should use the machinery and cause the wear and tear, the assessee's business of leasing his machinery being also a business, within the meaning of the section, in which the depreciation ensues.

Commissioner of Income-tax, Madras v. *Gin and Rice Factory, Guntur.* (1927) I.L.R., 50 Mad. (S.B.), 529

——————————, SEC. 50—"*Recovered,*" *meaning of*] The words "tax was recovered" in section 50 of the Indian Income-tax Act (XI of 1922) mean "tax was received by the Government" and not either "tax was refunded" to the assessee in the United Kingdom under section 27 of the Finance Act, 1920 (10 and 11 Geo. V, Ch. 18), or "tax was recovered by coercive process." Hence any claim for refund of tax claimable under section 49 of the Indian Income-tax Act, should, as provided by section 50 of the Act, be made within one year from the last day of the year in which it was received by or paid to the Government in India.

Commissioner of Income-tax, Madras v. *Binny & Co.* ... (1927) I.L.R., 50 Mad. (S.B.), 920

——————————, SEC. 66 (2)—*Combined application by four assessees before Commissioner to state a case—Competency of—Applicants, separately assessed—Separate application and separate fees, whether necessary—Combined application, whether can be regarded as valid on behalf of one of the applicants—Time for making the application, whether can be extended by the Commissioner.*] Where four persons, who were members of an undivided Hindu family, but subsequently became divided and were separately assessed to income-tax, applied to the Commissioner in one combined application on a single fee of one hundred rupees, to have a case stated to the High Court under section 66 (2) of the Income-tax Act (XI of 1922), and the applicants did not pay the additional fees or elect to have the application confined to one of them within time, as suggested by the Commissioner, *held*, (1) that it was not competent for four separately assessed persons to combine their applications in one document for a case to be stated by the Commissioner under section 66 (2) of the Act; that even assuming that they may, as, for instance, where the points to be raised are similar, their cases must be separately stated as they were separately assessed, and they must pay a separate fee of one hundred rupees for each assessment under the Act; (2) that there was no proper application before the Commissioner for his taking action in the case of one of the applicants, as the Commissioner had offered to do that and his offer was not accepted; and (3) that the Commissioner has no power under the Act to extend the time limited for making an application under section 66 (2) of the Act.

Commissioner of Income-tax, Madras v. *Ganga Raju.* (1927) I.L.R., 50 Mad., 335

INDIAN PENAL CODE, SEC. 294 (*a*)—"*Goods*"—*Immovable property—if included in.*] The term "goods" in section 294 (*a*) of the Indian Penal Code includes both movable and immovable property. The publication of an advertisement of a lottery by which the lucky winner would get a factory for less than its real value is an offence under section 294 (*a*) of the Indian Penal Code. 8 George I, Chapter II, section 36, and 12 George II, Chapter XXVIII, section 1, referred to.

Malla Reddi v. *King Emperor* ... ... (1927) I.L.R., 50 Mad., 479

——————————*Charge under sec.* 302—*Conviction under sec.* 304 (*second part*), *Indian Penal Code—Revision under section* 439, *Criminal Procedure Code—Notice of enhancement—Effect of section* 439 (4), *Criminal Procedure Code—Finding of acquittal, not complete, but partial.*] Where a person was charged with murder and the Sessions Court was of opinion on the evidence that the accused had been gravely provoked and did not intend to cause death and convicted him under the second part of section 304 of the Indian Penal Code, and the accused was called upon, in a revision petition filed in the High Court, to show cause why he should not be convicted of murder and the sentence enhanced to one of death *held*, that the High Court had no power in revision under section 439, Criminal Procedure Code, to do what was tantamount to convert a finding of acquittal into one of conviction, that the accused could not be convicted of an offence either under section 302 or the first part of section 304 of the Indian Penal Code except on an appeal by the Local Government. *Held* further, that the finding of acquittal referred to in section 439 (4), Criminal Procedure Code, need not be a complete acquittal. *In re Bali Reddi,* (1914) I.L.R., 37 Mad., 119, dissented from; *Emperor* v. *Sheodarshan Singh,* (1922) I.L.R., 44 All., 332, followed.

Subba Chukli, In re ... ... (1927) I.L.R., 50 Mad., 259

——————————, SEC. 341—*Agraharam road—Vested in a municipality—Public street—All members of public entitled to equal rights—Obstruction to lawful user—Wrongful restraint—Conviction for, if proper.*] All members of the public have equal rights in public streets vested in a municipality, and one section of the community cannot interdict another section of the community from the lawful use of the public streets. Where the accused, a Brahman, obstructed the complainant an Izhuva convert to Arya Samaj, from using a road in an *agraharam*, the road in question being vested in a municipality, *held*, that he had no right to so obstruct, and that he was rightly convicted under section 341, Indian Penal Code. *Sadagopa Chariar* v. *Krishnamoorthy Rao,* (1907) I.L.R., 30 Mad., 185 (P.C.), *Mansur Hasan* v. *Muhammad Zaman,* (1925) I.L.R., 47 All., 151 (P.C.), *Muchumarri Malliah* v. *Yerravulu Ganganna,* (1926) 94 I.C., 226, followed.

Sundareswara Srauthigal v. *King-Emperor* ... (1927) I.L.R., 50 Mad., 673

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INDIAN PENAL CODE (ACT XLV OF 1860), SEC. 499, EXCEPTION 9—*Statements by a lawyer acting in course of professional duties* prima facie *defamatory—Necessary in interests of client—Presumption of good faith—Proof of malice, overrides presumption—Absolute privilege, if available in India.*] When a lawyer is acting in the course of his professional duties and is thus compelled to put forward everything that may assist his client, good faith is to be presumed, and bad faith is not to be presumed merely because the statement is *prima facie* defamatory, but there must be some independent allegation and proof of private malice from which, in the circumstances of the case, the Court considers itself justified in inferring, that the statement was made, not because it was necessary in the interests of the client, but that the occasion was wantonly seized as an opportunity to vent private malice. Even the presence of malice will not override the presumption of good faith, when the statement made was obviously necessary in the interests of the client, and where the lawyer could not omit to make it without gravely imperilling the interests of his client, and would, in fact, not be discharging his duty to his client unless he made it. *In re Nagari Trikamji*, (1895) I.L.R., 19 Bom., 341, *Nikumja Behari Sen* v. *Harendra Chandra Sinha*, (1914) I.L.R., 41 Calc., 514, *Niren Narayan Singh* v. *Emperor*, (1927) 27 Cr. L. J., 1090, *McDonnel* v. *Emperor*, (1927) 27 Cr. L.J., 821, followed. *Dubitante*: The Indian law on the subject being found within the four corners of the Indian Penal Code, whether a complaint for defamation against a lawyer for matters uttered in Court in the course of his professional duties cannot be entertained. *Sullivan* v. *Norton*, (1887) I.L.R., 10 Mad., 28 (F.B.), questioned. *Tiruvengada Mudali* v. *Tirupurasundari Ammal*, (1926) I.L.R., 49 Mad., 728 (F.B.), referred to.

Mir Anwarrudin v. *Fathim Bai Abidin* ... ... (1927) I.L.R., 50 Mad., 667

INQUEST REPORT:—*See* "CRIMINAL PROCEDURE CODE, SEC. 174" 750

INTEREST ACT (XXXII OF 1889)—*Payment of advance—Interest on*:—*See* "CONTRACT ACT (INDIAN), SEC. 73" 94

——————— *Contract to supply goods*:—*See* "INDIAN CONTRACT ACT (IX OF 1872), SEC. 73" 94

INTERPRETATION OF STATUTES—*Marginal notes*:—*See* "CITY MUNICIPAL ACT (MADRAS), SEC. 288" 733

IRRIGATION CESS ACT, MADRAS (VII OF 1865)—*River, when "navigable"—Riparian proprietor using water of non-navigable river, whether liable to pay irrigation cess.*] A river is not "navigable" unless it is navigable *throughout* the year for *steamers and big boats*. Where only one side of a non-navigable river belongs to the Government and the other side belongs to a private owner (e.g., a Zamindar with a permanent sannad or, as in this case, an inamdar from him, the latter has a right as a riparian owner to take reasonable quantity of water for irrigation purposes without any liability to pay any cess under the Madras Irrigation Cess Act (VII of 1865), the extent of the right to take water being determined by the configuration of channels and sluices and the width of the river.

Subbarayudu v. *Secretary of State for India* ... (1927) I.L.R., 50 Mad., 961

JAGHIR—*Unsettled jaghir—Meaning of*:—*See* "ESTATES LAND ACT (MADRAS), SEC. 3" 10

JOINT TRIAL UNDER SS. 379 AND 447, INDIAN PENAL CODE:—*See* "CRIMINAL PROCEDURE CODE, SEC. 239" 735

JUDGMENT—*Order of single judge of High Court staying execution of lower Court's order, pending appeal to High Court*.—*See* "LETTERS PATENT, MADRAS HIGH COURT, CL. 15" 350

——————— *Refusal to revoke leave to sue on the original side*:—*See* "LETTERS PATENT, CL. 15" 770

JURISDICTION—*Civil Courts—Suit for unenfranchised personal inam*:—*See* "PENSIONS ACT, SEC. 4" 441

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JURISDICTION—*High Court—Issue of writ of certiorari—Failure to object to jurisdiction before Lower Court—If bar to obtaining writ*:—*See* "CERTIORARI" 130

——————— *Under section* 151, *Civil Procedure Code—When can be invoked—Inherent power under*:—*See* "CIVIL PROCEDURE CODE, SEC. 151" 67

JUS TERTII:—*See* "CIVIL PROCEDURE CODE, SEC. 11" 877

KARNAVAN—*Suit for removal—liability to account*:—*See* "MALABAR LAW" ... 431

KARTA—*Powers of*:—*See* "HINDU LAW" 421

LAND ACQUISITION ACT (I OF 1924), SEC. 6 (1)—*Contribution of one anna only, by Government towards acquisition—Validity of acquisition.*] In the absence of proof that the acquisition of a particular land is brought about by improper motives or that the Land Acquisition Act is set in motion to annoy a private owner, the contribution of even one anna by the Government towards the compensation for the acquisition of a land for a public road (the rest of the amount required for the purpose being contributed by the villagers) satisfies the proviso to section 6 (1) of the Act which provides that no declaration of acquisition shall be made unless the compensation to be awarded is to be paid . . . wholly or *partly* out of the public revenue. *Ponnaia* v. *Secretary of State for India*, (1926), 51 M.L.J., 338, dissented from; *Chatterton* v. *Cave*, (1878) 3 App. Cas., 483, and *Luchmeswar Singh* v. *Chairman, Darbhanga Municipality*, (1891) I.L.R., 18 Calc., 99 (P.C.), distinguished.

Senja Naicken v. *Secretary of State* ... ... (1927) I.L.R., 50 Mad., 308

——————————, SS. 18, 19 AND 30—*Sale by landlord of his kudivaram interest for cash and certain money rent payable every year—Land acquired under Land Acquisition Act—Compensation—Apportionment of—Dispute between landlord and purchasers of kudivaram—Right of landlord, whether merely to capitalized value of rent—Interest of landlord after sale of kudivaram.*] Where a landlord sold his kudivaram interest in the land to certain individuals under a sale deed whereby the vendees, besides paying a certain amount in cash were to pay also rupees four every year to the landlord and subsequently the land, comprising both the melvaram and kudivaram interests, was acquired by the Government under the Land Acquisition Act, and disputes arose as to the apportionment of the compensation amount between the landlord and the vendees of kudivaram, *held*, that the landlord, after the sale of the kudivaram, has not merely a right to receive the rent from the vendees, but has several other rights, such as the right to get back the land on forfeiture of the permanent tenancy, and other rights in the land; that it would be quite unfair and inequitable to value the melwaramdar's interest at a capitalized value at 20 years' purchase of the rent reserved in his favour; and that the apportionment of one-third of the compensation amount to the landlord was not improper.

Natesa Ayyar v. *Kaja Maruf Sahib* ... ... (1927) I.L.R., 50 Mad., 706

LANDLORD AND TENANT—*Lease—Restraint upon alienation of leasehold interest—Alienation of a portion, no breach of restraint.*] Unless there is a restriction against the alienation of any portion of the demised property, a restraint upon alienation of the demised premises does not prevent the alienation of a portion; *Chatterton* v. *Terrell*, [1923] A.C., 578, followed.

David Cutinha v. *Salvadora Minazes* ... ... (1927) I.L.R., 50 Mad., 331

LEASE FOR 99 YEARS—*Covenant for renewal for a further period of 99 years—"On such terms and conditions as should be judged reasonable"—Covenant, whether uncertain and void—Lessee assigning a portion of the premises to another—Lessee, whether competent to enforce specific performance of covenant for renewal of the whole or portion—Specific Relief Act (I of 1877), ss. 14 to 17, effect of.*] A lease for 99 years, granted by the East India Company in 1821, contained a clause for renewal for another like period on the lessee paying a sum of money and "upon such terms and conditions as should be judged reasonable," the entire leasehold interest became, by subsequent

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assignments, eventually vested in the plaintiffs, who in their turn assigned a major portion of the holding to a third party. Shortly before the expiry of the original lease period, the plaintiffs tendered the due amount and asked for renewal of the lease; but the lessors who had previously to the tender given notice to the plaintiffs, to quit the holding, refused to renew; the lessors sued to eject the plaintiffs, while the latter sued for specific performance of the covenant for renewal, in respect of the entire holding, or of the portion in their possession, without impleading the assignees of the other portion: *Held* by COUTTS TROTTER, C.J. (agreeing with VENKATA-SUBBA RAO, J.), that the covenant to renew was not unenforceable on account of uncertainty, *Gourlay* v. *The Duke of Somerset*, (1815) 19 Ves., 429; and that assignees of a portion only of the originally demised lands can sue for specific performance of a covenant for renewal, in respect of such portion only without the assignees of the other portions. A covenant to renew is, of all covenants, the clearest case of a covenant which must run with the land and is apportionable and can be specifically enforced by the assignee of a portion of the holding. *Simpson* v. *Clayton*, (1838) L.J. (C.P.), 59, followed. There is nothing in the Indian Specific Relief Act (I of 1877), to forbid each assignee of the lessees from suing for specific performance of the covenant to renew *qua* his portion. *Held by* KRISHNAN, J. (*contra*), that the covenant for renewal of the lease "upon such terms and conditions as shall be judged reasonable," is too vague, uncertain and unenforceable, and hence void; that the covenant for renewal is a single and indivisible covenant which cannot be apportioned between the various assignees; that sections 14 to 17 of the Indian Specific Relief Act (I of 1877) govern this case, and specific performance of part of the contract cannot be directed as the case did not fall under the exceptions specified in sections 14 to 16 of the Act. *Safiur Rahman* v. *Maharamunnissa*, (1897) I.L.R., 24 Calc., 832, and *Graham* v. *Krishna Chunder Dey*, (1925) I.L.R., 52 Calc., 335 (P.C.), relied on.

Secretary of State for India v. *Volkart Brothers* ... (1927) I.L.R., 50 Mad., 595

LETTERS PATENT (MADRAS), CL. 12:—*See* "SMUGGLED GOODS" ... 449

——————, CL. 15—*Judgment—Leave to sue on the Original Side granted—Application to revoke leave—Order of refusal, whether and when appealable.*] An order of a single Judge of the High Court refusing to revoke an order granting leave to sue on the Original Side of the High Court, *is not appealable*, under clause 15 of the Letters Patent, if the question of jurisdiction of the High Court to entertain the suit is still open to the defendant and can be raised on an appropriate issue at the trial of the suit; but if the order has finally shut out the defendant from thereafter pleading that the suit should have been dismissed on the point of jurisdiction, then the order is a judgment and is appealable. *Tuljaram* v. *Alagappa Chettiar*, (1912) I.L.R., 35 Mad., 1, applied.

Maharajah of Pithapuram v. *Rama Rao* ... ... (1927) I.L.R., 50 Mad., 770

——————, **MADRAS HIGH COURT**, CL. 15—*Order of single Judge, staying execution of a lower Court's decree, whether a judgment" within cl. (15)—appealability of—Party guilty of contempt by disobedience to decree, whether entitled to stay of execution.*] An order of a single Judge of the Madras High Court staying execution of a decree or order of a lower Court, by suspending an injunction, pending an appeal to the High Court, is a "judgment" within clause (15) of the Letters Patent, and is hence appealable. The long series of decisions of the High Court to the above effect are not affected or overruled in effect by *Sevak Jeranchod Bhogilal* v. *The Dakore Temple Committee*, (1925) 49 M.L.J., 25 (P.C.)

Pedda Jeeyangarlavaru v. *Krishnamacharlu* ... (1927) I.L.R., 50 Mad., 380

LIMITATION—*Combined mortgage decree against person and property—Application for execution—Filed more than twelve years from date of decree but less than twelve years from date of sale of hypotheca—Bar:—See* "CIVIL PROCEDURE CODE, SEC. 48" 5

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LIMITATION ACT (IX of 1908), ARTS. 39 AND 120—*Pleader and client—Several cases entrusted to same vakil—Agency in each case, separate and terminating at the end of each case—Suit for accounts against legal representatives of pleader—Limitation.*] A pleader engaged by a client for several cases died without finishing some of them. In a suit by the client after the pleader's death against his sons for an account of the moneys received by their father in all the cases and for the balance due to the plaintiff, *held*, that the pleader was not a general agent of the client so as to entitle the client to say that the agency terminated only on the death of the pleader, that the engagement in each case was separate, that the agency in respect of each case terminated at its end, that article 89 of the Limitation Act (IX of 1908) was applicable and that no new cause of action arose as against the sons on the death of their father so as to entitle the client to say that article 120 was applicable. *Arunachalam Chetty* v. *Rama Chetty*, (1914) 16 M.L.T., 614, followed, and *Bindraban Behari* v. *Jamuna Kunwar*, (1903) I.L.R., 25 All., 55, dissented from.

Appa Rao v. *Subba Rao* ... ... (1927) I.L.R., 50 Mad., 249

——————, ART. 166—*Application by decree-holder to set aside sale of property not belonging to judgment-debtor and for further execution, more than thirty days after sale:—See* "EXECUTION" 639

——————, ART. 182 (5)—*Application for delivery by decree-holder-purchaser, whether a step in aid.*] An application by a decree-holder-purchaser for delivery of property purchased by him in execution, is a step in aid of execution within article 182, clause (5) of the Limitation Act (IX of 1908). *Lakshmanan Chettiyar* v. *Kannammal*, (1901) I.L.R., 24 Mad., 185, followed. In order that an application by the decree-holder should serve as a step in aid, it is not necessary that it should be made in a pending execution application, *Kunhi* v. *Seshagiri*, (1882) I.L.R., 5 Mad., 141, followed. In these matters the principle of *stare decisis* is applicable.

Kannan v. *Avvulla Haji* ... ... (1927) I.L.R., 50 Mad., 403

——————, ART. 182 (5)—*Application for execution of decree—Application by judgment-debtor to record satisfaction—Statement by decree-holder, objecting to judgment-debtor's application—Subsequent application by decree-holder for execution, more than three years from last application for execution—Filing of statement by decree-holder objecting to record of satisfaction, whether a step in aid of execution—Pendency of execution application, whether necessary for effectiveness of an application for a step in aid of execution.*] The filing of a statement by a decree-holder, objecting to the judgment-debtor's application to record satisfaction of the decree, is not a step in aid of execution of the decree under article 182 (5) of the Limitation Act (IX of 1908), and cannot therefore save his application for execution from being barred by limitation. *Kuppuswami Chettiar* v. *Rajagopala Aiyar*, (1922) I.L.R., 45 Mad., 466, followed. *Quære*:—Whether an application to be a step in aid of execution should be one made in a pending execution application.

Krishna Pattar v. *Seetharama Pattar* ... ... (1927) I.L.R., 50 Mad., 49

—————— SS. 14 AND 15—*Suit by maker of note for declaration that it was obtained by fraud and undue influence—No injunction against payee filing a suit—Dependent judgment—Limitation for a suit on the note by the payee.*] The fact that the maker of a promissory note sued the payee for a mere declaration that the note had no consideration and was obtained by fraud and undue influence without suing for an injunction to restrain the payee from filing a suit on the note does not suspend the running of time for a suit on the note by the payee. *Sethu Row* v. *Seetha Lakshmi Ammall*, (1925) 21 L.W., 716, followed. The principle of dependent judgment is no longer good law and no equitable grounds for suspension of a cause of action can be added to the provisions of the Limitation Act. *Naganna* v. *Venkatappayya*, (1923) I.L.R., 46 Mad., 895 (P.C.), followed.

Satyanarayana Brahmam v. *Seethayya* ... ... (1927) I.L.R., 50 Mad., 417

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LIMITATION ACT (IX OF 1908), SEC. 19—*Acknowledgment* :—*See* "TRANSFER OF PROPERTY ACT, SEC. 55 (4) (b)" 548

——— SEC. 22—*Civil Procedure Code (Act V of 1908), O. I, r. 10 (5)—Application by plaintiff to add party as defendant—Order granting application—Review—Application dismissed—Revision—Order by High Court adding party—Date from which suit deemed to have been instituted against the added party.*] Where an application made by the plaintiff in the original Court to add a person as a defendant in a pending suit was originally granted but subsequently on review dismissed by that Court, and, on a revision petition filed against the last order, the High Court ordered that the party be added as a defendant to the suit without prejudice to any defence of limitation being raised by him in the trial of the suit, *held*, that the order of the High Court adding the party as a defendant, should, for purposes of limitation, be deemed to have taken effect, not merely on the date when it should have been made by the lower Court if it had taken a correct view of the position, but on the date when the plaintiff's application was presented to the trial Court; and that the suit was not barred. *Ramakrishna Moreshwar* v. *Bamabai*, (1893) I.L.R., 17 Bom., 29, followed. *Haveli Shah* v. *Khan Shahib Painda Khan*, (1926) M.W.N., 592 (P.C.), distinguished.

South Indian Industrials, Limited v. *Narasimha Rao* ... ... (1927) I.L.R., 50 Mad., 372

LOCAL BOARDS ACT (MADRAS) (XIV OF 1920)—*Election Rules under the Act, r. 1—Only one candidate for presidentship, nominated—Such candidate deemed elected—Election petition filed against the appointment, competency of—Election, meaning of.*] Where only one candidate for the presidentship of a local board has been nominated and in accordance with the rules has been deemed to be elected, no election petition will lie against this appointment. Election means selection of one out of two or more candidates, and therefore the return of a solitary candidate is not, strictly speaking, an election by the electors, for the electors have had no say whatever in the matter.

Krishnasamy v. *Gulam Muhammad Ghouse* ... (1927) I.L.R., 50 Mad., 86

——— R. 4, CL. (3)—*Rules for elections—Elections to Union Boards—Jurisdiction of District Court to transfer part-heard case—Objection to personation of a voter.*] Rule 4, clause (3) of the rules for the conduct of election enquiries framed under the Madras Local Boards Act (XIV of 1920) enables a District Court to transfer to a Munsif's Court even a part-heard case in the case of elections to Union Boards. *Zamindar of Bodakimidi* v. *Kumari Lahiri*, (1918) M.W.N., 772, followed. Even if no objection is taken at the time of election to the voting of any person personating a real voter, the same can be taken at the election enquiry.

Moideen Meera Sahib v. *Fernando* ... ... (1927) I.L.R., 50 Mad., 654

——— SS. 166 (1) AND 207—*Liability of licence-holder for act of his servant—Person licensed to ply car for hire on specified roads—Conductor employed by him plies for hire on road not covered by licence—Employer charged under ss. 166 (1) and 207 of the Madras Local Boards Act—Plea, act was done through conductor's ignorance and employer was unaware of act—Principle applicable—Act of servant is act of master.*] Where a person was licensed under the Madras Local Boards Act to ply his motor car for hire on certain specified roads, and a conductor employed by him plied the car for hire on a road not covered by the licence and the employer was charged with an offence under section 166 (1) of the Madras Local Boards Act, punishable under section 207 of the same Act, and he pleaded that the conductor plied the car on that road through ignorance and that he himself was not aware of the servant's act, *held*, that the principle to be applied in the case was that which applied in the case of other licence-holders, such as, holders of abkari licences and licences under the City Police Act; that the licence-holder having undertaken to conform to the terms of the licence and to be responsible that no breach of it took place, that it was the licence-holder

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who did everything that was done under cover of the licence, that the act of the servant of a licence-holder was the act of his master, and that the licence-holder was in law responsible for all that his servant did. *In re Sudalaimuthu Pillai*, 1 Weir, 647, *Velayuda Mudali* v. *King-Emperor*, (1920) I.L.R., 43 Mad., 438, *Queen-Empress* v. *Tyab Ali*, (1900) I.L.R., 24 Bom., 423, *Emperor* v. *Babu Lal*, (1912) I.L.R., 34 All., 319, *Emperor* v. *Jwala Prasad*, (1923) I.L.R., 45 All., 642, referred to.

Sivarama Mudaliar v. *Muthannanziengar* ... (1927) I.L.R., 50 Mad., 913

LOCAL BOARDS ACT (XIV OF 1920), SEC. 193—*If repealed sec. 249 of Act (V of 1920)* :—*See* "DISTRICT MUNICIPALITIES ACT" 846

——— SCH. VII, CL. (c)—"*Storing or otherwise dealing with*"—*Forwarding agent—Collection of packages of fish—Kept in shed or godown with a view to consignment—If comes within mischief of Sch. VII, cl. (c).*] A forwarding agent, who collects packages of fish and keeps them in a shed or a godown for a day or two with a view to their subsequent consignment elsewhere, is "storing or otherwise dealing with" fish within the meaning of Schedule VII, clause (c) of the Madras Local Boards Act. The shortness or otherwise of the period does not affect the question. A man who handles goods in any way is dealing with them, and storing for private purposes apart from trade is "dealing with". *Emperor* v. *Wallace Flour Mill Co.*, (1905) I.L.R., 29 Bom., 193, *N.E. Ry. Co.* v. *Mayor, etc., of Kingston-upon-Hull*, (1891) 55 J.P., 518, referred to.

Public Prosecutor v. *Saidali Kutti and Sons* ... (1927) I.L.R., 50 Mad., 752

"LOTTERY" WITHIN SEC. 294-A, INDIAN PENAL CODE :—*See* "CHIT FUND" 696

MAINTENANCE - *Illegitimate son—Illegitimate daughter—Hindu Law—Rights under—Charge* :—"*See* HINDU LAW" 340

MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT (MADRAS ACT I OF 1900), SEC. 3—"*Improvements*"—*Whether Act applies to non-agricultural holdings.*] Malabar Compensation for Tenants' Improvements Act (Madras Act I of 1900) applies only to improvements effected in agricultural holdings and vacant building sites. Hence if a shop in an urban area is let to a tenant who agrees by his lease to remove at the end of the term a bakery oven erected by him thereon, he is not entitled to any compensation for the oven at the time of eviction

Chathukutty v. *Kunhappu* ... ... (1927) I.L.R., 50 Mad., 813

MALABAR LAW—*Tarwad—Karnavan—Suit by junior members for removal of karnavan—Liability to account—Fraud and misappropriation alleged against karnavan—Karnavan ceasing to be such by succession to a higher sphere—Maintainability of suit—Suit, whether can be continued as to accounts—Karnavan, whether and when personally liable—Liability of agent of karnavan.*] Where certain junior members of a Malabar tarwad sued for the removal of the karnavati, on allegations of fraud, misappropriation of family funds in general and devoting the funds to her particular branch, and prayed that she should render a general account of her management and pay personally whatever sums be found due to the family, but in the course of the suit the karnavati ceased to be such because under the family law of succession she moved to a higher sphere, *held*, (1) that, as the removal of the karnavati was otherwise an accomplished fact, the suit for general account, not being necessary and incidental to her removal, was not in law sustainable and should be dismissed; (2) that, in a properly framed suit, on proof of specific fraudulent alienations or misappropriation by the karnavan, the junior members, suing on behalf of the tarward, are entitled to recover personally from the karnavan the amount of which their tarwad has been defrauded; (3) that, in so far as a person acted as agent of the karnavati, a suit which would not lie against the principal would not lie against the agent; and that, in so far as he acted as a mere trespasser, there could be no calling upon him for general accounts; but in a properly framed suit it would be open to the karnavan to sue such person as liable personally for any proved act of misfeasance or misappropriation by him.

Manavadan v. *Sreedevi* ... ... (1927) I.L.R., 50 Mad., 341

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MANAGER—*Liability to account—Nature of*:—*See* "HINDU LAW" 366

MATH—*Loan contracted by mahant—Liability of succeeding mahant*:—*See* "HINDU LAW" 497

MORTGAGE—*Puisne mortgagee paying off decree on prior hypothecation—Suit thereafter for redemption of puisne mortgage—Lapse of twelve years from date of hypothecation on date of suit—Right of puisne mortgagee to be paid the decree amount.*] When a puisne mortgagee pays off a decree on a prior hypothecation, he is subrogated to the right of the prior hypothecatee. He is not entitled to enforce the decree as such but can only enforce his charge arising by subrogation. The period within which he should enforce it is 12 years from the date on which a suit on the hypothecation should have been brought and not 12 years from the date of payment. Hence, if in a suit for redemption by the mortgagor to redeem the puisne mortgage, more than 12 years had elapsed from the date on which a suit on the hypothecation should have been brought, the puisne mortgagee cannot resist redemption by claiming also the amount he had paid in addition to the amount due on his mortgage. *Parvathi Ammal* v. *Venkatarama Iyer*, (1924) 47 M.L.J., 316, considered; *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh*, (1912) I.L.R., 39 Calc., 527 (P.C.), *Gopi Narain Khanna* v. *Bansidhar*, (1905) I.L.R., 27 All., 325 (P.C.), applied.

Kotappa v. *Raghavayya* ... ... (1927) I.L.R., 50 Mad., 626

——————*Redemption—Mortgage not purely usufructuary—Separate charge on same property—Mortgagee's right to have charge also redeemed—Code of Civil Procedure (Act V of 1908), O. XXXIV, r. 1—Transfer of Property Act (IV of 1882), ss. 61-62.*] Section 62 of the Transfer of Property Act, 1882, which gives a usufructuary mortgagor a right to recover possession of the property mortgaged when the mortgage money has been realized, or is paid, tendered or deposited in Court, applies only to a mortgage which is purely and simply usufructuary. The section is not in any way inconsistent with section 61 of the Act, which enacts by implication that a mortgagor cannot redeem without paying money due under a separate mortgage or charge on the same property. A deed of mortgage with possession provided for interest at a specified rate, and contained covenants by the mortgagor to pay both principal and interest. By a separate document of the same date the mortgagee leased part of the mortgaged property to the mortgagor, the document providing, upon its true construction, that upon default in payment of the rent reserved it should be a charge upon the property included in the mortgage deed. In a suit for redemption and possession brought by an assignee of the mortgagor's interest against an assignee of the mortgage, *held*, that the deed did constitute a usufructuary mortgage within section 62 and that under section 61 the mortgagee was entitled to have the arrears of rent included in the sum to be paid as a condition to possession; further, that to exclude the rent would lead to a circuity of action and would be contrary to O. XXXIV, r. 1, the object of which rule is that all claims affecting the equity of redemption should be disposed of in one suit.

Ramarayanimgar v. *Maharaja of Venkatagiri* ... ... (1927) I.L.R., 50 Mad. (P.C.), 180

——————*Suit for sale in a Sub-Court—Suit against Official Assignee and insolvent mortgagor—Transaction, fraudulent under sec. 53 of Transfer of Property Act—Presidency Towns Insolvency Act (III of 1909), ss. 4, 7, 55 and 56 – Jurisdiction of Sub-Court to determine question under sec. 55 of the latter Act—Special Act—Special forum, Insolvency Court—Provincial Insolvency Act (V of 1920), ss. 53 and 54—Jurisdiction of Civil Courts to determine question raised under either Act.*] Any question as to the invalidity of a transaction, raised by the Official Assignee under the special provisions contained in sections 55 and 56 of the Presidency Towns Insolvency Act, can be determined only by the Insolvency Court, constituted under the Act, and not by the ordinary civil Court. The principle of the decisions holding that only Insolvency Courts have jurisdiction to determine questions under sections 53 and 54 of the Provincial Insolvency Act, should be applied to cases falling under sections 55 and 56 of the Presidency Towns Insolvency

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Act. *Mariappa Pillay* v. *Raman Chettiar*, (1919) I.L.R., 42 Mad., 322, and *Official Receiver, Coimbatore* v. *Palaniswami Chetty*, (1925) I.L.R., 48 Mad., 750, followed. Where, therefore, in a suit for sale on a mortgage instituted in a Sub-Court against the Official Assignee and others, the Court found that the transaction was not voidable under section 53 of the Transfer of Property Act, the Court had no jurisdiction to determine, at the instance of the Official Assignee, whether it was void as against him under section 55 of the Presidency Towns Insolvency Act, but a decree should be given to the mortgagee, leaving it open to the Official Assignee to apply to the Insolvency Court to set aside the transaction if he could show that the case fell within section 55 of the latter Act.

Official Assignee of Bombay v. *Sundarachari* ... (1927) I.L.R., 50 Mad., 776

MORTGAGE BOND—*Whether certain stipulation regarding interest is by way of penalty*:—*See* "CIVIL PROCEDURE CODE, O. XLI, R. 33" 614

OFFICIAL RECEIVER—*Right to continue appeal when insolvent adjudicated during pendency of appeal*:—*See* "PROVINCIAL INSOLVENCY ACT, ss. 2, 20, 33, 33, 4, 50" 161

——————*not an agent of Court to enable court to ratify unauthorized acts—Sale by—If sec. 43 of Transfer of Property Act applicable*:—*See* "PROVINCIAL INSOLVENCY ACT, ss. 16 AND 19" 13

ORIGINAL SIDE, *High Court—Cause of action wholly or in part in Madras*:—*See* "SMUGGLED GOODS" 449

PARTIES—"*Proper*" *and* "*necessary*":—*See* "CIVIL PROCEDURE CODE, O. 1, R. 10" 34

PARTNERSHIP—*Illegality for non-registration—Dissolution.*—*See* "PROVINCIAL INSOLVENCY ACTS, ss. 2, 20, 33, 49, 50" 175

PENAL CODE, INDIAN, SEC. 294-A:—*See* "CHIT FUND" 696

PENSIONS ACT (XXIII of 1871), SS. 3, 11 AND 12—*Political pensions, meaning of—Political prisoner under Regulation III of 1818—Allowance granted by Government of India to such prisoner—Arrangement between Government of India and Foreign State (Panna State) that the allowance should be paid by the latter into Government treasury for payment—Allowance, whether ceases to be political pension—Pensions Act, applicability of—Agreement by the pensioner with his creditor, empowering latter to draw amounts from time to time in discharge of his debt—Validity of—Transfer of Property Act (IV of 1882), sec. 6, cls. (d) and (g)—Specific performance of agreement, suit for, whether maintainable.*] A pension payable to a political prisoner by the Government of India under a statutory obligation to maintain that person as under Regulation III of 1818, does not cease to be a political pension because the Government of India under some arrangement gets a foreign State to remit the amount to the Government treasury for payment, but falls under the Pensions Act (XXIII of 1871). An agreement entered into by such a pensioner with his creditor irrevocably empowering the latter to draw the amounts from the treasury from time to time in discharge of his debt and to pay a portion to the pensioner, is void under the provisions of the Pensions Act (XXIII of 1871), as well as under section 6, clauses (*d*) and (*g*) of the Transfer of Property Act, and cannot be specifically enforced. *Muthusami Nayudu* v. *Prince Alagia Manavala Samala Raja*, (1903) I.L.R., 26 Mad., 423, followed; *Bishambar Nath* v. *Imdad Ali Khan*, (1891) I.L.R., 18 Calc., 216 (P.C.), explained; *Rajendra Narain Singh* v. *Sundara Bibi*, (1925) I.L.R., 47 All., 385 (P.C.), distinguished.

Satraji Dongerchand Firm v. *Madho Singh* ... (1927) I.L.R., 50 Mad., 711

——————, SEC. 4—*Jurisdiction of Civil Courts—Unenfranchised personal inam lands—Suit for division of—Suit in Civil Court, whether maintainable and in what cases—Grant of land or land revenue—Prohibition of alienation of inam lands—Rule 5, cl. (3) of Inam Rules, 1859—Effect of prohibition—Alienation not binding on Government but not void—Will executed by a sharer in the inam lands, bequeathing his share—Right of legatee to sue for partition—Validity of bequest.*] A suit for partition, between members of the family, of unenfranchised personal inam lands, where the inam was

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the grant of lands and not of land revenue, is maintainable in a Civil Court, as its jurisdiction is not taken away in such cases by section 4 of the Pensions Act (XXIII of 1871). The object of rule 5, clause (3) of the Inam Rules of 11th October 1859 in prohibiting alienations of inam lands is to protect the interests of the Government, and the prohibition therein can only mean that as against the Government all alienations are inoperative, not that they are void: so long as the Government do not step in to enforce their rights, whatever they are, by ignoring the alienation, it is not open to others to question a transaction which amounts to an alienation; *Venkatarama Ayyar* v. *Chandrasekhara Ayyar*, (1921) I.L.R., 44 Mad., 632, followed. Where, therefore, a sharer in certain unenfranchised personal inam lands, after a division of status in the family, made a bequest of his share therein in favour of his wife, the latter is entitled to sue in a Civil Court for division of such lands by metes and bounds in respect of her husband's share bequeathed to her under his will.

Vaidyanatha Ayyar v. *Yojambal Ammal* ... ... (1927) I.L.R., 50 Mad., 441

PLEADER—*Agency—Suit for accounts against legal representatives of pleader:—See* "LIMITATION, ARTS. 89 AND 120" 249

POLITICAL PRISONER UNDER REGULATION III of 1818:—*See* "PENSIONS ACT, XXIII OF 1871" 711

PRESIDENCY TOWNS INSOLVENCY ACT (III of 1909), SS. 4, 7, 55 AND 56:—*See* "MORTGAGE" 776

——————————, SS. 55 AND 56—*Questions arising under—appropriate forum:—See* "MORTGAGE" 776

——————————SS. 55 AND 56—*Insolvent transferring all his property to a simple creditor without providing for other creditors—Knowledge of transferee—Good faith and consideration—Onus.*] If a person in insolvent circumstances transfers all his properties to one of his creditors solely for a past debt, without providing for his other creditors to whom he was heavily indebted, by means of an antedated deed of transfer, and the transferee, a relation of the transferor, takes the transfer knowing all the circumstances, he is not a transferee in good faith within the meaning of section 55 of the Presidency Towns Insolvency Act (III of 1909) and his transfer is liable to be cancelled under the section if the transferor is adjudged insolvent within two years of the transfer. The onus of proving that a particular transfer effected by the insolvent is void as against the Official Assignee under section 56 of the Act is on the Official Assignee, whereas the onus of proving good faith and valuable consideration in a case coming under section 55 is on the transferee.

Official Assignee, Madras v. *Sheik Moideen Rowther* ... (1927) I.L.R., 59 Mad., 948

——————————, SEC. 116—*Order of adjudication, based on certain acts of bankruptcy—Conclusiveness of the order as to character of the acts—Effect of order only as to acts furnishing grounds for adjudication—Order as to character of the acts whether binding on transferees—Duty of Official Assignee to apply under the Act to set aside transfers, etc., comprised in the acts on which adjudication was based—Application by Official Assignee—Cause of action—Fraudulent preference—Conversion—Amendment.*] An order of adjudication, based on certain acts of the insolvent being regarded as acts of bankruptcy, is not conclusive as to the character of such acts in all its legal consequences; the decision as to the character of such acts, apart from its furnishing ground for adjudication as insolvent, is not binding on the parties affected thereby who have not had any opportunity of being heard in the matter; but the Official Assignee is bound to take the ordinary procedure prescribed by the Insolvency Act to set aside the fraudulent preferences and payments, if any, constituted by such acts on which the adjudication was founded. The expression "duly made" in section 116 of the Presidency Towns Insolvency Act, construed. Where an Official Assignee applied to recover an amount from a garnishee alleging a case of fraudulent preference but the facts

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proved showed a case of conversion, the Official Assignee was not entitled to amend his petition at a late stage, or to withdraw his application. Duty of Official Assignee, more than the lay public, in making such applications, to set out the exact grounds or cause of action properly and definitely, pointed out.

Official Assignee of Madras v. *O.R.M.O.R.S. Firm* ... (1927) I.L.R., 50 Mad., 541

PROFESSION TAX:—*See* "DISTRICT MUNICIPALITIES ACT (MADRAS), SEC. 93 (3)" 987

PROVINCIAL INSOLVENCY ACT (V OF 1920)—*Two partners liable on a joint debt—Acts of bankruptcy by each during continuance of debt—Single petition to adjudicate both as insolvents, maintainability of.*] If two partners are liable on a joint debt and each of them is guilty of acts of bankruptcy during the continuance of the joint debt, by making alienations calculated to defeat or defraud the creditors of the firm, a single petition to adjudge both of them as insolvents is sustainable, though they may not have committed a joint act of insolvency. The test is whether if the petition were treated as a suit, the suit would be bad for multifariousness.

Punniah v. *Kesarmal Firm* ... ... (1927) I.L.R., 50 Mad., 256

——————————SS. 2, 20, 33, 49, 59—*Suit by vendor for damages for breach of contract for purchase of goods—Decree for damages—Appeal by vendee—Vendee adjudicated insolvent subsequent to filing of appeal—Right of Official Receiver to continue appeal—Suit by vendee to recover deposit—Decree dismissing suit—Appeal by vendee—Vendee adjudicated insolvent pending appeal—Right of Official Receiver to continue appeal—Remedy of Official Receiver against decrees for damages against insolvent—Official Receiver entitled to contest such decree by taking proceedings under the Insolvency Act.*] Where a decree for damages was passed against a vendee in a suit against him by the vendor for damages for breach of contract, and the vendee appealed against the decree but was adjudicated insolvent during the pendency of the appeal, and the Official Receiver claimed to continue the appeal, *held*, that section 59 of the Provincial Insolvency Act (V of 1920), does not authorize the Official Receiver to appeal, or continue an appeal already preferred by the insolvent prior to his adjudication, against a decree for damages in a suit for breach of contract against the insolvent; the expression "relating to the property of the insolvent" in clause (*d*) of section 59, does not mean "*affecting* the property of the insolvent." The Official Receiver is not without remedy against decrees for damages passed against the insolvent, because the decree is not binding on him but it is open to him to contest the validity of the decree as a debt, in proper proceedings taken under the provisions of the Provincial Insolvency Act (V of 1920), such as sections 33, 49 and 50 of the Act. Where, however, an insolvent before his adjudication, had instituted a suit against his vendor for the return of a deposit of money made by him with the latter under a contract for sale of goods, alleging breach of contract by the latter, but the suit was dismissed and the former appealed prior to his adjudication, the Official Receiver is entitled to continue the appeal, because in this case the deposit is the insolvent's property which became vested in the Official Receiver under section 20 of the Provincial Insolvency Act, 1920, and section 59, clause (*d*), expressly authorizes the Official Receiver to institute or continue legal proceedings relating to such property.

Subba Ayyar v. *Munisami Ayyar* ... ... (1927) I.L.R., 50 Mad., 161

——————————SEC. (2) (*a*) (*d*)—*Decree against son for debt of father—Liability of son to adjudication under the Act.*] Until there is a personal decree under section 52, Civil Procedure Code, a decree against a person as the legal representative of another (such as in this case a decree against a son for the debt of his deceased father to the extent of the assets in his hands) does not make him liable to adjudication under the Provincial Insolvency Act. *The Official Assignee of Madras* v. *Palaniappa Chetty*, (1918) I.L.R., 41 Mad., 824, followed; *Muthuveerappa Chettiar* v. *Sivagurunatha Pillai*, (1926) I.L.R., 49 Mad., 217, considered.

Nagasubrahmania Mudaliar v. *Krishnamachariar* ... (1927) I.L.R., 50 Mad., 981

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PROVINCIAL INSOLVENCY ACT (V OF 1920), SEC. 9, CLS. (*a*) AND (*b*)—*Petitioning creditor's right to present insolvency petition if entitled to Rs. 500 on date of presenting petition—"Some certain future time," meaning of—Section 25, giving discretion to Court.*] According to clause (*a*) of section 9 of the Provincial Insolvency Act (V of 1920), it is sufficient if the petitioning creditor is entitled to a debt of Rupees Five Hundred on the date of presenting the insolvency petition; it is not necessary that he should be entitled to that amount on the date of adjudication also. It is immaterial that by the later date the amount gets reduced as the result of an appeal or counter-suit by the debtor. Adjudicating a debtor on a creditor's petition is discretionary under section 25 of the Act.

Venkatarama Ayyar v. *Buran Sheriff* ... ... (1927) I.L.R., 50 Mad., 396

——— **(III OF 1907),** SS. 16 AND 19—*Order of adjudication passed by Official Receiver on reference by District Court—No order passed by Court appointing Official Receiver as Receiver of insolvent's properties—Sale of joint family immovable properties by Official Receiver—Validity of sale of insolvent's son's share—Suit by son for his share as unaffected by the Receiver's sale—Subsequent order, by District Court, appointing Official Receiver as Receiver of properties with effect from date of adjudication—Sale, whether validated thereby—Transfer of Property Act (IV of 1882), sec. 2 (d) and sec. 43—Applicability of the sections to sales by Official Receiver—Official Receiver, whether an agent of Court—Ratification—Sale by Receiver, whether a transfer falling within sec. 2 (d) of the Act.*] An application by a person to a District Court to be adjudicated an insolvent was referred by the Court to the Official Receiver for disposal; the latter adjudicated him an insolvent; the Court did not however pass an order appointing the Official Receiver as Receiver of the insolvent's properties; the Official Receiver sold certain joint family immovable properties belonging to the insolvent and his son; the latter sued in a District Munsif's Court for a declaration that the sale of his share was invalid and for partition and delivery of his share from the vendees; pending the suit the District Court passed an order appointing the Official Receiver as the Receiver of the insolvent's properties; on the vendees contending in the suit that the sale by the Official Receiver was validated by the subsequent order of the District Court appointing him Receiver of the insolvent's properties, *held* (*by the Full Court*), that the Official Receiver was not an agent of the Court, so as to enable the Court to ratify unauthorized acts done by the agent; *held* (*by the majority of the Court*, KRISHNAN, J., *dissenting*), (*a*) that a sale by an Official Receiver in insolvency was not a transfer by operation of law or in execution of, a decree or order of Court, falling under section 2, clause (*d*) of the Transfer of Property Act; and that consequently, section 43 of the Act was applicable to such a sale; and (*b*) that although at the time when the Official Receiver sold the properties he had no title vested in him in the absence of an order appointing him as Receiver of the insolvent's properties, still as the Receiver acquired title subsequently by the subsequent order of Court, the sale operated on such subsequently acquired interest under section 43 of the Act, and became valid. *Held by* KRISHNAN, J., that a sale by an Official Receiver is in the nature of a Court sale, and there is no implied representation as to title involved in it; that the Official Receiver's sale falls under the word "transfer by order of a Court of competent jurisdiction" in section 2, clause (*d*) of the Transfer of Property Act, and that consequently section 43 of the Act is not applicable to such sales.

Basava Sankaran v. *Anjaneyulu* ... ... (1927) I.L.R., 50 Mad., 135

——— SS. 28 (7) AND 53—*Voluntary alienation within two years prior to presentation of petition for insolvency—Voidability of.*] Though section 53 of the Provincial Insolvency Act (V of 1920) enacts that a voluntary transfer by an insolvent is voidable as against the Receiver if the transferor is adjudged insolvent within two years of the transfer, yet as an order of adjudication relates back to, and takes effect from, the date of presentation of the petition for insolvency, a voluntary transfer made within two years prior to the date of presentation of the petition for insolvency is voidable though it is beyond two years of the date of adjudication. Section 53 of the Act must be read along with section 28 (7) of the Act. *Sankaranarayana Aiyar* v. *Alagari Aiyar*, (1918) 35 M.L.J., 296, followed; *Nagindas* v. *Gordhandas*, (1925) I.L.R., 49 Bom., 730, and *Ghulam Muhammad* v. *Panna Ram*, (1923) 72 I.C., 433, dissented from.

Rangiah v. *Appaji Rao* ... ... (1927) I.L.R., 50 Mad., 300

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PROVINCIAL INSOLVENCY ACT (V OF 1920), SS. 28 AND 42—*Refusal to order final discharge, whether a termination of insolvency proceedings—No annulment of adjudication.*] On an order of adjudication, the property of the insolvent vests in the Official Receiver under section 28 of the Provincial Insolvency Act and it continues to be so until the insolvency proceedings terminate in any of the ways indicated by the Act, such as, annulment of the adjudication. An order refusing under section 42 of the Act the final discharge of the insolvent does not terminate the insolvency proceedings and does not, therefore, enable a decree-holder to apply for execution against the insolvent, without the leave of the Court.

Alamelu Ammal v. *Venkatarama Iyer* ... ... (1927) I.L.R., 50 Mad., 977

——— SS. 53 AND 75 (3)—*Appeal filed without leave—Petition for leave after filing of appeal, validity of appeal—Debtor in insolvent circumstances transferring all his movable and immovable properties to trustee for distribution among his creditors—Trustee, whether a purchaser in good faith and for valuable consideration—Indian Trusts Act (II of 1882), ss. 4, 5 and 6.*] In cases of appeals under section 75 (3) of the Provincial Insolvency Act (V of 1920) it is not necessary that leave to file the appeal should be obtained before filing the appeal; it may be obtained after. *Anantanarayan Ayyar* v. *Sankaranarayana Ayyar*, (1921) I.L.R., 47 Mad., 673, followed. A deed of trust by a person of his properties for payment of his debts is not valid unless it is an actual transfer of his properties and otherwise conforms to the provisions of sections 4, 5 and 6 of the Indian Trusts Act. If the intention to transfer both movables and immovables by means of a deed is one and indivisible and if the transfer of the immovables is invalid for some reason, e.g., non-registration of the deed, the transfer of the movables too cannot take effect. A trader who could not pay his debts in the ordinary course and who was in financial difficulties transferred to a trustee all his movable and immovable properties for distribution among his creditors and filed his petition for adjudication as an insolvent within three months of the transfer. *Held*, that the trustee who took the properties for such distribution with knowledge of the debtor's circumstances was not a purchaser in good faith and for valuable consideration within section 53 of the Provincial Insolvency Act. *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar*, (1916) 30 M.L.J., 415, not followed; *Ex parte Hillman, In re Pumfrey*, (1879) 10 Ch. D., 622, followed.

Official Receiver, Cuddapah v. *Subbiah* ... ... (1927) I.L.R., 50 Mad., 815

——— SS. 53 AND 54:—*See* "MORTGAGE" 776

PUBLIC OFFICER—*Suit against—Notice:—See* "CIVIL PROCEDURE CODE, SEC. 80" 239

PUBLIC OFFICIALS—*Immunity from prosecution without sanction—Extent of—Act arising out of abuse of official position, and not purporting to be official—Municipal Chairman—Threatening injury to voter's property with intent to influence his vote—Complaint under sec. 54 (a) of the Madras District Municipalities Act (V of 1920)—Sanction under sec. 197 of the Criminal Procedure Code (Act V of 1898)—If necessary.*] The privilege of immunity from prosecution without sanction accorded to public officials only extends to acts which can be shown to be in discharge of official duty, or fairly purporting to be in such discharge. A prosecution for an offence arising out of an abuse of official position by an act not purporting to be official does not require sanction under section 197 of the Code of Criminal Procedure. Where a complaint against a Chairman of a Municipal Council charged him with an offence under section 54 (*a*) of the Madras District Municipalities Act (V of 1920) in that he threatened a voter with injury to his property, with intent to induce such voter to vote for

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a candidate or to abstain from voting, held that sanction under section 197 of the Code of Criminal Procedure (Act V of 1898) was not necessary for the institution of the complaint. *Sheik Abdul Kadir Saheb* v. *Emperor*, (1916) M.W.N., 384, at 388, followed; *In re Gulam Muhammad Sharif-ud-daulah*, (1886) I.L.R., 9 Mad., 439, dissented from; *Municipal Commissioners of the City of Madras* v. *Bell*, (1902) I.L.R., 25 Mad., 15, referred to.

Kamisetty Raja Rao v. *Ramaswamy* ... ... (1927) I.L.R., 50 Mad., 754

PUBLIC STREET—*Right of user* :—*See* "INDIAN PENAL CODE, SEC. 341" ... 673

REGISTRATION ACT (INDIAN) (XXI OF 1908)—Bona fide *purchase of property for the purpose of facilitating registration of a transaction*—Bona fide *inclusion of such property in a mortgage document—Fraud on registration—Validity of registration of the document.*] Where a person *bona fide* buys property for the purpose of facilitating registration of a transaction and also *bona fide* includes it in a sale or mortgage, he cannot be held to commit a fraud on registration which would render the whole transaction invalid.

Chokkalingam Chettiar v. *Athappa Chettiar* ... (1927) I.L.R., 50 Mad., 800

——— **(XVI OF 1908)**, SEC. 17 (2) (*v*).—*See* "HINDU LAW" .. 687

——— **(INDIAN) (III OF 1887)**, SEC. 47—*Transfer of Property Act* (*IV of* 1882), ss. 122, 123 :—*See* "GIFT."

REGULATION, XXV OF 1802 :—*See* "MADRAS ESTATES LAND ACT (I OF 1908), SEC. 3, CL. (2), (*c*) AND (*d*), SEC. 6" 10

RELIGIOUS ENDOWMENTS ACT (XX OF 1863), SEC. 10—*Election to vacancy in temple committee on the authority of managing member and not on the authority of the committee—Election on basis of old voters' list in spite of objection, validity of.*] Where in accordance with the rules framed for the conduct of business of a temple committee, a member of the committee made a requisition in time to reopen a resolution of the committee fixing a date for filling up a vacancy in the committee, on the grounds that the voters' list on which the election was sought to be held was very old and required to be revised by the inclusion of names of new and eligible voters who had applied to be included and that the election should be held only after the revision of the list, *held*, that an election held on the basis of the old list without complying with the requisition of the member and on the authority of the managing member of the committee alone and not on the authority of the committee as required by section 10 of the Religious Endowments Act is invalid and should be set aside. *Tiruvengada* v. *Ranga*, (1883) I.L.R., 6 Mad., 114, considered.

Singaram Chettiyar v. *Srinivasa Ayyangar* ... (1927) I.L.R., 50 Mad. 726

RESIDENCE :—*See* "INDIAN INCOME TAX ACT, SEC. 4 (2)" 847

RES JUDICATA—*Decree in a suit giving share to Co-parcener in alienated property—If operates as* :—*See* "HINDU LAW" 320

RIVER—*Non-navigable—Riparian owner—Right of* :—*See* "IRRIGATION CESS ACT (MADRAS)" 961

REVIEW—*Notice to judgment debtors—Necessity of—Review without notice—Validity of* :—*See* "CIVIL PROCEDURE CODE, SEC. 151" 67

RULES—*Sec. 78 of Madras Village Courts Act—Constituting Special tribunals to inquire into elections—If ultra vires* :—*See* "MADRAS VILLAGE COURTS ACT, SEC. 78" 91

SAME ISSUE AGITATED BOTH IN CIVIL AND CRIMINAL COURTS—*If civil proceeding to be given precedence over criminal—General rule applicable.* There is no invariable rule that when the same issue is agitated both on the civil and criminal side, the civil shall take precedence of the criminal Court. Each case must be considered on its own merits, and the only general rule that can be adumbrated is that every Court should be left as far as possible to dispose of the case on its file with the utmost expedition. *Ram Saran Singh* v. *Nikhad Narain Singh*, (1925) A.I.R. (Patna), 624; *Sheikh Bahadur* v. *Nobadali*, (1924) A.I.R. (Calc.), 634, followed.

Ramiah v. *Ramiah* ... ... (1927) I.L.R., 50 Mad., 839

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SAME TRANSACTION :—*See* "CRIMINAL PROCEDURE CODE, SEC. 239" ... 735

SANCTION—*Section* 197, *Criminal Procedure Code* :—*See* "PUBLIC OFFICIALS". 754

SEIZED PROPERTY—*Title doubtful* :—*See* "CRIMINAL PROCEDURE CODE, SEC. 520" 916

SERVANT—*Act of — Liability of master* :—*See* "MADRAS LOCAL BOARDS ACT, ss. 166 (1) AND 207" 913

SMUGGLED GOODS SEIZED OUTSIDE MADRAS—*Order of confiscation by Collector, Customs, Madras—Given effect to at place of seizure—Suit for conversion on the Original Side by owner against Government—Cause of action—Wholly or in part in Madras—Sec.* 19, *Civil Procedure Code—"Resides"—Applicability to Government—"Business"—Nature of—Cl.* 12, *Letters Patent (Madras)—"Carry on business", "personally works for gain" and "dwells"—Explanation of—Sale-proceeds of confiscated goods, if revenue—Sec.* 106 (2), *Government of India Act.*] Where goods were seized outside the local limits of the ordinary original jurisdiction of the High Court by a subordinate customs officer as being smuggled into British India without payment of the duty lawfully leviable and the Collector of Customs, Madras, thereupon, passed an order directing the confiscation of those goods and the said order was communicated to the subordinate customs officer and given effect to by him. *Held*, in a suit for conversion by the owner of the goods against the Secretary of State for India filed on the Original Side of the High Court at Madras, that the confiscation became complete in the place where the seizure was carried out originally and not in Madras and that only a part of the cause of action arose within the local limits of the ordinary original jurisdiction of the High Court. The language of section 19 of the Code of Civil Procedure (Act V of 1908) does not cover the case of Government and the word "resides" in the section must be taken to refer only to natural persons and not to legal entities such as limited companies and Governments. The business intended by the section is a commercial business and not the business of Government. In clause 12 of the Letters Patent (Madras), whereas the words "carry on business" apply to corporate bodies, and the words "personally works for gain" to an individual or individuals the word "dwell" can only apply to an individual in a private sense and not to a legal entity. Money derived from the sale of smuggled goods, seized and confiscated, is revenue and the seizure and confiscation of smuggled goods is an act done or ordered to be done in the collection of revenue, and section 106 (2) of the Government of India Act is a bar to the entertainment of any suit concerning the same by the High Court in the exercise of its ordinary original civil jurisdiction. *Best & Co., Ltd.* v. *The Collector of Madras*, (1918) 35 M.L.J., 23, followed; *Subbaraya Mudali and others* v. *The Government and Cunliffe*, (1863) 1 M.H.C.R., 286 dissented from; *Doya Narain Tewary* v. *The Secretary of State for India*, (1887) I.L.R., 14 Calc., 256, approved; *Rodricks* v. *The Secretary of State for India*, (1913) I.L.R., 40 Calc., 308, approved.

Govindarajulu Naidu v. *Secretary of State* ... (1927) I.L.R., 50 Mad., 449

SPECIFIC RELIEF ACT (I OF 1877), ss. 14 TO 17 :—*See* "LEASE FOR 99 YEARS" 595

STORING :—*See* "MADRAS LOCAL BOARDS ACT, SCH. VII, CL. (*c*)" 752

SUBROGATION—*Puisne mortgagee paying off decree on prior hypothecation—Suit to redeem puisne mortgage after lapse of more than twelve years from date on which suit on hypothecation should have been brought* :—*See* "MORTGAGE" 626

SUCCESSION ACT (INDIAN) (X OF 1865), SEC. 187—*Corresponding to sec.* 213 *of Act XXXIX of* 1925—*Suit by heir-at-law for possession—Resistance by defendant relying on unprobated will in his favour—Bar by*

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section.] A defendant resisting a claim made by the plaintiff as heir-at-law cannot rely in defence on a will executed in his favour at Madras in respect of property situate in Madras, when the will is not probated and no letters of administration with the will annexed have been granted. Section 187 of the Indian Succession Act (X of 1865) corresponding to section 213 of Act XXXIX of 1925 is a bar to every one *claiming* under such a will, whether plaintiff or defendant; *Lakshmamma* v. *Ratnamma*, (1915) I.L.R., 38 Mad., 474, approved; *Caralapathi Chunna Cunniah* v. *Cota Nammalwariah* (1910) I.L.R., 33 Mad., 91, overruled. The section is no bar to proving the will for other purposes.

Ganshamdoss v. *Gulab Bi Bai* ... ... (1927) I.L.R., 50 Mad. (F.B.), 927

SUCCESSION ACT (INDIAN) (XXXIX OF 1925), SEC. 301—*Administrator-General's Act (V of 1902)—Judicial Trustees' Act (59 and 60, Vic., Ch. 35)—Application under sec. 301 for removal of executor—Duty of Court to enquire—Remedy of petitioner—Suit for removal, whether necessary and competent—Sec. 301, construction of the word "may" in—Remedy by suit or application.*] Where an application is made to the High Court, under section 301 of the Indian Succession Act (XXXIX of 1925) for the removal of an executor, the Court ought to enquire into the allegations made by the petitioner and ought not to dismiss the petition without any kind of enquiry on the ground that the matter required the taking of a considerable quantity of evidence and that another remedy by way of suit was open to the petitioner. Section 301 of the Indian Succession Act, 1925, reproduces section 4 of the Administrator-General's Act (V of 1902), which itself reproduces the Judicial Trustees' Act of England (59 and 60, Vic., Chap. 35); and until the said Acts were passed, the Courts had really no power to remove an executor as distinguished from a trustee, though a limited power existed in the Court of imposing restraints on his powers by appointing a receiver: see *Ratcliff, In re.* [1898] 2 Ch., 352, and *Amerchand Madhowji, Ex parte* (1905) I.L.R., 29 Bom., 188. But after the above Acts were passed in India, if the removal of an executor is sought, the only remedy that is open is by way of a petition under section 301 of the Indian Succession Act. The use of the word "may" in section 301 of the Act shows merely that a proper case must be made out, and that the Court shall act only if a proper case is made out; to that extent the power is discretionary, but the discretion is not arbitrary but a judicial discretion.

Dhanabakkiyammal v. *Thangavelu Mudaliar* ... (1927) I.L.R., 50 Mad., 956

SUCCESSION CERTIFICATE ACT (VII OF 1889), SEC. 4—*Insurance money payable after death, whether a "debt" due to the deceased within sec. 4.*] Under a policy of insurance, the policy amount was payable to the assured if he attained a stated age or to his representatives or assigns if he died earlier. The policy was not assigned to any one. On a claim for the policy amount by the son of the assured who died before the stated age, *held*, that the amount was a "debt" due to the deceased within section 4 of the Succession Certificate Act, *Banchharam Mazumdar* v. *Adya Nath Battarcharjee*, (1909) I.L.R., 36 Calc., 936 (F.B.), followed.

Vittal Rao v. *Hanumantha Rao* ... ... (1927) I.L.R., 50 Mad., 412

SUMMARY TRIAL:—*See* "CRIMINAL PROCEDURE CODE, SEC. 256" 540

TAKING—*Meaning of*:—*See* "HINDU LAW" 941

TEMPLE COMMITTEE—*Election to*:—*See* "RELIGIOUS ENDOWMENTS ACT, SEC. 10." 726

TENANT—*City Tenants Protection Act, Madras—Service of Summons under*:—*See* "CITY TENANTS PROTECTION ACT, MADRAS (III OF 1922)" 88

TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 61 and 62:—*See* "MORTGAGE" 180

——— ss. 122 and 123:—*See* "GIFT." 193

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TRANSFER OF PROPERTY ACT (IV OF 1882), s. 2 (*d*) AND s. 43:—*See* "PROVINCIAL INSOLVENCY ACT (III OF 1907), ss. 16 AND 19" 135

——— ss. 5 AND 123:—*See* "HINDU LAW." 687

——— SEC. 6, CLS. (*d*) AND (*g*):—*See* "PENSIONS ACT (XXIII OF 1871)" 711

——— SEC. 53:—*See* "MORTGAGE" 776

——— SEC. 55 (4) (*b*)—*Vendor's lien—Vendee executing a promissory note to a third party for the whole or part of purchase-money—Vendor's lien, whether extinguished—"Contract to the contrary," meaning of—Limitation Act (IX of 1908), sec. 19—Acknowledgment—Deposition—Acknowledgment, whether must be express or can be implied from facts and circumstances or as a matter of law.*] Where, at the instance of a vendor of immovable property, a promissory note was executed by the vendee to another person for the whole or part of the purchase-money, and both the vendor and the holder of the note sued to recover such amount personally as well as by sale of the property, *held*, that the holder of the note was the only person competent to sue on the note, whether he was beneficially entitled to the note or was a benamidar for the vendor: *Reoti Lal* v. *Munna Kunwar*, (1922) I.L.R., 44 All., 290, and *Subramania Tevan* v. *Arunachala Tevan*, (1909) 18 M.L.J., 186, followed; that the vendor's lien for unpaid purchase-money under section 55 (4) (*b*) of the Transfer of Property Act was extinguished by the execution of the promissory note, as it was a "contract to the contrary" within the section, but the vendor was entitled to a personal decree on the note, as the holder agreed to such a decree. Cases of extinguishment of vendor's lien by execution of a promissory note or a bond, etc., discussed. An acknowledgment of liability under section 19 of the Indian Limitation Act, 1908, need not be express but may be implied from facts and circumstances under which a statement in a deposition was made, but it cannot be implied as a matter of law. *Moniram Seth* v. *Seth Rupchand*, (1906) I.L.R., 33 Calc., 1047 (P.C.), applied; *Kandaswami Reddi* v. *Supyammal*, (1922) I.L.R., 45 Mad., 443, followed; *Ranganayekalu Aiya* v. *Subbayan*, (1909) 5 M.L.T., 71, disapproved.

Swaminatha Odayar v. *Subbarama Ayyar* ... ... (1927) I.L.R., 50 Mad., 548

TRANSFEREE DECREE HOLDER—*Application by for execution of decree—Death during pendency of application—Right of legal representative to be substituted and to continue*:—*See* "CIVIL PROCEDURE CODE, SEC. 146 AND O. XX" 1

TRANSFEREE IN GOOD FAITH:—*See* "PRESIDENCY TOWNS INSOLVENCY ACT, ss. 55 AND 56" 918

TRUSTS ACT (INDIAN) (V OF 1882), ss. 1 AND 5:—*See* "HINDU LAW" ... 687

VENDOR'S LIEN—*Extinction of*:—*See* "TRANSFER OF PROPERTY ACT, SEC. 55 (4) (*b*)" 548

VILLAGE COURTS ACT (MADRAS ACT I OF 1889), AS AMENDED BY MADRAS ACT (II OF 1920), ss. 13 AND 73—*Wide discretion of Munsif under section 73—No interference by High Court on revision—Suit for damage to growing crops—Growing crops personal property within section 13 of the Act.*] Section 73 of the Madras Village Court Act (Act I of 1889) gives a District Munsif the widest discretion to interfere or not with the decision of a Village Court. He may refuse to interfere even if the conditions imposed by the section are complied with and the High Court will not ordinarily interfere in revision with the exercise of such discretion. A suit for the value of growing crops destroyed by the defendant is a suit for the value of "personal property" within the meaning of section 13 of the Act.

Sundara Naicker v. *Potti Naicker* ... ... (1927) I.L.R., 50 Mad., 494

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VILLAGE COURTS ACT (MADRAS ACT I OF 1889), SEC. 78, RR. 18 (*a*) AND 64—*Election of members of Panchayat Court—Suit in a Civil Court for declaration that election is void—Maintainability of suit—Rules constituting a special tribunal for deciding validity of elections, whether* ultra vires—*Application for injunction—Order, whether valid or proper.*] A Civil Court has no jurisdiction to entertain a suit to obtain a declaration that the election of certain persons as members of a Panchayat Court is void. Rules framed by the Governor-in-Council under section 78 of the Madras Village Courts Act (I of 1889), constituting special tribunals (namely, Revenue Divisional Officer and the Collector) to inquire into and decide objections to elections, are not *ultra vires*, as the power to constitute a tribunal is a necessary part of the power to regulate the appointments, etc., conferred by the section. *Thimma Reddi* v. *Secretary of State*, (1924) I.L.R., 47 Mad., 325, referred to.

Venkata Siva Rao v. *Rama Krishnayya* ... .. (1927) I.L.R., 50 Mad., 91

"WAGERING CONTRACT" WITHIN SEC. 30 OF THE CONTRACT ACT:—See "CHIT FUND" 696

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THE
INDIAN LAW REPORTS
(*MADRAS SERIES*)

APPELLATE CIVIL.

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

M. P. P. S. T. PALANIAPPA CHETTIAR AND THREE OTHERS (APPELLANTS), 1926, September 17.

v.

VALLIAMMAI ACHI (RESPONDENT).*

Civil Procedure Code (Act V of 1908), *sec.* 146 *and O. XXII, rr.* 3, 4, 10 *and* 12 *and O. XXI, r.* 16—*Application by transferee decree-holder for execution of the decree—His death during the pendency of the application—Right of his legal representative to be substituted in the application and to continue it—whether general principles or the Code, applicable.*

The legal representative of a decree-holder who died during the pendency of an execution petition filed by him, cannot be substituted in his place in the execution petition and be allowed to continue it.

The question must be decided by reference to the specific terms of the Code of Civil Procedure and not on general principles.

Section 146, Order XXI, rule 16 and Order XXII, rules 3, 10 and 12, referred to.

APPEAL from the order of SRINIVASA AYYANGAR, J., in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 98 of 1911.

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* Original Side Appeal No. 79 of 1926.

PALANIAPPA CHETTIAR v. VALLIAMMAI ACHI.

A decree for money was obtained by one Jaganarayana Daga against the appellants on the 17th January 1912, in C.S. No. 98 of 1911 on the file of the Original Side of the High Court. The decree was transferred by the decree-holder to one R. M. M. Subrahmanyam Chetti on 8th May 1913. The latter applied to the High Court on 17th October 1916 to be recognized as transferee and to be allowed to execute the decree. The High Court granted the petition by an order dated the 8th March 1917, permitting the transferee to execute the same and directed a copy of the decree to be transmitted to the District Court of Rāmnād for execution. The records were subsequently returned by the latter Court to the High Court on 19th November 1917 without execution. The transferee decree-holder subsequently filed an application for execution on 17th January 1924 in the High Court. During the pendency of this application, the transferee decree-holder died in July 1924. His widow and only legal representative, the respondent herein, filed an application on 14th January 1925 praying that she should be brought on the record in the execution petition filed by her husband on 17th January 1924, as his heir and legal representative, and that she should be permitted to continue the further prosecution of the said execution petition. The learned Judge (SRINIVASA AYYANGAR, J.) held that, though it might be open to the legal representative of the decree-holder on the record to come in by way of a separate execution application, yet as the applicant apprehended that there might be some objection to a separate petition on the ground of limitation or otherwise, she should be allowed to continue the pending execution application by being brought on the record as the legal representative of the deceased transferee decree-holder. Against this order, the judgment-debtors preferred this appeal.

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K. Rajah Ayyar (with *V. Ramaswami Ayyar*) for appellants.—There is no provision in the Civil Procedure Code under which the legal representative of a deceased transferee decree-holder can come on the record of an execution petition which was filed by the deceased transferee and was pending at his death. Order XXII, rule 10 applies only to pending suits. See *Sitaramaswami* v. *Lakshmi Narasimha*(1) and *Subbarayudu* v. *Ramadasu*(2). The observations in *Muthiah Chettiar* v. *Govinddoss Krishnadoss*(3) are *obiter*. The application of Order XXII, rule 3, to execution proceedings is excluded by rule 12 of the same order; section 146, Civil Procedure Code, does not authorize *substitution* in a pending proceeding, but speaks only of "taking proceedings" or "making an application."

A. Krishnaswami Ayyar and *E. Vinayaka Rao* for respondent.—The matter is concluded by the decision of the Full Bench in *Muthiah Chettiar* v. *Govinddoss Krishnadoss*(3); section 146 and Order XXII, rule 10 apply to execution proceedings. By virtue of Order XXI, rule 16 and section 146, a transferee decree-holder's legal representative can apply to continue an execution petition filed by the deceased transferee. In the Full Bench case in 44 Mad., 919, the learned Judges hold that if there is no specific provision in the Civil Procedure Code, the Court should invent a procedure. On general principles, where a right to pursue a remedy survives, a legal representative is entitled to continue a proceeding started by his predecessor.

K. Rajah Ayyar in reply.—Order XXI, rule 16 does not authorize continuance, but only provides for an independent petition for execution. Section 146 does not authorize continuation of a proceeding.

JUDGMENT.

The question which this appeal raises is whether on the death of a decree-holder who is in course of executing his decree, his legal representative may be substituted in the execution petition and may continue it. The learned Judge has acceded to the request of the

(1) (1918) I.L.R., 41 Mad., 510. (2) (1922) I.L.R., 45 Mad., 872.
(3) (1921) I.L.R., 44 Mad., 919, 923 (F.B.).

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widow of the transferee decree-holder to be so brought on in a pending petition, and the judgment-debtors appeal.

Although Mr. A. Krishnaswami Ayyar has endeavoured to persuade us that, where a right to pursue a remedy survives, it follows on general principles that a legal representative has a right to continue a proceeding initiated by his predecessor, we have no doubt that the question must be answered by reference to the specific terms of the Code of Civil Procedure. Section 146 of the Code is of no assistance, because it merely enacts that, save as otherwise provided, a proceeding which may be taken by any person may be taken by any other claiming under him. Since a decree-holder may file an execution petition, his legal representative after his death may file one. The competence of a transferee decree-holder to do this is specially provided for by Order XXI, rule 16, and assuming that that rule applies by force of the words " by operation of law " to the case of a representative of a deceased decree-holder such as we are now dealing with, the matter is carried no further. At the same time, we do not accept the argument that, because this rule allows one method of proceeding with execution, it excludes any other method. For an answer to the question raised, it is necessary to go to Order XXII, which relates to the " death, marriage and insolvency of parties." Rules 3 and 4 of this order respectively provide for the substitution during the course of a suit of a legal representative for a deceased plaintiff or a deceased defendant; and construing the word " suit " so as to embrace execution proceedings, rule 3 would furnish the required authority. By rule 12, however, this rule (with two others) is expressly rendered inapplicable to execution proceedings, an expression of intention on the part of the framers of the rules so

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clear that it is really unnecessary to look further. Rule 10 of the same order has, however, been invoked. There has been some difference of judicial opinion [see *Sitaramaswami* v. *Lakshmi Narasimha*(1) and *Muthiah Chettiar* v. *Govinddoss Krishnadoss*(2)] as to whether this rule can be applied to a transfer or devolution of interest after decree; but we need not enter into that question because the words with which the rule opens, " In other cases of an assignment, creation or devolution of any interest " seem expressly intended to exclude the case of devolution by death, which, as we have already observed, is specifically dealt with in rules 3 and 4.

We accordingly allow the appeal and set aside the learned Judge's order. Respondent will pay the appellants' costs of appeal. Money deposited in Court to be refunded to the appellant.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

SWAMINATHA ODAYAR (APPELLANT), APPELLANT,

1925, October 6.

v.

THIAGARAJASWAMI ODAYAR (RESPONDENT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), *sec.* 48—*Combined decree against mortgaged property and the person of the mortgagor —Application for execution, filed more than twelve years from the date of the decree but less than twelve years from the date of sale of hypotheca—Bar—Limitation.*

Where a combined decree against the mortgaged property and the person of the mortgagor was passed under the Transfer of

(1) (1918) I.L.R., 41 Mad., 510. (2) (1921) I.L.R., 44 Mad., 919 at 929.

* Letters Patent Appeal No. 114 of 1924.

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Property Act, an application for execution of the decree against the person of the mortgagor, made more than twelve years from the date of the decree but within twelve years from the date of the mortgagee's failing to get relief by the sale of the mortgaged property, is barred under section 48 of the Civil Procedure Code.

Khulna Loan Company v. *Jnanendra Nath Bose*, (1917) 22 C.W.N., 145 (P.C.), relied on.

LETTERS PATENT APPEAL against the order of ODGERS, J., in Appeal against Appellate Order No. 103 of 1922 against the decree of the Subordinate Judge of Kumbakōnam in A.S. No. 25 of 1922 preferred against the order of the District Munsif of Valangiman in E.P. No. 516 of 1921 in Original Suit No. 7 of 1903.

A combined decree for sale of the mortgaged property and against the person of the mortgagor was passed in 1903 in O.S. No. 7 of 1903. Under the decree the mortgaged properties were first to be sold and the balance, if any, were to be realized from the person and other properties of the mortgagor. The mortgaged properties were sold on the 26th January 1911, and the proceeds were insufficient to discharge the decree amount. An application for execution against the person and the other properties of the mortgagor was filed in 1918 in E.P. No. 386 of 1918, and the executing Court passed an order *ex parte* for execution, holding that the application was not barred by limitation. A second application for execution of the decree against the person and other properties of the mortgagor was filed on 6th August 1921. The judgment-debtor thereupon applied to set aside the previous *ex parte* order, and the District Munsif did so, and dismissed the execution petition as time-barred. The lower Appellate Court confirmed the latter order. The decree-holder preferred a civil miscellaneous second appeal to the High Court and also applied for revision of the order of the

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District Munsif setting aside the *ex parte* order. ODGERS, J., dismissed both. This Letters Patent Appeal was preferred against the order on the civil miscellaneous second appeal.

R. Kuppuswami Ayyar for appellant.

The question of limitation is *res judicata* by reason of the order on E.P. No. 386 of 1918.

The decree against the person and other properties of the mortgagor comes into force only after the hypotheca is sold. Under the Transfer of Property Act, such a decree can properly be passed under section 90 only after the hypotheca has been sold; but, though irregular, such a decree can be passed in the first decree itself but it takes effect only from a later date; *an order* is still necessary for execution of the latter portion of the decree. It is a conditional decree. Reference was made to the following cases :—

Rameshvar Singh v. *Homeshvar Singh*(1), *Jeuna Bahu* v. *Parmeshwar Narayan Mahtha*(2).

The decision in *Khulna Loan Company* v. *Jnanendra Nath Bose*(3) is not applicable to this case.

No one appeared for respondent.

JUDGMENT.

This is an appeal from the order of our learned brother ODGERS, J. The first point urged for the appellant is that the order on Execution Application No. 386 of 1918 operated as *res judicata* in favour of th appellant and that the District Munsif was wro ed in dismissing the execution application which wa the 6th August 1921. The District Mun the appel- E.P. No. 386 of 1918 that the applic District Munsif lant was not barred by limitation.

(1) (1921) 40 M.L.J., 1 (P.C.). (2) I.L.R., 47 Calc., 370 (P.C.).
(3) (1917) 22 C.W.N., 145 (P.C.).

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who dealt with the present application set aside the *ex parte* order on No. 386 of 1918 on the ground that the District Munsif who first disposed of the petition had not before him the decision of the Privy Council in *Khulna Loan Company* v. *Jnanendra Nath Bose*(1). It is pointed out by Mr. Kuppuswami Ayyar, and very rightly too, that the District Munsif was not justified in setting aside the *ex parte* order on E.P. No. 386 of 1918 as the application to set aside the *ex parte* order was made more than 30 days after the judgment-debtor became aware of the *ex parte* order against him. Against this order, a revision petition was filed by the appellant, and ODGERS, J., has dismissed the revision petition. The order on E.P. No. 386 of 1918 passed by the former District Munsif has ceased to be in force. Therefore, there is no order now upon which the appellant can rely for his contention that the plea of limitation is barred by reason of the order on No. 386 of 1918. Therefore, we disallow this contention.

The next contention of Mr. Kuppuswami Ayyar is that the application is not barred by reason of section 48 of the Civil Procedure Code. The decree in this case is a combined decree both against the property and the person of the mortgagor under the old Code and it has been distinctly held by the Privy Council in *Khulna Loan Company* v. *Jnanendra Nath Bose*(1) that a decree against the person becomes unexecutable after the lapse of 12 years from the date of the decree, in other words, where combined decree gives relief against the property as [illegible] the person of the mortgagor, the time for execu-date [illegible] the person would be calculated from the failing to g[illegible]ee and not from the date of the mortgagee [illegible] by sale of the property. In this case,

(1) (1[illegible] W.N., 145 (P.C.).

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the properties were sold on the 26th January 1911, and the mortgagee obtained only part satisfaction of the decree. But in view of the decision of their Lordships of the Privy Council in *Khulna Loan Company* v. *Jnanendra Nath Bose*(1) we are unable to accept the contention of Mr. Kuppuswami Ayyar that the application for the execution of the decree against the person of the mortgagor should be considered to be in time, for the reason that he could not have executed the decree before the sale of the property was found insufficient to satisfy his decree. If an order was passed after the property had been sold that, for the balance, other properties of the mortgagors should be proceeded against, the present application would be in time, but no such order was passed and therefore the application is barred by section 48 of the Civil Procedure Code.

The appeal fails and is dismissed. We make no order as to costs, as the respondent does not appear.

K.R.

(1) (1917) 22 C.W.N., 145 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Madhavan Nayar.

1925, November 6.

RAMASAMI KAVUNDAN AND ANOTHER (RESPONDENTS), APPELLANTS,

v.

TIRUPATHI KAVUNDAN (APPELLANT), RESPONDENT.*

Madras Estates Land Act (I of 1908), sec. 3, cl. (2), (c) and (d), sec. 6—Regulation XXV of 1802—Jagir—"Unsettled jagir," meaning of—Unsettled jagir, whether an estate under the Estates Land Act, sec. 3, cl. (2) (c)—Enfranchisement at inam settlement, effect of—Tenants of ryoti lands in a jagir—Tenants in possession of lands at the time the Estates Land Act came into force—Tenants, whether acquired occupancy right under sec. 6 of the Act.

A jagir is a grant of land for life or for a definite number of lives in consideration of services, usually military, rendered to Government, in order that the grantee may maintain a certain dignity and state.

Where in respect of certain villages granted by the East India Company in 1829 to a person as a jagir for three generations, the deed of grant styled the villages a jagir, the officers of the Company consistently adopted that nomenclature in their documents such as the Inam Commissioner's Report, and the grant included the villages as a whole including waste lands and poramboke as well as the cultiva ted ayakut,

Held, that the grant was not merely of the land revenue, and the villages were, therefore, not an inam falling under section 3, clause (2) (*d*) of the Madras Estates Land Act;

that, even though merely calling a village a jagir will not constitute it a jagir, still the terms of the grant and the circumstances above mentioned showed that the grant in this case was a jagir, and there was no foundation in statute or authority for the view that the term jagir in section 3, clause (2) (*c*) of the Act

* Letters Patent Appeal No. 143 of 1924.

must be limited to jagirs granted before the advent of the East India Company;

that the word "unsettled" in section 3, clause 2 (*c*) of the Act qualifies jagir as well as palaiyam, and the jagir referred to therein, means only an unsettled jagir, as a settled jagir would be included in "permanently settled estate" under section 3, clause 2 (*a*);

that a jagir which has not been settled either under the Permanent Settlement Regulation or under the Inam Rules is an unsettled jagir, and mere confirmation by the Inam Commissioner as an inam would not amount to a settlement;

and that an unsettled jagir is consequently an estate, and the cultivating tenants in possession of ryoti land and not old waste, in an unsettled jagir, at the time the Madras Estates Land Act came into force, acquired occupancy rights therein under section 6 of the Act, even though they had no occupancy rights before the Act.

APPEAL under clause 15 of the Letters Patent against the judgment of DEVADOSS, J., in Second Appeal No. 300 of 1922.

The material facts appear from the judgment of MADHAVAN NAYAR, J.

A. C. Sampath Ayyangar for appellants.—Occupancy rights can be acquired either by grant, prescription or statute, *Nainapillai Marakayar* v. *Ramanathan Chettiar*(1). The tenants have acquired occupancy rights apart from Madras Act I of 1908 and in any event under the Act.

Secondly, the village in which the suit lands are situate is an estate, within the meaning of the Estates Land Act under section 3 (ii)(*d*). The grant was made by the East India Company in 1829 and the object of the grant was merely to assign the revenues. The mere description of the grant as being one of villages and not merely of melvaram does not show that the grant was of

(1) (1924) I.L.R., 47 Mad., 337 (P.C.).

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land; see *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddy*(1). The test is whether the grantee was intended himself to get into direct touch with the soil by cultivation. The case in *Suryanarayana* v. *Patanna*(2) was a case where, by the terms of the grant, the grantee was directed to cultivate and enjoy. The terms of the grant and the whole of the circumstances will have to be considered in finding out what was granted.

Again in the case of British grants there is a presumption that it is subject to such rights of occupancy as the tenants may have possessed at the time of such grants *Suryanarayana* v. *Patanna*(2). The grant was in the year 1829 and by that time ryotwari system had been introduced by the East India Company in the Bāramahal wherein the suit villages are situate. (See Maclean's Manual of Administration, Vol. I.) When a portion of the village was under cultivation at the time of the grant, the landlord must show that the suit land was waste at the time of the grant.

Alternatively the suit village is a "jagir" within the meaning of section 3 (2) (*c*). Jagirs are grants of land or land revenue as a reward for political services or on condition of service, military or otherwise. See Salem District Manual, Vol. I, page 330, and Maclean's Manual of Administration, Vol. I, page 167. Jagir grants were made by the British Government also in early times. See Baden-Powell on Land Revenue and Systems of Administration, Vol. I, page 189. The grant in this case specifically runs as a grant in jagir and it is as a reward for political services. The fact that the grant is for three generations is consistent with its being only

(1) (1922) I.L.R., 45 Mad., 586 at 605 (P.C.).
(2) (1918) I.L.R., 41 Mad., 1012 (P.C.).

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a jagir. The Government also prescribed a special law of succession treating it as a jagir grant. The character impressed by the grantor upon the grant must be regarded.

T. R. Ramachandra Ayyar for the respondent.—By long enjoyment and uniform payment of rent the Court cannot infer occupancy rights. *Nainapillai Marakayar* v. *Ramanathan Chettiar*(1), *The Secretary of State for India in Council* v. *Luchmeswar Singh*(2). The burden is upon the tenant to show how he acquired occupancy rights. Further this matter has not been pleaded in the plaint and the appellant ought not to be allowed to raise it now.

The suit land is not situated in an estate. The village is not an estate within section 3 (2) (*d*). There is no presumption that the grant is of the melvaram alone: see *Venkata Sastrulu* v. *Seetharamudu*(3) and *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddy*(4). The grant here includes waste lands, poramboke, maniams, inams and all rights in the land. The villages themselves were granted and the grantee is directed to enjoy the villages themselves. The inam register shows that the jagirdars brought a good deal of waste lands under cultivation and that they were maintaining the tank in good repair. The tenants must show that at the time of the grant there were ryots with permanent rights of occupancy on the land, *Suryanarayana* v. *Patanna*(5), *Venkata Sastrulu* v. *Seetharamudu*(3) and *Nainapillai Marakayar* v. *Ramanathan Chettiar*(1). The inam register shows that even in 1860 there was no permanent cultivation anywhere and that cultivation was fugitive. Therefore the grant was one of both varams.

(1) (1924) I.L.R., 47 Mad., 337 (P.C.).
(2) (1889) I.L.R., 16 Calc., 223 (P.C.).
(3) (1920) I.L.R., 43 Mad., 166 (P.C.).
(4) (1922) I.L.R., 45 Mad., 586 (P.C.).
(5) (1918) I.L.R., 41 Mad., 1012 (P.C.).

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Next the villages are not jagir. The description of a grant as a jagir grant will not take it out of the category of inams if it is really an inam. In *Sam* v. *Ramalinga Mudaliyar*(1), a grant in jagir was treated merely as an inam grant under section 3 (2) (*d*). It is only, therefore, those classes of grants, where the grantees exercised governmental functions in their estates and which were classed along with zamindaris which were jagirs within the meaning of section 3 (2) (*c*). Further the Inam Commissioner has dealt with this estate and treated it as an inam.

Again it is not an unsettled jagir. The Inam Commissioner has confirmed the jagir and that is a settlement.

A. C. Sampath Ayyangar in reply.—The fact that the Inam Commissioner dealt with the estate is not inconsistent with the villages being jagir. For the purpose of the Inam Commission, jagirs also were included under the heading of inams. See Maclean, Vol. I, page 167. Jagirs are after all only a species of inams. *Raghoji Rao Saheb* v. *Lakshmana Rao Saheb*(2).

The term "unsettled" in section 3 (2) (*c*) of the Madras Estates Land Act refers only to palaiyams and not to jagirs. Even if it refers to jagirs, the settlement there referred to is the settlement under Regulation XXV of 1802. The confirmation by the Inam Commissioner as an inam would not amount to a settlement.

JUDGMENT.

WALLACE, J.

WALLACE, J.—The appellant urged two distinct lines of argument before us, first, that the villages in which the suit property is situated are not an estate within the meaning of the Madras Estates Land Act, but that nevertheless the plaintiff had occupancy

(1) (1917) I.L.R., 40 Mad., 664. (2) (1912) I.L.R., 36 Bom., 639 at 659 (P.C.).

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rights in their lands, and secondly, that the villages are an estate and the plaintiffs had occupancy rights in their lands before the Act came into force or at least obtained it by virtue of section 6 of the Act.

As to the first line of argument, it appears to me that it has been raised in this form for the first time in this Letters Patent Appeal. I have no doubt that before the trial Court and the lower Appellate Court and at the hearing in Second Appeal the only case on which the plaintiffs took their stand was that the suit villages form an estate and on that case the defendant took up the position that they were not an estate. A few stray observations in the District Munsif's judgment do not persuade me to the contrary, and the Subordinate Judge's finding is perfectly clear, namely, that the plaintiffs have occupancy *in an estate*. There is no unambiguous indication that in either of the first two Courts the plaintiffs put forward any alternative case. I am clear that we should be wrong in permitting the plaintiffs to abandon their original case, adopt what was the defendant's plea and raise it for the first time in a Letters Patent Appeal. The discussion of the plaintiff's case in the first Courts is all on the assumption that the principles of the Madras Estates Land Act will apply to the plaint lands, and there is no discussion of the question whether, apart from that Act at all and on the assumption that the jagir is not an estate, the plaintiffs possess occupancy rights in the plaint lands.

As to the second line of argument, DEVADOSS, J., has held that the jagir is not an estate within the meaning of the Madras Estates Land Act and therefore the plaintiffs on the case on which they came into Court must fail. Plaintiffs have not been able to persuade me that this decision is wrong so far as it lays down that the jagir is not an inam within the meaning

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of section 3, clause (2) (*d*) of the Act. The problem has two aspects, whether the jagir falls under section 3, clause (2) (*c*) of the Act or whether it falls under (2) (*d*). To take the latter aspect first, the only point in plaintiff's favour is that the grant, Exhibit A, seems to speak of a "beriz" and "ryots" from which the plaintiffs would argue that there must have been occupancy rights at the time of the grant. As to this the plaintiffs have not chosen to file the original grant itself which is in Marathi. It is unsafe to base a decision on words merely used in a translation. On the other hand exhibit A speaks of handing over the whole cultivated ayacut, poramboke and waste lands in the villages to the donee, and the Inam Commissioner further notes in exhibit XIV that the jagirdar had to repair the tanks. It is difficult to hold that such language would have been used if the intention of the grantor was only to hand over the land revenue. Plaintiffs claim that they have erected pucca buildings on the suit land and have alienated portions from time to time. As to this I note no act of this sort prior to the passing of the Estates Land Act in 1908 is proved, so that no proof is afforded by these acts that the plaintiffs were ryots in possession when the Act came into force. The oral evidence as to long possession does not help much in view of the fact that in 1860 the Inam Commissioner remarked that there was no permanent cultivation in the villages. It is also a point against the plaintiffs' contention that not a single patta or muchilika is produced from 1829, the date of the grant, up to date. It is incredible that if the plaintiffs were occupancy ryots prior to the passing of the Estates Land Act they would not possess some such document. I am, therefore, not prepared to differ from DEVADOSS, J., in holding that the plaint villages are not inam of which only the land revenue has been granted

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by the donor. The plaint jagir does not therefore come under section 3, clause (2) (*d*) of the Act.

As to whether the villages are an unsettled jagir, it appears to me that the plaintiffs have a much stronger case, and on this point I differ from the learned Judge from whose decision this appeal is filed. It has first of all to be decided whether they are a jagir at all. The learned Judge has dismissed this claim merely on the ground that to call a village a jagir is not sufficient to constitute it a jagir. No doubt this is true but when, as in this case, the granting authority is the Government who presumably in 1829 were perfectly aware of the nature and constituent elements of a jagir and the Government styles the villages in the grant deed as a jagir, and its own officers have consistently adopted that nomenclature (see the Inam Commissioner's report, exhibit XIV, and the Salem District Manual, 1883, Vol. I, page 503, where the suit villages are styled unenfranchised jagirs) there are, in my opinion, strong grounds for holding that the grant was the grant of a jagir. Further it is plain from Exhibit A as noted above that the grant was not of the village beriz but of the village as a whole, its cultivated ayacut, waste lands and poramboke, and the ryots in it are directed to conform to the orders of the grantee. The learned Judge appreciates these points and emphasizes them for the purpose of showing that the grant was not a grant of melwaram only. But it seems to me that he has failed to take these points into consideration when he discusses whether or not the villages are a jagir. Exhibit A further shows that the grant was made as a reward for past services rendered to the Government.

Now the distinguishing feature of a jagir in olden days, although the distinction between a jagir and an inam in these days is becoming obscured, was that it was

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a grant of landed property for life or for a definite number of lives in lieu of pension for services, usually military, rendered to Government in order that the grantee may maintain a certain dignity and state—see Baden-Powell's Land Systems of British India, Vol. I, pages 180 and 257. Soundararaja Ayyangar's, Land Tenures in the Madras Presidency, page 217, *Ram Narayana Singh* v. *Ram Saranlal*(1) (a decision of the Privy Council) and *Sam* v. *Ramalinga Mudaliar*(2). The word "jagir" primarily points to "occupancy" as remarked by the Privy Council in *Sakina Bai* v. *Fatma Begum*(3). The mere fact that this jagir fell within the scope of proceedings before the Inam Commissioner does not indicate that this was merely an inam, for the Inam Commissioner was authorized to enfranchise even jagirs—see Maclean's Manual of Administration, Vol. I, page 167. The Inam Commissioner in his report exhibit XIV throughout styles this property as a jagir. Hence I find no difficulty in holding that the suit villages are a jagir. The opinion of the lower Appellate Court that the term "jagir" in section 3, clause 2 (*c*) must be limited to jagirs granted before the advent of the East India Company appears to me to have no foundation either in statute or in authority.

The suit villages being a jagir, the next question is whether it is an unsettled jagir. The appellant contends that the adjective "unsettled" in the definition does not qualify "jagir" but I cannot accept that view. If that had been the intention, one would have expected the definition to have run, "Any jagir or unsettled palaiyam." A comparison of this definition with that in section 4 (*c*) of the Madras Proprietary

(1) (1919) I.L.R., 46 Calc., 683 (P.C.).
(2) (1917) I.L.R., 40 Mad., 664 at 668 and 671.
(3) (1918) M.W.N., 384 (P.C.).

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Estates' Village Service Act, II of 1894, which is almost identical, indicates that a "settled jagir" would come under the heading of a "permanently settled estate" already provided for in sub-section (*a*) and therefore unnecessary for inclusion in sub-section (*c*). I am clear that in the case of jagirs, sub-section (*c*) applies only to "unsettled" jagirs, whatever that term may import.

Now there is no doubt what the term ordinarily means in the case of a palaiyam. It is a palaiyam for which no sannad has been issued under Regulation XXV of 1802—vide Maclean's Manual of Administration, Vol. I, page 120, paragraph 122. It is noted in that paragraph also that there were a few palaiyams held for police services which were treated as inam and enfranchised, but it does not appear that any of these survived unsettled until 1908. Hence the term "unsettled" as applied to palaiyams in that Act means "not held under a permanent settlement, see also *The Collector of Trichinopoly* v. *Lekkamani*(1). It is possible to argue that in the case of jagirs it may mean also "not enfranchised by the Inam Commissioner and this view obtains some support from some observations of SADASIVA AYYAR, J., in *The Secretary of State for India* v. *Srinivasachariar*(2), where he quotes BHASHYAM AYYANGAR, J., from *Gunnayan* v. *Kamakshi Aiyer*(3). But it is not necessary to go further into this point since this jagir is neither permanently settled nor enfranchised by the Inam Commissioner. The Inam Commissioner no doubt in Exhibit XIV agreed to "settle" the jagir in the name of one of the ten sharers who alone among the sharers was willing to have it enfranchised. But it appears that this proposal was not accepted by the Government and that the jagir remains unenfranchised—see Salem

(1) (1874) 1 I.A., 293 at 313.
(2) (1914) 15 M.L.T., 277, at 283.
(3) (1903) I.L.R., 26 Mad., 339 at 350.

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District Manual at the page quoted above, and the attempt of the Government to resume the jagir noted by the Subordinate Judge in paragraph 8 of his judgment in A.S. No. 30 of 1921. The villages therefore are *prima facie* an unsettled jagir, and therefore an estate within the meaning of sub-section (*c*).

Mr. Ramachandra Ayyar contends that it was not the policy of the framers of the Act to confer occupancy rights wholesale on all cultivating tenants in any unsettled jagir, and he contends for the restriction of the definition therefore to jagirs in which there were already occupancy ryots, that is, jagirs in which the grantee did not hold the kudiwaram ; in other words, that as regards jagirs the Act intended not to confer new occupancy rights but only to confirm existing ones. But that theory I cannot accept, and it is opposed to the ruling of the Privy Council in *Sivaprakasa Pandara Sannadhi* v. *Veeramma Reddy*(1). Had that been the idea, a jagir would have fallen more appropriately into sub-clause (*d*). Whatever may be predicated or negatived regarding the unsettled palaiyam must equally be so regarding the unsettled jagir, and the palaiyam, as I have indicated above, at any rate when the Act I of 1908 was passed was never a grant of land revenue alone, nor could it be enfranchised. The only form of settlement applicable to it was a permanent settlement. It is therefore clear that in any palaiyam not permanently settled it was the intention of the framers of the Act to lay down that the cultivating tenants in possession at the time of the coming into force of the Act should acquire occupancy rights even though they did not have such rights before. There is no difficulty therefore in accepting such an intention in the case of unsettled jagirs also. It follows that on the date

(1) (1922) I.L.R., 45 Mad., 586 (P.C.) at 601.

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of the coming into force of the Act all ryots in possession of ryoti land not old waste in unsettled jagirs acquired occupancy rights in their holdings.

The suit villages have been held to be an unsettled jagir. The plaintiffs in O.S. Nos. 63, 64 and 84 have been found by both the Judges of fact in this case to have been in enjoyment of their present holdings at the time Act I of 1908 came into force. Therefore by that Act they gained occupancy rights whether or not they possessed them before. I would therefore allow the appeals and set aside the judgment of DEVADOSS, J., and restore that of the Subordinate Judge in all four suits with costs to the appellants throughout.

MADHAVAN NAYAR, J.

MADHAVAN NAYAR, J.—These are appeals under section 15 of the Letters Patent against the judgment and decree of DEVADOSS, J., which set aside the decree of the Subordinate Judge of Vellore in A.S. Nos. 30, 31 and 32 of 1921 and dismissed the plaintiffs' suits.

The facts necessary for the decision of these appeals are very simple. The plaintiffs (appellants) claimed permanent rights of occupancy in the two suit villages. Before us they claimed such rights on the ground (1) that they had the rights before the passing of the Estates Land Act and (2) if that claim was found against them they stated that such rights were granted to them by the Estates Land Act either under clause (*c*) or clause (*d*), sub-section (2) of section 3. According to these clauses, "estate" means any unsettled palaiyam or jagir—see clause (*c*)—or any village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof provided that the grant has been confirmed or recognized by the British Government, or any separated part of such village—see clause (*d*). According to their latter claim, plaintiffs state that the suit villages form an unsettled jagir under clause (*c*), or an inam

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as mentioned in clause (*d*). I am satisfied, from the pleadings and the judgments of the Courts below and the absence of an issue on the question, that the first ground of their claim, viz., that they had perfected rights of permanent occupancy before the Estates Land Act came into force, was not specifically put forward for consideration in the Courts below, though the mention of some incidents of the rights claimed on that basis may be detected in the judgments. We cannot allow the question to be raised for the first time before us in Letters Patent Appeal. As regards the second ground of their claim, DEVADOSS, J., has held that the suit villages do not constitute a jagir and also cannot be considered to be an inam within clause (*d*). I agree with the learned Judge in his view that the lands do not fall within clause (*d*) but I differ from him on the question whether the suit lands form a jagir within the meaning of clause (*c*) and the plaintiffs are, therefore, entitled to claim permanent rights of occupancy.

The short question for our consideration is whether the suit villages constitute an "unsettled jagir" within the meaning of clause (*c*), sub-section (2) of section 3 of the Estates Land Act. The sannad, Exhibit A, describes that the suit villages were granted to Muhammad Moosa Sahib as "jagir for three generations" as "the person who rendered help to the Government of the Honourable East India Company." Originally the grant seems to have been an assignment of Rs. 1,710-3-7 from the collections of several villages. It appears that afterwards on account of a request from the grantees the grant was converted into a grant of two villages as shown by the following extract from the sannad :—

"You have made a request that Kollankuttai village may be left in your possession and that the village of Vellakuttai might be given in exchange for the other six villages, and we have

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received the order of Government . . . We have therefore entered as belonging to Government the aforesaid six villages and have assigned as jagir the two villages, namely, Kollankuttai as previously and Vellakuttai in their stead having an average beriz of Rs. 1,544-12-2 the total ayakat under cultivation including the porambokes, jamabandi, kattumaniam and inam, excluding therefrom the money profits, the six items, namely, mangavari profession taxes, . . . You may take possession of the aforesaid two villages, namely, Kollankuttai as before and Vellaikuttai and obtain receipt."

I agree with DEVADOSS, J., in his opinion that by the sannad was granted not merely the land revenue but the entire lands of the two villages as well and that there were cultivating tenants in possession of the villages at the time of the grant.

Mr. Ramachandra Ayyar argues (1) that the term "jagir" in clause (*c*), sub-section (2) of section 3 of the Estates Land Act is confined to assignments of land revenue alone of lands in which tenants had already existing rights of occupancy, meaning thereby, as I understand him, that under the Act it was not intended to grant any new right of occupancy to cultivating tenants in a "jagir," (2) that even if the villages in this case constitute a "jagir" the "jagir" cannot be called an "unsettled jagir." As regards the meaning of the term "jagir" and the description of its incidents, we have been referred to Maclean's Manual of Administration, Vol. I, page 167, paragraph 203, Glossary, Vol. III, page 308, various passages in Baden-Powell's Land Tenures, Vol. I, pages 189, 190, 257, *Sakina Bai* v. *Fatima Begum*(1) and also to *Sam* v. *Ramalinga Mudaliar*(2) in which there is an exhaustive discussion of the nature of the jagir tenure and its incidents. From the authorities referred to above, it appears that (1) by the mere use of the term "jagir" a village cannot be said to be an

(1) (1918) M.W.N., 384 (P.C.). (2) (1917) I.L.R., 40 Mad., 664.

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"estate"; (2) the jagir must be taken *prima facie* to be an estate only for life, although it may possibly be granted in such terms as to make it hereditary: obviously its duration can be limited as in the case before us; (3) in its origin the jagir was connected with some special public service, such as the maintenance of troops and the like, or at least if no such condition is imposed, it was a reward of land for some service to the State conferred upon some State official in recognition of his position (see I.L.R., 40 Mad., 664); and (4) the jagir primarily points to "occupancy" (see 22 C.W.N., 577). Having regard to these features, it cannot be disputed that what was granted to Moosa Sahib under the sannad was a jagir. The grant was so treated by the officers of the Government also. The Inam Commissioner (see Exhibit XIV) refers to these villages as jagir and to the grantees as jagirdars. The fact that they were subjected to proceedings under the Inam Commissioner does not mean much as the Commissioner had jurisdiction to deal with jagirs as well. In the Salem District Manual, Vol. II, these villages are described as "jagirs unenfranchised" (page 503, Vol. II).

DEVADOSS, J., points out that the term "jagir" does not signify much but does not discuss the question any further, though while discussing the question of whether the grant falls within clause (*d*) the learned Judge notes incidentally some features which would bring the suit villages within the term "jagir." The description of a jagir given by the authorities above referred to does not warrant the conclusion that jagirs, as contended for by Mr. Ramachandra Ayyar, are mere assignments of land revenue only. I do not see any reason why the term "jagir" as used in clause (*c*), sub-section (2) of section 3 of the Estates Land Act should be confined to mere

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assignments of land revenue alone. If that was the intention of the legislature, appropriate words would have been used for that purpose. The legislature probably recognized the claims made for permanent occupancy rights by cultivating tenants on jagirs of the kind described above by including within the term "estate" such jagirs, provided they were "unsettled." Such an assumption does not conflict with the policy of the Estates Land Act.

"Apart from the rules relating to procedure and the jurisdiction of the Revenue Courts, it created one new right in order to settle the constant disputes between landlord and tenants which had been going on for nearly a century; it gave occupancy rights to all ryots in occupation of lands within an 'estate' at the time of the passing of the Act."

See *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddy*(1). In my opinion, provided that the jagir is unsettled, cultivating tenants in possession of jagirs obtained permanent rights of occupancy under the Estates Land Act.

It is then argued for the appellants that "unsettled" governs only "palaiyam" and not "jagir" as well and that if we should hold that it governs "jagir" as well, then "unsettled" means only "not settled" under the Permanent Settlement Regulation: whereas the respondent contends that the word "unsettled" governs "jagir" as well and that a jagir cannot be described as an unsettled jagir, if it has been settled by the Inam Commissioner, though it may not have been settled under the Permanent Settlement Regulation. I have no doubt that the term "unsettled" governs "jagir" also. If the legislature intended that the word "unsettled" should qualify only "palaiyam" and not "jagir" the words of clause (*c*) would have been more appropriately

(1) (1922) I.L.R., 45 Mad., 586 (P.C.) at 601.

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"any jagir or unsettled palaiyam." There is a definition of "estate" in exactly similar terms in the Proprietary Estates' Village Service Act (Act II of 1894). See section 4 (*c*), and in giving illustrations of permanently settled estates in clause (*a*) a zamindari, jagir, mitta or palaiyam, is mentioned, suggesting thereby that "jagir" in clause (*c*) refers to an "unsettled jagir" as "settled jagir" has already been included in clause (*a*), see also Survey and Boundaries Act, IV of 1897, section 3 (I), clause (*c*).

The suit villages have admittedly not been settled under the permanent settlement regulation; nor have they been enfranchised under the Inam Rules. It is true that these were subjected to proceedings by the Inam Commissioner, but they do not seem to have been enfranchised finally; see the judgment of the Subordinate Judge in A.S. No. 30 of 1921, paragraph 8. These villages Vellakuttai and Kollankuttai are, as already pointed out, described as "jagirs unenfranchised" in the Salem District Manual (see Vol. II, page 503). In the case of palaiyams "unsettled" would mean not settled under the Permanent Settlement Regulation, XXV of 1802 (Maclean, Vol. I, page 120, paragraph 122). Having regard to the fact that the two villages have not been settled either under the Permanent Settlement Regulation or under the Inam Rules, a consideration of the question whether "unsettled" in the case of jagirs refers to settlement under the Regulation or under the Inam Rules also does not arise in this case, though it may be mentioned that the contention that "settled" may mean "settled under the Inam Rules also" receives support from the observations of SADASIVA AYYAR, J., in 15 M.L.T., 277 at 283, to the effect that inam settlement has got the same effect as the permanent settlement.

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In my opinion, the two villages in this case form an "unsettled jagir" and, therefore, fall within the definition of the term "estate" in section 3, sub-section (2) of the Estates Land Act and the appellants who are the tenants of the villages can, therefore, claim rights of occupancy under the Estates Land Act. The judgment of DEVADOSS, J., is reversed and the Subordinate Judge's decree is restored with costs here and at the hearing before DEVADOSS, J.

K.R.

ORIGINAL CIVIL.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice.*

SETH CHAND MULL DUDHA, C.I.E., PLAINTIFF,

v.

PURUSHOTHAM DOSS, DEFENDANT.*

1926, March 3.

Civil Procedure Code, O. XXXVIII, r. 1—Arrest before judgment—Security for appearance—Order for—Conditions precedent to.

A Court before exercising the powers conferred by Order XXXVIII, rule 1, Civil Procedure Code, has to be satisfied that (1) the plaintiff's cause of action is *prima facie* unimpeachable, i.e., the plaint on the face of it does not reveal any matter which is obviously doubtful and arguable and (2) there is reason to believe on adequate materials that unless the jurisdiction is exercised there is a real danger that the defendant will remove himself from the ambit of the powers of the Court.

APPLICATION under Order XXXVIII, rule 1, of the Civil Procedure Code for the arrest before judgment of the defendant in Civil Suit No. 114 of 1926 on the file of the High Court in its Ordinary Civil Jurisdiction.

Nugent Grant (with him *B. C. Sankara Narayana*) for the plaintiff.—My suit is founded upon a judgment of a special

* Civil Suit No. 114 of 1926.

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commission set up by H.E.H. the Nizam. That commission must be deemed under the circumstances to have been invested with judicial powers. It is open to the sovereign in a State to set up any kind of a tribunal he chooses, to adjudicate on the disputes between his subjects and such a tribunal, even though it be constituted only for the purpose of deciding a single case, is none the less a judicial tribunal. H.E.H. being the ultimate sovereign authority within the State is competent to suspend the operation of any provision of law and the *firman* by which H.E.H. appointed the commission and directed an adjudication between the parties without reference to the law of limitation is quite constitutional.

Sufficient facts have been set out in the affidavit in support of my application to satisfy the Court that unless the defendant is immediately arrested and brought before the Court and directed to furnish security for his appearance he will put himself outside the jurisdiction of this Court.

S. Varadachari (with him *V. C. Gopalaratnam*) for the defendant.—Plaintiff's suit is not based on the judgment of a Court of competent jurisdiction. The commission set up by the *firman* was not a judicial tribunal. The Commissioners only submitted a report to H.E.H. and on that H.E.H. issued an executive order directing the defendants to pay the plaintiff the sum found by the Commissioners. The proceedings which terminated in the order to pay are not in consonance with the principles of natural justice.

JUDGMENT.

This is an application under Order XXXVIII, rule 1, Civil Procedure Code, for arrest before judgment of the defendant and an order that he should be made to show cause in compliance with section 94 (*a*), Civil Procedure Code, why he should not give security for his appearance. At the close of the argument, I intimated what I proposed to do in the matter, but as it is one of considerable general importance I thought it best to state my reasons formally. The facts are shortly as follows: The suit was brought on the Original Side of this Court for a sum of very nearly 5½ lakhs and it was founded upon what is described as "the decree, dated 19th December

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1925, at Hyderabad, Deccan, of the Court of the Judicial Commissioner in the State of His Exalted Highness the Nizam of Hyderabad." That suit is not before me, but will be tried in the ordinary course by a Judge sitting on the Original Side of this Court, and I desire to say nothing that would in any way seem to anticipate that decision. But I am asked here to exercise a jurisdiction the effect of which might be to compel a man either to furnish security in a very large sum of money or possibly on his failure to do so to undergo imprisonment. I think it is desirable that I should state what are the principles which in my opinion should guide me in exercising that jurisdiction. It appears to me that before exercising the powers conferred by Order XXXVIII a Court should be satisfied on two points. The first is that the plaintiff's cause of action is *prima facie* an unimpeachable one subject to his proving the allegations made in the plaint. The second is that the Court should have reason to believe on adequate materials that unless the jurisdiction is exercised there is a real danger that the defendant will remove himself from the ambit of the powers of the Court. For the reasons which I am about to give, I do not think it necessary for me to go into the second point in this case as I do not think the plaintiff has succeeded in establishing his position on the first point. The debt on which the Hyderabad proceedings were founded was incurred about fifty years ago before the present defendant was born, in any event before the year 1877, because in that year a suit of some sort was launched for this very debt against Hargopaldoss, the brother of the present defendant's grandfather. It appears to have been started in a tribunal called the Court of Bankers which ceased to exist before any conclusion was arrived at; and according to the plaintiff, the suit was then transferred to the

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High Court of Hyderabad which I take to be the ordinary and regular tribunal in that State for the disposal of civil cases. No final judgment was ever delivered in that Court, because owing to some failure by the plaintiff to pay stamp duties or fees in the regular course the High Court ordered the suit to be taken off its list of pending cases. This statement I take from the affidavit of the plaintiff himself. The defendant says that that order was passed as long ago as 1881, and his statement is uncontradicted. In March 1922 a petition was addressed by the plaintiff to His Exalted Highness the Nizam of Hyderabad and in response to that petition a *firman* was issued by H.E.H. appointing a special commission to hear and report to him upon the claim and apparently some special directions were given in the *firman*, a complete copy of which has not been put before me, as to how the plea of limitation which, it was doubtless anticipated, the defendant would set up, was to be dealt with. The Commissioners were two Judges of the High Court and a gentleman who is described as holding the office of Sadrul Maham which is translated as head of the Department of Commerce and Industries. That tribunal issued a report, a copy of which is before me furnished by the plaintiff. The Commissioners framed issues, heard evidence, and examined accounts. The wording of a portion of the *firman* is quoted to the effect that the suit is to be heard by the commission "irrespective of limitation." The issue that was framed is this :

> "Is this case different from the case of Amersi Sejan Mal and Mahanand Ram Puran Mal (that is, apparently, the Original Suit in the Court of Bankers) and is it not covered by the *firman* and is it not exempt from limitation?"

with a note "onus on the defendant." The reason for framing this issue in this form appears to be as follows, that the plaintiff contended that the proceedings

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before the Commissioners were a mere continuation of the old suit that was filed before the defunct Court, the Court of Bankers, in 1877, and it was alleged that in that Court no question of limitation was ever entertained and no such plea was ever open to a defendant there.

I have not had put before me any information as to how the Courts of Ordinary Civil Jurisdiction in Hyderabad are constituted nor under what authority the ordinary law of limitation is in force, as it undoubtedly appears to be, in the Ordinary Civil Courts of the State. I have no information as to how far the prerogative of H.E.H. extends and I am not suggesting any doubts that H.E.H. was acting entirely within his constitutional powers in issuing the *firman* of 1923. So far as I can ascertain from perusing the document, the proceedings of the commission really amounted to what I should call a report to be laid before H.E.H. and I gather that the mandate to pay a sum of money issued to the defendant took the form of an order passed by H.E.H. in the amount reported by the Commissioners to be the sum in their opinion due. I may add that the principal debt was found by them to be a sum of about $2\frac{3}{4}$ lakhs and that interest at the rate which is alleged to have been originally agreed upon between the parties would, on a rough calculation, appear to amount to nearly eight lakhs at simple interest and to the stupendous figure of about half a crore at compound. Such a conclusion obviously staggered the Commissioners and they cut down the interest to the exact sum of the principal, I do not know on what legal basis.

I have already said that I do not propose to say anything about the merits of this case but I think before I make an order under Order XXXVIII, rule 1, must at least be satisfied that the plaint does not reveal on the face of it any matter which is obviously doubtful and arguable. In my opinion this plaint discloses highly contentious

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matters. Assuming, as I do for the purposes of this case, that the acts of H.E.H. the Nizam as a Sovereign Prince cannot be questioned in these Courts and that his subjects cannot be heard to say that any orders passed by him in relation to them are not binding upon them or that he has not power to take away any matter from the jurisdiction of the Ordinary Courts, to be dealt with by himself or anybody appointed for the purpose by him, it nevertheless seems to me that there are two matters apparent on the face of this plaint which preclude me from exercising the jurisdiction conferred on me by Order XXXVIII. The plaint is founded on the proceedings of the special tribunal created under the *firman* and describes it as a decree of that Commission. As I have already pointed out, it is at least highly arguable that the proceedings before the Commissioners terminated not in anything that could be called a decree or a foreign judgment within the meaning of section 13 of the Code of Civil Procedure but a report submitted to H.E.H. to guide him as to what action he should take. It is also obvious that it is highly arguable that the order to pay passed by H.E.H., though binding on the defendant as a subject, is not a judgment but an executive Act. I pass no opinion as to whether those arguments are sound or unsound but it appears to me that it would be wrong for me to subject this defendant to any process before he has had an opportunity of urging them. It is inapposite to speak in this case of safeguarding the liberty of the subject, because the matter comes before me on the footing that the defendant is not a subject of His Majesty the King-Emperor but of H.E.H. the Nizam. But at the same time when the jurisdiction of this Court is invoked against a subject of a foreign State on the ground that by coming within the physical boundaries of the jurisdiction of this Court he is liable to be sued as if he were a subject of His Majesty, a duty is cast

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upon me to be as jealous in safeguarding his liberties as if he were for all purposes a subject of His Majesty. I do not think it necessary to refer to the provisions of section 13 of the Code of Civil Procedure except in so far as inferentially I may be taken to have founded myself on clause (*a*) of that section as being a provision which it will be open to the defendant to invoke in his favour, and I do not feel called upon to pay any attention to the argument about natural justice which is referred to in clause (*d*). It would obviously be grossly disrespectful of this Court to entertain any argument to the effect that an order passed by a sovereign power by virtue of its prerogative was opposed to natural justice: nor for the matter of that am I able to see how natural justice, whatever the expression may mean, can be said to include the right of a defendant to plead limitation, unless it is granted to him by a statute acknowledged by the Sovereign Prince to be binding upon him and to limit by its terms the exercise of his prerogative. I may add that the impossibility of this Court taking upon itself to question the act of a Sovereign Prince on any such ground adds additional force to the defendant's contention that the act of H.E.H. was an executive act performed by him by virtue of his prerogative as a Sovereign Prince and not in any sense a judgment or a judicial decree. In conclusion, I wish to repeat once more that all these matters which I have discussed are ultimately matters for the Judge before whom the suit will come for trial, and that I need say no more than this: that they raise to my mind sufficient grounds for my refusing to act in anticipation of that determination by that tribunal. The summons will be dismissed with defendant's taxed costs in any event.

Attorney for the plaintiff: *N. T. Shamanna.*

B.C.S.

ORIGINAL CIVIL.

Before Mr. Justice Srinivasa Ayyangar.

1926, March 8.

SRI MAHANT PRAYAGA DOSS JEE VARU, TRUSTEE OF TIRUPATI DEVASTANAMS (PLAINTIFF),

v.

THE BOARD OF COMMISSIONERS FOR HINDU RELIGIOUS ENDOWMENTS, MADRAS (DEFENDANT)* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (APPLICANT).

Civil Procedure Code (V of 1908), O. I, r. 10 (2)—"Necessary" and "proper" parties—Suit by A against B—Application by C to be made a party defendant—No relief prayed against C—Opposition of plaintiff to application.

The Secretary of State for India applied to be made a party to a suit filed by the head of a mutt against the Commissioners appointed under the Madras Hindu Religious Endowments Act, for a declaration that the said Act was invalid and *ultra vires* and for an injunction to restrain the defendants from doing certain acts under the Act. The application was opposed by the plaintiff who prayed for no relief against the applicant.

Held, that the application must be dismissed as the applicant was neither a "proper" nor a "necessary" party within Order I, rule 10 (2), Civil Procedure Code. *Moser* v. *Marsden*, [1892] 1 Ch., 487 and *Norris* v. *Beazley*, (1877) 2 C.P.D., 80, followed.

APPLICATION by the Secretary of State for India in Council to be made a party in Original Suits Nos. 560, 574 and 624 of 1925 on the file of the High Court.

The necessary facts are given in the judgment.

The Advocate-General (*T. R. Venkatarama Sastri*) for the applicant.—This application is by the Secretary of State to be added as a party in these suits where the question is whether the Madras Hindu Religious Endowments Act is *ultra vires*.

* C.S. Nos. 560, 574 and 624 of 1925.

Order I, rule 10 (2), Civil Procedure Code, gives the widest possible discretion to the Court to add parties. The question of the validity of the Act is one of great public importance in which parties other than those in the suit are greatly interested and the addition of the Secretary of State is necessary to the adjudication of the question of the legality of the Act. The Government are vitally interested in it. Even if not a necessary party, he is at least a proper party. Where the validity of an Act of a Provincial Legislature of Canada was in question, the Attorney-General was allowed to intervene in *Esquimalt and Nanaimo Ry. Co.* v. *Wilson*(1); see also *Cunningham* v. *Tomey Homma*(2).

P. Venkataramana Rao for the Endowment Board.—This is a fit case for the exercise of the discretion of the Court. The opposition to adding the Secretary of State is not reasonable. The Act is of the Local Legislature and the Secretary of State is interested. If the Secretary of State is not added, it may lead to a multiplicity of suits.

S. Srinivasa Ayyangar and *T. Kumaraswamayya* for plaintiff in Civil Suit No. 560 of 1925.—The Secretary of State can under the Civil Procedure Code represent only the Crown; but under the present system, he is merely a part of the legislative machinery and cannot be allowed to come in. The plaintiff is *dominus litus*. No relief is prayed for against the Secretary of State and no cause of action is alleged against him. His presence is not necessary in any sense for deciding the question at issue. The fact that he may be incidentally interested in the decision of the question arising in the suit, is no ground for adding him as party; *Moser* v. *Marsden*(3).

V. Radhakrishnayya with *V. N. Venkatavaradachariar* for plaintiff in Civil Suit No. 574 of 1925.—The language of Order I, rule 10, is not wide enough to cover the present case. The expression "questions involved in the suit" refers only to the questions arising between the parties to the suits. See Order XVI, rule 11 of the Supreme Court rules and *Norris* v. *Beazley*(4). This decision has been followed in *Sitaramaya* v. *Ramappaya*(5). See also *Abdul Gafur* v. *Ali Miah*(6). There are various instances in which validity of Acts

(1) [1920] A.C., 358.
(2) [1903] A.C., 151.
(3) (1892) 1 Ch., 487.
(4) (1877) 2 C.P.D., 80.
(5) (1917) 5 L.W., 207.
(6) (1923) 28 C.W.N., 805.

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of provincial legislature has been in question without the Government being a party; *The Board of Commerce Act*, 1919, *and the Combines and Fair Prices Act*, 1919(1), *Canadian Pacific Wine Co.* v. *Tuley*(2), *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.*(3). In *Esquimalt and Nanaimo Railway Company* v. *Wilson*(4), the addition of the Attorney-General was not opposed by the plaintiff.

T. R. Ramachandra Ayyar with *K. Narasimha Ayyangar* for plaintiff in Civil Suit No. 624 of 1925.—The addition of Secretary of State is neither necessary nor desirable. The Secretary of State cannot compel a plaintiff to fight him. A plaintiff can choose whom to add as a party and where no relief is asked for against him and the plaintiff opposes, the Secretary of State cannot be added as a party.

The *Advocate-General* and *P. Venkataramana Rao* replied.

JUDGMENT.

This and the other applications in the connected suits are in the name and on behalf of the Secretary of State for India in Council for the purpose of his being added as a party to the suit presumably as party defendant.

The main object of each of the suits is to obtain a declaration that the Madras Hindu Religious Endowment Act I of 1925 is invalid and *ultra vires* and on the basis of such declaration the plaintiff has asked for a relief by way of injunction which is merely a relief consequent on the declaration.

The plaintiff in each of the cases is the head of a mutt or religious endowment and the only defendant to each of the actions is the Board of Commissioners for the Madras Religious Endowments, a body, it may be observed in passing, created and constituted by the said Act.

The question for determination therefore is whether on the application, I should direct the Secretary of State

(1) [1922] 1 A.C., 191. (2) [1921] 2 A.C., 417.
(3) [1923] A.C., 695. (4) [1920] A.C., 358.

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being added as party defendant in these suits. The question is of considerable importance and of great difficulty though I did not realize the full extent of either till I was more than half way through the hearing. It has been argued with much learning and light and also some little warmth on both sides, and I took time to consider my judgment not only having regard to the importance of the question to the parties but also to the general principles on which alone it seemed to me that a satisfactory solution can be arrived at. If it had been an ordinary case, I should probably have had very little difficulty in persuading the parties to agree to the addition of the party on conditions which may be regarded as equitable in the circumstances.

It was with this view that almost at the very commencement of the discussion I asked the learned Advocate-General who appeared for the applicant whether he had any instructions to agree as to any conditions as to costs. He said he had none. Some days thereafter he again appeared before me and intimated that so far as the applicant was concerned he had definite instructions not to consent to any conditions. He however at the same time intimated that he had received a communication from the President of the Board of Commissioners to the effect that if in the action the plaintiff should fail, the Board of Commissioners would consent to only one set of costs being allowed to the defendants and that they would be willing to allow the Secretary of State such one set. It is obvious that the two things are not and cannot be the same and that in these cases a set of costs to the Board of Commissioners must mean something very different to a set of costs to the Secretary of State, at any rate as at present represented in the action. Further I felt that such orders should if at all be passed

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only by consent of all parties. The plaintiff, however, refused to agree to any such arrangement and has asked me to decide the question raised, and having regard to the great importance of the matter and the likelihood of its being taken up elsewhere, sooner or later, I have deemed it fit to deal with the application directly and dispose of it on its merits.

The first observation that falls to be made with regard to the present application is that it is one for joinder of a third party as party defendant and made by the third party himself and not by the plaintiff or the defendant in the action. I have felt it necessary to state this because it seems to me that different considerations should apply to applications for joinder of additional parties when the party sought to be added is party plaintiff or party defendant and also when the application for such joinder is made by the party sought to be added or by either of the parties already on the record and if so, which of them. I will not pause to refer to all such considerations. In such a case as the present one, however, it is obvious that if a third party's application to be added as party defendant were opposed by both parties, I should have had very little hesitation in rejecting the application unless I were satisfied that the party sought to be added was not only a proper party but a necessary party. Having regard, however, in this case to the learned and strenuous argument in support of the application by Mr. Venkataramana Rao on behalf of the Board of Commissioners, I have felt bound to regard it virtually as an application by both. The question thus resolves itself into this. Should the plaintiff in this case be compelled to litigate against not only the defendant of his choice against whom he has prayed for the reliefs consequent on the declaration but also against the Secretary of

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State? I did not understand either the learned Advocate-General who argued the application on behalf of the applicant, the Secretary of State, or even Mr. Venkataramana Rao for the Board of Commissioners, to argue that the applicant was a necessary party to the suit in the sense in which that expression is understood in the law relating to parties to actions, that is to say, in other words, as a party without whom there can be no properly constituted suit, having regard to the cause of action alleged and the relief claimed. If it is to be only a question of a permissible party, then on principle it follows that such cannot generally be ordered when it is opposed by the person to fight whom he is so brought on the record. Thus when A institutes a suit on title to recover certain property from B, C should not be made additional plaintiff if B should object to it, except perhaps in the case of one possible exception of the title to the property between A and C being alternative in its proper sense. The principle is even stronger in the case of a plaintiff as against whom another defendant is sought to be added. It is the plaintiff that comes to Court alleging a cause of action as against a particular defendant and asking for reliefs against him. The very basic principle of judgment *inter partes* is that the judgments are not judgments *in rem* but declaratory and operative only as between them. The plaintiff being generally *dominus litus*, I fail to see on what principle of justice he can be compelled to fight against some other litigant not of his own choice unless such a process is required by a positive rule of law.

The question thus further resolves itself into this, whether in such an action the Secretary of State is a proper party having regard to the rules relating to the joinder of defendants. It was on this basis that the question was really argued by all the parties. It is Order 1

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of the First Schedule to the Civil Procedure Code that lays down the rules regulating the joinder of parties. Rule 3 no doubt relates to joinder of defendants but both in form and substance it is merely permissive and relates only to what the plaintiff may do if he were so minded It is clause (2) of rule 10 that applies to the present case. It provides that:

"The Court may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order . . . that the name of any person who ought to have been joined as defendant or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

It has not been suggested in this case that the applicant, the Secretary of State, is a person who ought to have been added as party defendant in this suit. The contention was that the presence before the Court of the Secretary of State in this case would be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. If the expression in this clause had not been the word "necessary" but merely "desirable" a great deal might have been said for the argument adduced in support of the application. But at no stage of the discussion was I able to understand the learned gentlemen that argued in support of the application to make out that the presence before the Court of the Secretary of State was necessary. The necessity referred to in the clause is for the purpose of enabling the Court effectually and completely to adjudicate upon and settle all the questions involved in a suit. It is obvious that this clause cannot be read as requiring that all persons who have or claim to have or who are likely to have any sort of right, title or interest in respect of

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any portion of the subject-matter of a suit should all be made parties. If it be borne in mind that the suit is by the plaintiff for certain reliefs against certain persons as defendants and that the judgment of Civil Courts are not judgments *in rem*, then it follows that the questions involved in the suit are only questions with regard to the right set up and the relief claimed on the one side and denied or withheld on the other. The expression therefore "all the questions involved in the suit" can only be questions as between the parties to the litigation. The phrase "to enable the Court effectually and completely to adjudicate upon and settle" would seem really to indicate that the addition of the party should be ordered only if in the opinion of the Court, in the absence of the party, it cannot effectually and completely adjudicate and settle all the questions. In these cases there is no question of the Court not being able effectually to adjudicate and settle any question. So far as I was able to see, the entire argument in support of the application was based on the position that in the absence of the Secretary of State the Court could not completely adjudicate upon and settle all the questions involved in the suit. In other words, the contention was that the Secretary of State was a proper party to every suit in which any question was raised with regard to the legality of any statute and that in the absence of the Secretary of State as a party in any such suit there can be no completeness of adjudication within the meaning of the rule. I confess that at first I was a little impressed with this argument. But as against this, there are found heaps of cases in the reports both in this country and elsewhere in which the question of whether a particular legislative enactment was *intra* or *ultra vires* was decided merely as between the parties to the litigation without any representation

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in the suit either of the Crown or of the public. But it may, no doubt, be remarked that in none of these cases the question has been raised or decided. The only case that has been cited before me in which there can be said to be any indication with regard to this matter is the case of *Cunningham* v. *Tomey Homma*(1). The question in that case was whether a particular provision was *ultra vires* of a Provincial Legislature and the Attorney-General of the province was allowed to intervene at some stage. There is no decision in the case as to whether he was either a necessary or proper party and their Lordships of the Judicial Committee do not even refer to it. I am unable, therefore, to regard it as a decision at all bearing on the point.

The case of *Esquimalt and Nanaimo Ry. Co.* v. *Wilson*(2) was also cited for the applicant and relied upon. The property which was the subject-matter of that action had been the subject of a grant by the Crown and the question that arose was whether in such an action, the Attorney-General of the province was a necessary party. At page 364 Lord BUCKMASTER, who delivered the judgment of their Lordships of the Judicial Committee, observes as follows :—

"The learned Judges of the Court of Appeal, from whose judgment their Lordships feel compelled to differ upon this point, do not refer to the rights of the Crown which may be affected but base their opinion solely on the ground that the Crown is not affected by the result, and that consequently a mere declaratory order against the Crown would be of no value. But for the reservation of the rights already referred to, their Lordships would have agreed with this conclusion."

At page 368 occurs the following sentence :—

"It is true that in these circumstances certain rights which the Crown possesses, if the grant be good, will be interfered with"

(1) [1903] A.C., 151. (2) [1920] A.C., 358.

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and at page 369 their Lordships concluded by saying that they

"therefore think that the Crown is affected in this matter, so that the presence of the Attorney-General is proper and necessary for the determination of justice."

It is not contended in this case that by reason of any adjudication as between the original parties to the action, the rights of the Secretary of State would in any manner or measure be affected. It is therefore not a case falling under the rule that the officer representing the Crown is a necessary party to every action, as the result of which the rights of the Crown may be affected.

The question would, *therefore*, have to be determined merely on a consideration of whether in the absence of the Secretary of State as a party to the action it is impossible to have a complete adjudication upon, and settlement of, all the questions involved in the suit. All the learned gentlemen that appeared at the Bar and argued the point on behalf of the various parties state that they were unable to find any decision bearing directly on the point.

I have therefore to arrive at a conclusion on first impression and on what I conceive to be the general principles applicable. The conclusion I have thus arrived at is this: If the expression "all questions involved in the suit" should be regarded as absolute and not merely relative to the parties before the Court, then the Secretary of State may in this case be regarded as a proper party and not otherwise. But it seems to me that there is neither principle nor authority that can be discovered for regarding such an expression as "all the questions involved in a suit" appearing in a rule relating to joinder of parties as absolute and not relative.

The whole scheme of the Civil Procedure seems to me to point to a suit being regarded as a suit for relief

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as against definite defendants, as a trial being one only as between the parties and an adjudication as one only binding them. If a plaintiff should claim certain property and it should be regarded that the question involved in the suit is generally whether he is the owner of the property and not whether as against any other particular person he is entitled to certain rights over property, very serious consequences are sure to ensue and procedure in our courts of law is certain to become exceedingly complicated and much more disastrously prolonged than it is at present.

At this stage I may with advantage refer to two decisions that have been cited at the Bar. Mr. S. Srinivasa Ayyangar for the plaintiff referred to the case of *Moser* v. *Marsden*(1). In that case, the plaintiff, the patentee of a machine, brought the action against the defendant for using a machine which he alleged was an infringement of his patent. One Montforts, the maker and patentee of the defendant's machine, applied to be added as defendant, alleging that the judgment in the action would injure him and that the present defendant would not efficiently defend the action. The Court of Appeal consisting of Lord Justice LINDLEY and Lord Justice KAY reversing the decision of the Court below, held that Montforts not being directly interested in the issues between the plaintiff and the defendant but only indirectly and commercially affected, the Court had no jurisdiction to add him as a defendant. Lord Justice LINDLEY at pages 489 and 490 observes as follows :—

"But reliance is placed on the following words of the rule, which provide for adding the names of parties 'whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter.' But what is the

(1) [1892] 1 Ch., 487.

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question involved in the action? The question, and the only question, is whether what Marsden is doing is an infringement of the plaintiff's patent."

And again later on, that eminent Judge says:

"Can it be said that the rule prevents the plaintiff from proceeding against a defendant without having to litigate with everybody who may be in any way affected, however indirectly, by the action? It appears to me that it does not. The counsel for the applicant grounded his argument on the allegation that Montforts' interest would be affected by the decision in this action. It is true that his interest may be affected commercially by a judgment against the defendant, but can it be said that it would be legally affected? Can we stretch the rule so far as to say that whenever a person would be incidentally affected by a judgment he may be added as a defendant?"

And Lord Justice KAY at pages 491 and 492 observes as follows :—

"No doubt the judgment in the present case may indirectly affect Montforts' patent; but the answer to that is, that whether it would affect it or not, this rule does not apply to such a case. Montforts says that the defendant will not contest the case properly, and will not conduct the defence so energetically as he would. But we cannot help that."

It seems to me that if ever a case can be conceived which would fall directly within the words of the rule already referred to this was such a case. There was a defendant, who when sued by the plaintiff for infringement of a patent right sought to justify his action on the patent right of a third party and if the terms of clause (2) of rule 10 should be taken absolutely, as contended for, it would have seemed to be a clear case in which for the purpose of effectually and completely adjudicating upon and settling all questions involved with regard to the patent right of the plaintiff it was not only proper but necessary, that this other patentee should have been added as a party defendant. But the Court of Appeal said "no" and decided that he was not a proper party on the ground, I take it, that the words

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of the rule should be construed not absolutely but relatively. It is a very strong case and I confess almost repugnant to commonsense. But the words of the statute that their Lordships of the Court of Appeal were considering were identical with the words which I have to consider and it has not been shown that this decision of the learned Judges has ever been overruled or even questioned. It must also be observed that their Lordships refused to make the other patentee a party to the action even though they came to the conclusion that by reason of the decision the commercial interest of the other party would be seriously affected. Mr. Radhakrishnayya referred to *Norris* v. *Beazley*(1). It was an action on a bill of exchange against the acceptor originally and the defendant sought to add the name of a company which he alleged was the party really liable and which had also in the same matter a counterclaim against the plaintiff. Chief Justice COLERIDGE makes in that case an observation which I may here reproduce. At page 83, that learned Judge observes:

"Now, this, although it is not a case of making a person a plaintiff against his will, is certainly the case of making a person a plaintiff in respect of a defendant as to whom he does not desire to be plaintiff without his consent.

Again, that learned Judge at page 84 lays down that:

"the defendant to be added must be a defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action, and that it was never intended to apply where the person to be added as defendant is a person against whom the plaintiff has no claim, and does not desire to prosecute any."

He proceeds thus:

"It seems to me that this application is answered, and that it was not intended that persons in the position of this

(1) (1877) 2 C.P.D., 80.

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Company should be added as defendants, merely for the convenience of another defendant . . . It seems to me that it is the more important to construe this rule strictly because it is obvious that, in many cases, if the defendant's contention is right, its provisions might be made use of in a manner exceedingly harassing to plaintiffs, by forcing them to include in their actions persons against whom they do not seek to proceed and to mix up their rights as against one person, with questions of a highly complicated nature arising between themselves and the others."

At page 85, Justice DENMAN says:

"I am quite clear, however, that the Court ought not to bring in any person as defendant against whom the plaintiff does not desire to proceed unless a very strong case is made out, showing that in the particular case justice cannot be done without his being brought in."

The foregoing observations seem to me to lay down in very clear and unmistakable terms the principle applicable to such a case as the present. On these principles I cannot possibly see my way to add the applicant as a party defendant to the action. I am further unable to understand why the Secretary of State is sought to be made a party to the action at all. The only suggestion on which such a joinder can be supported is that it is necessary that the declaration that the Act is *ultra vires* should be obtained in the presence of the Secretary of State. But the Secretary of State so far as the Civil Procedure Code is concerned represents merely the Government or the Sovereign and can under the present system be regarded if at all only as part of the legislative machinery. There is no principle for even suggesting that any declaration as against him will be effectual and binding as against all other possible persons such as Committees and other bodies and officers that may be constituted or created under the Act now in question.

There is no cause of action alleged against the applicant and no relief whatever claimed against him.

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On a proper construction of the rule I feel constrained to hold that the applicant is not a proper party to the suit. The plaintiffs have complained of certain actions by the Board of Commissioners which would undoubtedly be unlawful but for the Endowments Act. They therefore ask for an injunction on the ground that the Act which is held up as a shield by the defence is really not available to them because it is illegal and *ultra vires*.

The declaration therefore as against the defendants must be regarded as merely ancillary to the relief claimed. On principle and authority I have therefore come to the conclusion that the Secretary of State is neither a necessary nor a proper party and that as the plaintiffs oppose his being joined as additional defendant, I would not be justified in adding him as a party defendant, even as a person brought in merely to look on and see fairplay, to use the words of Lord MACNAGHTEN in the case of *The Duke of Bedford* v. *Ellis*(1). Even as a sort of harmless and permissible party I am satisfied he could not be added when such addition is opposed by the plaintiff and more so when on behalf of the applicant there has been an express refusal to submit to any condition as to costs.

Having regard to the number and variety of legislative bodies and authorities in the country at the present day, paramount, imperial, local, delegated, subordinate, etc., I feel that questions of *ultra vires* are certain to be raised in the courts in increasingly large numbers of cases and I refuse to contemplate with equanimity the prospect of the Secretary of State for India being required by every defendant to be made a party in every one of them.

(1) [1901] A.C., 1 at 12.

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In the result the application must be dismissed with taxed costs for the plaintiffs in each of the cases and it is ordered accordingly.

Application dismissed.

Government Solicitor (*C. Moresby*) for the applicant.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Madhavan Nayar.

1926, March 11.

M. KRISHNA PATTER (PETITIONER), APPELLANT,

v.

K. SEETHARAMA PATTER (COUNTER-PETITIONER), RESPONDENT.*

Limitation Act (IX of 1908), art. 182 (5)—Application for execution of decree—Application by judgment-debtor to record satisfaction—Statement by decree-holder, objecting to judgment-debtor's application—Subsequent application by decree-holder for execution, more than three years from last application for execution—Filing of statement by decree-holder objecting to record of satisfaction, whether a step in aid of execution—Pendency of execution application, whether necessary for effectiveness of an application for a step in aid of execution.

The filing of a statement by a decree-holder, objecting to the judgment-debtor's application to record satisfaction of the decree, is not a step in aid of execution of the decree under article 182 (5) of the Limitation Act (IX of 1908), and cannot therefore save his application for execution from being barred by limitation. *Kuppuswami Chettiar* v. *Rajagopala Aiyar*, (1922) I.L.R., 45 Mad., 466, followed.

* Appeal against Appellate Order No. 120 of 1923.

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Quaere :—Whether an application to be a step in aid of execution should be one made in a pending execution application.

APPEAL against the order of K. A. KANNAN, Subordinate Judge of South Malabar at Calicut, in Appeal No. 38 of 1923, preferred against the order of N. A. VAIDYANATHA AYYAR, District Munsif of Valuttūr, in E.A. No. 749 of 1922 in O.S. No. 226 of 1916.

This appeal arises out of an application filed in the District Munsif's Court of Alattur to transfer a decree from that Court to another Court. The decree was passed on 30th September 1916. An application for execution was filed on 4th July 1919. During the pendency of that application, the judgment-debtor filed a petition on 1st August 1919 in that Court to record satisfaction of the decree. The decree-holder filed a statement on 18th August 1919, objecting to the record of satisfaction and praying that the judgment-debtor's petition should be dismissed. The latter petition was dismissed on 19th August 1919. The decree-holder presented the present application on the 25th July 1922 for the transfer of the decree for execution to the District Munsif's Court of Vayitri. The judgment-debtor objected to the transfer on the ground that execution of the decree was barred by limitation. The decree-holder relied on his statement of objection to the record of satisfaction, as a step in aid of execution, to save the bar of limitation. The District Munsif held that the execution of the decree was not barred and directed the transfer of the decree. On appeal, the Subordinate Judge reversed the order and dismissed the application. The decree-holder preferred this Miscellaneous Second Appeal.

K. P. Ramakrishna Ayyar for appellant.—The statement filed by the decree-holder objecting to the record of satisfaction and praying for dismissal of the judgment-debtor's petition is an application to take a step in aid of execution,

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See *Kewal Ram* v. *Khadim Husain*(1), *Gobind Pershad* v. *Rung Lal*(2), *Shugan Chand* v. *Ramjas*(3), *Tamiz-un-nissa Bibi* v. *Najju Khan*(4), *Ishri Rai* v. *Raghupat Narāin Rai*(5).

Kuppuswami Chetty v. *Rajagopal Aiyar*(6) holds that where there is no pending execution application, there can be no application to take a step in aid of execution. The decision in *Abdul Kader Rowther* v. *Krishnan Malaval Nair*(7) decides that an adjournment is a step in aid of execution.

Reference was also made to *Lakshmiram Lallubhai* v. *Balashankar Veniram*(8), *Sheshadasacharya* v. *Bhimacharya* (9), and *Kedar Nath Dey Roy* v. *Lakhi Kanta Dey*(10).

Next there was practically a stay of execution under section 15 of the Limitation Act. A liberal construction should be placed on article 182 of the Act.

K. R. Narayana Ayyar for respondent.—There must be some positive step taken by the Court in aid or furtherance of execution, otherwise it is not an application to take a step in aid of execution. Mere opposition by decree-holder is not an application to take a step in aid of execution. See *Langtu Pande* v. *Baijnath Saran Pande*(11), *Umesh Chunder Dutta* v. *Soonder Narain Deo*(12), *Troylokya Nath Bose* v. *Jyoti Prokash Nandi*(13).

Reference was made to the following cases :—*Rangachariar* v. *Subramania Chetty*(14), *Masilamani Mudaliar* v. *Sethusami Aiyar*(15), *Balaguruswami Naiken* v. *Guruswami Naiken*(16).

JUDGMENT.

This is an appeal against an order of the Subordinate Judge of South Malabar at Calicut who, reversing the order of the District Munsif, held that the decree-holder-appellant's application to transfer the decree in O.S. No. 226 of 1916 from the Alattur

(1) (1883) I.L.R., 5 All., 576.
(2) (1894) I.L.R., 21 Calc., 23.
(3) (1910) 5 I.C., 292.
(4) (1918) I.L.R., 40 All., 668.
(5) (1921) 19 A.L.J., 641.
(6) (1922) I.L.R., 45 Mad., 466.
(7) (1915) I.L.R., 38 Mad., 695.
(8) (1915) I.L.R., 39 Bom., 20.
(9) (1913) I.L.R., 37 Bom., 317.
(10) (1917) 40 I.C., 1005.
(11) (1906) I.L.R., 28 All., 387 (390).
(12) (1889) I.L.R., 16 Calc., 747.
(13) (1903) I.L.R., 30 Calc., 761.
(14) (1920) 12 L.W., 9.
(15) (1918) I.L.R., 41 Mad., 251.
(16) (1925) 48 M.L.J., 506.

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District Munsif's Court to the District Munsif's Court of Vayitri for execution was barred by limitation. A prior petition for execution, E.P. No. 458 of 1919, had been presented on the 4th of July 1919. In the course of that petition an application was put in by the judgment-debtor to record satisfaction of the decree on the 1st of August 1919. A statement was then filed by the appellant on the 18th of August 1919 praying that the judgment-debtor's petition to record satisfaction of the decree should be dismissed. The present application for transfer was made on the 25th of July 1922. If time is calculated from the date of E.P. No. 458 of 1919, it is admitted that the present application is barred by time; but it was contended before the Subordinate Judge that the written statement of objections filed on the 18th of August 1919 should be taken as "a step in aid of execution" under article 182 (5) of the Limitation Act and that if time is calculated from that date the present application is not barred. In *Kuppuswami Chetty* v. *Rajagopala Aiyar*(1), it was held that a statement filed by a decree-holder objecting to the judgment-debtor's application to enter up satisfaction of the decree is not a step in aid of execution. Relying on that decision, the learned Subordinate Judge overruled the appellant's contention and dismissed his petition.

The same contention has again been pressed before us; and the learned vakil for the appellant has tried to distinguish the case in *Kuppuswami Chetty* v. *Rajagopal Aiyar* (1) on the ground that there was no pending execution application in that case, arguing from this fact that if there was a pending application in that case the learned Judges would have arrived at a different

(1) (1922) I.L.R., 45 Mad., 466.

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conclusion. He has also argued on the authority of various decisions that a statement of objections filed by the decree-holder in circumstances like the present should be held to be a step in aid of execution under article 182 (5) of the Limitation Act.

The facts of the case in *Kuppuswami Chetty* v. *Rajagopala Aiyar*(1) were as follows. The decree was dated the 2nd May 1916 and the only prior execution petition presented by the appellant decree-holder was dismissed on the 7th of September 1916. Admittedly the execution petition out of which the appeal arose was presented out of time, but it was said, as in the present case, that prior to the application for execution the judgment-debtor had put in a petition for entering up satisfaction of the decree and that in connexion therewith the decree-holder had filed a counter-statement denying the receipt of money and praying that the petition should be dismissed. It was contended that the application to reject the petition to record satisfaction of the decree was a step in aid of execution, but this contention was overruled. In the course of his judgment, AYLING, J. (who delivered the leading judgment) stated thus:

"The article 182 (5) classes together an application for execution and an application to take step in aid of execution and the latter words appear to be intended to cover an application, which is not an initial application for execution, but is an application to take some step to advance the execution proceedings, which is already pending, namely, application to bring to sale properties already under attachment (page 469) . . . But whatever case may be made out for an application made in connexion with a pending execution petition as one for taking a step in aid or furtherance of it, an application made at a time when no execution petition is pending stands on an obviously different footing."

(1) (1922) I.L.R., 45 Mad., 466.

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It is argued that two conclusions follow from these extracts—(1) that an application to be a step in aid of execution should be one made in a pending execution application and (2) that if there was a pending execution application in that case as in the one before us, then the learned Judges would have certainly held that the statement of objections filed by the decree-holder to the recording of satisfaction would be a step in aid of execution. As regards the first conclusion sought to be deduced from the judgment, no doubt the decision in *Balaguruswami Naicken* v. *Guruswami Naicken*(1) supports the appellant's contention; but it is not necessary to discuss the correctness of that conclusion in this case as admittedly here there is a pending execution application. If we really had to decide the question we should hesitate to accept this decision without further consideration of the matter in the light of all the decided cases of our Court which have not been referred to in *Kuppuswami Chetty* v. *Rajagopala Aiyar*(2). It seems to us that the remarks referred to were made by the learned Judge only to distinguish those cases wherein questions of a similar nature arose in connexion with pending execution applications. As regards the second conclusion sought to be deduced from that judgment, we have no doubt that the appellant's contention cannot be accepted because the learned Judge's decision is based upon an interpretation of the decree-holder's objection petition in view of what he considers should be the meaning of the expression "applying to take some step in aid of execution," for, the learned Judge states at page 470,

"The petition, Exhibit E, may tend to prevent the Court placing an obstacle in the way of future execution of the decree; but it does not ask the Court to take any step in aid of

(1) (1925) 48 M.L.J., 506. (2) (1925) I.L.R., 45 Mad., 466.

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execution. Supposing it to be successful, execution of the decree is no further advanced than it was before the petition was presented."

This shows that even if there was a pending execution application, the learned Judge would have come precisely to the same conclusion because in his view the decree-holder did not by filing his objection statement ask the Court to take any step in aid of execution. We respectfully accept this view.

According to the third column of article 182 (5) of the Limitation Act, time for execution is to be calculated from

"the date of applying in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree or order."

The latter part of this clause specifies the date of applying to the Court asking it to take some step in aid of execution of the decree or order as the date from which the period of limitation should be computed and not the date of the petitioner's taking some step in aid of execution. If this distinction is well kept in mind, much of the diversity of the views among the various High Courts as regards the meaning of the expression "applying to take some step in aid of execution" can easily be explained. As pointed out by OLDFIELD, J., in *Rangachariar* v. *Subramania Chetty*(1)

"It is material that the starting point under article 182, Schedule 1 of the Limitation Act, is not the taking of a step in aid of execution, but the application to take such a step."

In the same judgment SESHAGIRI AYYAR, J., refers to the same matter thus:

"Two things are essential. There must be an application and that application must ask the Court to take a step in aid of execution . . . The bare fact that a party took some steps would not be enough."

(1) (1920) 12 L.W., 9 at 10.

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The distinction we are referring to is nowhere better pointed out than in *Raghumundun Misser* v. *Kallydut Misser*(1). In that case the learned Judges were considering whether an application by a decree-holder for leave to bid at a sale in execution of the decree is a step in aid of execution within the meaning of the Limitation Act, XV of 1877, Schedule 2, article 179 (corresponding to article 182 of the present Limitation Act). In coming to the conclusion that it is not such a step the learned Judges state:

"We do not think an application of this kind is an application seeking the action of the Court in execution of the decree. It may be in one sense a step in aid of execution of the decree, but it is not a step by the Court. Before a judgment-creditor can get any benefit he must show that he asks the Court to take some step in aid of execution. A step taken by the judgment-creditor himself is not . . . sufficient."

This case has been followed in *Kuppuswami Chetty* v. *Rajagopala Aiyar*(2). If this distinction is borne in mind, it is obvious that a statement of objections filed by the decree-holder objecting to the recording of satisfaction cannot in any way be considered to be a step in aid of execution. By filing the statement the decree-holder does not ask the Court to take any step in aid of execution. In the words of AYLING, J., in *Kuppuswami Chetty* v. *Rajagopala Aiyar*(2)

"Supposing it to be successful, execution of the decree is no further advanced than it was before the petition was presented."

We will now discuss the cases referred to by the learned vakils on both sides.

In *Kewal Ram* v. *Khadim Husain*(3) it was held that

"an application by a decree-holder praying that the objections taken by the judgment-debtor to the sale of property

(1) (1895) I.L.R., 23 Calc., 690 at 692. (2) (1922) I.L.R., 45 Mad., 466.
(3) (1883) I.L.R., 5 All., 576.

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belonging to him in execution of the decree should be disallowed and the sale be confirmed, is an application from the date of which the period of limitation for a subsequent application for execution of the decree may be computed."

This judgment simply records this opinion and does not contain any discussion of the question. It is conceded that the decision in *Kuppuswami Chetty* v. *Rajagopala Aiyar*(1) is opposed to this view. This decision was followed by the Allahabad High Court in *Shugan Chand* v. *Ramjas*(2). In *Tamiz-un-nissa Bibi* v. *Najju Khan*(3), the latest decision of the Allahabad High Court brought to our notice, it was held that an application to the Court executing a decree asking that certain objections to the execution of the decree be rejected is a step in aid of execution within the meaning of article 182 (5) of the 1st Schedule of the Limitation Act. Here also the judgment does not contain any discussion of the question. In *Langtu Pande* v. *Baijnath Saran Pande*(4) it was held that the mere filing of an answer by the decree-holder resisting an application for a declaration of insolvency filed by the judgment-debtor cannot be deemed to be an application to take a step in aid of execution within the meaning of article 179. This view is opposed to the earlier and the later decisions of the same Court.

In *Umesh Chunder Dutta* v. *Soonder Narain Deo*(5) it was held that the appearance of a decree-holder by his pleader to oppose an application made by the judgment-debtor to set aside a sale in execution of the decree is not an application within the meaning of article 179 of Schedule 2 of the Limitation Act to take a step in aid of execution. The learned Judges stated that

(1) (1922) I.L.R., 45 Mad., 463. (2) (1910) 5 I.C., 292.
(3) (1918) I.L.R., 40 All., 668. (4) (1906) I.L.R., 28 All., 387.
(5) (1889) I.L.R., 16 Calc., 747.

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"The application contemplated by that article of the Limitation Act is an application to get some order of the Court in furtherance of the execution of the decree. The appearance of the pleader cannot be regarded as such an application."

The decisions in *Raghunundun Pershad* v. *Bhugoo Lall*(1) and *Raghunundun Misser* v. *Kallydut Misser*(2) also take a similar view of article 179, Schedule 11 of the Limitation Act. These cases have been followed in *Kuppuswami Chetti* v. *Rajagopala Aiyar*(3) as regards the interpretation of the article in question. (See also *Troylokya Nath Bose* v. *Jyoti Prokash Nandi* (4).) On the facts, the decision in *Gobind Pershad* v. *Rung Lal*(5) can be distinguished. In that case it was held that an application by a decree-holder, praying that a petition of the judgment-debtor to set aside the sale of property belonging to him should be rejected and the sale be confirmed, is an application falling within the meaning of article 179 (4) of Schedule 2 of the Limitation Act of 1877. The facts of the case show that after the sale was confirmed the judgment-debtor applied for a review of the order confirming the sale and the review was granted in spite of the objections of the decree-holder who appeared and opposed it. Subsequently the decree-holder put in an application praying that the judgment-debtor's application to set aside the sale might be rejected at the same time applying for confirmation of the sale. In view of the "review order" that was passed against the decree-holder, we are inclined to think that the decree-holder's application was in furtherance of execution proceedings. The decision in *Kedar Nath Dey Roy* v. *Lakhi Kanta Dey*(6) is also distinguishable. In that case the judgment-debtor raised objections to the delivery of

(1) (1890) I.L.R., 17 Calc., 268.
(2) (1896) I.L.R., 23 Calc., 690.
(3) (1922) I.L.R., 45 Mad., 466.
(4) (1903) I.L.R., 30 Calc., 761.
(5) (1894) I.L.R., 21 Calc., 23.
(6) (1917) 40 I.C., 1005.

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possession by the commissioner and the Court found it necessary to determine the standard of measurement and for that purpose to take evidence in the matter. An application was then made by the decree-holder for summoning witnesses. It was held that this was a step in aid of execution within the meaning of article 182 (5). It is clear from the facts that in the opinion of the Court execution could not proceed without determining the standard of measurement. In this view the application to file a list of witnesses may be deemed to be a step in aid of execution. The learned Judges in arriving at this conclusion follow the prior decisions of their Court already referred to. In *Brojendra Kishore Roy* v. *Dil Muhmud Sarkar*(1), when the decree-holder applied for execution of his decree the judgment-debtor put in an objection to its execution. Both parties having been directed by the Court to adduce evidence in support of their respective cases, the decree-holder filed a list of witnesses and intimated to the Court that he was ready to proceed with his case. The Court held that the filing of the list of witnesses and intimating to the Court that he was ready to proceed with the case implied an application on the part of the decree-holder to the Court to take the evidence which he was prepared to adduce and repel the objection taken by the judgment-debtor, and in effect this should be taken to be an application to the Court to take some step in aid of execution. This decision to some extent supports the appellant. Excepting this decision the Calcutta High Court has taken a view consistently opposed to the contentions of the appellant.

The Bombay cases relied upon by the appellant need not be discussed in detail. The latest decision of

(1) (1918) 44 I.C., 604.

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that Court is *Lakshmiram Lallubhai* v. *Balashankar Veniram*(1), in which it was held that an appeal against an order adjudging the judgment-debtor an insolvent was a step in aid of execution. This has been expressly dissented from in *Kuppuswami Chetty* v. *Rajagopala Aiyar*(2). In *Sheshadasacharya* v. *Bhimacharya*(3) an application filed by the decree-holder for extension of time to produce an extract from the Collector's record ordered by the Court to be filed within a particular date but which was not so filed, was held to be a step in aid of execution. With all deference to the learned Judges, we cannot accept this conclusion or the reasoning on which it is based.

Thus far we have discussed the decisions of the other Courts brought to our notice. Our own High Court has always held the position that an application to be a step in aid of execution, must be one in furtherance of execution proceedings. We have already indicated the interpretation put upon the article by the learned Judges in *Rangachariar* v. *Subramania Chetty*(4). Having reference to the facts of the case, the decision in *Kunhi* v. *Seshagiri*(5) does not really help the appellant. In that case it was held that an application by a judgment-creditor to the Court which passed a decree for a certificate that a copy of the Revenue Register of the land is necessary to enable him to obtain such a copy from the Collector's office and thereupon to execute the decree by attaching the land, is a step in aid of execution within the meaning of article 179 (4). INNES, J., pointed out that

"The production of the copy of the register was a necessary preliminary to execution and the application made by the

(1) (1915) I.L.R., 39 Bom., 20. (2) (1922) I.L.R., 45 Mad., 466 at 471.
(3) (1913) I.L.R., 37 Bom., 317. (4) (1920) 12 L.W., 9.
(5) (1882) I.L.R., 5 Mad., 141.

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decreeholder to the Subordinate Judge's Court would enable him to obtain it."

In this view the application was one in furtherance of execution proceedings and was a step in aid of execution. The decision in *Abdul Kader Rowther* v. *Krishnan Malaval Nair*(1) no doubt supports the appellant. There it was held that an application by a decree-holder for an adjournment to enable him to adduce further evidence was a step in aid of execution. We may point out that AYLING, J., in *Masilamani Mudaliar* v. *Sethuswami Ayyar*(2) found it impossible to concur with this view. The latest decision of our own Court is the one in *Balaguruswami Naicken* v. *Guruswami Naicken*(3) already referred to in another connection. The facts of the case are as follows. A mortgage-decree in favour of the plaintiffs was passed on the 14th of September 1916 and an execution application was filed on the 25th of September 1917. It was dismissed on the 17th of October 1917. The application that gave rise to the appeal was dated the 9th of March 1920. A certain sum of money in Court was paid to the decree-holder by order, dated the 31st of March 1920, and a cheque was actually issued on the 1st April 1920. The money in Court had been paid by a mortgagee of the judgment-debtor who had been directed to pay off the decree amount. The decree-holder relied to save his application from the bar of limitation on the date of the order for payment out to him of the money in Court. The learned Judges held that the application by the decree-holder is not a step in aid of execution. They base their decision on two grounds, (1) that in the circumstances of the case an application for an order for payment out by the Court is not a step in aid of

(1) (1915) I.L.R., 38 Mad., 695. (2) (1918) I.L.R., 41 Mad., 251 at 253.
(3) (1925) 48 M.L.J., 506.

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execution and (2) that as there was no pending execution application the order relied upon could not be considered to be a step in aid of execution. As regards the latter ground, we have already expressed our opinion. It is not necessary to discuss the first ground either as the decision, if correct, certainly supports the view that the application we have got to deal with in the present case is not a step in aid of execution. If we hold that the application in that case amounts to a step in aid of execution our opinion cannot help the appellant because as we have already pointed out his objection application cannot in any sense be deemed to be one in furtherance of execution proceedings.

The cases examined above show that there has been much diversity of opinion as regards the interpretation of the expression "applying to take some step in aid of execution." In our opinion, the decision in *Kuppuswami Chetty* v. *Rajagopala Aiyar*(1) interprets that expression correctly, and the weight of authority is in support of that interpretation. That decision must govern the present case. In this view the filing of statement by the decree-holder in this case objecting to the judgment-debtor's application to record satisfaction of the decree is not a step in aid of execution and cannot therefore save his last application from being barred by limitation. We therefore dismiss this appeal with costs.

K.R.

(1) (1922) I.L.R., 45 Mad., 466.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Madhavan Nayar.

1926. February 24.

POLEPEDDI KRISHNAMOORTHY (PETITIONER), PETITIONER,

v.

POLEPEDDI RAMAYYA AND OTHERS (RESPONDENTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), *O. XXXIII, rr.* 5 (*a*), 6, 7 *and* 15—*Application to sue in* forma pauperis—*Summary rejection by Court under r.* 5 (*a*), *without enquiry under r.* 6—*Effect of rejection—Second application to sue in* forma pauperis, *whether barred under r.* 15 *of the same Order.*

When an application to sue in *forma pauperis* is summarily rejected by the Court under Order XXXIII, rule 5 (*a*) of the Civil Procedure Code, without an enquiry under rule 6 and a consequent order under rule 7, a second application for the same purpose is not barred under Rule 15 of the same Order.

Chinnammal v. *Papathi Ammal,* (1925) 85 I.C., 982, followed; *Atul Chandra Sen* v. *Peary Mohan,* (1916) 33 I.C., 812, dissented from; *Bal Kaur* v. *Shib Das,* (1920) 56 I.C., 207, and *Howa* v. *Sit Shein,* (1917) 42 I.C., 803, referred to.

PETITION under section 115 of the Civil Procedure Code to revise the order of A. VENKATARAMA AYYAR, District Munsif of Tirupati, passed in Original Petition No. 25 of 1923.

The petitioner filed an application for leave to sue in *forma pauperis* in the District Munsif's Court. That petition was rejected by the District Munsif under Order XXXIII, rule 5 (*a*) of the Civil Procedure Code, on the ground that the petition did not comply with rule 2 of the Order, in that the application did not contain a schedule of any movable or immovable

* Civil Revision Petition No. 655 of 1924.

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property belonging to the applicant with the estimated value thereof. No enquiry was made into the pauperism of the petitioner and the order expressly stated that it ought not to be understood that any opinion was expressed on the question whether the petitioner was a pauper or not. The petitioner subsequently filed a second application to sue in *forma pauperis*. The respondent objected that the application was barred under rule 15 of Order XXXIII. The District Munsif upheld the objection and dismissed the application as barred. The petitioner preferred this Civil Revision Petition.

B. C. Sankara Narayana and *B. C. Panchanathan* for petitioner.

N. Chandrasekhara Ayyar for respondent.

JUDGMENT.

PHILLIPS, J.

PHILLIPS, J.—The question for decision is whether, when an application to sue in *forma pauperis* is rejected under Order XXXIII, rule 5 (*a*), a second application is barred by the provisions of rule 15 of that Order. The Calcutta High Court in *Atul Chandra Sen* v. *Peary Mohan*(1) has held that there is no distinction between orders of rejection passed under rule 5 and orders of refusal passed under rule 7 and this view has been adopted in *Ali Afzual* v. *Purna Chandra*(2). There is also a case *Ranchod Morar* v. *Bezanji Edulji*(3) where a similar view appears to have prevailed.

On the contrary, we have the authority of the Lahore High Court in *Bal Kaur* v. *Shib Das*(4) and of a Full Bench of the Burma Chief Court in *Howa* v. *Sit Shein*(5) that a distinction should be made between these two classes of orders. They have held accordingly that an order passed summarily under rule 5 (*a*) is not a bar to

(1) (1916) 33 I.C., 812.
(2) (1924) 40 C.L.J., 188.
(3) (1896) I.L.R., 20 Bom., 86.
(4) (1920) 56 I.C., 207.
(5) (1917) 42 I.C., 803 (F.B.).

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a second application. The leading case is the one in 33 I.C., 812 which distinctly holds that there is no distinction between orders under rule 5 and orders under rule 7. No reason is given for coming to this conclusion; and, as pointed out by the Burma Chief Court, there is at least a verbal difference between these two orders. I am inclined to think that there is more than verbal difference. The orders are different in kind. Under rule 5 the Court rejects an application summarily and without enquiry, whereas under rule 7 an order is passed after due enquiry into the merits of the application. The principle underlying rule 15 appears to be that of *res judicata*, viz., that the Court will not entertain a second application when the first has been dismissed on the ground that the petitioner is not entitled to sue as a pauper. Any order passed under rule 5 (*a*) is of a summary nature based on the petition itself or on facts which are apparent at the time of presentation of the petition. For instance, if the petition does not contain a schedule of property or if it is presented by the alleged pauper's agent, it has to be rejected, and if we are to apply the ruling of the Calcutta High Court, it can never be re-presented. This goes a good deal further than the principle of *res judicata* for it gives the force of *res judicata* to a summary order passed without enquiry or contest and consequently, I think it is doubtful whether that is the intention of the legislature. It is noticeable that rule 15 refers to an order "refusing to allow an applicant to sue as a pauper" and these words are the identical words used in rule 7, clause (3) and it is clear that rule 15 applies to such an order. I can see no reason for extending it to include an order rejecting an application when such order does not either in terms, or by implication, refuse to allow an applicant to sue as a pauper. For instance the rejection and return of a petition presented by an agent can hardly

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be said to amount to a refusal to allow the petitioner to sue as a pauper for there is no provision specifically prohibiting its re-presentation by the pauper himself. In the present case the order rejecting the application is very specific. The District Munsif states that he has to reject the petition but that he ought not to be understood as expressing any opinion on the question whether the plaintiff is a pauper or not. There is clearly no adjudication on the merits by this order. I am therefore of opinion that such an order is not a bar to the subsequent presentation of a petition based on the same right to sue. This view was adopted by my learned brother in *Chinnammal* v. *Papathi Ammal*(1) which was a case where the first petition had been dismissed for default. I would therefore hold that when there has been no enquiry under rule 6 and a consequent order under rule 7 the order rejecting the application is not a bar to a second application.

I may mention here that both in I.L.R., 20 Bom., 86 and 33 I.C., 812 there had been an enquiry under rule 6 although the Court purported to pass an order under rule 5.

I would therefore allow the petition and remand the case for disposal on the merits. The respondent will pay the petitioner's costs.

MADHAVAN NAYAR, J.

MADHAVAN NAYAR, J.—I entirely agree. In my judgment in 85 I.C., p. 982, I have indicated the view that Order XXXIII, rule 15, Civil Procedure Code, contemplates an enquiry and dismissal of "the application to sue as a pauper" on the merits. Since that has not taken place in this case, the present application is not barred under the provisions of that order. It must therefore be disposed of on the merits.

K.R.

(1) (1925) 85 I.C., 982.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

1926, March 5.

NARAYANA CHETTIAR AND ANOTHER, FIFTH AND SEVENTH DEFENDANTS, COUNTER-PETITIONERS (APPELLANTS),

v.

P. C. MUTHU CHETTIAR AND OTHERS, SECOND PLAINTIFF, PETITIONER, AND DEFENDANTS 8, 9 AND 10, COUNTER-PETITIONERS (RESPONDENTS).*

Civil Procedure Code (Act V of 1908), *sec.* 151, *O. IX, r.* 9, *O. XLVII, r.* 4, (2) (*a*)—*Application for execution—Dismissal for default of appearance of pleader for decree-holder—Restoration of petition—O. IX, r.* 9, *applicability of, to execution proceedings—Review notice to judgment-debtors, necessity for—Review granted without notice—Validity of order—Irregularity or illegality—Right to set aside order on becoming aware—Inherent power under sec.* 151, *Civil Procedure Code—Jurisdiction under sec.* 151, *when can be invoked—Other remedies—Bar of limitation of another petition, whether a ground for invoking jurisdiction.*

An application for execution of a decree was dismissed owing to the absence of the decree-holder's pleader on the day of the hearing; on the same day the application was restored on the application of the pleader without notice to the judgment-debtors; a petition for amendment of the execution application in certain particulars was filed and notice of this petition was issued to the judgment-debtors; when the petition came on for hearing, the judgment-debtors objected that the order of restoration of the execution application, passed without notice, was illegal and invalid and that it should be set aside:

Held, (1) that Order IX, rule 9, Civil Procedure Code, did not apply to execution proceedings and that the Court had no jurisdiction under Order IX, rule 9 to restore the execution application which had been dismissed for default; *Kaliakkal* v. *Palani Goundan*, 23 L.W., 227, followed;

* Appeal against Appellate Order No. 63 of 1924.

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(2) that the order of restoration should not be considered as a valid order passed on review under Order XLVII of the Code, as issue of notice to the opposite party was imperative under Order XLVII, rule 4, clause 2 (*a*), and no notice was issued to the judgment-debtors in this case; *Abdul Hakim Chowdhury* v. *Hem Chandra Das*, (1915) I.L.R., 42 Calc., 433, followed;

(3) that the order passed without notice was not merely irregular but illegal, and the judgment-debtors were not bound by it but could object to it when they became aware of it; *Surajpal Pandey* v. *Utim Pandey*, (1921) 63 I.C., 99, referred to;

(4) that the *ex parte* order restoring the application, could not in its nature be considered a final order, and the opposite party, on coming to know of it, could object to it on any ground open to him if he had notice of the application for restoration; see *Krishnaswami Panikondar* v. *Ramaswami Chettiar*, (1918) I.L.R., 41 Mad., 412 (P.C.), relied on;

(5) that the order of restoration was not based on grounds prescribed for review under Order XLVII of the Code; *Chhajju Ram* v. *Neki*, (1922) I.L.R., 3 Lah., 127 (P.C.); and

(6) that the Court had no jurisdiction to act under section 151 of the Act and restore the application for execution to its file, even though the filing of another application for execution would be barred by limitation; *Neelavani* v *Narayana Reddi*, (1920) I.L.R., 43 Mad., 94, applied; and *Bholu* v. *Ram Lal*, (1921) I.L.R., 2 Lah., 66, dissented from.

APPEAL against the order of R. GOPALA RAO, Acting District Judge of Rāmnād, in Appeal Suit No. 153 of 1922 preferred against the order of T. M. FRENCH, Subordinate Judge of Rāmnād, in E.A. No. 396 of 1920 in E.P. No. 36 of 1920 in O.S. No. 14 of 1908.

The decree-holder obtained a decree in O.S. No. 14 of 1908 on the 25th February 1908. He applied for execution in E.P. No. 36 of 1920 on the 23rd February 1920, which came on for hearing on 11th October 1921. It was dismissed on that date, owing to the absence of the decree-holder's pleader, but the Court restored the petition to its file on the application of the decree-holder's

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pleader without notice to the judgment-debtors. On the same date the decree-holder put in an application for amendment, of the description of the property to be sold in the original petition for execution. Notice was ordered on the amendment application which came on for hearing on 14th March 1922. On that day the judgment-debtors took the objection that the original E.P. No. 36 of 1920, which had been dismissed for default on 11th October 1921, should not have been restored to file, especially without notice to them. The learned Subordinate Judge held that the order of restoration without notice was illegal and could be objected to when the judgment-debtors became aware of it; that the restored petition, as a new petition, was barred by time and ought to be dismissed, and with it the application for amendment should also be dismissed. The decree-holder appealed to the District Judge, who reversed the order and remanded the case for disposal on the merits. The fifth and seventh defendants (judgment-debtors) preferred this Civil Miscellaneous Second Appeal.

C. S. Venkatachariar for appellants.

M. Patanjali Sastri for first respondent.

JUDGMENT.

DEVADOSS J.

DEVADOSS, J.—The first respondent herein filed an application on 23rd February 1920 for the execution of the decree in Original Suit No. 14 of 1908. The application after several adjournments came on for hearing on 11th October 1921, when, owing to the absence of the decree-holder's pleader, it was dismissed. The decree-holder's pleader appeared before the Court sometime after and the Court restored the application to file without notice to the opposite party. On the same day, the application was made by the decree-holder for an amendment of the execution application. When the

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amendment application came on for hearing, the judgment-debtors contended that the order restoring the petition to file was illegal and that the amendment petition should not be allowed. The Subordinate Judge of Rāmnād held that Order IX, rule 9, Civil Procedure Code, was not applicable to execution proceedings and that the order restoring the petition to file, if treated as an order under Order XLVII, was illegal, as the other party was not given notice of the application. In the result, he dismissed the petition for execution as well as the application for amendment. On appeal the District Judge held relying on *Janki Nath Hore* v. *Prabhasini Dasee*(1), that the Court had power under Order 47 to restore an application dismissed for default of appearance of the applicant, and that even if it was not an order under Order XLVII, it should be treated as one made under section 151. He set aside the order of the Subordinate Judge and remanded the execution application for disposal according to law. Defendants 5 and 7 have preferred this appeal against the order of the District Judge.

The first contention raised by Mr. C. S. Venkatachariyar for the appellants is that the Court had no power to restore an application to file which was dismissed for default, as Order IX, Civil Procedure Code, did not apply to execution proceedings. We have recently held in *Kaliakkal* v. *Palani Goundan*(2) that Order IX, Civil Procedure Code, did not apply to execution proceedings. Mr. Patanjali Sastri who appears for the first respondent does not challenge the correctness of this decision and concedes that Order IX is not applicable to execution proceedings. The order of the Subordinate Judge was not, therefore, one passed under Order IX, rule 9.

(1) (1916) I.L.R., 43 Calc., 178. (2) 23 L.W., 227.

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It is next contended that the order restoring the execution petition to file should not be treated as an order made in review of the order dismissing the application. The Subordinate Judge, when he restored the execution application to file, did not issue notice to the other side. Under Order XLVII, rule 4, notice to the other side is imperative. Clause 2 (*a*) is as follows:—

"No such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree or order, a review of which is applied for."

The question is whether an order passed without notice is a nullity or only an irregular order which the Court had jurisdiction to pass. The District Judge has relied upon *Janki Nath Hore* v. *Prabhasini Dassee*(1) as supporting his view that the order of the Subordinate Judge was an order under Order XLVII. In that case it was held

"where an appeal was summarily dismissed by a Division Bench of this Court and such order was ultimately set aside on review by the said Bench on an *ex parte* application without notice to the respondents, that the last order was valid even in the absence of such notice."

The learned Judges held that the respondent was not "the opposite party" within the meaning of rule 4, clause 2 (*a*), interested to appear and support the order of dismissal when the only order sought to be substituted therefor was that the appeal be heard in his presence. With very great respect we are unable to follow the reasoning of the learned Judges. When an appeal is dismissed the decree of the lower Court is left undisturbed and the respondent is entitled to the benefit of such dismissal. They conceded that an order of review cannot be made without previous notice to the person interested in supporting the order sought to be reviewed,

(1) (1916) I.L.R., 43 Calc., 178.

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but their view was that there was no opposite party when the Court was moved to set aside the order of dismissal for default. This case was followed by another Bench of the Calcutta High Court in *Official Trustee of Bengal* v. *Benodi Behari Ghose Mal*(1). In that case though the learned Judges observed that they prefer to follow *Janki Nath Hore* v. *Prabhasini Dassee* (2) in preference to a previous decision in *Abdul Hakim Chowdury* v. *Hem Chandra Das*(3) they rest their decision upon the practice obtaining in the Calcutta High Court for forty years under which an appeal summarily dismissed under Order XLI, rule 11, is set aside on review by the same Bench. These two cases cannot be authority for the position that no notice is necessary in the case of a review of an order under Order XLVII, for the practice of the Calcutta High Court was rightly or wrongly to set aside a summary order of dismissal on an application made for that purpose. In *Abdul Hakim Chowdury* v. *Hem Chandra Das*(3) it was held that non-compliance with rule 4 of Order XLVII rendered the granting of an *ex parte* application for review a nullity. HOLWOOD, J., observes at page 439 :

"It is clear that non-compliance with rule 4 of Order XLVII renders the granting of this application for review, which was prejudicial to the respondent, a nullity and that such an application should not be granted without previous notice."

This judgment was concurred in by CHAPMAN, J.

Where the law requires that a certain formality should be complied with before an order could be made, it is not open to the Court to ignore the clear provision of the law and pass an order without complying with it. The notice to the opposite party is imperative under rule 4, clause 2 (*a*). It is urged by the respondent that, when the Subordinate Judge restored the petition

(1) (1924) I.L.R., 51 Calc., 943. (2) (1916) I.L.R., 43 Calc., 178.
(3) (1915) I.L.R., 42 Calc., 433.

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to file, the appellants should have preferred an appeal against that order ; when a remedy is open to a party against an irregular order made by a Court it should not be considered to be a nullity ; for the Court has power to review its own order and if it reviews it irregularly the party affected by the order should appeal against it and rule 7 (*b*) provides for an appeal if the Court granting the review contravenes the provisions of rule 4. The question is not whether the party to an illegal order has a remedy or not. If a Court does something which it is not authorized by law to do, that order has no legal force. Such an order is illegal and not merely an irregular one and a party is not bound by the illegal order. In *Surajpal Pandey* v. *Utim Pandey*(1), the learned CHIEF JUSTICE and COUTTS TROTTER, J., declined to follow the case in *Janki Nath Hore* v. *Prabhasini Dassee*(2) and held that

"where an appeal has been dismissed for default it cannot be restored under Order XLI, rule 19, which has no application to such a case; nor can it be restored under Order XLVII, rule 4, clause (2), without notice to the opposite party,"

and

"If the appeal is restored without such notice and disposed of without the opposite party becoming aware of the order of dismissal or restoration, that party is entitled, as soon as the matter is drawn to its notice even in Second Appeal to a hearing."

The order of the Subordinate Judge restoring the appeal to file cannot be considered to be a final order and the opposite party on coming to know of the order could urge any objection which it was open to him to urge if he had notice of the petition for restoration. This was clearly laid down by the Privy Council in *Krishnasami Panikondar* v. *Ramasami Chettiar*(3). In

(1) (1921) 63 I. C., 99. (2) (1916) I.L.R., 43 Calc., 178.
(3) (1918) I.L.R., 41 Mad., 412.

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that case SANKARAN NAYAR, J., without notice to the respondent, excused the delay in filing the appeal and admitted it. When it came for hearing after notice an objection was taken before the Division Bench which heard it as being out of time. The Division Bench after an examination of the affidavits filed on both sides dismissed the appeal as provided by section 4 of the Limitation Act It was contended before the Privy Council that the order of SANKARAN NAYAR, J., was final and that the Division Bench had no jurisdiction at the hearing of the appeal to reconsider the question whether the delay was excusable. Their Lordships observe at page 416:

"This order of admission was made not only in the absence of Ramaswami Chettiyar, the contesting respondent, but without notice to him. And yet in terms it purported to deprive him of a valuable right, for it put in peril the finality of the decision in his favour, so that to preclude him from questioning its propriety would amount to a denial of justice. It must, therefore, in common fairness be regarded as a tacit term of an order like the present that though unqualified in expression it should be open to reconsideration at the instance of the party prejudicially affected; and this view is sanctioned by the practice of the Courts in India."

The order of the Subordinate Judge therefore restoring the petition could not be considered to be a final order and is open to the objection of the other side, on any ground it was open to it if notice had been issued.

There are at least two stages in a review application. When a review application is filed, the Court gives notice to the opposite party and on hearing the opposite party if it considers there are grounds for re-opening the case it grants the application and if after review it sees reason to alter the order already passed, it modifies it. Against the order granting review there is an appeal under rule 7 of Order XLVII and against the final order passed after review there is also an appeal. Why should a party be deprived of the right of appeal by his not being given notice when the Court grants an application

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for review? The Lahore High Court in *Firm Gopal Mal Ganda Mal* v. *Hara Chand*(1) holds the view that an order granting an application for review of an order dismissing a suit for default is not illegal merely because notice of the application was not given to the opposite party, if that party has been given every opportunity to raise any objections that he could raise and was therefore in no way prejudiced by the non-issue of notice to him. Though the party against whom an order is made without notice is entitled to object to it afterwards, it is not competent to a Court to omit to give notice to the opposite party when the law requires that notice shall be given of an application before it is granted.

The order made by the Subordinate Judge restoring the execution application to file cannot be considered on the merits as an order under Order XLVII, Civil Procedure Code. Though the petition mentioned Order XLVII, rule 1, section 151 and Order IX, rule 9, yet the affidavit did not set out any grounds which would justify a review of the order. The absence of a pleader is not a ground for review. The grounds for review are set out in Order XLVII, rule 1, and the Privy Council has ruled that no Court is justified in reviewing an order made by it on any ground other than those mentioned in Order XLVII, or grounds which are similar to the grounds specifically mentioned therein. In *Chhajju Ram* v. *Neki*(2) a Bench of the Lahore High Court reviewed an order made by another Bench. Viscount HALDANE in delivering the judgment of their Lordships observed:

"They think that rule 1 of Order XLVII must be read as in itself definitive of the limits within which review is to-day permitted, and the reference to practice under former and different statutes is misleading. So construing it they interpret

(1) (1923) 75 I.C., 656. (2) (1922) I.L.R., 3 Lah., 127.

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the words 'any other sufficient reason' as meaning a reason sufficient on grounds at least analogous to those specified immediately and previously."

The order of the Subordinate Judge restoring the appeal to file cannot be treated as an order under Order XLVII, rule 1.

It is next contended for the respondent that the Court has power under section 151 to correct its own errors or to pass an order which it thinks proper in the interests of justice. In *Bholu* v. *Ram Lal*(1) it was held that

"In the exercise of its inherent power expressly recognized by section 151 of the Code, a Court can restore an application for execution after it has dismissed it for default and should do so notwithstanding that the applicant has an alternative remedy by making a second application for execution if he satisfies the Court that it should exercise its inherent jurisdiction *ex debito justitiae*."

In that case reliance was placed upon *Debi Bakhsh Singh* v. *Habib Shah* (2) as supporting the view taken by it. In *Debi Bakhsh Singh* v. *Habib Shah*(2) the plaintiff was dead and the Court not being aware of his death, dismissed the suit for the non-appearance of the plaintiff. The Privy Council held that the dismissal was an abuse of the process of the Court. Their Lordships observe at page 337 :

"Quite apart from section 151, any Court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made."

Where the Court passes an order inadvertently or without being aware of certain facts which should have been brought to its notice it has power to correct an error committed by it, not owing to the negligence of a party, but owing to its not being aware of certain facts. What applied to a person who makes default in appearing before the Court cannot apply to a deceased person,

(1) (1921) I.L.R., 2 Lah., 66. (2) (1913) I.L.R., 35 All., 331 (P.C.)

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for he cannot appear before the Court and a Court has no power to dismiss a suit for default when the plaintiff is dead, and if it does without being aware of the fact, it can correct the wrong order made by it.

In this case it cannot be said that the application was dismissed for default of appearance. The decree-holder was asked to furnish certain information to the Court to enable it to proceed with the execution. He having failed to furnish the information or produce the necessary papers for proceeding with the execution, has brought himself within Order XXI, rule 57, and the dismissal of the application cannot therefore be considered to be a dismissal for default of appearance. It is strongly urged by Mr. Patanjali Sastri that the respondent would lose the benefit of his decree, for any subsequent application would be barred by the twelve years' rule and therefore the Court should use its inherent power to restore the application to remedy the wrong. The decree-holder can always file a fresh application for execution if the previous one is dismissed and the fact that a fresh application would be barred by limitation would not give jurisdiction to the Court which it does not otherwise possess. With very great respect, we are unable to agree with the learned Judge who decided *Bholu* v. *Ram Lal*(1) that the inherent power of the Court should be invoked in cases in which the second application may be barred by limitation. In *Babui Ritu Kuer* v. *Alakhdeo Narain Singh*(2) it was held that the Court should not use its inherent powers for the purpose of restoring execution cases. SUHRAWARDY, J., in *Saradindu Mukerjee* v. *Giresh Chandra Tewari*(3) takes the view that

"If an execution case is erroneously dismissed for default and the decree-holder applies for the restoration of the case by

(1) (1921) I.L.R., 2 Lah., 66. (2) (1919) 4 Pat. L.J., 330. (3) (1924) 78 I.C., 816.

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way of review, the application for restoration was one under section 151 of the Civil Procedure Code, and the mere fact that it was also described as an application for review did not give the judgment-debtor a right of appeal against the order of restoration."

The Bombay High Court in *Sonubai* v. *Shivaji Rao*(1) held that

"Where an application is made to readmit an appeal dismissed for default, it was open to the Court to exercise its inherent powers to deal with the application under section 151 of the Civil Procedure Code and make an order to the effect for the ends of justice or to prevent abuse of the process of the Court, without any reference to the period of limitation fixed for application to readmit appeals or to restore any other proceeding dismissed for default."

When an application is granted under section 151 of the Civil Procedure Code, the party affected by the order has no right of appeal, as observed by SUHRAWARDY, J., in *Saradindu Mukerjee* v. *Giresh Chandra Tewari*(2). Should the Court use such powers in such a way as to give an unfair advantage to one party over the other because it thinks that the ends of justice do require it? Justice should be administered according to law and procedure. It may be that in administering the law the Court may feel that one party gains an unfair advantage over the other. But it is not open to a Court to ignore the procedure laid down for its guidance and grant reliefs when it thinks such a relief should be granted without following the procedure laid down for its conduct. If the provisions of section 151 are given the extended interpretation which some Courts are prepared to give them, the Courts may overlook the rest of the Procedure Code whenever it considers that the ends of justice do require that a certain order should be passed. Section 151 enables a Court to make such orders as may be necessary for the ends of justice and to prevent the abuse of the process

(1) (1921) I.L.R., 45 Bom., 648. (2) (1924) 78 I.C., 816.

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of the Court. The law of limitation works hardship upon persons who have legitimate claims against their opponents, but the legislature has enacted the law of limitation; and it would not be right for the Court to overlook the law of limitation on the ground that the claim is a *bona fide* one and the defence on the ground of limitation is immoral. When the law lays down certain procedure for parties who are affected by any order, the mere fact that the law of limitation steps in and prevents the party from claiming relief under the procedure, is not sufficient justification for the Court to grant a relief under section 151. In this connexion reference may be made to *Neelaveni* v. *Narayana Reddi* (1). There OLDFIELD, J., observed at page 151:

"That our Courts possess inherent power is recognized in section 151 of the Civil Procedure Code. But the exercise of the power in a particular form in which it is invoked must be justified in each case in the manner authorized by authority . . . And generally the legitimacy of its exercise must be tested with reference to the principles which authority has prescribed."

In that case it was held

"that a Court has no power, apart from the provision of Order IX, rule 13 of the Civil Procedure Code, to set aside an *ex parte* decree passed by itself."

Though a Court may feel that an *ex parte* decree was improperly passed, it cannot get it aside by invoking its power under section 151. The application to set aside an *ex parte* decree can only be granted if the conditions laid down in Order IX, rule 13, are satisfied. In *Somayya* v. *Subbamma*(2), it was held that if the Court sees sufficient reason to grant the application it could do so, but that decision was overruled by the decision in *Neelaveni* v. *Narayana Reddi*(1). We hold that the order restoring the execution application to file cannot be said

(1) (1920) I.L.R., 43 Mad., 94. (2) (1903) I.L.R., 26 Mad., 599.

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to be an order passed under section 151. The first respondent could have presented a fresh application for execution, but owing to the law of limitation he is precluded from doing so and that would not give jurisdiction to a Court to invoke the aid of section 151. Mr. Patanjali Sastri very strongly urged that his client would lose about Rs. 5,000. However dishonest the conduct of the appellants might have been, they are entitled to the relief which the law gives them. We therefore, with much regret, allow the appeal, but in the circumstances disallow the costs of the appeal.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Madhavan Nayar.

1926, March 2.

BATHINA SUBBARAMI REDDI (PETITIONER), PETITIONER,

v.

GANESAM PATTABHIRAMI REDDI (RESPONDENT), RESPONDENT.*

Guardians and Wards Act (IX of 1890), ss. 41 (3), (4)—Minor attaining majority—Discharge of guardian by Court—Accounts, filed by guardian—Application to Court by quondam minor to enquire into the correctness of accounts filed by guardian—Court, whether competent to inquire in proceedings under the Act—Remedy by suit—Scheme of the Act—Court, not bound to declare guardian discharged from liability to minor—Disputes between minor and guardian to be determined only by suit and not by proceedings under the Act.

Where a minor, to whom a guardian had been appointed under the Guardians and Wards Act, 1890, attained majority

* Civil Revision Petition No. 400 of 1925.

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and the guardian was discharged and filed his accounts, the Court should not hold an enquiry under the Act into the correctness of the accounts and determine what amount or property was really accountable by the guardian to the minor.

The whole scheme of the Act seems to provide for matters of this kind, i.e., disputes between the minor and the guardian, by way of a suit by the minor against the guardian and not by way of proceedings under the Act.

Under section 41 (4), the Court is not *bound* to declare the guardian discharged from his liabilities and so is not bound to make an enquiry into the correctness of the accounts filed by him. *Nabu Bepari* v. *Sheikh Mahomed*, (1900) 5 C.W.N., 207; *Jagannath Panja* v. *Maheshchandra Pal*, (1916) 21 C.W.N., 688; and *Abdul Hasim* v. *Maleka Khatun*, 29 C.L.J., 44, followed; *Sitaram* v. *Musamat Govindi*, (1924) I.L.R., 46 All., 458, dissented from.

REVISION PETITION praying the High Court to revise the order of A. S. BALASUBRAHMANYA AYYAR, District Judge of Nellore, in I.A. No. 402 of 1924 in O.P. No. 85 of 1918.

The respondent was appointed guardian of the property of the petitioner during his minority, under the Guardians and Wards Act, 1890. The minor attained majority in 1924. The respondent applied to the District Court for being discharged from guardianship as the minor had come of age. The Court ordered his discharge from guardianship. But the respondent did not file his accounts into Court or deliver them or any property to the minor at any time. The petitioner filed the present application in the District Court under section 41 of the Act, praying that the guardian might be ordered to bring in and pass before the Court an account of the properties of the minor that came into his hands during his guardianship, and to deliver the properties of the minor which were ascertained on enquiry to be in his hands. The respondent filed certain accounts into Court and stated that he was in possession of Rs. 4,137 and odd and not Rs. 16,000 as

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alleged by the petitioner. The petitioner requested the District Judge to hold an enquiry into the correctness of the accounts filed and ascertain the real liability of the respondent in these proceedings. The District Judge declined to make an enquiry and passed an order as follows:—

"The accounts are filed. The petitioner will institute a suit if so advised against the discharged guardian on the items in the accounts to which he wishes to take objection."

Against this order, the petitioner filed this Civil Revision Petition.

B. Somayya for petitioner.

M. Patanjali Sastri for respondent.

JUDGMENT.

PHILLIPS, J.

PHILLIPS, J.—This is a petition under the Guardians and Wards Act. The minor having attained majority, the guardian was discharged and filed his accounts in Court. The minor took objection to these accounts and wished the Court to hold an enquiry and ascertain what amount was really due by the guardian. The District Judge has declined to hold any enquiry and has referred the minor to a suit if so advised. It is now contended for the petitioner, the late minor, that this order is wrong and that under section 41 (4) the Court ought to have held an enquiry and discharged the guardian after ascertaining what was due from him. There is no specific provision in the Act for such taking of accounts and determining the amount due by the guardian, but it is contended that in view of the fact that section 41 (4) says "the Court may declare him to be discharged from his liabilities," etc., this can only be done after an enquiry has been held, but it must be observed that there is no mandate in this section and it is not necessary that the Court should make such a declaration. Undoubtedly, if

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it were incumbent on the Court to make such a declaration, the Court would not be able to do so without holding an enquiry. It has been held by the Calcutta High Court in three cases *Nabu Bepari* v. *Sheikh Mahomed*(1), *Jagannath Panja* v. *Maheshchandra Pal*(2) and *Abdul Hasim* v. *Maleka Khatun*(3) that under the Guardians and Wards Act no such enquiry should be held. The Allahabad High Court has taken a contrary view in *Sita Ram* v. *Musammat Govindi*(4) and there is also the opinion of a Judge of this Court in C.R.P. No. 761 of 1922 to the effect that the Court ought to take an account. To deal with this last case first, the learned Judge seems to have come to this conclusion on the ground that he was unable "to concede that the Court is bound to accept without scrutiny any accounts that the guardian chooses to submit." This will certainly be applicable if the Court were bound to make the declaration mentioned in section 41 (4), but if the Court is not so bound, it does not seem necessary that there should be such an enquiry. If the Court is satisfied on a perusal of the accounts and on hearing the parties that the accounts are correct, it may make such a declaration, but it is not bound to do so, nor is it bound to certify that the accounts are correct. The whole scheme of the Act seems to provide for matters of this kind, i.e., disputes between the minor and the guardian, by way of suit. During the minority sections 35 and 36 provide for suits being filed by a next friend of the minor in case of misconduct on the part of the guardian, and there can be no doubt that, when the minor attains majority, he can bring a suit against his guardian. There being no provision at all for any enquiry into accounts by the

(1) (1900) 5 C.W.N., 207.
(2) (1916) 21 C.W.N., 688.
(3) 29 C.L.J., 44.
(4) (1924) I.L.R., 46 All., 458.

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Court, I think the opinion expressed by the Calcutta High Court is the correct one. This view obtains support from section 34 (*c*) and (*d*) where it is provided that the guardian must exhibit his accounts in the Court at such times and in such form as the Court from time to time directs and that if so required by the Court the guardian must pay into Court the balance due from him on those accounts, or so much thereof as the Court directs. These provisions presume that the accounts are correctly submitted and the Court may take action on such accounts, but no provision is made for an enquiry as to whether the accounts are correct or not. Similarly, under section 41 (3) when a guardian has been finally discharged, the Court may require him to deliver any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward. This section quite clearly assumes that a guardian will put in the accounts that he has been directed to keep into Court and that these accounts will be accepted subject to the minor's rights, or those of a next friend on his behalf, to question them in proper proceedings. If the Court were to hold an enquiry and come to the conclusion that the guardian owed a much larger amount than that stated in his accounts, there is no provision for enforcing any such order. Further, such an order is not appealable under section 47, and under section 48 an order made under the Act is final and is not liable to be contested by suit or otherwise. If therefore the Court made an order that the guardian was to pay a definite sum into Court, such an order could not be contested by a suit and there would be no remedy left either for the guardian or for his ward. This seems to be contrary to the intention of the Act, which as I have said before appears to leave all these questions for decision by a suit

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outside the guardianship proceedings. The interests of the minor are sufficiently protected firstly by the selection of a guardian by the Court, secondly by the control of the Court over such guardian. With all respect, I am unable to agree in the conclusions of the Allahabad High Court, for I do not think the arguments are very convincing. I prefer to follow the opinion of the Calcutta High Court referred to above and hold that the Court should not hold an enquiry and pass orders in such matters.

The District Judge's order is therefore correct and this petition is dismissed with costs.

MADHAVAN NAYAR, J.

MADHAVAN NAYAR, J.—I entirely agree. The concluion which we have arrived at in this case is also supported by the reasoning in C.M.A. No. 269 of 1925 to which I was a party. In that case it was held that, under section 45 (1), clause (*c*), a guardian is not expected to deliver "property or accounts" which he has not actually got in his possession. In other words, it was held that the property to be delivered is the property which is actually in the possession of the guardian and not what he should have with him according to the opinion of the Court; and so also, the accounts to be delivered are those which have been actually kept by him and not those which according to the Court are the correct accounts. The phrase used in section 41 (4) "when he has delivered the property or account" is the same as used in section 45 (1) (*c*) and may be understood also in the same way.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Madhavan Nayar.

1926, March 10.

KRISHNASAMY CHETTIAR AND ANOTHER (PETITIONERS), PETITIONERS,

v.

GHULAM MUHAMMAD GHOUSE SAHIB AND ANOTHER (RESPONDENTS), RESPONDENTS.*

Madras Local Boards Act (XIV of 1920)—Election Rules under the Act, rule I—Only one candidate for presidentship, nominated—Such candidate, deemed elected—Election petition filed against the appointment, competency of—Election, meaning of.

Where only one candidate for the presidentship of a local board has been nominated and in accordance with the rules has been deemed to be elected, no election petition will lie against this appointment.

Election means selection of one out of two or more candidates, and therefore the return of a solitary candidate is not, strictly speaking, an election by the electors, for the electors have had no say whatever in the matter.

REVISION PETITION filed against the order of the Subordinate Judge of Cuddalore in O.P. No. 44 of 1925.

The material facts appear from the judgment.

T. R. Ramachandra Ayyar and *S. R. Dikshit* for petitioners.

T. M. Krishnaswami Ayyar and *S. Srinivasa Ayyar* for respondents.

JUDGMENT.

The question here is whether where only one candidate for the presidentship of a local board has been nominated and, in accordance with the rules, has been deemed to be elected, an election petition will lie against this appointment. The question has been considered by

* Civil Revision Petition No. 1166 of 1925.

JACKSON, J., in *Srinivasachariar* v. *Venkatarama Iyer*(1) and he has come to the conclusion that no such petition will lie. His opinion is based on the wording of rule 1 of the rules for the decision of disputes. This decision is in a case under the Madras District Municipalities Act, whereas the question here arises under the Madras Local Boards Act, but the rules framed under each of these Acts are practically identical. The important words are in rule 1, that is,—

"No election . . . shall be called in a question except by an election petition . . . by any candidate or elector against the candidate (here in after called the returned candidate) who has been declared by the president of a local board to have been duly elected."

In the present case a successful candidate, who can hardly be called the "returned candidate" as he was the only one nominated, has not been declared by the president of the local board to have been duly elected, but under the rules he is *deemed* to have been elected. Similarly, it is difficult to hold that there was any other candidate who could present a petition or even any elector when no election has been held. Election means selection of one out of two or more and therefore the return of a solitary candidate is not, strictly speaking, an election by the electors, for the electors have had no say whatever in the matter. For these reasons we agree with the view taken by JACKSON, J. The authority to the contrary in *Sarvothama Rao* v. *The Chairman, Municipal Council, Saidapet*(2) is hardly in point, because this question was not argued before that Bench. The question there was whether Civil Courts had jurisdiction to entertain certain suits, and there is an observation in the judgment that the remedy lay by means of an election petition, but the point now taken was not discussed there. The petition is accordingly dismissed with costs.

K.R.

(1) (1924) 47 M.L.J., 762. (2) (1924) I.L.R., 47 Mad., 585.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Sundaram Chetti.

1926, September 8.

THAYAMMAL AND ANOTHER (DEFENDANTS), PETITIONERS,

v.

K. A. RATHNAVELU NADAR (PLAINTIFF), RESPONDENT.*

Sec. 9 of Madras City Tenants Protection Act (III of 1922)—"Service of summons" must be personal—15 days' limitation not applicable, if no personal service.

Service of summons on the defendant under section 9 of the Madras City Tenants Protection Act (III of 1922) should be personal and not by any other means. Hence where the summons was said to have been served on him by its being affixed to the outer door of his house, he is not bound to apply within 15 days of the affixture of the summons for the sale to him of the landlord's land.

PETITION under sections 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the Order of the Full Bench of the Court of Small Causes, Madras, in Full Bench Application No. 24 of 1926 preferred against the Order of P. SAMBANDA MUDALIYAR, Second Judge of the Court of Small Causes, Madras, in Ejectment Suit No. 469 of 1925.

The facts are given in the judgment. Section (9) of the Madras City Tenants Protection Act is as follows :—

"Any tenant who is entitled to compensation under section 3 and against whom a suit in ejectment has been instituted or proceeding under section 41 of the Presidency Small Cause Courts Act, 1882, taken by the landlord, may, within fifteen days after the date of this Act coming into force or within fifteen days after the service on him of summons, apply to the Court for an order that the landlord shall be directed to sell the land for a price to be fixed by the Court."

* Civil Revision Petition No. 239 of 1926.

C. S. Nageswara Ayyar for petitioner.

R. Thirumala Thathachariar for respondent.

JUDGMENT.

This is an application to revise the order of the Second Judge of the Court of Small Causes, Madras, dismissing an application of the petitioners under section 9 of the Madras City Tenants Protection Act, III of 1922. The petitioners are tenants. The respondent filed an ejectment suit and the summonses in the suit were fixed to the houses of the petitioners as it was said that they had gone out. This was on 21st December 1925. The petitioners filed their application under section 9 on 6th January 1926. On objection by the respondent, the application was dismissed as being out of time, for under section 9 the application has to be made within 15 days after the service of summonses. It is contended before us that the learned Judge did not record a finding that the service was good and that he did not take evidence as regards the allegations of the petitioners that they were not aware of the affixture of the summonses to the door of their houses and that they came to know of the filing of the suit only on 2nd January 1926. The learned Judge would have done well to have made a thorough inquiry into the allegations of the petitioners and satisfied himself that they were served before declaring the service to be good. But we do not propose to interfere with his order on this ground.

Under section 9 of the Act the service should be personal service. The relevant portion of the section is "within 15 days after the service on him of summons

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apply to the Court, etc." The expression "service on him of summons" we think, means that the service should be personal service. No doubt in the case of summonses under the Civil Procedure Code and under the Presidency Small Cause Courts Act, the service need not be personal. But taking into consideration the nature and the scope of Act III of 1922 and the fact that the defendant will have no opportunity of applying under section 9 if he does not make an application within 15 days, we think that the expression "service on him of summons" can only mean personal service. No doubt, we are aware of the difficulties that the plaintiff or any other landlord may encounter on account of the avoidance of service by the tenants, but that would be no ground for not giving the words of section 9 the plain meaning that they are capable of bearing. If the legislature wanted the service only to be good service, then the wording should have been "after due service" or "after proper service on him of the summons." In this view of section 9 of the Act, we hold that the petitioners were not served with summonses in the suit and therefore their application of 6th January 1926 was not out of time. We set aside the order of the learned Judge and direct him to restore the application to file and deal with it according to law.

The petitioners are entitled to the costs of this application. The costs of the suit will be provided for in the decree that may be passed by the Judge.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

1925, October 5.

KANARI VENKATA SIVA RAO AND OTHERS (COUNTER-PETITIONERS—DEFENDANTS), PETITIONERS

v.

CHITTOORI RAMA KRISTNAYYA (PETITIONER—PLAINTIFF), RESPONDENT. *

Madras Village Courts Act (I of 1889), *sec.* 78—*Rr.* 18 (*a*) *and* 64—*Election of members of Panchayat Court—Suit in a Civil Court for declaration that election is void—Maintainability of suit—Rules, constituting a special tribunal for deciding validity of elections, whether* ultra vires—*Application for injunction—Order, whether valid or proper.*

A Civil Court has no jurisdiction to entertain a suit to obtain a declaration that the election of certain persons as members of a Panchayat Court is void.

Rules framed by the Governor in Council under section 78 o' the Madras Village Courts Act (I of 1889), constituting special tribunals (namely, Revenue Divisional Officer and the Collector) to inquire into and decide objections to elections, are not *ultra vires*, as the power to constitute a tribunal is a necessary part of the power to regulate the appointments, etc., conferred by the section.

Thimma Reddi v. *The Secretary of State*, (1924) I.L.R., 47 Mad., 325, referred to.

REVISION PETITION against the order of J. VENKATA RAO, District Munsif of Bezwada, in I.A. No. 208 of 1924 in O.S. No. 98 of 1924.

This Revision Petition arises out of an application for a temporary injunction filed by the plaintiff in a suit instituted by him to obtain a declaration that the election of the defendants as members of a Panchayat Court was void. The District Munsif granted a temporary injunction against the defendants that they should not exercise the powers as members of a Panchayat Court pending disposal of the suit. Against this order, the defendants, who were respondents in the lower Court, preferred this revision petition. It appeared that

* Civil Revision Petition No. 482 of 1924.

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the plaintiff did not prefer any objection petition before the Revenue Divisional Officer, as provided in rule 18 (*a*) framed under the Act.

L. A. Govindaraghava Ayyar and *P. Satyanarayana Rao* for petitioners.

V. Ramadoss for respondents.

JUDGMENT.

This Revision Petition arises out of a suit filed in the Court of the District Munsif, Bezwada. The object of the suit was to obtain a declaration that the election of the defendants as members of the Panchayat Court of Bezwada was void. Pending the trial of the suit, the plaintiff applied for a temporary injunction restraining the defendants from entering upon their duties as panchayatdars. The District Munsif decided that he had jurisdiction to entertain the suit and proceeded to grant the injunction applied for. The result—but for the interference of this Court—might have been to deprive the citizens of Bezwada for several years of the services of a Panchayat Court. Rule 64 of the rules framed by Government under the Village Courts Act provides fully for the competency of the proceedings of Panchayat Courts despite defects in their constitution or in the qualifications of their members; so that it was as unnecessary as it was undesirable for the Munsif to have passed the order he did.

Apart from that, we are of opinion that he had no jurisdiction to entertain the suit. Rules have been framed by Government under the Act to regulate the election of panchayatdars. Rule 18 (*a*) lays down that objections to an election shall be made within 7 days after the election to the Revenue Divisional Officer, who shall enquire, and except in certain cases which are to be referred to the Collector, pass orders. Sub-section (*b*) declares that the orders of the Revenue Divisional Officer and the Collector respectively shall be final and not liable to be contested by suit or otherwise. It does

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not appear that the plaintiff made any attempt to comply with these rules. Instead of doing so, he has resorted to a method of contesting the election, which has been expressly excluded by the rules. The law on the subject has been stated in *Thimma Reddi* v. *The Secretary of State*(1) to which decision one of us was a party. It is this. That when a public body has been created by a statute and that statute empowers Government to frame rules for its working, it is open to Government to create a forum for the purpose of deciding disputes as to elections directed to be carried out under the statute and thereby to exclude the jurisdiction of the ordinary Civil Courts. The same principle is laid down in *Bhaishankar* v. *The Municipal Corporation of Bombay*(2):

"Where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of the Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive. It is an essential condition of those rights that they should be determined in the manner prescribed by the Act, to which they owe their existence. In such a case, there is no ouster of the jurisdiction of the ordinary Courts, for they never had any."

In this case, the jurisdiction of the Courts has been excluded by express words.

It is, of course, argued that the rules framed under section 78 of the Act are *ultra vires*. That section empowers the Governor in Council to make rules to "regulate the appointments or elections of Presidents and other members of the Panchayat Courts." It is, we think, a necessary part of this power of regulation that Government should appoint a tribunal to enquire into and decide objections to such elections.

The Revision Petition is allowed with costs throughout.

K.R.

(1) (1924) I.L.R., 47 Mad., 325. (2) (1907) I.L.R., 31 Bom., 604.

APPELLATE CIVIL—FULL BENCH.

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

1926, May 7.

KANDAPPA MUDALIAR AND FIVE OTHERS (DEFENDANTS), APPELLANTS,

v.

S. R. MUTHUSWAMI AYYAR AND SONS (PLAINTIFFS), RESPONDENTS.*

Indian Contract Act (IX of 1872), sec. 73—Interest Act (XXXII of 1839)—Contract to supply goods—Payment of advance—Breach—Right to interest on advance.

Held by the Full Bench (RAMESAM, J., dissenting) that in the absence of any demand or of any stipulation as to interest, a person who has advanced money to another for supply of goods at a certain time is entitled on default to recover only the advance and damages, viz., the difference in price between the contract rate and the market rate, and not also interest on the advance by way of damages for the period between the date of breach and the date of suit.

Per RAMESAM, J. In such a case, interest also is recoverable by way of damages, under section 73 of the Indian Contract Act.

APPEAL from the decree of T. N. LAKSHMANA RAO, Additional Subordinate Judge of Madura, in Original Suit No. 19 of 1922 on the file of his Court.

In this case the plaintiffs advanced under an agreement, dated 28th August 1918, Rs. 8,100 to the defendants who agreed to supply bales of yarn at certain prices. Alleging that the defendants supplied only four bales valued about Rs. 436 and broke the contract as to the rest by the end of October 1918, the plaintiffs filed this suit for recovery of balance of advance, viz., Rs. 7,764 and Rs. 2,774 as interest thereon at one per cent per mensem from the date of agreement, viz., 28th

* Appeal No. 202 of 1923.

August 1918 up to the date of suit, viz., 16th August 1921. The defendants pleaded *inter alia* that the consideration had failed, that the plaintiffs abandoned the contract and that the plaintiffs were not entitled to the return of the advance or interest. Accepting the version of the plaintiffs, the Subordinate Judge gave a decree to the plaintiffs for the balance of advance and interest at 1 per cent thereon from the date of breach, viz., 1st November 1918, up to date of decree with further interest at 6 per cent on the total amount from the date of decree. The defendants preferred this appeal.

This appeal coming on for hearing, the Court (COUTTS TROTTER, C.J. and VISWANATHA SASTRI, J.), made the following

ORDER OF REFERENCE TO A FULL BENCH.

THE CHIEF JUSTICE.—I have had the advantage of perusing the learned judgment about to be delivered by my brother. I think that the difficulty that I feel can be shortly put as follows. This money was not payable under a contract; it was money of the buyers in the seller's hands, which he was bound in conscience to return, as the contract had wholly failed.

Assuming, therefore, that the matter is one not covered by the Act, can we say that equity would compel the seller not merely to return the money, but to pay interest on it? No English Court would award interest on such a cause of action so far as I know, and it seems to me inconsistent with the nature of the remedy. However, as the matter is one of constant recurrence, and as the two recent Madras authorities *Rajah of Pittapur* v. *Ballapragada Pallamraju*(1) and *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*(2) are not very easy to reconcile entirely, I think it will be best to refer the matter to a Full Bench.

VISWANATHA SASTRI, J.—Appeal by defendants against the decree of the First Additional Subordinate Judge, Madura, in Original Suit No. 19 of 1922.

The suit was for the recovery of Rs. 10,538-7-0 being the amount of principal and interest due in respect of a yarn

(1) (1921) 40 M.L.J., 18. (2) (1919) I.L.R., 42 Mad., 661.

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contract entered into on 28th August 1918. Out of the sum claimed, Rs. 7,764 represents the balance of advances made on six different dates; and Rs. 2,774-7-0 represents the interest thereon at 12 per cent per annum from 28th August 1918 up to 16th August 1921.

One of the questions for consideration is whether plaintiffs were entitled to claim interest for a period prior to the institution of the suit. It was argued before us (1) that the recital in Exhibit A precluded the award of interest; (2) that "plaintiffs were not entitled to any interest as they made no demand prior to suit"; (3) that interest at 12 per cent per annum ought not to have been awarded from 1st November 1918 till date of decree; and (4) that interest at 12 per cent per annum by way of damages was excessive.

Exhibit A contains the agreement between the parties. The portion relied on runs as follows:—"Out of the amount arrived at the rate of Rs. ..... per packet sold to you, at the time when the delivery of the said bales is made, we shall make deduction at the rate of Rs. ..... as advance *not carrying any interest* for each bale out of the ..... bales purchased." It was contended that since the agreement stated that the advance was not to carry any interest, it was not open to plaintiffs to claim any interest. The vakil for the respondents contended that the agreement contemplated the delivery of the bales, and stated the course to be adopted in case of delivery; and that it said nothing as to interest being payable in case there was no delivery, and the advance amount had to be returned. It appears to me that the contention of the vakil for the respondents must prevail. If the contention of appellants' vakil is accepted, the logical consequence would be that plaintiffs would be precluded from claiming back the advance in case there was no delivery.

The second contention is based upon the provisions of the Interest Act, 1839. This Act introduced into British India the provisions of section 28 of Lord Tenterden's Act (Statute 3 and 4 William IV, Chapter 42); and, according to its provisions, Courts before which "debts or sums certain payable at a certain time or otherwise" were sought to be recovered, may if they thought fit "allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable if such debts or sums be payable by virtue of some written instrument at a certain date, or if payable otherwise, then from the time when demand of payment shall

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have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment." And then comes the following proviso:—"Provided that interest shall be payable in all cases in which it is now payable by law." It was urged before us that no demand was made prior to suit; and that interest could not be awarded by way of damages apart from the provisions of the Interest Act. In support of this contention the case of *Campbell* v. *Williams Chard & Co.*(1) was relied upon. In that case plaintiff had on 26th March 1921 agreed to purchase a motor car from defendants and defendants were to overhaul the car before delivery. Two sums of Rs. 1,000 and Rs. 500 were advanced on 29th March 1921 and 20th April 1921. At a trial run on 16th May 1921 the car was found to be not in working order; and, on 17th May 1921, plaintiff wrote for a refund. This was followed by a similar demand on 7th June 1921, and, on 31st October 1922, plaintiff's solicitors wrote to the defendants demanding a refund of Rs. 1,500 with interest at 9 per cent. The learned Judge (FAWCETT, J.) held, following the case of *London, Chatham and Dover Railway Company* v. *South-Eastern Railway Company*(2) that "interest could not be awarded by way of damages apart from the special provisions of the Interest Act" and awarded interest only from 31st October 1922.

As observed by the Privy Council in *Hurropersaud Roy* v. *Shamapersaud Roy*(3) Lord Tenterden's Act "has given rise to a great number of decisions, all of which are not easily reconcilable." This will also appear on a perusal of the judgment of Lord HERSCHELL, L.C., in *London, Chatham and Dover Railway Company* v. *South-Eastern Railway Company*(2). The same may also be said of the decisions under the Indian Act. In *Hurropersaud Roy* v. *Shamapersaud Roy*(3) the Privy Council held that independently of the provisions of the Interest Act, a decree might award interest on mesne profits from the date of the institution of the suit in which they were claimed. The proviso was held to refer "to the state of the law and the practice in *India* independently of the statute." In *Hamira Bibi* v. *Zubaida Bibi*(4) the question arose as to whether or not the widow of a Muhammadan, placed in possession of her

(1) (1923) 25 Bom. L.R., 837. (2) [1893] A.C., 429.
(3) (1878) I.L.R., 3 Calc., 654 at p. 660.
(4) (1916) I.L.R., 38 All., 581 (P.C).

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husband's estate in lieu of dower, was entitled when called upon by her husband's heirs to account for the rents and profits received by her during the period of her possession, to claim interest upon the amount of dower. The Privy Council held that Act XXXII of 1839 had no application, and that on equitable considerations she ought to be allowed some reasonable compensation which was "best calculated on the basis of an equitable rate of interest." In *Saunadanappa* v. *Shivbasawa*(1), it was held by CHANDRAVARKAR and PRATT, JJ., that where the parties were Hindus governed by the law of Mitakshara, Courts in India may, under special circumstances, award interest by way of damages when a deposit was wrongly withheld. And this decision was arrived at on a consideration of the decision of the Privy Council in *Hurropersaud Roy* v. *Shamapersaud Roy*(2). At page 660 of the report, the Lords of the Privy Council refer to the proviso, and state that it "refers to the state of the law and the practice in India independently of the statute." The case in *Saunadanappa* v. *Shivbasawa*(1) was referred to by FAWCETT, J., in *Campbell* v. *Williams Chard & Co.*(3) and explained on the ground that the decision turned upon applying the rules of Hindu Law. In *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*(4) a Bench of this Court (AYLING and SESHAGIRI AYYAR, JJ.) held that the Interest Act was not exhaustive of all cases where interest is allowable, and that the proviso saved cases in which it was legally allowable. In that case the suit was for a sum of money which was payable to the plaintiff (a Muhammadan lady), as and for her share, on taking accounts of the business which was carried on by her father and continued by her brothers after his death, and it was held that the proviso applied. In *Arunachellam Chettiar* v. *Raja Rajeswara Sethupathi*(5), the suit was to recover from a lessee sums collected from ryots after the term of his lease had expired, and it was held following *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*(4), that interest could be awarded on such collections by way of damages, although such award may not properly be made under the Interest Act. At page 76, KRISHNAN, J., says "It is true that there was no contract to pay interest, and that interest was not awardable under the Interest Act either, as there was no demand made for payment. But it is now

(1) (1907) I.L.R., 31 Bom., 354. (2) (1878) I.L.R., 3 Calc., 654 (P.C.).
(3) (1923) 25 Bom. L.R., 837. (4) (1919) I.L.R., 42 Mad., 661.
(5) (1922) 42 M.L.J., 74.

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settled that, apart from contract and the Interest Act, it is open to the Court to decree interest by way of equitable relief in a proper case, where justice, equity and good conscience require it." In *Venkatachalam Chettiar* v. *Ponnuswami Iyengar*(1), WALLACE, J., following *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*(2) held that "the Interest Act was not exhaustive of all cases in which interest is allowable."

There are three decisions of this Court where a view was taken opposed to that taken in the case in *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*(2) and two of them, *Kamalammal* v. *Peeru Meera Levvai Rowthen*(3) and *Subramania Ayyar* v. *Subramania Ayyar and others*(4) have been explained by SESHAGIRI AYYAR, J., in *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*(2) as having been cases under the Act. In *Saunadanappa* v. *Shivbasawa*(5), CHANDRAVARKAR, J., referring to *Kamalammal* v. *Peeru Meera Levvai Rowthen*(3) says that the attention of the learned Judges who decided that case was not drawn to the observations of the Privy Council in *Hurropersaud Roy* v. *Shamapersaud Roy*(6). The third case is *Rajah of Pittapur* v. *Ballapragada Pallamraju*(7) and to it SESHAGIRI AYYAR, J., was also a party. The suit was by a contractor to recover money payable for work done under a building contract which provided that all work done was to be paid for within a reasonable time after it had been inspected and approved; and it was held that interest could not be awarded.

Mr. Alladi Krishnaswami Ayyar referred us to several English decisions, and stated that the decision of the House of Lords in *London, Chatham and Dover Railway Company* v. *South-Eastern Railway Company*(8) precluded the award of interest. This decision was also relied upon at the bar in *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*(2) and SESHAGIRI AYYAR, J., observes as follows at page 667:—"The noble Lords who took part in the discussion, especially Lord HERSCHELL, point out that there has been a course of decisions in England which tied the hands of Courts from awarding interest on equitable grounds; and they regretted that they

(1) (1924) 47 M.L.J., 312. (2) (1919) I.L.R., 42 Mad., 661.
(3) (1897) I.L.R., 20 Mad., 481. (4) (1908) I.L.R., 31 Mad., 250.
(5) (1907) I.L.R., 31 Bom., 354 at page 359.
(6) (1878) I.L.R., 3 Calc., 654. (7) (1921) 40 M.L.J., 18.
(8) [1893] A.C., 429.

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were obliged on the principle of *stare decisis* to decline to re-open the question. There is no such course of decisions in this country. On the other hand the Privy Council held very early that on principles of equity, justice and good conscience which are specially referred to in the Civil Courts Act, the Courts in India are at liberty to award interest in cases not coming within the purview of the Interest Act. The Indian Courts have followed this rule for a long time. The Courts in this country therefore are not hampered in the exercise of their equity jurisdiction in the same way that the English Courts have been." These observations were approved by KRISHNAN, J., in *Arunachalam Chettiar* v. *Raja Rajeswara Sethupathi*(1)

In *In re Marshall and Salt's Contract*(2), the decree was for the return of a deposit, with interest at 4 per cent from the day when it was paid, although the agreement under which the deposit was made did not provide for interest. So also interest on the deposit amount was decreed in *In re Hargreaves and Thompson's Contract*(3). In *Starlup* v. *Cortazzi*(4) where the action was in assumpsit for breach of a contract to deliver linseed, the decree was for the return of the sum advanced with interest. In *Farquhar* v. *Farley*(5), where an auction purchaser sought to recover from the auctioneer the amount of his deposit on the ground that a good title was not made out, there was a decree for its return with interest. GIBBS, C.J., observes at page 595:—"In many cases it has been held, that on the mere fact of one man having in his hands the money which belongs to another, interest is recoverable."

There being a conflict between the decisions of this Court in *Kamalammal* v. *Peeru Meera Levvai Rowthen*(6), *Subramania Aiyar* v. *Subramania Aiyar and others*(7), *Rajah of Pittapur* v. *Ballapragada Pallamraju*(8) on the one hand and the decisions in *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*(9), *Arunachalam Chettiar* v. *Raja Rajeswara Sethupathi*(1) and *Venkatachalam Chettiar* v. *Ponnuswami Iyengar*(10) on the other hand and the question whether in such cases as the

(1) (1922) 42 M.L.J., 74 at p. 78. (2) (1900) 2 Ch., 203.
(3) (1886) 32 Ch. D., 454. (4) (1835) 2 Cr. M. & R. 165; 150 E.R., 71.
(5) (1817) 7 Taunt, 592; 129 E. R., 236.
(6) (1897) I.L.R., 20 Mad., 481. (7) (1908) I.L.R., 31 Mad., 250.
(8) (1921) 40 M.L.J., 18. (9) (1919) I.L.R., 42 Mad., 661.
(10) (1924) 47, M.L.J., 312.

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present, interest ought to be allowed or not being one of great importance to the mercantile community, my Lord considered it best to refer the question to a Full Bench. In this view I respectfully agree. The question referred will be:—

"In a suit to recover money advanced towards a contract for the supply of goods on the ground that the contract was not performed, is plaintiff entitled to interest from the date of the advance when the contract did not provide for it, and when no demand was made prior to suit?"

The other question for consideration is whether there was any breach on the part of defendants. The contract was for the supply of two lots of 50 bales each, and the bales which defendants had to supply were to be got from third persons. These third persons were in their turn to get the bales from others and so on in regular succession till the chain reached the Madura Mills. Higher up the chain stood plaintiffs, and they defaulted to supply the bales to their vendees. It was contended that, having themselves failed to supply the bales, and the contract having been for the supply of specific goods, they made it impossible for defendants to perform the contract, and could not consequently complain of any breach of contract on the part of defendants. In a similar case (Appeal No. 459 of 1924) which came before us recently, my Lord held that each contract in the chain was to be treated as a distinct contract; and that it was no answer for the parties to it to allege a breach in the chain higher up. I agree with the view taken by my Lord, and express the same opinion in this case also. So plaintiffs will be entitled to the refund of the advance, and the question whether they are to get interest on the sum advanced will depend on the answer to the reference.

ON THIS REFERENCE

N. Chandrasekhara Ayyar for appellants.—A suit to recover advance paid, on a breach of contract, is an action for what is known in English law as money had and received. In such an action interest is not allowed in England; see 25 Halsbury's Laws of England, page 278; *De Havilland* v. *Bowerbank*(1), *De Bernales* v. *Fuller*(2), *Higgins* v. *Sargent*(3), *Page*

(1) (1807) 1 Campb., 50. (2) (1810) 2 Campb., 426.
(3) (1823) 2 B. & C., 348; 107 E.R., 414.

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v. *Newman*(1), *Calton* v. *Bragg*(2), *Walker* v. *Constable*(3), *Gosbell* v. *Archer*(4), *Fruhling* v. *Schræder*(5), *London, Chatham and Dover Railway Company* v. *South-Eastern Railway Company*(6); see also Chitty's Statutes, Vol. 4, page 161.

Farquhar v. *Farley*(7), *Startup* v. *Cortazzi*(8), which are against these decisions are wrong; the latter is distinguishable on its special facts and it has been adversely commented on, in Blackburn on Sale and Mayne on Damages. An exception to the above rule has been made in England in cases of failure to convey real property; see *In re Hargreaves and Thompson's Contract*(9) and *In re Marshall and Salt's Contract*(10). See also *Johnson* v. *Rex*(11) where it was held that no interest can be claimed if there is no fraud.

The same has been the view of the Privy Council as regards the Interest Act; see *Juggomohun Ghose* v. *Manickchund* (12), *Juggomohun Ghose* v. *Kaisreechund*(13), *Kalyan Das* v. *Maqbul Ahmad*(14). The Madras High Court has taken the same view in the following cases. *Kisara Rukkumma Rau* v. *Cripati Viyanna Dikshatulu*(15), *Kamalammal* v. *Peeru Meera Levvai Rowthen*(16), *Subramania Aiyar* v. *Sabramania Aiyar and others*(17), *Vasudeva Mudaliar* v. *Velappa Nadar*(18) *Ganesa Seturam* v. *Ramaswami Servai*(19), *Rajah of Pittapur* v. *Ballapragada Pallamraju*(20), see Pollock's Contract Act, 5th Edition, page 412. The Interest Act which merely copies Lord Tenterden's Act under which interest is not allowable in cases like this, does not make any exception in favour of Hindus.

In the following cases interest was allowed for special reasons stated in them:—*Abdul Saffur Rowther* v. *Hamida Bivi Ammal*(21), *Arunachalam Chettiar* v. *Raja Rajeswara*

(1) (1829) 9 B. & C., 378; 109 E.R., 140.
(2) (1812) 15 East, 223; 104 E.R., 828.
(3) (1798) 1 Bos. & Pul., 306; 126 E.R., 919.
(4) (1835) 2 A. & E., 500; 111 E.R., 193.
(5) (1835) 2 Bing. N.C., 77; 132 E.R., 31.
(6) [1893] A.C., 429.
(7) (1817) 7 Taunt., 592; 129 E.R., 236.
(8) (1835) 2 Cr. M. & R., 165; 150 E.R., 71.
(9) (1886) 32 Ch. D., 454.
(10) [1900] 2 Ch., 203.
(11) [1904] A.C., 817.
(12) (1859) 7 M.I.A., 263 at 278.
(13) (1862) 9 M.I.A., 260.
(14) (1918) I.L.R., 40 All., 497 (P.C.), 504.
(15) (1863) 1 M.H.C.R., 369.
(16) (1897) I.L.R., 20 Mad., 481.
(17) (1908) I.L.R., 31 Mad., 250.
(18) (1917) 22 M.L.T., 512.
(19) (1917) 33 M.L.J., 468.
(20) (1921) 40 M.L.J., 18.
(21) (1919) I.L.R., 42 Mad., 661.

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Sethupathi(1), *Venkatachalam Chettiar* v. *Ponnuswami Iyengar* (2), *Miller* v. *Barlow*(3), *Hurropersaud Roy* v. *Shamapersaud Roy*(4), *Hamira Bibi* v. *Zubaida Bibi*(5), *Ahmed Musaji Saleji* v. *Hashim Ebrahim Saleji*(6)

The provisions of the Interest Act have not been complied with in this case. Hence interest cannot be claimed.

[CHIEF JUSTICE.—This is not a case where money is due on a contract.]

S. Varadachari (with *K. V. Sesha Ayyangar*), for the respondent.—The clue by which we can reconcile all the quoted cases decided both in England and in India, whether before or after the Tenterden's Act or Interest Act is this:—Whenever money is due under a contract, i.e., in fulfilment of a contract interest is not allowable in case of non-payment in the absence of any demand or stipulation as to interest; but where money becomes due owing to a breach of contract, interest is allowable and Interest Act or Tenterden's Act is no bar to allowance of interest; see *Startup* v. *Cortazzi*(7), *Farquhar* v. *Farleg*(8), *De Bernales* v. *Wood*(9), *Johnson* v. *Rex*(10), *London, Chatham and Dover Railway Company* v. *South-Eastern Railway Company*(11); see especially the arguments in the last case in all the Courts. See also *John* v. *Dodwell & Co.*(12). Allowance of interest in cases of breach as regards real property is not put upon any special ground that the breach affects real property but on the only ground of damage arising to the other party as in the case of sale of goods, by the detention of his money; and in such cases Lord Tenterden's Act was not pleaded as a bar; see *In re Hargreaves and Thompson's Contract*(13), the only difference between the two classes of cases is that in cases of real property, interest alone on advance is allowed but not full damages as in the case of sale of goods; 25 Halsbury, page 271, paragraph 472; illustrations (*n*) and (*r*) of section 73. The ground of decision in *Ganesh Baksh* v. *Harihar Baksh*(14), implies that, in cases of breach of contract, interest may be

(1) (1922) 42 M.L.J., 74.
(2) (1924) 47 M.L.J., 312.
(3) (1871) 8 Moo., P.C.C., 127; 17 E.R., 260.
(4) (1878) I.L.R., 3 Calc., 654 (P.C.).
(5) (1916) I.L.R., 38 All., 581 (P.C.).
(6) (1915) I.L.R., 42 Calc., 914 (P.C.).
(7) (1835) 2 Cr., M. & R., 165; 150 E.R., 71.
(8) (1817) 7 Taunt, 592; 129 E.R., 236.
(9) (1812) 3 Campb., 258.
(10) [1904] A.C., 817.
(11) [1893] A.C., 429.
(12) [1918] A.C., 563.
(13) (1886) 32 Ch. D., 454.
(14) (1904) I.L.R., 26 All., 299 (P.C.).

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allowed; hence *Kamalammal* v. *Peeru Meera Levvai Rowthen*(1), and the cases following it are wrong. There is a difference between cases of advance and no advance; see Benjamin on Sales, 6th Edition, page 1096; Sale of Goods Act, sections 51 and 54. Illustrations to sections in Indian Acts are guiding rules of law whether they are in accordance with English law or not; see *Mahomed Syedol Ariffin* v. *Yeoh Poi Gark*(2) and *Lala Balla Mal* v. *Ahad Shah*(3). Hence illustration (*r*) to section 73 even if it does not accord with English law must govern.

[RAMESAM, J.—Can you claim interest even from date of advance?] No.

N. Chandrasekhara Ayyar in reply.—Money claimable on a breach is also claimed under an implied contract like cases of money had and received; see *John* v. *Dodwell & Co.*(4). There is no difference between cases of loans and cases of money had and received; *Bradshaw* v. *Bennet*(5). Section 73 of the Contract Act is simply declaratory of the English common law rule as to damages, see *Jamal* v. *Moolla Dawood Sons & Co.*(6). Hence illustrations (*n*) and (*r*) cannot be supposed to extend that rule. If otherwise, we must expect express provision in the section itself. Illustrations (*n*) and (*r*) relate to withholding of remote damages. We should not understand illustration (*n*) as abrogating the Interest Act; see *Kamalammal* v. *Peeru Meera Levvai Rowthen*(1).

[RAMESAM, J.—You cannot object to illustration (*r*) in that way.] Interest Act applies both to express and implied contracts; this case falls under the latter class.

[RAMESAM, J.—If so, *Bain* v. *Fathergill*(7) must be wrong.]

OPINION.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—But for illustration (*r*) to section 73 of the Indian Contract Act, I should have felt very little difficulty about this case. It was a case of a sale of goods where the buyer agreed to pay considerable

(1) (1897) I.L.R., 20 Mad., 481. (2) [1916] 2 A.C., 575 at 581.
(3) (1918) 35 M.L.J., 614 (P.C.) at 617.
(4) [1918] A.C., 563 at 570.
(5) (1831) 5 Car. & P., at 51. (6) (1916) I.L.R., 43 Cal., 493 (P.C.).
(7) (1874) 7 H.L., 158.

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sums of money by way of advance before the due time for delivery of the goods and where the seller defaulted in the end and did not deliver the goods he had contracted to deliver. Under the contract the advances were merely in anticipation of the purchase price and there was no provision that interest on them should be credited to the buyer against the final adjustment. In this case the buyer has brought a suit in which he has not pressed for his ordinary remedy, namely, the difference between the contract price and the market price at the date of breach but has merely asked for the return of his deposit with interest. The question that has been referred to us is whether, if he elects such a remedy, he can have back not merely his deposit, which is not disputed, but interest upon it during the time that it was in the hands of the seller.

It is not now seriously contested that if his claim for the return of his deposit as advance is to be regarded as being in any way corresponding to the common law claim for the return of money had and received to his use as on a failure of consideration, he cannot be entitled to interest. Lord Tenterden's Act, 3 and 4, William IV, Ch. 42, section 28 obviously does not provide for such a case as this and I think it is quite clear that the Indian Interest Act of 1839 is a mere repetition for this country of the provisions of Lord Tenterden's Act.

But the plaintiff puts his case on a different ground. He puts it as a claim by way of damages flowing from the breach of contract of the seller and it is quite clear that if he has two causes of action he is entitled to pursue only one of them and give up the other, namely, the cause of action for money had and received to his use. It was practically agreed during the discussion that if the plaintiff's contention was right he would be entitled to claim damages under two heads; he will be entitled (1)

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to the difference between the contract and the market price and (2) in addition, to interest in the nature of damages for being kept out of the money which he paid as advance. If the latter claim is well founded, it cannot prejudice the plaintiff that he has not thought it worth while to pursue the former. On general principles that contention seems to me unsound, and I think one must test it on the footing that if the plaintiff was right at all he can recover damages under both these heads cumulatively although he has only sought in this particular instance to recover under one. It appears to me that the contract having been broken, all that the plaintiff can be entitled to is to be put in the same position as if it had been carried out. Had it been carried out, he would have been in this position; he would have advanced money under the contract without interest and he would have received the goods at the contract rate. Instead, we are to deal with it on the footing that he goes into the market and has to buy corresponding goods at a higher rate. That which puts him where he ought to have been if the contract had been carried out is to get the difference between the contract price and the market price *plus* the amount of the advance that he made which *ex hypothesi* would not have borne interest if the contract had been executed. If he is to be given interest on his advance as well as the difference between the contract and the market rate, he is being enabled to put money into his pocket which he would not have had, if the contract had been carried out.

I believe the difficulty has arisen owing to the common practice of plaintiffs to abandon their proper remedy, that is, the difference between the contract and the market rate, and sue only for the return of the advance. The practice arose during what is known as

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the speculation period when it was almost impossible owing to the suspension of business to ascertain what the market price on any given date was. In a case where a plaintiff says "I am no doubt entitled to damages on the ordinary basis, but it is almost impossible to ascertain them and I am content to take my advance back with interest" and the defendant accepts that as a rough and ready estimate of what the damages on the ordinary basis would work out at, there is no difficulty. But I cannot see that the plaintiff is entitled to enforce such a course on an unwilling defendant. To take any other view appears to me to be giving the plaintiff not merely an indemnity but a bonus. I am, therefore, of opinion that where a plaintiff without the consent of the defendant elects only to sue for the return of his deposit giving up his claim to damages based on the difference between the contract and market rate, he cannot recover interest on his advance.

As to illustration (*r*) to section 73 of the Contract Act, I admit the difficulty which it creates. I am content for myself to say that it does not deal with a case of sale of goods and that I cannot conceive that the Indian Legislature intended by so remote a side-wind to upset the settled principles of the English common law as to the measure of damages for breach of contracts of sale.

The only other difficulty that pressed upon me is the decision in *Startup* v. *Cortazzi*(1) which does look very much like an authority for the plaintiff in this case. The correctness of that decision has been questioned in such standard works as Blackburn and Benjamin and I can only say for myself that I am quite unable to understand on what principles it proceeded. I have not

(1) (1835) 2 Cr. M. & R., 165; 150 E. R., 71.

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thought it worth while to discuss the Indian cases. They have been fully considered in the referring judgment of VISWANATHA SASTRI, J., and in the Judgment about to be delivered by my brother RAMESAM. We are really sitting here to resolve as best we can for this Court the conflicting views expressed in those cases.

I desire to point out that if the plaintiff is entitled to interest, I do not see over what period it is to be calculated. He was clearly entitled to none up to the date of breach, because up to that time it was in the contemplation of both parties that the money should remain in the hands of the seller. For any period after that and before the plaintiff launched his suit it appears to me that he has himself to blame if such a period existed. By deferring the filing of his plaint he cannot cast an additional burden on the defendant. As for the period between the filing of his plaint and the determination of the suit, he is entitled to interest in the ordinary way and he will get it.

I think that the state of the case law in this country may have misled the plaintiff as to the true nature of his remedy and that if he now desires to go to the Court below and endeavour to prove damages on the basis of the difference between the market and the contract price, he ought to be allowed to do so.

RAMESAM, J.

RAMESAM, J.—The facts of this appeal are stated in the referring Judgment of VISVANATHA SASTRI, J., and need not be repeated. The question referred to the Full Bench is, whether the plaintiff is entitled to interest on the amount advanced on a contract for sale of goods, to a refund of which he is admittedly entitled. The appellants' contention is that under the Interest Act, he is not entitled to interest. The respondent contends first, that the matter does not fall under

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the scope of the Act and secondly, that, even if it does, it falls under the proviso according to which "interest shall be payable in all cases in which it is now payable by law." He contends that interest can be recovered as damages under section 73 of the Contract Act. The Interest Act is based upon section 28 of Lord Tenterden's Act, 3 and 4, William IV, Ch. 42. I would, therefore, first refer to the English law on the question. In *De Havillanc* v. *Bowerbank*(1) and *De Bernales* v. *Fuller*(2) Lord ELLENBOROUGH, C.J., disallowed interest in actions for money had and received. These were sought to be distinguished in *Calton* v. *Bragg*(3) on the ground that the plaintiff's action in the last case was on a running account between the parties, in the course of which the plaintiff had supplied the defendant with goods, and also lent him several sums at different times. The Court held that interest is not allowable by law when money is lent generally, without a contract for it expressed, or to be implied from the usage of trade, or from special circumstances or from written securities for the payment of principal money at a given time. Lord ELLENBOROUGH, C.J., observed:

"The mere form of the count cannot make any difference in this respect; for in most cases it happens that a plaintiff may either frame his count for money had and received, or for money lent. If interest were due in this case, why should it not also be due where goods are to be paid for at a certain day, when that time arrives, as Baron MONTAGU in one of the old cases is stated to have held; or in any other case where money is to be paid at a certain day? Those cases press closely upon the present. If there were any general rule for interest to run upon money due, why should it not be allowed upon all book debts? Juries would give ear readily enough to such a direction: but I dare not vary from the practice which has long prevailed in all the Courts of Westminister Hall.

(1) (1807) 1 Campb., 50. (2) (1810) 2 Campb., 426.
(3) (1812) 15 East, 223; 104 E. R., 828.

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If it be fit that the whole course of our proceedings in respect to giving interest should be recast, it must be done by Act of Parliament. Where one directs his agent to advance money to another, what difference can it make as to the point of interest, whether he afterwards counts for money had and received or for money lent. If interest were demandable generally upon money due, why should it have been thought necessary to introduce, as it has prevailed in practice, a particular count for interest agreed to be paid where the law would have given it without such an agreement. But in fact there has been no instance of its being allowed except upon written securities for the payment of money at a given time, or upon an express or implied agreement for it."

This was followed in *Higgins* v. *Sargent*(1). There the action was upon a policy of insurance. The next case that may be referred to is *Page* v. *Newman*(2). The action was to recover money lent. Lord TENTERDEN, C.J., followed the last two cases. So far all the cases relate to actions in which money was to be paid to the plaintiff as part-performance of the contract, whether it is a contract of loan or goods sold or insurance. It is at this stage that the Statute 3 and 4 of William IV was passed. The next case I would refer to is *Gosbell* v. *Archer*(3). In that case the lands of defendant were put up by him for auction. The plaintiff paid a deposit. A written memorandum of the contract was signed by the auctioneer's clerk who was held not to be the agent of the defendant. The defendant could not make out a title and the plaintiff sued to recover the amount deposited. It was held that he could not recover interest. The only question discussed by the learned Judges (Lord DENMAN, C.J., LITTLEDALE and WILLIAMS, JJ.) was whether the receipt given by the auctioneer's clerk fell under section 4 of the Statute of Frauds. It

(1) (1823) 2 B. & C., 348; 107 E.R., 414.
(2) (1829) 9 B. & C., 378; 109 E.R., 140.
(3) (1835) 2 A. & E., 500 111 E.R., 193.

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was held it did not. No other question was discussed, and therefore I do not think the appellant can very much rely upon this case. As there is no contract which could be proved, there could be no breach of contract and no claim for damages. The same remarks would apply to the next case strongly relied on by the appellant, namely, *Walker* v. *Constable*(1). The plaintiff based his action on the allegation that he contracted with defendant for the purchase of an estate, the sale being by auction and that he afterwards abandoned the contract. There was also a count for money had and received. It was held he could not recover interest as the specific contract could not be proved, it not being reduced to writing and the Statute of Frauds proved an obstacle to the proof of the contract. In *Farquhar* v. *Farley*(2), the action was by a purchaser at an auction but the subject-matter of the sale was not real property but the reversionary interest in bank stock. Plaintiff sued to recover back his deposit and it was held that he was entitled to recover interest also. GIBBS, C.J., says:

"The plaintiff sues, and alleges as a part of the damage, which he says, he has sustained, that he has lost, from the time when the contract ought to have been completed, the use of the sum which he had deposited towards his performance of the contract. There was a case tried before Lord ELLENBOROUGH, C.J., hardly distinguishable from the present. *De Bernales* v. *Wood*(3). That was an action in which the plaintiff recovered back a deposit from the auctioneer himself; so it went even further than I should have thought it necessary to carry the law in the present case. In many cases it has been held, that on the mere fact of one man having in his hands the money which belongs to another, interest is recoverable."

It is true that the last sentence of GIBBS, C.J., is somewhat indefinite and does not state any principle but

(1) (1798) 1 Bos. & Pul., 306; 126 E.R., 919.
(2) (1817) 7 Taunt, 592; 129 E.R., 236.
(3) (1812) 3 Campb., 258.

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the earlier sentences show that the action was regarded as one for damages for breach of contract and in this respect it was not distinguishable from *De Bernales* v. *Wood*(1), which related to the sale of a real estate, and in which Lord ELLENBOROUGH, C.J., awarded interest as "*special damage.*" It seems to me that this case is not inconsistent with the cases cited by the appellant and supports the respondent's contention that where there is a breach of contract, interest may be awarded as damages and in such a case the Act does not affect the right. The Act was not expressly referred to by the Court. Here I may refer to the very early case of *Flureau* v. *Thornhill*(2). In that case there was a sale by auction of a certain leasehold. The defendant could not make out a title. Then the defendant offered to the plaintiff his deposit with interest and costs. The plaintiff claimed a further sum as damages for the loss of the bargain. It was held that plaintiff was not entitled to any damages for the loss of the bargain. BLACKSTONE, J., said:

"If the vendor has not a good title, the return of the deposit with interest and costs is all that can be expected."

The rule has been adopted in later cases, for example, in *Bain* v. *Fothergill*(3), *Marshall and Salt's Contract, In re*(4), *In re Hargreaves and Thompson's Contract*(5); in all these cases the rule of law laid down in 1776 was adhered to, but this principle that there can be no damage for the loss of the bargain is peculiar to English law and has not been adopted in India. But this has nothing to do with the other principle adopted in the English cases according to which the deposit could be recovered with interest. I do not think these cases can

(1) (1812) 3 Campb., 258.
(2) (1828) 2 Black., 1078; 96 E.R., 635.
(3) (1874) L.R., 7 H.L., 158.
(4) (1900) 2 Ch., 203.
(5) (1886) 32 Ch. D., 454.

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be distinguished on the ground that interest was in substitution of the damage for the loss of the bargain. I do not think it has been stated anywhere in that form. The real ground for the award of interest in all these cases is that it is a damage flowing from the breach of contract and therefore interest can be awarded. No exception is made in section 23 of Lord Tenterden's Act in favour of contracts relating to real estates. If the Act is to be construed as applying to damages for breach of contract also and is not to be confined to moneys recoverable on the basis of performance of a contract one has to say that the English cases decided after the Tenterden's Act were erroneously decided, but seeing *Bain* v. *Fothergill*(1) is a decision of the House of Lords, it is impossible to say so. It seems to me that the proper way of explaining the cases relating to real estate is that they did not fall within the purview of the Statute or at any rate were covered by the proviso. Therefore, in all these cases interest was recoverable as damages for breach of a contract and not on account of any peculiarity of English law. This was the view of Lord ELLENBOROUGH, C.J., in *De Bernales* v. *Wood*(2) and of GIBBS, C.J., in *Farquhar* v. *Farley*(3), where he relied on the former case. The next case I would refer to is *Fruhling* v. *Schroeder*(4). In that case a sum of money which the defendant had received for J. and for which interest was allowed in favour of J. was transferred to plaintiff at J.'s request. It was held that the plaintiff could not recover interest. The Court considered it as a case of money had and received and disallowed interest, following *De Havilland* v. *Bowerbank*(5), *De Bernales* v. *Fuller*(6) and *Walker* v.

(1) (1874) L.R., 7 H.L., 158.
(2) (1812) 3 Campb., 258.
(3) (1817) 7 Taunt, 592; 129 E.R., 236.
(4) (1835) 2 Bing. (N.C.), 77; 132 E.R., 31.
(5) (1807) 1 Campb., 50.
(6) (1810) 2 Campb., 426.

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Constable(1). It seems to me that this case was clearly covered by the Act and cannot help the appellant in the present case. The action in that case cannot be said to be for damages for a breach. There is no contract between the plaintiff and the defendant. In *Startup* v. *Cortazzi* (2), the suit related to damages for a breach of contract to deliver a quantity of linseed. It was held that the plaintiff was entitled to recover (1) return of the money advanced, (2) interest on it and (3) difference between the contract price and the price at the date of performance. It is true there are not many cases in English Reports similar to this case in which both damages for loss of the bargain and interest on the advance were given. It is also true that some remarks have been made against this case in Blackburn on Sales at pages 555 to 556 and in Mayne on Damages, 9th edition, page 184—6. In the former it is said that the report was obscure, in the latter it is said that it is difficult to find the principle. But I think what was being discussed is the question relating to the damages for the loss of bargain whether the difference should be between the contract price and the price at the date of trial or the price at the date of performance or at the date of breach. The case has been referred to without any adverse comment in Benjamin on Sales, page 1096 and in Halsbury's Laws of England, Volume 25, page 271, section 472 and has never been judicially disapproved. But whatever doubts there may be on this question in English law it seems to me that the principle of the case of *Startup* v. *Cortazzi*(2) was adopted as illustration (*r*) of section 73 of the Contract Act. This illustration shows that not only the advance for the passage to Sidney and not only

(1) (1798) 1 B. and P., 306; 126 E.R., 919.
(2) (1835) 2 Cr. M. & R., 165; 150 E.R., 71.

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the difference between higher freight that the plaintiff had to pay but also the interest on the advance could be recovered. It seems to me that where a defendant breaks the contract and does not refund any advance paid to him the interest and the advance is one of the items of damage necessarily flowing from the breach. In English law in the case of real estates it may be there is no other item of damage for loss of bargain, but in the case of other contracts in English law and in the case of all contracts in Indian law, the advance money and interest on it were regarded as an item of damage in addition to the difference of price. I do not see any reason to think that illustration (*r*) was not deliberately put under the Act and was a slip and that therefore we ought not to follow it. On the other hand, it seems to me to stand to common sense and shows that the decision in *Startup* v. *Cortazzi*(1) was adopted by the Indian Legislature.

The decision of the House of Lords in *London, Chatham and Dover Railway Company* v. *South-Eastern Railway Company*(2), is not against the respondent, for the case there related to sums recovered in performance of contract and was therefore covered by the Act. In that case Lord HERSCHELL said at page 437:

"I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld from the time of action brought at all events. But I have come to the conclusion, upon

(1) (1835) 2 Cr. M. & R., 165; 150 E.R., 71.
(2) [1893] A.C., 429.

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a consideration of the authorities, agreeing with the Court below, that it is not possible to do so."

I have already said that that case was not a case of damages for breach of a contract. Lord SHAND said:

"I regret that the law of this country in regard to the running of interest is not like the law of Scotland."

In *Johnson* v. *Rex*(1) Lord MACNAGHTEN said at page 822:

"In order to guard against any possible misapprehension of their Lordships' views, they desire to say that, in their opinion, there is no doubt whatever that money obtained by fraud and retained by fraud can be recovered with interest, whether the proceedings be taken in a Court of equity or in a Court of law or in a Court which has a jurisdiction both equitable and legal."

I think the principle underlying this dictum is that in such a case interest was recoverable as a damage for the fraud whether arising in contract or in tort. In that case the Crown intentionally brushed aside all questions of fraud and accepted repayment of money paid by mistake. So, no interest was allowed. It could not help the appellant. In *In re Hargreaves and Thompson's Contract*(2), LINDLEY, L.J., said:

"But all such damages *as interest* and expenses of investigating the title, which, although they are called damages are matters rather for computation and taxation than for an inquiry, the Court has authority to order to be paid."

This is in consonance with the view of ELLENBOROUGH, C.J., in *De Bernales* v. *Wood*(3) and GIBBS, C.J., in *Farquhar* v. *Farley*(4). This was followed in *In re Marshall and Salt's Contract*(5).

I do not think it is necessary to discuss the Indian cases at great length. In view of Lord DAVEY's observations at pages 308 and 309 in *Ganesh Baksh* v. *Harihar*

(1) [1904] A.C., 817. (2) (1886) 32 Ch. D., 454.
(3) (1812) 3 Campb., 258. (4) (1817) 7 Taunt, 592; 129 E.R., 236
(5) [1900] 2 Ch., 203.

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Baksh(1), it cannot be said that the observations in *Kamalammal* v. *Peeru Meera Levvai Rowthan*(2), on section 73 of the Contract Act are final. I come to the conclusion that in all cases where there is a breach of contract on the part of the defendant and the plaintiff is entitled to damages for the breach, he is entitled to interest on any sum advanced to a refund of which he is entitled, besides any other item of damage to which he may be found also entitled. My answer to the question referred to the Full Bench is in the affirmative.

After I have written the above, I have had the advantage of perusing the judgment of my Lord the CHIEF JUSTICE and while regretting I have to differ from him I wish to add a few words with reference to it. If the matter is one of purely ascertaining the English law, I would not perhaps differ from my Lord's judgment. Even assuming that the view I have taken above of the English law is erroneous, I am of opinion that the Indian law as expounded in the Contract Act is different.

In the first place I do not see anything unreasonable in allowing the relief as a heading of damage. It is a relief in addition to the difference of prices. I do not see that giving such a relief places the plaintiff in a better position than if the contract was carried out. We are all agreed that, up to the date of performance, (or breach) the plaintiff is not entitled to interest. But after the said date, when the defendant breaks the contract and does not return the money, the plaintiff has to spend other money from his pocket to get similar goods in the market. He will be out of property twice over. When he wants goods, it is reasonable he should spend their price once but when he is asked to spend

(1) (1904) I.L.R., 26 All., 299 (P.C.). (2) (1897) I.L.R., 20 Mad., 481.

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twice over, I do not see the justice of depriving him of interest. I do not see that he gets any bonus in addition to indemnity. There must be some interval between the breach and suit and I do not think it is a fair answer to say to the plaintiff that he has to thank himself for the delay however reasonable it is. But I have not to find reasons for my view or to justify illustration (*r*) to the Contract Act. The illustration is there, and after the remark of Lord SHAW in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*(1), where he says:

"It is the duty of a Court of law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal"

and of Lord ATKINSON in *Lala Balla Mal* v. *Ahad Shah*(2), I cannot ignore it even if I wish to. I am not able to avoid it by saying that the actual illustration relates to freight and not to sale of goods. I am not able to see any difference in principle between the two.

I agree that, in the view of the majority, the plaintiff may be given an opportunity to prove the difference in prices if he chooses to do so. I understand we are all agreed that plaintiff is entitled to interest on the deficit from the date of the plaint.

BEASLEY, J.

BEASLEY, J.—I have had the advantage of reading the judgment of the learned CHIEF JUSTICE and am in entire agreement with it, and only desire to add a few observations with regard to illustration (*r*) to section 73 of the Indian Contract Act and as to how far such illustration must be taken to be part of the statute because that is the only difficulty I felt about this case

(1) [1916] 2 A.C., 575 at p. 581.
(2) (1918) 35 M.L.J., 614 (P.C.) at p. 617.

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as interest is clearly allowable if this illustration must be taken as part of the statute.

In the first place it illustrates a remedy in damages quite contrary to the now well-settled principles of the Common Law of England with regard to the measure of damages for breach of contract for sale of goods, and secondly it does not appear to be based upon any reported or now accepted decision either in England or in India and furthermore it is not a case of breach of contract for sale of goods at all.

I can see no authority whatever for that illustration except *Startup* v. *Cortazzi*(1), which is not now good law. But the question that arises of course is how illustrations to sections of statutes are to be treated? The question has been considered in two reported cases in the Privy Council. In *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*(2), Lord SHAW on page 581 says:

"On the second point their Lordships are of opinion that in the construction of the Evidence Ordnance it is the duty of a Court of Law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal. And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the statute, should not be thus impaired."

The other case is *Lala Balla Mal* v. *Ahad Shah*(3). On page 617 Lord ATKINSON says:

(1) (1835) 2 Cr. M & R., 165; 150 E.R., 71.
(2) [1916] 2 A.C., at p. 581.
(3) (1918) 35 M.L.J., 614 (P.C.).

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"Four illustrations are given. These are to be taken as part of the statute."

That is the only reference to this point in the whole of the judgment.

I do not take either judgment to mean that under every circumstance an illustration must be taken as part of the statute. All that in my view is meant is that a Court should not lightly disregard the illustrations merely because they do not seem to be in accord with generally accepted ideas as to the law in other places.

In the present case there is no question that the illustration is in direct conflict with English decisions and is entirely opposed to the settled principles of the English law as to the measure of damages in such cases—and moreover it deals with a case of a different nature to this.

In my opinion we are not obliged to accept the illustration as stating the intention of the Legislature in a case of damages for breach of contract for the sale of goods: and I do not feel myself bound by that illustration.

I agree with the learned CHIEF JUSTICE that this claim for interest cannot be allowed.

N.R.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Jackson and Mr. Justice Sundaram Chetty.

1926, September 30

O. A. O. K. LAKSHMANAN CHETTY (PETITIONER), PETITIONER,

v.

J. S. KANNAPPAR AND TWO OTHERS (RESPONDENTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), *sec.* 115—*Revision petition to High Court—Court—Madras City Municipal Act (IV of* 1919)—*Rule* 4 *of the rules made under the Act by Governor in Council—Objection petition before election as to qualification of candidate for election, before Commissioner of Corporation—Revision before Chief Judge of Presidency Small Cause Court—Nature of order—Chief Judge, whether a Court or* persona designata—*Revision to High Court from his order, whether competent—Jurisdiction—Extent of jurisdiction before Commissioner and Chief Judge—Madras City Municipal Act (IV of* 1919), *ss.* 59 *and* 347—*"Elections" in sec.* 59, *meaning of—Rule* 4, *whether* ultra vires.

The Chief Judge of the Presidency Small Cause Court at Madras, in deciding a revision petition preferred to him under rule 4 of the rules made by the Governor in Council under the Madras City Municipal Act, 1919, acts as a *persona designata* and not as a Court; and consequently the High Court has no jurisdiction to entertain a revision petition against his order in such a case.

The Municipal Corporation of Rangoon v. *M. A. Shaker,* (1925) I.L.R., 3 Rang., 560 (F.B.), followed; and *Parthasarathi* v. *Koteswara Rao,* (1924) I.L.R., 47 Mad., 369 (F.B.), distinguished.

The word "Elections" in section 59 (2) (*b*) of the Madras City Municipal Act means completed elections and does not cover disputes *before* such elections and the section does not authorize the Governor in Council to make rules in respect of

* Civil Revision Petition No. 742 of 1926.

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such disputes; but rule 4, though it purports to have been made under section 59, is rendered valid by the generality of the powers conferred on the Governor in Council by section 347 of the Act.

Quære: Whether the jurisdiction of the Commissioner of the Corporation of Madras, and of the Chief Judge of the Presidency Small Cause Court, is not confined to questions of form, or extends to an enquiry as to the disqualifications of the candidate, which do not appear on the face of the nomination paper but would involve an enquiry into facts.

Desirability of an amendment of the Madras City Municipal Act, so as to make it clear whether the limited or extended jurisdiction is conferred by the Act, pointed out.

PETITION to the High Court to revise the order of the Chief Judge of the Presidency Small Cause Court, Madras, in Municipal Election Revision Petition No. 1 of 1926.

The petitioner was nominated by some of the electors on 17th August 1926. The petitioner was an Honorary Presidency Magistrate. He resigned his office by a letter of resignation, dated 11th August 1926, and addressed to Government, which reached the Government on 14th August.

The Government passed their order on the 19th August 1926 withdrawing the power of an Honorary Presidency Magistrate, from the petitioner. Some of the registered voters preferred an objection petition before the Commissioner of the Corporation of Madras on the 20th August 1926, under rule 4 of the Election Rules, and the latter decided that the petitioner was disqualified to be a candidate as he was an Honorary Presidency Magistrate on the date of his nomination. A revision petition was filed by the petitioner before the Chief Judge of the Presidency Small Cause Court against the order of the Commissioner; but the petition was dismissed by the Chief Judge; against the latter's

LAKSHMANAN CHETTY v. KANNAPPAR.

decision, this civil petition was preferred to the High Court. The further facts appear from the Judgment.

Vere Mockett (with him *M. Damodara Naidu* and *S. Rangaswami Ayyangar*) for respondent, took a preliminary objection that the Civil Revision Petition was not competent.

The High Court had no jurisdiction to revise the order of the Chief Judge of the Presidency Small Cause Court. The case depends on the special language of the Madras City Municipal Act and rules framed by the Governor in Council under the Act. The Chief Judge, in acting under rule 4, is not a Court but a *persona designata*. The fact that the Presidency Small Cause Court is comprised of several Judges and the Chief Judge is invested with this jurisdiction under the rules, shows that the Chief Judge is not acting as a Court but as a *persona designata*. This identical question has been decided by a Full Bench of the Rangoon High Court in *The Municipal Corporation of Rangoon v. M. A. Shakur*(1). The decision of the Full Bench in *Parthasarathi v. Koteswara Rao*(2), is distinguishable as there the power was vested in a District Judge, who was the sole member of the District Court. The decision in *Vijiaraghavalu Pillai v. Theagaroya Chetti*(3), is a decision directly in point and has not been overruled by the Full Bench in 47 Mad., 369. Reference was made to Rogers on Election, page 723, rules 8, 11 and 12. The Indian Procedure is different from that in England in election cases. The nature and extent of the jurisdiction of the Commissioner and the Chief Judge is laid down by rule 3 of the Election Rules. The Commissioner can publish a list of candidates, as it appears to him to be valid and on objection to the qualification of a candidate, he can decide as to the validity of the objection.

K. S. Krishnaswami Ayyangar (with him *K. S. Rajagopala Ayyangar*) for petitioner.—Section 59 of the Madras City Municipal Act (IV of 1919) is the crucial section; section 54 does not apply to disputes before election, and has no relevancy to the present case. Rule 4 should be read with section 59 of the Act. Then it will be evident that the Chief Judge is a Court and not a *persona designata*. The rule should be construed in the light of the provisions of the City Municipal Act and those of the Presidency Small Causes Courts Act.

(1) (1925) I.L.R., 3 Rang., 560 (F.B.).
(2) (1924) I.L.R., 47 Mad., 369 (F.B.). (3) (1915) I.L.R., 38 Mad., 581.

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Where an established Court is afterwards invested with power to try some additional matters, that will not make it a *persona designata*: See *National Telephone Co., Limited v. Postmaster-General*(1).

The Presidency Small Cause Courts Act, section 6 and rules 4 and 6 framed by the High Court under the Act in 1912, show that the Chief Judge or any other Judge of that Court acting singly, should be deemed to be acting as a Court. The definition in rule 3, clause 3 also supports this view. If the three Judges of the Presidency Small Cause Court cannot sit alone and function as a Court, the mention of the Chief Judge in rule 4 of the Election Rules may be *persona designata*. But when each Judge can sit alone as a Court, then the mention of the Chief Judge alone in the rules framed by the Governor in Council under the City Municipal Act, is as a Court and not as a *persona designata*. Rule 4 of the Election Rules should be construed in the light of these provisions as referring to the Chief Judge as a Court, though the construction of rule 4 as referring to him as a *persona designata* may not be *ultra vires* by virtue of section 347 of the Act.

Vere Mockett in reply.—Sections 54 and 59 of the City Municipal Act make a distinction between Chief Judge and the Presidency Small Cause Court. Under the Land Acquisition Act, the Chief Judge alone deals with land acquisition cases; there he is acting purely as a *persona designata*.

The JUDGMENT of the Court was delivered by

COUTTS TROTTER, C.J.—This is a civil revision petition brought by Rao Bahadur Lakshmanan Chettiar against an order made by the Chief Judge of the Small Cause Court in the following circumstances. On the 17th August 1926 the petitioner was nominated as a candidate for election as a divisional Councillor for the 29th Division of the City. It is not in dispute that the nomination paper was regular on the face of it but it was said that the petitioner was disqualified for these reasons. For some time past he had been an Honorary Presidency Magistrate of this City. On the 11th of August he tendered

(1) [1913] A.C., 547.

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his resignation having in mind no doubt section 52 (1) (*b*) (iv) of the Madras City Municipal Act of 1919, which disqualifies a Presidency Magistrate (which has been held to include an Honorary Magistrate) for election as a Councillor. That resignation reached the Government on the 14th of August and Government passed an Order in the following terms:—

"The Governor in Council withdraws the powers of Honorary Presidency Magistrate for the City of Madras conferred on the undermentioned gentleman (i.e., the petitioner) who has resigned his appointment."

On the 20th of August an objection was put forward by the respondents alleging that the withdrawal by the candidate from his appointment as Presidency Magistrate only took effect by virtue of the Government Order withdrawing his powers which was subsequent to his nomination, and that therefore the nomination was bad. The objection was heard by the Commissioner acting under rule 4, hereinafter to be referred to, of the rules made under the Act and a petition was put in for revision before the Chief Judge of the Court of Small Causes under the same rule. Both officers pronounced the nomination to be invalid and struck the candidates name off the list of nominations in accordance with rule 3. Against that decision of the Chief Judge this revision petition is brought.

Two main points have been argued before us—the first, which goes to the root of the whole matter, being that this Court has no jurisdiction to entertain any such petition, on the ground that the Chief Judge of the Small Cause Court is not a Court subject to the machinery of the Code of Civil Procedure but a *persona designata* whose decision is not only not appealable but cannot be called up in revision. It has been held by a Full Bench of this Court, *Parthasarathi Naidu* v.

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Koteswara Rao(1), that the fact that his decision is not appealable so far from being a ground for holding that revision will not lie—points decisively in the opposite direction. The appellant's contention as to the character in which the Chief Judge decided this matter depends partly upon a consideration of the relevant sections of the Municipal Act and the rules made thereunder, partly on the effect of certain authorities which were cited to us. Section 59 (2) (*b*) of the Act provides that

"the Governor in Council may make rules which may provide for the adjudication by the Court of Small Causes of disputes . . . arising out of elections."

In our opinion "elections" within the meaning of that section means completed elections which have resulted in the creation of a councillor; and does not cover disputes arising before such election; but though rule 4 with which we are primarily concerned purports to be made under section 59 we are of opinion that it is rendered valid by the generality of the powers conferred on the Governor in Council by section 347 of the Act, and that the rule is not vitiated by its description as having been made under a section which is not applicable. Rule 4 gives power to a registered voter to make an objection to the list of candidates. Thereupon

"the Commissioner is to give his decision on the objection in writing, which decision shall be final unless a petition for revision is put in before the Chief Judge,"

and in such case it is argued that the Chief Judge acting under rule 4 is, in effect, the Court of Small Causes functioning through him alone and that his decision is, therefore, subject to revision. It is said that this position is confirmed by Order I (*a*), rule 6 of the rules of the Small Cause Court, 1912. That rule runs as follows:—

(1) (1924) I.L.R., 47 Mad., 369 (F.B.).

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"The Judges may sit apart or together at any time and any one or more of the Judges so sitting apart shall have all the judicial authority which is given to the Court by the principal Act or any other enactment for the time being in force, except in cases in which by such Act or other enactment or any rule or order having the force of law such powers are exercisable only by two or more Judges of the court or only by the Chief Judge.

It shall be competent to the Chief Judge to direct that any application, petition or suit shall be heard by a Bench consisting of two or more Judges of the Court."

The argument is that if by any Act or rule a matter shall be referred to the Chief Judge alone, he is nevertheless acting as the Court. We are of opinion that this rule only applies to cases where the reference made by the Act or rule in question is clearly to the Court, though functioning through the Chief Judge and that it leaves untouched the real question which we have to decide: namely whether this power was conferred by rule 4 made under the Municipal Act upon the Chief Judge as the Court functioning through himself or upon him as *persona designata*. Looking at the Municipal Act, it is clear that the draftsman of that Act was quite alive to the distinction between the Court of Small Causes (*vide* section 59) and the Chief Judge of that Court (*vide* section 54). It is difficult to resist the inference that when the Chief Judge is referred to in the Act he was meant to act as a *persona designata* and not as representing the Court. The Full Bench decision in *Parthasarathi Naidu* v. *Koteswara Rao*(1) was relied upon for the proposition that whenever jurisdiction is vested in the Judge of a Court it must be deemed to be vested in that Judge as representing that Court. In that case a vesting of jurisdiction in a District Judge was held to be equivalent to vesting the jurisdiction in the District Court, thereby subjecting his decision to the

(1) (1924) I.L.R., 47 Mad., 369 (P.C.).

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revisional powers of the High Court. It was pointed out in a judgment of a Full Bench in the Rangoon Court, *The Municipal Corporation of Rangoon* v. *M. A. Shakur*(1), reviewing all the authorities, with which we respectfully agree, that though that reasoning may apply to a Court which by its constitution has only one Judge it cannot govern a case where jurisdiction is conferred on a single member of a Court consisting of three Judges. It is obvious that words might easily have been used to indicate that while jurisdiction was conferred on the Small Cause Court, that Court should only function through its Chief Judge. We think that that distinction drawn by the Rangoon Court was correctly drawn and that nothing in the decision of the Full Bench in *Parthasarathi Naidu* v. *Koteswara Rao*(2) precludes us from holding, as we do hold, that under the Municipal Act and the rules the Chief Judge for this purpose is a *persona designata* and not merely a selected member of the Court chosen to represent it. That being so, we have no jurisdiction to entertain this revision petition, and it must be dismissed with costs.

But we think it is desirable that we should say a few words on the second point which was elaborately argued before us. That point was that the Commissioner and the Chief Judge were confined to questions of form, and that it was entirely outside the ambit of their jurisdiction to enquire into grounds of disqualification which did not appear on the face of the nomination paper and would involve an enquiry into facts. The position of a returning officer in England is analogous generally to that of the Commissioner under the Madras City Municipal Act, and it has been decided by a series of decisions in England, of which we need only cite *Pritchard* v. *Mayor, etc., of Bangor*(3), and *Hobbs* v.

(1) (1925) I.L.R., 3 Rang., 560. (2) (1924) I.L.R., 47 Mad., 369.
(3) (1888) 11 A.C., 241.

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Morey(1), that the returning officer is only to decide objections arising on the face of the nomination paper itself and not to go into questions relating to the personal qualifications of the candidate. Under section 52 of the Madras Act, among the disqualifications enumerated are that the person concerned is of unsound mind, or is interested in a contract with the Corporation. If the position be right that such allegations are to be investigated not after election but at the stage of candidature, the Commissioner might be faced with a series of elaborate enquiries relating to persons who might never reach the stage of election or appointment as a Councillor, might indeed receive no votes at all. It is said that, nevertheless, the effect of the Madras Act is to throw the burden of conducting such enquiries upon the Commissioner with regard to every candidate at the stage of nomination. In view of our decision on the main point, it is unnecessary to pronounce upon this question. But we think it desirable to point out the doubts that have been raised as to the effect of the Madras Act and to suggest that it should be amended in a manner that shall make it clear whether it is intended to invest the Commissioner with the wide powers suggested by the respondents or to confine him to the purely ministerial function with which alone he would be clothed if the principle of the English cases is to be applied. If the latter view is to prevail, there seems to be no good reason for granting an appeal to the Chief Judge or indeed to any other tribunal.

K.R.

(1) [1904] 1 K.B., 74.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice*, *Mr. Justice Jackson and Mr. Justice Sundaram Chetti.*

1926, October 7.

O. A. O. K. LAKSHMANAN CHETTIAR, PETITIONER,

v.

1. COMMISSIONER, CORPORATION OF MADRAS,
2. CHIEF JUDGE, COURT OF SMALL CAUSES, MADRAS, RESPONDENTS.*

Certiorari, writ of—Jurisdiction of High Court—Jurisdiction derived from Supreme Court of Madras—Jurisdiction and powers of High Court, similar in scope to those exercised by Court of King's Bench in England—Objection to jurisdiction not taken by the applicant before the lower Court—Bar to issue of writ—Power exercised by High Court, discretionary—Objection, whether based on law or facts, not taken before lower Court, bar to obtaining writ.

In the issue of a writ of certiorari, the High Court exercises a jurisdiction which has devolved on it from the old Supreme Court, and stands in the same position as the Court of King's Bench in England, and ought to follow the rules laid down by that Court in the decided English cases as to the scope and limitations of that jurisdiction.

Under the English decisions, the Court exercises, in such cases, a purely discretionary power, and will not exercise it in favour of a person, who has not taken before the lower Court an objection to its jurisdiction but has taken the chance of its decision on the merits in his favour.

Failure to object to jurisdiction before the lower Court is a bar to obtaining a writ of certiorari, whether the objection to jurisdiction is based on a pure point of law or based on facts which were or should have been within the knowledge of the applicant during the proceedings in the lower Court.

Rex v. *Williams*, [1914] 1 K.B., 608, and other English cases, relied on.

* Civil Miscellaneous Petition No. 3304 of 1926.

PETITION praying that the High Court may be pleased to issue a writ of certiorari to the Commissioner, Corporation of Madras, and the Chief Judge of the Court of Small Causes, Madras, to send up the orders, etc., in the matter of the 29th division (Royapetta) election, to the High Court.

The material facts appear from the judgment in C.R.P. No. 742 of 1926, printed at page 121 of this report (*supra*).

Vere Mockett with *S. Rangaswami Ayyangar* for first respondent took a preliminary objection that the writ of certiorari cannot be obtained, as the applicant did not raise the objection to jurisdiction of the lower Court before the lower Court. The only point that was argued there was whether he was or was not an Honorary Presidency Magistrate, when he was nominated as a candidate for election. The applicant did not contend that the Chief Judge had no jurisdiction to decide on the merits. He submitted to the jurisdiction and took the chance of a decision on the merits. Under such circumstances he cannot obtain the writ of certiorari. See *Rex* v. *Williams*(1).

As a matter of practice of the Court of King's Bench in England, the discretionary power as to issue of a prerogative writ will not be exercised by the Court, unless objection to jurisdiction was taken before the lower Court. This is a case of waiver of jurisdiction: *Ex parte, Parish of Somersetshire*(2), *Re The West London Philanthropic Burial Society*(3); vide also other cases referred to in the judgment.

The principle is that the applicant cannot take a new point before the King's Bench Court, which was not taken before the lower Court. If objection to jurisdiction was not taken before the Justices no issue of a writ of certiorari (which is discretionary with the Court) will be granted by the Court. The jurisdiction of the High Court is subject to the same conditions and limitations as that of the Court of King's Bench in prerogative writs.

K. S. Krishnaswami Ayyangar and *K. S. Rajagopala Ayyangar* for petitioner.—It is true that no objection as to

(1) [1914] 1 K.B., 608. (2) (1861) 25 J.P., 66. (3) (1869) 20 L.T., 972.

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jurisdiction was taken either before the Commissioner or the Chief Judge. But it is no bar to raise the question of jurisdiction before the High Court. There has been and can be no waiver of jurisdiction in this case. The English cases referred to are distinguishable. If the question of jurisdiction depends on facts which were within the knowledge of the party but he still did not object but acquiesced in the exercise of jurisdiction by the lower Court, he cannot take the objection afterwards; but where the question of jurisdiction does not depend on facts, but is on the face of the proceedings and is a pure point of law, the objection can be taken for the first time in the higher Court. This contention is not opposed to the English cases. The case of *Rex* v. *Williams*(1) was considered in *Rex* v. *West Suffolk Compensation Authority*(2) and in the latter case, though the objection to jurisdiction was not taken in the lower Court, still the party was allowed to take it in the higher Court. In the English cases cited, the party had knowledge of facts which ousted the jurisdiction of the Court and yet did not raise the objection before the lower Court. If the question did not require any fact at all but the objection was on the face of the record, or depended on facts of which judicial notice should be taken, then the objection can be taken at any stage. In the case of appeals from a subordinate Court, this distinction is recognized. See *Ramlal Hargopal* v. *Kishan Chand*(3). The question is whether the conduct of the applicant in this case has been such as to disentitle him to this writ.

Vere Mockett in reply referred to *Queen* v. *Knox*(4), *Queen* v. *Justices of Salop*(5) and *Queen* v. *Justices of Leicester*(6).

K. S. Krishnaswami Ayyangar in reply to the new cases cited. The case of *Queen* v. *Knox*(4) is not shown to be one in which a point of law, as distinguished from one of fact, was involved in the objection to jurisdiction.

Rule 4 of Election Rules compels me to go before the Chief Judge from an order of the Commissioner on all the points raised before the latter. Does resort to the Chief Judge amount to a waiver of objection to jurisdiction? There is no absolute bar in the English cases against issue of a writ of certiorari in the circumstances of this case.

(1) [1914] 1 K.B., 608 (2) [1919] 2 K.B., 374.
(3) (1924) I.L.R., 51 Calc., 361 (P.C.). (4) (1863) 32 L.J. (N.S.) (M.C.), 257.
(5) (1859) 29 L.J. (N.S.) (M.C.), 39. (6) (1860) 29 L.J. (N.S.) (M.C.), 203.

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JUDGMENT.

This is an application for a writ of certiorari directed to the Commissioner of the Corporation of Madras and the Chief Judge of the Court of Small Causes to call up their orders passed in the matter of Rao Bahadur Lakshmanan Chettiyar declaring him to be disqualified as a candidate at the election about to be held to select a Councillor for the 29th division of this city. Our interference is invoked on the ground that both these officers acted without jurisdiction and that therefore their orders should be quashed. In such a matter we act not under statute but under the inherent powers which devolve upon us from the old Supreme Court of Madras. We therefore stand with regard to prerogative writs in the same position as the Court of King's Bench in England and in our opinion we ought to follow the rules laid down by that Court in the decided English cases as to the scope and limitation of its jurisdiction. The facts were stated by us in our decision in C.R.P. No. 742 of 1926(1) and it is unnecessary to repeat them. The broad ground on which the jurisdiction of these officers is challenged is that whereas they were only empowered to inquire into disabilities appearing on the face of the nomination paper they in fact travelled outside that jurisdiction and went into a matter of substance which was arguable only on grounds not appearing on the face of the nomination paper. Mr. Mockett has taken the preliminary objection that certiorari will not lie where the person who applies for that writ has by his conduct taken the chance of a pronouncement in his favour by the lower Court on the merits. Mr. Krishnaswami Ayyangar, for the petitioner, has frankly conceded that his client did argue the case on the merits both before the Commissioner and before

(1) P. 121, supra.

LAKSHMANAN CHETTIAR v. COMMISSIONER OF CORPORATION OF MADRAS.

the Chief Judge and that he did not only not confine himself to the contention that those officers had no jurisdiction to entertain an objection to the jurisdiction but that he did not take this point at all. The English authorities which were cited *prima facie* establish the proposition that in such circumstances the applicant cannot obtain a writ of certiorari *exdebito justiae* but the Court is exercising a purely discretionary power. See *Queen* v. *Justices of Salop*(1), *Queen* v. *Justices of Leicester*(2), *Queen* v. *Knox*(3), *Rex* v. *Williams*(4), *Rex.* v. *West Suffolk Compensation Authority*(5). The point taken by Mr. Krishnaswami Ayyangar is that failure to object to the jurisdiction of the Court whose order is sought to be quashed only debars the applicant when the objection is one involving the investigation of facts which were or should have been within the knowledge of the applicant when he was before the lower Court, and does not apply to a contention of law. We see no warrant in the cases for drawing any such distinction, because in our opinion the test that they lay down is whether the applicant armed with a point either of law or of fact which would oust the jurisdiction of the lower Court has elected to argue the case on its merits before that Court. If so, he has submitted himself to a jurisdiction which he cannot be allowed afterwards to seek to repudiate. We are of opinion that the applicant has so conducted himself as to preclude this Court from exercising a discretionary jurisdiction in his favour. The petition will therefore be dismissed with taxed costs.

The interim order passed on the 1st October will be vacated.

K.R.

(1) (1859) 29 L.J. (N.S.) (M.C.), 39. (2) (1860) 29 L.J. (N.S.) M.C., 203.
(3) (1863) 32 L.J. (N.S.) (M.C.), 257. (4) [1914] 1 K.B., 608.
(5) [1919] 2 K.B., 374.

APPELLATE CIVIL.

Before Sir C. V. Kumaraswami Sastri, Kt. Offg. Chief Justice, Mr. Justice Krishnan, Mr. Justice Ramesam, Mr. Justice Venkatasubba Rao and Mr. Justice Curgenven.

BASAVA SANKARAN (PLAINTIFF), APPELLANT,

1926, August 13.

v.

GARAPATI ANJANEYULU AND OTHERS (DEFENDANTS 3 TO 5 AND 1 AND 2), RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 16 and 19—Order of adjudication passed by Official Receiver on reference by District Court—No order passed by Court appointing Official Receiver, as receiver of insolvent's properties—Sale of joint family immovable properties by Official Receiver—Validity of sale of insolvent's son's share—Suit by son for his share as unaffected by the Receiver's sale—Subsequent order by District Court appointing Official Receiver as receiver of properties with effect from date of adjudication—Sale, whether validated thereby—Transfer of Property Act (IV of 1882), sec. 2 (d) and sec. 43—Applicability of the sections to sales by Official Receiver—Official Receiver, whether an agent of Court—Ratification—Sale by Receiver, whether a transfer falling within sec. 2 (d) of the Act.

An application by a person to a District Court to be adjudicated an insolvent was referred by the Court to the Official Receiver for disposal; the latter adjudicated him an insolvent; the Court did not however pass an order appointing the Official Receiver as receiver of the insolvent's properties; the Official Receiver sold certain joint family immovable properties belonging to the insolvent and his son; the latter sued in a District Munsif's Court for a declaration that the sale of his share was invalid and for partition and delivery of his share from the vendees; pending the suit the District Court passed an order appointing the Official Receiver as the receiver of the

* Letters Patent Appeal No. 125 of 1924.

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insolvent's properties; on the vendees contending in the suit that the sale by the Official Receiver was validated by the subsequent order of the District Court appointing him Receiver of the insolvent's properties,

Held (*by the Full Court*), that the Official Receiver was not an agent of the Court, so as to enable the Court to ratify unauthorized acts done by the agent;

Held (*by the majority of the Court*, KRISHNAN, J., *dissenting*),

(*a*) that a sale by an Official Receiver in insolvency was not a transfer by operation of law or by, or in execution of, a decree or order of Court, falling under section 2, clause (*d*) of the Transfer of Property Act; and that consequently section 43 of the Act was applicable to such a sale; and

(*b*) that, although at the time when the Official Receiver sold the properties, he had no title vested in him in the absence of an order appointing him as Receiver of the insolvent's properties, still as the Receiver acquired title subsequently by the subsequent order of Court, the sale operated on such subsequently acquired interest under section 43 of the Act, and became valid.

Held by KRISHNAN, J., that a sale by an Official Receiver is in the nature of a Court sale, and there is no implied representation as to title involved in it; that the Official Receiver's sale falls under the words "transfer by order of a Court of competent jurisdiction" in section 2, clause (*d*) of the Transfer of Property Act, and that consequently section 43 of the Act is not applicable to such sales.

APPEALS, under clause 15 of the Letters Patent against the judgments of DEVADOSS, J., in Second Appeals Nos. 100 and 101 of 1923 preferred to the High Court against the decrees of the Subordinate Judge of Masulipatam in Appeal Suits Nos. 13 and 44 of 1922 preferred against the preliminary and final decrees of the Additional District Munsif of Gudivāda in Original Suit No. 159 of 1920.

One Muttayya, the second defendant in the suit applied on 24th January 1918 to the District Court of Kistna to be adjudicated an insolvent. The Court transferred the petition to the Official Receiver of Kistna

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for disposal on 31st January 1918. The latter adjudicated him insolvent on 15th July 1918. The Court did not pass an order appointing the Official Receiver as Receiver of the insolvent's estate. The Official Receiver sold the suit properties by auction on 25th August 1918, and sale deeds were executed in favour of the purchasers, namely, defendants 3 to 5, on 12th September 1919. The plaintiff, who was the undivided son of the insolvent (second defendant), instituted this suit (Original Suit No. 159 of 1920) in the District Munsif's Court of Gudivāda, for a declaration that the sale by the Official Receiver (the first defendant) of the plaintiff's half share of the property was invalid and for partition and delivery of his half share in the properties. During the pendency of the suit, the District Court passed an order, on 1st February 1921, appointing "the Official Receiver of Kistna as receiver for the properties of the insolvent with effect from the date of adjudication." The vendees contended *inter alia* that the sales to them were rendered valid by the last order of the District Court. The District Munsif who decided the suit on 9th February 1921, held that the sale was invalid as against the plaintiff's share and passed a preliminary and subsequently a final decree in favour of the plaintiff for partition. The vendees preferred appeals against the preliminary and final decrees and the Subordinate Judge dismissed their appeals. The vendees preferred second appeals, which were heard by DEVADOSS, J., and His Lordship allowed the appeals, reversed the decrees of both the lower Courts and dismissed the suit. The plaintiff preferred these appeals under the Letters Patent.

V. Ramadoss (with *N. Krishna Mohan*) for appellant.—

There are two points, in these appeals, namely, (1) whether the power of the father to sell the son's share vests in the Official Receiver on the father's insolvency. This point is covered by

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the decision of the Full Bench in *Seetharama Chettiar* v. *Official Receiver, Tanjore*(1).

(2) Whether the power of the father to sell his son's share vests in the Official Receiver before the Court passed an order appointing the Official Receiver as a Receiver of the insolvent's properties. The order of adjudication does not vest the property in the Official Receiver. Under section 16 of Provincial Insolvency Act (III of 1907), a special appointment of a receiver for the insolvent's property is necessary. It is only on such appointment that the properties vest in a Receiver. The Official Receiver is appointed by Government under section 19 of the Act. There ought to be a special order appointing a receiver for the insolvent's properties in each case. Else properties do not vest in a Receiver. The mere existence of an Official Receiver is not enough. This has been settled by a series of decisions of this Court.

The receiver is not an agent of the Court. The sale cannot be upheld on the principle of agency. The receiver is an officer who acts under powers conferred by the Provincial Insolvency Act and not an agent of the Court. There can be no ratification under law and there is no ratification by the Court in fact in this case. There is no ratification in law for three reasons, viz., (1) there was no acting by the Receiver on behalf of the Court, as its agent, under section 196 of the Indian Contract Act, (2) it is a void act and so cannot be ratified, and (3) under section 200 of the Indian Contract Act, the sale cannot be ratified so as to injure third parties, such as the plaintiff. See *Raghavachari* v. *Pakkiri Mahamed Rowther*(2) and *Cassim* v. *Esuf*(3).

Before the vesting order, there can be no agency as between the Official Receiver and the Court. There was no creation of agency in fact by the order of the Court transferring the petition to the Official Receiver for disposal, nor any ratification in fact by the Court at any time.

Section 43 of the Transfer of Property Act does not apply to sales by Official Receiver. There is no representation as to title in an Official Receiver's sale. It is like a Court sale. When a receiver sells, there is no representation that he has power to sell. It is not a sale by a private party. Such sales fall

(1) (1926) I.L.R., 49 Mad., 849. (2) (1916) 30 M.L.J., 497 at 501.
(3) (1916) 23 C.L.J., 453.

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under section 2 (*d*) of the Transfer of Property Act, and the provisions of the Act, including section 43, do not apply to such a sale. It is a sale by operation of law or by order of Court within section (*d*) of the Act. Further "Interest" in section 43 of the Act does not include "power" under section 68 of the Provincial Insolvency Act (III of 1907); the sale comes before the Court for confirmation; hence, it is a sale by Court, see *Gaya Prasad* v. *Baijnath*(1), *Mulraj* v. *Indra Singh*(2) and *Pandiri Bangaram* v. *Karumoory Subbaraju*(3).

S. Varadachari with *N. Rama Rao* for respondent.—On the passing of the order of adjudication the property vested in the Court unless a receiver was appointed for the insolvent's properties. Either the Court or Receiver had power to sell the properties. If the Court had power to sell when the receiver wrongly sold the properties, the Court can retrospectively accept the sale. The act of the receiver is not a judicial act, but an administrative act. The act contemplates sale being held by an agent, see section 20 of Act III of 1907 and sections 59 and 60 of the new Act (V of 1920). The Court is bound to set right its own mistake: See *Kala Mea* v. *Harperink*(4).

The terms of section 43 of the Transfer of Property Act clearly apply to such sales. This is not a transfer by operation of law or by, or in execution of, a decree or order of Court within section 2 (*d*) of the same Act. It does not fall under its exclusion. It is not a Court sale. There is a representation by the sale-deed itself that the vendor has power to sell. No representation *dehors* the document is necessary for application of section 43 of Transfer of Property Act: see *Angannayya* v. *Daroor Narasanna*(5) and *Krishna* v. *Rasik*(6).

The preamble to the Transfer of Property Act and section 2 (*d*) do not exclude a receiver's sale. The vesting of property in the receiver may be by operation of law, under section 20 of the Act III of 1907; but a sale by the receiver is not by operation of law or by order of Court; it is by act of parties, as in the case of sales by Court of Wards, or by guardians appointed by Court "Interest" under section 43 includes "power" which has been held to vest in Official Receiver by the Full Bench decision in *Seetharama Chettiar* v. *Official Receiver, Tanjore*(7).

(1) (1892) I.L.R., 14 All., 176. (2) (1926) A.I.R. (All.) 102.
(3) (1911) I.L.R., 34 Mad., 159. (4) (1909) I.L.R., 36 Calc., 323 (P.C.).
(5) (1909) 18 M.L.J., 217. (6) (1916) 23 C.L.J., 501 (505).
(7) (1926) I.L.R., 49 Mad., 849.

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V. Ramadoss in reply.—The receiver's sale is a sale by virtue of an order of Court. It is a transfer by an order of Court. Further there is no subsequent acquisition by the receiver of "interest" in the property within section 43 of the Transfer of Property Act.

JUDGMENT.

KUMARASWAMI SASTRI, OFFG. C.J.

KUMARASWAMI SASTRI, OFFG. C.J.—This is an appeal against the judgment of DEVADOSS, J., in S.A. No. 100 of 1923. The second defendant applied to the District Court of Kistna to be adjudicated an insolvent on the 24th of January 1918. On the 31st of January 1918 the District Court transferred the petition to the Official Receiver, the first defendant. The adjudication order was made on the 15th of July 1918 and the Official Receiver put the property in dispute to sale at an auction held on the 25th of August 1918, and executed a sale deed on the 12th of September 1919. Defendants 3 to 5 are the purchasers under the sale deed. The plaintiff who is the son of the second defendant sued for a declaration that the sale by the Official Receiver is invalid, and for a partition and delivery to him of his share. He alleged that the debts contracted by his father were for illegal and immoral purposes not binding on him and that even if the sale is valid his interest would not be affected. On the adjudication of the second defendant no order vesting the properties in the Official Receiver was made as required by section 16 of the Provincial Insolvency Act (III of 1907). The properties therefore vested in the Court in the absence of an express order vesting them in the Official Receiver. It is clear that before the order of adjudication which was passed on the 15th of July 1918 neither the Court nor the Official Receiver could have sold the properties, and that immediately, after the adjudication was made, the properties of the insolvent

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vested in the District Court. After the suit was filed the Official Receiver applied to the Court for a vesting order and an order was made on the 1st of February 1921. The question which we have to decide is whether the order made long after the sale deed executed by the Official Receiver who at the time of the execution of the sale deed had no power to sell owing to the absence of a vesting order, validates the sale. The Act in force at the date of the filing of the application by the insolvent was Act III of 1907. Section 16, clause (2) of that Act provided that on the making of an order of adjudication the whole of the property of the insolvent with the exception of the items mentioned in the section shall vest in the Court or in a Receiver as provided herein and shall become divisible among the creditors. This section is re-enacted as section 28 of Act V of 1920 and the relevant clauses are 2 and 5. This is, therefore, not a case where the properties continued to remain in the insolvent, but a case where after the adjudication order they vested in the Court and at the date of the sale they must be vested either in the District Court or in the Official Receiver if the vesting order was passed. It is not therefore that neither the Court nor the Receiver had the power to sell. One of them under the Act had the power to sell.

The sale by the Official Receiver is sought to be validated on two grounds, namely, that the Official Receiver being only an officer of the Court and the properties having vested in the Court, the sale by the Official Receiver must be treated as a sale by an authorized agent of the Court subject to ratification and that the vesting order passed subsequent to the sale had the effect of ratifying and validating the sale held by the Official Receiver. It is also contended that section 43 of the Transfer of Property Act would apply

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to a case like the present and that, even assuming that the Official Receiver sold without title, the vesting order gave him a subsequent title which the purchasers could avail themselves of.

As regards the first contention, I do not think that the Official Receiver, to whom the matter is transferred for disposal by the District Judge under the provisions of the Provincial Insolvency Act, can be said to be an agent of the Court in respect of any acts done by him. The Official Receiver is an officer appointed by the Local Government under section 19 of the Provincial Insolvency Act, III of 1907, and where a matter is transferred to him under the powers conferred by the Act he is an officer who acts not as an agent of the District Court but as a person who under the Act is invested with powers specified therein anymore than a Court to which a decree is transferred for execution under the provisions of the Civil Procedure Code can be said to be the agent of the Court transferring the decree. There may be cases where there is something in the order of Court transferring the matter to the Official Receiver which limits his powers or which can be said to constitute him as agent, but in the present case no such limitation exists. I do not think that the Official Receiver or the Official Assignee is an agent of the Court within the meaning of the Indian Contract Act so as to enable the Court to ratify any unauthorized acts done by the agent.

The next question is whether section 43 of the Transfer of Property Act would apply. In order to attract the provisions of section 43 the sale should not fall within section 2, clause (*d*) of the Transfer of Property Act. Section 2, clause (*d*) enacts that nothing contained in the Act shall be deemed to affect any transfer by operation of law or by, or in execution of, a

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decree or order of a Court of competent jurisdiction, except so far as is provided by section 57 and Chapter IV of the Act. I do not think that a sale by the Official Receiver acting under the provisions of the Provincial Insolvency Act is a transfer of property by operation of law or by, or in execution of, a decree or order of Court of competent jurisdiction. The order of Court under the Provincial Insolvency Act simply vests the property in the Official Receiver and on such vesting he is under the provisions of the Act entitled to deal with the property in the various modes specified in section 20 of Act III of 1907, which corresponds to section 59 of Act V of 1920. I may point out that both sections 20 and 59 do not require any leave or order of the Court so far as the sale of property is concerned. It is only as regards clauses (*c*) to (*i*) that any leave is necessary. No authority has been cited for the proposition that a sale by the Official Receiver is a sale in execution of a decree or order of the Court and attracts the advantages and the infirmities attending Court sales. Reference has been made to *Gaya Prasad* v. *Baij Nath*(1) as authority for holding that the sale by the Official Receiver is a sale under an order of Court and section 2, clause (*d*) of the Transfer of Property Act applies. There the question arose under the Companies Act and the sale was by the Official Liquidator appointed under the Act who sold under orders of Court. The question whether such a sale would be Court sale was left undecided. The learned Judges point out that without the order sanctioning the sale the defendant would have got no title from the Official Liquidator. In the present case there is no order of Court sanctioning the sale by the Official Receiver to the first three respondents, nor was any

(1) (1892) I.L.R., 14 All., 176.

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order necessary as the Act gave the receiver full powers of sale. It seems to me that a sale by an Official Receiver acting under the powers conferred by the Act and without any leave or sanction of Court being necessary stands in the same position as a sale by a person in whom property vests by law for the purpose of administration of an estate subject of course to such protection as the law allows to Judicial Officers acting in execution of their office. Though property vests in the receiver by operation of law the transfer by him is a transfer by one party to another and cannot be said to be a transfer by operation of law in favour of his vendee. Viewing the sale in this light, I am of opinion that the present case falls within section 43 of the Transfer of Property Act. There is always an implied covenant by the vendor that he has title to sell. Section 55 contains implied covenants in sales of immovable property and there can be little doubt that when a person sells property there is an implied covenant that he has power to sell. Even assuming that all that the Official Receiver can sell is the right, title and interest of the insolvent, still the Official Receiver covenants that he has authority to transfer such right title and interest as the insolvent has. It is of course open to him by apt covenants to protect himself against any of the infirmities of title or any disputes which may arise as regards the sale. But in the present case it is not contended that the Official Receiver has done so. In the present case the Official Receiver who had no power to sell has sold the property. There is as regards the vendee, who had no notice that no vesting order was passed and who was entitled to assume that the Official Receiver was clothed with the requisite authority, the implied covenant that he has title to sell and there is therefore an erroneous representation that

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he is authorized to transfer immovable property, when as a matter of fact he had no such power. The transferees in this case paid consideration for the transfer and if the Official Receiver subsequently got authority to transfer the property there is no reason why such subsequent authority should not operate so as to validate the antecedent sale. The case comes strictly within the wording of section 43. I may point out in this connection that in cases where after a sale it is sought to rectify any defects in the power of the Official Receiver it is desirable that notice should go to all the parties interested in the property and their objections should be heard as there may arise cases where it is undesirable that the Court should exercise its discretion when it is passing orders the effect of which would be to validate invalid transactions long afterwards and affect the right of third persons. In the present case there is no hardship shown.

As regards the plea that the debts were contracted by the father for illegal and immoral purposes no evidence has been adduced and the appellant's vakil does not want a remand for the determination of that question.

I had some doubt whether having regard to the decision of their Lordships of the Privy Council in *Sat Narain* v. *Behari Lal*(1) the Official Receiver could sell the interest of the minor which did not vest in him under the guise of exercising the power which the father has. In the case of a father who is a member of a joint family with his sons the whole joint property vests in them jointly. This is not the case where the father becomes an insolvent and his interest only vests in the Official Receiver. But in view of the decision of the

(1) (1925) I.L.R., 6 Lah., 1.

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KRISHNAN, J.

Full Bench in *Seetharama Chettiar* v. *Official Receiver, Tanjore*(1). I think the matter is concluded by authority.

The Letters Patent Appeal fails and is dismissed with costs.

KRISHNAN, J.—To understand the points raised in this appeal the facts may be briefly stated as follows: One Muttayya applied in 1918 to be declared an insolvent to the District Court of Kistna. The District Judge passed the order "transferred to the Official Receiver for disposal" and did nothing else. The Official Receiver adjudicated Muttayya an insolvent and instead of remitting the case to the District Judge for orders appointing him receiver of the properties and vesting them in him, very carelessly proceeded to sell the joint family property of Muttayya and his son, and the contesting respondents purchased it. Plaintiff has now brought the suit to have it declared that his half share in the property did not pass by the sale and to recover possession of it. While this suit was pending before the District Munsif the Official Receiver realizing his mistake applied in 1921 to the District Judge for a vesting order having retrospective effect from the date of adjudication and he passed an order as follows:—

"The Official Receiver of Kistna is appointed receiver for the properties of the insolvent with effect from the date of adjudication."

This order was passed without notice to any one three years after the adjudication.

We have to consider the effect of this belated proceeding on the Official Receiver's sale for it is contended that that order has validated the sale which admittedly was an invalid one at its date as the Official Receiver had no power to sell without a vesting order. A number of authorities have laid down in this Court

(1) (1926) I.L.R., 49 Mad., 849 (F.B.)

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that a sale without a vesting order is invalid and the point must now be taken to be settled. The learned vakil for the respondent therefore wisely conceded the point.

There is no provision in the Insolvency Act to enable a Court to pass orders with retrospective effect and so far as the Judge's order purports to take effect retrospectively it is clearly bad. But the respondents contend that giving it effect as from its date it has validated the sale from that date. The argument is put in two ways. It was first argued that the Official Receiver in selling the property must be treated as having acted as an agent of the Judge and his want of authority was subsequently cured by the Judge's order which amounted to a ratification by the principal of the agent's unauthorized act. It was next argued that section 43 of the Transfer of Property Act applied and as soon as the Official Receiver got authority to sell, the purchasers could take advantage of it and treat the sale to them as valid.

Taking the question of ratification first, I am of opinion that the contention cannot be supported. Though it may be, as pointed out in *Subba Aiyar* v. *Ramaswami Aiyangar*(1), the Court could appoint an agent to sell, there is nothing on record in the present case to suggest that the Court did appoint the Official Receiver as such agent; in fact he could not have done so. See *Kavali Sankara Rao* v. *Ramakrishnayya*(2). Nor is there anything to show that the Official Receiver purported to act as the agent of the Judge. He purported to sell on his own authority under the powers given him by the Act. The fact that he misconceived his powers does not make him an agent. The theory of

(1) (1921) I.L.R., 44 Mad., 547. (2) (1924) 43 M.L.J., 184.

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agency should not be introduced, in my opinion, unless there is some foundation for it on facts. The Official Receiver not being an agent, and not having purported to act as an agent, there can be no valid ratification. It is clear law that unless the agent purports to act as such, his action cannot be ratified by the principal. In this case there is the further difficulty that nothing appears in the Judge's vesting order implying any ratification of the sale or even to indicate that he knew of the sale. The plea of ratification must therefore be rejected.

Turning now to the argument based on section 43, it seems to me with all respect that the section is not applicable to the present case. Taking the language of the section, it has first to be made out that the Official Receiver made an erroneous representation that he was entitled to sell the suit property. The Official Receiver's sale is, in my view, in the nature of a Court sale and so far as I can see there is no implied representation involved in it. In such sales there is no covenant for title. What the Official Receiver sells is merely the title of the insolvent, if any, and the purchaser takes what he can get. If the purchaser fails to get a title, he does not thereby get any claim for damages against the Official Receiver, as he would against a private seller. Compulsory sales *in invitum* by Courts or by its officers stand on a very different footing from private sales.

Again it was argued that the Transfer of Property Act was itself excluded from applying to such sales by reason of section 2, clause (*d*), of that Act. The words of the section applicable are "transfer by order of a Court of competent jurisdiction," leaving out the other words. I am inclined to think that Official Receiver's sales come within these words. They are in

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the nature of Court sales and their validity really depends on the order of the Insolvency Court vesting the property in the Official Receiver and thus authorizing him to sell. The sale is a compulsory sale *in invitum* and the foundation of its validity is the order of Court. It is open to the Court to set aside a sale by the Official Receiver. The Official Receiver is an officer of Court and acts as such in effecting sales and not as a private individual. The Act, as its preamble shows, really deals only with transfer of property by act of parties. A similar point was raised before the Allahabad High Court with reference to a sale by the Official Liquidator and their Lordships were inclined to apply clause (*d*) to such a sale, though they did not expressly decide it. No other authority has been cited to us on the point.

For the above reasons, with all respect, I would hold that section 43 cannot be applied to this case. It may be mentioned in conclusion that, though the plaintiff raised the plea that his father's debts were illegal and immoral, he adduced no evidence in support of it.

Having come to the conclusion that the Official Receiver's sale was invalid and it has not been validated in any way, I hold that the plaintiff's suit should have been decreed. I would therefore allow the Letters Patent Appeal and dismiss the Second Appeal to the High Court with costs in both. Letters Patent Appeal No. 126 of 1924 follows.

RAMESAM, J.

RAMESAM, J.—This is a Letters Patent Appeal from the order of DEVADOSS, J., in Second Appeal No. 100 of 1923. The second defendant applied to be adjudicated an insolvent on the 24th of January 1918. The petition was referred for disposal on 31st January 1918 to the Official Receiver of Masulipatam, who is the first defendant. The second defendant was adjudicated an insolvent on the 15th of July 1918. The Official

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Receiver held an auction sale of the property on 25th August 1918. Defendants 3 to 5 are the purchasers by separate sale-deeds. The plaintiff is the son of the second defendant. He sued for a declaration that the sale by the first defendant of the plaintiff's share of the property to defendants 3 to 5 is invalid and for partition and recovery of his share. When the second defendant was adjudicated an insolvent, no vesting order in a receiver was made under section 16 of the Act of 1907 under which the proceedings were taken. The result was that the whole property of the insolvent vested in the Court under section 16, clause 2 (*a*). It has been held in a series of decisions in this Court that an express vesting order must be made so as to vest the property in the Official Receiver, and if no such order was made the property vests only in the Court. See *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar*(1), *Rama Aiyar* v. *Official Receiver of Tinnevelly* (2), *Vythilinga Padayachi* v. *Ponnuswami Padayachi* (3), *Kavali Sankara Rao* v. *Ramakrishnayya*(4), *Sankaranarayana Pillai* v. *Rajamani*(5), *Muthuswami Swamiar* v. *Somoo Kandiar*(6) and *Subba Aiyar* v *Ramaswami Aiyangar* (7). In the decision in *Muthuswami Swamiar* v. *Somoo Kandiar*(6), SESHAGIRI AYYAR, J., seems to have come to the conclusion with great hesitation and gave no reasons in support of the conclusion, being merely content not to dissent from the other Judge. In that case, the adjudication was made by the Official Receiver. In *Subba Aiyar* v. *Ramaswami Aiyangar*(7), also the petition for adjudication was "transferred to the Official Receiver for adjudication and for the administration of the estate." The Receiver made the

(1) (1916) 30 M.L.J., 415. (2) (1917) 32 M.L.J., 520.
(3) (1921) 41 M.L.J., 78. (4) (1924) 46 M.L.J., 184.
(5) (1924) I.L.R., 47 Mad. 462. (6) (1920) I.L.R., 43 Mad., 869.
(7) (1921) I.L.R., 44 Mad., 547.

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adjudication, but no order was made by the District Judge vesting the property in the receiver. The learned Judges, however, held that the words "for the administration of the estate" amounted to appointing the Official Receiver an agent of the Court. Whether that case was correctly decided or not, in the present case, the petition was merely referred to the Official Receiver for disposal, that is for adjudication or not as the case may be. It cannot be held that the disposal of an application for adjudication involves the administration of the estate by the receiver, especially when the receiver cannot deal with the estate until a vesting order has been made. The decision in *Subba Aiyar* v. *Ramaswami Aiyangar*(1) was distinguished in *Kavali Sankara Rao* v. *Ramakrishnayya*(2), in which the order was exactly the same as in the present case and it was held that the transfer of the petition for disposal cannot be construed as in *Subba Aiyar* v. *Ramaswami Aiyangar* (1). In the case of *Sankaranarayana Pillai* v. *Rajamani*(3), the Court itself made the order of adjudication and then passed the order "referred for further proceedings," and the learned Judges construed this to mean that the Official Receiver of the district should act as receiver in the particular case and the matter was referred to him and therefore the order amounts to an order of appointment. VENKATASUBBA RAO, J., was also of the opinion that the Official Receiver may be regarded as having been constituted as agent of the Court, as in *Subba Aiyar* v. *Ramaswami Aiyangar*(1).

It seems to me that the reasoning in *Sankaranarayana Pillai* v. *Rajamani*(3) does not help us in the present case, as the order of reference to the Official Receiver was not made after the adjudication, but the

(1) (1921) I.L.R., 44 Mad., 547. (2) (1924) 46 M.L.J., 184.
(3) (1924) I.L.R., 47 Mad., 462.

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reference itself was for the purpose of adjudication. We cannot imply by the mere use of the word "disposal" that it was intended to appoint the Official Receiver as the agent of the Court. Nor did the Official Receiver purport to act as the agent of the Court. The result is that the line of reasoning based upon the agency of the receiver does not avail in this case. Mr. Varada Acharya for the respondent contended that the Court itself can rectify the defect in the original order by the later order it passed on 1st February 1921 long after the sales and after the trial of this suit and eight days before the judgment of the District Munsif. He relies on *Kala Mea* v. *Harperink*(1). I cannot think that case, while showing that a Court may correct its own irregularities in some cases, supports the proposition that an order made on 1st February 1921 can date back and validate sales made in 1918. For this purpose the only argument that can be urged is by relying on section 43 of the Transfer of Property Act. In my opinion it may be said in this case that the Official Receiver erroneously represented to the purchasers that he was authorized to transfer the properties in the suit. There is no doubt that he also professed to transfer the properties for consideration. I also think that sales by Official Receiver will be covered by section 43 and will not fall under the exemption clause, section 2 (*d*) which relates to transfers by operation of law, and transfers by a decree or order and transfers in execution of a decree or order. The only obstacle that remains in the way of the respondent is whether the words "any interest which the transferor may acquire in such property" in section 43 will cover the right of a Hindu father to sell the whole joint family property which vests in the Official Assignee. According to our judgment in

(1) (1909) I.L.R., 36 Calc., 323.

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Seetharama Chettiar v. *Official Receiver, Tanjore*(1) I think the words "any interest in such property" are wide enough to cover the right of a Hindu father to sell the whole of the joint family property and are, if at all, wider than the word "property" in section 2 (*d*) of the Provincial Insolvency Act which, according to our construction, will include such power. On this last ground I am therefore inclined to hold, agreeing with DEVADOSS, J., that the appeal must be dismissed with costs.

VENKATASUBBA RAO, J.

VENKATASUBBA RAO, J.—It has been held by a Full Bench of this Court in *Seetharama Chettiar* v. *Official Receiver, Tanjore*(1) (originally posted along with the present appeals) that the conditional power of a Hindu father to dispose of his sons' interest vests in the Official Receiver, and that decision governs the present case so far as this point is concerned.

A further contention has in this appeal been raised, that the sales by the Official Receiver are bad by reason of the fact that when he effected the sales there was no order in virtue of which the property vested in him. The following dates are material. The second defendant applied to be adjudicated insolvent on the 24th January 1918. His petition was forwarded for disposal to the Official Receiver on 31st January 1918. The Receiver adjudicated him insolvent on 15th July 1918. The properties were sold by auction on 25th August 1918 and sale-deeds were executed by the Receiver in favour of defendants 3 to 5 on 12th September 1919. The vesting order was made by the Court on 1st February 1921.

This case has to be decided with reference to the Provincial Insolvency Act III of 1907. Under section 18 (1) the Court may, at the time of the adjudication or

(1) (1926) I.L.R., 49 Mad., 849.

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at any time thereafter, appoint a Receiver for the insolvent's property and thereupon such property vests in the Receiver. There being no order appointing a Receiver, the question of vesting in a Receiver cannot arise. When the order of the 31st January 1918 was made the insolvent had not been adjudicated and the Court could not therefore then appoint a Receiver for the property of the insolvent. The order of the 31st January cannot accordingly be construed as appointing the Official Receiver by implication Receiver of the insolvent's property. Then, can it be said, as has been contended by Mr. Varadachari, that the Official Receiver was the agent of the Court for the sale of the property? I do not think that on the facts of the present case, the theory of agency can be upheld. Under section 16 (2) (*a*), on the making of an order of adjudication, if the insolvent's property does not vest in the Receiver it vests in the Court. On 31st January 1918 when the petition was forwarded to the Official Receiver an order of adjudication had not been made and the property therefore did not vest in the Court, and it is thus difficult to accept the argument that the Official Receiver was intended to be constituted the Court's agent for the sale of the property. Moreover, the words of the order "forwarded to the Official Receiver for disposal" clearly show that the functions which the Official Receiver was to exercise, were delegated judicial functions under section 52 and have no reference to the administration, under section 20, of the insolvent estate. For these reasons, *Sankaranarayana Pillai* v. *Rajamani*(1), and *Subba Ayyar* v. *Ramaswami Ayyangar*(2), do not apply to the facts of the present case. It was next suggested that the Court by making

(1) (1924) I.L.R., 47 Mad., 462. (2) (1921) I.L.R., 44 Mad., 547.

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the vesting order, dated 1st February 1921, should be deemed to have ratified the unauthorized sales. The question of ratification does not arise as the Official Receiver did not purport to act on behalf of the Court. The contention of Mr. Varadachari based on the ground of agency thus fails.

It is next contended, that although the transfer was inoperative at the outset, it afterwards became operative under section 43 of the Transfer of Property Act.

It runs thus :—

"Where a person erroneously represents that he is authorized to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

"Nothing in this section shall impair the right of transferee in good faith for consideration without notice of the existence of the said option."

When the Official Receiver sold the properties in 1919 he had no interest in them and was therefore not competent to convey them; but in virtue of the vesting order, dated 1st February 1921, he acquired an interest and the transfer operates under section 43 on that interest without any further act on the transferor's part. This is the contention and in my opinion it seems to be sound and must be accepted. The section embodies a rule of equity that when a transferor purports to convey a property to which he had no title, the transferee must be satisfied out of any title, which the transferor may afterwards acquire in the same property. All the requirements of the section are here fulfilled. There was an erroneous representation by the Official Receiver that he was authorized to transfer the property. There was no order appointing him a Receiver and the property had not vested in him. Believing he had the

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right to deal with it he conveyed the property. The representation was, of course, not express, but express representation is not necessary under the law. Representation of ownership was implied in the very act of transferring the property and such an implied representation is sufficient for the purposes of the section. See *Angannayya* v. *Daroor Narasanna*(1) and Shephard and Browne's Transfer of Property Act, Commentaries to section 43. It was next contended that section 43 does not apply, because the preamble to the Transfer of Property Act states that the object of enacting it was to define and amend the law relating to the transfer of property by act of parties and it is suggested that the act of the Official Receiver does not fall within the description "act of parties." I find this to be a fallacious argument. The expression "by act of parties" connotes that the scope of the act is limited to voluntary transfers as distinguished from transfers by operation of law. When the property vests in a Receiver on insolvency there is a transfer by operation of law but when a Receiver transfers the property to an alienee, the alienation is a voluntary transfer and is as much an "act of parties" as any transfer by a private individual. Section 2 (*d*) of the Transfer of Property Act is next relied on as furnishing an argument against the application of section 43. The material portion of section 2 (*d*) reads thus :—

> "But nothing herein contained shall be deemed to affect any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction."

This provision makes it clear that transfers by operation of law do not come within the scope of the Act, but, as I have said, the sales in question are not such transfers.

(1) (1909) 18 M.L.J., 247.

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It is next obvious that these sales are not transfers in execution of a decree or order of a court of competent jurisdiction. Then remains the only other part of the section. Are these sales transfers by a decree or order of a Court? It is impossible to regard these as such. There is, in the present case, no decree or order which may be said to have the effect of transferring these properties. Section 2 (*d*) does not stand in the way. Next, it is said that the section does not apply to sales forbidden by law on the ground of public policy. This is not such a sale and this argument is equally untenable. It is lastly contended that section 43 does not prevent the insolvent's sons from attacking the sale. I am unable to follow this argument. The section refers to transfer of immovable property. What the Receiver transferred was undoubtedly immovable property. In so transferring immovable property he exercised the Hindu father's power to dispose of his sons' shares. The question is, what is that that he transferred? Whether in his capacity as the assignee of the insolvent or as exercising the insolvent's power of disposal, what the receiver actually did was to transfer immovable property. That is all that the section requires and I do not see how if the Receiver is bound by the transfer, the sons are not. I may take an illustration for showing how misleading the argument of the learned vakil for the insolvent's son, is. Let us take a simple case of the father himself transferring the property. Let us assume that the father acquires a property by purchase, as joint family property. Soon after its acquisition the father sells it for justifiable purposes. It is subsequently found that on the date of the transfer by the father, his title was defective as he had not taken, say, a release from some party with an outstanding title. When the defect is discovered, it is cured by the father taking the necessary release deed.

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Can it be said that the sons in this case can take advantage of their father's defect of title and contend that the property has not passed to the transferee? Similar instances may be given of cases of ward and guardian or beneficiary and trustee. In these cases it is impossible to uphold the contention that while the law forbids the actual transferor to rely upon his own defect of title, a third party for whom the transferor acts can however defeat this equitable rule and commit a fraud. I am clearly of the opinion that section 43 applies and I therefore accept the contention based on that section.

Another point has been urged by Mr. Varada Acharya, namely, that the Court is bound to set right its own mistake and for this he relies upon the very strong observations of Lord MACNAGHTEN in *Kala Mea* v. *Harperink*(1). I am not prepared to say that this contention is unsound, but I refrain from expressing any opinion at present on that point.

The appeal fails and is dismissed with costs.

L.P. Appeal No. 126 of 1924 follows.

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CURGENVEN, J.—I agree that the order of 31st January 1918 was not a vesting order, if only for the reason that under section 56 of the Provincial Insolvency Act the Court cannot pass such an order before the order of adjudication is passed.

Three separate lines of argument have been employed to support the position that the Court can validate its Official Receiver's sale by passing a subsequent vesting order. The first is that if the property does not vest in the Receiver it vests in the Court, and, the Receiver being an officer of the Court, we may regard Court and Receiver as one, and an act done by either as done by that single agency. The second argument would make

(1) (1909) I.L.R., 36 Calc., 323 (P.C.).

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the Receiver the Court's agent, thus enabling the Court to ratify an act under section 196 of the Indian Contract Act. The third argument is based on section 43 of the Transfer of Property Act.

I do not think it necessary to discuss the merits of the first and second arguments, because it appears to me clear that the case may be brought under section 43 of the Transfer of Property Act. That section is a branch of the law of estoppel, and the first requisite is that the transferee should have been misled into the impression that his transferor had title to transfer. It appears to me that where an Official Receiver sells the property of an insolvent, it may be presumed without more that a purchaser erroneously believed him to have authority to do so, and it is not necessary, in order that such purchaser may be protected under section 43, that he should have instituted any further inquiries. The section itself contains nothing which would make it inapplicable to a sale by a public servant, but reliance has been placed on the terms of section 2 (*d*) and, should any ambiguity be found therein, on the preamble. Section 2 (*d*) provides that nothing contained in the Act shall be deemed to affect "any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction . . ." No difficulty seems to be presented by the words "transfer by operation of law," which, however widely they may be construed, cannot cover a sale by a Receiver of an insolvent's property. Such a sale is frequently a matter of discretion and so a voluntary act on the part of the Receiver, as the purchase is on the part of the buyer, and, although the Receiver may be a public officer, the transaction is not the less an act of parties on that account. The ordinary rules relating to stamps and registration apply to such sales. The next phrase to be considered is "by a decree or order of a Court of

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competent jurisdiction." It would, I think, be a misuse of language to say that a sale was by order of the Court for the mere reason that the Court had passed a vesting order in respect of the whole assets. An Official Receiver is not required to obtain the Court's sanction before selling any portion of the property, nor is such sale subject to the Court's confirmation. There is an Allahabad Case, *Gaya Prasad* v. *Baij Nath*(1), in which the question was raised but not decided, whether a sale by the Official Liquidator, in the process of winding up a company, fell within section 2 (*d*) of the Transfer of Property Act, but since the learned Judges observe that without the order sanctioning the sale the defendant would have got no title from the Official Liquidator, I infer that there was a specific order of Court sanctioning that particular sale. If that was so, the argument for excluding such a sale from the provisions of the Act would be stronger than where only a general vesting order has been passed. Nevertheless, enough doubt was felt for the Bench to add the advice that Official Liquidators who take leases and subsequently as such Liquidators sell the interest of the lessee had better, for their own protection and to avoid any question of their continuing liability, execute in favour of the purchasers written assignments of the leases and see that they are registered. In other words, they should observe the formalities required for a transfer by act of parties.

There remains to be considered the effect of the words "in execution of a decree or order of a Court of competent jurisdiction," and it would, I think, be unduly extending the meaning of these words to hold that a sale of property vested in the Official Receiver by order of the Court is in execution of that order. In

(1) (1892) I.L.R., 14 All., 176.

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one sense, no doubt, the sale is in pursuance of or "in execution of," the order, since such an order has ordinarily in contemplation a realization of assets by sale. But attaching to "execution" the meaning which it bears in relation to judicial proceedings, I conclude that such a sale falls outside the scope of the exception. I agree, therefore, that the appeals must be dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Sir C. V. Kumaraswami Sastri, Kt., Officiating Chief Justice and Mr. Justice Curgenven.

1926, August 12.

1. DHURVAS T. SUBBAYYAR & BROTHERS, APPELLANTS IN BOTH APPEALS,
2. OFFICIAL RECEIVER, MADURA—SUPPLEMENTAL APPELLANT IN BOTH APPEALS.

v.

T. K. MUNISAMI AYYAR & SONS, RESPONDENTS IN BOTH APPEALS.*

Provincial Insolvency Act (V of 1920), ss. 2, 20, 33, 49, 50—Suit by vendor for damages for breach of contract for purchase of goods—Decree for damages—Appeal by vendee—Vendee adjudicated insolvent subsequent to filing of appeal—Right of Official Receiver to continue appeal—Suit by vendee to recover deposit—Decree dismissing suit—Appeal by vendee—Vendee adjudicated insolvent pending appeal—Right of Official Receiver to continue appeal—Remedy of Official Receiver against decrees for damages against insolvent—Official Receiver entitled to contest such decree by taking proceedings under the Insolvency Act.

Where a decree for damages was passed against a vendee in a suit against him by the vendor for damages for breach of

* Appeals Nos. 220 and 221 of 1921.

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contract, and the vendee appealed against the decree but was adjudicated insolvent during the pendency of the appeal, and the Official Receiver claimed to continue the appeal,

Held, that section 59 of the Provincial Insolvency Act (V of 1920), does not authorize the Official Receiver to appeal, or continue an appeal already preferred by the insolvent prior to his adjudication, against a decree for damages in a suit for breach of contract against the insolvent; the expression "relating to the property of the insolvent" in clause (*d*) of section 59, does not mean "*affecting* the property of the insolvent."

The Official Receiver is not without remedy against decrees for damages passed against the insolvent, because the decree is not binding on him but it is open to him to contest the validity of the decree as a debt, in proper proceedings taken under the provisions of the Provincial Insolvency Act (V of 1920), such as sections 33, 49 and 50 of the Act.

Where, however, an insolvent before his adjudication, had instituted a suit against his vendor for the return of a deposit of money made by him with the latter under a contract for sale of goods, alleging breach of contract by the latter, but the suit was dismissed and the former appealed prior to his adjudication, the Official Receiver is entitled to continue the appeal, because in this case the deposit is the insolvent's property which became vested in the Official Receiver under section 20 of the Provincial Insolvency Act, 1920, and section 59, clause (*d*), expressly authorizes the Official Receiver to institute or continue legal proceedings relating to such property.

APPEALS against the decrees of T. N. LAKSHMANA RAO, Additional Subordinate Judge of Madura, in O.S. No. 27 of 1921, and O.S. No. 58 of 1921, respectively.

The material facts appear from the judgment. These appeals were originally preferred by the vendees. After the filing of the appeals, the appellants were adjudicated insolvents, and the Official Receiver was appointed Receiver of their properties. The appeals were not prosecuted by the insolvents and were dismissed. The Official Receiver applied to have the appeals restored as he had no notice of the appeals and their dismissal. The petition was granted, and on the hearing of the appeals,

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the respondent took the objection that the Official Receiver was not entitled to continue the appeals.

A. Krishnaswami Ayyar for respondents.—There is a preliminary objection to the competency of the Official Receiver to continue the appeal. In Appeal No. 220 of 1921, a decree was passed for damages for breach of contract against the insolvent. Section 28 of the Provincial Insolvency Act, 1920, does not transfer a right of action to the receiver in insolvency. In *Chandmull* v. *Ranee Soondery Dossee*(1), it has been held that the Official Assignee cannot be made a party to a decree passed against an insolvent. In *Kondapalli Tatireddy* v. *Ramachandra Rao*(2), it has been held that an *insolvent* can continue the suit or appeal even after insolvency in certain cases. Section 59 (*d*) does not authorize the Official Receiver to appeal or continue the appeal of the insolvent against a decree for damages. Right of action for damages for breach of contract is not property. In English Common Law, a right of action for damages may vest in the Official Assignee. (See Williams on Bankruptcy, 11th edition, page 247.) The Indian Law is at variance with the English Law. Section 28 of the Provincial Insolvency Act, 1920, defines what properties vest in Official Assignee or Receiver. Property attachable under Civil Procedure Code, section 60, vest; mere right to sue is not assignable under section 6 of the Transfer of Property Act. A right to sue for damages does not vest in Official Assignee. In *Abu Mahomed* v. *S. C. Chunder*(3), it has been held that a right to damages for breach of contract, is not assignable and not attachable, and therefore does not vest in the Official Assignee under the Indian Law. The English Law is no guide, for there is express departure as to damages for breach of contract which does not vest in the Official Assignee under the Indian Law, by reason of the operation of section 28 of the Provincial Insolvency Act, 1920, section 60, Civil Procedure Code, and Transfer of Property Act, section 6.

C. V. Ananthakrishna Ayyar for appellant.—Order XXII, rule 8, says that the Official Assignee can continue the suit or appeal on behalf of the insolvent's creditors. Debtor and debt include judgment-debtor and judgment-debt. Official Receiver can come in and continue the suit or appeal under Order XXII, rule 8, Civil Procedure Code. The expression

(1) (1895) I.L.R., 22 Calc., 259 at 265. (2) (1921) 13 L.W., 616.
(3) (1909) I.L.R., 36 Calc., 345.

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"relating to property of the insolvent" in section 59 (*d*) of the Provincial Insolvency Act, 1920, includes decrees against insolvent for damages. "Relating to property" means affecting such property. See *United Telephone Co.* v. *Bassano*(1). The decision in *Chandmuli* v. *Ranee Soondery Dossee*(2), was under the old Insolvency Act, 11 and 12 Vic., Chap. 21. The present Insolvency Act, 1920, goes very much further than the old Acts. See *Easwara Iyer* v. *Govindarajulu Naidu*(3). A suit for damages for breach of contract is not a mere right to sue; see 2 Halsbury, page 137, section 236. The decision in 36 Calc., 345, is under the Transfer of Property Act.

A. Krishnaswami Ayyar in reply.—The construction of "relating to insolvent's property" in section 59, clause (*d*) as meaning "affecting such property" proves too much. If the appellant's construction is right, every suit by or against the insolvent can be continued by the Official Assignee or Receiver. The expression "relating to property" means having immediate reference to property.

Order XXII, rule 8, presupposes a right to maintain a suit by the Official Assignee. The right to institute a suit or continue it must be decided with reference to the Provincial Insolvency Act. The Receiver is not without remedy. The decree for damages is not binding on the Official Assignee. It is a debt. It must be proved as a debt. The Official Assignee can go to the Insolvent Court to re-open the judgment and decree. See sections 2, 33, 49 and 50 of the Provincial Insolvency Act, 1920. Under the English Law also, the decree can be re-opened and is not binding on the Bankruptcy Court. See Williams on Bankruptcy (11th edition), pages 53 and 146.

JUDGMENT.

These appeals arise out of a contract for purchase and delivery of goods entered into by the appellant in each of the cases with the respondent. The contract has been filed as Exhibit D, which, after describing the goods and the place where the goods were to be got from and delivered, in paragraphs 1 and 2, goes on to say that the purchaser shall be bound by the contract,

(1) (1886) 31 Ch. D., 630. (2) (1895) I.L.R., 22 Calc., 259 at 265.
(3) (1916) I.L.R., 39 Mad., 689 at 691.

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he (respondent) entered into with his vendors and should take delivery of the goods. As regards the delivery of the goods and the advance, paragraphs 5, 6 and 7 are material; they run as follows:

"On the very day on which the aforesaid two persons (their vendors) inform that the aforesaid bales have arrived here you should pay money and take delivery of the bales. Whenever the aforespecified bales are issued from the mill you should take delivery of the same. We are not liable therefor. As the aforespecified advance money is with us without interest, as the bales are issued, according to the proportion of the advance, you should deduct for the bales at the rate of Rs. 190 and at the rate of Rs. 160 per bale."

Then clause 8 says:

"If the bales are received from the aforesaid two persons and if we have not informed you of the same we are liable for the matters of loss that may result therein. In the matter of your not taking delivery after we informed you of the receipt, you yourself are liable for the loss that may arise therein."

This is signed by the respondent firm and is addressed to the appellant firm. Suit No. 27 of 1921 which led to Appeal No. 220 of 1921 was filed by the present respondent against the appellant for recovery of damages for breach of contract, the allegation being that the appellant has not performed his contract in taking delivery. The particulars are given in the plaint and the claim, after credit is given for the advance, is for Rs. 8,860 as detailed in Schedule A or in the alternative for Rs. 3,460 as detailed in Schedule B with interest and costs. Suit No. 58 of 1921 which refers to Appeal No. 221 of 1921 was filed by the present appellant against the respondent for the recovery of the advance paid with interest. His case is that under this contract he paid advances, that the respondent did not deliver the goods and therefore the contract was broken by the respondent and that the appellant is entitled to recover the advance with interest. He claims

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Rs. 5,289-10-0. The suits were tried together and the Subordinate Judge decreed the plaintiff's claim in O.S. No. 27 of 1921, holding that the breach was on the part of the defendant in that suit and awarded a decree for about Rs. 7,000 odd as damages after giving credit for the advance which was paid. He dismissed Suit No. 58 of 1921, the suit filed by the present appellant against the respondent, on the ground that the breach of contract being on the part of the plaintiff in that suit, he was not entitled to recover the deposit.

These appeals are filed by the appellant against the two decrees. After the filing of the appeals, the appellant became insolvent. He applied for the benefit of the provisions of the Provincial Insolvency Act and an Official Receiver was appointed. When the appeals came on, the appellant who became insolvent did not press the appeal. The Official Receiver not being a party, did not appear and the result was that the appeals were dismissed. The Official Receiver then applied to be made a party to the appeals on the ground that he had no notice of the appeals and their pendency and that there was a good case to represent to the Court against the decrees of the Subordinate Judge. His petition was granted on terms that he gave security and the dismissal was set aside; and he now appears by Mr. Anantakrishna Ayyar to prosecute the appeals.

A preliminary objection was taken by Mr. Krishnaswami Ayyar on the ground that, under the Provincial Insolvency Act, it is not competent to the Official Receiver to prosecute an appeal which relates to a claim for damages only and does not affect any property of the insolvent. He bases his contention on two grounds, first of all, he states that so far as the claim for damages is concerned, section 28 of the Provincial Insolvency Act of 1920 states the effect of an order of

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adjudication. Clause 2 states that on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a Receiver as hereinafter provided, and shall become divisible among the creditors and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose. Then follow what properties, for the purposes of the section, shall be included and excluded. As regards exclusion, clause 5 of the section says:

"The property of the insolvent for the purposes of this section shall not include any property (not being books of account) which is exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree."

We have now therefore to turn to the Civil Procedure Code to see what are exempted from attachment because such exempted property could not vest in the Court or in the Receiver. Section 60 of the Code in treating of property not liable to attachment refers in clause (*e*) to a mere right to sue for damages. We take it, by mere "right to sue" is meant a right which has not ripened into or merged in a decree of Court and which still exists as a cause of action which the insolvent can enforce if he chooses by filing a proper suit. Section 6 (*e*) of the Transfer of Property Act is also relied upon which exempts from transfer a mere right of suit and states that it cannot be transferred. In the case of an unliquidated claim for damages there can be no doubt that it is a mere right of suit and the contention of Mr. Krishnaswami Ayyar is that reading

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these sections together in this case, the right of suits would not vest in the Official Receiver and secondly, that he has no right to come in as a party. If the matter rested here, there may be some force in this contention. But in this case there are two points to be considered. On the date when the appellants became insolvents not only had the respondents exercised their right of filing a suit, but there was also a decree which they obtained against the insolvents and the matter did not rest merely on a chose-in-action which has not ripened into a decree. The case must therefore be judged with reference to section 59 of the Provincial Insolvency Act. That section says:

"Subject to the provisions of this Act, the Receiver shall, with all convenient speed, realize the property of the debtor and distribute dividends among the creditors entitled thereto and for that purpose may sell all or any part of the property of the insolvent; give receipts for any money received by him; and may, by leave of the Court, do all or any of the following things, namely, (*c*) carry on the business of the insolvent so far as may be necessary for the winding up of the same; (*d*) institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent."

Then other clauses follow which it is not necessary for us to consider. Turning to this section, what we have to see is what under clause (*d*) is the meaning of the terms "relating to the property of the insolvent." Is it a suit which directly or immediately affects the property of the insolvent or is it a suit or legal proceeding which might ultimately result in a decree which if executed or sought to be enforced would be payable out of the assets of the insolvent and thereby affect the property? The argument of Mr. Krishnaswami Ayyar is that it should be such as directly and immediately affects the property and that we cannot hold "relating to the insolvent's property" to mean "affecting the property," because that construction would result in every

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cause of action which the insolvent had being continued or defended by the Official Receiver for the benefit of the insolvent, while the law clearly is that so far as regards merely personal actions the Receiver cannot continue them, but he can continue actions which are not personal, and he referred to some English cases on the point. We do not think there is very much use in referring to English law on the subject, because the Provincial Insolvency Act has codified and crystallized the law which we have to administer on the subject and we have not been referred to any corresponding section in the English Act. We do not think there is any authority for holding that the words "relating to" must be taken to mean "affecting." Mr. Anantakrishna Ayyar himself admits that such a construction, which would give the Official Receiver power to conduct suits of a purely personal nature, which no Court has yet allowed to be done, would be placing an undue stretch on the section. What he argues is that where once a decree is passed or where the cause of action does not relate to personal actions but relates to action founded on contracts and not of a purely personal nature, as the effect of a decree passed would be, if improper, to reduce the assets which are divisible among creditors, or, as the effect of a suit dismissed, if proper, should be to diminish the amount coming into the hands for distribution to the creditors, a wide construction would be placed on section 59 (*d*). It is argued that the Official Receiver has no remedy in such cases unless a liberal construction is put on section 59 (*d*). It seems to us that the Official Receiver has in such cases a remedy. The definition of a debt under the Insolvency Act includes a decree debt because section 2 (*a*) states that "creditor" includes a decree-holder and "debtor" includes a judgment-debtor. Now the section

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as regards proof of debt is section 33 which states that

"When an order of adjudication has been made under this Act, all persons alleging themselves to be creditors of the insolvent in respect of debts provable under this Act shall tender proof of their respective debts by producing evidence of the amount and particulars thereof and the Court shall, by order, determine the persons who have proved themselves to be creditors of the insolvent in respect of such debts, and the amount of such debts, respectively, and shall frame a schedule of such persons and debts; provided that, if, in the opinion of the Court, the value of any debt is incapable of being fairly estimated, the Court may make an order to that effect and thereupon the debt shall not be included in the schedule. A copy of every schedule shall be posted in the court-house."

Then there is the provision that

"Any creditor of the insolvent may, at any time before the discharge of the insolvent, tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule, and the Court, after causing notice to be served on the insolvent and the other creditors who have proved their debts, and hearing their objections (if any), shall comply with or reject the application."

Then comes section 49 which describes the mode of proof and it says that

"A debt may be proved under this Act by delivering or sending by post in a registered letter, to the Court an affidavit verifying the debt. The affidavit shall contain or refer to a statement of account showing the particulars of the debt and shall specify the vouchers (if any) by which the same can be substantiated. The Court may at any time call for the production of the vouchers."

Then section 50 says

"Where the Receiver thinks that a debt has been improperly entered in the schedule, the Court may, on the application of the Receiver and after notice to the creditor, and such inquiry (if any) as the Court thinks necessary, expunge such entry or reduce the amount of the debt."

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Clause 2 deals with cases where no Receiver is appointed. Thus we find that where a decree is passed without the Receiver being made a party, it is open to him to contest the validity of that decree in proper proceedings under the Insolvency Act. So far as the law in England is concerned, it is clear that the Bankruptcy Court is not bound by the decrees passed against the insolvent but can go into proof of the consideration and the amount which is due and the validity of those decrees. We may refer to Williams on Bankruptcy (13th edition), page 253. It is therefore not a case where the Official Receiver is without a remedy. We are of opinion that section 59 does not authorize the Official Receiver to appeal against a decree which was passed against the insolvent in a suit for damages which the respondent filed against him.

The suit which the insolvent-appellant filed against the respondent for the return of the deposit stands in an entirely different position. His case is that he deposited a certain sum of money with the respondent which was to be appropriated in a certain manner and when certain contingencies happened, that the respondent is not entitled to retain the money as he has not given the goods which was the consideration for the deposit being given and that therefore he is entitled to the return of the deposit. Now, deposit under those circumstances is the insolvent's property. The money is with the respondent, but it is the insolvent's property and he is entitled to get a return of the money in certain contingencies. It cannot be said that because the respondent in that suit might justify the retention on the ground that the insolvent has not fulfilled the conditions which entitle him to its return on a breach of contract, the suit is a suit for damages sounding entirely in damages without any reference to the

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property of the insolvent. None of the sections would apply because, if it is property of the insolvent, and the suit is only for the return of that property, it clearly vests in the Official Receiver under section 20 and he is entitled to get back the money. The defence which the defendant may raise is no criterion in estimating or appreciating the cause of action of the plaintiff. What we have to see is whether that money can be said to be his property and there can be little doubt that the money would be his property unless the defendant can show a right to appropriation and not to return it. We are of opinion therefore that Appeal No. 220 of 1921 fails and is dismissed with costs as the Official Receiver could not prosecute it and that Appeal No. 221 of 1921 is competent and that the Official Receiver can appeal against that decree in so far as it relates to the dismissal of the suit to recover the deposit. In this view the question is material as to whether this deposit which was admittedly received by the respondent in this case is returnable or not; and that question will turn upon who committed the breach of the contract. In all cases of deposits on contracts it is well established that a person in default cannot claim a return of the deposit and in this case, as it is not denied that if the contract was broken damages would be much more than the amount deposited no obligations arise to return the deposit for which credit will be given as in estimating the amount of damages. In fact, in the other suit in which a decree was obtained damages were awarded to the extent of Rs. 7,000 after giving credit to the advance. The findings of the Subordinate Judge are these, that as regards two bales, notice was given as required by the contract and the bales were accepted but as regards one bale, notice was given as required by the contract but the goods were not taken delivery

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of and money paid. As regards seven bales although the respondent said that he tendered seven bales orally, the Subordinate Judge was not disposed to accept the evidence and to find that the seven bales were tendered according to the contract. As regards the twenty bales the position is that the respondent gave a notice Exhibit G to the insolvent stating that these bales were ready and he could take delivery on payment acting on the notice which he got in turn from Ramachari who was bound to deliver the goods. The notice went on to state that as the market was falling and as the traders were being put to great loss the Madura Mills who were to deliver the goods were willing to give goods of a more saleable quality in exchange for No. 44 and that it was open to the insolvent-appellant if he chose to accept them in lieu of the goods contracted for under the contract. There is nothing conditional about this notice. There is first of all the statement that the goods were ready for delivery and he could pay and receive them. There is an option given which if he chose he could exercise. It is not disputed that the insolvent-appellant got this notice. Having got it, he did not send any reply. It was his duty under the contract when he got this notice to have immediately paid the money and taken delivery of the goods. If delivery was not to be had at his godown according to the contract and he had to go to his vendor to take delivery, the vendor is not bound to get the goods to his godown in anticipation; immediately on his coming he could send for the goods and the performance would be complete. We find here as regards the one bale the insolvent-appellant has admittedly broken the contract; there is no question about it. In estimating who broke the contract and the effect of this notice, we have to take into consideration not only the fact that the appellant

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did not reply to this notice as a businessman would be bound to but that he did not take the one bale regarding which he broke the contract already. The motive for not taking delivery is the falling market. On these facts we think the respondent was justified in assuming that he would not perform the contract by taking the twenty bales and therefore making his own arrangements as regards these bales. As regards the seven bales the position is this. The Judge finds that there was no tender of the seven bales. Even assuming that that finding is correct, the insolvent-appellant who sues for the return of the deposit has broken the major part of the contract and the point is whether we should in this case apportion the damage as regards the seven bales which the Judge finds were not delivered. The contract is a single one and it is not argued before us that having regard to the state of the market, which it is not denied was a falling one about the time of the performance of this contract, the deposit would if apportioned to twenty-one bales still leave a margin as regards the seven bales. In these circumstances no purpose will be served by entering into an inquiry as to what was attributable to seven bales assuming that these seven bales were not tendered. It is clear from the evidence that so far as damages are concerned, it far exceeds the deposit and the suit will therefore fail as the appellant who claimed deposit committed breach of a very large portion of the contract. The appeal therefore fails and is dismissed with costs. The memorandum of objections is not pressed. Dismissed. No costs.

K.R.

APPELLATE CIVIL.

Before Sir C. V. Kumaraswami Sastri, Kt., Offg. Chief Justice, and Mr. Justice Curgenven.

THE FIRM OF PANNAJI DEVICHAND (DEFENDANTS), APPELLANTS,

v.

THE FIRM OF SENAJI KAPURCHAND, AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1926, August 11.

Indian Companies Act (VII of 1913), sec. 4, cls. 1 and 2—General Clauses Act (X of 1897), sec. 3, cl. 39—Partnership—Four unregistered firms forming a partnership—Total number of members of all the firms exceeding twenty—Partnership, not registered under the Companies Act, whether illegal—Business, meaning of, under sec. 4 (2)—"Persons" under sec. 4 (2) whether denotes only individuals or includes unregistered body of persons—Definition of "persons" under General Clauses Act, whether applicable to sec. 4 (2) of the Indian Companies Act—Suit for dissolution of illegal partnership and for accounts, whether maintainable.

Where four unregistered firms entered into a partnership to purchase certain goods, to sell them at different times and divide the profits and it appeared that the total number of members of all the firms together came to twenty-two, but the partnership was not registered under the Indian Companies Act: on a suit instituted by three of the firms against the fourth for dissolution of partnership and taking of partnership accounts,

Held, that the transaction was a business within section 4, clause 2 of the Indian Companies Act, and not a single venture falling outside the section;

that for purposes of registration required by section 4, clause 2 of the Act, each of the unregistered firms cannot be regarded as a single legal entity; that "persons" under section 4, clause 2, denotes individuals and does not include bodies of individuals; consequently the suit partnership, being composed of more than twenty persons, was an illegal partnership for want of registration

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Appeal No. 56 of 1922.

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under the Act; *Akola Gin Combination* v. *Northcote Ginning Factory* (1915) 26 I. C., 613, followed;

and that, where a plaintiff comes to Court on allegations which on the face of them show that the contract of partnership on which he sues is illegal, he is not entitled to any relief and his suit should be dismissed.

APPEAL against the decree of K. S. RAMASWAMI SASTRI, Subordinate Judge of Bellary, in Original Suit No. 56 of 1920.

The material facts appear from the judgment.

A. Krishnaswami Ayyar and *T. S. Narasimhachar* for appellants.

Advocate-General (*T. R. Venkatarama Sastri*) for respondent.

KUMARASWAMI SASTRI, OFFG. C.J.

The JUDGMENT of the Court was delivered by KUMARASWAMI SASTRI, Offg. C. J.—This is an appeal against the decree of the Subordinate Judge in a suit for dissolution of partnership and the taking of partnership accounts. The plaint states that the partnership was formed between four firms which were unregistered. They were four unregistered firms which according to the plaint entered into one partnership in respect of certain bales of yarn. It is alleged that business was carried on and profits accrued and the prayer is that an account be taken of the profits due to the plaintiffs and given to them.

When the appeal was taken up it was found that the total number of persons constituting the four firms which entered into this partnership to deal as a combined concern with these goods consisted of 22 persons and the question arose as to how far on the plaint such a partnership would be legal having regard to section 4 (2) of the Companies Act which states that

"No company, association, or partnership, consisting of more than twenty persons, shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or

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by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act, or of Letters Patent."

Clause 1 of section 4 deals with an association carried on for the purpose of banking and clause 2 refers to other business carried on. There can be little doubt on reading the plaint that the various persons mentioned in it who amount to more than 22 in number entered into the contract for the purchase of 2,000 bales with certain definite shares, that business did go on and that profits accrued as to which an account and division is sought. On the face of the plaint we find that 22 persons have combined to carry on the business mentioned in the plaint and to share in the profits. The first and main contention of the learned Advocate-General is that there was no business within the meaning of section 4 so as to make the association illegal and, secondly, that even though four private firms joined together to carry on business, and even though each of those firms might consist of a number of persons, we should not for the purposes of section 4 take into account the total number of persons but only the number of firms which joined together to carry on the venture.

As regards the first contention that there is no business carried on within the meaning of section 4 reference has been made to *Smith* v. *Anderson*(1) and *Kirkwood* v. *Gadd*(2). In order to determine whether what is carried on is a business or not one has to see what are the allegations in the plaint as to what the parties did. No doubt a single venture where a single article or a number of articles on a single contract are purchased and sold may not amount to a business. But on the allegations in the plaint although a number of bales were purchased at one time, sales were to go on, profits were

(1) (1880) 15 Ch.D., 247.

(2) [1910] A.C., 422 at 431.

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to be realized and those profits were to be divided. Reading the plaint as a whole it seems to us that this is not a single venture which would take it out of the definition of section 4.

The next point taken is that we must for purposes of section 4 treat each of the partnerships, although they were not registered, as a single legal entity. Reliance is placed on section 3, clause 39, of the General Clauses Act which runs as follows :—

"'Person' shall include any company or association or body of individuals, whether incorporated or not."

But section 3 of the General Clauses Act begins by saying that the definition shall apply unless there is anything repugnant in the subject or context of the Act. We think that under section 4 of the Companies Act what we have to see is whether, where an association or partnership is formed for purposes of carrying on a business, each of the members will be liable individually upon contracts made and whether each would have rights accruing to him upon such contracts. The mere fact that the persons forming this association or partnership choose to put themselves into groups each of which goes by a certain partnership name would not affect the question as it would otherwise be possible for more than 20 persons to carry on business in contravention of the Act simply by saying that each of them is a member of a certain partnership which in turn is unregistered. In the present case there is nothing in the plaint or in the agreement which is referred to in the plaint to show that the four persons who signed the contract as representing the four firms did it for their own individual benefit, the firms being only a kind of sub-partners with them in the venture. The plaint negatives any such contention as it gives the names of all the persons of each of the firms as persons who are entitled to the benefit of the contracts and subject to the

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obligations thereof. We have been referred to a decision in *Akola Gin Combination* v. *Northcote Ginning Factory*(1) where it was held that the word "person" in section 4 of Act VI of 1882 denotes individuals and does not include bodies of individuals which definition would be repugnant to the subject and context of the section. We agree with this decision and the reasons which led the learned Judge to hold that to say that persons forming unregistered companies should be taken as units for the purpose of section 4 of the Companies Act would be to defeat the intention of the Act and to allow a number of persons to enter into bodies for the purpose of defeating section 4. With reference to the decision in *Mewa Ram* v. *Ram Gopal*(2), it is sufficient to say that that was a case of a Hindu joint family where the manager acted. In the present case there is no question of a Hindu joint family entering into a partnership. It has been held in *Gangayya* v. *Venkataramiah*(3) that in the case of Hindu joint families each member is not a partner but is only in the position of a sub-partner. Where a plaintiff comes to Court on allegations which on the face of them show that the contract of partnership on which he sues is illegal, the only course for Courts to pursue is to say that he is not entitled to any relief on the allegations made as the Courts cannot adjudicate in respect of contracts which the law declares to be illegal.

We are of opinion that having regard to the plaint the partnership which is sought to be dissolved is illegal having regard to section 4 of the Indian Companies Act. The suit fails and the plaintiff will not be entitled to any decree. We therefore reverse the decision of the Subordinate Judge, allow the appeal and dismiss plaintiff's suit with costs throughout.

K.R.

(1) (1915) 26 I.C., 613. (2) (1926) I.L.R., 48 All., 395.
(3) (1918) I.L.R., 41 Mad., 454.

PRIVY COUNCIL.*

1926, November 30.

PANAGANTI RAMARAYANIMGAR (DEFENDANT No. 1), APPELLANT,

v.

MAHARAJA OF VENKATAGIRI AND OTHERS (PLAINTIFFS), RESPONDENTS.

[On Appeal from the High Court at Madras.]

Mortgage—Redemption—Mortgage not purely usufructuary—Separate charge on same property—Mortgagee's right to have charge also redeemed—Code of Civil Procedure (Act V of 1908), *Order XXXIV, r.* 1—*Transfer of Property Act (IV of* 1882), *ss.* 61–62.

Section 62 of the Transfer of Property Act, 1882, which gives a usufructuary mortgagor a right to recover possession of the property mortgaged when the mortgage money has been realized, or is paid, tendered or deposited in Court, applies only to a mortgage which is purely and simply usufructuary. The section is not in any way inconsistent with section 61 of the Act, which enacts by implication that a mortgagor cannot redeem without paying money due under a separate mortgage or charge on the same property.

A deed of mortgage with possession provided for interest at a specified rate, and contained covenants by the mortgagor to pay both principal and interest. By a separate document of the same date the mortgagee leased part of the mortgaged property to the mortgagor, the document providing, upon its true construction, that upon default in payment of the rent reserved it should be a charge upon the property included in the mortgage deed. In a suit for redemption and possession brought by an assignee of the mortgagor's interest against an assignee of the mortgage,

Held, that the deed did constitute a usufructuary mortgage within section 62 and that under section 61 the mortgagee was entitled to have the arrears of rent included in the sum to be paid as a condition to possession; further, that to exclude the

* *Present*: LORD PHILLIMORE, LORD SINHA, Mr. AMEER ALI and LORD SALVESEN

rent would lead to a circuity of action and would be contrary to Order XXXIV, rule 1, the object of which rule is that all claims affecting the equity of redemption should be disposed of in one suit.

APPEAL (No. 154 of 1924) from a decree of the High Court (April 19, 1920) varying a decree of the Subordinate Judge of North Arcot (March 21, 1917).

The suit was brought by the late Maharaja of Venkatagiri, now represented by the first respondent for redemption of a mortgage with possession, dated March 13, 1909; the mortgagor's interest has been purchased by the plaintiff on October 22, 1915, and the mortgage had been assigned to the defendant-appellant on September 9, 1913.

The plaintiff by his plaint prayed (*a*) that an account might be taken of the amount due to the defendants on the securities; (*b*) on payment, delivery of the documents and of possession of the properties free from any encumbrances.

The Subordinate Judge made a decree for redemption on payment of Rs. 2,47,884 with interest. On appeal to the High Court (WALLIS, C.J., and SESHAGIRI AYYAR, J.) the decree was modified by adding a further Rs. 29,711. The question in the present appeal was whether certain other sums should not be brought into the mortgage account, and whether sufficient interest had been allowed. Among those sums was the rent in arrear under a lease of the same date as the mortgage whereby the mortgagee let to the mortgagor part of the mortgaged property.

The facts of the case, and the effect of the judgments in India, appear from the judgment of the Judicial Committee.

Upjohn, K.C., and *Kenworthy Brown* for the appellant.

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Sir Herbert Cunliffe, K.C., *Dunne*, K.C., and *Narasimham* for the first respondent.

On the question whether the rent, if it were as the appellant contended a charge upon the property, must be paid on redemption of the principal mortgage, reference was made to the Transfer of Property Act, 1882, ss. 58, 60, 62, 98; Order XXXIV, rule 1, *Khuda Bakhsh* v. *Alim-un-nissa*(1), *Ramaswami Ayyar* v. *Vythinatha Ayyar*(2), *Jawahir Singh* v. *Someshwar Dat*(3), *Ganga Rai* v. *Kirtarath Rai*(4) and *Abdullah Khan* v. *Basharat Husain*(5).

The JUDGMENT of their Lordships was delivered by

LORD SINHA.

LORD SINHA.—This is an appeal against a decree of the High Court of Madras, dated the 19th of April 1920, varying a decree of the Subordinate Judge of North Arcot, dated the 31st March 1917, made in a suit filed in that Court on the 21st December 1915.

That suit arose out of a transaction between the Raja of Kalahasti and the Raja of Tuni, which was embodied in Exhibit A and Exhibit I in the case.

Exhibit A purports to be a deed of "mortgage with possession" of immovable properties described in schedules A, B, C and D (hereafter called the A, B, C and D properties) for a sum of 11 lakhs of rupees, with interest at 10 annas per cent per month, to be recovered from the rents and profits. The mortgagor was to have liberty to pay off the mortgage money at the end of four years, with option to defer payment for a further period of two years. If the money was not paid on the 13th of March 1915, the entire amount then due was to carry interest at 1 per cent per mensem—10 annas from the rents and profits and the remaining 6 annas to

(1) (1905) I.L.R., 27 All., 313. (2) (1903) I.L.R., 26 Mad., 760.
(3) (1906) I.L.R., 28 All., 225; 33 I.A., 42.
(4) (1911) I.L.R., 33 All., 393. (5) (1913) I.L.R., 35 All., 48; 40 I.A., 31.

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be payable by the mortgagor personally being also charged upon the properties.

Exhibit I purports to be a muchilika or counterpart lease, by which the mortgagor Raja takes a lease from the mortgagee of the "A" properties for a period of four years, from the 1st July 1909, to the 30th of June 1913. The lessee was to pay a fixed yearly rent of Rs. 18,750, in three equal instalments, which is equivalent to interest on $2\frac{1}{2}$ lakhs at 10 annas per cent per month. In default of payment of the rent reserved, the amount was to be recovered from the income of the ijara villages, and by means of the lessee's other property "*besides*" the property which was mortgaged with possession.

There was considerable controversy as to the precise meaning of the Telugu word "*gaka*" in Exhibit I, translated above as "*besides*." It may mean "in addition to" or "excepting." Their Lordships feel no doubt that in the context that word means "*in addition to*."

The circumstances under which the transaction embodied in Exhibits A and I took place were as follows:—

The Raja of Kalahasti was heavily in debt at the time. Decrees for sale had been obtained by mortgagees against the "A," "B" and "C" properties. The "B" and "C" properties had been actually sold, though proceedings to set aside the sales of the "B" properties were pending. To pay off all these encumbrances and to meet the expenses in connexion with the proceedings to set aside the sales which had already taken place and other immediate necessities, it was necessary for the Raja of Kalahasti (the mortgagor) to raise a sum of 11 lakhs of rupees. That money was to be applied as follows:—

(*a*) $2\frac{1}{2}$ lakhs for payment of three mortgage decrees against the "A" properties and expenses in connexion therewith.

(*b*) $2\frac{1}{2}$ lakhs to satisfy the mortgage decree against the "B" properties, and to meet all expenses in connexion with the proceedings to set aside the auction sales thereof, as also other necessities of the mortgagor, and

(*c*) 6 lakhs to satisfy a mortgage against the "C" properties in favour of a Sowcar of Hyderabad, who was in possession of those properties with an agreement to reconvey the same on receipt of 6 lakhs of rupees.

The Raja of Tuni agreed to lend this amount of 11 lakhs of rupees and to apply the same for the above purposes, on the security of the "A," "B" and "C" properties, with the addition of another small property described in Schedule D of Exhibit A, this last, it is suggested, being included merely with a view to registration in the district in which it was situated.

The terms of this agreement were embodied in the two deeds, Exhibits A and I, which were executed and registered on the same date, the 13th March 1909.

Thereafter, the mortgagee paid off the three mortgage decrees against the "A" properties and certain other expenses in connexion therewith and the amount so applied was more or less $2\frac{1}{2}$ lakhs of rupees.

He also paid into Court a sum of Rs. 1,93,617 in respect of the mortgage decree against the "B" properties.

These properties (23 villages in Taluk Pamur) had been sold, together with four other villages in the same Taluk, in Court auction and the mortgagor had applied to set aside those sales. The first Court confirmed the sales of the four villages and set aside the sales of the "B" villages (23 in number). Both sides appealed to the High Court, which confirmed all the sales (i.e., of all 27 villages) and the mortgagee lost his possession of "B" properties. He could not, however, get back the money he had paid into Court as stated above till the

24th April 1912, when his widow and representative got back from the Court Rs. 1,80,412-10-0 out of the Rs. 1,93,617-0-0 paid in. It is admitted that he did not receive any interest on the latter sum for the period while it was in Court, i.e., until the 24th April 1912, nor any interest thereafter on the balance which remained unpaid, *i.e.*, on the difference Rs. 13,205-6-0.

The mortgagee did not pay the 6 lakhs of rupees to the Hyderabad Sowcar and consequently the "C" properties never came under the operation of the mortgage (Exhibit A) and no question arose in the suit with reference thereto.

The mortgagor remained in possession of the "A" properties under the lease (Exhibit I), but did not pay any portion of the stipulated rent. The mortgagee (lessor) obtained a money decree in respect of seven instalments of the rent, but it is common ground that that decree as well as the remaining five instalments of rent remained unsatisfied.

The mortgagee died in 1911 and in 1913 his widow and representative transferred all his interest in the mortgaged properties to defendant No. 1, who thereafter sub-mortgaged it to defendant No. 2. Defendants 3 and 4 are the representatives of the original mortgagor and mortgagee respectively.

The equity of redemption of the "A" properties was sold in execution of a money decree against the mortgagor and purchased by the plaintiff, who instituted the present suit on the 21st December 1915, against the defendants above described for redemption and possession.

The plaintiff alleged that defendant No. 1 was claiming a great deal more than the sum (Rs. 2,34,150) which he admitted to be due on the mortgage of the

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"A" properties; and he asked that an account might be taken of the amount due to the defendant No. 1 on the security of the properties and that on payment of the same by the plaintiff, the defendants be directed to deliver to the plaintiff the mortgage instruments and all documents in their possession relating to the properties and to deliver possession of the said properties to the plaintiff without any encumbrance and to execute and register an acknowledgment in writing to the effect that the interest created by the mortgage has been extinguished.

The defendant No. 1 annexed an account to his written statement under which he claimed that the sum of Rs. 5,63,172-15-11 was due on the mortgage, including the arrears of rent above mentioned, and he also asked that an account should be taken of all moneys due to him and the plaintiff declared entitled to redeem only on payment of the whole amount found due, together with his costs of suit.

Now, a portion of the defendant's account consisted of claims for compensation based on several grounds, such as the alleged misdescription of one of the villages mortgaged, the fact that another of the villages was allowed to be sold for arrears of revenue on the alleged fraudulent compromise of the litigation for setting aside the sale of the "B" villages and so forth. These formed the subject of issues Nos. 7, 8 and 9 in the trial Court and were all decided in favour of the plaintiff. Both the Subordinate Judge and, on appeal, the High Court held that these were all claims for breach of contract sounding in damages and were not in any way charged upon the property. They therefore held that the plaintiff, as assignee of the equity of redemption, could not be required to pay such damages as a condition of redemption. Some of these claims

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were repeated in the case for the appellant-defendant before this Board, but as Mr. Upjohn, on behalf of the appellant, abandoned them at the hearing, their Lordships need not deal with them except in connexion with the question of the costs of this appeal.

The questions remaining for consideration are: 1st, Is the defendant entitled to credit in the mortgage account taken in this suit for the amounts he paid in connexion with the "B" properties and, if so, at what rate and for what period is he entitled to interest thereon? And 2nd, Is the defendant similarly entitled to credit for the arrears of rent remaining unpaid in respect of the "A" properties? These formed the subject of Issues Nos. 4, 5 and 12 in the first Court, which decided them all against the defendant.

That Court held as a matter of construction that Exhibit A amounted to three different mortgages for three different amounts on three distinct properties, and that the mortgage for 2½ lakhs on the "A" properties was distinct and separate from the other two items of 2½ lakhs and 6 lakhs, which were similarly received for the respective purposes of relieving the "B" and "C" properties from the encumbrances subsisting thereon. In that view the Subordinate Judge disallowed the claims in connexion with the "B" properties and went to the length of splitting up the stamp duty on Exhibit A, allotting half of it only, viz., Rs. 6,000 out of Rs. 12,000, to the claim against the "A" properties.

On the second point, he held that the mortgage (Exhibit A) and the lease (Exhibit I) were separate and severable transactions, that the arrears of rent payable under Exhibit I were not charged upon the "A" properties, either as to principal or interest, and that the plaintiff was not bound to pay the sums claimed in respect of such arrears.

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Taking the account on this basis, the Subordinate Judge decreed that (1) "if the plaintiff pays into Court on or before the 30th June 1917, the amount declared due, viz., Rs. 2,70,752-1-9, the defendants should deliver up to the plaintiff . . . all documents in their possession or power relating to the mortgaged property and should, if so required, retransfer the property to the plaintiff free from the mortgage and from all encumbrances, etc., and shall put the plaintiff in possession of the property, and (2) that if such payment was not made on or before the 30th June 1917, the said mortgaged property should be sold."

The defendant appealed to the High Court. The learned Judges in that Court, differing from the Subordinate Judge, held as a matter of construction that Exhibit A could not be treated as creating three distinct mortgages and that there was nothing in its provisions to cut down the plain words of the instrument by which the properties in the four schedules were charged in respect of the whole debt. They, therefore, modified the decree of the first Court by including in the mortgage debt the difference between the amount paid into Court by the mortgagee in respect of the "B" properties and the amount drawn out by him, viz., Rs. 13,204-6-0, with interest thereon at As. 10 per cent per mensem from the 31st January 1911, up to 19th April 1920 (date of High Court decree). They further modified the lower Court's decree by giving to the defendant the whole of the Rs. 12,000 for stamps, etc.—the additional sums thus allowed amounted, with interest, to Rs. 29,711-8-2.

The only objection to this part of the High Court's decree urged before this Board is that the appellant is entitled to interest on the entire amount paid into Court by the mortgagee (Rs. 1,93,617) from the time he lost

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possession of the "B" properties, i.e., to the 24th April 1912, at As. 10 per cent per month, in addition to the interest on the difference (Rs. 13,024) allowed by the High Court. Their Lordships are of opinion that this contention is well-founded and the High Court decree must be varied so as to give effect to it.

A second claim urged on behalf of the defendant-appellant to a sum of Rs. 5,572-14-8, is based on the ground that the mortgagor had collected a portion of the rents of the "A" properties between the 13th March 1909, and the 30th June 1909, and that this portion amounting to Rs. 5,572-14-8 was payable under Exhibit A to the mortgagee. The Subordinate Judge, as well as the learned Judges of the High Court, found against the defendant-appellant in respect of this claim and their Lordships see no reason to disturb this concurrent finding of fact.

A more important point in the case relates to the arrears of rent payable under the lease (Exhibit I). As stated above, the mortgagor never paid any of the instalments of rent payable under the lease (Exhibit A). For seven of these instalments a decree was obtained in O.S. No. 17 of 1912 and a small sum of money realized in execution of that decree; the remaining five instalments also remained unpaid and the defendant claimed that two sums of Rs. 30,997-14-1 and Rs. 38,684-11-0 remained due in respect of these arrears of rent with interest thereon. Their Lordships understand that there is no dispute as to the amount, but the plaintiff contends that these sums are not in any way charged upon the "A" properties and that he was not bound to pay the same for the purposes of redemption.

The Subordinate Judge decided in favour of the plaintiff on the ground that the lease (Exhibit I) did not create any charge on the corpus of the "A" properties.

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The High Court upheld that part of his decision, but on different grounds. The learned CHIEF JUSTICE (the other learned Judge not dissenting) rejected the Subordinate Judge's construction of the lease and held that the annual payments thereby provided were charged on the land in question by Exhibit I. The CHIEF JUSTICE held, however, that by virtue of section 62, clause (*b*) of the Transfer of Property Act, the plaintiff had a statutory right to redeem the usufructuary mortgage created by Exhibit A without paying off the charge for arrears of rent under Exhibit I. Mr. Justice SESHAGIRI AYYAR agreed with the CHIEF JUSTICE and was further of opinion that apart from section 62, clause (*b*), on which the CHIEF JUSTICE relied the defendant's claim on this head failed because there was no right in Indian law in a mortgagee to require all the mortgages on a property to be redeemed together.

It is contended before this Board on behalf of the defendant-appellant that the two deeds, Exhibits A and I, should be read together as they form parts of one transaction, the lease being in the nature of machinery for the purpose of realizing the interest due on the mortgage; further, that section 62 of the Transfer of Property Act has no application to the case as it applies only to a case of an usufructuary mortgage pure and simple, which Exhibit A is not, as it contains covenants for payment both of principal and interest. The section which the appellant's counsel urges as being applicable to the facts of this case is section 61 of the Transfer of Property Act, which enacts by implication that a mortgagor seeking to redeem shall not be entitled to do so without paying any money that may be due under a separate mortgage or charge, if the latter relates to the same property.

Their Lordships are of opinion that these contentions on behalf of the appellant must prevail. A number of

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authorities on the sections of the Transfer of Property Act were cited which their Lordships have considered, but upon which they think it unnecessary to comment. In their Lordships' view, section 62 of the Transfer of Property Act applies only to usufructuary mortgages pure and simple, and is not in any way inconsistent with the provisions of section 61.

The mortgage in question, Exhibit A, no doubt is usufructuary, but it is something more, inasmuch as it contains covenants on the part of the mortgagor to pay both principal and interest. Their Lordships are disposed to agree in the view taken of the mortgage by the learned CHIEF JUSTICE of Madras that it was an anomalous mortgage or at least a combination of a simple mortgage and ausufructuary mortgage. In no other view could the preliminary decree of the Subordinate Judge directing a *sale* of the property in default of payment, or the final decree of the High Court which embodies such direction, be made. If, again, apart from the usufructuary mortgage there is a simple mortgage or a charge subsisting on the properties in favour of the defendant by virtue of Exhibit I, the decrees both of the Subordinate Judge and of the High Court must be held to be erroneous in so far as they direct that on payment of the amount due under Exhibit A the defendant should deliver possession of the property free from encumbrance and all documents relating to the mortgaged property. Counsel, on behalf of the first respondent, conceded that portion of the decree should be set aside, but argued that the plaintiff should be relegated to a separate suit to enforce the simple mortgage or charge under Exhibit I.

It seems to their Lordships that the course suggested by the first respondent's counsel would lead to a circuity of action and would be contrary to the provisions of Order XXXIV, rule 1, of the Code of Civil Procedure,

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which requires all persons having an interest in the mortgage security to be joined as parties to any suit relating to the mortgage. The object of that provision is that all claims affecting the equity of redemption should be disposed of in one and the same suit. If the defendant did not set up his charge for the arrears of rent in this suit serious questions might well arise as to whether he would be entitled subsequently to bring a suit to enforce that charge. Their Lordships are of opinion that the defendant-appellant is entitled to add the sums in question to his claim in this suit, with interest thereon, from the due date of the mortgage, viz., 13th March 1915.

The judgment of the High Court should be varied on the points mentioned above and the case remitted to that Court in order to make a decree on the above basis, and their Lordships will humbly advise His Majesty accordingly.

The respondent No. 1 must pay the appellant's costs of this appeal, less a sum of £50, which their Lordships assess as being payable to him by the appellant in respect of unsustainable claims abandoned only at the hearing of this appeal.

Solicitor for appellant: *Douglas Grant* and *Dold.*

Solicitor for first respondent: *H. S. L. Polak.*

A.M.T.

PRIVY COUNCIL.*

KALYANASUNDARAM PILLAI (DEFENDANT), APPELLANT,

1926, December 13.

v.

KARUPPA MOOPPANAR AND OTHERS (PLAINTIFFS), RESPONDENTS.

[On Appeal from the High Court at Madras.]

Gift—Registration—Gift of immovable property by Hindu—Acceptance of gift—Adoption by donor before registration—Indian Registration Act (III of 1887), *sec.* 47—*Transfer of Property Act (IV of* 1882), *ss.* 122 *and* 123.

A Hindu executed a deed of gift of part of his immovable property and delivered it to the donee. On the following day he adopted a son. Three days later the deed was registered.

Held, that the gift was valid against the adopted son. On delivery of the deed to the donee there was an acceptance of the transfer within section 122 of the Transfer of Property Act, 1882, and thereupon the gift became effectual, subject to its registration as required by section 123.

Venkatarama Reddi v. *Pillati Rama Reddi*, (1916) I.L.R., 40 Mad., 204 (F.B.), and *Atmaram Sakharam* v. *Vaman Janardhan*, (1925) I.L.R., 49 Bom., 388 (F.B.), approved.

CONSOLIDATED APPEAL (No. 144 of 1924) from two decrees (November 13, 1922) of the High Court in Letters Patent Appeals, affirming two decrees (November 22, 1920) of that Court, which affirmed two decrees of the District Judge of Tanjore, which modified two decrees of the Subordinate Judge of Kumbakōnam.

The Appeal arose out of two suits against the appellant each brought with the sanction of the Advocate-General in the Court of the Subordinate Judge. In the first

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* *Present*: LORD SINHA, LORD BLANESBURGH, LORD SALVESEN and Sir JOHN WALLIS.

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suit respondents 1, 2 and 3 sued as trustees of a temple; they prayed for a declaration that certain properties were trust properties, for removal of the defendant-appellant from being a trustee, and for other relief. The other suit was brought by the other respondents as persons interested in a feeding charity.

The trust in favour of the temple and providing for the feeding charity were contained in a deed of gift executed on September 9th, 1891, by a Hindu named Vaithilingam Pillai. He had thereby transferred to trustees a portion of his immovable property, being the property in suit: the deed was delivered to the trustees on the same day. On September 10, 1891, the donor duly adopted the appellant. On September 12, 1891, a partition deed was entered into between Vaithilingam Pillai and the appellant and the family properties other than those which were the subject of the deed of gift were divided. On September 15, 1891, the deed of gift was registered by the donor. The appellant on becoming a major assumed the management of the trust under the provisions of the deed, and, it was alleged, neglected the performance of the trust.

The appellant by his written statements pleaded, *inter alia*, that the deed was inoperative against him as it had not been registered until after his adoption.

The High Court by the decrees now appealed from, held that the deed was operative against the defendant. The learned Judges (SCHWABE, C.J., COUTTS TROTTER, J., and KUMARASWAMI SASTRI, J.) followed the decision of the Full Bench in *Venkati Rama Reddi* v. *Pillati Rama Reddi*(1).

DeGruyther, K.C., and *Dube* for the appellant.

Sir George Lowndes, K.C., and *Narasimham* for the respondents.

(1) (1917) I.L.R., 40 Mad., 204 (F.B.).

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Reference was made to the Transfer of Property Act, 1882, sections 122 and 123, Indian Registration Act, 1877, sections 17 and 49, *Venkati Rama Reddi* v. *Pillati Rama Reddi*(1), *Subba Rama* v. *Venkatsubba*(2), *Atmaram Sakharam* v. *Vaman Janardhan*(3).

LORD SALVESEN.

The JUDGMENT of their Lordships was delivered by

Lord SALVESEN.—These are two consolidated appeals from a judgment and two decrees, dated 13th November 1922, of the High Court of Judicature at Madras. It is unnecessary to restate the prior procedure or judgments which dealt with a number of contentions in law, and questions of fact now either finally disposed of or no longer insisted upon. It is sufficient to say that when leave to appeal was granted by the order of the High Court of 19th April 1923, it was on the specific ground that it raised the substantial question of law, namely, "whether an adoption of a son by a Hindu made after the execution and delivery of a deed of gift, but before registration thereof, renders a deed void as against the adopted son." This is the only ground of appeal which is set forth in the appellant's case, and the respondents in their case, paragraph 2, take up the same position. Although, therefore, other grounds were indicated in the argument addressed to the Board which might have been equally fatal to the appeal, their Lordships think it right, in all the circumstances, to deal only with that which was the ground of judgment of the High Court, and in respect of which leave to appeal was given.

The relevant facts, which are no longer disputed, lie within short compass. On the 9th September 1891, a certain Vaithilingam Pillai executed a trust deed by

(1) (1917) I.L.R., 40 Mad., 204 (F.B.). (2) (1924) I.L.R., 48 Bom., 435. (3) (1925) I.L.R., 49 Bom., 388 (F.B.).

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which he appointed trustees to administer a trust for charity in the wide sense, including the maintenance of religious services at certain temples. In order to provide the necessary funds for the maintenance of these services, and for discharging the other duties imposed upon the trustees, he set apart certain immovable properties belonging to him, the income of which was to be devoted to the purposes of the trust. At the date of the deed, Vaithilingam had no son. The deed, however, was executed on the footing that it was his immediate intention to adopt a son for the perpetuation of his lineage, as although he had two wives, one of whom was living with him at the time, he was still childless and despaired of having issue. There is no question now that this constituted a gift of immovable property within the meaning of section 123 of the Transfer of Property Act, 1882, nor is there any question that the trust deed, on the day of its execution, was duly delivered to the trustees named therein.

On 10th September 1891, Vaithilingam, by a deed executed on that day, adopted the appellant, then five years old, as his son. On 11th September, he executed a deed of guardianship to the newly adopted son, and on the 12th, a partition deed between himself and the guardian of that son, the effect of which need not, for the purpose of this judgment, be further referred to. On 15th September three days later, the deed of gift was registered. On this it was contended for the appellant that the deed of gift was not complete until registration, and that, as the grantor had before registration adopted the appellant as his son, the latter's rights in the family property had intervened so as to revoke or invalidate the gift. The leading statutory provisions on which the solution of the question depends are sections 122 and 123 of the Transfer of Property Act,

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1882, and sections 47 and 49 of the Indian Registration Act (III of 1877). Section 122 of the Transfer of Property Act is as follows :—

"Gift is the transfer of certain existing movable or immovable property made voluntarily and without consideration by one person called the donor to another called the donee and accepted by or on behalf of the donee. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance the gift is void."

Section 123 is in these terms :—

"For the purpose of making a gift of immovable property the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses."

The controversy in the numerous cases in the Courts of India which have dealt with this point has always centred round the words in this section :—

"The transfer must be effected by a registered instrument,"

and it has been forcibly argued that, until registration, there is no complete gift, and that if the donor dies or revokes or becomes incapable of making the gift before registration, it cannot take effect. On the other hand, attention must be directed to section 47 of the Indian Registration Act of 1877, which is in these terms :—

"A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration."

The learned Chief Justice in the Court below, after referring to the above sections, said :—

"The effect of these sections in my judgment is that if a title is complete except for registration, no subsequent alienation or dealing with the property by the vendor or donor as the case may be can defeat the title which on registration becomes an absolute title dating from the date of the execution of the document."

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The other two Judges concurred in this view, making special reference to the case of *Venkati Rama Reddi* v. *Pillati Rama Reddi*(1), which, being a decision of the Full Bench, was binding upon them. In that case the donor died on the day following the execution of the deed of gift, and the deed was not presented for registration until a period of six months had elapsed from the date of his death; facts which, as it appears to their Lordships, were certainly not less cogent in favour of incompleteness than are those in the present case; and there the District Judge held that the gift deed, not having been registered by the donor during her lifetime, was void, and that the post-mortem registration was of no effect. This judgment was, however, reversed on appeal by the unanimous decision of the Full Bench. There was no express finding of fact, so far as appears from the report, that the deed of gift had been delivered to, and accepted by, the donee prior to the death of the donor, although, perhaps, this may be implied from the circumstances. In the present case, fortunately, there is no room for doubt on this point, because the learned Judges of the High Court remitted this question of fact to the Subordinate Judge and he reported that the deed had been delivered over, on the day of its execution, to one of the trustees appointed under it on behalf of himself and the other trustee. The decision of the Full Bench in *Venkati Rama Reddi* v. *Pillati Rama Reddi*(1), is thus summarized in the headnote:—

"There is nothing in section 123 of the Transfer of Property Act which requires the donor to have the deed registered. All that is required is that he should have executed the deed. Once such an instrument is duly executed the Registration Act allows it to be registered even though the donor may not

(1) (1917) I.L.R., 40 Mad., 204.

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agree to its registration, and upon registration the gift takes effect from the date of execution."

Their Lordships think that this statement of the law needs qualification by reference to section 122 of the Transfer of Property Act, and is only correct upon the footing that the gift had been accepted by or on behalf of the donee during the lifetime of the donor. A deed of gift executed in accordance with the terms of section 123 of immovable property but never communicated to the intended donee, and remaining in the possession of the grantor, undelivered, would, in their Lordships' opinion, not come within the ruling of the Full Bench in the case in question.

The only other case to which it is necessary to refer is a Full Bench decision of the High Court of Bombay in 1924, namely, *Atmaram Sakharam* v. *Vaman Janardhan*(1). The circumstances in that case were very much the same as in the present, and the decision is thus correctly expressed in the headnote:—

"Where the donor of immovable property has handed over to the donee an instrument of gift duly executed and attested, and the gift has been accepted by the donee, the donor has no power to revoke the gift prior to the registration of the instrument."

This case was very fully argued and the argument on behalf of the appellant in the present appeal could not be better stated than it was in the dissenting judgments of SHAH, Acting C.J., and MULLA, J.; and these arguments were all brought very forcibly under their Lordships' notice, and supplemented by the learned counsel for the appellant. Their Lordships, however, cannot accept them. They are unable to see how the provision of section 123 of the Transfer of

(1) (1925) I.L.R., 49 Bom., 388.

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Property Act can be reconciled with section 47 of the Registration Act, except upon the view that, while registration is a necessary solemnity in order to the enforcement of a gift of immovable property, it does not suspend the gift until registration actually takes place. When the instrument of gift has been handed by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. Registration does not depend upon his consent, but is the act of an officer appointed by law for the purpose, who, if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it if it is presented by a person having the necessary interest within the prescribed period. Neither death, nor the express revocation by the donor, is a ground for refusing registration, if the other conditions are complied with. Their Lordships accordingly find themselves in complete agreement with the judgment of the Full Bench of the Bombay High Court in the case cited. As this decision, and the similar decision of the Full bench of the Madras Court, had settled the law for these Presidencies, it is unnecessary to refer to the various conflicting decisions of inferior tribunals which were overruled.

Their Lordships apprehend that the Judges of the High Court of Madras, in allowing leave to the appellant in the present case to proceed with his appeal, desired to elicit an authoritative opinion as to the soundness of the two latest decisions in the Madras Courts, and their Lordships think it desirable that a point which has occasioned so much controversy in the past should be settled by a decision, which will apply to the whole of India.

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Their Lordships will accordingly humbly advise His Majesty that the judgment and decrees of the High Court should be affirmed, and that this appeal should be dismissed. The appellant must pay the costs.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondents: *Douglas Grant and Dold.*

A.M.T.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Venkatasubba Rao.

1926, May 4.

VEERABHADRAYYA (APPELLANT), FIRST DEFENDANT

v.

ZAMINDARS OF NORTH VALLUR AND FOUR OTHERS (RESPONDENTS), PLAINTIFFS NOS. 1 AND 2 AND DEFENDANTS NOS. 2 TO 5.*

Madras Estates Land Act (I of 1908), ss. 3 (10), (16), 6, 8 and 185—Conversion of ryoti lands into private lands by a zamindar before the Act—Lease of such lands after the Act for a period—No occupancy right—Sec. 8, not retrospective.

Before the Estates Land Act (Madras Act I of 1908), it was competent for a zamindar to convert what were once ryoti lands into private or *kamatam* lands and to hold them as such; and if after the Act a person is let into possession of such converted lands either as ijaradar (lessee for a period) or as the agent of the zamindar, he does not thereby acquire occupancy rights therein.

Section 8 of the Act is not retrospective.

APPEAL against the decree of the Court of the Subordinate Judge of Kistna at Ellore in Original Suit No. 35 of 1919.

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* Appeal No. 164 of 1924.

VEERA-BHADRAYYA v. ZAMINDARS OF NORTH VALLUR.

The facts are given in the judgment of VENKATA-SUBBA RAO, J.

P. Venkataramana Rao for appellant.—The suit lands were always ryoti and were treated as such before and after 1877. They were never private lands, nor were they treated as such after 1877. It was not competent for a zamindar even before the Estates Land Act to convert ryoti lands into private lands. Even if they had been converted into private lands before the Act the effect of the Act as soon as it was passed was to make them ryoti lands except in the case mentioned in the proviso to section 185 of the Act. This is the effect of merger; see sections 8, clauses (1), (2), (3) and (4) and 185 of the Act. The Act is retrospective in this respect. The words "before or after the commencement of the Act" in section 8 (1) should be read as qualifying clause (3) also of that section. He referred to SESHAGIRI AYYAR, J.'s view in *Zamindar of Chellapalli* v. *Somaya*(1) and SADASIVA AYYAR, J.'s view in *Zamindar of Nuzvid* v. *Lakshminarayana*(2) and also to *Srimantha Raja Yarlagadda Mallikarjuna Prasada Naidu* v. *Subbiah*(3). Prior to the Act, occupancy right was as a rule enjoyed by every ryot in zamindaris; see *Venkatanarasimha Naidu* v. *Dandamudi Kotayya*(4), *Cheekati Zamindar* v. *Ranasooru Dhora*(5). When the original character of the lands is known to be ryoti, section 185 impliedly forbids evidence to show that on the date of the Act it was private land. Similarly the section impliedly forbids evidence of dealing with the lands subsequent to the Act. The evidence in the case shows that the first defendant was let into possession only as ryot and not as agent or ijaradar. If so section 6 (1) gives him the occupancy right.

V. Ramadas (with *Krishna Arya, Viraraghavalu* and *P. Somasundaram*) for respondents.—The evidence in the case shows that since 1877 there has been a gradual conversion of ryoti lands into private lands and all of them were treated as such up to the time of the passing of the Estates Land Act and even after the Act up to the time of this suit. Section 8 (3) enacts that merger shall not convert ryoti lands into private lands; the section does not prohibit other methods of conversion even after the Act. The Act does not prohibit any such

(1) (1916) I.L.R., 39 Mad., 341. (2) (1922) I.L.R., 45 Mad., 39.
(3) (1920) 39 M.L.J., 277. (4) (1897) I.L.R., 20 Mad., 299.
(5) (1900) I.L.R., 23 Mad., 318.

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conversion if it had taken place before the Act. The words whether "before or after the commencement of the Act" in section 8 (1) cannot be read as qualifying clause (3) of that section. The Act cannot be read so as to have a retrospective effect and to destroy rights vested long before the Act came into force; see WALLIS, C.J.'s view in *Zamindar of Chellapalli* v. *Somaya*(1), NAPIER, J.'s view in *Zamindar of Nuzvid* v. *Lakshminarayana*(2) and SPENCER, J. in Second Appeal No. 1765 of 1918. The Privy Council must be deemed to have upheld in *Yarlagadda Mallikarjuna Prasad Nayudu* v. *Somaya*(3) the view of SIR JOHN WALLIS. Section 185 does not preclude evidence to show whether the lands were dealt with as private lands after the Act; see *Lakshmayya* v. *Sri Raja Varadaraja Appa Row Bahadur*(4). Prior to the Act there was no presumption that lands in zamins were lands with occupancy rights; see *Suryanarayana* v. *Patanna*(5), *Venkatasastrulu* v. *Seetharamudu*(6), *Nainapillai Marakayar* v. *Ramanathan Chettiar*(7); and it was a matter of proof in each case. In this case it has not been proved that these lands were occupancy lands prior to the Act; but the contrary has been proved. Therefore section 8 has no application. The first defendant was let into possession in 1917 only as agent and not as a ryot. The document under which he got possession expressly stated that it was for a year only and that he must give up possession at the end of the fasli. Even if he had got in as an ijaradar that would not give him the status of a "ryot," so as to entitle him to occupancy right. Hence section 6 (1) cannot apply.

JUDGMENT.

KRISHNAN J.

KRISHNAN, J.—I have had the advantage of reading the judgment my learned brother has prepared in this case. The main question is whether at the time the defendant was put in possession of the lands they were ryoti lands or the private or kamatam lands of the zamindar. The first defendant's claim to permanent

(1) (1916) I.L.R., 39 Mad., 341. (2) (1922) I.L.R., 45 Mad., 39.
(3) (1919) I.L.R., 42 Mad., 400 (P.C.) (4) (1913) I.L.R., 36 Mad., 168.
(5) (1918) I.L.R., 41 Mad., 1012 (P.C.) (6) (1920) I.L.R., 43 Mad., 166 (P.C.)
(7) (1924) I.L.R., 47 Mad., 337 (P.C.).

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right of occupancy in them is based on clause (1), section 6 of the Estates Land Act and for that clause to apply the land must be a "ryoti land not being old waste." 'Private' land is excluded from 'ryoti' land by its definition in section 3, clause (16). It is argued that though these lands were, prior to 1877 or 1880, such as would have fallen within the definition of ryoti lands under the Act they had been effectively converted into kamatam lands before the Act was passed. My learned brother has dealt with this question exhaustively and as I agree with him, I do not propose to go over the same ground. In this connection it was argued by the learned vakil for the appellant that the effect of the passing of the Act was to reconvert into ryoti all lands which had been converted previously by the zamindar from ryoti into kamatam lands, except in the one case provided in the proviso to section 185; he relied upon sections 8 and 185 for this contention. Here again I agree generally with my learned brother in the view he has adopted of these sections and do not propose to discuss the question at length. We cannot give retrospective effect to the provisions of an Act, especially when to do so will destroy existing rights, unless it is made clear by express language that such effect was intended. I do not read section 8, clause (3) as necessarily retrospective in effect. I am of opinion that the zamindar was at liberty to convert his ryoti lands into kamatam lands before the passing of the Act and in the present case lands were kamatam lands both at the time of the passing of the Act and when the first defendant was given possession. On this view the appeal fails and must be dismissed with costs.

But as my learned brother has gone on to discuss the question as to the character in which the defendant

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was put in possession of the plaint lands and has differed from the finding of the Subordinate Judge, I desire to say that I do not entirely agree with him in this part of the case. I think there is no sufficient reason to interfere with the learned Subordinate Judge's finding on the point that the first defendant was given possession of the lands to cultivate them not as a lessee or ryot but as an ijaradar or agent of the zamindar. Though the zamindar had let the lands on lease prior to giving it to Onta Lakshmana and had again offered them for lease by Exhibits F, F-1 and F-2, he expressly countermanded the giving on lease by auction at the time and we have Lakshmana's own admission in Exhibit A that he cultivated only as an agent. An agent may be remunerated by a share of the produce just as a lessee may be. The facts relied on by the learned Subordinate Judge, though perhaps not conclusive, strongly point to Lakshmana and the first defendant having cultivated as ijaradars and not as lessees. There is a body of oral evidence which supports the plaintiffs' case. I do not attach weight to what the first defendant did by subleasing the lands himself, as he had evidently conceived the idea of setting up a permanent tenancy. I am inclined to think that on the whole the finding of the Subordinate Judge on this point is correct. The question, however, is really of no importance in this case in the view I take. I have added what I have stated above lest I be understood to have agreed with my learned brother on that point.

The appeal is dismissed with costs.

The memorandum of objections is dismissed with costs.

VENKATA-SUBBA RAO, J.

VENKATASUBBA RAO, J.—The plaintiffs are the zamindars of North Vallur. They have filed the suit which gives rise to this appeal for a declaration that the

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suit lands are their private (kamatam) lands and that the first defendant has no occupancy rights in them. There is also a prayer that the first defendant should be directed to deliver up possession of the lands and to pay mesne profits. According to the plaintiffs, the first defendant was appointed an agent at the commencement of fasli 1327 (1917 A.D.) for the purpose of carrying on the zamindar's private cultivation on the lands. It is also alleged in the plaint that it was agreed that the first defendant's agency should terminate immediately after the harvest of that fasli. The plaintiffs allege that after the harvest, the then zamindar, the plaintiffs' father, took possession of the lands and prepared them for cultivation but died on the 6th June 1918, that the plaintiffs after their father's death carried on certain agricultural operations and that soon thereafter the first defendant trespassed upon the lands.

The suit is resisted on the ground that the lands are ryoti lands within the meaning of the Estates Land Act and that the first defendant was admitted as a ryot from the commencement of fasli 1327. He denies that he gave up possession at the end of that fasli and states that he continued to occupy the lands in the next fasli with the consent of the plaintiffs' father. In any event he denies that he was bound to quit the land at the end of 1327 and states that he acquired permanent rights of occupancy by virtue of the provisions of the Estates Land Act.

Two main questions arise in the suit :—

(1) Are the suit lands the private lands of the zamindar, or, are they ryoti lands in which the first defendant can acquire rights of occupancy?

(2) If it be found that they are ryoti lands, was the first defendant admitted to possession as a ryot and

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if he was not so admitted, in what character did he take possession of the lands?

The learned Subordinate Judge has found that the lands are kamatam. He has also found that the first defendant took possession of them as the zamindar's agent. The plaintiffs having succeeded in the suit, the first defendant has filed the present appeal.

In regard to the original character of the lands there can be no doubt that they were ryoti. The documentary evidence clearly establishes this point. The estate owned two species of kamatam :—

(1) Immemorial kamatam;

(2) lands relinquished by ryots and absorbed into zamindar's kamatam lands.

This distinction is kept in view in the records of the zamindari and document after document refers to this twofold character of the kamatam lands. It is also proved beyond doubt that the suit lands come under the second category, namely, lands originally ryoti but subsequently incorporated with the zamindar's private lands. The finding of the Subordinate Judge is, that the suit lands were at their inception ryoti but were subsequently converted into kamatam. This finding is correct and although the plaintiffs' learned vakil said at first that he would attack it, he subsequently gave up the point and had to concede that he could take no exception to the finding.

The lands having thus been proved originally to be ryoti lands, two questions arise :—

(1) Could there be a valid conversion before the Estates Land Act came into force, of ryoti land into kamatam land?

(2) If it was capable of being so converted, has such conversion been in fact effected in regard to the suit lands?

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I shall first deal with the question of law raised. For the plaintiffs it is contended that there was no legal bar before the Estates Land Act was passed, which would prevent a zamindar from converting ryoti land into kamatam land. Mr. Venkataramana Rao, the first defendant's learned vakil, strongly contests this proposition.

Section 185 of the Estates Land Act has been much commented on by the learned vakils on both the sides. It runs thus:—

"When in any suit or proceeding it becomes necessary to determine whether any land is the land-holder's private land, regard shall be had to local custom and to the question whether the land was before the first day of July 1898 specifically let as private land and to any other evidence that may be produced, but the land shall be presumed not to be private land until the contrary is shown. Provided that all land which is proved to have been cultivated as private land by the landholder himself, by his own servants or by hired labour with his own or hired stock for twelve years immediately before the commencement of this Act, shall be deemed to be the landholder's private land."

The section, it must be first noted, deals only with the method of proof and does not enact any rule of substantive law. When the question arises, whether a particular plot of land is landholder's private land or not, how is the Court to approach the evidence? The section says that the land shall be presumed not to be private land until the contrary is shown. It refers to specific classes of evidence which may be adduced to show that the land is the landholder's private land. Is the land private land or not at the time of the suit or proceeding referred to in the section? The section does not profess to deal with the nature of the land in the past. Its intention obviously is to provide some tests for helping the Court to decide the nature of the land at the time of the suit or proceeding in which the question is raised. The section does not deal with the

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point, whether land which was once ryoti could or could not have been converted by the date of the suit into private land. It has been strongly urged for the defence that the section implies that when the origin of the land is known to be ryoti, it is not open to a party to show that on the date of the suit it was private land. I am unable to impute any such intention to this section. To accept this construction would be to unduly enlarge the scope of the section, which, as I have said, merely lays down a rule of evidence and does not profess to enact any rule of substantive law. Now, turning to the proviso, the effect of it is to create an irrebuttable presumption that a certain kind of land shall be private land. If land had been for 12 years immediately before the commencement of the Act, directly cultivated by the landholder (that is, cultivated by his own servants or by hired labour) that land shall be absolutely presumed to be the landholder's private land. Here again, it must be noticed that this clause is enacted by way of a proviso and not as an exception; so that, it does not follow that land not answering the description in the proviso, shall be treated as other than private land.

If there is thus nothing in section 185 to justify the contention that ryoti land could not before the date of the Act be converted into private land, is there any other section in the Act that forbids such conversion? It has been contended for the defence that section 8 (1) produces such a result. It enacts that whenever before or after the commencement of the Act the entire interests of the landholder and the occupancy ryot have become united in the same person, such person shall have no right to hold the land as a ryot, but shall hold it as a landholder. If the ryot's interest therefore passes to the landholder, the latter shall still hold the land as a

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landholder only; but there is nothing to prevent private land being held by a landholder. If we turn to the definition of 'private' land in section 3, clause 10, we find that "private land" is described as the home farm land of a landholder. There is thus nothing incompatible with the spirit of the Act in a landholder holding private land. In my opinion, section 8 (1) does not support the contention of the defendant.

Mr. Venkataramana Rao next contends that section 8 (3) supports his view. It says that merger of the occupancy right under sub-sections 1 and 2 shall not have the effect of converting ryoti land into private land. Both sides have argued the case on the footing that as a combined result of several provisions of the Act, ryoti land cannot, subsequent to the Act, be converted into private land. My remarks therefore must be understood as referring only to conversion previous to the Act. Under section 8 (3) the merger by itself cannot convert ryoti into private land. It does not preclude conversion by acts subsequent to the merger, in other words, while section 8 (3) says that the merger shall not have a certain effect, it does not in addition say that no act subsequent to the merger shall have the effect of converting ryoti into private land. Next, whatever be the interpretation of section 8 (3), does it have a retrospective effect? Was it intended that land converted into private land in remote antiquity and dealt with as such for centuries, should, the moment the Act was passed resume its original character and once again become ryoti land? One would be disinclined to impute this intention to the legislature in the absence of clear and unambiguous language. It is urged that the words in section 8 (3) "merger of the occupancy right under sub-section 1" necessarily import into this clause, every qualification mentioned in clause 1. It is on this basis

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contended, that the words "before or after the commencement of this Act" in clause I should be read as part and parcel of clause 3. In my opinion, the words in question in clause 3 can be given full effect by interpreting "merger" in that clause as meaning merger resulting from a union by transfer, succession or otherwise as mentioned in clause 1. I am unwilling to strain the language of this sub-section with a view to render it retrospective.

Mr. Venkataramana Rao has next drawn our attention to clauses 2 and 4 of section 8 and contended that they indicate a clear intention to place the ryot in a very advantageous position. That may be so, but it does not follow that the particular advantage now contended for, has been conferred upon him. The obscure wording of this section of the Act, as in the case of many other sections, has led to a great conflict of opinion, but on the whole I have come to the conclusion that the Act does not retrospectively forbid conversion of ryoti into private land. My view receives support from the judgments of Sir JOHN WALLIS, C.J., in *Zamindar of Chellapalli* v. *Somaya*(1), NAPIER, J., in *Zamindar of Nuzvid* v. *Lakshminarayana*(2), and SPENCER, J., in S.A. No. 1765 of 1918. A contrary view was taken by SESHAGIRI AYYAR, J., who differed from the learned CHIEF JUSTICE in *Zamindar of Chellapalli* v. *Somaya*(1), and SADASIVA AYYAR, J., who differed from NAPIER, J., in *Zamindar of Nuzvid* v. *Lakshminarayana*(2), and also by ABDUR RAHIM and BURN, JJ., in *Sreemantha Raja Yarlagada Mallikarjuna Prasada Naidu* v. *Subbiah*(3).

Before concluding this part of my judgment, I must notice one contention raised by Mr. Ramadas, the

(1) (1916) I.L.R., 39 Mad., 341. (2) (1922) I.L.R., 45 Mad., 39.
(3) (1920) 39 M.L.J., 277.

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learned Vakil for the plaintiffs. He argues that before the passing of the Estates Land Act there was no presumption that a tenant had occupancy rights in land in a Zamindari, that in the present case it has not been proved that tenants had any such rights in the suit land, that it therefore follows that section 8 which refers to the union of the kudivaram and melvaram interests has no application and that therefore the landholder was competent to treat the land as private land before the date of the Act. He relies for the position that there is no presumption that tenants in Zamindari lands have occupancy rights, upon the Privy Council Rulings in *Suryanarayana* v. *Patanna*(1), *Venkata Sastrulu* v. *Seetharamudu*(2), and *Nainapillai Marakayar* v. *Ramanathan Chettiar*(3), which deal only with inams; but the learned Vakil contends that the judgments in them contain observations wide enough to apply also to ryots under Zamindars. Mr. Venkataramana Rao's answer is twofold. He says that in the first place the decisions referred to cannot be treated as ovrruling the view which was expressed in *Venkatanarasimha Naidu* v. *Dandamudi Kotayya*(4), and *Cheekati Zamindar* v. *Ranasooru Dhora*(5), and which has long prevailed, namely, that there is such a presumption in favour of occupancy rights in Zamindari tracts. Secondly, he urges that even granting that in the lands in question the tenants did not have occupancy rights, the plaintiffs' position is not thereby improved as the Act forbids conversion of any ryoti land into private land. These contentions raise important questions of law, which in the view I have taken of the other points, I do not find it necessary to discuss.

(1) (1918) I.L.R., 41 Mad., 1012. (2) (1920) I.L.R., 43 Mad., 166.
(3) (1924) I.L.R., 47 Mad., 337. (4) (1897) I.L.R., 20 Mad., 299.
(5) (1900) I.L.R., 23 Mad., 318.

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As ryoti land could in law be converted, before the Estates Land Act came into force, into kamatam land, the next point to be decided is, were the suit lands actually so converted? Sir JOHN WALLIS, C.J., in *Zamindar of Chellapalli* v. *Somaya*(1) at page 341 citing *Budley* v. *Bukhtoo*(2) observes that the test laid down in that case may be accepted, namely, the private land is that which a "zamindar has cultivated himself and intends to retain as resumable for cultivation by himself even if from time to time he demises it for a season." This test has been approved by the Privy Council in *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somaya*(3). Now applying that test, I shall proceed to deal with the question, whether the lands were actually converted into kamatam lands.

[His Lordship then dealt with the documentary evidence and proceeded as follows:—]

This chart shows that during the period between 1878 and 1895 the suit lands were mostly under the direct cultivation of the zamindar. We find that in 1887-88 there was a break, the zamindar cultivating over half of the kamatam lands personally and leasing the rest. The entire lands were resumed by the zamindar in the next three faslis. Again in 1892-93 and the two succeeding faslis we find that portions were cultivated by the estate directly and portions were leased out.

[After dealing with some documentary evidence on the point his Lordship proceeded as follows:—]

I have so far confined myself to the evidence relating to dealings with the lands previous to 1898, for the last lease to which I have referred, is the lease given by the receiver in 1896. Section 185 of the Estates Land Act says that when it becomes

(1) (1916) I.L.R., 39 Mad., 341. (2) (1871) N.W.P. H.C.R., 203.
(3) (1919) I.L.R., 42 Mad., 400.

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necessary to determine whether any land is landholder's private land, regard shall be had *inter alia* to the question whether the land was before the 1st of July 1898 specifically let as private land. Legislation which culminated in the Estates Land Act was for some time in contemplation and it was believed that to forestall it, landholders were anxious to make self-serving statements in documents executed during the years that immediately preceded that Act. Although the section merely says that regard shall be had to the manner of letting the land before 1st July 1898, it seems to follow from this, that evidence of subsequent dealings is by implication excluded. This is the construction I am disposed to place upon the section. If the question is whether a plot of land is ryoti land or private land, the landholder to make out his contention that they are private, cannot rely upon leases made subsequent to July 1898. But, in my opinion, such leases can be put in evidence for the purpose of showing not the character of the land (ryoti or kamatam) but for showing that if the lands had been treated as private lands till 1898, they were not treated differently subsequent to that date. The question may arise in this way. It may be said that the lands were till 1898 kamatam but lost that character subsequent to that date. To rebut such a case, it is certainly open to a landholder to rely upon his subsequent dealings with the land and show that he did not change the character of the land from private into ryoti. This is, I think, the right construction of the section and my view receives support from the observations of SUNDARA AYYAR, J., in *Lakshmayya* v. *Sri Raja Varadaraja Appa Row Bahadur*(1).

I shall therefore examine the documents subsequent to 1898 with a view to find out whether the lands which

(1) (1913) I.L.R., 36 Mad., 168 at p. 175.

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were kamatam on that date, preserved that character afterwards or again became converted into ryoti.

[His Lordship then dealt with the documentary evidence on this point and proceeded as follows :—]

But for the present it is sufficient to point out that the dealing with the land by the zamindar has not been such as to convert what was at the commencement of 1912 kamatam land into ryoti land. My conclusion therefore on this part of the case is, that when the first defendant obtained this land in 1917 the land was the private land of the zamindar in which the first defendant could acquire under law no occupancy rights.

On the point whether the zamindar directly cultivated the land, a great deal of oral evidence has been adduced. It has been very fully analysed by both the learned vakils and discloses many contradictions and discrepancies. As a matter of fact, the plaintiffs' oral evidence on this point runs counter in some places to the documentary evidence which I have discussed. I may say that in general the witnesses speak to there being direct cultivation, so far corroborating the documentary evidence on the point, but in regard to details their evidence is worthless. The point, however, has mainly to be decided with reference to the documents filed and I have already said that they clearly establish the plaintiffs' case.

I have held that ryoti land could, before the Estates Land Act came into force, be converted into private land. I have further held that the plaintiffs have made out that the suit lands which were originally ryoti had been so converted. I have also pointed out that the suit lands which had become private lands before the Act was passed, continued to be so treated till 1917 when the first defendant was admitted to possession. These findings are sufficient to lead to a dismissal of the

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appeal as the first defendant's case that he acquired occupancy rights thus entirely fails.

The plaintiff has urged that even granting that the land was ryoti, the first defendant was not admitted to possession as a ryot but only as an agent. On a very careful consideration of the evidence, I have come to the conclusion that this part of the plaintiffs' case has not been made out. The learned Subordinate Judge who has come to a different conclusion, has, it seems to me, been influenced by the quantity rather than the quality of the evidence.

[His Lordship then dealt with the oral and documentary evidence on the point and proceeded as follows :—]

The reasons given by the learned Subordinate Judge for holding that the first defendant was an agent, are, in my opinion, utterly unsound, and I have come to the conclusion that he was admitted to possession as a lessee. As I have, however, said this finding is of little avail to him. The lands being the private lands of the zamindar, it signifies little whether the first defendant entered upon them as agent or as lessee, as in neither case could he acquire occupancy rights.

I have now dealt with all the principal points raised. As I have held that in 1917 when the first defendant was admitted into possession, the lands were the private lands of the zamindar, the question is of no importance, namely, whether he trespassed in 1918 or he held over after his term expired at the end of 1917.

In regard to the mesne profits claimed, it has not been shown that the amount awarded is excessive. In the result, the appeal is dismissed with costs.

The memorandum of objections is dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.

1926, July 29.

L. R. M. RAMAN CHETTIAR (PLAINTIFF), APPELLANT,

v.

TIRUGNANASAMBANDAM PILLAI AND TWO OTHERS (DEFENDANT AND SUPPLEMENTAL RESPONDENT), RESPONDENTS.*

Guardians and Wards Act (IX of 1890), ss. 29, 30, 31 (2), 47 and 48—Alienation by guardian—Mortgage—Sanction by District Court—Effect of—Necessity and benefit of minor—Validity of mortgage, whether can be questioned—Sanction, whether conclusive as to necessity for the mortgage—Sanction order, not reciting necessity, whether invalid.

Where an alienation by way of mortgage or sale has been made by the guardian of a minor, appointed under the Guardians and Wards Act, with the sanction of the District Court, the alienee can rely upon it and the alienation must be upheld unless the alienee has been a party to a fraud or collusion or has been guilty of any underhand dealing: *Gangapershad Sahu* v. *Maharani Bibi*, (1885) I.L.R., 11 Calc., 379, followed; *Venkatasami* v. *Viranna*, (1922) I.L.R., 45 Mad., 429, dissented from.

The fact that the order granting sanction did not recite, as required by section 31 (2) of the Act, the necessity for the loan, does not render the sanction invalid, as this defect is nothing more than a mere irregularity; the Court must be taken as having adopted the grounds set forth in the petition and affidavits, even though the grounds are not reproduced in the order: *Rameshwar Singh* v. *Dhanput Singh*, (1910) 5 I.C., 334, and *Buddhoo* alias *Gulab Dass* v. *Sheocharan*, (1924) 22 All. L.J., 851, followed.

APPEAL against the decree of C. V. KRISHNASWAMI AYYAR, Subordinate Judge of Tuticorin, in O.S. No. 61 of 1921.

The material facts appear from the judgment of VENKATASUBBA RAO, J.

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* Appeal Suit No. 71 of 1923.

RAMAN CHETTIAR v. TIRUGNANA-SAMBANDAM PILLAI.

Advocate-General (*T. R. Venkatarama Sastri*) and *E. Vinayaka Rao* for appellant.

S. Muthia Mudaliar for respondent.

JUDGMENT.

VENKATA-SUBBA RAO, J.

VENKATASUBBA RAO, J.—The question to be decided in this appeal has reference to the validity of a mortgage bond executed by the guardian of the minor defendant. The plaintiff claimed about Rs. 8,000 in his plaint, but the learned Subordinate Judge disallowed some items and passed a decree for Rs. 3,000 and odd. The plaintiff has filed the present appeal.

In the District Court of Tinnevelly, O.P. No. 41 of 1914 was filed by one Muthiah Pillai, the brother-in-law of the defendant, for the purpose of getting a guardian appointed, under the Guardians and Wards Act, of the person and property of the defendant, who was then about 12 years of age. Among the respondents to that petition were, Subramania Pillai and Satyanada Pillai whose names alone are important having regard to the facts with which we have to deal. The defendant was the adopted son of one Manickavasagam Pillai who had died previous to the petition and Subramania and Satyanada were the defendant's brothers in his natural family. In September 1914 an order was made by the Court appointing Subramania the defendant's guardian under the Act. In August 1915 Subramania applied to the District Court under the same Act, for permission to borrow Rs. 4,000 on the security of immovable property of the minor. Certain affidavits were filed in support of that application and after notice to all the parties to the petition, the Judge granted on the 24th September 1915 permission to execute a mortgage deed and raise the sum mentioned. The draft of the proposed bond was submitted to the Court and it was approved; the engrossed bond was

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then produced and seen by the Court. It was directed to be registered and after registration it was again produced before the Court and there the matter ended. I may remark that the learned Judge also sanctioned the compound interest provided for in the bond, the mortgage bond having deviated in this respect from the affidavits filed. The record of what took place in the District Court shows very clearly that not only were the terms generally approved of by the District Judge but that the actual bond itself was perused by him and received his sanction.

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

I have discussed the evidence at some length in order to show that although some vague charges have been made against the plaintiff, there is no proof of either fraud, collusion of any other kind of underhand dealing on his part. Indeed, no attempt has been made to substantiate any such charges.

On these facts, is the plaintiff not entitled to a decree for the whole amount claimed? The ordinary rule of law is that the purchaser should establish the validity of the alienation by showing either that it was made for a purpose binding upon the minor or that he (the purchaser) acted with due care and caution after making reasonable enquiry. [See *Hanuman Pershad's* case(1).] What then is the effect of a sanction given under the Guardians and Wards Act? By section 29 of that Act the guardian is forbidden to enter into certain transactions without the previous permission of the Court. Section 30 enacts that a disposal of immovable property in contravention of section 29 is voidable at the instance of

(1) (1858) 6 M.I.A., 393.

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the minor. Section 31 lays down that the permission shall not be granted except in case of necessity or for an evident advantage to the ward. Under section 47 an appeal lies to the High Court from an order of a District Court refusing permission to a guardian to do an act under section 29. The effect of section 48 is, that an order granting permission under section 29, if not set aside in revision by the High Court, is final and cannot be contested by a suit or otherwise.

What is the effect then of an alienation by a guardian made with the sanction of the Court? The answer is to be found in the judgment of their Lordships of the Privy Council in *Gangapershad Sahu* v. *Maharani Bibi*(1). This is what they say :—

"Their Lordships think that when an order of the Court has been made authorizing the guardian of an infant to raise a loan on the security of the infant's estate, the lender of the money is entitled to trust to that order, and that he was not bound to enquire as to the expediency or necessity of the loan for the benefit of the infant's estate. If any fraud or underhand dealing is brought home to him, that would be a different matter; but apart from any charge of that kind, their Lordships think he is entitled to rest upon that order."

Their Lordships then proceed to remark,

"It is sufficient for the plaintiff to say, 'I have got the order of the Court.'"

These words are clear and unequivocal. Let us look at the reason of the thing. The legislature has cast upon the Court the duty of enquiring whether the transaction is beneficial to the minor. No sanction can be granted unless the Court is satisfied that it is. The lender or the purchaser is no longer harassed by doubts as to the character of the transaction. He looks at the order authorizing the mortgage or the sale. An order of a competent Court is produced to him and is he not

(1) (1885) I.L.R., 11 Calc., 379.

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entitled to act upon it? The very object of the sections to which I have referred, is to safeguard the interests of the minor. A transaction is not authorized unless the Court comes to the conclusion that it is for his benefit. From the point of view of the guardian again, if he honestly and frankly tells the Court the circumstances which has led to his application, he will have performed his duty and as he does not trust to his own judgment but to the judgment of the Court, he can rely upon the sanction in any proceedings that may be taken at some future time against him. From the point of view of the purchaser, his title to the property stands on a better footing than if there had been no sanction, as the question of the beneficial nature of the transaction cannot be re-opened. This incidently benefits the minor, as a fair price can be obtained for his property. I understand this to be the principle underlying the sections to which I have referred and the decision of the Privy Council unambiguously declares that this is the effect of those sections. It is quite a different matter, of course, if the alienee is proved to be a party to any fraud or collusion and the proposition contained in the judgment of the Privy Council is made expressly subject to this reservation. If further authority is needed for this position, I need only refer to *Rameshwar Singh* v. *Dhanpat Singh*(1) and *Akhil Chandra Saha* v. *Girish Chandra Saha*(2). But the defendant relies strongly upon a case of this Court in *Venkatasami* v. *Viranna*(3), decided by SPENCER and RAMESAM, JJ. In hat case it has been held that the effect of the sanction is merely to shift the onus of proof; whereas, ordinarily it is for the alienee to show that the transaction is binding, the burden is, where

(1) (1910) 5 I.C., 334. (2) (1917) 21 C.W.N., 864.
(3) (1922) I.L.R., 45 Mad., 429.

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the sanction has been obtained, upon the minor to show that the transaction is not binding. SPENCER, J., relies upon *Sikher Chund* v. *Dulputty*(1) and *Jugul Kishori Chowdhurani* v. *Anunda Lal Chowdhuri*(2). As regards the former of these two cases it is sufficient to say that it was decided before the Privy Council case *Gangapershad Sahu* v. *Maharani Bibi*(3). Apart from that, the observations of GARTH, C.J., in *Sikher Chund* v. *Dulputty*(1) show that he understood the law as interpreted subsequently by the Judicial Committee. Though some observations in his judgment may give apparent support to the contention of the defendants, the judgment taken as a whole cannot be regarded as an authority in their favour. In regard to *Jugul Kishori Chowdhurani* v. *Anunda Lal Chowdhuri*(2), the second case relied on by SPENCER, J., it must be noticed that it is a case of specific performance of a contract where entirely different considerations would apply. Although the contract may have been sanctioned under the Guardians and Wards Act, so long as it has not been actually carried out, it is certainly open to the Court to examine, when a suit is brought for that purpose, whether it will be to the advantage of the minor that it should be specifically enforced. SPENCER J.'s judgment, it must be noticed, does not refer to the Privy Council decision. So far as RAMESAM, J.'s decision is concerned, that learned Judge distinguishes the Privy Council case on the ground that it relates to a mortgage, whereas the case with which he was dealing relates to a sale. With the utmost deference, this fact, in my opinion, does not in principle make any difference.

(1) (1880) I.L.R., 5 Calc., 363. (2) (1895) I.L.R, 22 Calc., 545.
(3) (1885) I.L.R., 11 Calc., 379.

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I am disposed to hold, differing from *Jugul Kishori Chowdhurani* v. *Anunda Lal Chowhuri*(1) that where an alienation has been made with the sanction of the Court, the alienee can rely upon it and the alienation must be upheld unless the alienee has been a party to a fraud or collusion or has been guilty of any underhand dealing.

Applying this rule, I have no hesitation in deciding that the plaintiff is entitled to a decree for the full amount claimed. It only remains for me to say a word in regard to items 1 and 2. The promissory notes, as I have said, were executed by Subramania in his personal capacity and not as the minor's guardian. At their inception, therefore, these debts were the personal debts of Subramania. The plaintiff was not thus called upon, when the debts were incurred, to make any enquiries regarding any benefit or advantage accruing to the minor. When the mortgage was taken, the plaintiff, in regard to these debts, was in the position not of the minor's creditor but of a stranger. He was then shown the sanction and what meaning did it convey to him? It may be described in some such words: "A certain sum had been raised by Subramania acting for himself from the plaintiff. Subramania was able to convince the Court that this sum had been spent for the benefit of the minor. The Court being so convinced, has by the order of sanction, authorized Subramania to reimburse himself to that extent and for that purpose to borrow on behalf of the minor an amount from the plaintiff."

This is the effect of the sanction order and the plaintiff was perfectly justified in trusting to and acting upon that sanction.

Looking at the case from this point of view, it is immaterial whether it has or has not been made out

(1) (1895) I.L.R., 22 Calc., 545.

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that the sums were actually raised or utilized, for the minor's benefit or for purposes binding upon him. I express no opinion as regards Subramania's liability to the minor. Whether he misled the Court or not when he obtained the sanction, is a question with which we are not concerned. It cannot be denied that he was not as frank as he might have been, in the affidavits, filed in support of his application for sanction. But that is a question entirely foreign to the present enquiry.

There is one further point which remains to be noticed. It has been contended by the defendant that the sanction obtained is not valid as it does not recite, as required by section 31 (2), the necessity for the loan. In my opinion, this defect is nothing more than a mere irregularity and does not render the sanction invalid. As has been pointed out in *Rameshwar Singh* v. *Dhunput Singh*(1) the Court must be treated as having adopted the grounds set forth in the petition and the affidavits and although the grounds are not reproduced in the order, the clear effect is to base the order upon those grounds. The fact that the grounds are not specifically referred to in that order, cannot make it invalid. *Buddhoo* alias *Gulab Dass* v. *Sheo Charan*(2) takes the same view. This contention, therefore, is overruled.

In the result, the decree of the lower Court is modified and there will be a mortgage decree in favour of the plaintiff for the entire amount claimed in the plaint with interest as provided for in the mortgage bond and costs throughout. Time for redemption is three months.

REILLY, J.

REILLY, J.—I agree. If a man takes a mortgage on the property of a minor for whom no guardian has been appointed or declared under the Guardians and Wards

(1) (1910) 5 I.C., 334. (2) (1924) 22 A.L.J., 851.

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Act, what is required of him before he can succeed in a suit on his mortgage? It is sufficient if he shows that he acted in good faith and that he satisfied himself by reasonable inquiry that the advance was required for the necessities or for the clear benefit of the minor. If a man proposing to take a mortgage on the property of a minor finds in the course of his inquiries that a guardian has been appointed under the Guardians and Wards Act and that that guardian has obtained the sanction of the District Judge for the proposed mortgage, what further inquiry are we to require of him? The minor in such a case is a ward of the Court, and the duty of the District Judge to guard the minor's interests is higher, far higher, than the mortgagee's. Is the mortgagee to sit in judgment on the order of the District Court and to inquire whether that order was made upon sufficient grounds? I think such a position would be entirely unreasonable and for that view we have the very highest authority. I venture to repeat the words which my learned brother has quoted in his judgment from *Gangapershad Sahu* v. *Maharani Bibi*(1):

> "Their Lordships think that, when an order of the Court has been made authorizing the guardian of an infant to raise a loan on the security of the infant's estate, the lender of the money is entitled to trust to that order, and that he is not bound to inquire as to the expediency or necessity of the loan for the benefit of the infant's estate."

Now, that is perfectly plain and unequivocal, and it is not suggested that the new Guardians and Wards Act has made any change in the law since that pronouncement. Our attention has been drawn to the fact that there is a case of this Court in which the principle of that decision of the Privy Council was not strictly followed. That is *Venkatasami* v. *Viranna*(2). It is

(1) (1885) I.L.R., 11 Calc., 379. (2) (1922) I.L.R., 45 Mad., 429.

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true that this Madras case was one of a sale while the case before the Privy Council was one of a mortgage; but I find it difficult to see that there is any real distinction in principle in this matter between a sale and a mortgage. With very great respect I find it impossible to follow the decision of the learned Judges in 45 Mad., 429, so far as it is to the effect that the sanction of the District Judge in such a case is not a complete protection to an alienee who acts in good faith saving him from the necessity of pressing his inquiries further. In his judgment SPENCER, J., does not mention this very important decision of the Privy Council; and I gather that the other learned Judge, RAMESAM, J., though he refers to the Privy Council decision, would have hesitated to depart from it if the case before him had been one of a mortgage. I may mention that Mr. Muthiah Mudaliar for the defendant has stated explicitly before us that he does not suggest that the plaintiff in this case was a party to any fraud in obtaining the sanction of the District Judge.

There is one peculiarity of this case to which I must refer. It appears that part of the consideration for the mortgage now in question was not money advanced directly to the guardian for the minor's estate but money which had been advanced long before the date of the mortgage to the guardian himself on his own responsibility without any reference to the minor's estate. If a mortgagee, in whose case the District Judge has sanctioned the mortgage of a minor's property for a certain amount, instead of advancing that amount to the guardian sets off part of it against a debt incurred already by the guardian on his own responsibility and not as guardian, then in an ordinary case there will be a very heavy burden on the mortgagee to show that he acted in good faith and that he really pursued inquiries

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sufficiently far to satisfy him that that debt was one for which the minor's estate was ultimately liable. Fortunately for the plaintiff in this case, we cannot require him to discharge any such burden in respect of the two items of consideration representing loans to the guardian on his own responsibility, because it appears that the facts regarding those two loans were placed before the District Judge. Those items of consideration are fully described with the information that they represent loans taken by the guardian on his own responsibility in the mortgage deed itself, and the records show that the draft of the mortgage-deed was laid before the District Judge and approved by him, a procedure which is not always adopted when the District Judge sanctions mortgages in such cases. The plaintiff, it appears to me, therefore is entirely protected in this case from any such necessity of pushing his inquiries behind the District Judge's sanction or showing that he acted in good faith in adjusting those loans, which had been made to the guardian personally, against the mortgage amount. I may add that it has been urged before us that the District Judge's order sanctioning the loan was invalid, because it did not recite the necessity which he found for the mortgage as required by section 31 (2) of the Guardians and Wards Act. In regard to that, all that I think necessary to say is that it has been decided in *Rameshur Singh* v. *Dhanpat Singh*(1) and *Buddhoo* alias *Gulab Dass* v. *Sheo Charan*(2) that, even where the District Judge does not recite the necessity specifically in his order of sanction, if the record shows that the affidavits or the petitions before him set out the necessity clearly and he says "Sanction granted" or words to this effect, we may read into his order the necessities and reason,

(1) (1910) 5 I.C., 334. (2) (1924) 22 A.L.J., 851.

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alleged and presume that he adopted them. In this case there is no reason, whatever, to suppose that the District Judge did not inquire into the matter as carefully as was necessary and apply his mind to it and adopt the reasons and necessities alleged before him in the affidavits filed in the matter.

I agree that the appeal must succeed and that orders should be made as proposed by my learned brother.

K.R.

APPELLATE CIVIL.

Before Sir Kumaraswami Sastri, Kt., Offg. Chief Justice, and Mr. Justice Curgenven.

1926, August 13.

BOBBALADI GETTAPPA (PLAINTIFF), APPELLANT

v.

BOBBALADI ERAMMA AND OTHERS (DEFENDANTS 1 to 8), RESPONDENTS.*

Hindu Law—Adoption by a Jain widow—Consent of husband or his sapindas, whether necessary—Hindu Law of adoption, whether applicable to Jains—Custom—Onus.

It is concluded by the authority of a series of decisions, extending over several years, that the presumption is that the Jains are governed by the ordinary Hindu Law, unless it is shown that by custom a different law prevails among them. *Sheo Singh Rao* v. *Dakho,* (1878) I.L.R., 1 All., 688 (P.C.), and *Chotay Lall* v. *Chunnoo Lall and others,* (1879) I.L.R., 4 Calc., 744, relied on.

A Jain widow is not competent to adopt a son to her husband without the authority of her husband or the consent of his sapindas, in the absence of proof of a custom to the contrary.

The onus of proving such a custom among the Jains in derogation of the ordinary Hindu Law, is upon the party setting it up; the fact that among certain special sects of Jains in the

* Appeal No. 422 of 1922.

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other Presidencies such a custom has been upheld by Courts, does not warrant a general presumption of the prevalence of the custom in the Madras Presidency in the face of the decision in *Peria Ammani* v. *Krishnaswami,* (1893) I.L.R., 16 Mad., 182 which negatived such a custom.

APPEAL against the decree of G. G. Somayajulu Pantulu, Subordinate Judge of Bellary, in Original Suit No. 56 of 1921.

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

C. Sambasiva Rao for appellant.

P. Venkataramana Rao and *V. S. Narasimhachar* for respondents.

JUDGMENT.

KUMARASWAMI SASTRI, OFFG. C.J.

KUMARASWAMI SASTRI, OFFG. C.J.—The only question in these appeals is whether the consent of the husband or his sapindas is necessary to validate an adoption made by a Jain widow. The Lower Court held that the Jains are governed by Hindu Law in the absence of proof of any custom to the contrary and that the adoption is invalid as no consent was obtained either from the husband or his sapindas. The finding of fact as to the absence of consent is not disputed before us. The main argument of Mr. Sambasiva Rao who appears for the appellant is that so far as the Jains are concerned no consent is necessary and that the Lower Court is wrong in thinking that the Hindu Law applied to them. Were the matter *res integra,* I would be inclined to hold that modern research has shown that Jains are not Hindu dissenters but that Jainism has an origin and history long anterior to the Smritis and commentaries which are recognized authorities on Hindu Law and usage. In fact Maha Veera, the last of the Jain Theerthankaras, was a contemporary of Buddha and died about 527 B.C. The Jain religion refers to a number of previous Theerthankaras and there can be little doubt that

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Jainism as a distinct religion was flourishing several centuries before Christ. In fact Jainism rejects the authority of the Vedas which form the bedrock of Hinduism and denies the efficacy of the various ceremonies which Hindus consider essential. There is great force in the observations of HOLLOWAY, J., in *Rithcurn Lallah v. Soojan Mull Lallah* (1) that Hindu Law cannot be applied to them. So far as Jain Law is concerned it has its own law books of which Bhadrabahu Samhita is an important one. Vardhamana Niti and Ashana Niti by the great Jain teacher Hemachandra deal also with Jain Law. No doubt, by long association with Hindus who form the bulk of the population, Jainism has assimilated several of the customs and ceremonial practices of the Hindus but this is no ground for applying the Hindu Law as developed by Vijnaneswara and other commentators, several centuries after Jainism was a distinct and separate religion with its own religious ceremonial and legal systems, *en bloc* to Jains and throwing on them the onus of showing that they are not bound by the law as laid down by Jain law-givers. It seems to me that in considering questions of Jain Law relating to adoption, succession and partition we have to see what the law as expounded by Jain law-givers is and to throw the onus on those who assert that in any particular matter the Jains have adopted Hindu Law and custom and have not followed the law as laid down by their own law-givers. I have not been referred to any Jain law-giver requiring consent of the husband or sapindas to enable a widow to adopt. Several Jain communities have successfully shown the custom of adoption without consent being valid. The absence of any necessity for consent was

(1) (1874) 9 Mad. Jurist, 21.

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probably due to no consent having been required by the Jain law-givers. I see nothing in the Bhadrabahu Samhita requiring any consent (see Translation of Bhadrabahu Samhita by J. L. Jaini, M.A., Judge, High Court, Indore). As regards Bhadrabahu Samhita, verse 40 empowers a sonless man or woman to take a boy in adoption. Verse 83 empowers a widow to adopt a boy and make over her property to him. Verse 73 runs as follows :—

"The virtuous lady may, like her husband, take to herself a son of a good gotra, and instal him on the estate of her husband."

In *Govindmal v. Gulab Chand*(1) decided so early as 1833 the pandits consulted were of opinion that according to Jain sastras a widow had power to adopt without any authority from her husband. There was some difference of opinion if she could depose an adopted son. They refer to Jain sastras and there is no suggestion that the law applicable to them is the Hindu Law, or that any special custom was necessary to be alleged and proved to support an adoption by a widow without consent of her husband or sapindas. There is great force in the argument of Mr. Sambasiva Rao that it is for those who contend that the consent of the husband or his sapindas is necessary to prove that the Jains have in the matter of adoption followed Hindu Law. The matter however in my opinion is concluded by authority, and a series of decisions extending over several years have held that the presumption is that the Jains are governed by ordinary Hindu Law unless it is shown that by custom a different law prevails among them.

In *Chotay Lall v. Chunnoo Lall and others* (2) decided in 1878 their Lordships of the Privy Council held that

(1) (1833) 5 Select Reports, S.D.A. Cases, 276.
(2) (1879) I.L.R., 4 Calc., 744 (P.C.).

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the ordinary Hindu Law of inheritance should apply to Jains in the absence of any proof of special custom varying it. Their Lordships, in dealing with the argument of Mr. Cowell that Jains should be presumed to be governed by their customs differing from ordinary law and referring to the case of *Sheo Singh Rai* v. *Dakho* (1), observed :—

"This decision did no more than adopt and affirm the law, to be deduced from a roll of cases in India, that when the customs of the Jains are set up they must be proved like other custom varying the ordinary law, and that when so proved, effect should be given to them."

In *Sheokuarbai* v. *Jeoraj* (2) their Lordships of the Privy Council observe :—

"The Jains are Hindu dissenters, and although, as was pointed out by Mr. Mayne in paragraph 46 of his 'Hindu Law and Usage,' generally adhering to the ordinary Hindu Law, that is, the law of the three superior castes, they recognize no divine authority in the Vedas and do not practise the shradha, or ceremony for the dead. The due performance of the shradhs, or religious ceremonies for the dead is at the base of the religious theory of adoption, but the Jains have so generally adopted the Hindu Law that the Hindu rules of adoption are applied to them in the absence of some contrary usage (Mayne's 'Hindu Law', paragraphs 148 and 106, and cases there cited)."

In *Mussammat Mandit Koer* v. *Phool Chand Lal* (3) it was held that unless a custom to the contrary is proved, Jains are governed by the Hindu Law of inheritance and ordinarily the Mitakshara school of law would be applicable to them. In *Bachebi* v. *Makhan Lal* (4) it was held that the ordinary Hindu Law of inheritance would apply to Jains in the absence of proof of custom or usage varying that law. The learned Judges treated the question as well settled and referred to the decision of their Lordships of the Privy Council

(1) (1878) I.L.R., 1 All., 688 (P.C.).
(2) (1920) 25 C.W.N., 273 (P.C.).
(3) (1898) 2 C.W.N., 154.
(4) (1881) I.L.R., 3 All., 55.

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in *Chotay Lall* v. *Chunnoo Lall*(1). The same view was taken as early as 1867 by Sir BARNES PEACOCK, C.J., and JACKSON, J., in *Lalla Mohabeer Pershad* v. *Mussamut Kundun Koowar*(2) where the learned Judges held that the Jains are governed by the Hindu Law of inheritance applicable in that part of the country in which the property is situate. In *Asharfi Kunwar* v. *Rup Chand* (3) the learned Judges take it that the law as laid down by their Lordships of the Privy Council is that in Jain cases it rests on the party alleging a custom or practice at variance with that of orthodox Hindus to prove his allegation and they throw the onus on him of showing the custom that a widow can adopt without the permission of her husband, though on the evidence they held that custom proved. In *Peria Ammani* v. *Krishnaswami* (4) it was held by MUTTUSWAMI AYYAR and BEST, JJ., that the onus lay on the party asserting to show that among the Jains a widow could adopt without permission from her husband or his sapindas, and that the custom which was set up was not proved.

Reference has been made to authorities in Bombay but they do not afford much assistance as according to Mayukha no permission of the husband or his sapindas is necessary for a widow to adopt. I may however point out that in *Bhagvandas Tejmull* v. *Rajmal*(5) it was held that adoption amongst Jains was regulated by the ordinary Hindu Law as was their succession to their property generally and that it was for the Jains to allege and prove any custom, which was different from the normal Hindu Law and usage in the country in which the property is located and the parties reside.

(1) (1879) I.L.R., 4 Calc., 744 (P.C.).
(2) (1867) 8 W.R., 116.
(3) (1908) I.L.R., 30 All., 197.
(4) (1893) I.L.R., 16 Mad., 182.
(5) (1873) 10 Bom. H.C.R., 241.

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Cases have been referred to, where, among special sects of Jains, Courts have held that a custom has been proved whereby authority to adopt is unnecessary. [*See Lakhmi Chand* v. *Gatto Bai*(1), *Manohar Lal* v. *Banarsi Das*(2), *Asharfi Kunwar* v. *Rup Chand*(3) and *Harnabh Pershad* v. *Mandil Dass*(4).]

The argument of Mr. Sambasiva Rao is that there is such a general agreement as to usage not requiring consent in other parts of India that we may presume that there is such a usage among the Jains in the Madras Presidency. I do not think that having regard to the various sects into which the Jains are divided there can be any general presumption as contended for by Mr. Sambasiva Rao. In fact so far as the Jains in the Madras Presidency are concerned the usage was negatived in *Peria Ammani* v. *Krishnaswami*(5). In the present case there is no evidence of any custom among the Jains in the Bellary District and little help is afforded by the fact that this family migrated from the Nizam's Dominions as there is nothing to show that in the Nizam's Dominions the customary law among the Jains is that permission is not necessary.

The appeal fails and is dismissed with costs.

CURGENVEN, J.

CURGENVEN, J.—The question in all these four appeals is whether the widow of a Jain is competent to make an adoption without having received her husband's consent or the consent of the sapindas. Padmanna, a Jain and resident of the Bellary District, adopted Somanna. The father and the adopted son traded in partnership and acquired property. Padmanna made a will leaving some of his property to his wife Eramma

(1) (1886) I.L.R., 8 All., 319. (2) (1907) I.L.R., 29 All., 495.
(3) (1908) I.L.R., 30 All., 197. (4) (1900) I.L.R., 27 Calc., 379.
(5) (1893) I.L.R., 16 Mad., 182.

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for her life and the remainder to Somanna. Somanna pre-deceased Eramma leaving a widow Maremma; and the two widows engaged in a dispute about the property. Maremma relinquished her rights for a certain consideration, but subsequently purported to adopt one Gatteppa, admittedly without any authority from her husband and without the sapindas' consent. Appeal No. 422 of 1922 arises out of a suit by Gatteppa against Eramma, Maremma and others to establish the validity of his adoption. Appeals Nos. 432 and 433 of 1922 and 394 of 1923 relate to suits by Eramma to recover certain moneys, the adoption being put forward in response to her claims.

We know nothing of Padmanna's antecedents, except from the statement of one witness, that he migrated to Bellary from the Nizam's Dominions. But even if this statement be accepted, it affords no help in deciding the question in issue, since no evidence has been offered as to the usage of Jains in those dominions. Indeed, no evidence of usage has been given at all, so that it lies upon the party asserting the validity of the adoption to establish that it is a part of the Jain Law that an adoption might be so made. It must be shown that there is a usage so universal as to have the force of law.

The only reported case of this Court *Peria Ammani* v. *Krishnaswami*(1) related to Jain converts in Tanjore and the circumstances were perhaps special. The plaintiff was put to the proof of the custom and it was held on the evidence that he had failed to prove it. BEST, J., in whose judgment MUTHUSWAMI AYYAR, J., concurred, pointed out that the Jains are seceders from Brahmanical Hinduism but that they retained many of the customs of the orthodox Hindus, so that where a

(1) (1893) I.L.R., 16 Mad., 182.

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custom different from the ordinary Hindu Law is set up as prevailing among Jains, the burden of proving such a custom is on those who allege it, and in the absence of such proof the ordinary law must prevail. The course taken by decisions in Allahabad is in full agreement with this decision. The earliest of these cases relates to a sect of Jains known as Saraogi Agarwalas and came before the Privy Council in *Sheo Singh Rai* v. *Dakho*(1) Their Lordships' judgment shows that the position adopted by the High Court and approved by themselves was:—

"When amongst Hindus (and Jains are Hindu dissenters) some custom different from the normal Hindu Law of the country in which the property is located and the parties resident is alleged to exist, the burden of proving the antiquity and invariability of the custom is placed on the party averring its existence."

The evidence of representative Jains was therefore taken, and upon this evidence it was found that the widow of a Saraogi Agarwala Jain enjoys the right of adoption, without the permission of her husband or the consent of his heirs. In the next case, *Lakhmi Chand* v. *Gatto Bai*(2), it appears to have been accepted without contest that a Saraogi Jain widow may so adopt. The chief question arising in *Manohar Lal* v. *Banarsi Das*(3) was whether a Jain widow might adopt a married man to her husband. The judgment of STANLEY, C.J., and BURKITT, J., contains an instructive summary from the works of various writers on the Jain religion. The conclusion was again drawn that the Jains are Hindu dissenters and are governed by the Hindu law of adoption, except in such respects as may be established by any different usage that may be proved. Hence, upon the

(1) (1878) I.L.R., 1 All., 688. (2) (1886) I.L.R., 8 All., 319.
(3) (1907) I.L.R., 29 All., 495.

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question raised in that case it was necessary to take evidence of the usage alleged by proving a number of instances in which such adoption had been made, and these instances were held to establish the usage. The same question came before the same two judges in *Asharfi Kunwar* v. *Rup Chand*(1) and was disposed of in the same way. They quoted the ruling of the Privy Council that in Jain cases it rests on the party alleging a custom or practice at variance with that of orthodox Hindus to prove his allegation. In disposing of the appeal against that judgment the Judicial Committee took occasion again to give expression to this principle, adding:

"The question in the present case was and is whether a custom applicable to the parties concerned authorizing the adoption of *a married boy* has been established. This is strictly speaking a pure question of fact determinable on the evidence given in the case."

These observations apply equally to a contention that a widow may adopt without authorization. The same principle was accepted by their Lordships of the Privy Council in *Chotay Lall* v. *Chunnoo Lall*(2) where referring to *Sheo Singh Rai* v. *Dakho*(3) they observe,

"The effect of that case is that the customs of the Jains, where they are relied upon, must be proved by evidence, as other special customs and usages varying the general law, should be proved, and that in the absence of proof the ordinary law must prevail."

This principle was also found in an early Allahabad case, *Bachebi* v. *Makhan Lal*(4). It is thus clear that the onus of establishing that Jain widows have power to adopt in the manner claimed lies upon the party asserting it. The nature and the amount of evidence sufficient to shift that onus must vary with the particular circumstances of the case. It may, however, be safely said that judicial decisions which have reference to parts of India

(1) (1908) I.L.R., 30 All., 197. (2) (1879) I.L.R., 4 Calc., 744.
(3) (1878) I.L.R., 1 All., 688 (P.C.). (4) (1881) I.L.R., 3 All., 55.

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other than the Madras Presidency are not themselves sufficient material upon which to found an affirmative decision. That could only be so if the usage were so invariable as to have become a part of the Jain law. No doubt, as was held in *Harnabh Pershad* v. *Mandil Dass*(1) judicial decisions recognizing the existence of a disputed custom among the Jains of one place are very relevant as evidence of the existence of the same custom among the Jains of another place, but, as that case equally shows, the evidence that the usage has application to the particular case cannot be dispensed with. It is certainly not yet possible to accept the view that this custom has so often been found to exist that the onus is now shifted on to the person who denies it. The Madras Presidency, where the single reported ruling is against such a custom, cannot be the first place in which such doctrine should be accepted. In the absence of any evidence of local usage, therefore, it must be concluded that the adoption was not validly performed.

K.R.

(1) (1900) I.L.R., 27 Calc., 379.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Reilly.

1926, August 27.

K. R. M. A. R. ARUNACHELAM CHETTY (PLAINTIFF), APPELLANT

v.

J. A. DAVID, OFFICIAL RECEIVER OF RAMNAD DISTRICT AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 80—Suit against public officer—Suit for injunction—Notice of suit—Future acts and past acts—Notice, whether necessary for a suit for injunction in respect of threatened acts—"Act purporting to be done" in section 80, meaning of—whether includes future as well as past act.

In respect of acts of public officers purporting to be done in their official capacity, section 80, Civil Procedure Code, requires notice of suit prescribed therein to be given only in the case of past acts completed or begun but incomplete, and not in the case of threatened acts; the expression "acts purporting to be done" in the section should be construed as meaning past acts and not future or threatened acts.

Where therefore an Official Receiver in insolvency advertised the sale of certain properties on a future date as belonging to the insolvent, a person claiming the properties can maintain a suit for a declaration and an injunction against the Official Receiver, although he did not give the two months' notice prior to the institution of the suit as prescribed by section 80 of the Civil Procedure Code. *The Superintending Engineer, II Circle, Bezwada* v. *Chituri Rama Krishna*, (1920) 39 M.L.J., 151, distinguished.

APPEAL against the decree of S. NARAYANASWAMI AYYAR, Acting Subordinate Judge of Sivaganga in O.S. No. 113 of 1924.

The material facts appear from the judgment.

* Appeal No. 15 of 1926.

ARUNA-CHELAM CHETTY v. DAVID.

C. S. Venkatachari for appellant.

T. M. Krishnaswami Ayyar for respondent.

JUDGMENT.

RAMESAM, J.

RAMESAM, J.—The plaintiff is the appellant before us. The suit was for a declaration that the suit properties belonged to him and defendants 3 and 4 and for a perpetual injunction restraining the first defendant, who was the Official Receiver of the Ramnad District, from selling them as the properties of the second defendant in I. P. No. 9 of 1917 on his file. The Official Receiver advertised the suit properties for sale on 10th November 1924. On the 5th November the plaintiff sent a notice of suit to the first defendant and the suit was filed on the 7th November 1924. The Subordinate Judge of Sivaganga dismissed the suit on the ground that two months had not elapsed before the filing of the suit and after the giving of notice. The plaintiff in appeal contends that a notice under section 80, Civil Procedure Code, is unnecessary. He concedes that the Official Receiver is a public servant, but argues that the suit is not in respect of an act purporting to be done in his official capacity. His argument is that the suit is only in respect of a threatened act and not in respect of an act which was begun, and therefore the section does not apply. This contention of the appellant is supported by the decision of the Calcutta High Court in *Ganoda Sundary Chaudhurani* v. *Nalini Ranjan Raha*(1) and other decisions of the Bombay High Court which will be referred to presently. In *Ganoda Sundary Chaudhurani* v. *Nalini Ranjan Raha*(1), WOODROFFE, J., relies on the word "done," but I am not satisfied with this line of reasoning. The phrase is not "an act

(1) (1909) I.L.R., 36 Calc., 28.

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done" but "an act purporting to be done" and the words "to be done" are not inconsistent with a future act. It is possible to describe a future act by a phrase using the words "purporting to be done" by using other appropriate words such as "future" or "intended" indicating that a future act was meant or by the mere use of the future tense in the sentence. As PRATT, J., points out in *Muradally Shamji* v. *B. N. Lang*(1) one mode of indicating past acts only is by using the words "purporting to have been done." The phrase "purporting to be done" uses the present indefinite form and is grammatically wider than the phrase "purporting to have been done." While conceding all this, I am still of opinion that as a matter of an ordinary idiom the whole phrase "an act purporting to be done" would ordinarily refer to past acts only whether finished or begun but incomplete and does not refer to future acts. The use of the perfect form is not ordinarily resorted to for describing past acts though grammatically more accurate and if a future act is meant it is expressly described by appropriate words. Where no such words are used, the phrase ought in my opinion to be ordinarily limited to past acts (unless the context requires one to extend it to future acts also, there being no grammatical impediment to doing so)—as a matter of reasonable construction if not of grammatical necessity. The decision in *Secretary of State* v. *Gajanan Krishna Rao*(2) relates to a suit against the Secretary of State. In *Nagindal Chunilal* v. *The Official Assignee, Bombay*(3), where the suit was against the Official Assignee of Bombay, the Judges followed the decision of CUNNINGHAM, J., in *Shahebzadee Shahun Shah Begum* v. *Fergusson*(4). Though I come to the same conclusion, I do not wish to adopt

(1) (1920) I.L.R., 44 Bom., 555 at p. 560. (2) (1911) I.L.R., 35 Bom., 362.
(3) (1913) I.L.R., 37 Bom., 243. (4) (1881) I.L.R., 7 Calc., 499.

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that line of reasoning. The decision in *Naginlal Chunilal* v. *The Official Assignee, Bombay*(1) was followed in *Secretary of State for India* v. *Gulam Rasul*(2). In *Muradally Shamji* v. *B. N. Lang*(3) PRATT, J., while differing from the above cases was merely content to follow them sitting as a single Judge. In *Bhagchand Dagadusa* v. *The Secretary of State for India*(4) KEMP, J., observed:

"The suit is in respect of something the second respondent is going to do, not in respect of something he has done. In my opinion, therefore, no notice is necessary so far as the suit is one for an injunction against the second defendant."

The only Madras decision which touches the question is *The Superintending Engineer, II Circle, Bezwada* v. *Chituri Rama Krishna*(5). In that case, the suit was against the Superintending Engineer of Kistna District, and both the learned Judges held that the suit was bad for want of a proper notice on the ground that the suit related to a past act, the act being the order of the Engineer directing the removal of the image and the temple. There was considerable discussion in the judgments as to whether an order which states an intention would be an act and both the learned Judges held it would be. SPENCER, J., decided the case on another ground and referred to the want of a proper notice only as an additional ground, but SADASIVA AYYAR, J., rested his judgment solely with reference to section 80, Civil Procedure Code. It does not appear that the point whether the phrase "an act purporting to be done, etc" includes a future act was raised by the vakil for the respondent. At any rate, it is not discussed in the judgment and therefore the judgment is not against

(1) (1913) I.L.R., 37 Bom., 243. (2) (1916) I.L.R., 40 Bom., 392.
(3) (1920) I.L.R., 44 Bom., 555. (4) (1924) I.L.R., 48 Bom., 87 at 153.
(5) (1920) 39 M.L.J., 151.

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the view I am taking. The fact remains that there is no decision against the view I am taking and there are several agreeing with it on different lines of reasoning.

The learned vakil for the respondent, besides arguing that the section is not confined to past acts only—an argument above dealt with, also argues that this suit must be considered to be in respect of a past act, the past act being the advertisement of the Official Receiver announcing the sale of the suit properties. If the suit can be regarded as one in respect of a past act, the judgment in *The Superintending Engineer, II Circle, Bezwada* v. *Chituri Ramakrishna*(1), already mentioned supports him. But I find it difficult to hold that the suit is in respect of the advertisement. The reason for the suit, or in other words, the cause of action for the suit may be furnished by the advertisement or some other similar past act of the first defendant, but it does not follow that the suit is in respect of that act. The relief sought is to restrain the sale and I think the only proper description of this suit is, "a suit to restrain the intended sale." I am therefore unable to accede to the argument of the learned vakil for the respondent on the second point.

The result is, I hold that in respect of acts of public servants done in their official capacity the section applies only in the case of past acts completed or begun but incomplete and not threatened acts, and therefore the suit is not unsustainable for want of notice. I would therefore allow the appeal and remand the case back for disposal according to law. Costs to abide the result. Court fee paid in appeal will be refunded.

REILLY, J.

REILLY, J.—Plaintiff instituted a suit for a declaration and for an injunction restraining the Official Receiver of Rāmnād from selling the property

(1) (1920) 39 M.L.J., 151.

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concerned, but did not give the Receiver notice as required by section 80, Civil Procedure Code, two months before presenting his plaint. The question is whether section 80, Civil Procedure Code, prohibits the institution of a suit for an injunction against an Official Receiver, who, it is admitted, is a public officer unless the notice mentioned in the section has been given to the Receiver two months earlier. It is contended for plaintiff that as regards a public officer the section requires the notice to be given only if the suit to be brought against him is in respect of some act already done or at least partly accomplished and that, if the suit is in respect of a future act—some threatened, intended, contemplated or apprehended act—then no such notice is required. For defendant I it is contended that, if the act in respect of which the suit is brought is the act of a public officer and purports to be done by him in his official capacity, then whether the act is past, present or future, the suit cannot be instituted unless the notice has been given two months earlier. The question which contention is correct depends on the interpretation of the words "in respect of any act purporting to be done by such public officer in his official capacity" in the section. Do those words cover only a past act or do they include also a future act? On the surface by their mere grammatical form, the words quoted appear to me capable of including a future act. But, when we probe into their meaning, can we say with propriety that an act purports to be done in any particular manner or capacity until it is actually done. We can conceive an imaginary act and conceive it as done in some particular capacity. But can we properly speak of an act not yet done as an act purporting—that is conveying to the outer world a pretence or profession—to be done in a particular capacity? No doubt we could do so hypothetically. But, if the dry

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language of a statute speaks of an "act purporting so and so" without adding any word to indicate that the expression is intended to include not only acts done but also acts threatened, contemplated or intended, are we at liberty to interpret the expression as including an act not yet done? If the words in question were "in respect of any act done by a public officer in his official capacity," would there be any doubt that they did not include an act not yet done? Does the insertion of the words "purporting to be" not only widen the character of the acts included but also add future acts to past acts? On the other hand it has been argued for the Official Receiver that, if the legislature had intended to require previous notice to be given to a public officer only when a suit was to be brought in respect of a past act, it would have been a simple and easy matter to find a form of words which would have made that intention indisputably clear. There is some force in that argument. Without pursuing these questions and considerations further I think it may fairly be said that the phrase in questiou is susceptible of two interpretations, a wider interpretation including future acts and a narrower confined to past acts, and that at the least the narrower interpretation is as consonant with the wording of the section as the wider one. That being so, let us look at the consequences to which the wider interpretation leads. In practice almost all suits against public officers in respect of future acts will be suits for injunctions. Unless a suit for an injunction is to fail entirely of its purpose, it is often necessary that the plaintiff should obtain a temporary injunction pending the suit. Under our procedure a temporary injunction can be obtained only after a suit is instituted. If no suit can be instituted for an injunction against a public officer and no temporary injunction can be obtained against him until two months after notice of

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the suit has been given, the remedy of injunction against such an officer may often be illusory. Can we suppose that the Legislature intended to deprive a private party of a remedy against a public officer which can be enforced against another private party or to expose a private party to the risk of irreparable damage at the hands of a public officer, though means are provided for guarding against such damage at the hands of another private party? Can we suppose that the Legislature, having provided the courts with the weapon of a temporary injunction for the protection of private rights, intended to tie the hands of the courts for two months before that weapon may be used against a public officer? This last suggestion at least we cannot accept lightly. It is a well-established rule that when a provision of a statute is susceptible of two interpretations and one of them leads to a manifest absurdity or to a clear risk of injustice and the other leads to no such consequences, the second interpretation must be adopted. In my opinion that rule may properly be applied in interpreting the words now in question. I may mention here that Mr. Krishnaswami Ayyar for the Official Receiver has pointed out that section 80 clearly makes notice necessary for every suit against the Secretary of State whether in respect of past or future acts and has asked with some dialectical force whether it is reasonable so to interpret the section as to require notice with its attendant danger of irreparable damage to be given before the institution of a suit for an injunction against the Secretary of State but not before the institution of a suit for an injunction against a public officer. I see nothing really unreasonable in supposing that such a distinction was contemplated by the Legislature. Even when a suit is to be brought against the Secretary of State for an injunction, if the protection of a temporary injunction is urgently necessary, the plaintiff

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can obtain the temporary injunction against the public officer whose immediate act is feared if the section allows him to institute a suit at once against that officer without notice. In practice the immediate protection of a temporary injunction need never be required against the Secretary of State. Finally in interpreting the words in question there is one other consideration of great importance. So far as it is concerned with suits against public officers, section 80, Civil Procedure Code, is a provision restricting the ordinary right of every man to come to the Civil Courts for relief. It is our duty to interpret such a provision with the utmost strictness, and we must be very sure that our interpretation does not take us one fraction of an inch, one iota, beyond the length to which the language of the provision clearly compels us to go. For these reasons, if the question were bare of authority, I should have no doubt that the correct interpretation of the words in question was the narrower one, viz., that "act" does not include here a future act.

2. If we turn to cases in which the words in question have been interpreted in this connexion, we find that the prevailing view in the Bombay High Court is as shown by *Naginlal Chunilal* v. *The Official Assignee, Bombay*(1) and *Bhagchand Dagadusa* v. *The Secretary of State for India*(2), that section 80, Civil Procedure Code, does not make previous notice essential for the institution of a suit for an injunction against a public officer in respect of some threatened act. The only cases of the Calcutta High Court to which we have been referred, viz., *Shahebzadee Shahun Shah Begum* v. *Fergusson*(3), and *Ganoda Sundary Chaudhurani* v. *Nalini Ranjan Raha*(4), which both dealt with the corresponding section of the

(1) (1913) I.L.R., 37 Bom., 243.
(2) (1914) I.L.R., 48 Bom., 87.
(3) (1881) I.L.R., 7 Calc., 498.
(4) (1909) I.L.R., 36 Calc., 28.

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Code of 1882, show that according to the view of the learned Judges concerned previous notice is not required before the institution of a suit against a public officer for an injunction. Mr. Krishnaswami Ayyar for the Official Receiver relies on *The Superintending Engineer, II Circle, Bezwada* v. *Chituri Ramakrishna*(1), the only reported case of this Court in which the question whether section 80, Civil Procedure Code, requires notice to be given before the institution of a suit against a public officer for an injunction appears to have arisen for decision. But in that case, though both the learned Judges found that the suit was bad for want of notice to the officer concerned, they did not explicitly interpret section 80 as extending to suits against public officers in respect of threatened acts, though that would obviously have been the simplest way to dispose of the case. On the contrary they appear to have based their decision on a finding that the suit was really one in respect of an act which the officer had completed already. Though with respect I do not wish to be understood to agree with the reasoning of the learned Judges in all the Bombay and Calcutta cases which I have mentioned, it will be seen that they support the view that "act" in section 80, Civil Procedure Code, does not include a future act and that the decision in *The Superintending Engineer, II Circle, Bezwada* v. *Chituri Ramakrishna*(1) is not against that view.

3. I agree that this appeal should be allowed and that the suit should be remanded with costs to abide as proposed by my learned brother.

K.R.

(1) (1920) 39 M.L.J., 151.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Curgenven.

1926, September 24.

SREE RAJAH PARTHASARATHY APPA RAO (PLAINTIFF), APPELLANT,

v.

SUBBA RAO AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), arts. 89 and 120—Pleader and client—Several cases entrusted to same vakil—Agency in each case, separate and terminating at the end of each case —Suit for accounts against legal representatives of pleader—Limitation.

A pleader engaged by a client for several cases died without finishing some of them. In a suit by the client after the pleader's death against his sons for an account of the moneys received by their father in all the cases and for the balance due to the plaintiff,

Held that the pleader was not a general agent of the client so as to entitle the client to say that the agency terminated only on the death of the pleader, that the engagement in each case was separate, that the agency in respect of each case terminated at its end, that article 89 of the Limitation Act (IX of 1908) was applicable and that no new cause of action arose as against the sons on the death of their father so as to entitle the client to say that article 120 was applicable. *Arunachalam Chetty* v. *Raman Chetty*, (1914) 16 M.L.T., 614, followed. *Bindraban Behari* v. *Jamuna Kunwar*, (1903) I.L.R., 25 All., 55, dissented from.

APPEAL under clause 15 of the Letters Patent against the judgment of Mr. Justice PHILLIPS in Second Appeal No. 96 of 1923 preferred against the decree of Subordinate Judge's Court of Kistna at Ellore in Appeal Suit No. 65 of 1922 preferred against the decree of the Additional District Munsif of Ellore in Original Suit No. 204 of 1921.

The facts are given in the judgment.

* Letters Patent Appeal No. 124 of 1924.

APPA RAO v. SUBBA RAO.

P. Chenchiah for *P. Venkataramana Rao* for appellant.

S. Varadachari and *V. Suryanarayana* for respondent.

JUDGMENT.

ODGERS, J.

ODGERS, J.—In this case the plaintiff, a zamindar, sued the legal representatives of a pleader who was employed to conduct certain summary suits, etc., in Bhimavaram for the plaintiff, asking for a decree for about Rs. 1,800 being the amount due from the deceased pleader to the zamindar on account of money received and not accounted for by him. Now the Subordinate Judge after calling for findings as to what suits the pleader had appeared in and when those were disposed of, held that only 22 suits were disposed of before the institution of this suit; and the most important point perhaps urged by Mr. Chenchiah for the appellant in Letters Patent Appeal from the judgment of my brother PHILLIPS (who dismissed the Second Appeal) is the point of limitation. Mr. Chenchiah urges the following points: Firstly that there was a general agency that is to say, that the pleader was what is sometimes called a "standing vakil" to the zamindar and therefore his agency must be taken to have extended from 1916 when he was first engaged, to his death in March 1918. Now this contention was not only negatived by my brother PHILLIPS but by the Subordinate Judge also, chiefly on the authority of the case *Saffron Walden Second Benefit Building Society* v. *Rayner*(1) where the Lords Justices held that there was no such thing as an office of a Solicitor and Lord Justice JAMES points out that a solicitor is a man's solicitor when he chooses to employ him and in the matter in which he is so employed. Lord Justice BRAMWELL says that

(1) (1880) 14 Ch. D., 406.

"a man is solicitor for a another when that other has occasion to employ him as such."

It is of course not disputed that in our practice the pleader has to file a separate vakalat for every suit that he institutes on behalf of his client. And that was so in the present course of employment; a separate vakalat being also filed by the pleader in each execution proceedings. So that in my opinion this contention must be negatived.

Then it was contended that even if his agency was not general his accounts were; that is to say, that the pleader maintained an open current account with the client and that the account instead of being closed as each suit was disposed of, simply ran on in the ordinary way, familiar to us, as payments by the employer and drawings against those payments by the pleader. Now that really is a pure matter of surmise because the only accounts that we have in evidence are contained in Exhibit R which in my opinion negatives any such idea. There, the suits are kept separate, the expenses for each execution petition are set out and there is no ground for saying on such accounts as we have, that there was anything in the nature of an open running account between the client and his pleader.

Now then with regard to limitation. Mr. Chenchiah strongly contended before us that there was a liability to account outstanding at the death of the pleader when the agency terminated and that therefore every item of account within 3 years from the date of the death of the pleader must be taken into account in this suit. He argued that a new cause of action arises as against the legal representatives and that therefore he is entitled to reckon 3 years, not from the date of the termination of each suit, but from the date of the death of the pleader when the agency terminated. Now in support of this

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proposition we have been referred to *Kumeda Charan Bala* v. *Asutosh Chattopadhyaya*(1), *Kali Krishna Pal Chowdhry* v. *Srimati Jagattara*(2) and *Bindraban Behari* v. *Jamuna Kunwar*(3). It is noteworthy that no Madras case has been cited, although one is to be found in *Natasayyan* v. *Ponnusami*(4) to this effect. In fact our law as laid down in Madras is in favour of the opposite view. *Natasayyan* v. *Ponnusami*(4) has been overruled in *Mallesam Naidu* v. *Jugala Panda*(5) the view which is also supported by *Periasami Mudaliar* v. *Seetharama Chettiar*(6) and there is direct authority in *Arunachalam Chetty* v. *Raman Chetty*(7). Mr. Chenchiah tried to distinguish this case on the ground that there the suit was barred when instituted, being more than 3 years after the death of the agent, and that therefore it could not apply to the principle for which he was contending. But the judgments clearly show that the agent died in April 1919 and the suit was brought in December of the same year. The learned Judge held that there was no separate cause of action as against the sons, that is to say, the action against the sons is not different from that against the father, and as it was barred against the father after his life, it was also barred against the sons. Mr. Justice SPENCER in his judgment in that case distinctly says that *Natasayyan* v. *Ponnusami*(4) has been overruled by the two latter Madras cases referred to above and that the matter falls under article 89 of the Limitation Act. It was faintly suggested on the authority of the case in Calcutta Weekly Notes that as legal representatives are not mentioned in article 89, that article can have no application to a suit like the present. That in my view

(1) (1912) 17 C.W.N., 5. (2) (1868) 2 B.L.R., 139.
(3) (1903) I.L.R., 25 All., 55. (4) (1893) I.L.R., 16 Mad., 99.
(5) (1900) I.L.R., 23 Mad., 292 (F.B.). (6) (1904) I.L.R., 27 Mad., 243 (F.B.).
(7) (1914) 16 M.L.T., 614.

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is distinctly overruled by the case in *Arunachalam Chetty* v. *Raman Chetty*(1) and it is pointed out by Mr. Varadachariar that there are many articles which would be reduced to absurdity if this contention were applied to them, for instance, articles 78 and 79. The column under which these articles appear is headed "Description of suit." To my mind the omission of any mention of legal representatives in the words under "Description of suit" does not mean that the article is not intended to apply to a suit against the legal representatives in order to let in article 120. It seems to me that in this case we ought to follow the decisions in *Arunachalam Chetty* v. *Raman Chetty*(1) and *Mallesam Naidu* v. *Jugala Panda*(2) and *Periasami Mudaliar* v. *Seetharama Chettiar*(3) and no reason has been shown why any of these decisions should be held to be inapplicable to the present case. It seems to me therefore that the appeal fails on all the points put forward and must be dismissed with costs.

CURGENVEN, J.

CURGENVEN, J.—The only issue we have to decide in this Letters Patent Appeal is that of limitation. The appeal is taken against the judgment of PHILLIPS, J., in second appeal affirming the appellate judgment that such claims as would be barred against the pleader himself are barred against his sons and legal representatives, the defendants.

I think there can be no doubt that a separate agency began and terminated with each suit or other proceeding. It is true that there is an order of appointment (Exhibit B-2) under which the pleader was to conduct the estate litigation, but it did not amount to a general power-of-attorney, and it has not even been suggested that it would of itself have given the pleader authority to conduct the suits. That was furnished by the

(1) (1914) 16 M.L.T., 614. (2) (1900) I.L.R., 23 Mad., 292.
(3) (1904) I.L.R., 27 Mad., 243.

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vakalat executed in each case, and it was the vakalat therefore that created the agency. It is then said that, granting so much, the agency did not come to an end with the suit, but continued until the pleader had accounted to his principal or had refused to account. Even assuming this to be so, it is acknowledged in the plaint that in some instances accounts had been rendered, and since there is no evidence on the record to show which cases these were, it is not possible to say, in any particular case, that account was not rendered. It must be taken, I think, that the agency in a given case came to an end with the case, and this assumption is the more permissible since we find that separate vakalats were executed for suits and for execution proceedings.

Thus, had the suit been against the pleader himself, each proceeding he had taken under a separate vakalat would have furnished the basis for an account to be rendered, and time would have run from the date of termination of the proceeding. Would the rule of limitation be different, now that the father is dead and the suit is against the sons?

The answer to the question depends upon whether the sons were sued upon a cause of action different from that which was available against the father. In other words, did a fresh cause of action arise upon the father's death? The question, I think, is to be answered in the negative both upon general principles and upon authority. Suppose the father has been sued and had died pending suit. There is no doubt whatever, I suppose, that the sons could have been substituted for him as his legal representatives and the suit continued. This must surely mean that the cause of action survived the father's death, and was available also against the sons. A legal representative, so far as the assets come into his hands, carries on the liability of the deceased in all cases where that liability does not lapse with the death. Of the

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cases cited which appear to run counter to this doctrine, the only one in which the facts raise an issue strictly analogous to the present is *Bindraban Behari* v. *Jamuna Kunwar*(1). In that case it was not only held that a fresh cause of action arose, when, upon the death of the father, the money came into the defendant's hands but, further, that the suit against the son would not fall under article 89 of the Limitation Act, because the suit was not against the agent but against his legal representative. With all respect, I must dissent from both propositions; against the latter it has only to be pointed out that the Limitation Act classifies suits according to their "description" and that a suit of the description referred to in article 89 may be brought against the legal representative of an agent as well as against the agent himself, just as under article 78 the drawer's representatives may be sued upon a dishonoured bill of exchange. Against the doctrine that receipt of the money by the son creates a fresh cause of action, the Madras case relied upon by the learned Judge, *Arunachelam Chetty* v. *Raman Chetty*(2) appears to me to be clear authority from which I can see no reason to differ.

It may be, as was admitted in *Venkatacharyulu* v. *Mohana Pandya*(3) that the onus and methods of proof may differ when the suit is against a legal representative, and it may even be that the remedy would be different in kind; but those are no reasons for holding that a fresh cause of action arose when the assets liable for the claim came into the defendant's hands upon their father's death.

I agree therefore that this appeal must be dismissed with costs.

N.R.

(1) (1903) I.L.R., 25 All., 55 at 56. (2) (1914) 16 M.L.T., 614.
(3) (1921) I.L.R., 44 Mad., 214.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Sundaram Chetti.

1926, September 22

PUNNIAH (APPELLANT) 2ND RESPONDENT,

v.

KESARMAL FIRM AND 4 OTHERS, (RESPONDENTS) PETITIONERS.*

Provincial Insolvency Act (V of 1920)—Two partners liable on a joint debt—Acts of bankruptcy by each during continuance of debt—Single petition to adjudicate both as insolvents, maintainability of.

If two partners are liable on a joint debt and each of them is guilty of acts of bankruptcy during the continuance of the joint debt, by making alienations calculated to defeat or defraud the creditors of the firm, a single petition to adjudge both of them as insolvents is sustainable, though they may not have committed a joint act of insolvency. The test is whether if the petition were treated as a suit, the suit would be bad for multifariousness.

APPEAL against the order of E. PAKENHAM WALSH, District Judge of Guntūr, in I.P. No. 43 of 1923.

The facts are given in the judgment.

B. Satyanarayana for appellant.

B. Somayya for respondent.

JUDGMENT.

This appeal arises out of a petition filed by a creditor to adjudge respondents Nos. 1 and 2 insolvents. The second respondent is the son-in-law of the first respondent.

The main contention put forward on behalf of the appellant here (who was the second respondent in the

* Appeal against Order No. 317 of 1924.

lower Court) is that a single petition for adjudicating both the respondents as insolvents is bad for misjoinder, and therefore unsustainable. There is no doubt that they are liable to the petitioner for a joint debt. The learned District Judge has also found upon the evidence on record, that they are also partners. That finding has been challenged before us, but we are satisfied that the inference drawn by the learned Judge is on the whole correct. Each link in the chain of circumstances adverted to by him, may be inconclusive by itself, but the cumulative effect of all the links justifies his conclusion. We are not prepared to differ from him on this point. It is, however, contended by Mr. B. Satyanarayana that a single petition against both the respondents is unsustainable unless it is shown that they are guilty of a joint act or acts of insolvency. The observations on page 186 in William's Bankruptcy Practice (13th edition) are pertinent to the present case :—

"In order to sustain a joint petition against two or more persons, it is necessary that some acts of bankruptcy shall have been committed by each of them. This may be a joint act of bankruptcy; but it is not requisite that they should have committed a joint act of bankruptcy or that they should all have committed an act of bankruptcy of the same kind; and in order to support a joint petition against all the members of a firm, the acts of bankruptcy must have been committed during the continuance of a joint debt and the petition must be founded on a joint debt."

We are of opinion that where two partners are liable to a creditor under a joint debt and each of them is alleged to have committed acts of bankruptcy, during the continuance of the joint debt, by making certain alienations with a view to defraud or defeat the creditors of the firm or with the object of giving a fraudulent preference, a single petition for adjudging both of them as insolvents, cannot be deemed to be unsustainable merely because they have not committed a joint act of

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insolvency. The test is, whether if the application were treated as a suit the suit would be bad for multifariousness, as was held in *Mamayya* v. *K. R. Rice Mill Co.*(1) In that case, the members of a joint Hindu family were sought to be adjudged insolvents. It seems to us, that that decision does not go to the length of laying down that, if the acts of insolvency are not joint but separate, a single petition would not lie, though it would not be bad for multifariousness, when treated as a suit. If the act of insolvency committed by each partner, would be one of the circumstances affording a cause of action against him, it has still to be shown that the two causes of action cannot be made the subject of trial on a single application as it would amount to a misjoinder. We are unable to find such inconveniences as would make it obligatory on the Court to ask the petitioner to confine his case to one of the respondents by way of election. We hold that there is no legal bar to the maintainability of a single petition against both the joint debtors who are also partners in this case.

As for the question whether the second respondent is shown to have committed an act or acts of insolvency, we cannot say that the learned Judge is wrong in his inference. The alienations effected by the second respondent are mortgages under Exhibits C and C-1, one of which was in favour of his own wife's sister's husband. There is a cloud of suspicion hanging over these transactions which would come under clauses (*b*) and (*c*) of section 6 of the Act. We hold that the order of the District Judge is correct, and dismiss this appeal with costs.

The respondent is entitled to his costs in the lower Court. We allow the memorandum of objections. The respondent will add the amount of his costs to the amount already due to him.

N.R.

(1) (1921) I. L.R., 44 Mad., 810.

APPELLATE CRIMINAL.

Before Mr. Justice Waller and Mr. Justice Madhavan Nayar.

SUBBA CHUKLI, *In re.**

1925, December 4.

Charge under sec. 302, *Indian Penal Code—Conviction under sec.* 304 (*second part*), *Indian Penal Code—Revision under sec.* 439, *Criminal Procedure Code—Notice of enhancement —Effect of sec.* 439 (4), *Criminal Procedure Code—Finding of acquittal, not complete but partial.*

Where a person was charged with murder and the Sessions Court was of opinion on the evidence that the accused had been gravely provoked and did not intend to cause death and convicted him under the second part of section 304 of the Indian Penal Code, and the accused was called upon, in a revision petition filed in the High Court, to show cause why he should not be convicted of murder and the sentence enhanced to one of death.

Held, that the High Court had no power in revision under section 439, Criminal Procedure Code, to do what was tantamount to convert a finding of acquittal into one of conviction, that the accused could not be convicted of an offence either under section 302 or the first part of section 304 of the Indian Penal Code except on an appeal by the local Government.

Held further, that the finding of acquittal referred to in section 439 (4), Criminal Procedure Code, need not be a complete acquittal. *Re Bali Reddi*, (1914) I.L.R., 37 Mad., 119, dissented from. *Emperor* v. *Sheodarshan Singh*, (1922) I.L.R., 44 All., 332, followed.

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 Session of the Coimbatore Division in Sessions Case No. 108 of 1925.

Public Prosecutor for the Crown.

A. V. Narayanaswami Ayyar for the accused.

* Criminal Revision Case No. 654 of 1925.

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JUDGMENT.

The respondent in this case was charged with the murder of his sister-in-law. The evidence against him is this: He had quarrelled with his wife, and was beating her. Her sister intervened, saying "You dog, why do you beat her in my sight." At this respondent picked up a sickle, seized the sister by the hand and gave her two cuts on the neck which killed her on the spot. The Sessions Judge accepted the evidence, but, being of opinion that respondent had been gravely provoked, and did not intend to cause death, convicted him under the second part of section 304, Indian Penal Code, and sentenced him to undergo seven years' rigorous imprisonment.

Respondent has been called upon to show cause why he should not be convicted of murder, and why the sentence passed on him should not be enhanced to one of death. We are satisfied that we have no power in revision to do what is tantamount to converting a finding of acquittal into one of conviction. The respondent has been acquitted by the Sessions Judge of murder and also under the first part of section 304, Indian Penal Code, and we cannot convict him of either of these offences except on an appeal by the local Government. No doubt, there is a ruling of the High Court to the contrary effect in *Re Bali Reddi*(1). It lays down that the finding of acquittal referred to in section 439, Criminal Procedure Code, must be a complete acquittal. With great respect, we think that the effect of that decision is to import into section 439 something that is not there. The wording of the section is quite clear. It prohibits the converting of a finding of acquittal into one of conviction and says nothing about the

(1) (1914) I.L.R., 37 Mad., 119.

SUBBA CHUKLI, *In re.*

acquittal being partial or complete. We think that the correct view has been enunciated in *Emperor* v. *Sheodarshan Singh*(1). We must, therefore, decline to alter the finding or enhance the sentence. We desire to say as little as possible about the merits of the case, in view of the action we propose to take. There has, we consider, been a miscarriage of justice. We set aside the conviction and order a retrial on the charge of murder by the present Sessions Judge of Coimbatore.

B.C.S.

APPELLATE CIVIL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Krishnan and Mr. Justice Curgenven.

1926, September 1.

R. E. MAHOMED KASSIM & Co. (PLAINTIFF), APPELLANT,

v.

SEENI PAKIR BIN AHMED AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 13 (b)—Foreign judgment—Judgment passed on default of appearance of defendant—Defendant duly served with summons—Judgment passed without trial on evidence—Suit on such judgment in a Court in British India, whether maintainable—Decision on the merits of the case, in sec. 13 (b), Civil Procedure Code, meaning of.

A foreign judgment, passed on default of appearance of the defendant duly served with summons, on the plaint allegations without any trial on evidence, is not one passed on the merits of the case within the meaning of section 13 (b) of the Civil Procedure Code; and a suit cannot be brought on such a judgment in any Court in British India. *Keymer* v. *Visvanatham*

(1) (1922) I.L.R., 44 All., 332.

* Appeal Suit No. 61 of 1924.

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Reddi, (1917) I.L.R., 40 Mad., 112 (P.C.), followed; *Janoo Hassan* v. *Mahamad Ohuthu*, (1924) I.L.R., 47 Mad., 877, overruled.

APPEAL against the decree of K. S. GOPALARATNAM AYYAR, the Additional Subordinate Judge of Rāmnād, in Original Suit No. 21 of 1923 (O.S. No. 20 of 1922 on the file of the Court of the Subordinate Judge of Rāmnād):—

This appeal, coming on for hearing before KRISHNAN and VENKATASUBBA RAO, JJ., was referred to a Full Bench. The material facts appear from the following:—

ORDER OF REFERENCE TO A FULL BENCH.

KRISHNAN, J.—The suit from which this appeal has arisen was brought by the Plaintiff on a judgment of the Supreme Court of Penang obtained by him against first and second defendants and one Pichai Haji, deceased, whose legal representatives are defendants 3 to 6. That suit was on a deed of composition, Exhibit F, executed by the said three persons for money due on dealings in Penang. Though they were British Indian subjects, they were at the time of the suit in Penang, resident within the jurisdiction of the Penang Court. At the hearing of that suit they did not appear in Court to contest it. They were declared to have been properly served, the present first defendant having been served personally and the two others by substituted service. In accordance with a rule of procedure of that Court by which, in suits in which defendants, being properly served, do not appear and contest, judgment is given for the plaint-claim without any trial, judgment was entered up in favour of the plaintiff as a matter of course. It is on that judgment the present suit is brought.

The Subordinate Judge dismissed the suit holding that judgment was obtained against the defendant in Penang Court "by procuring a false and fraudulent return of service of the writs of summonses obtained against them" and that in fact the defendants had not been served at all and that it was against natural justice to recognize such a judgment in our Courts. I am unable to agree that there was any real defect in the service of summons. The issue raised in the present suit, Issue I, has reference only to service on the first defendant. That issue is "Has the decree in O.S. No. 714 of 1921 on the file of the

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Supreme Court of Penang been obtained against the first defendant by procuring a false and fraudulent return of service of the writ of summons on him?" The verified report of the process-server to the Penang Court was that he was personally served, Exhibit D. The only evidence we have now, viz., that of P.W. 1 is that he was personally served. The first defendant did not go into the box and deny it. I think that on this evidence it must be held that the first defendant was personally served. As regards the other two defendants who were served by substituted service, no issue was raised, but the Subordinate Judge has held that substituted service was bad . . . [The learned Judge dealt with the evidence and proceeded as follows:—]

There is no justification in my opinion for the Subordinate Judge's finding that the defendants had not been served at all.

It has, however, been broadly argued by the learned vakil for the respondents that the judgment of the Penang Court being a judgment by default cannot form the basis of a suit in this country. He relies upon section 13 of the Civil Procedure Code, clause (*b*), and contends that the judgment, not having been given on the merits of the case, is not binding on the defendants. He concedes that an *ex parte* decree given by a Court after taking evidence and finding that the Plaintiff's claim is proved on such evidence, may be a decree on the merits, but he urges, that, as in the present case, no such evidence was taken, but the Penang Court under its rules of procedure entered up judgment for Plaintiff on the defendants' default of appearance, such a judgment could not be treated as one on the merits of the case. He has relied on *Keymer* v. *Visvanatham Reddi*(1), in support of his contention. In that case the Privy Council in agreement with this Court's judgment in *Viswanadha Reddi* v. *Keymer*(2) held that a judgment in England obtained after the defence was struck off for default in not answering interrogatories and after the suit had thus become an undefended one, was not a judgment on the merits and a suit founded on it in this country must fail. There was also another case reported in *Oppenheim & Co.* v. *Mahomed Haneef*(3), where a suit had been brought in Madras on an *ex parte* judgment in England, given on an award passed there; the suit was

(1) (1917) I.L.R., 40 Mad., 112 (P.C.). (2) (1916) I.L.R., 39 Mad., 95. (3) (1922) I.L.R., 45 Mad., 496 (P.C.).

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also based on the award itself as well as on the original cause of action. The main point decided in that case was that the English award could not be impugned here on the ground of irregularity, but it was taken for granted in it that the suit so far as it was based on the English judgment that followed on the award could not be maintained as it was a judgment by default.

On the other hand there is a recent decision of a Bench of this Court in *Janoo Hassan* v. *Mahamad Ohuthu*(1), which held that a judgment though passed in an *ex parte* proceeding was one on the merits and formed a proper basis for a suit here. That was a Ceylon case where also a similar rule prevails as in Penang, entitling the Court to give a decree without any trial when the defendants being served do not appear; though the Ceylon rule gives power to the Judge to take evidence if he thinks fit, there is nothing to show that in the particular case any evidence was taken. It is difficult to reconcile this view with the view expressed in the cases in *Keymer* v. *Visvanatham Reddi*(2) and *Oppenheim & Co.* v. *Mahomed Hanef*(3). The 40 Madras case has been sought to be distinguished in *Janoo Hassan* v. *Mahamad Ohuthu*(1), on the ground that in the former case, defendant had filed a defence which was subsequently struck off, whereas, in a case where defendant does not appear, there is no defence raised, and it is suggested that in such cases there is a presumption that the defendant admits the claim. I am not satisfied that this is a proper distinction. Their Lordships do not put the case on any such narrow basis in *Keymer* v. *Visvanatham Reddi*(2). It is difficult to say that there is any decision on the merits when a decree is given mechanically in accordance with a prescribed rule.

A number of English decisions were cited to us wherefrom it would appear that suits on foreign judgments are allowed in England though they are judgments by default. My learned brother has referred to them and I need not do so again. It does not seem, however, to be necessary to refer to them in detail as we are governed by the language of section 13 of the Civil Procedure Code in dealing with the binding character of foreign judgments in this country. Whatever the English view might be, the question what the Indian Law is, though not of frequent

(1) (1924) I.L.R., 47 Mad., 877. (2) (1917) I.L.R., 40 Mad., 112 (P.C.).
(3) (1922) I.L.R., 45 Mad., 496 (P.C.).

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occurrence, is of much importance, and in view of the decision in *Janoo Hassan* v. *Mahamad Ohuthu*(1), I think it is desirable that it should be settled by a Full Bench. I would therefore refer to the Full Bench the following question:—

"Does a suit lie in this country on a foreign judgment given on default of appearance of the defendant on the plaint allegations without any trial on evidence?"

The other points in the case are reserved for further disposal after the Full Bench have given their opinion.

VENKATASUBBA RAO, J.—I agree that the judgment cannot be supported on the ground on which it is based. As my learned brother has fully dealt with that point, I do not propose to cover the same ground. If the ground on which the judgment is founded, is the only ground available to the defendant, I should, without hesitation, reverse the decision and allow the appeal; but the defendant's learned vakil seeks to support the judgment on another ground, namely, that a foreign judgment by default of appearance cannot be the foundation of an action in an Indian Court. The question is—does a foreign judgment given in default of appearance, operate as *res judicata* under section 13 of the Civil Procedure Code? The answer to this question depends, in my opinion, upon the view to be taken as to whether the law as contained in this section is or is not identical with the English Law on the point.

I cannot accede to the argument that under the English Law a foreign judgment obtained by default of appearance cannot be pleaded in bar. In *Douglas* v. *Forrest*(2), an action was brought in the English Courts upon a Scotch judgment obtained in default of appearance. The defendant was a native of Scotland and the debt was contracted in that country. The debtor was out of Scotland at the time, had not been personally served and had no notice of the proceedings. By the Scotch Law a person against whom such a decree was pronounced might at any time within forty years dispute the merits of such decree. BEST, C.J., held that the decree was consistent with principles of justice and would therefore support an action in an English Court.

To the same effect is the decision in *Vanquelin* v. *Bouard*(3). The French Court of the Tribunal de Commerce pronounced

(1) (1924) I.L.R., 47 Mad., 877. (2) (1828) 4 Bing., 686; 130 E.R., 933.
(3) (1863) 15 C.B. (N.S.), 341; 143 E.R., 817.

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judgment against defendant for default of appearance and it was contended that this foreign judgment was not binding upon an English Court, as under the law of France it would become void and of no effect as a matter of course, upon the defendant merely entering an opposition to it. ERLE, C.J., overruled this contention observing that the mere fact that a judgment is in a certain event liable to be set aside, does not prevent its being the foundation of an action in the English Courts. A further plea was taken in that case (the 13th plea) that the French Court had no jurisdiction. KEATING, J., while disallowing the plea, observed that the defendant ought not to be allowed to deny facts which it was competent to the foreign Court to try and must be assumed to have been tried.

In *Pemberton* v. *Hughes*(1), the *Vanquelin case*(2) was referred to with approval by the Court of Appeal. This was not a suit on a foreign judgment but its validity was put in issue. The plaintiff claimed to be the widow of Pemberton alleging that a decree for divorce from her former husband Erwin had been pronounced by the proper Court in Florida in an undefended action by the husband against the wife. The defendant in the English Court pleaded that at the time when the plaintiff went through the form of marriage with Pemberton, she was still the wife of Erwin and that consequently she was not the widow of Pemberton and was not entitled to the relief claimed. LINDLEY, M.R., after referring to the fact that in *Vanquelin* v. *Bouard*(2), *the defendant allowed judgment to go by default*, observed, that the Court of Common Pleas rightly overruled the plea of want of jurisdiction based on the ground that the French action had been brought in a wrong Court in France. In regard to foreign judgments, it was held that the only jurisdiction which matters, is the competence of the Court from an international as distinguished from a purely municipal point of view. RIGBY, L.J., and VAUGHAN WILLIAMS, L.J., also approved of the decision in the *Vanquelin case*(2).

That a suit lies in an English Court upon a foreign judgment obtained by default, is assumed in *Nouvion* v. *Freeman*(3). The point there decided was, that a judgment known as "Remate Judgment" in a Spanish Court cannot be the foundation of an action. The proceedings in the foreign Court are

(1) [1899] 1 Ch., 781. (2) (1863) 15 C.B. (N.S.), 341; 143 E.R., 817. (3) (1890) 15 App. Cas., 1.

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merely in the nature of "Executive" proceedings in which the defendant can plead only certain limited defences and under the Spanish Law, in respect of the same subject-matter, either party can take ordinary proceedings in which the whole merits may be gone into and the "Remate Judgment" may be superseded by the final "Plenary Judgment." It is on account of the nature of the "Remate Judgment" that the House of Lords held that the foreign judgment there in question could not be the basis of an action in an English Court. There are observations in the judgments of Lord HERSCHELL and Lord WATSON, which clearly imply, that the mere fact that a foreign judgment was given in default of appearance does not render it any the less binding upon the parties to that judgment. Stating the principle on which the enforcement of foreign judgments proceeds, Lord HERSCHELL declares that the foundation of the rule is that a final adjudication has been given where "*the whole merits of the case are open, at all events to the parties however much they may have failed to take advantage of them.*" Lord WATSON observes to the same effect that the reason for making a foreign judgment conclusive, is either because there had already been an investigation by the foreign Tribunal "*or because the defendant had due opportunity of submitting for decision all the pleas which he desired to state in defence.*" If the defendant, therefore, had the opportunity of defending the action, the fact that he did not actually defend it, is immaterial.

I have not the slightest doubt that under the English Law a suit lies upon a foreign judgment given on default. On behalf of the defendant two cases have been strongly relied on: *The Delta*(1) and *The Challenge*(2). These cases are distinguishable and at any rate I am satisfied that on the point in question they cannot, at the present day, be regarded as authoritative. In the first of the two cases, *The Delta*(1), the judgment was based upon the ground that "the suit in the Court of Commerce had not passed into a *res judicata* but was only a *lis alibi pendens*." The learned Judge says expressly that it is upon this ground that his judgment is principally founded, although, he adds that there is a second reason, namely, that the foreign judgment was not given *on the merits of the case but on matters of form only*. In regard to *The Challenge*(2), the basis of the judgment was, that the defendants

(1) (1876) 1 P.D., 393. (2) [1904] Prob., 41.

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were not bound to submit to the jurisdiction of the Court in France and that they did not in fact submit to that jurisdiction. The plea of *res judicata* based on such a judgment by default was disallowed. *The Challenge*(1) therefore only applies to a case where the defendant was not a subject of, or resident of the country in which the foreign judgment was obtained. As I have said, the weight of authority in England is clearly in favour of holding that a foreign judgment by default operates as *res judicata*.

The question then arises, is the law in India different? Under section 13 of the Civil Procedure Code, a foreign judgment is declared to be conclusive except in certain cases specified in six clauses. For the present purpose the relevant clauses are clauses (*b*) and (*d*). Clause (*b*) says that a foreign judgment shall not be conclusive where it has not been given *on the merits of the case*. Clause (*d*) says that it shall not be conclusive where the proceedings in which the judgment was obtained are *opposed to natural justice*. There can be no doubt that the exception relating to natural justice is recognized in the English cases. The decisions to which I have referred fully bear this out; but it seems to me, however, that the further limitation in section 13 that the foreign judgment should have been given on the merits of the case, is a departure from the English rule. The only English cases where there was any reference to the merits of the case, are the *Delta* and the *Challenge* and it was assumed in these two cases that if the validity of the foreign judgment is to be judged by its being on the merits, a judgment by default does not satisfy that test and cannot therefore be the foundation of an action in an English Court.

In *Keymer* v. *Visvanatham Reddi*(2), the Defendant was originally sued in an English Court. His defence was struck out as he refused to answer interrogatories and judgment was given against him. Their Lordships of the Judicial Committee held that a suit did not lie in an Indian Court upon the English judgment so given. Their Lordships say:—

"He (the defendant) was *treated as though he had not defended* and judgment was given upon that footing. It appears to their Lordships that no such decision as that can be regarded as a decision given on the merits of the case within the meaning of section 13, sub-section (*b*)."

(1) [1904] Prob., 41. (2) (1917) I.L.R., 40 Mad., 112 (P.C.).

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The implication in this passage that the foreign judgment would be inconclusive had the suit been never defended at all is, as I have pointed out, not in consonance with the English Law on the point and I must therefore take it that in their Lordships' opinion the reference to merits in section 13 (*b*) makes the Indian Law more stringent in this respect. When the same case was before the Madras High Court Sir JOHN WALLIS, C.J., and SESHAGIRI AYYAR, J., expressed also the opinion that under the Code an *ex parte* judgment is not conclusive for the reason that there has been no trial on the merits. They indicate that this view may not be in accordance with the more recent English cases but as they are construing a section of the Code they are bound to give full effect to it.

In *Oppenheim & Co.* v. *Mahomed Haneef*(1), the point came up for decision but was not decided. The plaintiff based his suit upon a foreign judgment as well as on the antecedent cause of action. COUTTS TROTTER, J., as he then was, sitting on the Original Side, assumed on the authority of the Keymer case, that a suit did not lie in an Indian Court on a foreign judgment by default, but held that on the alternative cause of action the plaintiff was entitled to a decree. Before the Judicial Committee the view of COUTTS TROTTER, J., on the first point was not challenged and their Lordships were invited to deal only with the second point.

Thus we have that in the first of the Privy Council cases the observation is in the nature of an *obiter dictum* and in the second Privy Council case the point was assumed and not challenged.

Notwithstanding this, I should be prepared to hold (agreeing with my learned brother) that section 13, clause (*b*), enacts a rule different from that which obtains in England and that an *ex parte* foreign judgment does not operate as *res judicata*; but I find that a different view has been taken by PHILLIPS, J., in a considered judgment (MADHAVAN NAYAR, J., concurring) in *Janoo Hassan* v. *Mahamad Ohuthu*(2), and that another Bench consisting of PHILLIPS and RAMESAM, JJ., have, without discussion, followed this case (see Appeals 144 and 145 of 1922, unreported). In view of what I have said, I think that the question as framed by my learned brother should be referred to a Full Bench for its opinion.

(1) (1922) I.L.R., 45 Mad., 496 (P.C.). (2) (1924) I.L.R., 47 Mad., 877.

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In making this reference I must advert to an argument advanced by the defendants' learned vakil. He sought to make a distinction between two classes of *ex parte* decrees, (1) Where by the procedure of the Court the plaintiff must adduce some evidence, generally oral, although there is default of appearance by the defendant; (2) Where upon a special form of writ, formal proof is dispensed with and judgment is given as a matter of course. It is contended that in the first case the judgment can be said to be on the merits whereas it is different in the second case. I must say that I cannot follow this distinction. In the one case the plaintiff proves his claim by adducing formal evidence; in the other case there is the implied admission of the claim by the defendant who, while it is open to him to contest it, allows judgment to go by default. I cannot accept this intermediate position; it may be that either of the two views is correct, but I find nothing in principle to justify the distinction sought to be made."

ON THIS REFERENCE—

A. Krishnaswami Ayyar (with *E. Vinayaka Rao*) for appellant.—The defendants were properly served with summons. They did not appear. They had full opportunity to appear but did not avail themselves of the same. Under the Law of Penang, the Court was competent to pass judgment for the plaintiff without trial on evidence. No evidence need be taken in such a case under the Penang Law, if the defendant is *ex parte*, after being legally served with summons. Where opportunity was given to the defendant to appear and he did not appear, the decision cannot be said to be not on the merits. Where no opportunity was given to defendant, a judgment in his absence is of course not on the merits. In *Keymer* v. *Visvanatham Reddi*(1), the defence was struck off as a penalty for his not answering interrogatories: hence this opportunity to appear was denied. It is not so here; the defendant, who was duly served, did not appear. It means he practically admitted the claim. The decision in *Janoo Hassan* v. *Mahamad Ohuthu*(2) supports this view. The English decisions in a series of cases show that a suit lies on a judgment given in default of appearance of defendant, if the defendant was duly served with summons or

(1) (1917) I.L.R., 40 Mad., 112 (P.C.). (2) (1924) I.L.R., 47 Mad., 877.

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writ. See *Douglas* v. *Forrest*(1), *Nouvion* v. *Freeman*(2). Section 13 (*b*), Civil Procedure Code, should be construed in the light of the English decisions.

K. V. Krishnaswami Ayyar and *N. Kunjithapatham Ayyar* for respondents.—The decision in *Keymer* v. *Visvanatham Reddi*(3) governs this case. There is no decision on the merits within section 13 (*b*), Civil Procedure Code. By the Law of Penang, the judgment is given on default of appearance even without formal proof or evidence on plaintiff's side, on the allegations in the plaint. It is not a decision on the merits but on default. The English cases are not applicable. Reliance was placed on the decisions of the Privy Council in *Keymer* v. *Visvanatham Reddi*(3); *Oppenheim & Co.* v. *Mahomed Haneef*(4). The decision in *Janoo Hassan* v. *Mahamad Ohuthu*(5) is not correct in the face of the decision in *Keymer* v. *Visvanatham Reddi*(3).

OPINION.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—This case has been dealt with so fully by the referring Judges that I propose to say very little. The suit was brought on a foreign judgment, namely, a judgment of the Supreme Court of Penang. At the hearing of that suit the defendants did not appear in Court to contest it but it has been held that the summonses have been properly served in accordance with the views obtaining in that Court. In that Court where the defendant does not appear after proper service of summons judgment is given without trial and without taking any evidence. It seems to me impossible to argue that that is not clearly within the decision and even the wording of the Privy Council in *Keymer* v. *Visvanatham Reddi*(3). It was argued—and very likely correctly argued—that the English Law was different. The answer to that is we are bound by the statute on which the decision in Keymer's case was based. That statutory provision is section 13 (*b*) of the

(1) (1828) 4 Bing., 686; 130 E.R., 933. (2) (1890) 15 App. Cas., 1.
(3) (1917) I.L.R., 40 Mad., 112 (P.C.). (4) (1922) I.L.R., 45 Mad., 496 (P.C.).
(5) (1924) I.L.R., 47 Mad., 877.

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COUTTS TROTTER, C.J.

Code of Civil Procedure under which an exception to the conclusiveness of a foreign judgment in a British Indian Court is where it has not been given on the merits of the case. As I understand Mr. Alladi Krishnaswami Ayyar's argument, he says that it is not like the case of the defendant's defence being struck out for not answering interrogatories or being out of time or anything of the kind; for that may be held not to be a defence on the merits because *ex hypothesi* the position is the defendant was precluded from going into the alleged merits which he had set up and he says it is quite different where the defendant does not appear at all because that is a clear intimation by him that he admits the validity of the plaintiff's claim and that is just as good as if the plaintiff has actually proved it by evidence. I think the decision of their Lordships of the Privy Council impliedly excludes any such distinction and I regret to say that I cannot agree with the attempt made by two learned Judges of this Court to draw this distinction in *Janoo Hassan* v. *Mahamad Ohuthu*(1), and I think that that case must be regarded as no longer law.

KRISHNAN, J.

KRISHNAN, J.—I agree with the learned CHIEF JUSTICE that our answer to the Full Bench reference must be that the foreign judgment is not conclusive as it has not been given on the merits of the case and that the suit therefore does not lie on it. I have dealt at length with this point in the referring order and I have nothing further to add except to give expression to my opinion which I withheld in that order as the matter was to be placed before the Full Bench. I have no doubt whatever that under section 13 (*b*) of the Code of Civil Procedure a decree obtained on default of appearance of the defendant without any trial on evidence is a case where the judgment must be held not to have been given on the merits of the case.

(1) (1924) I.L.R., 47 Mad., 877.

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KRISHNAN, J.

The matter, it seems to me, is concluded by the judgment of the Privy Council in Keymer's case. It was taken as settled in the subsequent case of *Oppenheim & Co.* v. *Mahomed Haneef*(1). After that, the attempt in *Janoo Hassan* v. *Mahamad Ohuthu*(2) to distinguish the Privy Council case on the ground that it was a special case where the defence had been put forward but struck out, interrogatories not having been answered by the defendant, is not tenable. I should like to add also that I would not entirely agree with my learned brother VENKATASUBBA RAO, J., regarding the concluding paragraph of his reference that there is no distinction between a case in which a decree is given without any trial whatever and a decree in a case in which even though defendant did not appear the matter was tried in full on evidence and the plaintiff proved his case. In the latter class of cases it may well be argued that they are cases which have been decided on the merits and do not fall within section 13 (*b*). However, that matter does not really arise here, for this case is clearly one where the decision was given without any evidence at all, but under the rules governing the Penang Court under which, where the defendant does not appear, a decree is given as a matter of course. I agree with the order proposed by the learned CHIEF JUSTICE.

CURGENVEN, J.

CURGENVEN, J.—I agree that the observations of the Privy Council in Keymer's case cover a case of this nature in which no evidence was given and therefore the decision was not upon the merits. The decision in *Janoo Hassan* v. *Mahamad Ohuthu*(2) appears to me to run counter to those observations and must be dissented from. I agree therefore that the question referred to us should be answered in the negative.

K.R.

(1) (1922) I.L.R., 45 Mad., 496 (P.C.). (2) (1924) I.L.R., 47 Mad., 877.

APPELLATE CRIMINAL.

Before Sir Charles Gordon Spencer, Offg. Chief Justice.

[ON A DIFFERENCE OF OPINION BETWEEN DEVADOSS AND WALLACE, JJ.]

1925, July 28.

SOGAIMUTHU PADAYACHI AND ANOTHER (ACCUSED), PETITIONERS,

v.

KING-EMPEROR, RESPONDENT.*

Accused charged with murder and theft—Unexplained possession of stolen property, only circumstance in evidence—Conviction for murder, if legal—Indian Evidence Act, section 27, statement under—If whole of statement admissible.

Where unexplained possession of stolen property belonging to a deceased person is the only circumstance appearing in the evidence against an accused charged with murder and theft, he cannot be convicted of murder unless it is satisfactorily proved that possession of the property could not have been transferred from the deceased to the accused except by the former being murdered.

If an accused makes a statement under section 27 of the Indian Evidence Act, the whole of the statement which leads to the discovery of the stolen article is admissible and it should not be cut up so as to confine it only to the actual words which the accused may use to express the fact that he had hidden the properties. *Queen-Empress* v. *Sami*, (1890) I.L.R., 13 Mad., 426, and *Moyila Kurmiah* v. *Emperor*, (1913) M.W.N., 145, referred to. *In re Nainamalai Konan*, (1921) 14 L.W., 418, and *Manju Nathaya* v. *King-Emperor*, (1914) 26 M.L.J., 352, followed.

TRIAL referred by V. VENUGOPAUL CHETTY, Sessions Judge of the East Tanjore Division at Negapatam, for confirmation of the sentences of death passed upon the petitioners in case No. 11 of the Calendar for 1924.

The case was first heard by DEVADOSS and WALLACE, JJ., and as they differed in opinion, it was placed before

* Referred Trial No. 1 of 1925.

a third Judge (SPENCER, Offg. C.J.) under section 429 of Criminal Procedure Code.

JUDGMENT.

DEVADOSS, J.—The appellants have been convicted of the murder of the Pandara Sannadhi of Dharmapuram and have been sentenced to be hanged by the Sessions Judge of East Tanjore. The case for the prosecution is that the late Pandara Sannadhi of Dharmapuram, retired to bed on the night of the 28th October 1923 after closing the doors of the mutt. He was in a normal state of health on that day. Early next morning the village munsif of the place P.W. 15 went to the mutt and finding that the main door of the mutt was not open, he knocked at the door and not receiving any reply, he sent two men by a scaffolding to go over the terrace of the mutt and to see what had happened. They returned saying that they found the Pandara Sannadhi lying dead. The village munsif also went up and found the Pandara Sannadhi dead. He opened the doors of the mutt and came out. Shortly after, one Ratnasabhapati Tambiran and Ayyadurai Pillai with a crowd of 100 or 150 persons came and notwithstanding the protests of the village munsif entered the mutt, brought the body from the room in which it was, to the hall marked F in the plan and began to bathe the body preparatory to its burial. P.W. 15 who had sent a report to the Sub-Magistrate of Mayavaram and the Police, awaited their arrival. The Sub-Magistrate and the Police Sub-Inspector arrived about 10–15 a.m. and entered the mutt and found the corpse of the Pandara Sannadhi seated in a chair and Ratnasabhapathi Tambiran offering puja to it. The Sub-Magistrate stopped the ceremonies with the help of the Police and wanted to have an inquest held. He held an inquest and the Medical Officer of Mayavaram who was sent for by the Sub-Magistrate to the mutt held a *post-mortem* examination on the body of the Pandara Sannadhi. The result of his examination showed that the Pandara Sannadhi was murdered by being strangled to death. Some persons were arrested and the Magistrate recorded statements from various persons. The Circle Inspector of Mayavaram who was absent at Madras returned to Mayavaram on the morning of the 30th. He took up the investigation and on the 31st on information given by the appellants, properties of considerable value were recovered.

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Several persons were charge-sheeted and the Subdivisional Magistrate of Mayavaram held a preliminary inquiry and committed the appellants along with others to the Court of Session. In the Sessions Court the Public Prosecutor intimated to the Court that it would be convenient to try the appellants and two others on the charge of murder only. The Sessions Judge ordered that the charges under sections 457 and 380, I.P.C., should be tried after the disposal of the charge under section 302, I.P.C. The appellants and two others were tried only on the charge of murder. The Sessions Judge acquitted accused 3 and 4 and convicted accused 1 and 2 of murder and sentenced them to be hanged. This appeal is by accused 1 and 2.

The theory of the prosecution is that Ratnasabhapati Tambiran who is one of the Tambirans of the Dharmapuram Mutt was ill-disposed towards the late Pandara Sannadhi and with a view to wreak his vengeance as well as to succeed him he planned the murder of the Pandara Sannadhi. The murderers after murdering the Pandara Sannadhi helped themselves to some of his personal effects without touching the properties belonging to the mutt. This circumstance among others is relied upon by the prosecution in order to substantiate the theory that Ratnasabhapati Tambiran was the man who planned the murder and hoped to succeed to the headship of the mutt. He asked his creatures not to touch any of the properties belonging to the mutt lest the mutt of which he hoped to be the head should suffer. It is not proper to consider in detail the evidence connecting Ratnasabhapati Tambiran with the murder as he is awaiting his trial, lest any expression of opinion in this case which is not absolutely necessary for the purpose of arriving at a decision as to the guilt or otherwise of the appellants should prejudice Ratnasabhapati Tambiran in his trial.

Mr. Jayarama Ayyar who appears for the appellants does not seriously dispute the factum of murder . . . The only question in the appeal is whether the appellants are guilty of the murder.

The evidence against the appellants mainly consists of the statements made by them to the Police which led to the discovery of the stolen property. In consequence of information supplied by the appellants 1 and 2 the Police were able to recover

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property worth about Rs. 7,000. They consist of cash, currency notes, gold coins, jewels which are worn by Tambirans of a mutt, cash bags, etc. The question for decision is whether the properties were recovered in consequence of information given by the appellants and whether the evidence of the possession of the stolen property by them is sufficient to bring home to the appellants not only the charge of the theft but also the charge of murder.

The arguments of Mr. Jayarama Ayyar may be roughly classified under three heads:—(1) that the evidence that confessional statements were made is not credible, (2) that the alleged confessional statements are not admissible in evidence, and (3) granting that the confessional statements were made and property was recovered in consequence, it does not follow that the appellants were either guilty of theft or murder. The confessional statements are spoken to by P.Ws. 8, 9, 10, 15 and 21 . . . That the statements set out above were made by the appellants is satisfactorily proved.

The next question is whether the statements are admissible in evidence. The contention of Mr. Jayarama Ayyar is that under section 27 of the Evidence Act only statements which directly lead to the discovery of property are admissible in evidence, and that, if the accused himself goes to the place where the property is hidden or buried, and digs out the property, then any statement made by him in connexion therewith is not admissible in evidence; and he relies upon a decision of a Bench of this Court reported in *Pasupuleti Ankadu* v. *Emperor*(1). There the learned Judges held that the information given by the accused in order to be admissible in evidence ought to lead to the discovery of property. If the accused himself goes to the place where the property is hidden and digs out the property, the information given by him as to the place where the property is hidden is not receivable in evidence. This narrow construction of the section is opposed to the decisions of this Court and does not receive support from the wording of the section. Section 27 is a proviso to sections 24 and 25. A confession made on account of inducement, threat, or promise having reference to the charge against the accused proceeding from a person in authority is not admissible by virtue of section 24; and

(1) (1881) 7 Cr.L.R., 175.

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a confession made to a Police officer is not admissible in evidence. But a confession made by an accused person to a Magistrate is admissible in evidence under section 26 even though the accused is in Police custody and section 27 is a proviso to sections 24 and 25. It is in these terms:—"Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved." With great respect I am unable to agree with the view of the learned Judges. If an accused person while in custody of the Police says that he has left the property on the top of a palmyra tree and if the Police ask him to go up the tree and get it the information regarding the property is inadmissible. If the accused says that he has dropped the stolen property into a well and if the Police ask him to dive under the water and bring up the thing and he brings it up the information given by him regarding the property is inadmissible. If the Police instead of sending the accused himself up the tree or down the well send some other person to fetch the thing, the information given by the accused person is admissible. Surely the section does not warrant any such conclusion. If on account of or owing to the information given by the accused person the Police go with him to the place where the property is said to be hidden and ask the accused person or some other person to dig the place pointed out by the accused person and property is recovered, the information given by the accused person regarding that property is admissible in evidence and it matters little whether the actual handing up of the property is done by the accused person or by any other person employed for the purpose by the Police. As observed by SARGENT, C.J., in *Queen Empress* v. *Nana*(1), "whether the statement made by the accused is of such a detailed description as to enable the Police themselves to discover the property or only of such a nature as to require his assistance in discovering the exact spot where the property is, cannot, in our opinion, affect the question."

It would be different if the accused person without giving any information hands up the property; then the fact of his handing up only can be proved and no information regarding it can be proved for the simple reason that the accused has not

(1) (1890) I.L.R., 14 Bom., 260 (F.B.) at 264.

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given any information about it. In *Manju Nathayya* v. *King-Emperor*(1), SADASIVA AYYAR, J., held that it did not matter whether the accused himself took out from the rubbish heap the stolen articles or whether the Police had acted on the information given by him to recover the properties from the heap. It is unnecessary to consider this argument any further.

The next branch of the argument is that the statement of the first accused that "the properties stolen from the mutt are buried by me and others" is not admissible in evidence.

Mr. Jayarama Ayyar's contention is that only so much of information as leads to the discovery of the property is admissible and nothing more. In other words the statement of the accused that the properties are in a particular place is admissible and any statement which carries an explanation as to how the properties came to be there is inadmissible in evidence as well as the statement that they are stolen properties. He relies for his contention upon *Queen Empress* v. *Commer Sahib*(2), and *Queen Empress* v. *Babu Lal*(3). In the former case the learned Judges observe at page 154: "The statement made by the prisoner in this case, viz., that he had deposited the cloths produced with the witnesses who delivered them up on demand was the proximate cause of their discovery and was admissible evidence. If he had proceeded further and stated that they were cloths which he stole on the day mentioned in the charge from the complainant, that statement would not be evidence, for it would be only introductory to a further act on his part . . ." The test according to them is "was the fact discovered by reason of the information and how much of the information was the immediate cause of the fact discovered and as such a relevant fact." This decision does not support the contention for the appellants that the statement that the appellants buried the articles is not receivable in evidence. In that case the learned Judges held that the statement that he deposited the cloths produced with the witnesses was admissible in evidence.

The Full Bench case *Queen Empress* v. *Babu Lal*(3), does not support the contention of Mr. Jayarama Ayyar. There the majority of the Judges held that so much of the information given by the accused to the Police officer whether amounting to a confession or not as related distinctly to the facts thereby discovered might be proved. BRODHURST, J., was of opinion that

(1) (1914) 26 M.L.J., 352. (2) (1889) I.L.R., 12 Mad., 153.
(3) (1884) I.L.R., 6 All., 509 (F.B.).

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if the accused says "The knife with which I committed the murder is together with the body, in this well"; that statement would be admissible in evidence. The leading case on this point is a Full Bench decision in *Queen Empress* v. *Nana*(1). In that case the question was whether the statement "I have kept the property, and buried it in the fields" was admissible or not. The Full Bench held that the statement "I buried it in the fields" was admissible in evidence but not the portion "I have kept" as that portion was not necessarily connected with the fact discovered. This conclusion they arrived at after an examination of the Indian and English authorities. In *In re Nainamalai Konan*(2), Mr. Justice SPENCER held that the statement that the accused had kept the jewels which were missing from the deceased's corpse in his house and that he would produce them, was admissible in evidence, though he proceeded to unlock his house and produced the jewels from a pot in the presence of witnesses. In *Manju Nathayya* v. *King-Emperor*(3), Mr. Justice SADASIVA AYYAR held that the statement "stolen money would be found in the heaps of rubbish" was admissible not only for showing that certain property was found in the rubbish but also for showing that the money was the missing money. He observes at page 355:

"As regards the other portion of the statement of the first accused, namely, that portion signifying that the property stolen from the dabbi about which the Police was then making investigation, will be found in the rubbish heap, I think that is a statement which is distinctly related to the discovery of the stolen property and is therefore clearly admissible. That statement sufficiently identifies the properties found in the heap with the temple properties stolen from the dabbi."

The learned Judge has admitted in evidence this statement "properties stolen from the mutt were buried by me and others in the Cauvery bank." The objection to the portion of the statement "stolen from the mutt" is untenable for the simple reason that when the police questioned the accused person, they did not ask him about properties which belonged to *A* or *B*. They must have questioned him only as to the properties that was the subject of the theft. If a Police officer asks an accused person "Can you give me any information

(1) (1890) I.L.R., 14 Bom., 260 (F.B.). (2) (1921) 14 L.W., 418.
(3) (1914) 26 M.L.J., 352.

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about properties missing on account of the theft?" and if the accused person says "Yes" and shows a particular place the question and answer must be taken together. It follows from the fact that the accused person shows certain property to the Police that he has answered the question as regards the missing properties in the affirmative. I do not see any valid objection to the statement "stolen from the mutt" being held admissible. As mentioned by BRODHURST, J., in *Queen Empress* v. *Babu Lal* (1) if the accused says "the revolver with which I shot the deceased is in this well," can it be said that that statement is inadmissible? If the accused says "I have hidden the stolen properties in this place" the whole statement must be taken together. If he does not make a statement that the properties are stolen there is no confession at all. Section 27 of the Evidence Act does contemplate a confession, for the latter portion of the section says "So much of information, whether amounting to a confession or not, as relates distinctly to the fact thereby discovered, may be proved." If a person simply shows the property in a field there is no confession at all. If he says "This is the stolen property" then there is a confession. On a careful consideration of section 27 I have no hesitation in holding that the portion of the statement "stolen from the mutt" is admissible in evidence. See *R.* v. *Griffin*(2).

The more important question in the case is whether the evidence relating to the discovery of the property together with the statements of the accused is sufficient to bring home the offence of murder to the appellants. It was held in *Queen-Empress* v. *Sami*(3), that "recent and unexplained possession of the stolen property which would be presumptive evidence against the prisoners on the charge of robbery was similarly evidence against them on the charge of murder." The learned Judges observe at page 432:

"In cases in which murder and robbery have been shown to form parts of one transaction, it has been held that recent and unexplained possession of the stolen property, while it would be presumptive evidence against a prisoner on the charge of robbery, would similarly be evidence against him on the charge of murder."

(1) (1884) I.L.R., 6 All., 509 (F.B.). (2) (1809) Russ and Ry., 151.
(3) (1890) I.L.R., 13 Mad., 426.

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Mr. Jayarama Ayyar relies upon *Moyila Kurmiah* v. *Emperor*(1) and contends that the property stolen must be proved to have been on the person of the deceased before the person in possession of the articles could be connected with the murder. In that case there was a difference of opinion between BENSON, J., and SUNDARA AYYAR, J. In that case the murder was not discovered for some days. The body was found under water weighted with heavy stones. The murdered woman was of easy virtue and the body was found in a pond at a considerable distance from her house. There was room for doubt whether the woman could not have been divested of her jewels before she was murdered. BENSON, J., took the view that the accused was seen with her about the time of her disappearance and held that he was the person that murdered her. SUNDARA AYYAR, J., who did not believe a good portion of the evidence, thought it was unsafe to presume that the jewels found with the accused were on the person of the deceased at the time of her death. SANKARAN NAYAR, J., to whom the case was referred under section 429 of the Criminal Procedure Code, found that the evidence was not reliable and the date of the murder was uncertain and the relations that subsisted between the accused and the deceased did not render his possession suspicious. The facts of that case are distinguishable from the facts of this case. In that case the accused was a former husband of the woman and the woman frequented him and slept on his threshing floor. It might be that he came by the jewels in an honest way. That case can have no application to the present. It is quite unnecessary to consider the case in *Paimullah* v. *The King-Emperor*(2), which is opposed to the decision in *Queen-Empress* v. *Sami*(3) and other cases of this Court. "Upon an indictment for arson, proof that property, which was in the house at the time it was burnt, was afterwards found in the possession of the defendant, raises a probable presumption that the defendant was present and concerned in the arson. See *Rex* v. *Rickman*(4). A like presumption may arise in the case of murder, accompanied by robbery. (Wills' Circumstantial Evidence, 6th edition, 216–218. Archbold's Criminal Pleading, page 399, 26th edition.) . . .

(1) (1913) M.W.N., 145.
(2) (1911) 16 C.W.N., 238.
(3) (1890) I.L.R., 13 Mad., 426.
(4) (1789) 2 East P.C., 1034.

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The next question is, were they in the possession of the deceased on the night of the occurrence. . . . It is not essential in this case to prove that the deceased was wearing the ring at the time of his death. It is sufficient if there is satisfactory evidence that the jewel was in his possession shortly before his death.

. . . The following passage from Archbold's Criminal Pleading throws light on this point: "The fact that a person is alive on a given day may be presumed from proof of his being alive on an antecedent day. If, for example, it was proved on the trial of a man for bigamy that the first wife was in good health on the day preceding the second marriage, the inference would be almost irresistible that she was living on the latter day, and the jury would, in all probability, find that she was so. If, on the other hand, it was proved that she was on the day before the second marriage in a dying condition, and nothing further was proved, they would probably decline to draw that inference. The question is, however, entirely for the jury, the law making no presumption either way."

That the properties were with the deceased cannot be seriously disputed. That the ring was actually worn by him is also proved. And there is no evidence that they were either missed or mislaid. There is also the evidence of P.W. 7 to the effect that the deceased kept his jewels in their usual place on the night of the murder. His evidence has been attacked on the ground that he gives an unsatisfactory reason for leaving Dharmapuram early next morning. But that is no good reason for rejecting his evidence that the deceased kept the jewels in the usual place in which he used to keep them. If anything was missed that night before the deceased retired to bed, he certainly would not have allowed P.W. 7 and other servants to go away without making a search for the missing things. P.W. 5, the agent of the mutt, was with the deceased till at least 9 o'clock that night. If anything unusual had happened in the Odukkam or in the jewel room, the deceased would have communicated his suspicions to P.W. 5. The evidence is, that the deceased was close-fisted and would not allow the mutt funds or the temple funds to be wasted or misused. He was in the habit of sleeping with the keys of the rooms and boxes under his pillow. A person of such temperament would not have kept quiet if he had found anything unusual in the Odukkam or in the jewel room; and to suggest that these articles might have been

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removed before the night of the murder is to suggest a very very improbable thing.

It is next contended that the properties discovered on the information of the appellants were not in their exclusive possession and therefore the appellants should not be held liable for the theft and murder. If property is found in a house or any other place in the common possession of a number of persons, any one of them cannot be convicted of being in possession of stolen property. But where property is hidden or buried by a person it is in his exclusive possession and it does not matter whether the place in which it is hidden is an open place such as the bed of a river or the top of a mountain. The real question is, in whose possession the property is. If a person hides a thing in a cave or on the top of a tree, he is in possession of it and none else, though he may not be the owner of the cave or the owner of the tree. Though a valuable thing is hidden in the bed of a river, it is the person who hides it that knows where it is and he therefore is the person who is in possession of it. If more persons than one bury the property in any place, they are in exclusive possession of that property. It is immaterial therefore what the nature of the ownership of the property is, in which the property is buried or hidden. It is only the person who buries or hides the property that is in possession and exclusive possession of the property. In this case, the first accused has given information about the property which was in a field on the bank of the river and the second accused has given information about the presence of property in his *manja kollai* and they are the persons who can be said to be in exclusive possession of the properties.

It was seriously urged by Mr. Jayarama Ayyar, that the material objects recovered on the information given by the appellants might have been removed before the deceased was murdered or might have been removed after the deceased was murdered and that in any case there is no evidence to connect the theft of the property with the murder. In other words his contention is that the murder and theft are not parts of the same transaction but two different transactions. . . .

The next theory that the properties might have been removed after Ratnasabhapati Tambiran and others went into the mutt, is still more fantastic. . . . I may therefore dismiss, without further consideration, the theory that the material

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objects recovered on the information given by the appellants were removed after the murder of the deceased.

The circumstances elicited in the course of the trial lead to the irresistible conclusion that the murder was a deliberately planned one. . . . Th eproperties which were the subject of the theft were only properties which belonged to the deceased and it is a significant fact that none of the temple properties except M.Os. XIII and XXV were lost that night . . . It is therefore clear that the theft was confined to the properties of the deceased and the thieves had an object in leaving untouched the properties belonging to the mutt and the temples. In the light of this fact it cannot be said that the murder and the theft are two different transactions.

. . . . I have no hesitation in coming to the conclusion that murder was the primary object of the persons who entered the mutt that night and that the theft was committed immediately after the murder and therefore that the murder and the theft are parts of one and the same transaction.

The next question is whether the accused are guilty of the murder. That they were in possession of stolen properties within three days after the theft is proved beyond reasonable doubt. They pointed out the place where the properties were and they were recovered on their information and there is no explanation by the appellants as to how they came to be in possession of the properties. On this evidence a jury is entitled to come to the conclusion that the appellants are the murderers. If a person who retires to bed in a normal state of health is found next morning lying dead and his safe rifled and his valuables stolen and if it comes to light that the man did not die a natural death, but was murdered and if the property which was in the safe shortly before the murder is found in the possession of persons who are unable to account for them the jury is entitled to draw the inference and the law requires them to draw the inference that the persons in possession of such property are not only the thieves but also murderers. If the persons with whom the stolen property is found have an explanation to offer which explanation if accepted would prove them to be innocent it is for them to offer it. Section 106 of the Evidence Act is enacted for this purpose: "When any fact is specially within the knowledge of any person, the burden of proving that fact is upon him." It was held in *The Deputy*

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Legal Remembrancer v. *Karuna Baistobi*(1) that "If, notwithstanding the fact of the purchase of these two (minor) girls successively, the intention (of the accused) was something other than that which would evidently be suggested by the character and circumstances of the act, it was for the accused to have shown that." If a man steals a horse and fearing pursuit asks a way-farer to hold the horse for a short time and runs away and the pursuers find the horse with the way-farer, the Jury may come to the conclusion that the way-farer is the thief (see illustration (*a*) to section 114 of the Evidence Act). It is open to him to prove that he was holding the horse for some other person but the burden of proving it is upon him (section 106 of the Evidence Act). In the absence of any such proof on his part, the Jury is entitled to come to the conclusion that he is the thief if the evidence is that he was found with the stolen horse soon after the theft of the horse. In this case if the appellants are only receivers of stolen property or they only helped the thieves to hide the property in various places, the onus is upon them to prove that they only received the property or that they were present when the stolen property was hidden.

The thieves who removed the things on the night of the murder were persons who could distinguish the personal property of the Pandarasannadhi, from the property belonging to the temple under the mutt, and this leads to the necessary inference that the mutt servants must have been concerned in the theft. The appellants were palanquin-bearers of the deceased and they had every opportunity of knowing what ornaments he wore on ordinary and on extraordinary occasions.

It has been very vehemently contended by Mr. Jayarama Ayyar that the evidence is all circumstantial and the possibility of the stolen articles being removed from the mutt independently of the murder should not be excluded in the consideration of the evidence. In other words, if there is a possibility of any other explanation than the appellants being the murderers they should have the benefit of doubt. That is not the law of evidence which governs proof in criminal cases. "After every deduction made, it is impossible to deny that a conclusion, drawn from a process of well-conducted reasoning on a mass of evidence purely presumptive, may be quite as convincing and in some cases far more convincing than one arising from a limited portion of direct

(1) (1895) I.L.R., 22 Calc., 164, at p. 175.

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testimony." (Best on Evidence, 265.) Chief BARON POLLOCK makes the following observations with regard to the quantum of proof in criminal cases. "If the conclusion to which you are conducted be that there is that degree of certainty in the case that you would act upon it in your own grave and important concerns, that is the degree of certainty which the law requires, and which will justify you in returning a verdict of guilty." (See Wills' Circumstantial Evidence, 318, 319.) In this case the various circumstances which are in evidence and the circumstances which are proved with regard to the murder of the deceased and the circumstances which are attendant upon the theft of the stolen properties, the nature and value thereof, and the places in which these properties were hidden, all these lead to the conclusion that the appellants are not only the thieves but also the murderers.

After a very patient and anxious consideration of all the evidence and circumstances in the case, I see no sufficient ground to differ from the finding of the learned Sessions Judge that the accused are guilty of the murder of the late Pandarasannadhi . . . I confirm the conviction and sentence and dismiss the Appeal.

WALLACE, J.—I regret that I am unable to agree with my learned brother on the chief question for decision in this case.

The points to be decided in this case have been considerably narrowed down in this Court. That the Pandarasannadhi was murdered in his sleeping room in the Dharmapuram Mutt at about midnight on the night of Sunday the 28th of October 1923 is not now disputed. The Public Prosecutor also has not considered it necessary to go into the question of the complicity of Ratnasabhapati Tambiran in the murder. The lower Court, it seems to me, was not well advised in postponing and in separating the trial of the Tambiran from that of the present appellants, since all alike were charged with being members of a conspiracy to accomplish this murder. The mass of evidence now recorded as relevant to the complicity of the Tambiran in the murder will now have to be taken over again when he is tried. Nor did the Public Prosecutor argue against the finding of the lower Court that no conspiracy between the Tambiran and the appellants to accomplish this murder has been proved, so that the case against the appellants has resolved itself into this: the consideration of the evidence as regards the alleged production by them of property alleged to have been stolen from the mutt,

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and of the question whether the facts proved in respect of that production are sufficient to justify the finding that the appellants took part in the murder. The appellants are not now on their trial for theft or robbery, or for receiving stolen property, so that the whole question for determination is whether they were found in possession of stolen property in such circumstances that the inference that they acquired this property by murder and therefore were themselves guilty of murder is justified in law . . .

It may be further taken as proved that these properties were removed from the mutt in an unlawful manner. The appellants did not claim any of them as their own, and no lawful owner of property goes and buries that property in a stranger's field or garden.

It is further clear from the evidence that the first accused himself buried M.Os. IV and IV (*a*) and that while he was doing so, others were burying M.Os. I to III and V to XIII (*b*). I see no good ground for disbelieving the evidence that first accused himself stated so to the Police. The learned Pleader for him contends that this statement is not admissible under section 27 of the Indian Evidence Act and that this section is restricted to cases where the actual finding of the property in consequence of information given by the accused person is accomplished not by the accused himself, but by others. I can see no reasonable ground for so restricting the operation of this section and for supposing that any distinction is intended between cases where the accused himself takes out the properties from their hiding place and cases where some one else on his directions takes them out. The distinction seems to be pointless, since, if the section really meant that, all that the Police would have to do, in order to apply it, would be to see that the person who actually dug out the property was not the accused, but some one else. Mr. Jayarama Ayyar also contends that the statement of the first accused that the properties were "buried by me" is inadmissible since that statement was not necessary for the discovery of the property. But such an interpretation of the section also renders it pointless. The essence of the section is that the statement made by the accused must be a confession, that is an admission or statement, suggesting an inference of guilt. If every word suggesting an inference of guilt is to be excluded and only words, which directly disclose where the property is, are admissible, then the section has no

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application. It is clear that the Court is not intended to separate up the actual words used by the accused, which led to the discovery of the property, strike out some words here and admit some words there. So much of the statement as was the immediate cause of the discovery, is admissible. In this case, if the property was discovered in a particular place because the accused said, "I buried it there" that statement is certainly admissible. That is the law which has been laid down by this Court in *Queen Empress* v. *Commer Sahib*(1), and *Manju Nathayya* v. *King-Emperor*(2), and by a Full Bench of the Bombay High Court in *Queen Empress* v. *Nana*(3). It does not, in my view, differ from the law as laid down by a Full Bench in *Queen Empress* v. *Babu Lal*(4). Thus, if an accused person says, "I murdered so and so and buried his body there," the statement "I murdered" is not admissible because it has nothing to do with the discovery of the body, but the statement that "I buried the body there," is admissible because the body is discovered in consequence, and the discovery is the guarantee of the truth of the statement. So here, if the first accused said, "I stole these properties from the mutt and buried the stolen properties here," the former sentence would not be admissible, but the latter is admissible, even though it contains an admission that the property was stolen.

It lies then upon the Court first of all to determine what the statement made by the accused person was. . . . I am not prepared to believe that the first accused said anything more than that he buried these properties. . . . I think there is evidence to justify the inference that the second accused admitted that he had buried the properties which were discovered on his information, M.Os. XVII to XXVII, and thus admitted that they were in his possession.

I am therefore satisfied that these two appellants did, on the 31st of October, produce, as having been buried by themselves, property belonging to the mutt to which they had no right and to which they lay no claim. The obvious inference is that they either stole it or received it knowing that it was stolen property. As already stated, they are not at present on their trial for such offences, and it may be that they will still have to stand their trial for such offences before a Magistrate or before a jury. So

(1) (1889) I.L.R., 12 Mad., 153.
(2) (1914) 26 M.L.J., 352.
(3) (1890) I.L.R., 14 Bom., 260 (F.B.).
(4) (1884) I.L.R., 6 All., 509 (F.B.).

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this conclusion is not to be taken as prejudging the verdict in such a trial. It has only to be determined in this case, and used for the further purpose of deciding, whether or not the appellants are guilty of the murder of the deceased . . . All that can be said to be proved is, I think, that these properties found in the possession of the appellants on the 31st did belong to the mutt and they were stolen from it, but when they were stolen it is impossible to say with any accuracy.

Now in order to draw from this an inference that these articles were, or must have been, acquired by appellants by means of murder, it was essential to show that these appellants could not have acquired them so as to be in possession of them on the 31st unless they had taken part in the murder of the deceased on the 28th night. In my opinion the prosecution has failed to establish the facts necessary to make such a conclusion inevitable or even reasonable. I put the test to myself in this way: Is it impossible or outside probability that these articles came into the possession of the appellants without their having used any violence or force to the deceased? If there was any evidence or even strong probability that he was wearing any one of these articles at the time of his death, there would be a strong presumption that they were obtained by using force to him; and it is in cases of this kind that the inference from theft to murder has usually been drawn. But the evidence here with regard to the articles is to the opposite effect, namely, that he was not wearing any of them at the time of his death . . . No check of the jewels, etc., or anything else was made the next morning; and no one knows whether, if a proper check on that morning, as soon as the murder was discovered, had been made, these jewels would not have been found in their proper place. . . .

These various hypotheses are not so wholly improbable that one can be sure that they are wrong. They seem to me at least as reasonable as those which the prosecution puts forward for acceptance. At any rate, I am not able to infer from the evidence and circumstances of this case that the burglary must have been at the same time as the murder and therefore part and parcel of the same transaction. It is certain that there was one raid, and it is possible that there was more than one raid on the jewel room after the murder was discovered.

The learned Judge has relied for the conviction solely upon an inference drawn from the recent possession of stolen property

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by the appellants that they could not have come into possession of the property unless by means of murder. I cannot find that this inference has any solid basis . . . He is merely relying on presumptions and not on evidence when he supposes that the theft must have taken place on the night of the 28th (paragraph 49), or that the rooms J and K must have been locked that night and that the keys must have been under the deceased's pillow and could not have been got without murdering the deceased (paragraph 73). No doubt the presumption of law stated in section 114 of the Indian Evidence Act has been applied in some cases, as *Queen-Empress* v. *Sami*(1), to justify a conviction for murder when the only evidence to connect the murder with the accused is the fact that he was in possession of property stolen from the deceased shortly after the murder. But in all these cases, the only reasonable inference to be drawn from the facts was that the property could not have been come by otherwise than by use of force, or violence to the deceased; cases for example, where the property was proved to have been on the deceased's person at the time of the murder and therefore must have been removed from him by force or by use of force; and in such a case it is reasonable to hold the accused guilty of the use of that force and therefore of murder unless he is able to give any reasonable explanation for his recent possession of such property. But where, as in this case, the evidence is that none of the stolen property was on the person of the deceased at the time of the murder and there is nothing to show that it could not have been obtained without the use of force to him at all and there is no certainty that it was not obtained before the murder or after the murder independently of the murder, I am clear that no presumption can be drawn from the mere possession of stolen property to justify a conviction for complicity in the murder, even if the accused offers no explanation for his possession of the stolen property, which explanation if he was really the thief or receiver of stolen property, he would naturally be unwilling to offer. In such a case I am confident that neither law nor justice justifies the hanging of a man simply because he does not plead guilty to being a thief or a receiver of stolen property. The Court has to be satisfied not merely that the thief could not have come into possession of the property unless murder has been committed, but also that he could not have come into possession of

(1) (1890) I.L.R., 13 Mad., 426.

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the property unless he himself has taken part in the murder or was privy to it. Any book on circumstantial evidence instances cases of miscarriage of justice where that principle has been neglected. The prosecution cannot simply prove the possession of articles and ask the Court to infer that the theft was part and parcel of the murder by presuming that the articles were in the mutt at or about the time of the murder, presuming that the deceased would have noticed their absence if they had been stolen before the murder, presuming that they were kept in the room J on the night of the murder, presuming that the room was locked that night, presuming that the key of the room was under the pillow of the deceased that night, presuming that the key was taken out from under the pillow of the deceased, presuming that the key could not have been got at without using force on the deceased. Such presumptions are in my opinion, in the circumstances of this case, unsound; and there is no evidence whatever to support them.

I am therefore not satisfied in this case that the theft has been proved to be part and parcel of the murder. I am not therefore able to support the conviction of the appellants for the murder with which they have been charged. I would reverse their conviction and sentence and direct that they be acquitted of the offence of murder, and set at liberty so far as this charge is concerned.

BY THE COURT.

As there is a difference of opinion between us, the case will be placed before a third Judge under section 429 of the Criminal Procedure Code.

K. S. Jayarama Ayyar for the first petitioner.

S. Nagaraja Ayyar for the second petitioner.

Public Prosecutor for the Crown.

JUDGMENT.

SPENCER, OFFG. C.J.

SPENCER, OFFG. C.J.—The two accused in this case have been convicted of the murder of the Pandarasannadhi at Dharmapuram on the night of 28th October 1923, and have been sentenced to death by the Sessions Judge of East Tanjore. My learned brothers, DEVADOSS, J., and

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WALLACE, J., have differed on the question whether the conviction for murder should be confirmed or not, and it is for me to decide now which of their views should prevail. The fact that the deceased was murdered at the time and place stated in the charge has not been questioned before me. The complicity of these accused in the murder is alone in question. They were palanquin-bearers employed in the mutt. There is no evidence as to their movements on the night of the murder. The only evidence appearing against them consists of (1) the fact that they produced certain properties alleged to have been stolen from the mutt and from the deceased and (2) the fact that they made certain statements at the time of producing those properties which are admissible under section 27 of the Evidence Act.

In *Queen-Empress* v. *Sami*(1) in which there was reason for concluding that murder and robbery were committed as parts of the same transaction, the presumption was drawn that any one who took part in the robbery also took part in the murder and evidence as to the disposal of the property belonging to the murdered person was taken into consideration against the accused on the charge of murder. In that case, there was other evidence besides the evidence as to the production of stolen property, to connect the accused with the crime, namely, evidence that the first accused assisted in disposing of the corpse, and that he and the second accused acted in concert together and evidence that the second accused was seen in the neighbourhood of the crime at the time when the deceased disappeared.

In *Moyila Kurmiah* v. *Emperor*(2), there was evidence that the accused was seen in the company of the murdered woman shortly before her disappearance.

(1) (1890) I.L.R., 13 Mad., 426. (2) (1913) M.W.N., 145.

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My learned brothers have differed mainly on the question whether the murder of the Pandara Sannadhi and the theft of property from the mutt have been shown to be parts of the same transaction; and secondly as to the significance to be drawn from the fact that the accused showed places where certain property was buried and at the same time made statements.

I adhere to the view that I expressed in *In re Nainamlai Konan*(1), that

"the statement of an accused that he had in his possession certain stolen property is admissible in evidence even though he himself produced the property."

I agree with the opinion of SADASIVA AYYAR, J., expressed in *Manju Nathayya* v. *King-Emperor*(2), that it makes no difference whether the accused himself digs out the property from the place where it is hidden or whether on information given by him, someone else digs up the ground and produces the property. Upon this point DEVADOSS, J.'s opinion is undoubtedly sound and is supported not only by authority but also by common sense. I also agree with the opinion of the learned Judges who heard the appeal that if an accused makes a statement which is admissible under section 27, the whole of the statement which leads to the discovery of the stolen property is admissible and that sentences should not be cut up so as to reduce the statements only to the actual words which the accused may use to express the fact that he has hidden the properties. I think that the Sessions Judge was wrong in ruling out the statement of the first accused that the properties produced by him were stolen on the night of the occurrence.

WALLACE, J., is not satisfied that the accused used those words. If there is no proof that he used the words,

(1) (1921) 14 L.W., 418. (2) (1914) 26 M.L.J., 352.

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of course no reliance should be placed on the use of them for convicting the accused; but if the accused did use the words, then, they are parts of the sentence in which he gave information which led to the discovery of stolen property, and parts of sentences cannot be excluded so as to have the effect of making the whole statement incomplete and less intelligible.

Mr. Justice DEVADOSS held that the murder and the theft were parts of the same transaction, because the thieves seem to have removed the properties of the deceased and left untouched the properties belonging to the mutt. If that is clearly made out, it might tell against the first accused in the charge, Rathnasabapathi Thambiran, who claimed to be the rightful successor to the deceased Pandara Sannadhi and in that capacity was responsible for the custody of the mutt properties. But for some reason or other the prosecution reserved the case of Rathnasabapathi Thambiran and Ayyadurai Pillai and proceeded against these accused, who at the worst were only minor accomplices in the crime of murder.

I cannot too strongly condemn the improper procedure of the Sessions Court in allowing the principal accused to remain untried while a charge of murder was proceeded with against certain other persons who are supposed to have played a minor part in the crime. There is no reason why all the accused should not have been tried together at one trial. Even if some of them were principal offenders and the others were accomplices, section 239, clause (*b*), Criminal Procedure Code, permits them all to be tried together in one trial.

The Sessions Judge has committed several other irregularities such as marking as exhibits statements made at the inquest by several persons who were not witnesses at the trial and statements of witnesses made

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on previous occasions without drawing their attention to the statements and without any apparent reason that they were required for contradicting or for corroborating the witnesses: but about that I shall have something to say later.

I am unable to agree with DEVADOSS, J., that the circumstance that most of the properties found missing belonged to the deceased rather than to the mutt or the temple for which he was trustee, sufficiently establishes as against these accused that the murder and the theft were part of the same transaction. In the trial of Rathnasabapathi Thambiran it might be a circumstance worthy of some consideration but the connexion between these accused and that man has not been traced. M.O. 25 (bajibandu) produced by the second accused from his garden is an identifiable article of considerable value belonging to the God and not to the deceased.

The wood-shavings near the eastern door, the dropping of melted candle grease and the scattered coins are signs of crime noticed by the Police Inspector (P.W. 8) when the rooms of the mutt were unsealed on the 30th October. It is strange that the Stationary Sub-Magistrate (P.W. 1) and the Village Munsif (P.W. 15) and the Sub-Inspector (P.W. 10) did not depose to having observed any of these signs when they entered the mutt on the morning of the 29th before the rooms were sealed up by the Sub-Magistrate. It does not appear that any questions were put to them at the trial upon this point. The Village Magistrate stated that the doors were open when he went there and a large crowd of 100 or 150 people went inside the mutt, that Rathnasabapathi was there, announcing that he had been anointed the previous night and had succeeded to the office of Pandara Sannadhi and that the authorities would be told that the late Pandara Sannadhi had died

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a natural death, and that the corpse was dressed up and decorated with jewels. P.W. 13 corroborated this story and stated that the Odukkam room in which valuables were kept was open. According to P.W. 14 Ayyadurai Pillai had access to the jewels, and according to P.W. 15 Ayyadurai Pillai was present in the mutt after the murder. Accepting these circumstances to be true, as the prosecution must do seeing that they are spoken to by prosecution witnesses not treated as hostile, what is the position of a mutt servant found in possession of property belonging to the mutt or to its murdered principal? Can this possession be explainable otherwise than under the hypothesis that he is either the murderer, or privy to the murder committed by others? I think that when a building full of valuables was open to the public and when the master was dead, a certain amount of looting may have been committed by the mutt servants and by members of the crowd that was drawn to the spot by news of the murder of a holy man and that the looters may have been quite innocent of the murder and quite ignorant as to the perpetrators of it. As WALLACE, J., observed,

> "it is certain there was one raid and it is possible that there was more than one raid after the murder was discovered."

It is also conceivable that the real murderers may have distributed some of the deceased's and the mutt's properties in order to purchase the silence of the mutt servants. For the prosecution the point is sought to be made that the accused have not attempted to explain their possession of property stolen from the mutt, that the burden is on them under section 106, Evidence Act, of proving facts specially within their knowledge, and under section 114, illustration (*h*) if they decline to answer a question which they are not compellable to answer by law, the court may presume that the answer,

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if given, would be unfavourable to their innocence. Innocence of what crimes? When the charge is that the accused committed murder or theft in a building or both, is it legitimate to presume that the accused are guilty of the more serious offence of murder because they are unable or unwilling to explain their possession of stolen property? I think the answer must be that if there is other evidence to connect the accused with the death of the murdered man, a jury or in this country a judge, may find upon circumstantial evidence that he is the murderer. But when the unexplained possession of stolen property is the only circumstance appearing in the evidence against an accused charged with murder and theft, the accused cannot be convicted of murder unless the court is satisfied that possession of the property could not have been transferred from the deceased to the accused except by the former being murdered. WALLACE, J., observed,

"Neither law nor justice justifies the hanging of a man simply because he does not plead guilty to being a thief or a receiver of stolen goods."

I agree with that observation. In the present case there is evidence that the first accused made a statement prior to the discovery of the stolen property that he buried the cloth bundle while others were burying cash, currency notes and jewels in the same place, and there is evidence that the second accused said that he buried the *gandi* and other jewels not yet recovered in the yard behind his house. These statements are admissible under section 27, Evidence Act, as they led to the discovery of property concerned in the crime; but the prosecution has been put to a disadvantage because the Sessions Judge failed to record in direct narration what the accused said, so far as the witnesses who deposed to the fact recollected it, in the actual words of the accused,

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and because the search lists, Exhibits TT and ZZ prepared at the time also do not contain the statements of the accused as they made them, and lastly because neither the committing Magistrate nor the Sessions Judge made use of their powers under section 342, Criminal Procedure Code, of asking the accused to explain the circumstances appearing against them, namely, that they had told the witnesses to the search that they had buried certain material objects which were stolen at or about the time of the murder. In the Magistrate's Court the explanation offered by both accused for the production of the property was that they were beaten and compelled to dig in places shown to them by the police. They were never asked to explain the other circumstances appearing against them, viz., that they admitted having buried the property in the places where it was found.

The Public Prosecutor suggests that, as the trial has been defective in these and other respects and as evidence has yet to be recorded against other accused whose trial has been reserved, I should order a retrial of these accused. I am of opinion that that step should not be taken unless there is a reasonable probability of their being convicted on the evidence known to be available against them. I do not find upon the materials in the record any probability of these accused being convicted of murder if they are retried. I agree with WALLACE, J., that upon the evidence now before the Court the conviction for murder cannot stand against either of them. They are, therefore, both acquitted so far as this charge is concerned and the death sentences are quashed.

B.C.S.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Sundaram Chetti.

1926, September 23.

RANGIAH AND THREE OTHERS (APPELLANTS), 21ST TO 24TH RESPONDENTS,

v.

Y. V. APPAJI RAO (RECEIVER, RESPONDENT), RESPONDENT.*

Provincial Insolvency Act (V of 1920), ss. 28 (7) and 53—Voluntary alienation within two years prior to presentation of petition for insolvency—Voidability of.

Though section 53 of the Provincial Insolvency Act (V of 1920) enacts that a voluntary transfer by an insolvent is voidable as against the Receiver if the transferor is adjudged insolvent within two years of the transfer, yet as an order of adjudication relates back to, and takes effect from, the date of presentation of the petition for insolvency, a voluntary transfer made within two years prior to the date of presentation of the petition for insolvency is voidable though it is beyond two years of the date of adjudication. Section 53 of the Act must be read along with section 28 (7) of the Act. *Sankaranarayana Aiyar* v. *Alagiri Aiyar*, (1918) 35 M.L.J., 296, followed. *Nagindas* v. *Gordhandas*, (1925) I.L.R., 49 Bom., 730, and *Ghulam Muhammad* v. *Panna Ram* (1923) 72 I.C., 433, dissented from.

APPEALS against the orders of the District Court of Anantapur in I.A. No. 272 of 1921 in I. P. No. 3 of 1920. The facts and arguments appear from the judgment.

K. Krishnaswami Ayyangar and *S. Ranganatha Ayyar* for appellants.

B. Somayya for the respondents.

* Appeals against Orders Nos. 307 of 1924 and 91 of 192 .

JUDGMENT.

These Appeals are against the orders of the District Judge of Anantapur annulling certain transfers of property under section 53 of the Provincial Insolvency Act. It is contended for the appellants that section 53 of the Act does not apply as the transfers of property were more than two years before the date of the adjudication of the insolvent. It is urged that the expression "is adjudged insolvent" can only refer to the adjudication of the insolvent and not to the date of the presentation of the petition on which the adjudication was made. The question for determination is, does an application to set aside a voluntary transfer lie under section 53 of the Provincial Insolvency Act if the transfer is more than two years from the date of the order of adjudication but within two years from the date of the presentation of the petition on which the adjudication was made? This point is covered by authority so far as our High Court is concerned.

In *Sankaranarayana Aiyar* v. *Alagiri Aiyar*(1), OLDFIELD and SADASIVA AYYAR, JJ., considered this point at considerable length and came to the conclusion that the adjudication referred to in section 36 of the old Act had to be treated as made on the date of the presentation of the petition on which the insolvent was adjudicated. It is contended that this decision is wrong and is opposed to the view of the Bombay and Lahore High Courts. The argument is that under section 53 the period of two years is to be calculated backwards from the date of adjudication as the clause "if the transferor is adjudged insolvent within two years after the date of the transfer" can only mean the date of the order of adjudication and not the date of the presentation of the

(1) (1918) 35 M.L.J., 296.

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petition on which the adjudication is made, that clause (7) of section 28 cannot govern the plain meaning of the words in section 53, and if the legislature intended that the two years should be calculated backwards from the date of the presentation of the petition the expression "is adjudged insolvent" would not have been used, for in section 54 it is clearly enacted that the transfer should be within three months of the petition presented for adjudication. No doubt there is a difference between the wording of section 53 and that of section 54. In section 53 the clause is:

"Any transfer . . . shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be voidable"

Section 54 is:

"Every transfer of property . . . shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void . . ."

If section 53 stood alone it might be contended with some show of reason that the expression "is adjudged insolvent" can only mean the order of adjudication, but in clause (7) of section 28 it is enacted that

"an order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on which it is made."

The question is, does clause (7) of section 28 govern section 53? It is suggested that clause (7) is not an independent section as in the English Act, and therefore it cannot be held to govern the provisions of section 53. This argument is fallacious. Section 28 lays down the consequences that flow from the order of adjudication. It is a general provision relating to adjudication and the consequences of adjudication. Section 28 (7) is therefore a general clause which applies to all dealings by or with the insolvent, unless any particular dealing is expressly exempted from its operation.

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Section 53 is based upon the corresponding provisions in the English Act and in interpreting section 53 we must take into consideration what the law of bankruptcy is under the English Act. Reliance is placed upon a judgment of WRIGHT, J., in *Reis In re, Ex-parte Clough*(1), where the learned Judge observed that there was a difference between the meaning of the words "adjudicated bankrupt" and the meaning of the words "becoming bankrupt." The expression in section 47 of the English Act is "If the settler becomes bankrupt." It was contended before WRIGHT, J., that the expression "becomes bankrupt" should be held to mean "being adjudged bankrupt" and he construed the expression "becoming bankrupt" as insolvency commencing at the time of the first of the acts of bankruptcy proved to have been committed within three months next preceding the date of the presentation of the bankruptcy petition. He did not accept the contention that the expression "adjudged bankrupt" meant only the actual adjudication of the insolvent. He only stated the contention that there was a distinction between the use of the words "adjudged bankrupt" and the use of the words "becoming bankrupt." There is no reason for overlooking the clear provision in section 28 (7) in considering the other sections of the Act. It is a well-known canon of construction that the Courts should construe the provisions of legislative enactments in such a way as not to impute inconsistency to the legislature. Where the provisions are reconcilable the Courts should try to reconcile. They should not attach importance to a single phrase or clause in one section and overlook the clear provisions in other sections which are of a general character. There are exceptions to the general

(1) [1904] 1 K.B., 451.

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provision in section 28, clause (7). Section 51 which reads as follows:—

"Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realized in the course of the execution by sale or otherwise before the date of the admission of petition,"

contains an exception to section 28 (7). A creditor or a debtor may present a petition for adjudication of the debtor. The petition may be returned for correction and some time may elapse before the petition is admitted by the Court. In such cases the date from which the time should be reckoned is not the date of the admission of the petition but that of the presentation thereof. Under section 55 which relates to *bona fide* transactions, a transaction would be held to be good if it takes place before the date of the order of adjudication and if the person with whom such transaction takes place had not, at the time, notice of the insolvency petition by or against the debtor. If the argument of the appellants is to hold good, a voluntary transfer made a day before the presentation of the insolvency petition cannot be attacked, if the Court does not adjudicate the insolvent for two years. The policy and the scope of the Insolvency Act is to prevent fraudulent preference and fraudulent transfers and the period mentioned in section 53 has nothing to do with the delay of the Court in passing the order of adjudication. The matter might be taken as far as the Privy Council and if it takes five years for the matter to be finally settled by the Privy Council, could it be said that a voluntary transfer made a few days before the presentation of the insolvency petition could not be attacked by reason of the adjudication not having been made for a considerable time owing perhaps to causes over which the Court might not have control? OLDFIELD and SADASIVA AYYAR, JJ., have given

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cogent reasons for their conclusion that clause (6) of section 16 of the old Act corresponding to clause (7) of section 28 of the present Act governed section 36 of the old Act which corresponds to section 53 of the present Act. It is unnecessary to consider all the arguments advanced in that case.

In *Rakhal Chandra Purkait* v. *Sudhindra Nath Bose*(1), a bench of the Calcutta High Court held that the provisions of section 36 of the Provincial Insolvency Act were to be read with section 16 (6) of the Act. In *Sheonath Singh* v. *Munshi Ram*(2), a bench of the Allahabad High Court concurred in the view taken by this Court in *Sankaranarayana Aiyar* v. *Alagiri Aiyar*(3). The learned Judges observed:

" . . . the view which we take is the view which was always taken from the earliest days in the administration of the bankruptcy law for reasons inherent in the policy of the bankruptcy law, . . . some of which are contained in that judgment of the Madras High Court."

The case that is strongly relied upon by Mr. K. Krishnaswami Ayyangar is *Nagindas* v. *Gordhandas*(4). In that case Sir NORMAN MACLEOD, C.J. and COYAJEE, J., held that the point of time from which the two years period mentioned in section 53 was to be calculated was the date on which the order of adjudication was made and not the date of the presentation of the petition. With very great respect we dissent from the view of the two learned Judges. They do not discuss at length the point whether clause (7) of section 28 controls the provisions of section 53. They refer to the judgment of WRIGHT, J., in *Reis, In re Ex-parte Clough*(5), and after referring to corresponding provisions in the English

(1) (1919) I.L.R., 46 Calc., 991.
(2) (1920) I.L.R., 42 All., 433.
(3) (1918) 35 M.L.J., 296.
(4) (1925) I.L.R., 49 Bom., 730.
(5) [1904] 1 K.B., 451.

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Act and the Provincial Insolvency Act conclude at page 738—

"It cannot be denied that a person is adjudged insolvent on the day on which the order is made, though the effect of the order on the insolvent's property relates back to an earlier date,"

and observe:

"Therefore, in our opinion if it had been intended that a voluntary transfer should be voidable if made within two years from the date of the presentation of the petition on which the adjudication order is made there was no reason why that should not have been as clearly stated in section 53 as it is in section 54, and we do not think that the doctrine of 'relation back' can be imported into the former section, so as to make it appear that the point of time from which the two years are to be calculated is the date of the presentation of the petition, and not the date when the transferor is adjudged insolvent."

We fail to see why the general provision of law in clause (7) of section 28 should not be read into section 53 unless the clear terms of section 53 are against reading that clause into it. It cannot be suggested that the Indian Legislature made a departure from the English Law in enacting section 53. Under the English law the relation back is to the available acts of bankruptcy or the first of the available acts of bankruptcy. Section 43 of the English Act enacts:

"The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition."

The Indian Legislature in enacting clause (7) of section 28 lays down that the order of adjudication shall

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relate back to and take effect from the date of the presentation of the petition on which it is made and not from the act of bankruptcy on which a receiving order is made or, if there are more acts of bankruptcy than one, the first of the acts of bankruptcy committed within three months next preceding the date of the bankruptcy petition.

In *Ghulam Muhammad* v. *Panna Ram*(1), the Lahore High Court takes the same view as that of the Bombay High Court in *Nagindas* v. *Gordhandas*(2). The learned Judges refer to the decision in *Sankaranarayana Aiyar* v. *Alagiri Aiyar*(3), and comment on the argument of SADASIVA AYYAR, J., and observe that his argument merely amounts to an admission that the framers of the Act committed a mistake and an explanation how the mistake came to be committed. The view of the two learned Judges is opposed to the view of the Calcutta High Court *Rakhal Chandra Purkait* v. *Sudhindra Nath Bose*(4), and to the decision in *Sankaranarayana Aiyar* v. *Alagiri Aiyar*(3). With due respect we must say that no convincing argument has been referred to in their judgment as to why section 16 (6) of the old Act should not be read into section 36 of the Act. In *Madhu Sardar* v. *Khitish Chandra Banerjee*(5), MOOKERJEE and BEACHCROFT, JJ., held that section 34 of the Provincial Insolvency Act restricts the operation of clause (6) of section 16, and the provision in section 34 with regard to the assets realized in execution must be held to be an exception to the general rule laid down in section 16 (6) of the old Act. On a careful consideration of the relevant sections of the Act and the case law on the point we have no hesitation in holding that the

(1) (1923) 72 I.C., 423.
(2) (1925) I.L.R., 49 Bom., 730.
(3) (1918) 35 M.L.J., 296.
(4) (1919) I.L.R., 46 Calc., 991.
(5) (1915) I.L.R., 42 Calc., 289.

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period of two years should be calculated backwards from the date of the presentation of the petition on which the adjudication is made.

[On the merits, their Lordships discussed the evidence and agreed with the learned District Judge that the sales were not *bona fide*.]

In the result the appeals fail and are dismissed with costs.

N.R.

APPELLATE CIVIL.

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

1926, September 16.

SENJA NAICKEN AND ANOTHER (APPELLANTS), PLAINTIFFS,

v.

SECRETARY OF STATE FOR INDIA (RESPONDENT), DEFENDANT.*

Land Acquisition Act (I of 1894), sec. 6 (1)—Contribution of one anna only, by Government towards acquisition—Validity of acquisition.

In the absence of proof that the acquisition of a particular land is brought about by improper motives or that the Land Acquisition Act is set in motion to annoy a private owner, the contribution of even one anna by the Government towards the compensation for the acquisition of a land for a public road (the rest of the amount required for the purpose being contributed by the villagers) satisfies the proviso to section 6 (1) of the Act which provides that no declaration of acquisition shall be made unless the compensation to be awarded is to be paid . . . wholly or *partly* out of the public revenue. *Ponnaia* v. *Secretary of State for India*, (1926) 51 M.L.J., 338, dissented from;

* Second Appeal No. 1755 of 1922.

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Chatterton v. *Cave*, (1878) 3 App. Cas., 483 and *Luchmeswar Singh* v. *Chairman, Darbhanga Municipality*, (1891) I.L.R., 18 Calc., 99 (P.C.), distinguished.

SECOND APPEAL against the decree of the District Court of Salem in Appeal Suit No. 135 of 1921 preferred against the decree of the Principal District Munsif of Salem in Original Suit No. 20 of 1920.

The facts are given in the Judgment.

K. Ramanatha Shenoi for appellants.—Contribution of one anna, a trifling amount, towards the compensation amount, viz., Rs. 600, required for the purpose, does not satisfy section 6 (1) of the Land Acquisition Act. "Part" in that sub-section means a substantial part though not a major portion. It has been found in this case that the villagers wanted to acquire this land out of spite towards the owner. Under such circumstances it has been held that the acquisition is illegal; see *Ponnaia* v. *Secretary of State for India*(1). "Part" does not mean a "particle;" see *Chatterton* v. *Cave*(2). Unless the provisions of the Act are strictly complied with, the acquisition is illegal especially if there is improper motive; see *Luchmeswar Singh* v. *Chairman, Darbhanga Municipality*(3)

Government Pleader (C. V. Anantakrishna Ayyar) for respondent.—The finding is that the acquisition is required for a public purpose; and the declaration to that effect is conclusive. Even if the villagers were prompted by any other motive, that is irrelevant and immaterial, *Chatterton* v. *Cave*(2) dealt with the wording in the English Copyright Act, the considerations in which are different from those under the Land Acquisition Act. However small the amount contributed by the Government may be, it is a "part" of the compensation within section 6 (1) of the Act. The real ground of decision in *Luchmeswar Singh* v. *Chairman, Darbhanga Municipality*(3) being that if the provisions of the Act are not complied with, the acquisition is illegal, it is no authority for this case, in which all the provisions of the Act have been complied with. Hence *Ponnaia* v. *Secretary of State for India* (1) which relies on the above two cases is wrong. Supposing the amount of compensation is enhanced on appeal, the excess will have to be paid only by the Government and not by the villagers.

(1) (1926) 51 M.L.J., 338. (2) (1878) 3 App. Cas., 483. (3) (1891) I.L.R., 18 Calc., 99 (P.C.).

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K. Ramanatha Shenoi replied.

This Appeal first coming on for hearing before Mr. Justice ODGERS and Mr. Justice VISWANATHA SASTRI, the Court delivered the following :—

JUDGMENT.

A similar question was under discussion in Appeal Suit No. 165 of 1923 before SPENCER and RAMESAM, JJ. (since reported as *Ponnaia* v. *Secretary of State for India* (1), and we feel that it is inexpedient that the question should be decided by us before we have had an opportunity of seeing the judgment which will shortly be delivered by the other Bench. We feel that it is also important to find out exactly how this sum of Rs. 926-7-6 was deposited by the ryots in this case ; was it deposited for the specific purpose of constructing this road and was it accepted as such or was there simply a credit to the General Revenues, of the amount? The form of the receipt granted to the ryots may be material and the way in which the money has been credited in the books of the Government officers. There will be a finding called for on the nature and terms of the deposit made by the ryots in this case and the District Judge will kindly deal with any evidence either already on record or additional as the parties may produce on this point. The finding will be submitted within six weeks and ten days will be allowed for filing objections.

[In pursuance of this Order, the District Judge submitted a finding, the effect of which is given in the Judgment of ODGERS, J., *infra*.]

This Second Appeal coming on for final hearing after the return of the finding of the Lower Appellate Court upon the issue referred by the High Court for trial, on Thursday 19th August 1926, and having stood over till

(1) (1926) 51 M.L.J., 338.

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ODGERS, J.

this day for consideration, the Court delivered the following :—

JUDGMENT.

ODGERS, J.—This was a suit by two inhabitants of Thidavoor, Athur Taluk, Salem District, against the Secretary of State, for a declaration that certain notifications and subsequent proceedings taken by the Government officials under the Land Acquisition Act are illegal and *ultra vires*. The Plaintiffs are the owners of the property in question which was acquired for the purpose of forming a road by a Government notification, dated 14th September 1918. The learned District Munsif dismissed the suit. On appeal to the learned Judge the same result was reached. It appears that the cost of the road was defrayed by private contributions and that the Government added the sum of one anna from public revenue. When the Second Appeal first came on before Mr. Justice VISVANATHA SASTRI, and myself we found that a similar question as to whether the provisions of section 6, clause (1) had been complied with was under discussion in Appeal No. 165 of 1923 before SPENCER and RAMESAM, JJ. (since reported as *Ponnaia* v. *Secretary of State for India* (1)). We therefore deferred our decision on the question but sent the case down for a finding as to how the contributions were deposited by the ryots in order that we might discover whether that money could be fairly termed public revenue or not. The learned District Judge, now Justice WALLACE, in the Lower Appellate Court had held that the compensation awarded was at the time of the award "public revenue" and that as soon as the public agency had applied the private funds for public purposes, private ownership in these funds ceased and they became public revenues.

(1) (1926) 51 M.L.J., 338.

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The finding called for has now been returned and it is to the effect that the contributions were accepted as such by the Government and kept as separate deposit for the purpose of constructing the road. It therefore seems to me that the contributions cannot be said to be public funds as they were never merged in the general funds of the public.

However that does not decide the matter. It is admitted that the Government contributed one anna to the cost and the question is whether this satisfies the requirement that the compensation was paid wholly or partly out of public revenues (see Exhibit II). We have now the advantage of the judgment of SPENCER and RAMESAM, JJ., and they held that the condition in the section is not satisfied by the payment of one anna. The question is can this decision be accepted by us? The learned Judges seem to apprehend that if a small contribution were deemed to satisfy the section, it may be a mere device for private persons to employ the Act for private ends or for the gratification of private spite or malice. I think it fair to assume that the Government by whom the acquisition has to be made would not knowingly or willingly lend itself to any such acquisition or employment of the Act and in this particular case the Collector of Salem in his proceedings, dated 12th July 1916, Exhibit A, found there was no objection to the construction of a road through this land provided the people concerned contributed the cost. Now the learned Judges in the case referred to held that the words "partly out of public revenues" was not satisfied by the contribution of a particle, for which they relied on *Chatterton* v. *Cave*(1). This case will have to be examined in some detail as the whole of the

(1) (1878) 3 App. Cas., 483.

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ratio decindendi of the learned Judges appears to rest on this and possibly on one other case which they cite at the end of their final judgment after a finding had been returned, namely *Luchmeswar Singh* v. *Chairman, Darbhanga Municipality*(1). *Chatterton* v. *Cave*(2) was a case of infringement of copyright where two plays had been separately adapted from a common source by the parties to the litigation. The matter was left to the Lord CHIEF JUSTICE, COLERIDGE, and he found that

"the extent to which the one was taken from the other was so slight and the effect on the total composition was so small that there was no substantial and material taking of any one portion of the defendant's drama from any portion of the plaintiff's."

It is there that the distinction between "part" and "particle" is made. Lord O'HAGAN at page 497 says,

"No doubt any scene or point or incident or line or word in a drama is part of it; and no doubt it is the duty of a court of construction to carry out the plain intention of the legislature strictly even though it may not approve of them as sound in principle or wise in policy or just in operation. But we should scrutinize carefully the terms of a statute before we lend ourselves to administer it with ill results and see whether it forces us inevitably to produce them."

He then goes on to apply the same construction to the statute giving copyright in dramatic productions as those which afford protection to copyright in books and to hold that to render a writer liable for literary piracy he must be shown to have taken a material portion of the publication of another. He observes that the question in every case must be one of fact:

"Part" is not necessarily the same as "particle" and there may be a taking so minute in its extent and so trifling in its nature as not to incur the statutory liability."

With great deference I gravely doubt whether the analogy of a question of copyright can be applied to a

(1) (1891) I.L.R., 18 Calc., 99 (P.C.). (2) (1878) 3 App. Cas., 483.

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matter under the Land Acquisition Act. I invited the learned Advocate for the appellant to say where a "particle" would end and "part" begin of this sum of Rs. 600. It is true an anna is a very small part of Rs. 600. But nevertheless it is a part. It is not to be forgotten that their Lordships in the case considered above were not dealing with an original subject at all. Admittedly both of the litigants had derived their compositions from a common source and it stands to reason that before you can compel a man to pay damages for stealing the product of your brain, time and labour, you must be able to point out that any resemblance between his production and yours is not merely accidental but is a designed theft of the product of your brain. Otherwise as their Lordships point out one might go to the absurdity of objecting to a man using the same words though in a different collocation as you have done. As their Lordships say it is a question of fact as to how much similarity will establish the fact of this theft, it seems to me that this case has no resemblance to the question of money whether any amount however small is a definite proportion of the whole.

The other case *Luchmeswar Singh* v. *Chairman, Darbhanga Municipality*(1) involves the question of the power of a guardian. There a guardian acting in a dual capacity as guardian of the minor Maharaja and Chairman of the Municipality gave up a part of his ward's property to the Municipality for the nominal compensation of Rupee one. It was held that no valid title to the land was established against the ward, as the guardian did not act in the interests of the minor. That case in my opinion has nothing whatever to do with the

(1) (1891) I.L.R., 18 Calc., 99 (P.C.).

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present. Had there been evidence that this acquisition had been brought about by any indirect motive or that the Act had been set in motion in order to annoy the owner, one would have felt very loath to say that the acquisition was right and proper. But the Collector seems to have considered the matter carefully and there is no evidence before us of any improper motive on the part of those who desired that the path should be made. It cannot of course be argued that the land was not acquired for a necessary purpose because that once the notification has been made it is to be presumed that the purpose is necessary.

There is one other consideration which I think operates in favour of the view I have taken. Suppose on appeal the compensation had been enhanced. There is no doubt that the Government would have to defray the extra sum out of the public revenues and having once undertaken the acquisition they could not call on the constituents again.

For all these considerations I am therefore of opinion that with respect the decision in Appeal No. 165 of 1923 [*Ponnaia* v. *Secretary of State for India*(1)] cannot be followed. I would therefore hold that the contribution of one anna does satisfy the proviso in section 6, clause (1) of the Land Acquisition Act. In the result the Second Appeal fails and must be dismissed with costs.

MADHAVAN NAYAR, J.

MADHAVAN NAYAR, J.—I have had the advantage of reading my learned brother's judgment with which I agree.

The facts of the case need not be re-stated. Section 6, clause (1) of the Land Acquisition Act provides that when it appears to the Local Government that any particular land is needed for a public purpose, a declaration

(1) (1926) 51 M.L.J., 338.

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shall be made to that effect by a prescribed officer of the Government. This clause is subject to the proviso that "no such declaration shall be made unless the compensation to be awarded for such property is to be paid . . . wholly or partly out of public revenues or some fund controlled or managed by a local authority." In this case we are concerned with the question as to how far a declaration is valid if the Government contributes towards the payment of compensation for a piece of land acquired under the Act only one anna out of the public revenue, the remainder being paid by private contributions; in other words, can it be said that in such circumstances, compensation has been paid partly out of the public revenue within the meaning of the proviso and consequently the declaration made under section 6, clause (1) is valid?

It is argued for the appellants that in order to constitute a payment, payment partly out of public revenue, the part of the compensation paid from the public revenue must be a substantial sum and not merely such a small sum as one anna. On the other hand, it is contended for the Government that the requirement of the proviso that the compensation is to be paid partly out of public revenue is complied with if some part of the compensation however small it may be, is paid out of the public funds.

The appellants' argument is supported by the decision of SPENCER and RAMESAM, JJ., in Appeal No. 165 of 1923 [*Ponnaia* v. *Secretary of State for India* (1)] in which the learned Judges held that the requirement of the proviso above referred to was not satisfied by the contribution of a "particle," viz., one anna, as in the present case. With due deference I am

(1) (1926) 51 M.L.J., 338.

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not able to agree with this view. In the course of the judgments, reference is made to two cases, namely, *Chatterton* v. *Cave* (1) and *Luchmeswar Singh* v. *Chairman, Darbhanga Municipality*(2) in support of their conclusion. For the reasons given by my learned brother I agree with him in thinking that the decision in *Chatterton* v. *Cave* (1), which, dealing with the question of the infringement of copyright held that there cannot be a violation of 3 and 4 Will 4, c. 15, s. 2, where the matter or thing taken from the first work and introduced into the second is not material and substantial, cannot afford any guidance in solving the present question, as the considerations involved in the two cases are totally different. The decision in *Luchmeswar Singh* v. *Chairman, Darbhanga Municipality*(2) is also not of much use. In that case the guardian of the estate of a minor Maharaja who was also the Chairman of the Municipality made over a part of the minor's property to the Municipality for the compensation of the nominal sum of one rupee. At the instance of the Maharaja, the Privy Council set aside the acquisition of the land mainly on the ground that the procedure set forth in the Land Acquisition Act was not complied with in acquiring the land. After referring to sections 11 and 13 of the Act, their Lordships of the Privy Council observe as follows :—

"On a day fixed the Collector who, after the declaration is by section 7 to make order for the acquisition of the land, is to proceed to inquire summarily into the value of the land, and to determine the amount of compensation which, in his opinion, should be allowed for it, and to tender such amount, to the persons interested. And in determining the amount of compensation he is ordered to take into consideration the matters mentioned in section 24 one of which is the market value, at the time of awarding compensation of the land. It is obvious

(1) (1878) 3 App. Cas., 483. (2) (1891) I.L.R., 18 Calc., 99 (P.C.).

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that the offer of one rupee compensation was not in accordance with the duty of the Collector under these sections, and it would be altogether wrong to treat one rupee as the amount of compensation determined under section 13. Section 14 says that if the Collector and the persons interested agree as to the amount of compensation to be allowed, the Collector shall make an award under his hand for the same. This was never done."

Later on, the ground for declaring the acquisition invalid is more pointedly stated by their Lordships in this way:

"Although the Court of Wards had not power to alienate the land for the purpose for which it was required, possession might have been lawfully taken of it if the provisions of the Land Acquisition Act had been complied with. But they were not. The Collector made no inquiry into the value of the land. He was the Chairman of the Municipality, and his sole object appears to have been to benefit the town, forgetting that, as the representative of the Court of Wards, it was his duty to protect the interest of the minor, and to see that the provisions of the Act were complied with."

These extracts make it abundantly clear that the acquisition in that case was set aside not on the ground that the compensation paid was only one rupee but that in determining the amount of compensation the provisions of the Act were not complied with. The learned Judges (SPENCER and RAMESAM, JJ.) seem to be of the opinion that if the words of the statute are not construed in the way they suggest, then

"the owners should be deprived of their ownership by a mere device of private persons employing the Act for private ends or for the gratification of private spite or malice."

I don't think that this result would follow. It may be assumed that the Government will not improperly employ the Act to enable an individual to satisfy his private ends. In this case there is no evidence that the Collector has been prompted to make the acquisition by any indirect motive. The evidence shows that the Collector considered the matter carefully and found

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that there was no objection to the acquisition of the land in question provided the people concerned contributed the cost.

The consideration pointed out by my learned brother that if on appeal the compensation is enhanced the Government would have to defray the extra amount from out of the public revenues is also in favour of the view that we are taking in this case.

It is true that one anna is a small part of Rs. 600, still it cannot be denied that it is part of that amount. If one anna is not to be considered as a part of the amount for the purposes of this proviso, then how are we to find what portion of it will form a part of it to satisfy the meaning of the words in question in the proviso? If the Legislature intended that a *substantial portion* of the compensation should be paid out of the public revenue, then it would have used appropriate language to convey that idea.

For the above reasons I agree with my learned brother that the contribution of one anna out of the public revenue for the payment of the compensation satisfied the proviso in section 6, clause (1) of the Land Acquisition Act.

The Second Appeal must therefore be dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

1926, February 5.

KANDASAMY UDAYAN (FIRST DEFENDANT-APPELLANT), APPELLANT,

v.

VELAYUTHA UDAYAN (PLAINTIFF-RESPONDENT), RESPONDENT.*

Hindu Law—Alienation by a co-parcener—Suit by another co-parcener to recover property alienated or his share therein —Right of alienee as defendant to demand a general partition in that suit—Proper course for alienee, to institute a separate suit for general partition—Decree in co-parcener's suit, whether res judicata *as to share of co-parcener in a suit by vendee for general partition—Form of decree to be given in co-parcener's suit.*

In a suit instituted by a co-parcener of a joint Hindu family against a vendee for setting aside an alienation of a certain item of family property by another co-parcener and recovering his share in it, it is not competent to the court to direct a general partition of all the family properties at the instance of the alienee-defendant.

Subba Goundan v. *Krishnamachari*, (1922) I.L.R., 45 Mad., 449, followed. *Ramasami Aiyar* v. *Venkatarama Ayar*, (1923) I.L.R., 46 Mad., 815, explained.

A decree in the suit of a co-parcener to have his share of the alienated property partitioned between him and the alienee, is not *res judicata* in a subsequent suit by the alienee for general partition, including the share in the property decreed to the co-parcener by the previous decree.

Sourimuthu v. *Pavadai Pachia Pillai*, (1925) 49 M.L.J., 679, dissented from.

When a suit is instituted by a co-parcener to recover his share in the alienated property, the proper course to be followed

* Letters Patent Appeal No. 49 of 1925.

by the alienee is to institute a separate suit for general partition so that the two suits may be tried together and the Court may be in a position to consider whether the property alienated to him should be allotted to the alienor's share or not.

Form of the decree in a suit by a co-parcener to recover his share in property alienated by another co-parcener, considered.

Hanmandas Ramdayal v. *Valabhdas*, (1919) I.L.R., 43 Bom., 17, followed.

APPEAL under clause 15 of the Letters Patent against the judgment of ODGERS, J., in Second Appeal No. 1700 of 1923.

The material facts appear from the judgment.

T. M. Krishnaswami Ayyar for appellant.

C. Krishnama Achari for respondent.

The JUDGMENT of the Court was delivered by

DEVADOSS, J.

DEVADOSS, J.—The plaintiff sued for a declaration that a certain alienation made by his father was not binding on him and prayed for possession of the property alienated and in the alternative that if the sale was good to the extent of his father's share, his share of the property should be delivered to him. The District Munsif held that the sale was a nominal transaction and that it was not binding upon the plaintiff and decreed the suit. On appeal the District Judge held that sale was good to the extent of the father's share and decreed the plaintiff's share to him.

In Second Appeal it was contended that the alienee should be allotted the property alienated to him as there was other property belonging to the family which could satisfy the claim of the plaintiff. Mr. Justice ODGERS who heard the Second Appeal declined to uphold the contention and dismissed the Second Appeal. The alienee's representatives have preferred this Letters Patent Appeal.

KANDASAMY UDAYAN v. VELAYUTHA UDAYAN.

DEVADOSS, J.

It is contended before us by Mr. T. M. Krishnaswami Ayyar for the appellant that the family property is more than sufficient to meet the claim of the plaintiff and that the alienee should not be deprived of the plaint property which is a house. It is urged that the appellants have an equity in their favour and that they should not be driven to a separate suit when the equities could be worked out in this case. The District Judge found that it would be unfair to allow the alienee to retain the property as the rest of the property which would devolve on the son consists entirely of outstanding debts which might or might not be good. The alienee, neither in his written statement nor in his evidence before the lower Court, placed before the Court sufficient materials which would enable it to ascertain whether the plaintiff's share could be met out of the other properties belonging to him and his father. In the written statement he did not care to put forward an alternative case that, in case the plaintiff was able to succeed to the extent of his share, he should be allowed to retain the property sold to him as the family property was sufficient to meet the plaintiff's claim and the plaintiff would not be prejudiced by his being allowed to retain the property sold to him. Without an opportunity for the plaintiff to show that the property of the family is not sufficient to meet his claim and in the absence of evidence as to whether the plaintiff has got another house which is fit for his occupation and that he would not be prejudiced by allowing the alienee to retain the house sold to him, the Court would not be justified in granting relief to the alienee in the manner asked for by him, even if such relief could be granted in this suit.

Is it competent for the Court in a suit by a co-parcener for setting aside an alienation of a certain item of family property to grant relief which it could grant on

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a general partition? Mr. Krishnaswami Ayyar relies strongly upon *Ramasami Aiyar* v. *Venkatarama Ayyar*(1), as supporting his contention. In that case Mr. Justice PHILLIPS and Mr. Justice VENKATASUBBA RAO held

"that the alienee need not be directed to institute a separate suit to work out his rights by a partition, but was entitled in the co-parcener's suit as a defendant to get a decree for partition and claim to be allotted the item purchased by him in respect of his vendor's share if that was consistent with the rights of the other co-parceners."

It was held in *Subba Goundan* v. *Krishnamachari*(2) by Mr. Justice KUMARASWAMI SASTRI and one of us, that, in a suit instituted by the co-parceners of a joint Hindu family to set aside a sale of ancestral immovable property by their father or manager of the family on the ground that the sale was not for family necessity and to recover possession of the property from the vendees,

"the latter were not entitled as defendants to insist in this suit on the plaintiffs submitting to a partition either of the items sold or of the entire family property so as to give the vendees their alienor's share in the properties sold to them, that the vendees were entitled in this suit to a decree declaring that they are entitled to the share of their alienor but that they should be left to work out their rights by a separate suit for partition."

A careful perusal of the judgment in 46 Mad., 815, would show that there is no real conflict between it and the decision in 45 Mad., 449, though the observation of Mr. Justice PHILLIPS at page 821 may appear to be so.

"If an equity exists in the alienee and it can be enforced without a separate suit, there seems to me to be no reason for restricting that equity to a mere right to sue, a limitation which cannot be supported on equitable principles."

He also observes

"No doubt in many cases it would not be easy to enforce the alienee's equitable right in a suit brought by one of the

(1) (1923) I.L.R., 46 Mad., 815. (2) (1922) I.L.R., 45 Mad., 449.

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co-parceners to recover the property, because it would be necessary to add all the co-parceners to the suit and ascertain the amount of family property available for division, etc."

If the Court is prepared to convert a suit for declaration that certain alienation by a member of a joint Hindu family is not binding on the plaintiff into a suit for general partition at the instance of the alienee defendant then the suit becomes a suit for general partition. The decision in 46 Mad., 815, applies to cases where all the facts are before the Court which would enable it to allow an alienee to retain the property and such a suit is practically a suit for partition. What was held in 45 Mad., 449, was that there must be a separate suit for partition; for in a suit where one item of property is sought to be recovered on the ground that the alienation of it is not binding on the plaintiff, the whole family should not be driven to be parties to a suit for partition. The proper course for the alienee would be to sue for partition and ask the Court to allot to his alienor the specific property conveyed to him and if the Court finds that the interests of the other co-parceners would not be prejudiced by allotting to the alienating co-parcener the specific property alienated by him, the Court may allow the alienee to retain the property. We adhere to the view expressed in 45 Mad., 449, and as pointed out in that case at page 464,

"Having regard to the provisions of the Civil Procedure Code which do not allow any wide rights of counter-claim, it is difficult to see how a suit by the plaintiff for possession and mesne profits can be converted at the instance of the defendants into one for a general partition which would involve the presence of other parties and an enquiry into the debts and liabilities of the family. If the claim of the defendants is to be treated as a cross suit and if the written statement is to be stamped as a plaint in such cross suit claiming a general partition, there is no reason why the defendants should not file their own suit for a general partition and work out any decree which they may

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obtain in the decree in the suit by the co-parceners. There is no special advantage in the defendant's doing in their written statement what they could easily do in a plaint filed by them. It is open to them, as soon as a co-parcener files a suit for possession, to file a suit for partition, and where proper grounds exist the Court would try the suits together so as to afford relief to all parties. On the point of view of hardship we think that the hardship would be greater if a simple suit for possession which the co-parcener is in law entitled to file in cases of invalid alienations is converted into an elaborate enquiry as to a general partition of the family."

In *Davud Beevi Ammal* v. *Radhakrishna Aiyar*(1), it was held

"that a purchaser from one member of a joint Hindu family of property, which that member has no right to sell, it being joint property, can enforce the sale only by partition of the entire family property; and if, in such partition, the properties sold can with due regard to the interests of the other sharers, to the debts due by the family, and to an equitable allocation of the various items of the family property to the shares of the several co-parceners, be wholly allotted to the vendor's share, the purchaser will be entitled to the whole of the property which the vendor professed to convey to him."

It is urged by Mr. Krishnaswami Ayyar that a separate suit would be barred by the principle of *res judicata* and therefore the Court should consider in this suit whether the alienee could be allowed to retain the property sold to him. In *Sourimuthu* v. *Pavadai Pachia Pillai*(2), Mr. Justice PHILLIPS and Mr. Justice RAMESAM held that if a decree is obtained by a member of a joint Hindu family against an alienee for his share of the property alienated on the ground that the alienation was not binding on him, in a subsequent suit by the alienee for a general partition and for the allotment of the alienated property to the share of the alienating co-parcener, the property allotted to the plaintiff in the previous suit could not be allotted again to the alienating

(1) (1923) 44 M.L.J., 309. (2) (1925) 49 M.L.J., 679.

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co-parcener's share and therefore the second suit is barred by *res judicata*. With very great respect to the learned Judges we are unable to agree with the view taken by them in that case. When a co-parcener brings a suit for declaration that an alienation by another co-parcener is not binding on him and for his share of the property alienated the Court gives him a decree for his share, if it finds that the alienation is not binding on the plaintiff. But his share does not become absolutely his, for the alienating co-parcener still continues a member of the joint family, and on a suit for partition by him the property alienated may fall to his share in which case the alienee would be entitled to get it. The matter is not different when the alienee himself brings a suit for a general partition and prays to be allowed to retain the property which was sold to him. When a member of a joint Hindu family sues to set aside an alienation made by another co-parcener that suit is not for partition and does not involve necessarily the status of division between him and the other members of the joint family. All that is objected to is the alienation of the particular item and if that alienation of the particular item is not binding on the family it is not binding on the alienor's share as well and the property is recovered for the benefit of the family. The alienor, so long as he is a member of the joint family, has his right to partition subsisting and in a suit by him he can ask that the property alienated by him may be allotted to his share and if the Court on a consideration of all the circumstances in the case thinks that it would be equitable to allot to him that property it might do so, for the plaintiff in the suit for setting aside the alienation cannot set up the plea of *res judicata* against any relief being granted. If the principle of *res judicata* would not avail against the alienating co-parcener, it is difficult to see how it could

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avail against the alienee who stands only in the shoes of the alienating co-parcener. To hold that a suit by an alienee for partition is barred by *res judicata* by reason of a previous suit in which the alienation was held binding only to the extent of the alienor's share, would be to leave no option to the Court but to convert every suit for setting aside an alienation into a suit for general partition. Would it be equitable to enforce a general partition in a suit to set aside an alienation when the property alienated bears an insignificant proportion to the property owned by the family? It is neither reasonable nor expedient that a suit to set aside an alienation of a certain item of property should be converted into a suit for general partition at the instance of a vendee who bought the property knowing perfectly well his vendor was not exclusively entitled to the property and that even in a general partition, that property might not be allotted to his share.

We therefore hold that a suit by the vendee would not be barred by the decree in the suit of a co-parcener to have his share of the alienated property partitioned between him and the alienee.

The proper course for the alienee would be, as pointed out by us in 45 Mad., 449, when the alienation of a particular item of property is challenged by a member of the joint Hindu family, to bring a suit for general partition so that the suit might be tried along with the suit for setting aside the alienation and if the alienee is able to show that the alienation is binding on the whole family then he succeeds in both the suits and if the alienation is not binding on the plaintiff's share but is only binding on the alienor's share, then in the suit for general partition brought by him the Court would be in a position to consider whether the property alienated to him should be allotted to the alienor's share or not.

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If both the suits are tried together, there would not be any difficulty at all, and in this case in order to obviate any possible plea of *res judicata* which might be raised on the strength of the decision in 49 M.L.J., 679, we would pass a decree as was done in *Hanmandas Ramdayal* v. *Valabhadas* (1). In that case a minor brought a suit against his father and decree-holders as well as auction-purchasers for a declaration that the plaintiff's half share in the two properties sold did not pass to the auction-purchasers and for possession of his half share on equitable partition. He obtained a declaration that his share was not bound. It was held that his interests did not pass to the purchasers at the Court-sale. The learned Judges upheld the decree of the lower Court and stayed the execution of the decree for three months directing that if during that period of three months the present appellant filed a suit for partition against the plaintiff the stay of the present decree should last until the disposal of the appellant's suit for partition but if such a suit for partition be not brought within three months allowed then this appeal to be dismissed with costs. We think such a direction should be given in this case.

We therefore dismiss the Letters Patent Appeal with costs and direct that the execution of the decree in plaintiff's favour be stayed for three months and if before the expiry of that period the appellant brings a general suit for partition then the stay would continue till the disposal of the suit for partition but if no such suit for partition is brought then the stay of execution will stand cancelled.

K.R.

(1) (1919) I.L.R., 43 Bom., 17.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

1926, April 21.

G. P. SATYANARAYANAMURTI (AGENT TO THE RAJAH OF MANDASA, PETITIONER), COMPLAINANT,

v.

PILLA RAMAYYA (RESPONDENT), ACCUSED.*

Estates Land Act (I of 1908), sec. 212 (b)—"Distraint duly made"—Distraint—Essence of—When complete.

The essence of a distraint is the act of taking out of the possession of the real owner and such act is not completed until the taking out of the possession of the real owner is complete.

Where cattle seized for arrears of rent under the Estates Land Act were still in the owner's pen and the person distraining was proceeding to drive them out of the pen, and the owner prevented him from so doing, held, that the distraint was not complete, and that such interference constituted resistance to a distraint duly made within the meaning of section 212 (*b*) of the said Act.

Narayana Reddi v. *Dyvadeenachar*, (1925) I.L.R., 48 Mad., 505, distinguished.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the Hight Court to revise the judgment of the Court of the Joint Magistrate of Berhampur in Criminal Appeal No. 97 of 1925 preferred against the judgment of the Court of the Second-class Magistrate of Sompeta in Calendar Case No. 83 of 1925.

K. Bashyam for the petitioner.

M. V. Narayana Rao for the respondent.

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

* Criminal Revision Case No. 688 of 1926.

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JUDGMENT.

The chief point in this case is whether the accused resisted "a distraint duly made" under Act I of 1908. The facts are that the agent of petitioner seized certain cattle said to belong to accused, for arrears of rent, and was proceeding to drive them out of accused's pen, when accused interfered and prevented him from doing so. Petitioner contends that this was resistance to a distraint. I am inclined to agree. No doubt a learned Judge of this Court held in *Narayana Reddi* v. *Dyvadeenachar*(1) that cattle are not "produce" within the meaning of section 212 (*b*), but the offence regarding produce is forcibly or clandestinely removing it *after* it has been duly distrained. In the present case my view is that the distraint was not complete when accused interfered and therefore it is not a case on all fours with *Narayana Reddi* v. *Dyvadeenachar*(1). The essence of a distraint, I take it, is the act of taking out of the possession of the real owner, and such act will not be completed, until the taking out of the possession of the real owner is complete. Here the cattle were still in accused's pen when accused resisted, and I would hold therefore that the act of taking them out of his possession had not been completed when he resisted the taking and that therefore he was "resisting a distraint" within the meaning of section 212 (*b*). Accused urges that even so it has not been proved that the distraint was legal since the power-of-attorney of prosecution first witness has not been produced. Prosecution first witness swore that he had a registered power-of-attorney to distrain and this statement has never been challenged by accused until now and I cannot uphold the contention.

(1) (1925) I.L.R., 48 Mad., 505.

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The next point is the contention that the cattle were not the accused's because he is divided from his father. The first Court found that unproved. The Lower Appellate Court did not consider it, and it is not worth while sending the case back for a finding on that point.

With this expression of opinion on the main point of law I dismiss the petition.

B.C.S.

APPELLATE CIVIL.

Before Mr. Justice Odgers.

DAVID CUTINHA (PLAINTIFF), APPELLANT,

v.

SALVADORA MINAZES AND 11 OTHERS (DEFENDANTS 1, 2, 4 TO 13), RESPONDENTS.*

1926, August 25.

Landlord and tenant—Lease—Restraint upon alienation of leasehold interest—Alienation of a portion, no breach of restraint.

Unless there is a restriction against the alienation of any portion of the demised property, a restraint upon alienation of the demised premises does not prevent the alienation of a portion; *Chatterton* v. *Terrell*, [1923] A.C., 578, followed.

SECOND APPEAL against the decree of K. S. MENON, District Judge of South Kanara, in Appeal No. 239 of 1922, preferred against the decree of T. S. RAJA RAO, Principal District Munsif of Mangalore, in Original Suit No. 110 of 1920.

The facts are given in the judgment.

J. A. Pinto for appellant.

B. Sitarama Rao for respondent.

* Second Appeal No. 1701 of 1923.

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JUDGMENT.

This is a case which has taken some time to argue as it involves the question of forfeiture of a mulgeni lease. The lease is contained in a decree (Exhibit A of the 30th August 1910). It sets out—

"If there is necessity to alienate the said mulgeni right and the right of improvements, the same should be surrendered to plaintiff only, on receiving from him the value of improvements fixed by four wise men, and it should not be alienated to any other person by means of mortgage, sale, gift, etc., in any manner whatever. If the plaintiff refuses in writing to take the property on paying the value of improvements in that manner, the defendants may alienate the same to other persons. If in contravention to this, the defendants alienate their right, the said alienation and also the mulgeni right should be cancelled and the property should come under plaintiff's possession."

The alienations complained of consist of the grant of a mulgeni lease by some of the tenants and also the grant of a simple mortgage, Exhibit J. Both the lower Courts have held that none of these matters falls within the clause restrioting alienation. The tenants, i.e., the persons in possession at the present moment, seem to be descendants of the original lessees and their alienees. Mr. Pinto for the appellant has strenuously argued that these lessees are entitled by arrangement among themselves to some kind of definite shares in the leased lands. The plaint, it is true, does allege, and in fact was obliged to allege that the defendants have alienated portions of the leased property. The plaintiff also alleges that by arrangement among themselves defendants 4 to 6 are in possession of a particular portion of the leased property. But he is careful to add that the said arrangement does not bind him. There is some allegation in the written statement that the rent was paid in shares. But in one of the written statements it is admitted that the mulgar is entitled to receive rent in one lump sum. This theory seems to have been started

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for the first time in this Court and there seems to be no evidence and no finding in either of the lower Courts that the mulgar ever recognized this division or partition, or whatever it may be called, among these Indian Catholics.

A distinction has been attempted to be applied by Mr. Pinto in considering cases which I shall shortly notice. It is an axiom of the law that a forfeiture clause should be very strictly construed. As long ago as *Church* v. *Brown*(1), Lord Chancellor (ELDON) said:—

"these covenants having been always construed by Courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation."

It is admitted and indeed found by the lower appellate Court that these alienations have been not only of portions of the leased property, but even adopting what I may call the partition theory, extend only to a portion of the defendants' share. That I think at once distinguishes the case from the well-known case of *Varley* v. *Coppard*(2), which was a case of assignment to a partner and the case of *Langton* v. *Henson*(3), which is a similar case of assignment between partners. There is ample authority in the English law and in fact in the law here too to show that unless there is a restriction against the assignment of any portion of the demised property, the restraint on the alienation of the demised premises will not prevent the alienation of a portion. I am not impressed with the reasoning of the learned District Judge as to the grant of a mulgeni lease not being an alienation. It clearly is an alienation. But I think that the respondents must succeed on the ground that the restriction on alienation of a portion of the demised premises is not

(1) (1808) 15 Ves. J., 259 at 265; 33 E.R., 752.
(2) (1872) 7 C.P., 505
(3) (1905) 92 L.T., 805.

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contained in the words of the lease which I have set out above. It is perhaps not necessary to multiply examples, but there are some cases which have been cited and which lend support to the contention for the respondent; for instance in *Grove* v. *Portal*(1), JOYCE, J., quotes the passage already cited from *Church* v. *Brown*(2) and says that the dictum of the lower Court has never been disapproved of; and again in *Russell* v. *Beecham*(3), SCRUTTON, L.J., says quoting Lord ELDON again that,

"a covenant not to part with possession of premises would not restrain the tenant from parting with a part of the premises, these covenants having been always construed by Courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation."

In *Chatterton* v. *Terrell*(4), Lord WRENBURY says—

"It is said and said with truth, that if there be a covenant not to assign or underlet the premises, it is not a breach to assign or sub-let part of the premises. It was not so stipulated, if those be the words, for the words 'or any part thereof' are not found in the covenant."

See also *Venkataramana Bhatta* v. *Krishna Bhatta*(5). The covenant here, I think, does not restrain the alienation of a portion or portions of the property. In that view the decree of the lower appellate Court was right.

This Second Appeal must be dismissed with costs.

N.R.

(1) [1902] 1 Ch. 727.
(2) (1808) 15 Ves. J., 259 at 265; 33 E.R., 752.
(3) [1924] I.K.B. 525, 536. (4) [1923] A.C., 578 at 585.
(5) (1924) 47 M.L.J., 307.

SPECIAL BENCH.

Before Sir Murray Coutts Trotter, Mr. Justice Krishnan and Mr. Justice Beasley.

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

1926, January 12.

v.

MOTHAY GANGA RAJU AND OTHERS (ASSESSEES).*

Income-tax Act (XI of 1922), sec. 66 (2)—Combined application by four assessees before Commissioner to state a case—Competency of—applicants, separately assessed—Separate application and separate fees, whether necessary—Combined application, whether can be regarded as valid on behalf of one of the applicants—Time for making the application, whether can be extended by the Commissioner.

Where four persons, who were members of an undivided Hindu family, but subsequently became divided and were separately assessed to income-tax, applied to the Commissioner in one combined application on a single fee of one hundred rupees, to have a case stated to the High Court under section 66 (2) of the Income-tax Act (XI of 1922), and the applicants did not pay the additional fees or elect to have the application confined to one of them within time, as suggested by the Commissioner,

Held, (1) that it was not competent for four separately assessed persons to combine their applications in one document for a case to be stated by the Commissioner under section 66 (2) of the Act; that even assuming that they may, as, for instance, where the points to be raised are similar, their cases must be separately stated as they were separately assessed, and they must pay a separate fee of one hundred rupees for each assessment under the Act;

(2) that there was no proper application before the Commissioner for his taking action in the case of one of the applicants as the Commissioner had offered to do that and his offer was not accepted; and

* Referred Case No. 9 of 1925.

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(3) that the Commissioner has no power under the Act to extend the time limited for making an application under section 66 (2) of the Act.

CASE stated under section 66 (2) of Act XI of 1922 by the Commissioner of Income-tax, Madras, in his letter No. 394 of 1924, dated 26th March 1925.

The following questions were stated by the Commissioner for the decision of the High Court:—

I. Whether four separate applications and deposits are necessary in this case for requiring the Commissioner to take action under section 66 (2) of the Act.

II. If the answer to the question (1) is in the affirmative, whether there was no proper application before the Commissioner for his taking action in the case of one of the applicants.

III. Whether there is any question of extending the period in this case and whether the Commissioner has no discretion in the matter.

IV. Whether section 34 of the Act covers a case where the Assessing Officer and the Commissioner in appeal held, after full investigation, that a certain income was not taxable in the hands of a particular individual but was to be included in the taxable income of a partnership of which he was a partner and it was subsequently held in proceedings relating to the partnership (to which the original assessee was not a party) that the partnership was not taxable on this amount and whether such assessment does not amount to an indirect review of the Commissioner's original proceedings not warranted by the Act.

V. Where, after dissolution of partnership, interest on the capital of the business up to date of dissolution was paid to retiring partners by another partner who took over the business, whether the partner who took over the business is not taxable on the amount of such interest under note 5 (*b*) (III) of the rule 19 printed at page 54 of the Manual and section 26 of the Act, and whether the fact that the payment could not be made till after dissolution makes it any the less a payment to a partner.

VI. Whether it is permissible to review considered proceedings of the Commissioner on the strength of other proceedings to which the original assessee was not a party.

VII. Whether the ruling of the Commissioner, that the share of profits of a joint concern transferred to an individual at

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partition would not be income in his hands, does not govern the present case and whether the circumstances adverted to in paragraph 4 of the proceedings, assuming them to be correct, would render the said ruling inapplicable.

T. Ramachandra Rao for the First Assessee.

M. Patanjali Sastri for the Referring Officer.

JUDGMENT.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—On the direction of the learned Judge several separate questions have been framed for our determination. In our opinion the answers to the first three dispose of the whole matter and preclude us from going into the others. The first question is whether four applications are necessary in this case for taking action under section 66 (2) of the Act. That is the section which says that the Income-tax Commissioner is to state a case when a proper application is made accompanied by the proper fee—which is Rs. 100 as matters stand. These applicants were four persons. They had once been an undivided family and, had they remained so, different considerations might arise, but they had in fact become separated and they were separately assessed. Nevertheless an attempt was made to have a case stated regarding them all on a single fee of Rs. 100. That, of course, was an impossible attitude to take up and as they were divided the result was that it was an application by four people each of whom, as my learned brother put it, can be deemed to have paid one-fourth of the prescribed fee. I have no sympathy with the applicants because they were expressly told, or their vakil was expressly told, the position by a letter from Mr. Strathie, the Commissioner, dated 13th February 1924. He points out,—

"Only one sum of Rs. 100 is deposited. There were however separate assessments and four appellate orders. Under section 66 (2) each assessee must put in a separate application

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and each must deposit the prescribed fee of Rs. 100. I cannot therefore act on the present application."

Then he goes on,—

"If you wish me to deal with all the cases, will you please send four separate applications and an additional Rs. 300. If, however, you are willing that only one case should be dealt with and if you tell me with which case you wish me to proceed, I shall treat the Rs. 100 as having been received from that individual."

Nothing could be more reasonable than that and the assessees' vakil could have put the whole matter right by accepting one of those two alternatives. Instead of that the vakil sends an answer saying that, as all the questions were common to the four applicants, a reference in one will necessarily cover the case of all. Then he says he writes to his client. He must have known time was passing and in the result the time had elapsed before he communicated with his client and ascertained his decision as to which of the two alternatives he would accept. Thereupon Mr. Strathie wrote the letter of the 19th February in which he says that the time is gone for his reply, that the reply was in every case evasive (as indeed it was) and he declined to take any further action in the matter. Thereupon, penitent too late, the vakil writes a letter at once requesting that the Rs. 100 sent with the application should be treated as deposited on behalf of M. Narasimha Rao and that a reference may be made in his case leaving the other people over. That is the position and our answer to the question must be that the application as originally sent was defective and that the fee that accompanied even if the application was in order was insufficient. It is not competent for four separately assessed persons to combine their applications for a case stated of this sort in one document. But, even assuming that they may be, as for instance where the

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points to be raised were the same, it is obvious that, as they were separately assessed, their cases must be separately stated and they must pay a separate fee of Rs. 100 for each separate assessment under the Act.

Then the next question is if the answer to question (i) is in the affirmative, as it has now been answered in the affirmative, whether there was no proper application before the Commissioner for his taking action in the case of one of the applicants. The answer is, No. He had offered to do that and his offer was not accepted.

The third question is whether there was any power to extend the period in this case or whether the Commissioner had no discretion in the matter. The answer is that the Statute fixes a time and it would be an obviously undesirable burden on the Income-tax Commissioner to put upon him the consideration of questions as to whether he should exercise discretion in the direction of leniency in one case and not in another. The Statute is express and there is no provision in it for any official or even for the Court to extend the time. Therefore, as our answers to the first three questions are what I have outlined, the remaining questions which, I suppose, raise the merits, we are unable to deal with. Rs. 150 will be allowed for costs of Government.

KRISHNAN, J.

KRISHNAN, J.—I agree.

BEASLEY, J.

BEASLEY, J.—I agree.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Odgers.

1926, December 6.

P. M. A. M. VELLAIYAPPA CHETTY AND OTHERS (DEFENDANTS), APPELLANTS

v.

NATARAJAN AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Hindu Law—Maintenance—Illegitimate son, right of—Right of illegitimate daughter to maintenance—Right to maintenance, whether a charge on joint family property of putative father in the hands of his coparceners—For what period, if at all, right to maintenance extends.

Among Nattukottai Chetties, who have been held to be Sudras, illegitimate sons, born of a woman kept as a continuous and exclusive concubine, are entitled to maintenance for their life, out of the joint family property of their putative father in the hands of his coparceners.

The fact that the woman kept is a dancing girl is immaterial.

Subramania Aiyar v. *Rathnavelu Chetty*, (1918) I.L.R., 41 Mad., 44 (F.B.), and *Ananthaya* v. *Vishnu*, (1894) I.L.R., 17 Mad., 160, relied on.

An illegitimate daughter is not entitled to maintenance out of the joint family property of their putative father in the hands of his coparceners.

There is no basis in the Hindu Law for the view that the father is bound to maintain his illegitimate daughter, nor is she a member of the family of her putative father's coparceners, so as to be entitled to a charge for maintenance on the joint family property.

Parvati v. *Ganpatrao Balal*, (1894) I.L.R., 18 Bom., 177, referred to.

APPEAL from the judgment and decree of KUMARASWAMI SASTRI, J., passed in the exercise of the Ordinary

* Original Side Appeal No. 42 of 1925.

Original Civil jurisdiction of the High Court in Civil Suit No. 615 of 1919.

The suit was instituted by the three plaintiffs, who were minors, the first two plaintiffs claiming to be the illegitimate sons and the third plaintiff the illegitimate daughter, of the first defendant, one Muthia Chetty. The suit was instituted by the mother of the plaintiffs as their next friend. Originally it was against Muthia Chetty only. He died during the pendency of the suit after filing his written statement in which he denied *inter alia* that the plaintiffs were his children; on his death, the defendants 2 to 5, who were his undivided uncles and uncles' sons, were brought on the record. The latter adopted the written statement of the deceased and also contended that the deceased first defendant was a member of a joint undivided Hindu family possessed of considerable joint family property, that the first defendant was not possessed of any separate property, that on his death all the joint family property vested in them by survivorship and that the plaintiffs were not entitled to any relief against the surviving coparceners. The learned Trial Judge (KUMARASWAMI SASTRI, J.) granted a decree awarding maintenance of rupees one hundred per mensem for their life in favour of the first two plaintiffs who were the illegitimate sons, and a maintenance of Rs. 50 per mensem for the illegitimate daughter (third plaintiff) till she attained majority. The defendants preferred this appeal.

A. Krishnaswami Ayyar (with *S. Rangaswamy Ayyangar*) for appellants.—The illegitimate sons are not entitled to maintenance as against the undivided coparceners of their putative father. There is no text for it. Chapter I, section 12 of the Mitakshara, which deals with the rights of an illegitimate son, is exhaustive of his rights. He is declared entitled only to inherit in certain contingencies; no right to maintenance is given in any

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contingency to an illegitimate son among the Sudras. The analogy of persons, who are disqualified or excluded from inheritance and therefore declared entitled to maintenance, is not applicable to illegitimate sons, as in the former case the texts specially so provide. The decision in *Subramania Mudaly* v. *Valu*(1) is erroneous. The case of *Ananthaya* v. *Vishnu*(2) is one of an illegitimate son among the regenerate classes, and maintenance was claimed against the joint family property in the hands of his legitimate brother; the text specially grants maintenance to an illegitimate son among the regenerate classes. In the other decisions dealing with this question, there is no discussion of the point. Illegitimate sons are not members of the family of the putative father, and their rights cannot be extended; see *Ayiswaryanandaji Saheb* v. *Sivaji Raja Saheb*(3).

In any event illegitimate sons cannot have greater rights than a legitimate son as regards maintenance; therefore an *adult* illegitimate son cannot have maintenance in any event, any more than an adult legitimate son.

An illegitimate daughter is not entitled to maintenance. There is no text for it. There is no text recognizing a right of inheritance by her in any contingency. She is not a member of the putative father's family. See *Parvati* v. *Ganpatrao Balal*(4). In *Bhikya* v. *Babu*(5), it was held that an illegitimate daughter has no right to inherit to her putative father.

K. S. Krishnaswami Ayyangar for respondents.—An illegitimate son is a member of the family and he is entitled to maintenance, if not to a share, even though the connexion was adulterous or incestuous. See *Subramania Mudaly* v. *Valu*(1) and *Kuppa* v. *Singaravelu*(6).

Whatever may be an illegitimate son's right to inherit, if he proves his paternity to the putative father, the former is entitled to maintenance. As a person excluded from inheritance, he is entitled to maintenance. See Mitakshara, Chapter I, section XII, placita 21 to 31. Daughter-in-law and sister-in-law are entitled to maintenance, Mitakshara, Chapter II, section I, placita 27 and 28. See Sarcar's Hindu Law, page 304. A concubine is a member of the family and she is entitled to

(1) (1911) I.L.R., 34 Mad., 68.
(2) (1894) I.L.R., 17 Mad., 160.
(3) (1926) I.L.R., 49 Mad., 116 at 136.
(4) (1894) I.L.R., 18 Bom., 177.
(5) (1908) I.L.R., 32 Bom., 562.
(6) (1885) I.L.R., 8 Mad., 325.

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maintenance, as a joshit. If discarded she has no right to maintenance, but her son is still entitled. An illegitimate daughter is entitled to maintenance. The case in *Ghana Kanta Mohanta* v. *Gerali*(1) is a case of an illegitimate daughter. See West and Buhler's Hindu Law, page 408, where an illegitimate daughter is stated to be entitled to maintenance. In *Parvati* v. *Ganpatrao*(2) the point as to maintenance is obiter. The decision in *Jogendro Bhupati Hurrochandra Mahapatra* v. *Nityanand Man Sing*(3) shows that an illegitimate son is a member of the family and can succeed by right of survivorship to other members. See also *Ramalinga Muppan* v. *Pavadai Goundan*(4).

Illegitimate son is entitled to maintenance against collaterals: see *Gopalasami Chetti* v. *Arunachellam Chetti*(5) and *Panchapagesa Odayar* v. *Kanaka Ammal*(6). The case of *Rama Rao* v. *Rajah of Pittapur*(7) does not deal with illegitimate sons; the case of *Nagubai Munglorkar* v. *Bai Monghibai*(8) is not exhaustive as to persons entitled to maintenance.

Members of a family fall into two classes. See Sarcar's Hindu Law, pages 297 and 304. Like illegitimate son and concubine, an illegitimate daughter is entitled to maintenance.

A. Krishnaswami Ayyar in reply.—The Privy Council has held that an illegitimate son's son has no right to maintenance; see *Roshan Singh* v. *Balwant Singh*(9). The illegitimate son or daughter is only a member of the family of himself or herself and the putative father and his legitimate sons. They are not members of a family with the putative father's collaterals. If it is a personal right against putative father, it ceases with minority as against the father or his collaterals in any case.

JUDGMENT.

KRISHNAN, J.

KRISHNAN, J.—This is an appeal in a suit by certain minor plaintiffs represented by their mother Chinnammal as their next friend for maintenance against the first defendant in the first instance. The learned Judge on

(1) (1905) I.L.R., 32 Calc., 479.
(2) (1894) I.L.R., 18 Bom., 177.
(3) (1891) I.L.R., 18 Calc., 151 at 156 (P.C.).
(4) (1902) I.L.R., 25 Mad., 519.
(5) (1904) I.L.R., 27 Mad., 32.
(6) (1917) 33 M.L.J., 455.
(7) (1918) I.L.R., 41 Mad., 778 at 784 (P.C.).
(8) (1926) 51 M.L.J., 577 (P.C.).
(9) (1910) I.L.R., 22 All., 191 (P.C.).

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the Original Side has given a decree to the plaintiffs at the rate of Rs. 100 a month for each of the two boys, the first two plaintiffs, for their lifetime, and Rs. 50 a month to the girl, the third plaintiff, till she attains the age of 18. The appeal is against this decree by defendants 2 to 5.

The plaintiffs' case is that they are the sons of the first defendant by their mother Chinnammal, who was a continuously and exclusively kept concubine of the first defendant, Muthiah Chetty, and that as Sudras they are entitled to at least a right of maintenance against their putative father. Muthiah Chetty died after filing the written statement in which he denied that these plaintiffs were his children. He also denied that Chinnammal was a continuously and exclusively kept concubine of his, though he admitted that he used to visit her occasionally as a dancing girl, Chinnammal being a member of the dancing girl caste. Defendants 2 to 5 were brought on record as his legal representatives, they being the coparceners in the joint family to which Muthiah Chetty belonged. The real question now is whether the plaintiffs can claim any maintenance against the joint family property in the hands of the defendants, assuming that they were the sons of Muthiah Chetty.

The issues framed in the case are set out on the 5th page of the printed book, part I, and are as follows :—

(1) Was Chinnammal kept continuously or exclusively by the defendant as a concubine?

(2) Are the plaintiffs the children of the defendant by such continuous concubinage?

(3) Is the defendant bound to pay any maintenance to the plaintiffs and is the said maintenance a charge on the family property as alleged in the plaint?

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(4) Is the defendant a Vysia, and if so, are plaintiffs entitled to maintenance beyond the period of their majority?

(5) What maintenance, if any, are the plaintiffs entitled to? No alteration was made in the form of these issues on account of the defendants 2 to 5 coming on record.

Now, the main question of fact tried in the case is the first issue. On that the learned trial Judge after taking the evidence and discussing it very fully in his judgment has come to a decided conclusion that Chinnammal was kept continuously and exclusively by the first defendant as his concubine from 1904 or 1905 to about 1919.

[The learned Judge then dealt with the evidence and proceeded as follows:—]

I have no doubt on a consideration of the whole evidence in this case that the plaintiff's version that Chinnammal was a continuously and exclusively kept concubine of the first defendant Muthiah Chetty is true and would therefore confirm the finding of the learned Judge on that point.

On this finding the question that arises for decision is what relief, if any, can be given to the plaintiffs in this case. So far as the two boys are concerned, namely, the first two plaintiffs, there does not seem to be much difficulty in the law that has to be applied. In the Mitakshara there is an express text which deals with illegitimate children of Sudras. That Nattukottai Chetties are Sudras has been settled by authority. In section XII, Chapter I, there is a text which says:

"Even a son begotten by a Sudra on a female slave may take a share by the father's choice. But, if the father be dead, the brothers should make him partaker of the moiety of a share, and one, who has no brothers, may inherit the whole property, in default of daughter's sons."

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(See Setlur's translation of Books on Inheritance, page 35.) As a commentary on this it is stated that,

"the son begotten by a man of a regenerate class on a female slave does not obtain a share even by the father's choice, nor the whole estate after the death. But, if he be docile, he receives only maintenance."

This is the text upon which the right of the illegitimate children among Sudras has been based. The present case is not one in which any share can be asked for and it is therefore that maintenance only is asked for by the two boys. The text does not expressly deal with maintenance of Sudras, it is true, but the authorities are quite clear that where the illegitimate son cannot ask for a share he is entitled to get maintenance from his putative father's joint family estate even in the hands of his coparceners.

It has now been settled that the children to get a share need not be the children of a dasi strictly speaking, but may be of any concubine provided that the concubine is a continuously and exclusively kept concubine and the children are not born in either adulterous or incestuous connexion. The fact that the woman kept is a dasi or slave or a dancing girl is immaterial. The children would take the right of illegitimate children under the text, that is, where they claim a share in the property of their father, but where they merely claim maintenance, even this does not seem necessary; it is sufficient to show that they are the children of their putative father. It is recognized by a Bench of this Court in *Subramania Mudaly* v. *Valu*(1), that where an illegitimate son is claiming maintenance only out of the estate of his putative father, it did not matter whether he was the result of adulterous intercourse or not. In the present

(1) (1911) I.L.R., 34 Mad., 68.

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case it is not necessary to go so far, for we have here evidence that Chinnammal was a continuously kept concubine of Muthiah Chetty. As pointed out by Sir JOHN WALLIS, C.J., in the Full Bench ruling in *Soundarajan* v. *Arunachlam Chetty*(1) (see page 151):

"The limitation as to her being an exclusive and continuous concubine is not to be found in the texts and appears to have been imposed by the Courts as necessary to secure due evidence of the paternity, just as the further restriction that the connexion must not have been incestuous or adulterous was imposed on general grounds of morality."

As I have already stated, we have here clear evidence to show that the children were born to Chinnammal who was kept in exclusive and continuous concubinage by Muthiah Chetty and there can be no doubt whatever about the paternity and the rights of the boys under the text of Mitakshara already cited. In *Ananthaya* v. *Vishnu*(2), it was held that under the Mitakshara Law an illegitimate son is entitled to maintenance as long as he lives, in recognition of his status as a member of his father's family for life, and the question is not one of giving maintenance during the minority of the illegitimate son or anything of that sort, but the giving of maintenance is really in lieu of his rights in his father's estate. The case in *Ananthaya* v. *Vishnu*(2) is a case of the regenerate class and the commentary on the text in the Mitakshara expressly applies to it; nevertheless the further question as to what is the period for which the maintenance should be given is the same whether it is a case of the regenerate class or of a Sudra son. In the case of a Sudra son, the position seems to be that, because he could not be given a share that the text allows him to get in certain circumstances, he is given in lieu thereof a right to

(1) (1916) I.L.R., 39 Mad., 136 (F.B.). (2) (1894) I.L.R., 17 Mad., 160.

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maintenance against his father's estate, very much in the same manner as a widow gets a right to maintenance against her husband's estate when he dies undivided from his coparceners. There again the maintenance is given not for any particular period but for the whole lifetime. It has been conceded by Mr. Alladi Krishnaswami Ayyar that the authorities have invariably laid down that the illegitimate son of a Sudra is entitled to maintenance if he is not entitled to get a share in his father's property and that it is too late for him now to argue that no maintenance could be given; but he tried to argue that the maintenance could not be enforced against the joint family property in the hands of the father's coparceners. It seems to me that this argument is untenable, as the maintenance will be a charge upon that estate for so long as the illegitimate children are alive. The whole law on the subject has been considered rather fully in the Full Bench decision *Subramania Ayyar* v. *Rathnavelu Chetty*(1). There again it is recognized that the illegitimate sons have a right to get maintenance if they do not get their share. In these circumstances, it seems to me that the decree so far as it gives maintenance to the sons for their life is correct.

As to the question of the claim for maintenance by the illegitimate daughter, the third plaintiff, it seems to me that there is some difficulty in the matter. The learned trial Judge has given her also maintenance on the ground, so far as I can make out, that she is a member of the joint family. The learned Judge says that the father being bound to maintain his illegitimate daughter, the coparceners who take his property by survivorship are equally bound to do so. It seems to

(1) (1918) I.L.R., 41 Mad., 44 (F.B.).

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me that there is no legal basis in Hindu Law for the view that the father is bound to maintain his illegitimate daughter; he is under no more than a personal obligation to do so under the Criminal Procedure Code. An illegitimate daughter gets no kind of right against her father's property so far as I can make out. There is no text in her favour, the Mitakshara being expressly confined to sons. The learned advocate for the respondent tried to put it on the ground that joint family property is burdened with the liability to maintain all the members of the joint family and consequently that an illegitimate daughter being a member of the joint family, the liability is on the joint family property to maintain her. The very fact that the learned Judge has found it necessary to restrict the maintenance up to the age of eighteen indicates that, whatever her right of maintenance may be, it is very different from those of the sons. It seems to me that whether the child is legitimate or illegitimate, it has got a personal right of maintenance against its father only during its minority, when it is unable to look after itself, and that the right under the Hindu Law to get maintenance out of the father's estate in lieu of a share in it is a different right. It is not possible to postulate that the illegitimate daughter of a person is a member of the joint family to which he belongs. In fact it cannot be said even as regards illegitimate sons that they are members of the joint family, for no rights exist between the illegitimate sons and the collaterals or coparceners of the father in the joint family. They cannot be treated as relations of one another and they are not entitled to share and cannot ask for a partition as against the coparceners, and except for the bare right of maintenance charged on the joint family property of their father, the illegitimate sons have no right against the other coparceners.

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The cases cited to us have all been cases of illegitimate sons and not of illegitimate daughters, except one or two cases which I shall refer to presently. One is the case in *Parvati* v. *Ganpatrao Balal*(1), where SARGENT, C.J., says :—

"Unless, therefore, the expression '*dasiputra*' can be held to include 'daughter,' there is no authority for a daughter having a claim to maintenance. It was said that a 'son' is to be construed as including a daughter, as 'brothers' was interpreted as including 'sisters' by Nanda Pandita. But that mode of interpretation has been much controverted, as may be seen by the discussion of the authorities in the judgment in *Vinayak Anandrar* v. *Lakshmibai*(2), which was decided upon the authority of the Mayukha. Moreover, the right of illegitimate children to be maintained by the family is clearly an exceptional one as shown by the language of the text; and as the right to maintenance is laid down in terms in favour only of illegitimate sons, the proper inference, from the absence of any express provision for daughters is, we think, that they were not contemplated as having the same right."

If it was contemplated by the text in the Mitakshara that, besides the illegitimate sons, illegitimate daughters also should get sons' right of maintenance, such right would certainly have been extended by the commentator to regenerate classes as well. But it does not seem that under the text any right passes to the daughter for maintenance. This view of the Bombay Court was supported and followed again in *Bhikya* v. *Babu*(3), where it was held that an illegitimate daughter could not succeed to her father's property in preference to the son of a divided brother among Sudras. The learned Judges declined to construe the word "sons" occurring in the text so as to include daughters. With all respect it seems to me that this is the correct view. They even held that the illegitimate daughter had no right of succession at all. It would follow from this

(1) (1894) I.L.R., 18 Bom., 177 at 183.
(2) (1861) 1 Bom. H.C.R., 117. (3) (1908) I.L.R., 32 Bom., 562.

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that she had no right of maintenance either which is something given in lieu of the right of succession.

The learned advocate for the respondent tried to put the claim of the illegitimate daughter to maintenance on the ground that she was a member of the family as stated already. It seems to me impossible to support that view. No authority has been cited in support of it, nor indeed for the position that he is taking up that the illegitimate daughter has got any right to maintenance at all. I have therefore come to the conclusion, though with considerable reluctance, that the third plaintiff cannot be given any right to maintenance, she being only an illegitimate daughter of Muthiah Chetty. Before concluding this case I may mention that, though an issue was raised as to whether Nattukottai Chetties were Vaisyas or not, it has been conceded that they are Sudras. The matter has been settled by authority in this Court.

The last question that has been argued is as to the amount of maintenance which has been granted to the sons. It is urged by the learned vakil for the appellants that Rs. 100 a month for each boy is excessive and out of proportion to the property of the father. The learned trial Judge has discussed this question and, no evidence having been given against the circumstances mentioned by him in his judgment, it is not clear how we can interfere with the amount that has been fixed by the learned Judge. If the defendants really meant to contest the point, they ought to have adduced proper evidence as to what the income of Muthiah Chetty was and what the value of his share of the family property was. This they have not done. In these circumstances I think that it would not be right to interfere with the award of Rs. 100 for each of the boys. I have already stated that in my view the illegitimate daughter is not

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entitled to any relief in this suit. In the result, I would modify the decree of the lower Court and dismiss the suit of the third plaintiff and confirm the decree that has been given to the first and second plaintiffs. The defendants will pay the costs of the plaintiffs 1 and 2 in this appeal, but as between the third plaintiff and themselves they will each bear their own costs.

ODGERS, J.

ODGERS, J.—This is an appeal from the decree of Mr. Justice KUMARASWAMI SASTRI sitting on the Original Side whereby he allowed a sum of Rs. 100 a month for each of the first and second plaintiffs during their lifetime and Rs. 50 a month for the third plaintiff till she attains the age of eighteen. The suit was brought by the mother of these minor plaintiffs against the defendant claiming that she was the exclusive and continuously kept concubine of the defendant. The first point that has been urged before us is that the continuous and exclusive intercourse between the mother of the plaintiffs and the first defendant alleged to have existed from 1904 to 1919 was not proved. [The learned Judge dealt with the evidence and concluded that the attempt to show that the plaintiffs' mother was not the continuous and exclusively kept concubine of the first defendant, failed and then proceeded as follows] :—

Then arises an interesting question of law, for, it is said, to begin with, that the illegitimate sons, though they may be entitled to maintenance from their putative father personally, have no right as against the property of the joint family of which their father was a member at the time of his death. This argument is now raised owing to the fact that the defendant is now dead and the allowance given to the male plaintiffs has been charged on property of the family of which the deceased was a member. Texts referring to this matter are extremely meagre and they are contained in the

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Mitakshara, Chapter 1, section XII, placita 1 to 3. There it is said that

> "a son begotten by a Sudra on a female slave may take a share by the father's choice. But if the father be dead, the brethren should make him partake of the moiety of a share; and one who has no brothers may inherit the whole property in default of daughter's sons."

The law developed from the texts seems to be perfectly clear. In *Krishnayyan* v. *Muttusami*(1), a continuous concubine was held to be a dasi within the meaning of the Mitakshara and an illegitimate son cannot take the interest of his father or succeed as collateral heirs, as there is no sapinda relationship as it is founded on a legal marriage. In *Ranoji* v. *Kandoji*(2), the texts are all examined and an illegitimate son is held not entitled to a share of joint family property at partition but he is entitled to maintenance. In *Parvathi* v. *Thirumalai*(3), an illegitimate son of a Sudra is always entitled to maintenance as a member of his father's family by reason of his sonship even though he may be the son by a married woman. Yagnavalkya's text applies to a separated householder. In *Ananthaya* v. *Vishnu*(4), the case of a Brahman, an illegitimate son was held entitled to maintenance for life in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance among the regenerate classes. The maintenance may be secured on the family property. In *Annayyan* v. *Chinnan*(5), the rule is regarded as well established in Madras that an illegitimate son of a Sudra by an unmarried Sudra woman is entitled to a share of the family property if the concubinage was continuous and if the connexion was not incestuous or adulterous or in violation of or

(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) (1894) I.L.R., 17 Mad., 160.
(5) (1910) I.L.R., 33 Mad., 366.

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forbidden by law. This rule was confirmed by the Full Bench in *Soundarajan* v. *Arunachalam Chetty*(1). There are other authorities in Madras as for instance, *Kuppa* v. *Singaravelu*(2), *Gopalasami Chetti* v. *Arunachellam Chetti*(3), *Subramania Mudaly* v. *Valu*(4), and *Muttuswamy Jagavera Yettappa Naiker* v. *Vencataswara Yettaya*(5). Therefore it seems to me it is well established in Madras that though an illegitimate son may be entitled to a share of the family property if there are no collaterals he is at least entitled to maintenance for life such as he has been awarded here. The learned Judge sitting on the Original Side was therefore, in my opinion, quite right in awarding such maintenance and nothing has been shown to us to induce me to think that the rate of maintenance is excessive. The latest case appears to be *Panchapagesa Odayar* v. *Kanaka Ammal*(6), where it was held that the illegitimate son of a permanently kept concubine is entitled to maintenance against the co-parcenary property of the family of which the father is a member.

Turning to the daughter, third plaintiff, more difficulty exists. From what has been said it is clear that the "right of a son by a female slave in the case of a Sudra's estate," which is the heading of the section of the Mitakshara, is an altogether exceptional provision, and it is at least doubtful whether one ought to assume that the same provision would have appeared to the ancient sages fit to be made for an illegitimate daughter in the same way. An argument has been addressed to us by the learned counsel for the respondent, if one may say so, in general terms, based on the fact that even an illegitimate daughter may be regarded as a member of

(1) (1916) I.L.R., 39 Mad., 136 (F.B.).
(2) (1885) I.L.R., 8 Mad., 325.
(3) (1904) I.L.R., 27 Mad., 32.
(4) (1911) I.L.R., 34 Mad., 68
(5) (1868) 12 M.I. A., 203.
(6) (1917) 33 M.L.J., 455.

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the family and on the duty of a father to provide for his infant children. In *Parvati* v. *Ganpatrao Balal*(1), SARGENT, C.J., uses the following words which, I think, are exceedingly useful in coming to a decision on a question of the present nature (page 183):

"Unless therefore the expression '*dasi putra*' can be held to include 'daughter,' there is no authority for a daughter having a claim to maintenance. It was said that a 'son' is to be construed as including a daughter as 'brethren' was interpreted as including 'sisters' by Nanda Pandita. But that mode of interpretation has been much controverted, as may be seen by the discussion of the authorities in the judgment in the *Vinayak Anandrar* v. *Lakshmibai*(2), which was decided upon the authority of the Mayukha. Moreover the right of illegitimate children to be maintained by the family is clearly an exceptional one as shown by the language of the text; and as the right to maintenance is laid down, in terms, in favour only of illegitimate sons, the proper inference from the absence of any express provision for daughters is, we think, that they were not contemplated as having the same right."

In *Ghana Kanta Mohanta* v. *Gereli*(3), the real point that was decided was that the order of the Magistrate under the Criminal Procedure Code was no bar to a civil suit for maintenance. The learned Judges said that under the Hindu Law the father of an illegitimate child is bound to provide for its maintenance. Whether the "child" was a daughter or not it does not appear. Further in *Bhikya* v. *Babu*(4), a case of inheritance, it was held that the language of the texts and their context prohibits the idea that illegitimate daughters were intended to be included as heirs. Even illegitimate sons in order to inherit were expressly mentioned and among Sudras illegitimate daughters cannot succeed to their father's property in preference to the son of a divided brother of the father. One is therefore

(1) (1894) I.L.R., 18 Bom., 177.
(2) (1861) 1 Bom. H.C.R., 117.
(3) (1905) I.L.R., 32 Calc., 479.
(4) (1908) I.L.R., 32 Bom., 562.

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driven with some reluctance to decide that as the right of an illegitimate child under Hindu Law depends on the special text and that his recognition is of a somewhat exceptional nature, the illegitimate daughter was not so recognized and there is no authority or justification for holding that she must stand in the same position as an illegitimate son. There is no case that has been cited to us where an illegitimate daughter has been held entitled to maintenance from the joint family property of which the father was a member. I do not think we shall be justified on the general ground that the father should provide for his infant children or by some generality of language that an illegitimate daughter is a member of the family in grafting a further exception in Hindu Law in her favour. I, therefore, think that that part of the learned Judge's decree must be varied and that the illegitimate daughter, third plaintiff, must be declared not entitled to any allowance from the estate of the deceased father. As to the amount of the boy's maintenance, I agree that we cannot now go into this. I agree with the order proposed by my learned brother.

A. E. Rencontre, Attorney for respondents.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Venkatasubba Rao.

1926, November 12

KUPPUSAMY AYYANGAR AND OTHERS (DEFENDANTS 1, 2 AND 11), APPELLANTS,

v.

BAVASWAMI RAO AND OTHERS (PLAINTIFFS AND DEFENDANTS 3 TO 10, 12 AND 13), RESPONDENTS.*

Civil Procedure Code (XIV of 1882), *ss.* 458 *and* 459—*New Code,* 1908, *O. XXXII, r.* 11—*Guardian* ad litem—*Refusal to act as such, whether amounts to automatic removal—Order of Court, whether necessary—Execution proceedings—Notice served on guardian after refusal to accept but without removal by Court—Sale held, whether void for want of representation of minor in execution proceedings.*

The guardian *ad litem* of a minor duly appointed by the Court in a suit, by his declining to act as such, does not automatically cease to be the guardian, without an order of Court removing him from guardianship under sections 458 and 459 of the old Code, 1882, and the minor is consequently not unrepresented in the proceedings in the suit.

Where therefore a guardian *ad litem* appointed in a suit, declined to accept service of notice for the minor in the execution proceedings in the suit, but the Court did not remove him from guardianship and notice was again served on him as such,

Held, that a sale held in execution was not void on the ground that the minor was not legally represented in the proceedings.

C.M.As. Nos. 188 and 224 of 1920 and *Narendra Singh* v. *Chatrapal Singh,* (1926) 94 I.C., 340, referred to.

Krishna Pershad Singh v. *Moti Chand,* (1913) I.L.R., 40 Calc., 635 (P.C.), distinguished.

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* Appeal No. 435 of 1922.

KUPPUSAMY AYYANGAR v. BAVASWAMI RAO.

APPEAL against the decree of C. V. VISWANATHA SASTRI, District Judge of East Tanjore at Negapatam, in O.S. No. 4 of 1922.

The material facts appear from the judgment.

T. Ranga Achariyar (with *V. N. Venkatavarada Ayyangar*) for appellants.—The finding of the lower Court on the question of fraud should not be accepted. There was no issue regarding fraud and the defendants were not called on to meet any issue of fraud. Mere suspicion of fraud is not proof of fraud when the defendants were not called on to meet such a case in the absence of an issue therefor.

The sale is not void on the ground that there was no representation of the minor in execution proceedings. Mere refusal of the guardian to act as such does not amount to a discontinuance of his office. The Court must pass an order removing him. It is so both under section 458 of the old Code (Act XIV of 1882) as well as under the new Code of 1908, Order XXXII, rule 11. Unless so removed, the minor is represented by the guardian on record. Removal by Court is necessary: see C.M.As. Nos. 188 and 224 of 1920 (per SPENCER and RAMESAM, JJ.), *Narendra Singh* v. *Chatrapal Singh*(1), *Venkata Chandrasekara Raz* v. *Alakarajamba Maharani*(2) and *Shambhu* v. *Kanhaya*(3). The decision in *Krishna Pershad Singh* v. *Moti Chand*(4) shows that want of representation of a minor by a guardian in execution proceedings is only material irregularity and is matter for an application under section 311, Civil Procedure Code (old Code). It is not a case of illegality making the sale void.

Sales are invalid, either void or voidable as against minors, in three classes of cases:—

(1) Where in a suit itself a decree is passed against a minor without being represented by a guardian or represented by a person who cannot in law be appointed a guardian. The sale held in execution is void in all proceedings.

(2) Where a decree is proper but in execution after the sole judgment-debtor dies, a minor is not joined as legal representative with a proper guardian; here also sale is void.

(1) (1926) 94 I.C., 340. (2) (1899) I.L.R., 22 Mad., 187.
(3) (1922) I.L.R., 44 All., 619.
(4) (1913) I.L.R., 40 Calc., 635 (P.C.).

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(3) Where there are several judgment-debtors and one of them dies, and some of the legal representatives only are brought on the record, the sale is not void but only voidable. The present case falls under the last class. Section 47, Civil Procedure Code, bars the suit, if the sale is void or voidable. If the sale is voidable, it should be avoided under section 47 or Order XXI, rule 90; if it is an illegality that vitiates the sale, section 47 will equally apply; in either case a suit is barred.

Order XXI, rule 22, requiring notice to legal representatives does not apply to this case because (1) all the three judgment-debtors were parties to the suit; (2) because proviso to rule 22 makes it unnecessary to give notice to legal representative, if notice had already been given to him; "same person" does not mean the same person in the same character. The plaintiff here is not even a legal representative of the deceased grandfather, as the plaintiff's father and uncle were alive. The sale is binding on the minor as he was represented in execution proceedings by his father.

The decree against the manager of a joint Hindu family is binding on the minors, even though the minors were parties to the suit but were not properly represented: see *Ganpat Lal* v. *Bindbasini Prashad Narayan Singh*(1). Though a karnavan is joined with anandravans in a suit, the former represents the latter; see *Vesu* v. *Kannamma*(2), *Ganapathy Mudaliar* v. *Krishnama Chariar*(3) and *Payidanna* v. *Lakshminarasamma*(4) are cases where a legal representative was not effectively brought on record.

Where some of the legal representatives are already on record you need not bring them once again as legal representatives; see *Narendra Singh* v. *Chatrapal Singh*(5).

The plaintiff's remedy was only to redeem in the prior mortgage suit. Being a decree under the Transfer of Property Act, it was a final decree for sale and should be executed; see *Mallikarjunadu Setti* v. *Lingamurti Pantulu*(6), *Ellarayyan* v. *Nagaswami Ayyar*(7). The plaintiff should seek his remedy in execution in that suit and a separate suit is not maintainable.

(1) (1920) I.L.R., 47 Calc., 924 (P.C.). (2) (1926) 51 M.L.J., 282.
(3) (1918) I.L.R., 41 Mad., 403 (P.C.). (4) (1915) I.L.R., 38 Mad., 1076.
(5) (1926) 94 I.C., 340. (6) (1902) I.L.R., 25 Mad., 244 (F.B.).
(7) (1926) I.L.R., 49 Mad., 691.

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T. R. Ramachandra Ayyar (with *A. V. Viswanatha Sastri*) for respondent (plaintiff).—The minor is dropped out of the second notice; he was not made a party and served with notice. (1) If, in a suit, a minor is not represented by a guardian, the decree, etc., are void. (2) If even in execution proceedings a minor is not represented by a guardian, it is still void. The guardian having refused to act, the minor is no party at all. The decision of the Privy Council in *Krishna Pershad Singh* v. *Moti Chand*(1) does not mean that an application under section 311, Civil Procedure Code, was the only remedy. This decision is an answer to all those cases holding that removal of the guardian by Court is necessary under Order XXXII, rule 11, Civil Procedure Code. After the refusal by the guardian to act, there is no representation of the minor. See *Jangi* v. *Mt. Sundar*(2) and *Fatima Begum* v. *Hasan Khan*(3). In a money decree, a guardian appointed in the suit does not continue after decree, for purposes of execution. See *Salaluddin* v. *Afzal Begum*(4). The sale is void, if the minor is not represented in execution proceedings. See *Khairajmal* v. *Daim*(5) and *Raghunath Das* v. *Sundar Das Khetri*(6).

In *Raghunathaswami Iyengar* v. *Gopal Rao*(7), where the legal representative of a puisne mortgagee was not brought on record after proclamation and before sale, it was held that the sale was void and that a suit lies to set it aside. In *Rajagopala Aiyar* v. *Ramanuja Chariyar*(8), it was held that if there was no service of notice in execution proceedings, sale is void even though there were other judgment-debtors and need not be set aside by an application.

T. Rangachariar in reply.—There are two essentials to apply section 47, Civil Procedure Code, viz., (1) Question should relate to execution, etc., (2) Between parties to the suit. *Rajagopala Ayyar* v. *Ramanuja Chariar*(8). Of course if the decree itself is attached, a suit may lie.

The decision of the Privy Council in *Raghunatha Das* v. *Sundar Das Khetri*(6) does not apply here, as the Official

(1) (1913) I.L.R., 40 Calc., 635 (P.C.).
(2) (1922) All. I.R., 416.
(3) (1922) I.L.R., 3 Lah., 417.
(4) (1924) 39 C.L.J., 590.
(5) (1905) I.L.R., 32 Calc., 296 at 312 and 314 (P.C.).
(6) (1915) I.L.R., 42 Calc., 72 (P.C.).
(7) (1921) 41 M.L.J., 547.
(8) (1924) I.L.R., 47 Mad., 288 (F.B.).

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Assignee is not the legal representative of the insolvent judgment-debtor in a money decree.

An application under section 47, Civil Procedure Code, should have been made even if the sale were deemed to be void. The sale is not void but is only voidable and has to be set aside. There is no plea that notice was not issued to guardian on record but the only charge is that no fresh guardian was appointed on plaintiff's application or Court's own motion. The guardianship continues even after decree. See *Venkata Chandrasekhara Raz* v. *Alakarajamba Maharani*(1), C.M.A. 108 of 1920 and Order XXXII, rule 3.

The case in 39 C.L.J., 340, is wrongly decided and is contrary to *Venkatachandrasekhara Raz* v. *Alakarajamba Maharani*(1). *Ganpat Lal* v. *Bindbasini Prashad Narayan Singh*(2) is a direct authority on this point.

JUDGMENT.

VENKATASUBBA RAO, J.

VENKATASUBBA RAO, J.—The decree of the lower Court directs that the suit lands shall be partitioned into four equal shares and one of them shall be allotted and delivered to the plaintiff. The decree also gives the latter mesne profits. The first, second and eleventh defendants have filed this appeal.

The facts relevant for determining the points that arise in the appeal lie within a very narrow compass. I find it however necessary and useful, on account of the judgment of the lower Court and the arguments advanced, to refer to and state the facts of the case fully.

One Govindappa had two sons, defendants 12 and 13. The plaintiff is the son of the twelfth defendant. These formed members of a joint Hindu family and owned valuable land of the extent of about 340 acres. They

(1) (1899) I.L.R., 22 Mad., 187.
(2) (1920) I.L.R., 47 Calc., 924 (P.C.).

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executed a simple mortgage (Exhibit B of 19th February 1898) in favour of defendants 1 and 2 and one Ramanathan Chetti, the deceased father of the fourth defendant, for securing repayment of Rs. 60,000. Previous to this mortgage a lease had been executed in favour of the eighth defendant for a period of five years (Exhibit A, 28th April 1897). On 31st July 1899, Annamalai Chetti, the agent of Ramanathan Chetti aforesaid, obtained a transfer of the lessors' interest in the lease (Exhibit C). On 4th May 1900 Ramanathan Chetti and the first defendant obtained an assignment of the lessee's (eighth defendant) interest (Exhibit F). The effect of these two assignments was to enable two of the mortgagees, the first defendant and Ramanathan Chetti, to get possession of the properties mortgaged to them by way of simple mortgage. I may mention in this connexion that the second defendant is a High Court Vakil and that the first defendant is his clerk. The next step taken by the mortgagees was to file a suit on 24th September 1900 in the Negapatam Sub-Court (Original Suit No. 38 of 1900) for the recovery of the amount due under Exhibit B. It is sufficient to say that on 19th June 1901 a decree was passed in this suit. Alongside of these events there was another set of transactions that I must now refer to. On 24th August 1898 Govindappa and one of his sons, the thirteenth defendant, executed in favour of Ramanathan Chetti and two others a promissory note for Rs. 200. A suit was filed (Small Cause Suit No. 2632 of 1899 in the Kumbakōnam Sub-Court) and a decree was obtained by the payees under the note against Govindappa, his sons, defendants 12 and 13, and his grandson, the present plaintiff. The decree is Exhibit D, dated 11th December 1899. It is worthy of note that the present second defendant acted as the vakil for the plaintiffs in that suit. The present

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plaintiff being then a minor, an officer of the Court was appointed as his guardian *ad litem* in the suit (Exhibit D-1). The decree-holders got the decree transferred for execution on 25th January 1900 to the District Munsif's Court, Tiruvalur, then attached the judgment-debtors' equity of redemption in 33 items (suit items) out of 34 items mortgaged under Exhibit B, brought the said equity of redemption to sale and in the Court auction it was purchased by the ninth defendant, another clerk of the vakil, the second defendant, for Rs. 287-12-0. The date of this sale is 9th July 1901. It is admitted that the ninth defendant obtained this sale *benami* for defendants 1 and 2.

It is these transactions that took place between 1899 and 1901 that are now impeached by the plaintiff. The suit though filed in 1916 has been held to be in time as the plaintiff had only recently attained majority. The lower Court set aside the sale of the 9th July 1901 on the ground *inter alia* that it is vitiated by fraud. I gather that the learned Judge means that there was fraud on the part of the first and second defendants and Ramanathan Chetti. From my narrative, two facts emerge. Although the mortgage was a simple mortgage, two of the mortgagees contrived to get possession by taking an assignment of the lease from the eighth defendant. Next, without executing the mortgage decree, by an ingenious device the mortgagees not only got the equity of redemption sold but two of them became the purchasers of that equity. To complete my sketch, I must mention that on 29th March 1902 Ramanathan Chetti assigned his interest in the mortgage decree to defendants 1 and 2, the vakil and his clerk (Exhibit K). The result of these various complicated transactions is, that by 1902 the second defendant and his clerk managed to get practically an

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absolute title to the suit properties and also obtained physical possession. It would have been a straightforward course to execute the mortgage decree, but this was not done. The second defendant had recourse to every indirect method to get title to and obtain possession of the property. He was the vakil that appeared for the plaintiffs in the suit on the promissory note. The benami purchase by the ninth defendant is again very suspicious. It cannot be denied that the conduct of the second defendant has a very ugly look. There are other suspicious circumstances to which the plaintiff has referred us. There were several execution applications to execute the Small Cause decree and it was in pursuance of an order made on the last of them that the property was sold. In one of the prior applications, the decree-holders applied for leave to bid stating that they were prepared to purchase the property for Rs. 100. The District Munsif made an order to the effect that as the property was at least worth Rs. 24,000 leave to bid on the terms proposed could not be granted. This happened on the 7th of April 1900. Subsequently, the property was put to auction, and the highest bid was that of a thousand rupees. This was more than sufficient to pay off the decree amount but the decree-holders requested the Court to stop the sale and it was accordingly stopped. Having contrived to get the sale stopped on that occasion, they got the property sold again and it was at that sale that the ninth defendant purchased it benami for defendants 1 and 2 for Rs. 280 odd. The last execution application (the one which resulted in the sale is dated 18th March 1901) and in that the decree-holders made a false statement that on the previous occasion there was no bid made for the property at the sale. They thus concealed from the Court the fact that there had been a bid of a thousand

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rupees for the property. The plaintiff suggests that the second defendant planned and carried out this fraud, sometimes keeping himself in the background. When in another connexion this matter came up before the High Court, SPENCER, J., referred to the act of the purchasers as a "trick played on the Court" and was of the opinion that the mortgagors were "cheated." In the judgment of the lower Court the learned Judge has characterized the conduct of the second defendant in strong terms and recorded a finding that he was a party to a fraud. I agree that it is impossible not to suspect fraud on the part of the first and second defendants, but the difficulty is that there was no issue regarding fraud and the defendants were not asked to meet any such issue. No application was made for amending the issues or raising a new issue. When the learned Judge was dealing with a mass of material which showed that the conduct of the second defendant was not above board, he overlooked the fact that he was not called on to try a case of fraud and unwittingly gave a finding that the sale was vitiated by the fraud of the first and second defendants. This finding, therefore, cannot be supported.

The facts that have a bearing on the real point to be decided in this appeal, I shall now proceed to state. When the decree-holders applied (as I have said) on 18th March 1901 for sale of the property, the executing Court made the following Order :—

"For sale of attached properties. Notice to 15th April."

Notice was taken out, but none of the defendants was served. The Court guardian of the present plaintiff (the third defendant in that suit) *declined to accept service.* The grounds of his refusal were, that he was an officer of the Kumbakōnam Court, that he was appointed guardian only for the suit and as execution

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was proceeding in a different Court another guardian should be appointed in his place for the minor. The return of the process-server and the endorsement of the Nazir are dated 15th April 1901. When the matter was taken up on that date by the Court, it passed the following Order :—

"Not served. Fresh notice to 30th instant."

We must take it that the words "not served" were intended to refer to all the defendants and that fresh notice was directed to be taken out as against all of them including the minor third defendant (the present plaintiff). It is difficult to say how the Court disposed of the objection of the Court guardian. From what appears on the record, it passed no orders in that respect with the result that the same person continued to remain on the record as the minor's guardian. When in the face of the process-server's endorsement the Court directed fresh notice to the minor defendant, it means and implies that the Court did not feel called upon to remove the guardian on the record and appoint another in his stead. This view receives support from the fact that in subsequent proceedings the minor is described as being represented by the same court-guardian. (See Exhibits II, II-A and 4.) For the plaintiff it is contended that subsequent to 15th April 1901 the proceedings were bad, because he was not represented on the record at all. It is urged that when the guardian *ad litem* declines to act, he automatically ceases to hold the office of guardian and from that moment the minor must be treated as unrepresented. In my opinion, this is the only contention that can be urged in the appeal having regard to the pleadings and the issues. Before dealing with this point, however, I must refer to another contention that has been raised. On the 30th of April the Court made the following

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order :—"Served. Absent. Proclaim and sell. Sale 8th July." It is urged that the minor's guardian was not served at all and that the note of the Judge "served" is a mistake. Parts of the record were produced at the trial and they show that the adult defendants were served. There was no paper forthcoming to show that the minor was served. We are asked to infer from these facts that the Court's attention was not directed to the existence of the minor and that when it made a note "served," it had in mind only the major defendants. It seems to me that this is not a question raised in the suit and that we cannot properly go into it. The plaintiff's allegations in the plaint in this respect are—

(1) the Court guardian declined to act in the execution proceedings ;

(2) that thereupon the Tiruvālūr Munsif's Court ordered the appointment of a fresh guardian ;

(3) the decree-holders, however, wilfully omitted to get a fresh guardian appointed ;

(4) irrespective of any order of the Court it was the duty of the decree-holders to have the minor properly represented on the record ;

(5) omission in that respect renders the sale null and void.

(See paragraph 3 (*p*) of the plaint.)

The complaint thus is that no steps were taken to get a fresh guardian appointed. It is not suggested that notice was not properly served on the guardian on the record. The defect pleaded being want of a fresh appointment, the allegation implies that the proceedings were not defective in regard to the service of the guardian on the record. The issue framed accordingly reads thus :—

"Whether there has been no representation, at least no proper representation of the minor in the execution proceedings

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in S.C. No. 2632 of 1899 in the Tiruvālūr District Munsif's Court?"

This issue relates to representation only and raised no point regarding service of the notice. There is a presumption in favour of the regularity of the proceedings of a Court, but the plaintiff asks us to say that the Court made a wrong note that the parties were served when one of them was not and we are asked to say this, after the lapse of about twenty years from the date of the order. It is unsafe to surmise or speculate in a matter like this. When the defendants had no notice that they were to meet such a case the Court would not be justified in recording a finding in the absence of an averment and in the absence of an issue. In this case there can be no possible excuse for the plaintiff asking us to read more into his plaint than is actually alleged in it; for, when he applied to sue in *forma pauperis*, the High Court by its judgment, dated 14th October 1919, directed him to amend his plaint in such a manner as to make his allegations clear on the basis of which he contended that the sale did not affect his interest. The plaint, as I have shown, does not contain any allegation that the sale is bad on account of non-service of notice on his guardian on the record.

Having thus disposed of matters which, in my opinion, are irrelevant in this appeal, I shall now deal with the question of law raised, namely, whether when a guardian *ad litem* refuses to act, he by force of his own refusal ceases to be the guardian and the minor thereafter is unrepresented in the proceedings.

The provisions of law applicable are sections 458 and 459 of the Civil Procedure Code, 1882. They provide that if a guardian of a minor defendant fails to do his duty or if other sufficient cause is made to appear, the Court may remove him and if he is removed, the Court shall appoint a new guardian in his place. These

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sections do not give any countenance to the idea that a guardian duly appointed, by his declining to act as such, automatically ceases to be a guardian. The provision in the present Code is even more explicit. Order XXXII, rule 11, reads thus:—

"Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit."

The only difference between the two provisions is this, that whereas the old Code does not expressly refer to the case of a guardian desiring to retire, the present Code contains an express provision in that respect. It says that if he desires to retire, the Court may permit him to do so. If the plaintiff's argument is correct, it is unnecessary for the Court to remove a guardian, whereas section 459 contemplates such removal. If a mere statement of a guardian that he declines to act results in an automatic removal, what is the effect of the section which says that the Court may remove him? Is the plaintiff in a case to judge for himself whether a guardian properly appointed has ceased to be such? Taking section 458 it may with equal reason be contended that when a guardian fails to do his duty, in that case also, by force of his own default he ceases to be a guardian. Is a plaintiff in an action to decide in each case at his peril, whether on the facts and in law, a guardian does or does not continue to act? This falls within the functions of the Court and is not left to be decided by one of the parties to the action.

In C.M.As. Nos. 188 and 224 of 1920, SPENCER and RAMESAM, JJ., took the same view. They observe:

"The third defendant's guardian applied under Order XXXII, rule 11 of the Civil Procedure Code, to retire on the ground that the minor had attained majority, but his discharge

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was not complete until the permission of the Court, which is part of the procedure prescribed by rule 11, was given. The sale was closed on the 4th of August 1919 and on the same day the Court passed an order, on the guardian's application, refusing to permit him to retire. The result was that he continued to represent the third defendant and the execution proceedings were not affected by any irregularity in the representation of the parties."

In *Narendra Singh* v. *Chatrapal Singh*(1), a Bench of the Allahabad High Court was of the same opinion. The learned Judges in that case held that a guardian *ad litem* does not cease to be a guardian merely because he expresses a desire to retire from his office and that it is open to the Court to permit, or to refuse to permit, him to retire.

In the present case, the Court guardian stated thus:

"As I was appointed guardian of the minor during the trial of the suit as an officer of this Court and as the decree has been sent to that Court for execution where proceedings are now being taken, I beg that another guardian may be appointed for the minor."

This is a mere suggestion to the Court and there is nothing in it to show that if the Court did not permit him to retire he would decline to act. It is not unlikely that the Court thought that the reason given was not a sufficient reason to permit the guardian to retire. There is thus absolutely no justification for holding that after the 15th April 1901 the plaintiff must be treated as having been unrepresented in the proceedings.

Krishna Pershad Singh v. *Moti Chand*(2), relied on by the plaintiff's learned vakil, is clearly distinguishable. In that case, it was held that the mother of the infant was competent to make an application on his behalf to set aside a sale when a Court guardian duly appointed who was on the record, refused to continue to act in that

(1) (1926) 94 I.C., 340. (2) (1913) I.L.R., 40 Calc., 635 (P.C.).

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capacity. It is one thing to say that when the minor's interests are not being safeguarded, somebody other than the guardian on the record can take steps to protect those interests; but it is quite a different thing to hold that an order of Court made in the presence of a guardian not duly removed is invalid and of no effect, merely on the ground that the guardian had previously intimated that he was unwilling to act. This objection of the plaintiff therefore fails.

I may in conclusion say a word regarding the ground of fraud taken by the lower Court. The learned Judge is of the opinion that fraud was brought home to the first and second defendants and the sale is therefore invalid; but it must be borne in mind that the second defendant had, prior to the suit, parted with his interest in favour of a third party and that interest is now vested in the eleventh defendant. It is hardly proper to penalize the eleventh defendant for the fraud of the second defendant without giving the former a chance to meet a case of fraud.

In the result, the appeal is allowed and the suit is dismissed.

As regards costs, I do not think, in the circumstances, that I can allow the first and second defendants any costs. The order of the lower Court directing the first and second defendants to pay the plaintiff his costs of the suit is not disturbed. The suit is dismissed with costs throughout of the eleventh defendant (third appellant). Under Order XXXIII, rule 11, I direct that the plaintiff shall pay the Court fees payable to the Government on the plaint.

KRISHNAN, J.

KRISHNAN, J.—I agree.

The Memorandum of Objection is dismissed, but without costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Reilly.

1926. November 25.

THE SOUTH INDIAN INDUSTRIALS, LIMITED (PLAINTIFFS), APPELLANTS,

v.

MOTHEY NARASIMHA RAO (THIRD DEFENDANT), RESPONDENT.*

Indian Limitation Act (IX of 1908), sec. 22—Civil Procedure Code (Act V of 1908), O. I, r. 10 (5)—Application by plaintiff to add party as defendant—Order granting application—Review—Application dismissed—Revision—Order by High Court adding party—Date from which suit deemed to have been instituted against the added party.

Where an application made by the plaintiff in the original Court to add a person as a defendant in a pending suit was originally granted but subsequently on review dismissed by that Court, and, on a revision petition filed against the last order, the High Court ordered that the party be added as a defendant to the suit without prejudice to any defence of limitation being raised by him in the trial of the suit,

Held, that the order of the High Court adding the party as a defendant, should, for purposes of limitation, be deemed to have taken effect, not merely on the date when it should have been made by the lower Court if it had taken a correct view of the position, but on the date when the plaintiff's application was presented to the trial Court; and that the suit was not barred.

Ramakrishna Moreshwar v. *Bamabai*, (1893) I.L.R., 17 Bom., 29, followed. *Haveli Shah* v. *Khan Sahib Shaikh Painda Khan*, (1926) M.W.N., 592 (P.C.), distinguished.

APPEAL against the decree of T. SUNDARAM AYYAR, Additional Subordinate Judge of Vizagapatam, in Original Suit No. 52 of 1922.

* Appeal No. I of 1926.

The suit was instituted on 3rd November 1922 against defendants 1 and 2, who were members of a firm and were partners, for damages for breach of contract entered into with the plaintiffs for the purchase of certain bales of gunnies, which were to be taken in four instalments, the last being on 1st April 1921. The first defendant was dead when the suit was instituted but the plaintiff was not then aware of it. The plaintiff filed a petition (I.A. No. 130 of 1923) on the 27th January 1923, to add his son as a party to the suit, not as a legal representative of the first defendant but as a necessary party to the suit to get the appropriate relief. The Subordinate Judge passed an order on 23rd February 1923, adding the respondent as the third defendant to the suit. A review petition was filed by the third defendant, and the same Subordinate Judge passed an order on 10th October 1923, setting aside the previous order and directing the re-hearing of the original petition (I.A. No. 130 of 1923); and on 26th April 1924, he passed his final order refusing to grant the petition and dismissing the application. Against this order a civil revision petition was filed in the High Court, and KUMARASWAMI SASTRI, J., who heard the petition, held that the respondent should be added as a party to the suit without prejudice to any defence being raised by him in the suit. The suit came on for trial on the question of limitation before the lower Court on 29th October 1925, and the then Subordinate Judge held that the suit was barred against the third defendant, holding that the suit could not be deemed to have been instituted against the third defendant, as summons in the suit was not even then served on him as required by Order I, rule 10 (5), Civil Procedure Code; he accordingly dismissed the suit against the respondent. The plaintiffs preferred this appeal.

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K. P. Raman Menon for appellants.—The suit as against the added party is not barred. Section 22, Limitation Act, governs this case. Order I, rule 10 (5), Civil Procedure Code, itself says that it is subject to the Limitation Act. The order adding the respondent as a defendant takes effect from the date of the application: see *Ramakrishna Moreshwar* v. *Bamabai*(1), *Subbaraya Iyer* v. *Vaithinatha Iyer*(2).

T. R. Ramachandra Ayyar and *T. Ramachandra Rao* for respondent.—The date on which the defendant is made a party to the suit is the date on which the order is made. Section 22 of the Limitation Act says that the suit shall be deemed to have been instituted "*when he was made a party.*" It is not the date of the application but the date of the order. The first order of the Subordinate Judge had been set aside on review.

The decision of the Privy Council in *Haveli Shah* v. *Khan Sahib Shaikh Painda Khan*(3), governs this case and is conclusive on the question. See also *Ammayya Pillai* v. *Narayana Chetti*(4).

K. P. Raman Menon in reply.—In the Privy Council case, there was neither revision application nor order of a superior Court; the order striking out the original defendants was final.

JUDGMENT.

REILLY, J.

REILLY, J.—The question is whether the suit was in time as against defendant 3, assuming, what has not yet been decided, that time ran from 1st April 1921. The plaint was presented against defendants 1 and 2 on 3rd November 1922. The plaintiffs presented their application I.A. No. 130 of 1923 to bring defendant 3 on record on 27th January 1923, and an order to that effect was made by the Subordinate Judge on 23rd February 1923. But on 10th October 1923 the Subordinate Judge granted a review, set his order of 23rd February 1923 aside and directed that the plaintiffs' application, I.A. No. 130 of 1923, should be re-heard. On 26th April 1924 he

(1) (1893) I.L.R., 17 Bom., 29.
(2) (1910) I.L.R., 33 Mad., 115.
(3) (1926) M.W.N., 592 (P.C.).
(4) (1925) 21 L.W., 125.

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dismissed that application. Against that dismissal the plaintiffs preferred C.R.P. No. 752 of 1924 to this Court, and on 12th March 1925 my learned brother found that the Subordinate Judge's dismissal of the plaintiffs' application was wrong and ordered that defendant 3 be added as a party to the suit. When the suit came on again for hearing before the Subordinate Judge on 29th October 1925 he found that, though defendant 3 had been added as a party by my learned brother, no summons had been served on him as a defendant in the suit and therefore under rule 10 (5) of Order I, Civil Procedure Code, proceedings in the suit had not yet begun against him. If that was the correct view, then the suit was already barred as against defendant 3, even assuming that time began to run not earlier than 1st April 1921. The Subordinate Judge, therefore, dismissed the suit as against defendant 3, and the present appeal is against that order.

2. It has not been seriously disputed before us that the reason given by the Subordinate Judge for his order now under appeal is untenable. It is clear that he has overlooked the opening words of rule 10 (5) of Order I, viz., "subject to the provisions of the Indian Limitation Act, 1877, section 22." Under that section the suit must be deemed to have been instituted against defendant 3 when he was made a party. Admittedly he was made a party to the suit by my learned brother's order of 12th March 1925. But it is contended for the plaintiffs that, though the order was made on that day, the effect of that order is that defendant 3 must be deemed to have been made a party at a much earlier date. It is clear in my opinion that the order of my learned brother on 12th March 1925 must be regarded as the order which the Subordinate Judge should have made when he finally disposed of the plaintiff's application,

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I.A. No. 130 of 1923, on 26th April 1924 and must be taken to have had effect at least from that date. But the plaintiffs go further and contend that the order relates back to a still earlier date, viz., the date of their application, I.A. No. 130 of 1923, that is 27th January 1923. Undoubtedly the effect of the Subordinate Judge's order granting a review was to make that application remain pending on his file from the date of its presentation to its final disposal on 26th April 1924. It was decided in *Ramakrishna Moreshwar* v. *Bamabai*(1) that, when a party is added on application, the addition must be deemed to have effect from the date of the application; and that principle appears to have been recognized *obiter* in *Subbaraya Iyer* v. *Vaithinatha Iyer*(2). It is true that in *Ammayya Pillai* v. *Narayana Chetti*(3) DEVADOSS, J., refused to adopt that principle in interpreting section 22 of the Limitation Act. In his judgment he mentioned 17 Bom., 29, but said that it had no application to the case with which he was dealing. Why it had no application is not clear from the report. If he meant that the principle of 17 Bom., 29, was wrong, then with the greatest respect I am unable to follow him. It appears to me to be obviously the right principle to adopt in the matter, as otherwise, though an application might be made in time, as in this case, by the dilatoriness of the Court or by the manœuvres of the opposite party or by a mistaken decision of the Court, which had to be put right on appeal or revision, the order to which the party applying was entitled might not be made until the suit had become time-barred, and it would be unreasonable to leave the party who had applied in good time at the mercy of such chances. It is contrary to one of the clear principles of the Law of

(1) (1893) I.L.R., 17 Bom., 29. (2) (1910) I.L.R., 33 Mad., 115.
(3) (1925) 21 L.W., 125.

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Limitation that a diligent party who has come to Court with his suit or his application within the period prescribed should be defeated because the Court for some reason cannot or does not give him his relief within that period. The heavy penalty for exceeding the arbitrary periods of limitation is to be counter-balanced by the assurance of safety when within them. The order made by my learned brother on 12th March 1925 must, I think, be deemed to have taken effect not merely on the date when it should have been made by the Subordinate Judge, if he had taken a correct view of the position, viz., 26th April 1921, but on the date when the Plaintiff's application was presented to him, viz., 27th January 1923.

3. But Mr. Ramachandra Ayyar for defendant 3 has referred us to a recent decision of the Privy Council, *Haveli Shah* v. *Khan Sahib Shaikh Painda Khan*(1), which he contends upsets all those calculations. That, as their Lordships found, was a suit for compensation due to the plaintiff on account of one Sundar Dass deceased having induced certain third parties to break a contract with the plaintiff and fell within article 27 of the Limitation Act. It was instituted in the Court of the District Judge of Quetta on 23rd November 1922 against Sundar Dass' two minor sons with their mother as guardian. Their Lordships found that the suit was time-barred as the breach of contract complained of had occurred more than a year before 23rd November 1922. But their Lordships went on in their judgment to find that there was another defect in the suit which was fatal to it, even if it fell under article 49 or article 115 of the Limitation Act and the period of limitation was therefore three years from the date of the cause of action,

(1) (1926) M.W.N., 592 (P.C.).

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which was in October 1920. On 12th June 1923 the Judicial Commissioner in Baluchistan ordered the names of the minor sons to be struck out as defendants and those of the administrators of Sundar Dass' estate to be added; and the plaint was amended in accordance with that order on 10th July 1923. There was some dispute whether the mother of the sons was the administratrix of the estate. On 21st June 1924, in the words of their Lordships,

> "As the result of consideration, the Judicial Commissioner at Quetta came to the conclusion that his own order of 12th June 1923 had been wrong and that the two sons should be restored to the record as defendants through their mother and guardian."

Their Lordships point out that the suit as against the sons was brought to an end by the Judicial Commissioner's order of 12th June 1923 and find that, when after the lapse of a year the names of the sons were restored as defendants on 21st June 1924, that was in effect the institution of a new suit against them, which by that date was unquestionably time-barred. Mr. Ramachandra Ayyar contends that following that decision of the Privy Council we must treat the present suit as having been dismissed against defendant 3 when the Subordinate Judge on 26th April 1924 finally refused to make him a party to it. But the present case may clearly be distinguished from the case before their Lordships. In the present case the order of the Subordinate Judge made on 26th April 1924 has lost its entire effect and became null, as it was wiped out by the order of my learned brother on revision substituting for it the order which the Subordinate Judge himself should have made. The order made on 12th June 1923 by the Judicial Commissioner on the other hand was never wiped out by any superior authority and in their Lordship's view stands good to the present day. Towards

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the end of their judgment their Lordships remark that "on 21st June 1924 the Judicial Commissioner reviewed this order and altered it." But it does not appear probable that they are there using the word "reviewed" in the technical sense of a review under the Code of Civil Procedure. It is clear that they regard the Judicial Commissioner's order of 21st June 1924 as something different from an order legally made on review under the Code. It is probable that there was no application for review, and none is mentioned. If there had been such an application it would almost certainly have been mentioned as by 21st June 1924 the time for a review had long passed, and it may be noticed that their Lordships say that the second order was made "only after the lapse of a year." And earlier in their judgment their Lordships, when they first refer to the order of 21st June 1924, instead of saying, as would be natural if that order was made in consequence of some application by the plaintiff under Order XLVII, Civil Procedure Code, that the Judicial Commissioner made the order on an application for review being granted, merely say that the Judicial Commissioner acted "as the result of consideration." It does not appear to me that this judgment of the Privy Council is of any help or guidance to us in the present case, in which an application to implead defendant 3 was made in ample time and remained pending until the Subordinate Judge made his incorrect order of 26th April 1924, for which the correct order was substituted by my learned brother on 12th March 1925.

4. In my opinion, assuming time to run in this suit from 1st April 1921 or any date not earlier than 27th January 1920—a question which has still to be determined—defendant 3 has been made a party in time. This appeal should therefore be allowed and the suit as

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against defendant 3 should proceed. The costs of this appeal and the costs already ordered in the lower Court will abide and be provided for in the Subordinate Judge's decree, the result of which they will follow. The Court fee on this appeal will be refunded to the plaintiffs.

KUMARASWAMI SASTRI, J.

KUMARASWAMI SASTRI, J.—I agree.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Madhavan Nayar.

1926, November 17.

PERIA KOIL KELVI APPAN GOVINDA RAMANUJA PEDDA JEEYANGARLAVARU (RESPONDENT IN C.M.P. No. 3375 OF 1926 ON THE FILE OF THE HIGH COURT), APPELLANT,

v.

KADAMBI DARMAPURI TIRUVENGADA KRISHNAMACHARLU AND 8 OTHERS (PETITIONERS IN C.M.P. No. 3375 OF 1926 ON THE FILE OF THE HIGH COURT), RESPONDENTS.*

Madras High Court Letters Patent, cl. (15)—Order of single Judge, staying execution of lower Court's decree, whether a "judgment" within cl. (15)—Appealability of—Party guilty of contempt by disobedience to decree, whether entitled to stay of execution.

An order of a single Judge of the Madras High Court staying execution of a decree or order of a lower Court, by suspending an injunction, pending an appeal to the High Court, is a "judgment" within clause (15) of the Letters Patent, and is hence appealable. The long series of decisions of the High

* Letters Patent Appeal No. 328 of 1926.

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Court to the above effect are not affected or overruled in effect by *Sevak Jeranchod Bhogilal* v. *The Dakore Temple Committee*, (1925) 49 M.L.J., 25 (P.C.).

APPEAL under clause (15) of the Letters Patent against the judgment, dated 7th October 1926, and passed by the Hon'ble Mr. Justice CURGENVEN in C.M.P. No. 3375 of 1926 in A.S. No. 119 of 1926 preferred to the High Court against the decree of the Court of the Subordinate Judge of Chittoor in O.S. No. 23 of 1919.

The plaintiff brought a suit (O.S. No. 23 of 1919) in the Sub-Court, Chittoor, (*a*) for a declaration that he was the *Ejman* or head of the *Goshti* or congregation of Sri Vaishnava Brahmans that assemble at the Tirumalai Tirupati temples for worship, and that the assembled members of the Goshti and worshippers should follow his lead in the matter of recitation of Prabandams, etc., (*b*) for an injunction restraining the Vadagalai Adyapakas, some of the defendants, from reciting the Vadagalai Ramanujadayapatram and (*c*) for compelling them to recite the Thengalai Sri Sailesa Dayapatram as directed by the plaintiff. The defendants consisted of Thengalai Acharyapurushars, Vadagalai and Thengalai Adyapakas and others.

The Subordinate Judge held that the plaintiff had made out his right to the headship of the congregation and restrained the Vadagalai Adyapakas by a perpetual injunction from reciting their own Vadagalai patram.

The Vadagalai Adyapaka defendants filed an appeal to the High Court (A.S. No. 119 of 1926). During the pendency of the suit, and even after the decree, the defendants ignoring the decree for injunction continued to recite their Vadagalai patram. The plaintiff thereupon took proceedings under section 144, Criminal Procedure Code, to prevent the defendants from continuing the

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breach of injunction. The local magistracy refused to interfere and the plaintiff thereupon applied to the Court which passed the decree, under Order XXI, rule 32, Civil Procedure Code, for committing the defendants for contempt of Court. Thereupon the defendants applied in C.M.P. No. 3375 of 1926 to the High Court for stay of execution of the decree pending their appeal, praying that the *status quo ante*, i.e., the recitation of the Vadagalai patram, be maintained.

His Lordship Mr. Justice CURGENVEN holding that the plaintiff had not been diligent but had slept over his rights under the decree granted stay of execution.

The above Letters Patent Appeal was filed by the plaintiff against the order granting stay of execution of the decree.

C. S. Venkatachariyar (with him *D. Ramaswami Ayyangar*) took a preliminary objection that no appeal lay, inasmuch as the order granting stay of execution of a decree was not a "judgment." "Judgment" in Letters Patent has been held to mean a "decree" by the recent Privy Council decision, *Sevak Jeranchod Bhogilal* v. *The Dakore Temple Committee*(1). Hence only such orders as have the force of decrees are appealable under the Letters Patent. An order staying execution is not such an order. *Sevak Jeranchod Bhogilal* v. *The Dakore Temple Committee*(1) must be deemed to have in effect overruled *Tuljaram Row* v. *Alagappa Chettiar*(2). See also *Tata Iron and Steel Company, Ltd.* v. *Chief Revenue Authority of Bombay*(3), *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Mallikarjuna Prasada Nayadu*(4), *Vairavan Chettiar* v. *Ramanathan Chettiar*(5).

(1) (1925) 49 M.L.J., 25 (P.C.). (2) (1912) I.L.R., 35 Mad., 1 (F.B.).
(3) (1923) I.L.R., 47 Bom., 724 (P.C.). (4) (1901) I.L.R., 24 Mad., 358.
(5) (1921) 14 L.W., 701.

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T. Ranga Achariyar (with him *V. N. Venkatavarada Achariyar* and *R. Gopala Achariyar*) contended that the Full Bench judgment in *Tuljaram Row* v. *Alagappa Chettiar*(1) concluded the question. It had been followed by several Full Bench decisions of this Court. See *Sreenivasa Ayyangar* v. *Ramaswami Chettiar*(2), *Kulasekara Naicker* v. *Jagadambal Ammal*(3). Sir ARNOLD WHITE, C.J., who was a party to *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Mallikarjuna Prasada Nayadu*(4) refused to regard it as good law in *Tuljaram Row* v. *Alagappa Chettiar*(1). The judgment in *Vairavan Chettiar* v. *Ramanathan Chettiar*(5) is not a considered judgment. The decision of the High Court in *Sonachalam Pillai* v. *Kumaravelu Chettiar*(6) is a well-considered judgment covering all the decisions on the subject. In L.P.A. No. 240 of 1925, the effect of *Sevak Jeranchod Bhogilal* v. *The Dakore Temple Committee*(7) has been considered and it was held that it did not alter the law as understood by prior decisions. Further, *Sevak Jeranchod Bhogilal* v. *The Dakore Temple Committee*(7) is not a decision on clause 15 of the Letters Patent but is one under clause 39. The observations were *obiter*. The fact that the authorities who issued the Letters Patent to the Lahore High Court in 1919 also use the term "judgment" in a clause analogous to clause 15, with the knowledge of the interpretation put upon that term by *Tuljaram Row* v. *Alagappa Chettiar*(1) and other decisions shows that this interpretation has been accepted by the authorities.

The preliminary objection being overruled, *T. Ranga Achariyar* argued on the merits that the burden of

(1) (1912) I.L.R., 35 Mad., 1 (F.B.). (2) (1916) I.L.R., 39 Mad., 235 (F.B.).
(3) (1919) I.L.R., 42 Mad., 352 (F.B.). (4) (1901) I.L.R., 24 Mad., 358
(5) (1921) 14 L.W., 701. (6) (1924) I.L.R., 47 Mad., 316.
(7) (1925) 49 M.L.J., 25 (P.C.).

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making out a case for stay was on the applicants; that they must satisfy the provision of Order XLI, rule 5, Civil Procedure Code, and that the defendants, judgment-debtors, were guilty of gross contempt of Court, in that they continued to disobey the decree of Court and were therefore disentitled to any discretionary relief; see *Raj Rajeswari Jiu* v. *Gati Krishna*(1).

C. S. Venkata Achariyar replied that the plaintiff had not been diligent about his rights, and had acquiesced in the defendants' disobedience.

JUDGMENT.

WALLACE, J.

WALLACE, J.—This appeal is against an order of CURGENVEN, J., in C.M.P. No. 3375 of 1926 in which the learned Judge directed stay of execution of a decree by suspending the injunction which had been decreed by the Subordinate Judge of Chittoor in O.S. No. 23 of 1919.

The respondent took a preliminary objection that no appeal lies, and we heard a good deal of argument on the matter into which I do not propose to go at length. It cannot be denied that the practice of this Court has been to allow a Letters Patent Appeal from an order of a single Judge of this Court in matters of stay of execution pending the disposal of an appeal in the Court.

Mr. Venkatachariyar, however, for the respondent, contended that the pronouncement of the Privy Council in *Sevak Jeranchod Bhogilal* v. *The Dakore Temple Committee*(2) implies that the practice of this Court is not justified in law. In that case the Judicial Committee remarked at the end of their judgment,

(1) (1924) 39 C.L.J., 217.
(2) (1925) 49 M.L.J., 25 (P.C.).

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referring to the Letters Patent of the High Court of Bombay, that the term "judgment" in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense. The point actually before them was the meaning of the word "judgment" in clause 39 of the Letters Patent of Bombay. But the remark is general and is not confined to section 39. As the language of the Letters Patent of Bombay is the same as that in Madras, the remark would equally apply to this Court.

It is essential, in order to understand the application and the necessity for the remark quoted above, to state the point at issue in that case. Under a temple scheme prescribed by the Privy Council decree, the temple committee was given power to frame rules subject to the sanction of the local District Judge and subject to alterations and additions by the High Court. The District Judge sanctioned certain rules so drawn up and so-called "appeals" were taken in the High Court, the appellants also applying under the rules of the scheme for modifications by the High Court. The High Court did not entertain the latter, but heard the so-called appeals and, after the decision, granted the appellants leave to appeal to the Privy Council. The Privy Council held that the orders of the High Court on the appeals were not "judgments" within the meaning of section 39 of the Letters Patent and that the High Court had no legal authority to deal with the matter at all except in so far as it was exercising the power conferred on it by the Privy Council decree scheme, a matter more in the nature of executive or administrative than of judicial activity. Hence, as the Privy Council held, no appeal lay from the District Judge to the High Court and therefore no appeal lay from the High Court to the Privy Council except on the sole ground that the

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judgment or decree was incompetent. Then the remark here relied upon follows.

I do not read the remark as meaning more than that all pronouncements in the form of judgments are not judgments within the meaning of the Letters Patent but only such pronouncements as are of the nature of decrees. What the Privy Council intends to import by the term "decree," whether, for example, it is a decree as understood under the old equity law as equivalent to a judgment or whether it is the Civil Procedure Code definition of a decree, it does not say. There is of course no particular reason why we should interpret the Letters Patent by the Civil Procedure Code, nor to my mind is there any particular reason why we should interpret the word "decree" in the old equity sense. If the remark made is, as suggested by Mr. Venkatachariyar, a reference to the old distinction whereby final decisions in actions in equity cases were known as decrees while final decisions in actions in common law cases were known as judgments, then the dictum might just as easily have been reversed and it might have run that the term "decree" in the Letters Patent means a judgment. That the words "judgment" and "decree" as used in the Letters Patent, whether mutually interchangeable or not, are not confined to final decisions in actions seems clear from the wording of clause 40 which speaks of preliminary or interlocutory judgments, decrees, etc. Another Privy Council case has been referred to, *Tata Iron and Steel Company, Ltd.* v. *Chief Revenue Authority of Bombay*(1), but that does not carry us any further, as the Privy Council there held in effect that the duties of the High Court in the matter before it were merely advisory and not judicial and therefore

(1) (1923) I.L.R., 47 Bom., 724 (P.C.).

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their pronouncement was not a judgment. No such considerations arise in the present case. Until therefore the Privy Council has made more clear that it intended to overrule a long series of decisions not only in this Court but in the other High Courts, I am not prepared to hold that these have been overruled. There is no hint in the Privy Council decision that they were aware that they were overruling a long-continued practice. Had they intended to do so, I think they would have said so in explicit terms. This is the view which has been adopted by another Bench of this Court in a recent decision in Letters Patent Appeal No. 240 of 1925 with which I respectfully agree. The balance of authority in this Court is that a Letters Patent Appeal does lie in a case like the present, and later decisions have usually been founded on the *obiter dicta* in the Full Bench case in *Tuljaram Row* v. *Alagappa Chettiar*(1) which have been regarded as laying down correct law. See *Sreenivasa Ayyangar* v. *Ramaswami Chettiar*(2), *Kulasekara Naicker* v. *Jagadambal Ammal*(3), *Sonachalam Pillai* v. *Kumaravelu Chettiar*(4), *Baba Sah* v. *Purushothama Sah*(5), *Kanyalal Boya* v. *Balaram Paramasukdoss*(6), *Krishna Reddy* v. *Thanikachala Mudali*(7), *Savan Durga Bai Ammal* v. *Ramanatha Rao*(8), *Syed Yusuf Sahib* v. *Subhan Bi Bi*(9), *Venkata Chinnayamma* v. *Subbamma* (10). The only cases to the contrary cited before us are *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu*(11) and *Vairavan Chettiar* v.

(1) (1912) I.L.R., 35 Mad., 1 (F.B.).
(2) (1916) I.L.R., 39 Mad., 235 (F.B.).
(3) (1919) I.L.R., 42 Mad., 352 (F.B.).
(4) (1924) I.L.R., 47 Mad., 316.
(5) (1925) I.L.R., 48 Mad., 700.
(6) (1922) 43 M.L.J., 480.
(7) (1923) 45 M.L.J., 153.
(8) (1925) 49 M.L.J., 632.
(9) (1925) 21 L.W., 308.
(10) (1925) 21 L.W., 310.
(11) (1901) I.L.R., 24 Mad., 358.

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Ramanathan Chettiar(1) which, without any detailed discussion of the point at issue, follows *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Mallikarjuna Prasada Nayadu*(2). The late Chief Justice Sir ARNOLD WHITE who was a party to *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Mallikarjuna Prasada Nayadu*(2) delivered the leading Judgment in *Tuljaram Row* v. *Alagappa Chettiar*(3) and thus went back upon his views in that case. This deprives it of a considerable portion of its authority.

It is pointed out by Mr. Rangachariyar for the appellant that in spite of these repeated rulings here and in other High Courts to the same effect no restricted definition of the word "judgment" was introduced into section 15 of the Letters Patent when it was amended in 1919 and, what is perhaps more significant still, in the recent Letters Patent of the Lahore High Court the same language as in the older Letters Patents has been adopted—see *Gokal Chand* v. *Sanwal Das* (4), and *Ruldu Singh* v. *Sanwal Singh*(5). I would, therefore, repel the technical objection taken.

On the merits I think the appellant has a good case. The learned Judge has failed in my opinion to give adequate weight to the important fact that *prima facie* the defendants have been in a state of disobedience to the decree ever since it was passed. I do not wish to prejudge the proceedings which are now pending against them for contempt. But from their own affidavit, paragraphs 8 and 11, it is clear *prima facie* that they have never attempted to obey the decree and that, even when the plaintiff objected, they nevertheless went on in their course of disobedience. Now it is obviously the duty of a party to a decree to obey the decree until he has

(1) (1921) 14 L.W., 701. (2) (1901) I.L.R., 24 Mad., 358.
(3) (1912) I.L.R. 35 Mad., 1 (F.B.). (4) (1920) I.L.R., 1 Lah., 348.
(5) (1922) I.L.R., 3 Lah., 188.

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had it stayed or set aside in proper proceedings, and I am not prepared to encourage parties to disobey decrees, by granting to a *prima facie* disobedient party the very relief which he has been getting illicitly by his own disobedience. He disobeys as long as he dare and then when he finds the position getting awkward and that disobedience cannot succeed any longer he comes up for an injunction and expects to get it because he has been so successful up to date in not obeying the decree. The Court would be stultifying itself if it granted relief to parties guilty of such conduct.

This alone seems to me sufficient ground for a refusal to uphold the decision of the learned Judge. I would, therefore, reverse his decision and cancel the order passed upon the Civil Miscellaneous Petition and grant the appellant his costs both here and on the Civil Miscellaneous Petition.

MADHAVAN NAYAR, J.

MADHAVAN NAYAR, J.—This is an appeal against the order of a single Judge of this Court staying the execution of the decree in O.S. No. 23 of 1919 on the file of the Subordinate Judge's Court at Chittoor pending the disposal of the appeal preferred against that decree.

A preliminary objection is taken that the order appealed against does not amount to a "judgment" within the meaning of clause 15 of the Letters Patent and that, therefore, an appeal does not lie. It is argued by the respondent that there is a conflict of decisions in this Court as regards what amounts to a "judgment" under clause 15 of the Letters Patent, that therefore the question should be referred to a Full Bench and that the decisions of this Court will have to be reconsidered in the light of the recent pronouncement by the Privy Council in *Sevak Jeranchod Bhogilal* v. *The Dakore Temple Committee*(1).

(1) (1925) 49 M.L.J., 25 (P.C.).

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The latest reported decision of this Court bearing on this point appears in *Sonachalam Pillai* v. *Kumaravelu Chettiar*(1). In that case, following the decision in *Tuljaram Row* v. *Alagappa Chettiar*(2), it was held, after an examination of the case-law on the subject, that an order of a single Judge of the High Court refusing to stay execution of a decree of a mufassal Court pending the disposal of an appeal therefrom to the High Court is a "judgment" within the meaning of clause 15 of the Letters Patent and that an appeal therefrom is maintainable under that clause. It is conceded that this decision would govern the present case. But what is argued is this, namely, that *Tuljaram Row* v. *Alagappa Chettiar*(2) is not a direct decision on this point and that at the time when *Sonachalam Pillai* v. *Kumaravelu Chettiar*(1) was decided there was a conflict of decisions on the question under consideration and that, therefore, the learned Judges in *Sonachalam Pillai* v. *Kumaravelu Chettiar*(1) should have referred the question to a Full Bench; and they not having done so, we are now asked to make the reference.

The respondents' vakil relies upon two decisions of this Court—*Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu*(3), and *Vairavan Chettiar* v. *Ramanathan Chettiar*(4), in support of his argument that an order of a single Judge of the High Court refusing stay of execution or allowing it does not amount to a "judgment" within the meaning of clause 15 of the Letters Patent. The decision in *Vairavan Chettiar* v. *Ramanathan Chettiar*(4) simply follows the decision in *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu*(3), and does not contain any discussion on the

(1) (1924) I.L.R., 47 Mad., 316. (2) (1912) I.L.R., 35 Mad., 1 (F.B.).
(3) (1901) I.L.R., 24 Mad., 358. (4) (1921) 14 L.W., 701.

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point at issue. The decision in *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu*(1), supports the respondent as it states that an order made by a single Judge refusing stay of execution is not a "judgment" within the meaning of clause 15 and no appeal lies therefrom. But this decision was considered by the Full Bench in *Tuljaram Row* v. *Alagappa Chettiar*(2). No doubt the question referred to the Full Bench in *Tuljaram Row* v. *Alagappa Chettiar*(2), was whether an order of a single Judge on the Original Side refusing to frame an issue which is asked for by one of the parties is a "judgment" within the meaning of clause 15 of the Letters Patent and is appealable; but the meaning of the term "judgment" was elaborately considered in that case by the learned Chief Justice and KRISHNASWAMI AYYAR, J. Both of them held that in the particular case before them there was no appeal. AYLING, J., contented himself by saying that he agreed that the answer to the question referred should be in the negative. I do not think it is necessary for the purposes of this case to refer to the discussion of the meaning of the term "judgment" contained in that decision. I am prepared to accept the meaning put upon that term by the learned Chief Justice. In explaining its meaning the learned Chief Justice refers to various interlocutory orders which, in his opinion, would amount to "judgments" within the meaning of clause 15 and one of such instances is an order refusing stay of execution. He states that he should be prepared to hold that an appeal lay from such an order. He notes that a contrary view on this question was taken in *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu*

(1) (1901) I.L.R., 24 Mad., 358. (2) (1912) I.L.R., 35 Mad., 1 (F.B.).

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Raja Yarlagadda Mallikarjuna Prasada Nayadu (1), to which he himself was a party but he resiled from it in this decision. As the point for determination in *Tuljaram Row* v. *Alagappa Chettiar*(2) was whether an appeal lies from an order of a Judge on the Original Side declining to frame an issue which was asked for by one of the parties to the suit, the opinion on the question whether an appeal lies from an order refusing stay of execution is no doubt an *obiter dictum* ; but in view of the elaborate discussion of the question, I think we should follow it.

It would be hardly right to confine *Tuljaram Row* v. *Alagappa Chettiar*(2) to the question therein decided. In fact, in this Court, the decision in *Tuljaram Row* v. *Alagappa Chettiar*(2) has been generally considered as affording a general test as to what amounts to a "judgment" within the meaning of clause 15 of the Letters Patent. Applying the test contained in it, the learned Judges in *Srinivasa Ayyangar* v. *Ramaswami Chettiar* (3) held that the order of a single Judge of the High Court rejecting a petition to send for the records and to revise the judgment of the lower Court exercising small cause jurisdiction is a judgment within the meaning of clause 15 of the Letters Patent and is therefore appealable. Following the same decision it was held in *Kulasekara Naicker* v. *Jagadambal Ammal*(4) that an order as to costs passed by a Judge of the High Court in the exercise of his original jurisdiction is not the less a judgment within the meaning of clause 15 of the Letters Patent because it relates to costs only. Two Full Bench decisions have thus treated the decision in *Tuljaram Row* v. *Alagappa Chettiar*(2) as binding on

(1) (1901) I.L.R., 24 Mad., 358.
(2) (1912) I.L.R., 35 Mad., 1 (F.B.).
(3) (1916) I.L.R., 39 Mad., 235 (F.B.).
(4) (1919) I.L.R., 42 Mad., 352 (F.B.).

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matters not directly dealt with by it. Various Benches of this Court have also applied the decision in *Tuljaram Row* v. *Alagappa Chettiar*(1) in determining the appealability of various interlocutory orders passed by single Judges of this Court. *See Kannayalal Bhoya* v. *Balaram Paramasukdoss*(2), *Krishna Reddy* v. *R. Thanikachala Mudali*(3), *Syed Yusuf Saheb* v. *Subhan Bibi*(4) *Venkatachinnayamma* v. *Subbamma*(5), *Baba Sah* v. *Purushothama Sah* (6). I have already referred to the decision on the present question as it relates to the appealability of an order passed by a single Judge of this Court refusing stay of execution. In view of this large volume of authority in this Court, I must hold that the decision in *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu*(7) is no longer good law and that the decision in *Vairavan Chettiar* v. *Ramanathan Chettiar*(8) which simply follows it without discussing the question cannot be accepted as an authority. In this state of authorities, I do not think there is any necessity now to refer the question before us to a Full Bench. So far as I can speak from experience, I may state that the practice in this Court ever since *Tuljaram Row* v. *Alagappa Chettiar*(1) has always been to allow appeals against orders like the one before us. It may also be mentioned that the decision in *Thuljaram Rao* v. *Alagappa Chettiar*(1) has been followed in the Lahore High Court—(*see Gokal Chand* v. *Sanwal Das*(9) and *Ruldhu Singh* v. *Sanwal Singh*(10).

The next question for consideration is whether the meaning of the term "judgment" in clause 15 of the

(1) (1912) I.L.R., 35 Mad., 1 (F.B.).
(2) (1922) 43 M.L.J., 480.
(3) (1923) 45 M.L.J., 153.
(4) (1925) 21 L.W., 308.
(5) (1925) 21 L.W., 310.
(6) (1925) I.L.R., 48 Mad., 700.
(7) (1901) I.L.R., 24 Mad., 358.
(8) (1921) 14 L.W., 701.
(9) (1920) I.L.R., 1 Lah., 348.
(10) (1922) I.L.R., 3 Lah., 188.

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Letters Patent as explained in *Tuljaram Row* v. *Alagappa Chettiar*(1) should be re-considered in view of the pronouncement of the Privy Council in *Sevak Jeranchod Bhogilal* v. *The Lahore Temple Committee*(2). The facts of this case are briefly these :—The Privy Council had sanctioned a scheme of management for a certain temple in Ahmedabad. This scheme empowered the Committee of the temple to frame rules for its management, etc., subject to the sanction of the District Judge of Ahmedabad and it was provided that the scheme may be altered or modified by the High Court of Bombay. The Temple Committee drew up certain rules which with some modifications were sanctioned by the District Judge. Appeals were preferred against the order of the District Judge to the High Court and applications were also concurrently made to the High Court for modification of the scheme. The High Court did not make any order on the applications but gave judgments on the appeals varying the order of the District Judge by amending the rules in certain respects. From the judgments of the High Court an appeal was filed to the Privy Council under section 39 of the Letters Patent of the Bombay High Court. After pointing out that appeals to the High Court did not lie and that the High Court had original powers under clause 20 of the scheme for altering or modifying the rules which it did not exercise but which it might still exercise upon a proper application, their Lordships of the Privy Council state as follows :—

"There was no right of appeal to His Majesty in Council from the judgments of the High Court of the 11th of April 1919 and the 22nd of September 1919 or from any decrees which were drawn up, except on the sole ground that the judgments or decrees were incompetent. The term "Judgment" in the

(1) (1912) I.L.R., 35 Mad., 1 (F.B.). (2) (1925) 49 M.L.J., 25.

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Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense."

It is this last sentence that is relied upon by Mr. Venkatachariyar in support of his argument that the opinion of the High Court in *Tuljaram Row* v. *Alagappa Chettiar*(1) should be revised. It is contended that if the judgment of the High Court in the case before the Privy Council interfering with the scheme does not come within the meaning of the term as used in the Letters Patent, then the order refusing stay of execution or allowing it cannot be considered to be a judgment because that does not amount to a decree. It may be observed that though the opinion is generally stated the appeal in that particular case was under clause 39 of the Letters Patent and not under clause 15.

Their Lordships do not explain in what sense the term "decree" is used in that sentence. Whether the term should be given the same meaning that is given to it by the Civil Procedure Code or whether it is used as understood in the old Equity Law according to which, as contended for by Mr. Venkatachariyar, final decisions in equity cases were known as decrees is not at all clear. Clause 40 of the Letters Patent shows that the words "judgment" and "decree" are not limited to final decisions, because it refers to preliminary or interlocutory judgments, etc. The decisions in *Tuljaram Row* v. *Alagappa Chettiar*(1) and other cases were in existence when the Letters Patent was amended in 1919 and still the legislature did not interfere with the term "judgment" by giving it a limited definition. In the recent Letters Patent of the Lahore High Court the same language as in the older Letters Patent appears. Another case referred to, viz., *The Tata Iron and Steel Company, Ltd.* v. *Chief Revenue Authority of Bombay*(2) does not give much help in deciding this matter. In

(1) (1912) I.L.R., 35 Mad., 1 (F.B.). (2) (1923) I.L.R., 47 Bom., 724 (P.C.).

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that case it was held that the decision of the High Court upon a case stated and referred to it by the Chief Revenue authority under section 51 of the Income-tax Act was merely advisory and not judicial. In these circumstances, it is difficult to hold that by the pronouncement referred to, their Lordships of the Privy Council have overruled the long current of authorities in this and in other courts bearing on the question; at any rate, until the doubt is removed by a clearer pronouncement, the contention that the decisions referred to have been overruled cannot be accepted. A similar conclusion was reached by another Bench of this Court in L.P.A. No. 240 of 1925. For these reasons the preliminary objection raised by the respondent must be overruled.

On the merits, I agree with my learned brother that the decision of the learned Judge should be reversed with costs here and on the Civil Miscellaneous Petition.

N.R.

APPELLATE CIVIL.

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

1926, August 20.

S. K. VENKATARAMA AIYAR (RESPONDENT), APPELLANT,

v.

A. BURAN SHERIFF AND ANOTHER (PETITIONERS 1 AND 2), RESPONDENTS.*

Sec. 9, Provincial Insolvency Act (V of 1920), cls. (a) and (b)—Petitioning creditor's right to present insolvency petition if entitled to Rs. 500, on date of presenting petition—"Some certain future time," meaning of—Sec. 25, giving discretion to Court.

According to clause (a) of section 9 of the Provincial Insolvency Act (V of 1920), it is sufficient if the petitioning

* Appeal against Order No. 306 of 1925.

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creditor is entitled to a debt of Rupees Five Hundred on the date of presenting the insolvency petition; it is not necessary that he should be entitled to that amount on the date of adjudication also. It is immaterial that by the latter date the amount gets reduced as the result of an appeal or counter-suit by the debtor. Adjudicating a debtor on a creditor's petition is discretionary under section 25 of the Act.

APPEAL against the order of J. C. STODART, District Judge of South Arcot, in Insolvency Petition No. 20 of 1923.

The facts are given in the judgment.

M. S. Venkatarama Ayyar (with *E.R. Rajagopalachariyar* and *R. Srinivasa Ayyar*) for appellant.—Clause (a) of section 9 of the Provincial Insolvency Act really requires that the debt of Rs. 500 must be due not only on the date of presentation of the petition but also on the date of adjudication. Hence if as the result of an appeal or a counter-suit by the debtor this amount gets reduced or is made not payable at the time of adjudication but is made to be contingent upon some other event, such as the decision on appeal, there is no right to present the petition; for the appellate decree relates back to the date of the original decree; see *Rangaswami Kavundan* v. *Alagayamman*(1). Moreover, as the Appellate Court ordered that the amount due to the judgment-creditor should be paid only after the passing of the decree of the Appellate Court, the amount is not payable at "some certain future time" within the meaning of clause (b) of section 9. "Certain" means "specified;" see *Rangasami Mudaliyar* v. *Srinivasa Mudaliyar*(2), *Juggomohun Ghose* v. *Manickchund* and *Kaisreechund*(3), *Page* v. *Newman* (4), which are decisions on the same words under the Interest Act. Further under section 25 of the Act it is discretionary with the Court to adjudge a debtor as an insolvent on a creditor's petition. In the circumstances of this case the lower Court should have exercised the discretion and refused the adjudication.

K. S. Venkatarama Ayyar for respondents.—All that section 9 requires is that the debt of Rs. 500, must be due on the date of presentation of the petition and not on the date

(1) (1915) 2 L.W., 169.
(2) (1910) 8 M.L.T., 405.
(3) (1859) 7 M.I.A., 263.
(4) (1829) 9 Barn & Cress., 378; 109 E.R., 140.

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of adjudication also. The effect of adjudication is to relate back to the date of presentation; see section 28, clause(7) *Kalianji* v. *The Bank of Madras*(1). Section 13 (2) and section 34 (2) relate not only to debts existing on the date of presentation of the petition but also to contingent debts on that date. The decisions quoted relate to Interest Act where the wording is different from that in the Provincial Insolvency Act. In the former Act the words are "at a certain time;" in the latter Act they are "at some certainfuture time;" hence the decisions under the Interest Act will not apply. Even under the Interest Act, it has been held in the decisions quoted, that the Act will be satisfied if the time could be made certain though not specified. Here the appellate decree does not affect the case. That appellate decree itself is now under appeal to this Court and it may be displaced. Hence that is an uncertain test. Provisions of the Civil Procedure Code have been made applicable to proceedings in insolvency; hence as in suits, only events existing in the date of plaint or petition are alone to be looked to to ascertain the maintainability of a plaint or petition and not subsequent events. Moreover, as the debtor had alienated all his properties, there was no other remedy open to the decree-holder but to present this petition and thereafter to get the fraudulent transfers annulled. The lower Court was not asked to exercise the discretion under section 25 of the Act and no special reasons were assigned in that Court or have been assigned in this Court for the exercise of that discretion in appellant's favour.

M. S. Venkatarama Ayyar replied.

JUDGMENT.

ODGERS, J.

This is an appeal against the order of the District Judge of South Arcot adjudicating the appellant an insolvent. The facts prior to this adjudication are a little complicated, and the arguments founded thereon have taken some time to hear. The petitioning creditors filed two suits against the debtor, O.S. No. 548 of 1922, for gunny bags and O.S. No. 583 of 1922, for some amounts due in a partnership business. There was, moreover, a

(1) (1916) I.L.R., 39 Mad., 698.

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suit O.S. No. 580 of 1922 by the insolvent against these creditors for accounts due on an alleged partnership between him and them. This suit on the 7th of November 1922 was dismissed and the other suits by the creditors were decreed. In May 1923 the insolvent made some alienations of his properties and deposited the amount due in O.S. No. 548 into Court and the Court sale was set aside. On the 23rd May 1923 a petition for adjudication was filed in the District Munsif's Court. In the meantime appeals had been filed in O.S. No. 583 and O.S. No. 580. On the 13th August 1923 creditors petitioned the District Court to adjudicate the appellant an insolvent, and on the 1st December 1923 a stay of the petition was obtained pending the disposal of the appeals. On the 14th April 1924 the appeal in O.S. No. 548 was allowed and the stay was dismissed. The appellant was therefore in a position to ask for restitution of about Rs. 585 which he paid out in order to set aside the Court sale. In O.S. No. 580, the appellant's suit, he obtained a preliminary decree for accounts and in O.S. No. 583, an amount of Rs. 1,059 was decreed against him (the appellant) but it was only to become payable on the passing of the final decree in O.S. No. 580 of 1922. This O.S. No. 580 has been to second appeal when it was decided against the appellant and is now awaiting final appeal under the Letters Patent. On the 17th September 1924 the petition for adjudication was considered and the petitioners were held to be creditors and entitled to present the petition and two months afterwards the adjudication took place. The learned Judge has held that the petitioner has complied with the conditions precedent set out in section 9 of the Act to enable him to present the insolvency petition. It is admitted that the large bulk of the debt alleged to be due to the creditors is the amount due under the

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decree in O.S. No. 583 of 1922, viz., Rs. 1,059 odd, the time for payment of which was postponed till the final decree was passed in O.S. No. 580 of 1922. The learned Judge held that the postponement had not the effect of divesting the petitioners' character as creditors and that they were creditors when the petition was filed and they are still creditors.

It is contended that it is not sufficient that these petitioners should be creditors at the time the petition was filed, but they must be creditors at the time the order of adjudication is passed. We do not find any provision to that effect in the Act although there is a note by Mr. Williams in his book that this obtains in the corresponding provision in the Bankruptcy Act. The question seems to me to be whether a creditor has fulfilled the three conditions precedent set out in paragraph 9 at the time he filed the insolvency petition, viz. (to put it shortly) a debt of Rs. 500, a liquidated sum payable either immediately or at some certain future time, and an act of insolvency With regard to the last requirement no question has arisen in this case. Certain acts of insolvency, namely, alienations of property have been *prima facie* found by the Judge to exist, and the adjudication is founded upon those, but as before stated, the objection before us is that the petitioning creditors were not clothed with the proper authority as required by the Act before filing the petition in the two other respects. We had a great deal of discussion as to whether this decree debt of Rs. 1,059 made payable on the passing of the final decree in O.S. No. 580 is a liquidated sum payable at some certain future time and some decisions were quoted before us, *Rengasami Mudaliar* v. *Srinivasa Mudaliar*(1),

(1) (1910) 8 M.L.T., 405.

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Juggomohun Ghose v. *Manickchend* and *Kaisreechund*(1), and *Page* v. *Newman*(2) to the effect that it must be some definite ascertained debt. Those decisions as pointed out by the learned vakil for the respondents all relate to the Interest Act where the words are "certain time" and there has been some discussion as to whether "some certain future time" is something different from "a certain time." Speaking for myself I am rather inclined to think that the expression "some certain future time" means any time in the future which is capable of being ascertained. But I do not propose to decide in this present proceeding what the exact meaning of "some certain future time" in section 9 (*b*) means. The question then comes down to this, whether the aggregate amount of debts due to the creditors amounted to Rs. 500 at the date of the filing of the petition. That that is the crucial date is, I think, fairly clear on principle because the words in section 9 are that the creditors shall not be entitled to present an insolvency petition unless the three conditions set out are fulfilled and further we find that section 13 (2) sets out the particulars that are to be contained in every insolvency petition presented by a creditor or creditors and in (*b*) "the amount and particulars of his or their pecuniary claim or claims against such debtor." That seems to refer to the date of the insolvency petition. There is no doubt that at the date of the insolvency petition the appellant was indebted to the respondents in a sum of at least Rs. 1,059. But it is contended that the order made on appeal, namely, that this amount should not be payable until the amount of the final decree in O.S. No. 580 is ascertained has the effect of referring back the date of the appellate decree to that of the original

(1) (1859) 7 M.I.A., 263.
(2) (1829) 9 Barn. and Cress., 378; 109 E.R., 140.

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decree and that therefore we do not know whether Rs. 1,059 or nothing or less or more will in fact be found due to the petitioning creditors. That argument of course cuts both ways, because it has to be remembered that O.S. No. 580 is under Letters Patent Appeal and if it is to be held that an appeal is simply a continuation of all the previous proceedings then O.S. No. 580 is still going on. Then there is a further question as to the costs payable to the appellant. It was stated to us that two sums of Rs. 204 and Rs. 245 were due to the insolvent from the creditors which together with a sum of Rs. 585 due to him (as stated above) in restitution would amount to some thing over Rs. 1,000. The question is whether a Court is to go into this kind of thing when it examines whether or not petitioning creditor has qualified himself, to present his petition. I think not. I think that the fact that the appellant admittedly owed Rs. 1,059 at the date of the petition is sufficient to qualify the petitioning creditors. The only other point raised was that under section 25 the Court should have held that there were circumstances which rendered it improper to adjudicate this man an insolvent.

There seems to have been some talk of a stay; hence this proviso in the decree as to the payment of Rs. 1,059 which has caused this trouble. But the provisions of section 25 are discretionary and there is no evidence that the learned District Judge was asked to exercise this discretion under the section and I do not think it can be said that under those circumstances he ought to have exercised, nor am I prepared to do so on appeal. There may be good grounds why it is better in the interests of both parties that this man should be adjudicated an insolvent, I do not know. But it seems to me that to exercise a discretion under section 25 in appeal and to

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hold that there is other sufficient cause why no order should be made would be to ask us to do a thing that we ought not to do especially in the circumstances of this case.

As to the costs one set has been paid into the Official Receiver's hands and the other set is under stay. It therefore cannot be said that this whole amount is due or can be immediately set off against Rs. 1,059.

I think therefore this civil miscellaneous appeal must fail and be dismissed with costs.

MADHAVAN NAYAR, J.

MADHAVAN NAYAR, J.—I agree and have nothing to add.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Sundaram Chetti.

1926, September 14.

KANNAN (7TH RESPONDENT), APPELLANT,

v.

AVVULLA HAJI (PETITIONER), RESPONDENT.*

Limitation Act (IX of 1908), art. 182 (5)—Application for delivery by decree-holder-purchaser, whether a step in aid.

An application by a decree-holder-purchaser for delivery of property purchased by him in execution, is a step in aid of execution within article 182, clause (5) of the Limitation Act (IX of 1908). *Lakshmanan Chettiyar* v. *Kannammal,* (1901) I.L.R., 24 Mad., 185, followed.

In order that an application by the decree-holder should serve as a step in aid, it is not necessary that it should be made in a pending execution application. *Kunhi* v. *Seshagiri,* (1882) I.L.R., 5 Mad., 141, followed. In these matters the principle of *stare decisis* is applicable.

* Appeal against Appellate Order No. 142 of 1924.

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APPEAL against the Order of the District Court of North Malabar at Tellicherry in Appeal Suit No. 529 of 1923 preferred against the Order of the Principal District Munsif of Badagara in Regular Execution Petition No. 708 of 1922 in Original Suit No. 951 of 1915.

D. A. Krishna Variar for Appellant.

T. S. Viswanatha Ayyar for Respondent.

JUDGMENT.

The question in this appeal is whether an application under Order XXI, rule 95, for delivery of property by a decree-holder who has purchased the property in execution of his own decree is a step in aid of execution within the meaning of the expression in Article 182, clause (5) of the third column of the Limitation Act. The argument of Mr. Krishna Variar for the appellant may be summarized under the following heads:—

1. *Lakshmanan Chettiyar* v. *Kannammal*(1), which is a case in point, is opposed to the decisions before and after it.

2. The expression "purchaser at a sale in execution of a decree" in Article 138 of the Limitation Act is equally applicable to a decree-holder who purchases property in execution of his own decree as well as to a person who is a stranger to the decree, and therefore the former should be held to occupy the same position as the latter in regard to applications made after the court sale.

3. When the judgment-debtor's property is purchased in court sale by the judgment creditor the decree is wholly or partially satisfied and thereafter there is

(1) (1901) I.L.R., 24 Mad., 185.

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no decree to be executed to the extent of the value of the property sold.

4. An application by a decree-holder can be a step in aid of execution only when an execution application is actually pending. Such an application cannot be said to be pending when a decree has been satisfied by the decree-holder purchasing the property of the judgment-debtor in court sale.

In *Lakshmanan Chettiyar* v. *Kannammal*(1), it was held that an application by the decree-holder for delivery of the lands purchased by him in execution of his decree was a step in aid of execution as the execution was not complete so long as the purchaser had not secured possession. This case is directly in point and the authority of this case has not been challenged for quarter of a century. It would not be right to question the correctness of a decision, which has been accepted as laying down the law correctly for a number of years. The Court should follow the principle of *stare decisis* in deciding points already decided by the Court. A decision of a Bench on a point of law should be held to be good till the Privy Council upsets it or takes a view opposed to it or a Full Bench of the High Court overrules it. As the authority of *Lakshmanan Chettiyar* v. *Kannammal*(1) is said to be opposed to the decisions preceding it and decisions subsequent to it, we proceed to consider whether it is so or not.

It is urged that the decisions in *Ramanadhan Chetti* v. *Kunnappu Chetti*(2), and in C.M.A. No. 122 of 1895 (unreported) are against the view of this Court in *Lakshmanan Chettiyar* v. *Kannammal*(1). In *Ramanadhan Chetti* v. *Kunnappu Chetti*(2), the facts were:—

(1) (1901) I.L.R., 24 Mad., 185. (2) (1870) 6 M.H. C.R., 304.

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The defendant became the purchaser of the property sold in execution of a decree and the price for which the sale took place was sufficient to satisfy the decree. Instead of paying the purchase money into Court the defendant retained the whole sum with the assent and knowledge of the plaintiff upon the understanding that he should give a receipt to the Court for himself and on behalf of the plaintiff and afterwards should pay to the plaintiff his portion of the amount decreed. The defendant presented a petition to that effect to the Court and obtained the necessary certificate confirming the sale. The defendant having failed to pay the amount to the judgment-creditor to which he was entitled, the latter brought a suit for the amount. It was contended that section 11 of Act XXIII of 1861 corresponding to section 47 of the present Code was a bar to the suit. The learned Judges held that the plaintiff's suit was not barred. There is no doubt an observation of the learned Judges that the execution proceedings were completely at an end and no subsequent application under the decree could have been entertained by the Court which executed it. But the observation of the learned Judges should be considered in connexion with the facts of the case. It is not proper to rely upon one or two sentences in a judgment without reference to the facts of the case. In that case the decree-holder consented to take the amount of the decree from the auction purchaser and allowed satisfaction of the decree to be entered up. The auction purchaser not having paid the money, he had to bring a suit. The decree having been satisfied there was no decree to be executed. It would be the same thing if a decree-holder, instead of executing the decree, takes a fresh document from the judgment-debtor in satisfaction of the decree; and in such a case if the judgment-debtor fails to pay the amount under the

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document, can the decree-holder execute the decree in satisfaction of which he took the document? It is an arrangement subsequent to the passing of the decree between the judgment-creditor and the judgment-debtor whereby the decree is satisfied, and if the subsequent agreement is not acted up to, the only remedy is to enforce the agreement. *Ramanadhan Chetti* v. *Kunnappu Chetti*(1) therefore is not an authority for the contention that the decree-holder's application in this case is not a step in aid of execution, nor is it against the view of the learned Judges in *Lakshmanan Chettiyar* v. *Kannammal*(2) In C.M.A. No. 122 of 1895 SHEPHARD, J., sitting as a single Judge followed the decision in *Ramanadhan Chetti* v. *Kunnappu Chetti*(1). But the facts of the case were not the same as those in *Lakshmanan Chettiar* v. *Kannammal*(2). In C.M.A. No. 122 of 1895 the facts were as follows:—The second defendant in the case objected to the delivery proceedings on the ground that the purchaser got possession of the lands sold to him and that the Court should ascertain the price and position of the plots sold and direct delivery of possession. SHEPHARD, J., held that such an application did not lie inasmuch as there had been a sale and the decree-holder was put in possession, and in the circumstances the execution came to an end because the sale itself was not questioned. It is difficult to see how this decision has any bearing on the question in *Lakshmanan Chettiyar* v. *Kannammal* (2). It may be noted in passing that SHEPHARD, J., who decided C.M.A. No. 122 of 1895, was one of the Judges who decided *Lakshmanan Chettiyar* v. *Kannammal* (2) in 1900. *Kuppuswami Chettiar* v. *Rajagopala Ayyar* (3) is strongly relied upon as supporting the appellant's contention. In that case the judgment-debtor

(1) (1871) 6 M.H.C.R., 304. (2) (1901) I.L.R., 24 Mad., 185.
(3) (1922) I.L.R., 45 Mad., 466.

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had made an application to the Court for entering up satisfaction. The decree-holder had objected to satisfaction of the decree being entered and filed a statement called counter statement denying the receipt of the decree amount and asking that the petition should be dismissed. It was contended that the counter-statement was a step-in-aid of execution. AYLING and VENKATASUBBA RAO, JJ., held that the statement was not a step in aid of execution. The observation of AYLING, J., who delivered the judgment of the Court that an application to be a step-in-aid of execution should be made in a pending execution application is strongly relied on. AYLING, J., differs from the observations of RAMESAM, J., in *Sankara Nainar* v. *Thangamma*(1). With very great respect we are unable to agree with the view of AYLING, J., that an application in order to be a step-in-aid of execution should be made in a pending execution application. We shall deal with this point specifically under the fourth head. The facts of the case in *Kuppuswami Chettiar* v. *Rajagopala Ayyar*(2) are distinguishable from the present. In that case the so-called counter-statement was not an application to have the decree executed or to enable the Court to do anything which would further the execution of the decree. As we have observed, the observations in a judgment should be considered in connexion with the facts of the case. If *Kuppuswami Chettiar* v. *Rajagopala Ayyar*(2) is considered as an authority in favour of the appellant we should respectfully dissent from it. But we hold that this is not an authority on the point now in question. *Balaguruswami Naicken* v. *Guruswami Naicker*(3), to which one of us was a party is also relied upon. In that case the mortgagee decree-holder applied for the payment out of a sum of money in Court which was not realized

(1) (1922) I.L.R., 45 Mad., 202. (2) (1922) I.L.R., 45 Mad., 466.
(3) (1925) 48 M.L.J., 506.

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in execution of the decree. It was held that that application was not a step-in-aid of execution. The observation at page 509 that "Where an act of the plaintiff is not in furtherance of execution or in a pending execution it cannot be said to be a step-in-aid of execution" does not help the appellant. It is clearly stated that the act must either be in furtherance of execution or in a pending execution and the passage cannot be twisted to mean that the application should be in a pending execution application. That case therefore is not against the decision in *Lakshmanan Chettiyar* v. *Kannammal*(1). The decision in *Kuppuswami Chettiar* v. *Rajagopala Ayyar* (2) was followed by another Bench of this Court in C.M.A. No. 120 of 1923. The facts in that case were very similar to the facts in *Kuppuswami Chettiar* v. *Rajagopala Ayyar*(2). There also the judgment-debtor applied to the Court to have satisfaction of the decree entered and the decree-holder put in a statement objecting to the satisfaction being entered. The Court held that the filing of such statement was not a step-in-aid of execution. The learned Judges, PHILLIPS and MADHAVAN NAYAR, JJ., negatived the contention that an application in order to be a step-in-aid of execution should be made in a pending execution application. It is clear from the above discussion that there is no case so far as this High Court is concerned which is against *Lakshmanan Chettiyar* v. *Kannammal*(1) or which questions its correctness.

The argument that the expression "purchaser at a sale in execution of a decree" in Article 138 covers the case of a judgment-creditor who purchases the property in execution of his own decree is untenable. It is well settled that a decree-holder who purchases property in

(1) (1901) I.L.R., 24 Mad., 185. (2) (1922) I.L.R., 45 Mad., 466.

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execution of his own decree cannot bring a suit for possession of the property purchased by him. Article 138 of the Limitation Act must be read along with the provisions of the Civil Procedure Code. Section 47 of the Civil Procedure Code bars a suit by a decree-holder for possession of the property purchased by him in execution of his own decree. Vide *Kattayat Pathunayi* v. *Raman Menon*(1), *Sandhu Taraganar* v. *Hussain Sahib*(2), and *Muttia* v. *Appasami*(3). To hold that an application like the present is not an application in execution of a decree would be tantamount to holding that the above decisions are incorrect; for it has been consistently held that when the decree-holder applies for delivery of possession of the property purchased by him, the Court should consider the objections and an appeal lies under section 47 against the order made by the executing Court and there is no warrant either in principle or in authority to hold a different view.

The contention that there is nothing to be executed after the decree-holder purchases the property in execution of the decree is denying the decree-holder a right to which he is entitled. The mere fact that he purchases the property of the judgment-debtor is not *pro tanto* satisfaction of his decree. He is allowed to give credit for the value of the property purchased by him, but that alone would not be sufficient to satisfy the decree. Till he obtains possession it cannot be said that his decree is satisfied to the extent of the value of the property purchased. He has to apply to the Court for delivery of possession. The contention that the moment he buys the property of the judgment-debtor he ceases to be the decree-holder and assumes the capacity of a stranger purchaser is not supported by any authority.

(1) (1903) I.L.R., 26 Mad., 740. (2) (1905) I.L.R., 28 Mad., 87.
(3) (1890) I.L.R., 13 Mad., 504.

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When the law prescribes a certain course to be pursued by the decree-holder even when he becomes the purchaser of the property it is not open to rely upon the expression used in Article 138 of the Limitation Act and to hold that his capacity as decree-holder ceases the moment he becomes the purchaser in Court sale. We hold that the execution is not complete till the decree-holder obtains possession of the property purchased by him in execution of his decree.

An act or an application in order to be a step-in-aid of execution need not be in a pending execution application. This point was decided so far back as *Kunhi* v. *Seshagiri*(1), and it is too late in the day to question the principle of that decision. In that case the judgment-creditor applied to the Court which passed the decree for a certificate that a copy of the Revenue Register was necessary, to enable him to obtain such copy from the Collector's office and thereupon to execute the decree by attaching the land. It was held that that application was a step-in-aid of execution. INNES, J., observed at page 143

"I agree with the observations in *Chunder Coomar Roy* v. *Bhogebutty Prosonno Roy*(2), that any application in furtherance of an application to put a decree into execution may be held to be an application to enforce the decree".

MUTTUSWAMI AYYAR, J., concurred in this view. This case was followed in *Abdul Kadar Rowthar* v. *Krishnan Malaval Naiyar*(3). In *Sankara Nainar* v. *Thangamma* (4), RAMESAM, J., observed

"In my opinion there is no warrant for the view that an application to take a step-in-aid of execution should be made in execution".

We entirely agree with the observation of RAMESAM, J.

(1) (1882) I.L.R., 5 Mad., 141. (2) (1878) I.L.R., 3 Calc., 235 at 238.
(3) (1915) I.L.R., 38 Mad., 695. (4) (1922) I.L.R., 45 Mad., 202.

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When the decisions of our own High Court are almost unanimous as regards a certain point it is unnecessary to consider what the views of the other High Courts are on that point. We may, however, remark that the views of the Bombay and Calcutta High Courts are in accordance with our view. In *Sadasiva Bin Maharu* v. *Narayan Vithal*(1), the point before us was specifically decided and in *Kailash Chandra Tarfdar* v. *Gopal Chandra Poddar*(2), a Full Bench of the Calcutta High Court held the same view as that in *Lakshmanan Chettiar* v. *Kannammal*(3). There are conflicting views in the decisions of the Allahabad High Court. The Patna High Court no doubt takes a different view.

On a careful consideration of the cases on the point we have no hesitation in answering the question in the affirmative. The appeal fails and is dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Jackson.

1926, October 27.

VITTAL RAO AND ANOTHER, MINORS, BY GUARDIAN MADHURAMMA (PETITIONERS), APPELLANTS,

v.

R. HANUMANTHA RAO AND 7 OTHERS (RESPONDENTS), RESPONDENTS.*

Sec. 4, Succession Certificate (Act VII of 1889)—Insurance money payable after death, whether a "debt" due to the deceased within sec. 4.

Under a policy of insurance, the policy amount was payable to the assured if he attained a stated age or to his representatives

* Appeal against Order No. 510 of 1925.

(1) (1911) I.L.R., 35 Bom., 452. (2) (1926) 43, C. L.J., 345.
(3) (1901) I.L.R., 24 Mad., 185.

VITTAL RAO v. HANUMANTHA RAO.

or assigns if he died earlier. The policy was not assigned to any one. On a claim for the policy amount by the son of the assured who died before the stated age,

Held, that the amount was a 'debt' due to the deceased within section 4 of the Succession Certificate Act. *Banchharam Mazumdar* v. *Adya Nath Battacharjee* (1909) 13 C.W.N., 966 I.L.R., 36 Calc., 936 (F.B.), followed.

APPEAL against the Order of the District Court of Bellary, dated 3rd August 1925, in O.P. No. 14 of 1925. One Lakshmana Rao had effected a policy of insurance on his life, the amount of which was payable to 'him if he attained a stated age' or 'to his representatives or assigns' if he died earlier. The policy was not assigned to any one and on the death of the assured before the stated age, the petitioners, his minor sons, applied under Succession Certificate Act for a certificate to collect the amount of the policy. The respondents were other relations of the deceased, who did not oppose the application either in the original Court or in the High Court. The District Judge refused the application holding that as the policy amount did not become payable to the *deceased*, on account of his death before the stated age, it was not a '*debt*' *due to the deceased*. The petitioners therefore filed this appeal.

K. Srinivasa Rao for appellants.—The amount due under the insurance policy is a "debt" within the meaning of section 4 of the Act; see *Mathew* v. *Northern Assurance Company*(1), *Visvanath P. Vaidya* v. *Mulraj Khatau*(2), *Oriental Government Security Life Assurance, Limited* v. *Venteddu Ammiraju*(3). The last case was reversed by the Full Bench only on the question of the application of the Married Women's Property Act in *Balamba* v. *Krishnayya*(4) but was approved on the present point. *Srinivasa Chariar* v. *Ranganayaki Ammal*(5) and *Charusila Dasi* v. *Jyotish Chandra Sirkar*(6) relied on by

(1) (1878) 9 Ch. D., 80. (2) (1911) 13 Bom. L.R., 590.
(3) (1912) I.L.R., 35 Mad., 162. (4) (1914) I.L.R., 37 Mad., 483 (F.B.) at 506.
(5) (1915) 32 I.C., 991. (6) (1916) 33 I.C., 157.

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the lower Court proceed on the applicability of the Married Women's Property Act and so do not touch the present question. The Full Bench in *Bancharam Mazumdar* v. *Adya Nath Battacharjee*(1) is in my favour rather than against me.

No one appeared for the respondents.

JUDGMENT.

This is an appeal against the refusal of the District Judge of Bellary to grant a succession certificate in order that the petitioners might recover a sum of money due on a life insurance policy. The learned Judge held, with reluctance, that the moneys did not form a debt under section 4 of the Succession Certificate Act. The respondents are *ex parte* and we have not had the advantage of hearing their arguments; but we have examined the cases relied on by the learned District Judge in support of the view that moneys due from an insurance company under a policy of insurance are not debts within the meaning of section 4 of the Succession Certificate Act. The learned Judge deals with the decision in *Oriental Government Security Life Assurance, Ltd.* v. *Venteddu Ammiraju*(2) and the decision of the Full Bench in *Balamba* v. *Krishnayya*(3) as confined to the applicability of section 6 of the Married Woman's Property Act. But *Oriental Government Security Life Assurance, Ltd.* v. *Venteddu Ammiraju*(2) clearly lays down that the policy is part of the estate of the deceased and that the heirs are entitled to the payment of the money under it after his death. No doubt a question was raised in *Oriental Government Security Life Assurance, Ltd.* v. *Venteddu Ammiraju*(2) as to the Married Woman's Property Act, but in *Balamba* v. *Krishnayya*(3) in which it is said that *Oriental Government*

(1) (1909) I.L.R., 36 Calc., 936; 13 C.W.N., 966.
(2) (1912) I.L.R., 35 Mad., 162.
(3) (1914) I.L.R., 37 Mad., 483 (F.B.).

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Security Life Assurance, Ltd. v. *Venteddu Ammiraju*(1) was overruled it must be observed that the only question on which *Oriental Government Security Life Assurance, Ltd.*, v. *Venteddu Ammiraju*(1) appears to have been overruled is the question of the Married Woman's Property Act, because at page 506 Sir ARNOLD WHITE, Chief Justice, said

"if the view taken by the learned Judges as to the Married Woman's Property Act was right, I should agree with their conclusion in that case that no cause of action arose to the beneficiaries and that the policy moneys formed part of the estate of the assured notwithstanding that under the contract the money was payable to the beneficiaries in default of trustees."

Another case cited by the learned District Judge, *Srinivasa Chariar* v. *Ranganayaki Ammal*(2) clearly turned on the applicability of section 6 of the Married Woman's Property Act. The dictum in *Charusila Dasi* v. *Jyotish Chandra Sirkar*(3) relied on by the Judge must have reference to the facts of the case which it decided and it is at least doubtful as to whether this also is not a case under the Married Woman's Property Act, as the assured had constituted his widow his nominee for the receipt of the money. In so far as the learned Judge has held or may be taken to have held that an insurance policy is not contemplated by the Succession Certificate Act in that it is not a debt due to the deceased it may be pointed out that in *Mathew* v. *Northern Assurance Company*(4) it was held that the insurance company is a debtor, and in *Visvanath P. Vaidya* v. *Mulraj Khatau*(5) the learned Judges held that the policy moneys are debts. Since the hearing of the appeal the Full Bench ruling of the Calcutta High

(1) (1912) I.L.R., 35 Mad., 162.
(2) (1915) 32 I.C., 991.
(3) (1916) 33 I.C., 157.
(4) (1878) 9 Ch. D., 80.
(5) (1911) 13 Bom. L.R., 599.

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Court in *Banchharam Muzumdar* v. *Adya Nath Bhattacharjee*(1) has come to our notice which held that the ordinary meaning of the word "debt" is to be ascribed to the language of section 4 of the Act in question and that it applies to a sum of money which does not become payable till after the death of the creditor and that in such a case the heirs of the creditor cannot obtain a decree without the production of a certificate under the Succession Certificate Act. The case in *Abdul Karim Khan* v. *Maqbul-un-nissa Begam*(2) which was a question of dower was referred to with approval. These two cases fortify the opinion we had previously formed at the hearing of the argument that it may be legitimately inferred from the decisions that a succession certificate may be granted in respect of the money due under a policy of insurance. In fact the decision of the Calcutta High Court seems to set the matter at rest. In this view the decision of the learned District Judge was wrong and his order must be set aside and the case remanded to him to be dealt with according to law in the light of the above observations.

N.R.

(1) (1909) I.L.R., 36 Calc., 936; 13 C.W.N., 966, F B.
(2) (1908) I.L.R., 30 All., 315.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Wallace.

MULLAPUDI SATYANARAYANA BRAHMAM AND TWO OTHERS (DEFENDANTS), APPELLANTS,

1926, November 29.

v.

MAGANTI SEETHAYYA (PLAINTIFF), RESPONDENT.*

Limitation Act (IX of 1908), ss. 14 and 15—Suit by maker of note for declaration that it was obtained by fraud and undue influence—No injunction against payee filing a suit—Dependent judgments—Limitation for a suit on the note by the payee.

The fact that the maker of a promissory note sued the payee for a mere declaration that the note had no consideration and was obtained by fraud and undue influence without suing for an injunction to restrain the payee from filing a suit on the note does not suspend the running of time for a suit on the note by the payee. *Sethu Row* v. *Seetha Lakshmi Ammall* (1925) 21 L.W., 716, followed.

The principle of dependent judgments is no longer good law and no equitable grounds for suspension of a cause of action can be added to the provisions of the Limitation Act. *Naganna* v. *Venkatappayya* (1923) I.L.R., 46 Mad., 895 (P.C.), followed.

SECOND APPEAL against the decree of A. NARAYANA PANTULU, Subordinate Judge, Kistna at Ellore, in Appeal Suit No. 338 of 1922, preferred against the decree of M. ANATHAGIRI RAO, Principal District Munsif of Ellore, in Original Suit No. 74 of 1922.

This suit was to recover Rs. 696-3-0 being the amount due on a promissory note, dated 5th September 1918, executed by the defendants' father (deceased at the time of suit) to the plaintiff for Rs. 500 with interest at 12 per cent per annum. The history of the case was as follows.

* Second Appeal No. 248 of 1924.

SATYANARAYANA BRAHMAN v. SEETHAYYA.

The defendants' father filed a suit (Original Suit No. 674 of 1918), on 25th September 1918 for a declaration that this promissory note executed by him was vitiated by fraud and undue influence and was not supported by consideration. He also prayed for its cancellation. The trial Court allowed the suit on 22nd November 1920; but the decree was reversed on appeal on 9th December 1921 by the Appellate Court on the findings that the note was supported by consideration and that there was no fraud or undue influence. On 12th December 1921 the present suit was filed by the payee of the note against the sons of the executant who has since died for recovery of the amount due on the note. The defendants pleaded want of consideration, undue influence, fraud and limitation. The plaintiff answered that limitation was suspended during the period between 25th September 1918 and 9th December 1921 when the previous suit was pending and that the other pleas were barred as *res judicata*. The trial Court dismissed the suit as barred by limitation, though it held that the other pleas were *res judicata*. The appellate Court allowed the suit holding that it was not barred by limitation and that the other pleas were *res judicata*. The defendants preferred this second appeal.

V. Suryanarayana for Appellants.

K. Venkatarama Raju for Respondent.

JUDGMENT.

In the former suit there was no prayer for an injunction nor did the Court give an injunction. Therefore there was nothing in the decree of the District Munsif, the obedience to which involved a restraint on the present plaintiff, preventing him from filing the suit earlier. In this respect this case resembles the decision in *Sethu Row* v. *Seetha Lakshmi Ammal*(1). It is

(1) (1925) 21 L.W., 716.

SATYANARAYANA BRAHMAM v. SEETHAYYA.

unnecessary to repeat the reasons given in that case to which one of us was a party. It is true that the decision in the *Secretary of State* v. *Ranganayakamma*(1), has since been reversed by the Judicial Committee on the intimation of the parties "that the Secretary of State for India-in-Council has now decided not to contest the appeal." Their Lordships allowed the appeal "without making any pronouncement on the merits of the judgment of the High Court." The Secretary of State was unwilling to retain tax wrongly collected, by relying on the plea of limitation. The Subordinate Judge relies on *Nrityamoni Dassi* v. *Lakhan Chandra Sen*(2). Though the High Court has stated that section 14 of the Act did not apply and though the Privy Council agreed "generally" with the High Court for holding that there was no limitation, that case was meant to be decided under section 14. After the decree of HENDERSON, J., in the first suit and until its reversal, the descendants of Money Madub Sen must be taken to have been *bona fide* prosecuting a claim for partition in the first suit. They got a decree for partition and they attempted to support the decree in appeal and could not have then filed a suit of their own during the pendency of the appeal.

But whatever view may be taken of the decision in *Nrityamoni Dassi* v. *Lakhan Chandra Sen*(2) two points are now clear; (*a*) no such principle of a dependent judgment as was once laid down in *Jogesh Chunder Dutt* v. *Kali Churn Dutt*(3), now exists, see *Naganna* v. *Venkatappayya*(4), (*b*) no equitable grounds for suspension of a cause of action can be added to the provisions of the Limitation Act. We agree with the explanation

(1) (1920) 12 L.W., 334.
(2) (1916) I.L.R., 43 Calc., 660 (P.C.).
(3) (1878) I.L.R., 3 Calc., 30 (F.B.).
(4) (1923) I.L.R., 46 Mad., 895 (P.C.).

SATYA-NARAYANA BRAHMAM v. SEETHAYYA.

of *Mussumat Ranee Surno Moyee* v. *Shoshee Mokhee Burmonia*(1), given by WALMSLEY and MUKERJEE, JJ., in *Jamini Mohan Sarcar* v. *Nagendra Nath Pal*(2) and generally with the view taken by MUKERJI, J., of various decisions particularly of *Bassu Kuar* v. *Dhum Singh*(3), which has been relied on before us. The decisions in *Huro Pershad Roy* v. *Gopal Das Dutt*(4) and *Muthuveerappa Chetti* v. *Adaikappa Chetti*(5) belong to the same group as *Mussumat Rani Surno Moyee* v. *Shoshee Mohee Burmonia*(1). The case in *Kunhi Kutti Ali* v. *Kunhammad*(6) is like *Nrityamoni Dassi* v. *Lakhan Chandra Sen*(7). The facts of *Najaf Shah* v. *Rangu Ram*(8) are obscure but that case cannot help the plaintiff.

There was nothing in the present case to prevent the filing of the suit on 5th September 1921. It may be that the District Munsif would have dismissed the suit following his finding in the earlier case on the question of consideration and undue influence. But, on appeal, it would have been reversed along with the other appeal and plaintiff would have got his decree. So long as there was no legal impediment to the filing of the suit earlier, no time can be excluded. The third column of Article 73 operates.

We allow the appeal and restore the District Munsif's decree with costs here and in the lower Appellate Court.

N.R.

(1) (1868) 12 M.I.A., 244.
(2) (1925) 43 C.L.J., 155.
(3) (1889) I.L.R., 11 All., 47 (P.C.).
(4) (1883) I.L.R., 9 Calc., 255 (P.C.).
(5) (1920) I.L.R., 43 Mad., 845.
(6) (1923) 44 M.L.J., 179.
(7) (1916) I.L.R., 43 Calc., 660 (P.C.).
(8) (1921) I.L.R., 2 Lah., 323.

PRIVY COUNCIL.*

BULLI GANGI REDDI (PLAINTIFF), APPELLANT.

1927, February 22.

v.

BULLI TAMMI REDDI (DEFENDANTS 1 AND 2 AND OTHERS), RESPONDENTS.

[On Appeal from the High Court at Madras.]

Hindu Law—Religious endowment—Power of karta to dedicate family property—Evidence of dedication—Application of profits of property.

The fact that the deceased karta of a Hindu joint family regularly paid the expenses of a choultry out of the profits of a family property, the expenses not however exhausting the whole of those profits, does not establish a dedication of the profits to the charity.

Consideration of the powers of a karta to dedicate property of the joint family to a religious charity.

APPEAL (No. 174 of 1924) from a decree of the High Court (20th January 1922) reversing, so far as material to this appeal, a decree of the Subordinate Judge of Cocanada (16th August 1920).

The appellant instituted a suit against the respondents for partition.

A variety of issues were framed, but the only question material to the present appeal was whether Gangi Reddi, the deceased karta of the joint family, had made an effective dedication of the profits of a usufructuary mortgage to the expenses of a choultry. It was originally contended that the usufructuary mortgage in question had been the separate property of Gangi Reddi and was dedicated by his will; but it was found in the

* PRESENT: LORD PHILLIMORE, LORD CARSON, LORD DARLING, MR. AMEER ALI and SIR LANCELOT SANDERSON.

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suit, and not disputed on the present appeal, that it had been the property of the joint family.

The facts appear from the judgment of the Judicial Committee.

The Subordinate Judge made a preliminary decree for taking accounts and by his judgment held that there had been no dedication of the profits of the usufructuary mortgage.

On Appeal, the High Court (SPENCER and KUMARASWAMI SASTRI, JJ.) modified the decree with regard to the terms of accountability, and, coming to the conclusion on the facts that the whole of the profits derived from the usufructuary mortgage had been continuously devoted to the expenses of the choultry, they held therefore that there had been a dedication.

DeGruyther, K.C., and *Narasimham* for the appellant.—A dedication was not proved. To establish a dedication it must be shown that the donor intended to convey the property irrevocably to himself or to a trustee for the charitable purpose. Though the continued application of the income from a property to a particular charity is evidence of a dedication, it is not sufficient by itself: *Konwar Doorganath Roy* v. *Ram Chunder Sen*(1), *Abhiram Goswami* v. *Shyama Charan Nandi*(2). Moreover, an examination of the evidence and accounts shows that the whole of the income from the property was not applied to the expenses of the charity, though the expenses were paid out of that income. That, in any case, is not sufficient: *Govinda Doss* v. *Venkataperumal*(3). The decision in *Ramalinga Chetti* v. *Sivachidambara Chetty*(4) does not controvert that view. There, there had been a gift on the occasion of the funeral of a deceased member of the family.

The respondents did not appear.

The JUDGMENT of their Lordships was delivered by

LORD PHILLIMORE.

LORD PHILLIMORE.—This case turns on a question of fact. A member of the family of Reddi, whom it is

(1) (1876) I.L.R., 2 Calc., 341; L.R., 4 I.A., 52.
(2) (1909) I.L.R., 36 Calc., 1003; L.R., 36 I.A., 148.
(3) (1914) 27 M.L.J., 195.
(4) (1919) I.L.R., 42 Mad., 440.

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convenient to call Gangi Reddi, was a merchant carrying on business at Cocanada. He died in April 1917. He had two sons, one of whom predeceased him, leaving a son—the present plaintiff. The younger son and his son are the present defendants. There were also several daughters.

Gangi Reddi made three wills asserting that his property was self-acquired property, and being such that he could dispose of by will. It has, however, been decided that his property is to be regarded as ancestral family property, and not such as he could dispose of by will.

The younger son had assisted his father in his later years and was according to the will to be manager of family property, and in fact he undertook to manage it and did so till this suit was brought on the 18th December 1918. By it the plaintiff's claim to a half share of the entire family property was asserted and a partition was demanded.

The plaint contained various allegations of malversation by the first defendant.

When the case came on for trial, a number of questions arose which were disposed of by the Subordinate Judge. Most of his directions were confirmed by the High Court on appeal. In the cases in which the judgment of the Subordinate Judge was so varied the decision of the High Court has been generally accepted. The only point remaining is that which is the subject of the present appeal.

The earlier clauses of the will provide for certain distributions between the wife and sons and daughters which are either not questioned or have been disposed of by the judgments already mentioned. The last clauses of the will run as follow:—

"7. I advanced a loan to Muchilika Appalaraju and others of Chengondapalli, Ernagudem Taluk, took an usufructuary

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mortgage of Chengondapalli and its hamlets Patnam Madampatt, etc., forming a muttah belonging to the said Appalaraju and others and have been managing the same. The net profits realized from the said muttah annually, I have been giving away for the expenses of feeding, etc., in the choultry which I built in Gollalamamidada and have been making credit and debit entries accordingly in the accounts also. So long as the said Chengondapalli muttah is in our possession according to the term, the net profits annually realized therefrom shall be paid for the expenses of the said choultry even after my death, and Bulli Thammi Reddi shall look after the whole management needed for it. Besides this, the interest that may annually be realized on a sum of Rs. 10,000 (ten thousand rupees) out of my own funds shall either be spent to meet the expenses of the charity choultry at Gollalamamidada once a year or shall be kept in deposit for the said purpose.

"8. The will already executed by me on 13th May 1906 and registered as No. 12 on pages 111 to 114 of Vol. 4, Book III, in the office of the Sub-Registrar of Bikkavole is hereby cancelled and this will has been executed to take effect from the time of my death. This will is executed with my consent."

It has been stated that Gangi Reddi claimed that his property was all self-acquired. He asserted this claim in the first paragraph of the will in question; but as it has been decided that this claim was not well-founded, he could not dispose of this property or found a charitable endowment by will. In the present suit the plaintiff disputed the validity of this endowment, and the first defendant supported it.

Originally the defence rested upon the proposition that the property was self-acquired; but during the progress of the case the first defendant was allowed to raise further defences, namely, that there had been a dedication to charity during the lifetime of Gangi Reddi, and that the plaintiff's father and other persons interested had acquiesced in the dedication. As regards the sum of Rs. 10,000 the Subordinate Judge upheld this dedication while in respect of the usufructuary mortgage he held

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that there was no dedication. As regards so much of the charity as he held to be validly founded, the Judge directed that the management should be with the two branches of the family in alternate years, varying in this respect the direction in favour of the first defendant which appears in the will.

The plaintiff accepted this decision, and so it must be taken as settled that there was a valid constitution of a charitable endowment to the extent of the Rs. 10,000. The first defendant was not content with the other part of the decision and appealed to the High Court, which decided that there was an appropriation of the usufructuary mortgage as well as of the Rs. 10,000 to the charitable endowment.

It is from this decision that the plaintiff now appeals.

It is much to be regretted that the first defendant has not seen his way to be represented before their Lordships; but the facts of the case have been fully presented by counsel for the appellant, and every portion of the evidence on the record has been brought to their Lordships' notice.

A dedication of a portion of the family property for the purpose of a religious charity (and the charity which Gangi Reddi purported to endow is of this nature) may, according to Hindu Law, be validly made without any instrument in writing, even if it be an appropriation of some landed property, and the act of the karta of the family would be valid if assented to in any way, however informally, by the other members of the family. Such an appropriation may even (if the property allotted be small as compared with the total means of the family) be made by the karta without consent. This much was not questioned by counsel for the appellant.

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But the appropriation or alienation must be made by the manager by an act *inter vivos*, and must not be an alienation *de futuro* by will.

In the view of the Subordinate Judge the foundation, so far as the Rs. 10,000 was concerned, was supported by the principles above stated, but the other endowment was not. In the view of the High Court both stood upon the same footing.

The evidence in the case was somewhat meagre. The plaintiff gave evidence and had nothing material to depose on this subject, but he relied on entries in the family book of accounts. The first defendant said that his father wanted a choultry for Brahmans to be built, and that it had been located in its place for ten or fifteen years. The clerk in the service of the deceased verified the accounts and spoke as to a mortgage on an estate called Toyyeru, held in common by Gangi Reddi and another man named Basavi Reddi, the profits of which so far as it came to Gangi Reddi were used by him for the expenses of running the choultry, the balance or surplus being spent by Gangi Reddi on his own account. He further said that at a later date the usufructuary mortgage of Chengondapalli, spoken of in the will, was also acquired. In cross-examination he stated that there were separate khatas or accounts relating to Toyyeru, Chengondapalli and the choultry kept in the ledger books, and that the expenses incurred for the choultry used to be debited to the choultry account from day to day.

This is all the material oral evidence, and it is meagre enough; but the first defendant, on whom lies the burden of supporting this endowment, offered some documentary evidence of importance.

Gangi Reddi—as it has been said—made three wills. The first, dated 13th July 1905, was confined to provisions

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relating to members of the family. In the second, dated the 13th May 1906, these words occur:

"From after my death interest accruing on a sum of Rs. 10,000 (ten thousand rupees) shall be paid once a year for the Dharma Chathram (charity house) situate in Gollalamamidada;"

and in the third will comes the clause already mentioned.

Now the third will states historically that he has been giving away the net profits of the usufructuary mortgage for the expenses of feeding, etc., in the choultry, and that he had been making credit and debit entries accordingly in the accounts, and then proceeds to direct that so long as the mortgage remains in the possession of the family the net profits annually realized shall be applied in the same manner.

This is not quite in agreement with the statement of the clerk, who speaks of a surplus or balance which was applied to the ordinary family expenses; but still there is the statement which is not to be neglected.

The other document of importance is a deposition which Gangi Reddi made on the 16th October 1903—that is, before any one of the three wills were made. It would appear that in that case he was suing upon a promissory note, and that the defence was that it was a forgery, and that this defence was supported by a suggestion that he had not money enough to be in a position to lend the sum, whenever it was said to be due on the promissory note.

Their Lordships would gather that the transaction had been effected by the elder son who at the time of the deposition had not been long dead, and that some difficulty may have arisen because he was dead at the time when the trial came on. In that deposition

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Gangi Reddi started by giving himself a character as a substantial person, and he said as follows :—

"I am plaintiff. I have been dealing for the last forty years. All this is my self-acquisition. I am illiterate. I am only a marksman. I earned my property by trade. I paid this year Rs. 265 or 275 as income-tax. I get about Rs. 3,000 from my lands. I endowed a choultry at Samarlakota for Rs. 10,000. I gave a leasehold right of the annual value of Rs. 1,200 for 25 years for a chatram in my village. My son asked me to endow the chatram for lame and blind people, with the interest accruing on Rs. 10,000 funded capital. I am going to do so hereafter. Basavi Reddi and myself are the biggest merchants of my village. There are no big merchants in my village who are not of my caste or in the neighbouring villages. For the last 10 or 14 years my son was carrying on all my affairs. I and Basavi Reddi are partners in the Rice Mill at Nidadavole. I had dealings with defendants. My son was conducting business on my behalf with the defendants."

He was cross-examined upon this statement, and he then said

"The lease right with which I endowed the choultry is held jointly by me and Basavi Reddi."

This deposition, it may be said, cuts both ways. It supports the statement that he had endowed a choultry, and further supports the endowment with Rs. 10,000. But if the leasehold right was held jointly with Basavi Reddi, it was the leasehold right of Toyyeru and not of Chengondapalli, which apparently he held alone, and the statement if it relates to Toyyeru cannot be evidence of an unrevocable donation of that property, because no such case is now set up.

Neither Court in India seems to have noticed this. It agrees with the accounts and with the evidence of the clerk that at one time some of the profits of the Toyyeru mortgage were applied to support the choultry. If so, it would be a *temporary arrangement* by which the deceased in that way applied at his pleasure portion of his income to the upkeep of the charity.

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From the accounts it appears that some money was spent on the choultry at as early a date as 1897, and that the building was set up in 1899.

Down to the year 1900 such expenditure as was made upon the choultry was debited in the Toyyeru account and not to the Chengondapalli account. This expenditure did not exhaust the profits from Toyyeru, and the mode of accounting simply points to those profits as being used as the purse out of which the deceased made his charitable contribution.

After 1900 and until 1911 an account of the expenses on the choultry, never amounting to more than a few hundred rupees a year, and much less than the receipts of corresponding date from the Chengondapalli mortgage, was regularly kept; but there was no transfer of the debit to Chengondapalli, and no correlation between the two accounts till December 1911, when the sum of Rs. 8,400 for the charity and another sum of Rs. 11,240 being the loss on a particular trade, were both debited to the account of Chengondapalli, and even then left it in credit to the extent of Rs. 6,321. Such accounts as have been filed since that date are simply accounts kept contemporaneously for the two purposes without any correlation or transfer from one to the other.

These accounts support the appellant's case. They are inconsistent with any appropriation of the full net profits of the usufructuary mortgage to the purposes of the choultry. They do not even show any regular appropriation year by year of any fixed sum or indeed of the annual cost of upkeep fixed or unfixed, to the account of the charity.

Their Lordships, however, have been embarrassed by the view taken in both Courts as to these accounts. There is a passage in the judgment of the Subordinate Judge in which he says that there is

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"no doubt of the fact that in the Chengondapalli khata the income was being shown as having been taken on to the account of the choultry in the account books maintained during the time of the late Gangi Reddi. This fact could not be denied on plaintiff's side. But the plaintiff's counsel contends that though expenses for a charity might be met from out of a particular property it cannot be held that that property was dedicated for the upkeep of the charity."

This looks at first sight like a finding that the whole proceeds of the usufructuary mortgage were applied to the benefit of the choultry; and if this were the case, there must be some error in the presentation of the accounts as printed, some material omissions or some explanation, which, if the respondents had been represented by counsel, would have been furnished. The result has been to necessitate very careful enquiry.

But as their Lordships have already noticed, there is an initial mistake in the judgment of the Subordinate Judge. He had failed to notice that the deceased in his deposition must have been speaking of the other estate. Further, when the passage of his judgment is more carefully scrutinized, it would seem that he had not thought it necessary to draw the distinction between meeting all the expenses of a charity out of a particular property, and applying all the receipts of that property to the charity.

His judgment, so construed, does not throw suspicion upon the accounts. As to the High Court, the learned Judges say :—

"It appears from the accounts that the income from the muttah was utilized for the expenses of the choultry from the date of its opening. The evidence shows that there was a dedication of the income from the muttah for the purpose of the upkeep of the choultry."

Much of this paragraph, as already observed, is founded on a mistake; but, be this as it may, their judgment is consistent with a view that the profits of

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the usufructuary mortgage were not all applied to charity; but merely that they were treated as the purse from which the expenses of the charity were met.

This being so, the accounts and the evidence of the clerk really conclude the matter, and their Lordships must hold that there was no dedication of the Chengondapalli mortgage by any act *inter vivos*, and that the view of the Subordinate Judge was right; and their Lordships will humbly advise His Majesty that the appeal should be allowed, and the judgment of the Subordinate Judge restored with the costs here and below.

Solicitors for appellant: *Douglas Grant* and *Dold*.

A.M.T.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Jackson.

1926. November 9.

KOZHIKKOT PUTHIA KOVILAGATH MANAVADAN *alias* ANUJAN RAJA AVARGAL AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

VIAYATHEN SREDEVI *alias* VALIA THAMBURATTI AVARGAL AND OTHERS (DEFENDANTS), RESPONDENTS.*

Malabar Law—Tarwad—Karnavan—Suit by junior members for removal of karnavan—Liability to account—Fraud and misappropriation alleged against karnavan—Karnavan ceasing to be such by succession to a higher sphere—Maintainability of suit—Suit, whether can be continued as to accounts—Karnavan, whether and when personally liable—Liability of agent of karnavan.

Where certain junior members of a Malabar tarwad sued for the removal of the karnavati, on allegations of fraud,

* Appeal Suit No. 128 of 1926.

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misappropriation of family funds in general and devoting the funds to her particular branch, and prayed that she should render a general account of her management and pay personally whatever sums be found due to the family, but in the course of the suit the karnavati ceased to be such because under the family law of succession she moved to a higher sphere,

Held, (1) that, as the removal of the karnavati was otherwise an accomplished fact, the suit for general account, not being necessary and incidental to her removal, was not in law sustainable and should be dismissed;

(2) that, in a properly framed suit, on proof of specific fraudulent alienations or misappropriation by the karnavan, the junior members, suing on behalf of the tarwad, are entitled to recover personally from the karnavan the amount of which their tarwad has been defrauded;

(3) that, in so far as a person acted as agent of the karnavati, a suit which would not lie against the principal would not lie against the agent; and that, in so far as he acted as a mere trespasser, there could be no calling upon him for general accounts; but in a properly framed suit it would be open to the karnavan to sue such person as liable personally for any proved act of misfeasance or misappropriation by him.

APPEAL against the decree of U. GOVINDAN NAYAR, Additional Subordinate Judge of Calicut, in Original Suit No. 16 of 1925 (O.S. No. 50 of 1924, Sub-Court, Calicut).

The three plaintiffs, who are some of the junior members of the Puthia Kovilagam consisting of four tavazhies, sued for the removal of the first defendant, who was the Valia Thamburatti or the eldest female member of the four tavazhies and as such occupied the position of head of the kovilagam and manager of the kovilagam properties. She was in management from 22nd September 1915. The suit, besides praying for her removal from management of kovilagam properties, also prayed that she and the second defendant, who was her son and was actually managing the estate on her behalf, should be called upon to render accounts of her

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management from 22nd September 1915, the date on which the first defendant became the Valia Thamburatti. The plaint alleged various acts of malfeasance and misfeasance in the course of her management, and acts of fraud and misappropriation of kovilagam funds. The plaint also prayed that the first and second defendants should pay personally and out of the properties of their tavazhi whatever sum is found due to the kovilagam on the rendering of accounts by the defendants. During the pendency of the suit, the first defendant attained the stanom of another kovilagam, called Ambadi Kovilagam, and thereby ceased to be the Valia Thamburatti of the Puthia Kovilagam, and thus ceased to be the karnavati of the suit kovilagam. The defendants contended that the entire suit thereby abated and should be dismissed. The plaintiffs contended that the suit did not abate with regard to the prayers as to rendering accounts by the first and second defendants and their liability to pay money found due to the kovilagam on taking account, and that the suit should be tried with regard to those reliefs. The Subordinate Judge held that the entire suit abated and dismissed the suit. The plaintiffs preferred this appeal.

C. V. Anantakrishna Ayyar and *P. S. Narayanaswami Ayyar* for appellants.—The suit was for removal of the karnavati of Puthia Kovilagam, called the Valia Thamburatti and to make her account for her mismanagement. Defendants 2 and 3 also took part in the mismanagement and plaintiffs claim that they should also be made to account. After the suit was filed first defendant ceased to be karnavati, as she attained a higher stanom. So there was no necessity to remove her and the plaintiffs are entitled to ask for accounts. The junior members are entitled to bring this suit—see *Anantan* v. *Sankaran*(1), *Sankaran* v. *Sreedharan*(2) and *Karunakara*

(1) (1891) I.L.R., 14 Mad., 101. (2) (1924) 48 M.L.J., 691.

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Menon v. *Kuttikrishna Menon*(1). The lower Court has not considered the allegations of fraud; junior members have a proprietary right in the property, *Kunnath Packi* v. *Kunnuth Muhammad*(2) and Sundara Ayyar's Malabar Law, page 152. The karnavan's power is only to manage and not to misappropriate, *Raman Menon* v. *Raman Menon*(3). The karnavan cannot deal as he likes with the surplus of the tarwad property, see *Thimmakka* v. *Akku*(4). If a manager spends away the surplus, he is bound to indemnify, *Raya* v. *Gopal Mallan*(5). The karnavan is in the same position as a Hindu manager, *Venkanna* v. *Narasimham*(6) and *Tod* v. *P. P. Kunhamod Hajee*(7). Their position is fiduciary. In this case therefore the late karnavati, the first defendant, is bound to account.

T. R. Ramachandra Ayyar and *K. P. Ramakrishna Ayyar* for respondents.—No suit lies against a karnavan for accounts only. See *Kennath Puthen Vittil Thavazhi* v. *Narayanan*(8), Sundara Ayyar's Malabar Law, page 53, and Mayne's Hindu Law, page 380. In the present case the suit was one mainly for removal of the karnavati and all the other reliefs are incidental. There are no specific allegations of fraud to make the karnavati account. If there are specific allegations of fraud, it is open to them to bring a fresh suit regarding these allegations. The karnavan's powers are greater than those of the manager, *Tod* v. *P. P. Kunhamod Hajee*(7), *Kennath Puthen Vittil Tavazhi* v. *Narayanan*(8). He has also got absolute right over the income, *Govindan Nair* v. *Narayanan Nair*(9). The late karnavati has left all the assets in the hands of the present karnavati. So it is the latter that should be made liable. The late karnavati cannot be made liable; for, the only remedy against her is removal. In this case the removal has been effected and therefore plaintiff's suit is not maintainable.

JACKSON, J.

The JUDGMENT of the Court was delivered by JACKSON, J.—Appeal from decree in O.S. No. 16 of 1925, Subordinate Judge, Calicut.

(1) (1917) 5 L.W., 511; 38 I.C., 666. (2) (1925) 49 M.L.J., 513.
(3) (1901) I.L.R., 24 Mad., 73 (P.C.). (4) (1911) I.L.R., 34 Mad., 481.
(5) (1911) 11 I.C., 666. (6) (1921) I.L.R., 44 Mad., 984.
(7) (1878) I.L.R., 3 Mad., 169.
(8) (1905) I.L.R., 28 Mad., 182 (F.B.).
(9) (1912) 23 M.L.J., 706.

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The parties to this suit are members of the family of the Zamorin of Calicut, but for the purposes of this appeal it is unnecessary to detail the complicated rules of succession prevailing in that family. In essence the suit is simple, and the learned vakils on either side have proceeded (and, in our opinion, rightly proceeded) on the assumption that it is a suit for the removal of the karnavan of an ordinary Malabar tarwad, coupled with the prayer that he be ordered to furnish a general account for the period of his office. In this family, the karnavan happens to be a woman, the first defendant. The second defendant is her son, alleged to have acted as her manager and to have imposed his will upon her to the detriment of the tarwad in general. Defendants 3 and 4 are the remaining members of the particular branch, descended by way of the motherhood of the first defendant (the tavazhi in Malayali phraseology). It is alleged in the plaint that by various acts of malfeasance (set forth at great length therein, paragraphs 12-A to DD) first and second defendants in collusion have misappropriated funds belonging to the family in general, and have devoted them to the first defendant's particular branch. The plaintiffs are three junior members of the family, and they have brought all the other members into the suit by impleading them as defendants.

In the course of the suit, the first defendant ceased to be karnavan because by the family rule of succession she moved to a higher sphere. Therefore there was no longer any question of removing her (prayer A in the plaint), and it only remained to consider how far prayers B and C were sustainable: directing defendants 1 and 2 to render all accounts of receipts and expenses of the family from 22nd September 1915, and to pay whatever sums might be found due to the family in general from the personal property of defendants 1 and 2 and out of tavazhi property of defendants 1 to 4.

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The learned Subordinate Judge has held on the authority of *Kennath Puthen Vittil Tavazhi* v. *Narayanan*(1), that the karnavan is not liable to pay to the tarwad any surplus income; and on the authority of *Karunakara Menon* v. *Kutti Krishna Menon*(2), that an anandravan cannot ordinarily sue a karnavan to render accounts of his management. The right of such junior members is confined to suing for maintenance, to suing for cancellation of any transaction entered into by the karnavan to the detriment of the family, and to suing for his removal.

"As incidental to the relief for removal from management and only that way, it is competent to anandravans to call upon the karnavan to render accounts. But that is allowed not with a view that the anandravans may recover from the karnavan the amount found due, such a remedy being directly opposed to the inherent status of the karnavan, and is unheard of, but simply in order that the extent of the loss suffered by the tarwad at the hands of the karnavan may be ascertained with a view to his removal. But when there is no question of his removal there is clearly no liability on him to render accounts. To hold otherwise would be to reduce the karnavan to the position of a trustee which he certainly is not."

The Sub-Judge has further found that according to the plaint the second defendant stood only in the position of an agent of first defendant, and was accountable to first defendant alone. Accordingly he dismissed the suit.

It has been contended on behalf of appellants that the karnavan of a Malabar tarwad cannot use its funds for purposes other than tarwad purposes, and assuming that the other members of the tarwad can prove misappropriation, the karnavan is bound to render an account. If general misappropriation is proved, the karnavan must render a general account. In any case those who have been benefited by the misappropriation,

(1) (1905) I.L.R., 28 Mad., 182 (F.B.). (2) (1917) 38 I.C., 666.

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such as defendants 2, 3 and 4, would be bound to account; and any special acts of mismanagement by second defendant would give a cause of action in this suit.

The first ground in appellants' argument is clearly sustainable. The learned Subordinate Judge may be correctly stating the traditional law of his community, but at this date judicial rulings negative the extreme position that a karnavan cannot be held accountable for alienations made by him in fraud of his tarwad.

Large as the powers of the karnavan appear to be, those powers are essentially powers of management, *Raman Menon* v. *Raman Menon*(1). The karnavan has not any larger right of ownership than any junior member, *Govindan Nair* v. *Narayanan Nair*(2). The members other than the karnavan have the right to prevent the karnavan from wasting or improperly alienating the family property, *Vasudevan* v. *Sankaran*(3). The karnavan has no higher claim in the enjoyment of the income than any other member of the family. He has a right to expend as he pleases for the common benefit of all, *Narayani* v. *Govinda*(4). His office is fiduciary—*Tod* v. *P. P. Kunhamod Hajee*(5).

In these circumstances it would seem proper that the karnavan should make good from his personal estate any of his defalcations from the family property; but there happens to be no case directly in point. However, the observations of WALLIS, C.J., in *Venkanna* v. *Narasimham*(6) seem to apply, although there the defalcation was by a widow with a limited life estate:

"As to the widow's own accountability for wasting the movable corpus of the estate, the authorities are meagre, because the remedy against her would rarely be effective, but on principle I see no sufficient reason for refusing to hold her

(1) (1901) I.L.R., 24 Mad., 73 at 80 (P.C.).
(2) (1912) 23 M.L.J., 706 at 709. (3) (1897) I.L.R., 20 Mad., 129 at 141.
(4) (1884) I.L.R., 7 Mad., 352. (5) (1878) I.L.R., 3 Mad., 169 at 176.
(6) (1921) I.L.R., 44 Mad., 984 at 988.

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accountable for waste in the sense of making her replace the movable corpus which she has made away with."

In *Raya* v. *Gopal Mallan*(1), a bench of this Court ruled that if the manager of a joint Hindu family were proved guilty of negligence or misconduct he would be held personally liable for any loss caused to the family thereby; and in *Govindan Nair* v. *Narayanan Nair*(2), the substantive right of the karnavan in the tarwad property is held to be of exactly the same character as that of the managing member of a Mitakshara family. Therefore on proof of fraudulent alienation of misappropriation by the karnavan the junior members of a tarwad, suing on its behalf, will be entitled to recover from the karnavan personally the amount of which their tarwad has been defrauded.

It is obvious that in a suit of this character if the junior members have succeeded in establishing a case that calls for rebutter, the karnavan, thus put upon his defence, must render some account of the impugned transaction, else he will fail in the suit. Such a case is contemplated in *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi*(3), where it is observed:

"He is not accountable to any member of the tarwad in respect of the income of it, nor can a suit be maintained for an account of the tarwad property in the absence of fraud on his part."

And again in *Karunakara Menon* v. *Kutti Krishna Menon*(4).

"If plaintiff could show that the karnavan and senior anandravan were colluding to defraud the tarwad, it might be open to him to file a suit for the removal of the karnavan and to ask for appropriate relief on behalf of the tarwad, including the rendering of an account."

This presumably means that if any specific fraud is proved against the karnavan in regard to some specific

(1) (1911) 11 I.C., 666.
(2) (1912) 23 M.L.J., 706 at 709.
(3) (1880) I.L.R., 2 Mad., 328.
(4) (1917) 5 L.W., 511.

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item of property he must account for his dealing with that item, and if a general case of mismanagement is made out against the karnavan, he may be liable to removal, unless he can render a satisfactory general account of his management. It does not mean, as now contended on behalf of appellants, that whenever junior members sue to remove their karnavan, they can, by virtue of asking for that relief, always demand, as of right, that the karnavan shall render general accounts. If this were so, the well-known principle recognized in this very ruling in *Karunakara Menon* v. *Kutti Krishna Menon*(1), that an anandravan cannot sue a karnavan for an account of his management would become a dead letter. For then any anandravan could sue his karnavan for a rendering of accounts by merely tacking on a subsidiary prayer for the karnavan's removal from office.

The matter may be summed up as follows:—The karnavan is the manager of the family estate. He may administer that estate for the benefit of the family according to his own discretion. He is not bound to render any account or to pay to the tarwad any surplus he may have in his hands, *Kenath Puthen Vittil Tavazhi* v. *Narayanan*(2), which of course does not mean that he may devote the surplus to other than tarwad purposes, but only that he need not distribute it among the individual members, if in his discretion he prefers to accumulate or invest it for the benefit of the family as a whole. If it be proved against him that he has abused this discretion and fraudulently misappropriated the family estate, he must account for that transaction. If it be proved generally that he is a bad manager, he will be liable to removal, unless he gives a good account of his management. But he cannot be compelled actually

(1) (1917) 5 L.W., 511.
(2) (1905) I.L.R., 28 Mad., 182 at 195.

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to render accounts by a threat of removal or for any other reason.

Therefore, when they pray for a decree directing defendant 1 to render all accounts of receipts and expenses from 22nd September 1915 plaintiffs have no cause of action. They are entitled to sue for a decree removing first defendant from management, and to contend, if first defendant gives no account by way of rebutter of their proved allegations, that such a decree should be granted and first defendant should be removed. But if, as in this case, the removal is already an accomplished fact, such a contention would be idle. And plaintiffs might have brought their suit in a different form praying that each proved defalcation might be set aside and first defendant held liable in damages. In its present form and in the present circumstances, the suit discloses no cause of action as against first defendant, and was rightly dismissed.

In so far as second defendant acted as the agent of first defendant a suit, which would not lie against his principal, would not lie against him. And in so far as second defendant acted as a mere trespasser there could be no question of calling upon him for general accounts. In a properly framed suit it would be open to the karnavan as representing the tarwad to sue the second defendant as liable for any proved act of malfeasance or misappropriation. In the same way defendants 3 and 4 or their tavazhi might be held liable in a suit for setting aside specific transactions, but not in a suit for general accounts, a matter in which they have no responsibility.

For the above reasons, we consider that the suit was rightly dismissed, and the appeal also must be dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

1926, August 6.

VAIDYANATHA AIYAR AND ANOTHER (9TH AND 10TH DEFENDANTS), APPELLANTS,

v.

YOGAMBAL AMMAL AND OTHERS (PLAINTIFF AND DEFENDANTS 1 TO 8, 11 AND 23), RESPONDENTS.*

Pensions Act (XXIII of 1871), sec. 4—Jurisdiction of Civil Courts—Unenfranchised personal inam lands—Suit for division of—Suit in Civil Court, whether maintainable and in what cases—Grant of land or land revenue—Prohibition of alienation of inam lands—R. 5, cl. (3) of Inam Rules, 1859—Effect of prohibition—Alienation, not binding on Government, but not void—Will executed by a sharer in the inam lands, bequeathing his share—Right of legatee to sue for partition—validity of bequest.

A suit for partition, between members of the family, of unenfranchised personal inam lands, where the inam was the grant of lands and not of land revenue, is maintainable in a Civil Court, as its jurisdiction is not taken away in such cases by section 4 of the Pensions Act (XXIII of 1871).

The object of rule 5, clause (3) of the Inam Rules of 11th October 1859 in prohibiting alienations of inam lands is to protect the interests of the Government, and the prohibition therein can only mean that as against the Government all alienations are inoperative, not that they are void: so long as the Government do not step in to enforce their rights, whatever they are, by ignoring the alienation, it is not open to others to question a transaction which amounts to an alienation; *Venkatarama Ayyar* v. *Chandrasegara Ayyar*, (1921) I.L.R., 44 Mad., 632, followed.

Where, therefore, a sharer in certain unenfranchised personal inam lands, after a division of status in the family, made a bequest of his share therein in favour of his wife, the latter is entitled to sue in a Civil Court for division of such

* Appeal No. 351 of 1923.

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lands by metes and bounds in respect of her husband's share bequeathed to her under his will.

APPEAL against the decree of A. P. P. SALDANHA, Subordinate Judge of Tanjore, in Original Suit No. 15 of 1920.

The material facts appear from the judgment.

A. Krishnaswami Ayyar and *K. Sankara Sastri* for appellant.

Advocate-General, M. S. Venkatarama Ayyar, S. Subrahmanya Ayyar, T. M. Kasturi and *Balasundaram* for respondents.

JUDGMENT.

SPENCER, J.

SPENCER, J.—I agree. In *Rama* v. *Subba*(1) the underlying policy of Regulation IV of 1831, which was repealed by the Pensions Act (XXIII of 1871), is stated to have been to protect the reversionary interest of the Crown over grants of revenue. The Pensions Act consolidated the law on the subject of pensions and grants of revenue. In sections 4 to 6 it re-enacted the provisions of the Regulation which it had repealed with reference to unenfranchised inams. Thus the same policy was continued in the Act which is now in force. Government have in fact by various enactments constituted themselves the sole and final arbiters of all the questions relating to the validity and sufficiency of grants of money or land revenue as well as those relating to the personality of the recipient and Government's own right to resume grants once given. Similarly by section 58 of Madras Act II of 1864 they took away the power of Civil Courts to adjudicate as to rates of land revenue payable to Government. Seeing that the learned Judge who decided *Rama* v. *Subba*(1) expressly stated that the grant concerned in the suit that was before them was not

(1) (1889) I.L.R., 12 Mad., 98.

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a grant of the freehold in the soil, and seeing that the object of that suit was in effect to challenge the decision of the Government, who accepted the recommendation of the Board of Revenue and the Collector, as to the person who should be recognized as the representative of the grantee of the jaghir, I am of opinion that that case should not be treated as an authority against the maintainability of the present suit for partition of plaintiff's share in certain unenfranchised personal inams belonging to her husband's family and devised to her by his will.

In *Jeeyamba Bai* v. *Secretary of State for India*(1), the suit was brought by one of the Ranis of the Tanjore family against the Government itself to have it declared that Government had acted illegally in resuming a certain inam village. This decision clearly stated that the suit related to a grant of land revenue and land revenue only. In the suit out of which the present appeal arises, there is no question as to the grant of land revenue but only a question whether the plaintiff is entitled to a share in the freehold interest in certain unenfranchised personal inam lands. The jurisdicti n of the Civil Courts to decide such a point is not ousted by anything in the Pensions Act. On the other point I have nothing to add to my learned brother's judgment. The appeal fails and is dismissed with costs of plaintiff. The appeal is also dismissed as against eleventh defendant with costs proportionate as stated in my brother's judgment. The eleventh defendant's memorandum of objections is allowed but without costs. The other parties will bear their own costs.

RAMESAM, J.

RAMESAM, J.—The ninth and the tenth defendants are the appellants before us. The suit is for partition between the members of the family. The family had become

(1) (1912) 23 M.L.J., 687.

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divided in status long ago. The present suit is for division by metes and bounds. The plaintiff is the widow of one Muthusami Iyer who died in 1904 and claims under his will. The appeal relates to the subject matter of the fourth issue, namely, items 1, 4, 5, 7 and 8 which are unenfranchised hereditary personal inams.

Two points have been raised for the appellant:—

(1) that the suit is not maintainable in a Civil Court under section 4 of the Pensions Act and

(2) that the plaintiff has no right to a share in these items either as heir or as devisee.

Taking the first point, section 4 of the Pensions Act enacts that no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government. Now, remembering that "an enactment of a character which deprives the subject of his right to resort to the ordinary Civil Courts of Justice for relief in certain cases ought to be construed strictly and the Court should not extend its operation further than the language of the Legislature requires," [vide the cases cited in *Balwant Ramachandra* v. *Secretary of State*(1)], one would think that the proper construction of the section would confine its operation to a grant of land revenue only as opposed to a grant of land. This is the view taken in this Court in *Panchanada* v. *Nilakanda*(2) where TURNER, C.J., says:

"That Act contemplates money payments to be received through the Collector or recovered from persons bound to pay revenue"

and therefore the Act does not cover grants of lands, revenue free.

This is also the view taken by BATTY and RUSSELL, JJ., in *Balwant Ramachandra* v. *Secretary of State*(1).

(1) (1905) I.L.R., 29 Bom., 480 at 490. (2) (1884) I.L.R., 7 Mad., 191.

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They follow the decision in *Panchanada* v. *Nilakanda*(1). They also refer with approval to *Kumara Tirumalai Naik* v. *Bangaru Tirumalai Sauri Naik*(2) where it is observed:

"It cannot be said that the giving of land free of revenue is a grant of land revenue."

Babaji Hari v. *Rajaram Ballal*(3) was quoted as authority. The passage cited runs thus:

"The land revenue arising from a man's own holding, when it is remitted, and the land pays nothing, is rather extinguished than granted."

I agree with these cases.

The appellant relies on two decisions, *Rama* v. *Subba*(4) and *Jeeyamba Bai* v. *Secretary of State for India*(5). It may be that in the former case it is possible to arrive at the conclusion that on a construction of the grant there is a distinct grant of the land revenue apart from the land though there was also a grant of the land. It may be that in such cases the Act applies, but if anything more was intended to be laid down in *Rama* v. *Subba*(4), I am not able to agree with it especially as my view is in consonance with the trend of later decisions of this Court. The second decision relied on by the appellant, *Jeeyamba Bai* v. *Secretary of State for India*(5), was a decision of BENSON and SUNDARA AYYAR, JJ. SUNDARA AYYAR, J., afterwards explained it in *Secretary of State* v. *Subbarayadu*(6), and it is authoritative only in the light of that explanation. In the latter case, it was observed:

"The plaintiffs alleged that the land itself was their manyam and this position was not contested by any of the defendants. The suit is therefore not one relating to any grant of land revenue."

(1) (1884) I.L.R., 7 Mad., 191.
(2) (1898) I.L.R., 21 Mad., 310 at 320.
(3) (1876) I.L.R., 1 Bom., 75 at 81.
(4) (1889) I.L.R., 12 Mad., 98.
(5) (1912) 23 M.L.J., 687.
(6) (1913) I.L.R., 36 Mad., 559.

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Referring to *Jeeyamba Bai* v. *Secretary of State for India*(1), it was said :

"The instrument of grant, it was held, distinctly made a grant of the taxes due to the Government, although it may have been that the kudivaram also was granted. The grant of the kudivaram and melvaram was regarded as distinct and several. . . . The ratio of the decision was . . . , that where the Court is able to hold that there is a district grant of the land revenue itself a suit relating to it is not within the cognizance of the Civil Courts except with the sanction of the Collector."

I also agree that, where there is a distinct grant of the land revenue even though the land is also granted, the Act applies. But I am not to be taken as holding that the decisions in *Rama* v. *Subba*(2) and *Jeeyamba Bai* v. *Secretary of State for India*(1) are correct as to the construction of the grants in those cases. That point does not arise in this case. All that I can now say is, if the construction of the grants in those cases is right, I agree with the principle of law applied. The position of the words "land revenue" next to the words "pension or grant of money," I think, also supports this view. There is only one other decision of this Court to which I shall refer: it is *Desayi* alias *Allam Raju Nanjunadiah* v. *Desayi* alias *Allam Raju Venkatasubbiah*(3), where it was held that the Pensions Act does not apply to a claim among the members of the family for partition, but I shall not commit myself to the preceding sentence

"These observations are of great value in considering the right of an alienee to recover possession of an inam."

The actual decision is that the Act did not apply. I therefore hold in this case that the Pensions Act is not a bar to the maintainability of the suit. I may add

(1) (1912) 23 M.L.J., 687. (2) (1889) I.L.R., 12 Mad., 98.
(3) (1914) 27 M.L.J., 618.

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that the decision in *Panchanada* v. *Nilakanda*(1) arose in connexion with this very family. *Venkatarama Ayyar* v. *Chandrasegara Ayyar*(2) is another decision relating to the same family. The last decision leads me to the second point.

Mr. Krishnaswami Ayyar argues for the appellant that under the terms of the Inam Settlement (vide Exhibit 5, which is the Inam Register), the land was confirmed under rule 5, clause (3) of the Inam Rules of 11th October 1859. But this was not agreed and it was ultimately confirmed under rule 5, clause (1). Sub-clause (I) of clause (1) of rule 5 says that succession is limited to direct lineal heirs. As the widow cannot succeed as an heir, it is argued that the plaintiff cannot succeed as she claims under a will of her husband which is an alienation within the meaning of clause (3). Now the object of clause (3) is to protect the interests of Government and the prohibition therein can only mean that, as against the Government, all alienations are inoperative, not that they are void. So long as Government do not step in to enforce their rights, whatever they are, by ignoring the alienation, I do not think it is open to others to question a transaction which amounts to an alienation. This is the view taken in *Venkatarama Ayyar* v. *Chandrasegara Ayyar*(2), also in *Boyanapalli Venugopal Row Garu* v. *Venkatanarasimha Rao*(3) and *Lakshmipathi* v. *Narasimham*(4). I agree with all these decisions. The appellant refers to *Subban Ali* v. *Imami Begam*(5), but I do not think that case has any application here. I agree with the respondent's contention that so long as lineal heirs of the grantee remain the Government has no right to resume and the property descends

(1) (1884) I.L.R., 7 Mad., 191. (2) (1921) I.L.R., 44 Mad., 632.
(3) (1911) 2 M.W.N., 384. (4) (1916) 3 L.W., 590.
(5) (1925) I.L.R., 52 Calc., 971 at 977.

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like ordinary property. This is not a case in which a special rule of succession is laid down for each individual holder of his share of the inam. It may also be pointed out that from 1904 up to 1917 the plaintiff has been allowed by the other members of the family to be in possession of her husband's share by receipt of the corresponding income and the appellants before us themselves recognized her right. Exhibit 14 is a lease taken by the ninth defendant in favour of himself, the plaintiff and Jagadesa Ayyar, father of defendants four to eight. His explanation that the document so taken was all arranged by the 1st defendant cannot be accepted. It appears from the registration endorsement that the document was delivered to the ninth defendant, though he does not now choose to produce the original and produces only the registration copy. The plaintiff having been recognized to be the owner of her husband's share for more than 12 years claiming under her husband's will she has acquired title by prescription against the other sharers who also seem to be estopped from denying her title. The second point also fails.

The result is, the appeal is dismissed with costs of the plaintiff.

In the appeal, some grounds were taken against the eleventh defendant's decree, but the appellant has not paid any court fee in respect of it and it is dismissed with proportionate costs of the eleventh defendant, pleaders' fees being calculated on the proportionate shares of the eleventh defendant in the items 1, 4, 6, 7 and 8.

The eleventh defendant has filed a memorandum of objections claiming profits subsequent to the institution of the suit. It is conceded by the appellants that he is entitled to it and the omission is probably the result of a slip. The memorandum of objections will be allowed,

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but there will be no order as to costs. The other parties will pay their own costs.

The appeal having been posted to be spoken to this day, the Court (RAMESAM, J., and CURGENVEN, J.) delivered the following

JUDGMENT:—

The mesne profits decreed in favour of plaintiff and eleventh defendant will be ascertained by the Court below and a supplemental final decree will be passed. No part of the mesne profits is to be left to be determined in execution as was originally directed by the Court below.

K.R.

ORIGINAL CIVIL.

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

1926, October 19.

C. GOVINDARAJULU NAIDU, PLAINTIFF,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, DEFENDANT.*

Smuggled goods seized outside Madras—Order of confiscation by Collector of Customs, Madras—given effect to at place of seizure—Suit for conversion on the Original Side by owner against Government—Cause of action—wholly or in part in Madras—Sec. 19, Civil Procedure Code—"Resides"—Applicability to Government—"Business"—Nature of—Cl. 12, Letters Patent (Madras)—"Carry on business", "personally works for gain" and "dwells"—Explanation of—Sale-proceeds of confiscated goods, if revenue—Sec. 106 (2), Government of India Act.

Where goods were seized outside the local limits of the ordinary original jurisdiction of the High Court by a subordinate

* Civil Suit No. 324 of 1925.

GOVINDA-RAJULU NAIDU v. SECRETARY OF STATE.

customs officer as being smuggled into British India without payment of the duty lawfully leviable and the Collector of Customs, Madras, thereupon, passed an order directing the confiscation of those goods and the said order was communicated to the subordinate customs officer and given effect to by him.

Held in a suit for conversion by the owner of the goods against the Secretary of State for India filed on the Original Side of the High Court at Madras, that the confiscation became complete in the place where the seizure was carried out originally and not in Madras and that only a part of the cause of action arose within the local limits of the ordinary original jurisdiction of the High Court.

The language of section 19 of the Code of Civil Procedure (Act V of 1908) does not cover the case of Government and the word "resides" in the section must be taken to refer only to natural persons and not to legal entities, such as limited companies and Governments. The business intended by the section is a commercial business and not the business of Government.

In clause 12 of the Letters Patent (Madras), whereas the words "carry on business" apply to corporate bodies, and the words "personally works for gain" to an individual or individuals, the word "dwell" can only apply to an individual in a private sense and not to a legal entity.

Money derived from the sale of smuggled goods, seized and confiscated, is revenue and the seizure and confiscation of smuggled goods is an act done or ordered to be done in the collection of revenue, and section 106 (2) of the Government of India Act is a bar to the entertainment of any suit concerning the same by the High Court in the exercise of its ordinary original civil jurisdiction.

Best & Co., Ltd. v. *The Collector of Madras*, (1918) 35 M.L.J., 23, followed.

Subbaraya Mudali and others v. *The Government and Cunliffe*, (1863) 1 M.H.C.R., 286, dissented from.

Doya Narain Tewary v. *The Secretary of State for India*, (1887) I.L.R., 14 Calc., 256, approved.

Rodricks v. *Secretary of State for India*, (1913) I.L.R., 40 Calc., 308, approved.

SUIT by the plaintiff for the recovery of goods or their value from the defendants filed on the Original Side of the High Court.

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The facts necessary for this report appear in the judgments of their Lordships.

K. Narasimha Ayyar for the plaintiff.—My suit is in conversion. The confiscation was completed when the Collector of Customs, Madras, made an order directing confiscation. Next, apart from any question as to the place where the wrong was done, this case will come within the meaning of section 19 of the Civil Procedure Code. The section does not speak of a cause of action but only of a wrong. Clause 12 of the Letters Patent is only enabling and there is nothing in it to prevent the Original Side from entertaining my suit. The seat of Government is here and the order of confiscation emanated from here; *see Subbaraya Mudali and others* v. *The Government and Cunliffe*(1), and *In the matter of Subramania Chetty*(2). Lastly, section 106 (2) of the Government of India Act is no bar to the Original Side entertaining this suit; *see Alcock, Ashdown and Company, Ltd.* v. *Chief Revenue Authority*(3). Section 20 (2) 3 of the same Act states what are revenues. Money collected by way of penalty may be revenue but the sale proceeds of confiscated goods are not.

Advocate-General for the defendant.—The plaintiff, not having obtained leave to sue, must show that his cause of action arose wholly in Madras; or he must establish that at the time of the commencement of the suit, the defendant dwelt, or carried on business, or personally worked for gain within Madras. Section 19 of the Civil Procedure Code does not help him. The wrong complained of was completed only when the order of confiscation was given effect to at Cuddalore. The goods were never brought to Madras except a small portion for being exhibited in this suit. "Carries on business" means business in the commercial sense, *see Doya Narain Tewary* v. *The Secretary of State for India*(4) and *Rodricks* v. *Secretary of State for India*(5). "Personally works for gain" indicates what is the nature of the business contemplated. "Dwell" or "resides" is used with reference to natural persons and cannot apply to corporate bodies or merely legal entities. "Seat of Government" is only a popular expression and carries with it no legal implications. The collection of

(1) (1863) 1 M.H.C.R., 286.
(2) (1922) I.L.R., 45 Mad., 156.
(3) (1923) I.L.R. 47 Bom., 742.
(4) (1887) I.L.R., 14 Calc., 256.
(5) (1913) I.L.R., 40 Calc., 308.

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customs is under the Government of India. Smuggled goods, after confiscation, are sold, and the proceeds form part of the customs collections, an important head of the revenues of the Central Government. Section 106 (2) of the Government of India Act is an absolute bar to the entertainment of the suit on the Original Side. The decision in 35 M.L.J., 23, is conclusive on the point. 47 Bom., 742, deals with mandamus and does not apply to the present case.

JUDGMENT.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—The plaintiff brings this suit against the Secretary of State for India in Council in the following circumstances:—He made sales to customers in Salem and Coimbatore of a quantity amounting in all to 100 marcs of gold thread. The gold thread was despatched to the purchasers from a place called Nellikuppam in South Arcot and in transit it was seized by the Inspector of Customs, Cuddalore Circle, who alleged that the gold thread had been smuggled into British India and had not paid duty. The case for the plaintiff was that he had bought it ultimately through a sub-purchaser from Messrs. Parry & Co., who had imported it from France and paid duty upon it. The Collector of Customs to whom an appeal lay from the District Officer, or who rather had to affirm or disaffirm the action of the District Officer, made an order on the 30th July 1924 whereby he confiscated the goods and ordered their sale. Thereupon there was an appeal to the Governor in Council which was made by the plaintiff and was rejected. He now seeks the assistance of the ordinary Courts of the land to get his goods back or their value and he has brought this suit which is one of trover against the Secretary of State on the ground that what was done amounted to a wrongful conversion of his goods, his case of course being that the orders made were illegal inasmuch as in

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truth and in fact his goods never were smuggled at all. It seems to me that there are three difficulties that the plaintiff has not surmounted. In the first place, as he did not ask the Court for leave to bring his suit on the Original Side of this Court, he is faced with this difficulty that he must show that his cause of action arose wholly in Madras. The goods never came to Madras except a very small portion by way of exhibit for the purpose of this case, and if any wrong was done it was done by the seizure and detention of the goods in Salem or Coimbatore or Cuddalore and the only step in the whole transaction that can be suggested to have been performed within the Madras jurisdiction is the order of the Collector of Customs confirming the seizure and directing the goods to be retained at Cuddalore. It seems to me quite impossible to say that that really was an effective dealing with the goods. If the seizure of the goods was tortious it no doubt made the Collector of Customs a tort-feasor, but that is quite a different proposition from saying that, because owing to something he did in Madras he was a tort-feasor and had allied himself with tort-feasors, in Cuddalore, that makes the tort in any sense committed in Madras. That would be enough to dispose of this case, but two other points were raised and I think it right to deal with them.

In the first place, it is said that, apart from any question of the place in which the wrong was committed, this case can be brought within the meaning of section 19 of the Code of Civil Procedure in its second half which provides a jurisdiction "if the defendant resides or carries on business or personally works for gain within the local limits of the jurisdiction" of the Court in question. It is said here that the Secretary of State for India, which must be taken to be a paraphrase

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for the Madras Government, carries on business within the limits of the jurisdiction of this Court, as the headquarters of the Madras Government is situated in Fort St. George. Similarly I suppose it would have to be contended that at some time or other jurisdiction would be conferred upon the Subordinate Judge's Court of the Nilgiris, because during certain parts of the year the headquarters of the Madras Government is at Ootacamund. In my opinion the words of the section do not cover the case of Government at all. The only doubt I had was with regard to the word "resides" occurring in the section. I was inclined to the view at one time that Government must be said to "reside" in the place where its official headquarters are located, but on consideration I think that the word "resides" must be taken to refer to natural persons and not to legal entities such as limited companies or Governments. With regard to limited companies, they of course will be covered by the words "carries on business" and it was very strenuously argued that, the business of Government being to govern, Government must be deemed within the meaning of the section to carry on business at its headquarters. In my opinion the words that follow in the alternative "or personally works for gain" show that the business intended by the section is a commercial business and not a business of State or Government. The result will be one that really works no hardship. There is always a jurisdiction given within the local area where the wrong was done and it would have been perfectly open to the plaintiff here to sue the Secretary of State either in Salem or in Coimbatore or in Cuddalore—wherever the goods were in fact taken out of his possession. He has not chosen to do so. He has chosen to bring a suit on the Original Side of this Court without even taking

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the trouble to apply for leave on the ground that part of the cause of action arose within its jurisdiction.

Finally the point is taken on behalf of the Secretary of State that this is a matter affecting the revenue and that section 106 (2) of the Government of India Act covers the matter. On that subject, I have nothing to add to what I said in my own considered judgment which is reported in *Best and Co., Ltd.* v. *The Collector of Madras*(1), where I had to consider all the decisions affecting this matter and came to the conclusion that, however antiquated the section is and however useless according to present conditions, so long as it was allowed to stand in the statute book it must be given effect to and the effect is this, that in matters affecting the revenue the Original Side of this Court and that side alone is debarred from interfering in revenue matters. The section came to birth, nearly 100 years ago, when there was a conflict of jurisdiction between the Sudder Courts and the High Courts. That conflict has utterly vanished and there is no justification whatever for preserving this antiquated fossil on the statute book; but there it is, and so long as it is there we have to abide by it. I am quite clear that this is a matter affecting the collection of revenue though it be in the nature of a penalty and that therefore this Court has no jurisdiction to entertain the suit on that ground. For all these reasons I am of opinion that the plaintiff's suit is demurrable and must be dismissed with costs.

BEASLEY, J.

BEASLEY, J.—The plaintiff who trades in gold thread sold 100 marcs of gold thread to his constituents in Salem and Coimbatore and sent them to those constituents by registered post. When they arrived at

(1) (1918) 35 M.L.J., 23.

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their respective destinations they were seized under the orders of the Inspector of Cuddalore Customs Circle, who also sent a notice to the plaintiff calling upon him to show cause why the goods so seized should not be confiscated under sections 12 and 13 of the Land Customs Act. I think it would be well to explain what the procedure is. The local Inspector, where the goods seized are of the value of Rs. 250 or under, is empowered either to order those goods to be returned to their owner or to confiscate them if he thinks a good case for confiscation has been made out. Where the goods are of more than the value of Rs. 250 he can order them to be returned. He has full power to do so if he thinks that they are goods which ought never to have been seized, but he cannot make an order of confiscation; he has to refer the matter to the Collector of Customs at Madras, who either confirms the seizure by making an order of confiscation of the goods or orders their return to their owner. From this order of the Collector of Customs in Madras there is an appeal to His Excellency the Governor in Council. The plaintiff having received a notice calling upon him to show cause why his goods already seized should not be confiscated duly appeared before the local Inspector but notwithstanding his appearance and his contentions the local Inspector referred the matter to the Collector of Customs, Madras. In view of the procedure I have already referred to it is obvious that the action of the local Inspector in referring the matter to the Collector of Madras, indicates that, had the value of the goods been Rs. 250 or under, he himself would have made the order confiscating them. The Collector of Customs, Madras, made an order confiscating the goods and this order was duly communicated to the local Inspector who informed the plaintiff of the confiscation of the goods. The plaintiff

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then preferred an appeal to the Governor in Council who dismissed his appeal. The plaintiff now claims the return of the goods or their value from the defendant.

Two preliminary objections are taken by the defendant to the jurisdiction of this Court to try the plaintiff's suit. One is to the territorial jurisdiction and the other is, by reason of section 106 (2) of the Government of India Act, 1915 the High Courts may not exercise any original jurisdiction in any matter concerning the revenue or concerning any act done or ordered to be done in the collection thereof according to the usage and practice of the country or the law for the time being in force; and it is contended that this is a matter concerning the revenue or is an act done or ordered to be done in the collection of it. With regard to the first objection the point is whether the cause of action arose wholly within the local limits of this High Court or in part. Clearly if no part of the cause of action arose within the local limits of the High Court the objection founded on the earlier part of clause 12 of the amended Letters Patent is well founded and even if part of the cause of action arose within the local limits it is equally well founded because the leave of the Court to sue here must first have been obtained and no such leave has been obtained. The plaintiff's contention here is that the suit is for conversion of his goods and that the act of conversion was the order for the confiscation of his goods made here in Madras by the Collector of Customs. He could have sued for damages for the wrongful seizure of his goods. In such case he must have preferred his suit in the mufassal Court in the place where the goods were seized; or he could have sued for damages both for wrongful seizure and for conversion or as here sued for conversion only; but in the latter case to allege that the tort was wholly committed in Madras seems to

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me to be opposed to obvious facts. The goods were seized outside the local limits of this Court. Without such seizure no order for confiscation could have been made by the Collector of Customs, Madras. The first essential was this seizure. What was it that was required to make that seizure effective? The confiscation order of the Collector of Customs, Madras, and even that seizure was not made effective until the order of confiscation of the goods was received by the local Inspector in the mufassal. The confiscation then became complete in the place where the seizure was carried out originally and not in Madras. The goods were never at any time in Madras except for a small portion of them which have been brought here for the purpose of being exhibited in this suit. The plaintiff cannot be heard to say that the seizure was lawful because in his plaint he describes it as unlawful and the whole basis of his claim must be wrongful seizure. The seizure here cannot be right and the confiscation wrong. Either the seizure and the order for confiscation were right or both were wrong. For the purpose of upholding the objection on this part of clause 12 of the Letters Patent it is only necessary to hold that only a part of the cause of action arose outside the local limits of this High Court. For the reasons I have already stated I have no difficulty whatever in so holding.

The next contention is that even so he can sue by reason of the latter part of clause 12 of the Letters Patent, which is:

> "or if the defendant shall dwell or carry on business or personally work for gain within those limits."

It is contended that the defendant both dwelt and carried on business here at the commencement of the suit and in support of this contention the plaintiff has cited the decision of a bench of this Court in *Subbaraya*

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Mudali and others v. *The Government and Cunliffe*(1). In that case it was held that under clause 12 of the Letters Patent the Government must be considered as carrying on business at the place where its members exercise all the functions of Government, that is, in Madras. But even in that case the word "dwell" was considered inapplicable to the Government. On the other hand in *Daya Narain Tewary* v. *The Secretary of State for India*(2) it was held by a Bench that the words "carrying on business or personally work for gain" are inapplicable to the Secretary of State for India in Council. At page 273 in the course of this judgment MITTER, J., says:

> "that the word 'business' in clause 12 of the Letters Patent was used in a restricted sense is also indicated by the words 'personally work for gain' to be found in the same section. The latter words would be unnecessary if the word 'business' had been intended to be used in an unrestricted sense."

And with that statement I am in entire agreement. In my view the Government cannot be said to be carrying on business within the meaning of the word in that clause of the Letters Patent. This decision in *Daya Narain Tewary* v. *The Secretary of State for India*(2) was followed in *Rodricks* v. *Secretary of State for India*(3). We are not here bound by the decision in *Subbaraya Mudali and others* v. *The Government and Cunliffe*(1) and as I am in agreement with the Calcutta decisions I have no hesitation in following them. Nor do I think that Government can be said to dwell anywhere. Whereas the words "carry on business" apply to a corporate body and to limited companies and "personally work for gain" to an individual or individuals, the word "dwell" can only apply to an individual in a private sense and not to an entity. A corporation cannot be said to dwell anywhere. It may

(1) (1863) 1 M.H.C.R., 286. (2) (1887) I.L.R., 14 Calc., 256.
(3) (1913) I.L.R., 40 Calc., 308.

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have an office where it carries on business but it does not dwell there A dwelling denotes a place where a person resides, eats and sleeps. In my view therefore this Court has no territorial jurisdiction to try this suit.

The only remaining objection is that this High Court on its Original Side cannot try this case by reason of section 106 (2) of the Government of India Act.

That sub-section reads as follows:—

"The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue or concerning any act done or ordered to be done in the collection thereof according to the usage and practice of the country or the law for the time being in force."

It is contended by the defendant that this is a matter concerning the revenue or concerning an act done in the collection thereof; and it is not out of place in this connection to mention what is done with goods seized and confiscated. They are sold and the proceeds go to the customs. Part of the revenue of the country is derived from the customs and the collection of the customs is a collection of part of the revenue of the country and I am prepared to hold that that the sale of seized and confiscated goods and the taking by the customs authorities of those proceeds is the collection of customs and therefore of revenue. It is admitted by Mr. Narasimha Ayyar that penalties in the shape of double or treble duties imposed on smuggled goods would be revenue. Yet he contends that the money derived from the sale of seized or confiscated goods is not. I cannot myself see any distinction whatever. I may conjecture that one of the objects of the sale is to recoup the customs for the unpaid duty which, had it been paid, would have been revenue. But there is another obvious reason for this penalty and it is this: persons who bring dutiable goods into the country are required to declare their possession of them and to pay the proper duty which is then collected from them and

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becomes part of the revenue of the country. That is clearly the collection of revenue. If, however, persons smuggle dutiable goods into the country they prevent the collection of the duties and so the revenue. The object of the seizure and confiscation is two-fold, to punish the offender and to deter others from preventing or hindering the collection of revenue; and it seems to me impossible to hold that the seizure and confiscation of smuggled goods is not an act ordered or done in the collection of revenue, as it is obviously designed to facilitate the collection of customs and therefore the revenue.

The decision in *Alcock, Ashdown and Company, Ltd.* v. *Chief Revenue Authority of Bombay*(1) has in my opinion no application to this case. That case dealt with a mandamus to the Income-tax officer to make an assessment and was a matter which was merely a preliminary towards the assessment of the assessee. The acts complained of in this case were not in any sense preliminary but in my view directly related to the collection of customs. I may add that the question as to whether or not section 106 (2) of the Government of India Act does prohibit the exercise by this Court of its original jurisdiction in revenue matters has been decided by the learned CHIEF JUSTICE in *Best and Co., Ltd.* v. *The Collector of Madras*(2) and he there decided that the section was an express prohibition against the exercise of such powers. I need not say more than that I entirely agree with his judgment and with the reasons he gave therein. I agree with the learned CHIEF JUSTICE that both the objections are fatal to the plaintiff's suit and that it must therefore be dismissed.

Attorney for the defendant: *Government Solicitor.*

B.C.S.

(1) (1923) I L.R., 47 Bom., 742 (P.C.). (2) (1918) 35 M.L.J., 23.

APPELLATE CRIMINAL.

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

1923, October 12.

THE PUBLIC PROSECUTOR, APPELLANT,

v.

KANDASAMI THEVAN, ACCUSED.*

Identity of thumb-mark—Judge taking thumb-mark of accused—If objectionable—Conviction based on comparison of thumb-marks—If proper.

The question of identity of a thumb-mark is a question of fact to be decided as any other question of fact. There is no objection in law to a Judge taking the thumb-mark of an accused person, if the Judge thinks it relevant; and a conviction based on a comparison of the thumb-mark of an accused person with the thumb-mark on the document in question is not improper.

Bazari Hajam v. *King-Emperor*, (1922) I.L.R., 1 Pat., 242, dissented from. *Public Prosecutor* v. *Veerammal*, 23 Crl. L.J., 695, referred to.

APPEAL against the order of acquittal of the Court of Session of East Tanjore at Negapatam of the East Tanjore Division in Sessions Case No. 24 of the calendar for 1923.

The facts necessary for this report appear in the judgment of His Lordship the CHIEF JUSTICE.

Public Prosecutor for the Crown.

C. A. Seshagiri Sastri for the accused.

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—This is an appeal by the Crown against the acquittal of the accused on charges relating to a money order which came to his hands in his capacity of postman. I am quite at a loss to understand how,

* Criminal Appeal No. 480 of 1923.

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on the face of the evidence, in this case, the learned Judge could have arrived at the conclusion at which he arrived. In my judgment, it is against all the evidence. He has given entirely wrong grounds from start to finish.

The facts are that Rs. 20 was sent to a woman called Muniammal by her daughter who was away in the Malay States. The money order, Exhibit C, purports on the face of it, to have been paid over to the lady P.W. 1 and to bear her left hand thumb-mark witnessed by a man called Doraiswami. The accused says that he received that document and the money from the local postmaster, took it to P.W. 1, paid the money to her and got her receipt by taking her thumb-mark witnessed by Doraiswami. It is perfectly clear on the evidence that he did nothing of the kind. There can be no doubt whatever that the witness's signature is a forgery and there cannot be the slightest doubt that the thumb-mark on the document is not the thumb-mark of P.W. 1, but is the thumb-mark of the postman himself, the accused. The learned Judge declines to act on what he describes as the evidence of an expert, that the thumb-mark on Exhibit C is similar to the thumb-mark of the accused. The evidence was not that it was similar but it was that it was identical. He apparently accepts the evidence that the mark on Exhibit C has no resemblance to either of the thumb-marks of P.W. 1, but he suggests that it is possible that it was not her thumb-mark but was her finger-mark. It is quite clear that the definite rule of the post office well known to the accused was that he is to take the left thumb-mark of the person who cannot write. There was no evidence at all before the Court that there was any resemblance between this mark and the finger-marks of P.W. 1 and, therefore, this suggestion

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is a figment of the learned Judge's imagination. He further purports to follow a ruling in *Bazari Hajam* v. *King-Emperor*(1), a case on which considerable doubt has already been thrown by this Court on other points in *Public Prosecutor* v. *Veerammal*(2) and the part on which he relies is a statement in the judgment of BUCKNILL, J., to the following effect:—

"The very fact of the taking of the thumb-impression from an accused person for the purpose of possible manufacture of the evidence by which he could be incriminated is in itself sufficient to warrant one in setting aside the conviction upon the understanding and upon the assumption that such was not really a fair trial."

It was applied in this case by the learned Judge to certain impressions of the accused's thumb-marks taken before the Magistrate. It really was unnecessary for anything that the learned Judge had to apply his mind to, because there were ample examples of the accused's thumb-marks without having recourse to that particular example which was excluded. But I think it is very desirable to say that I wholly disagree with the remark I have quoted from the judgment of BUCKNILL, J. Why the taking of the thumb-impression from an accused person should be described as being taken for the purpose of possible manufacture of the evidence, or on what principle of law a conviction based on the resemblance between that thumb-impression and the thumb-impression on the document in question in the suit is to be set aside on the assumption that it was not a fair trial is beyond my comprehension. It is enough for me to say that I see no objection in law at all to the taking of the accused's thumb-mark, if the Judge thinks it relevant at any time; nor do I think that a conviction based on a comparison of the thumb-mark of the accused

(1) (1922) I.L.R., 1 Pat., 242. (2) 23 Crl. L.J., 695.

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person with the thumb-mark on the document in question in the suit is in the least objectionable. The question of identity of the thumb-mark is a question of fact to be decided by evidence as any other question of fact; as I have already stated, in my judgment, it is clearly established in this case that the thumb-mark on the document in question in the suit is the thumb-mark of the accused. In my judgment, there is ample evidence to convict this accused. I shall not, however, part from this case without saying something about certain documents, Exhibits I, II and II (*a*). It would seem to be a fact, and clearly established as a fact, that P.W. 1 received from her daughter a registered letter, two months after the date of the alleged payment to her of this money, saying that she had sent this money and had no receipt for it, and that P.W. 1 took that letter to the postmaster at Nidur. She having told him that she had not received the money and he having got what purported to be her receipt in the records of the post office, he said he would make enquiries and see her again. She came two days later and was then met by the accused, and the accused handed to her Rs. 20 and took her thumb-mark as a receipt for the payment. That receipt has never been produced. At a later date when the higher postal authorities were making enquiries into the matter, this woman was got somehow to the post office and statements were taken from her. The first one of them Exhibit I, taken by the postmaster is interpreted by him to mean that she was then stating that she had been paid her Rs. 20 at its due date, that is, in December; and the same statement is repeated in her later statements, Exhibits II and II (*a*), taken by the Inspector on a later occasion. They were written by the Inspector's peon in Tamil, because the Inspector could not

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write Tamil freely, and her thumb-impressions were taken. They are badly translated into English. They purport to show that they were read over to P.W. 1. They were then shown to her at the trial to show, and were apparently accepted by the learned Judge as showing, that the whole story was wrong and that she really had received the money in December. The postmaster, who took the first statement Exhibit I, knew perfectly well that that was not what she meant to say, because she had come with a man whom she had got to read to her the letter from her daughter and had said, "Here is that letter, why have I not got the money?" He then delays matter so as to give time to the accused to refund the money which he had stolen and then writes a statement which looks as if the woman was satisfied that she had been paid at the proper date and so supplies evidence to save this dishonest postman when the matter comes up for discussion. I think it is a matter into which very careful enquiry should be made by the postal authorities to ascertain how far this postmaster was a party to the fraud and how far the inspector was justified in taking the statements which he took in the circumstances of this case. However, it is a matter with which we are not concerned. What we are concerned with is to see that justice is done. I am quite satisfied that this was a deliberate misappropriation of the money entrusted to this postman and that the accused thereby committed criminal breach of trust. He must be convicted of that charge. For a public servant like a postman to commit a crime of that kind, to bolster it up with forging the name of a witness and to substitute his own thumb-mark for that of the payee is a very serious crime indeed. The maximum punishment for that offence is transportation for life or imprisonment for ten years. So far, as we know, this is

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his first offence and I, therefore, think that the proper sentence is a sentence of rigorous imprisonment for three years.

WALLER, J.

WALLER, J.—I entirely agree. There can be no doubt whatever that Muniammal was not paid the money on the alleged date, but about two months later after she had received a letter from her daughter. It is clear that her supposed thumb-impression on the acknowledgment is really that of the accused and that the signature of the attesting witness is a forgery. There is, however, no appeal against the acquittal on the charge of forgery but only against the acquittal under section 409, Indian Penal Code. I agree that the acquittal should be set aside and the accused should be convicted of an offence under section 409, Indian Penal Code. I entirely agree in the opinion which the learned Chief JUSTICE has expressed as regards the ruling in *Bazari Hajam* v. *King-Emperor*(1).

B.C.S.

APPELLATE CRIMINAL.

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

In re MUTHU BALU CHETTI AND OTHERS (ACCUSED).*

1926, August 26.

District Municipalities Act (V of 1920), ss. 249 and 250—Permission under sec. 250 obtained—If licence under sec. 249 necessary.

Permission obtained under section 250 of the District Municipalities Act (Act V of 1920) to construct or establish a factory or instal machinery does not absolve a person from

(1) (1922) I.L.R., 1 Pat., 242.

* Criminal Revision Case No. 377 of 1926.

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taking out a licence under section 249 to work the same. The object and scope of the two sections are entirely different. Section 249 contemplates an annual payment for the use of the machinery, while section 250, a payment once for all, for installing it.

In re Smith, (1920) 45 M.L.J., 731, approved.

In re Ramachandra Rao, (1920) 45 M.L.J., 555, referred to.

Criminal Revision Case No. 503 of 1925, dissented from.

CASES referred for the orders of the High Court under section 438 of the Criminal Procedure Code by the Sessions Judge of Madura in Criminal Revision Petitions Nos. 49 to 76 of 1925 on his file.

F. S. Vaz for the Municipality.

S. T. Srinivasa Gopala Chari for the accused.

Public Prosecutor for the Crown.

JUDGMENT.

ODGERS, J.

ODGERS, J.—This batch of criminal revision cases has been referred by the Sessions Judge of Madura. The First-class Bench of Magistrates, Madura Town, convicted the persons concerned under section 338 of the District Municipalities Act on the ground that they had not taken out licences under section 249 of the same Act. Permission had been obtained under section 250 and it was contended before the Bench of Magistrates and before us in revision that if such permission is obtained it is unnecessary to take out a licence under section 249. Reliance is placed on the ruling of a Bench of this Court in Criminal Revision Case No. 503 of 1925 and the learned Sessions Judge has referred the matter to this Court on the ground that the convictions are illegal having regard to that ruling. The Magistrates found as a fact that the working of the rice mills in question is likely to be dangerous to human life or health or property and would therefore fall

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within the mischief of schedule V (*q*) of the Act. So we must take it that the persons concerned have been found to be doing in the course of an industrial process something which is likely to be dangerous to human life or health or property.

The sole question is whether permission obtained under section 250 absolves the persons concerned from taking out licences under section 249. This portion of the Act beginning at section 249 is headed "Industries and Factories" and section 249 deals with "Industries" and section 250 with the construction or establishment of factories, workshops or workplaces in which it *is proposed* to employ steam power, water power or other mechanical or electrical power or with the installation of any machinery or manufacturing plant driven by steam, water or other power as aforesaid. The person intending to construct a factory or instal machinery must before beginning such construction, establishment or installation apply to the municipal council for permission to undertake the work. This section says nothing about the kind of trade or industry to be carried on in the factory or on the premises in which machinery, etc., is to be installed and in my opinion the proviso in 3 (*a*) of the section is not intended to apply to matters of this kind. The permission is to construct or establish a factory or to instal machinery. Section 249 deals with a wholly different state of things. It gives the council power to notify that all or some of the trades or industries enumerated in schedule V may not be carried on within municipal limits or at a distance of three miles outside without the chairman's licence. They are all noxious or more or less objectionable trades or occupations. Many of them may be carried on without the establishment of a factory or workshop or the installation of any machinery. In the case referred to (Criminal

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Revision Case No. 503 of 1925) DEVADOSS and WALLER, JJ., recognize the distinction pointed out above in the Act between industries and factories. But they seem to have been impressed by the fact that the council was to grant the permission under section 250, whereas the chairman is to grant the licence under section 249. I cannot with deference see the anomaly. The council regulates the construction or user of buildings within the municipality as factories, the chairman in the first instance regulates their working if it is desired to carry on one or more of the scheduled occupations or trades therein. There is always an appeal to the council from the decision of the chairman. But much or most of the discussion in the judgment turns on the construction of clause (*q*) of schedule V as to which as observed we must accept the finding of fact by the Bench.

There are two decisions of KRISHNAN, J., both reported in *In re Ramachandra Rao*(1) The first *In re Ramachandra Rao*(1) is referred to by the learned Judges in the case under discussion. That case deals with the construction of clause (*q*) of schedule V. The other case *In re Smith*(2) was not referred to by the learned Judges. In it KRISHNAN, J., was dealing with sections 287 and 288 of the Madras Act IV of 1919 which are closely analogous to the sections now under review, and the learned Judge was of opinion that the licence for the use of machinery and the payment once for all for erecting machinery are different things, and the fact that payment was made in one case is no excuse for not paying in the other. With this opinion I respectfully agree, and on the above considerations I am unable, I regret, to concur with the ruling of the Bench in Criminal Revision Case No. 503 of 1925.

(1) (1920) 45 M.L.J., 555. (2) (1920) 45 M.L.J., 731.

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I must hold therefore that the convictions in these cases were right. I would return all these revision petitions to the District Judge to be dealt with in the light of the foregoing remarks.

MADHAVAN NAYAR, J.

MADHAVAN NAYAR, J.—The facts of this reference are not much in dispute. The accused keeps within the municipal limits of Madura Town a rice mill for converting paddy into rice and for this purpose, he uses a rice-hulling machine which is worked by a 20-horse power oil-engine. He has been convicted by the Court of the First-class Bench of Magistrates, Madura Town, under sections 249 and 338 of the District Municipalities Act for having failed to take out a licence for using the engine to work the machine. The main argument advanced on his behalf is that having obtained permission under section 250 of the Act for the installations of the rice mill and the engine, he is not required to take out any further licences for working the engine under section 249. This argument is supported by a decision of this Court in Criminal Revision Case No. 503 of 1925. Mr. Adam argues that this case has been wrongly decided by the learned Judges.

It may be stated at the very outset that we have been asked by the learned Public Prosecutor to consider this reference on the assumption that the machinery in question falls within schedule V, clause (*q*) of the District Municipalities Act. The District Judge has not expressly stated so in his letter of reference; but the magistrates who have convicted the accused have held that the working of this machinery is dangerous to human life, health or property as mentioned in clause (*q*) of the schedule.

Section 249 of the District Municipalities Act states that no place within the municipal limits shall be used for any one or more of the purposes specified in

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schedule V without the chairman's licence. Under this section it is obligatory on any one using a place for working machinery of the description specified in schedule V to obtain a licence. The licence granted under the section shall enure for a year. It is obvious that the object of the section is to make the licensee pay an annual fee for using machinery of the kind described in clause (*q*) of schedule V in his premises. Section 250 of the same Act states that every person intending to construct or establish any factory . . . in which it is proposed to employ steam-power . . . or to instal in any premises any machinery . . . driven by steam, water . . . shall before beginning such construction or installation obtain a licence from the Municipal Council (clauses (*a*) and (*b*)). This section contemplates the levy of a fee before a factory is established or special kind of machinery is installed. The payment is a payment once for all and not annual, as in cases falling under section 249. The object and scope of the two sections are thus, in my opinion entirely different. The one contemplates an annual payment for the use of the machinery, while the other a payment once for all for installing it. The argument advanced by Mr. Srinivasa Gopala Chari, if accepted, would lead to this position, viz., that once permission is granted for installing the machinery, the applicant can work the machinery for ever without making any payment at all. This can hardly have been the intention of the legislature in enacting sections 249 and 250 of the District Municipalities Act. In the judgment already referred to, it is stated that

"It would be completely anomalous to hold that, after the Council had granted permission for the erection of a mechanical power factory, it is open to the Chairman to refuse a licence for its being worked or to impose impracticable conditions on its working."

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With great respect to the learned Judges, I cannot see any anomaly in the situation if the scope and object of the two sections are correctly appreciated. In my opinion, the fact that the industries included in section 249 and schedule V are licensed by the chairman, subject to the control of the Council while the power factories referred to in section 250 are regulated by the Council itself, subject to the orders of the Governor in Council, has no material bearing on the question under consideration.

Sections 287 and 288 of the City Municipal Act may be referred to with advantage in this connexion. Section 287 states that

"The owner or occupier of every place used for any purpose specified in schedule VI shall in the first month of every year, or, in the case of a place to be newly opened, before it is opened, apply to the Commissioner for a licence for the use of such place for such purpose."

Section 288 states that

"No person shall, without the permission of the Commissioner, erect anywhere any steam-boiler or machinery by the use of which smoke, smell, noise, vibration, dust or floating particles of combustible or other matter are produced or danger is likely to arise to the inhabitants of the neighbourhood."

In *In re Smith*(1) Mr. Justice KRISHNAN had to consider the true scope of these two sections under slightly different circumstances. In that case the accused was convicted for not taking a licence under section 288. He had removed his machinery from its old place to a new one, and obtained permission to use it in his new premises, but he had not obtained permission to erect the machinery in the new place. It was argued as the first point that

"the accused having been allowed to use the machinery in Jones' street and it having been merely transferred to the new

(1) (1920) 45 M.L.J., 731.

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place, he could not be asked to pay any new licence fee for erecting the machinery there."

The learned Judge in overruling this argument made the following observation :—

"I do not agree with this connexion because the two things are different, the one is an annual payment of the licence fee for the use of the machinery and the other is a payment once for all for erecting the machinery and the fact that the payment was made in the one case is no excuse for not paying in the second time."

I think these observations may well be applied in considering the arguments advanced in the case before us.

For these reasons, I would respectfully differ from the decision in Criminal Revision Case No. 503 of 1925. The other question raised in that case, viz., whether the machinery falls within clause (*q*) of schedule V does not arise in the present case as already indicated. I would therefore return this reference and the connected cases to the District Judge and ask him to deal with the case in the light of the above observations.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace and Mr. Justice Madhavan Nayar.

1926, September 3.

In re MAYANDI THEVAN, APPELLANT.*

Criminal Tribes Act (VI of 1924), sec. 23—Conviction under sec. 23 (1) (b)—Second and third convictions—If should be after accused's tribe is declared or accused registered as member of criminal tribe—Reduction of sentence—"Special reasons to the contrary"—Character of.

For the conviction of an accused person under section 23 (1) (*b*) of the Criminal Tribes Act (VI of 1924) it is not necessary that both the second and the third convictions should be

* Criminal Appeal No. 203 of 1926.

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after the tribe to which the accused belongs had been declared a criminal tribe or after the accused was registered as a member of a criminal tribe.

The mere fact that the offence is not of a very serious nature cannot form a "special reason to the contrary" for reducing the sentence. Such a special reason must be something apart from the nature of the offence such as, youth, age, illness, or sex.

Criminal Appeals Nos. 318 and 367 of 1925 followed.

Reference No. 17 of 1924 dissented from.

Section 23 (1) runs as follows :—

Whoever being a member of any criminal tribe and having been convicted of any of the offences under the Indian Penal Code specified in schedule I, is convicted of the same or of any other such offence shall, in the absence of special reasons to the contrary which shall be stated in the judgment of the Court, be punished,

(*a*) on a second conviction, with imprisonment for a term of not less than seven years, and

(*b*) on a third or any subsequent conviction, with transportation for life:

Provided that not more than one of any such convictions which may have occurred before the 1st day of March 1911, shall be taken into account for purposes of this sub-section.

APPEAL against the order of the Court of the Assistant Sessions Judge of the Madura Division in case No. 93 of the calendar for 1925.

Public Prosecutor for the Crown.

No one appeared for the accused.

JUDGMENT.

The appellant in this case has been convicted on the unanimous verdict of a jury of offences under sections 457 and 380, Indian Penal Code, and sentenced to rigorous imprisonment for seven years. It was held that he broke into prosecution witness 1's house and stole a ram therefrom. There is no misdirection in the charge and none is urged in the appeal petition. The

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only question for consideration is the question of sentence.

The appellant is a member of a notified criminal tribe and has had two previous convictions, both subsequent to 1911. *Prima facie* therefore the sentence which ought to have been passed on him for a third conviction is, under section 23 of Act VI of 1924, transportation for life. Notice was served on him to show cause why the sentence imposed should not be enhanced. The Sessions Judge has given no reasons for not imposing the sentence of transportation for life.

In a judgment of this bench in Reference No. 17 of 1924 we held that, when an accused person was a member of a criminal tribe but was not registered as such until 1923, his second and third convictions must be convictions after his registration, and not merely his second and third convictions, "he being a member of a criminal tribe" since, if the latter view prevailed, section 23 (1) (*b*) could be applied before (1) (*a*) had been applied. By the proviso all convictions prior to 1st March 1911 count as one. If the second conviction may be a conviction *after* 1st March 1911 but *before* the tribe is declared a criminal tribe, then at the time of the conviction section 23 (1) (*a*) would not be applied; but if the third conviction was *after* the tribe was declared a criminal tribe, then, if mere membership of a criminal tribe operates to bring section 23 into force for a third conviction, section 23 (1) (*b*) must be applied although (1) (*a*) had not yet been applied. This seemed to us to indicate that what the section really meant was that both the second and third convictions should be after the tribe to which the accused belongs had been declared a criminal tribe or after the accused was registered a member of the criminal tribe. The correctness of this ruling was, however, doubted by a member of another bench in

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Criminal Appeals Nos. 318 and 367 of 1925, DEVADOSS, J., holding with us and WALLER, J., taking the other view. In this difference of opinion the matter was placed before a third Judge, the learned CHIEF JUSTICE, who upheld the view of WALLER, J., and pointed out that the statute did in words distinguish, when it intended to do so, between a member of a criminal tribe and a registered member of a criminal tribe—compare section 23 with sections 22, 24 and 25. We think there is considerable force in this point, though it does not wholly get over the difficulty that in certain cases section 23 (1) (*b*) will apparently have to be applied before section 23 (1) (*a*) has been applied. We are not prepared to press our previous view which was, we admit, partly induced by a reluctance to suppose that the legislature intended such an extreme severity as the Act would seem to imply.

We have called for the notification under which the tribe of this accused was notified as criminal. It is dated 5th June 1918 and the accused was apparently registered on 14th July 1920. The fact that he was a member of a criminal tribe seems to have been overlooked by the First-class Magistrate of Usilampatti who convicted him, his second conviction, on 20th December 1923 and sentenced him to 18 months' rigorous imprisonment. He ought then to have sentenced him to an imprisonment of not less than 7 years. Now undoubtedly the only legal sentence which can be imposed on him is transportation for life, unless the Court is satisfied that there are special reasons for reducing the sentence. We cannot think that the mere fact that his offence is not of a very serious nature, that is to say, housebreaking and not robbery or dacoity, can form a special reason for reducing the sentence. Such special reasons must in our view be something apart from the

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nature of the offence, such as, youth or age or illness or sex. The Act clearly implies that on a third conviction of an offence under schedule I the punishment to follow is transportation for life. We must therefore enhance the sentence on the accused to one of transportation for life.

At the same time we feel that the sentence is unduly harsh and doubt if the framers of the Act really intended such a result. It means, for instance, that for, say, three separate thefts of a goat, the three goats being worth perhaps Rs. 9 in all, at different times, a man may be sentenced to transportation for life. The result of enforcing such penalties must be, we feel sure, a crop of recommendations to Government to reduce the sentences and we would suggest that the better course would be to consider whether the extreme rigour of the Act may not be mitigated by fresh legislation. In the present case we intend to move the Government to reduce the sentence to rigorous imprisonment for seven years which, we think, is an adequate sentence even for a member of a criminal tribe in the circumstances of this case, and we shall do so accordingly.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace and Mr. Justice Madhavan Nayar.

C. M. PEDDA MALLA REDDI AND B. C. MALLA REDDI, PETITIONERS (ACCUSED),

1926, September 8.

v.

KING-EMPEROR (RESPONDENT).*

Indian Penal Code, sec. 294 (a)—"Goods"—Immovable property—If included in.

The term "goods" in section 294 (*a*) of the Indian Penal Code includes both movable and immovable property.

The publication of an advertisement of a lottery by which the lucky winner would get a factory for less than its real value is an offence under section 294 (*a*) of the Indian Penal Code. 8 George I, Chapter II, section 36 and 12 George II, Chapter XXVIII, section 1, referred to.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Sessions of Cuddapah in Criminal Appeal No. 39 of 1925 preferred against the judgment of the Court of the First-class Deputy Magistrate of Jammalamadugu in Calendar Case No. 70 of 1925.

The two appellants were owners of a ginning and groundnut decorticating factory. They put in a petition to the Collector of the district requesting sanction for the disposal of the factory by means of a lottery. The Collector informed the appellants that there was no provision of law under which he could sanction the holding of lotteries and that it was for the promoters to see that they did not offend against the law. In spite

* Criminal Revision Case No. 760 of 1925.

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of this, advertisements about the holding of the lottery were published in two Madras dailies for a period of about five and a half months stating *inter alia* that the lottery was for Rs. 52,500 and that there were 10,500 tickets of Rs. 5 each. Handbills also were distributed in connexion with the same. In an advertisement appearing on a certain day it was stated that the lottery was being held after obtaining the permission of Government. In later advertisements it was stated that the factory was being sold after reference to Government. A similar recital was also to be found in the handbills. The reference to Government in all these advertisements and handbills was to the endorsement of the Collector. The appellants later on applied to Government for sanction to hold the lottery and Government refused the sanction sought for. Subsequently advertisements appeared in the dailies referred to above that the lottery was suspended owing to Police interference. A few weeks later Government sanctioned the prosecution of the appellants under section 294-A of the Indian Penal Code.

V. L. Ethiraj and *M. C. Sridharan* for petitioners.

Public Prosecutor for the Crown.

JUDGMENT.

The chief question for decision in this case is whether the act of the appellants, viz., publishing an advertisement of a Rs. 52,500 lottery, by which a ginning factory was to be raffled at Rs. 5 tickets, is an offence within section 294-A of the Indian Penal Code. The argument is that "goods" in the section applies only to movables, and that if the Legislature had intended to include immovable property, it would have said so in appropriate words. We are not able to accept this

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contention. The idea of the lottery was that the lucky winner should get the factory for less than its real value, viz., for the actual sum he paid for his tickets, which would undoubtedly be for his "benefit." The proposal therefore was to do something "for the benefit of any person." There seems no reason, short of complete oversight, why a lottery for movable goods should be an offence and a lottery for immovable goods not an offence. The general clause was evidently regarded as sufficient to cover the latter case. The Public Prosecutor has called our attention to the wording of the English Acts, still in force, 8 George I, Chapter II, section 36 and 12 George II, Chapter XXVIII, section 1, both of which enact that a lottery for "lands" is an offence. We think there is no substance in this contention.

The next argument is that there is no case proved against the first appellant. The lower courts have found as a fact that he took part in the publication, and we cannot say that there is no evidence on which they could do so. It is quite clear that the first appellant's name was throughout associated with the lottery. We reject this contention also.

It is finally urged that the sentence is heavy. We agree with this. All that was called for in the circumstances was a vindication of the law. The lottery was not held and no one is the worse for the publication. We reduce the fine to a fine on each appellant of Rs. 100 (rupees one hundred). The balance, if paid, should be refunded.

B.C.S.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Wallace.

1926, September 2.

VELLAYAPPA CHETTY AND 3 OTHERS—(SECOND DEFENDANT'S LEGAL REPRESENTATIVES), APPELLANTS

v.

SUBRAMANIAM CHETTIAR AND 4 OTHERS—(PLAINTIFFS 1 AND 2 AND DEFENDANTS 1, 3 AND 4), RESPONDENTS.*

Madras Estates Land Act (I of 1908), sec. 3 (4) (a) and (f)—Wells dug at very small cost and planting coconut gardens, not improvements.

Wells constructed by digging small pits in sandy soil at a very small cost, in which underground and surface water naturally collects are not "improvements" within section 3, clause (4) (a) of the Act. Coconuts are not "fruits" and planting coconut gardens is not planting "fruit gardens" within section 3 (4) (f) of the Act and hence it is not an improvement within the section.

Second Appeal No. 571 of 1916 explained and dissented from.

SECOND APPEAL against the decree of the District Court of Rāmnād in Appeal Suit No. 975 of 1920 preferred against the decree of the Court of the Special Deputy Collector of Rāmnād at Manamadura in Summary Suit No. 2580 of 1918.

Section 3 (4) of the Madras Estates Land Act is as follows:—

"Improvement" means with reference to a ryot's holding any work which materially adds to the value of the holding, which is suitable to the holding and consistent with the character thereof, and which if not executed on the holding, is either executed directly for its benefit or after execution is made directly beneficial to it and subject to the foregoing provisions, includes—

(a) the construction of tanks, wells, water channels, and other works for the storage, supply, or distribution of water for agricultural purposes;

* * * * *

* Second Appeal No. 433 of 1924, etc.

(f) the planting of fruit trees and fruit gardens.

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M. Patanjali Sastri with *C. Rama Rao Saheb* for appellants.

B. Sitarama Rao with *V. Ramaswami Ayyar* for respondents.

JUDGMENT.

DEVADOSS, J.

DEVADOSS, J.—In this batch of Second Appeals the appellants are the ryots. The landholder brought suits under section 77 of Act I of 1908, The Madras Estates Land Act, for arrears of rent for certain faslis. The appellants contended that the rent claimed in respect of coconut plantations was more than the rent they were bound to pay and that they were liable to pay only at the punja rate. Both the lower Courts found against the contentions of the appellants. Two points are raised in these appeals. The first is, that the coconut plantations in respect of which the alleged higher rent is claimed are an improvement within the meaning of section 3, clause (4) of the Act and the second is that the coconut plantations come within clause (6) of the same sub-section. Both the Courts have found that the wells were dug at the cost of a few annas, and the digging of such wells was not an improvement within the meaning of section 3 (4). The evidence is that two coolies working till noon could dig a well. The soil is sandy and the water is almost within a foot or two from the surface. When coconut seedlings are planted, small pits are dug which are euphemistically known as wells and water is baled out from these wells. The coconut seedlings require water for about five or six years after plantation. The appellant's contention is that the sinking of these wells is an improvement within

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section 3, clause (4) of the Act. Clause (4) is in these terms:

"Improvement means with reference to the ryot's holding any work which materially adds to the value of the holding, . . . "

The question is whether these wells have materially added to the value of the holding. The water of each pit is said to be sufficient to water 60 or 70 plants and twigs of tamarind trees and cotton stocks are placed round the wells so as to prevent the earth or the sand from falling in. The real test of the improvement is the rise in value of the holding by reason of the improvement. Could it be said that by having a few pits here and there in a field, the cost of digging which is not more than eight annas, the value of the holding would be enhanced? It is impossible to hold that these pits would in any way enhance the value of the holding. The soil itself being sandy it is fit for coconut plantation. It is not by digging wells alone that the appellants have been able to grow coconut plantations. The case would be different if the wells are dug and crops which would not thrive but for the water of the well have been raised. Wells are something more than mere pits which could be dug by a cooly within one hour or two hours or as it is done in some places by removing the sand with the feet. It cannot be said that small pits one or two feet deep for the purpose of baling water would enhance the value of the holding. Reliance is placed by Mr. Patanjali Sastri on the observation of a bench of this Court in Second Appeal No. 571 of 1916. The learned Judges observe:

"We can see no reason to restrict the meaning of 'improvement' to a permanent improvement, for temporary improvements can materially enhance the value of the holding for the period during which they are in existence."

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On looking into the papers in that case it appears that the District Judge found that there was no improvement as the wells were sunk at a trifling cost. In paragraph 3 he says:

"His claim has been rightly disallowed even though it may be that the wells in question being temporary pits sunk at a trifling cost are not 'improvements' within the meaning of the term as defined in the Act section 3 (4) since they do not materially add to the value of the holding."

The learned Judges observe:

"As regards the charge for Vanpayir the Judge finds in Second Appeal No. 169 of 1917 that the temporary wells by aid of which crops were grown are improvements within the meaning of section 13 (3) of the Estates Land Act. We accept this finding and would apply it also in the other cases in which no such finding is given, for we can see no reason to restrict the meaning of improvement to a permanent improvement, for temporary improvements can materially enhance the value of the holding for the period during which they are in existence."

It is difficult to understand how they considered the finding of the District Judge as one of improvement when he definitely found that they were not improvements as they did not materially enhance the value of the holding. In this case it cannot be said that these wells have in any way added to the value of the lands in the possession of the appellants.

It is next contended that coconut trees are fruit trees within the meaning of clause (*f*) of section 3 (4). The clause is "planting of fruit trees and fruit gardens." What are "fruit" trees is not easy to define. The ordinary meaning of a fruit tree is a tree cultivated for its fruit. The question is, is the coconut palm a fruit tree? No doubt the coconut is used for various purposes. But can it be called a fruit tree as is meant in clause (*f*)? A fruit tree is a tree the fruit of which is edible as such; every tree which bears fruit cannot be called a fruit tree. It is well known that in several parts of the

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country coconut palms are grown not for the sake of the fruit but for tapping them for toddy and so is the palmyra palm in the southern districts of this Presidency. Where the tree is not grown for its fruit to be used as such it would not be right to hold that that tree is a fruit tree. With some hesitation we hold that the coconut palm is not a fruit tree within the meaning of clause (*f*) of sub-section (4) of section 3.

In this view it is unnecessary to consider at length the contention of Mr. Sitarama Rao for the respondents that the assessment or the rent of the land in this estate is on the basis of the crops and there is no such thing as punja rate. We are unable to accept this contention. Lands are classified as nanja and punja and there are certain well-known crops which are punja crops and the mere fact that some crops are charged at a certain rate would not be sufficient to uphold the contention that there is no such thing as punja rate. The patta produced in this case and the oral evidence go to show that there is a well-recognized rate as punja rate. Even punja is classified in this estate as *thirvapathu* punja and *varapathu* punja. It is unnecessary to discuss this question any further. The defendants not having made out that the rent demanded is higher than the rent which they have to pay for the coconut plantations they are not entitled to any relief. In the result the Second Appeals fail and they are dismissed with costs.

WALLACE, J.

WALLACE, J.—I agree and only wish to add my own reasons on the two chief points.

As regards the question whether the pits dug are an improvement, it has to be noted that an "improvement" means something which "materially adds to the value of the holding." Now this is a point on which we cannot speculate. It ought to be a matter of evidence,

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and I can find no evidence thereon. The sort of evidence one would expect would be evidence of persons who consider that the market value of the holding has gone up appreciably in consequence of the making of these pits, and who would therefore be prepared to pay appreciably more for the holding after the pits were made than before they were made. But of this sort of evidence there is none. I agree therefore with my learned brother that we cannot find these pits are an improvement within the meaning of section 3 (4) (*a*) of the Madras Estates Land Act.

The next point is whether the planting of coconuts is a planting of fruit trees and fruit gardens within the meaning of section 3 (4) (*f*). "Fruit" of course is a most elastic term and can be applied to include berries (even coffee berries) or nuts, crab-apples or tomatoes, beans, or peppercorns, pumpkins, or plantains, and even grains and pulses. Nothing can be gathered from the "dictionary" meaning of the word as to its meaning in this definition, and we have to try and gather otherwise what the legislature meant. I think that it must at least have meant some exceptional or unusual crop, a change from the usual routine of crops, the planting of something more valuable than usual and therefore a kind of crop which is not in the ordinary sense a crop usually cultivated as a crop. Now I cannot regard coconuts as such a crop. Over large tracts of country in this Presidency it is the normal crop; in parts, the only crop suited to the soil. I do not imagine that the legislature intended that the planting of a normal crop should be styled an improvement. That it is regarded as a normal crop in the locality from which the suits arise is clear from the pattas filed, which show that areas deliberately grown with coconuts are charged per area, although isolated trees probably growing on bunds, etc.,

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WALLACE, J.

are charged per tree. This at least is the explanation of the "patta" sentences given by the respondent, and I am not prepared to say that it is wrong. I therefore agree with my learned brother that, as at present advised, we cannot say that the planting of coconuts on the suit lands is an improvement within the meaning of section 3 (4) (*f*).

N.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Wallace.

1926, March 9.

In re PUNYA NAHAKO AND THREE OTHERS (DEFENDANTS—RESPONDENTS IN S.A. No 641 OF 1921), PETITIONERS.*

Madras Court Fees Act (V of 1922)—Review—Change in the Court Fees Act before date of review—Subject matter of review and court-fee thereon—Arts. 4 and 5 of Schedule I of the Court Fees Act (VII of 1870).

A petition for review of an original or appellate decree must be valued on the reliefs prayed for in the petition as if the petitioner were then filing a plaint or memorandum of appeal for those reliefs. (1872) 7 M.H.C.R., Appendix, page 1 and *In re Manohar G. Tambekar*, (1880) I.L.R., 4 Bom., 26, followed; *Nandilal Agrani* v. *Jogendra Chandra Dutta*, (1923) 28 C.W.N., 403, not followed.

If between the date of the plaint or the appeal and the date of filing the petition for review, there has been a change in the Court Fees Act increasing the fee payable *ad valorem*, the petitioner must pay at the increased rate.

A defendant who wishes to file a review of a decree in a second appeal filed by the plaintiff, which allowed in favour of the plaintiff a suit for land and three years' mesne profits prior to date of suit, must pay court-fee not only on the same but also on mesne profits between the date of the plaint and the date of filing the second appeal. *Brahmayya* v. *Lakshminarasimham*,

* Civil Miscellaneous Petition No. 140 of 1925.

PUNYA NAHAKO, *In re.*

(1893) I.L.R., 16 Mad., 310 and *Balarama Naidu* v. *Sangan Naidu*, (1922) I.L.R., 45 Mad., 280, followed.

PETITION under Order XLVII, Rule 1, Civil Procedure Code, praying the High Court to review the decree and judgment, dated 29th February 1924, passed in Second Appeal No. 641 of 1921 preferred against the decree of the District Court of Ganjām in Appeal Suit No. 282 of 1919 preferred against the decree of the Principal District Munsif's Court of Berhampur in Original Suit No. 598 of 1917.

This was a suit filed in 1917 for certain lands and for mesne profits for three years prior to suit. The suit was allowed *in toto* by the trial Court but was dismissed *in toto* on appeal. Thereupon the plaintiff who filed a second appeal in 1921 in the High Court got on 29th February 1924 the decree of the District Munsif restored *in toto*. On 7th July 1924 the defendants filed a petition for review of the whole decree valuing the petition as if it was one only for the lands and three years' mesne profits prior to suit and paying court-fee according to the old Court Fees Act. The Registrar of the High Court wanted the petitioners to pay also for mesne profits for four years between the date of the plaint and the date of filing the second appeal, and at the higher rate according to the Madras Amended Court Fees Act (V of 1922). The question of court-fee payable was posted before a Bench.

C. Sambasiva Rao for the petitioner argued that the petitioner was not bound to include future mesne profits and that even if he was, according to *Nandilal Agrani* v. *Jogendra Chandra Dutta*(1), the court-fee leviable on the review is that paid on the second appeal, viz., at the lower rate.

Government Pleader (*C. V. Anantakrishna Ayyar*) for Government.—As the decree has awarded mesne profits and as they have been ascertained even by the first Court, the petitioners

(1) (1923) 28 C.W.N., 403.

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who are under the decree liable to pay mesne profits and who wish to get rid of the same by this petition must pay court-fee also on mesne profits subsequent to the suit; *Brahmayya* v. *Lakshminarasimham*(1), *Balarama Naidu* v. *Sangan Naidu*(2). The fee payable on a review by the defendants must be calculated on the reliefs prayed for in the review and not on the reliefs prayed for in the second appeal filed by the plaintiff, who is not obliged in law to include subsequent mesne profits in his memorandum of second appeal. As on the date of the review the new Court Fees Act (Madras Act V of 1922) had come into force, the petitioners must pay on the valuation in the second appeal and on mesne profits subsequent to the plaint at the increased rate according to the new Act; see 7 M.H.C.R., Appendix, page 1, which has not been dissented from till now and *In re Manohar G. Tambekar*(3).

JUDGMENT.

ODGERS, J.

ODGERS, J.—I agree with the opinion of my learned brother. I see no valid reason why the decision of this Court in 1872 to be found in 7 M.H C. Reports, Rulings Appendix, page 1, which has stood since 1872 should be dissented from. The interpretation put upon the articles in question in *Nandilal Agrani* v. *Jogendra Chandra Dutta*(4) seems to me to work an obvious injustice. This Court's interpretation of the rule seems also to have found acceptance in Bombay [*In re Manohar G. Tambekar* (3)].

I also agree with my learned brother's remarks on the question of mesne profits.

The fee levied by the office is right.

WALLACE, J.

WALLACE, J.—The point for decision in this reference is what is the proper stamp fee to be levied on the review application (C.M.P. No. 140 of 1925). This was an application for review of a judgment in second appeal. The judgment in that appeal was passed before the increase in the court-fees under the amended court-Fees Act of

(1) (1893) I.L.R., 16 Mad., 310. (2) (1922) I.L.R., 45 Mad., 280.
(3) (1882) I.L.R., 4 Bom., 26. (4) (1923) 28 C.W.N., 403.

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1922 came into force. The review application was put in after that amended Act had been passed. The first question is whether the rate of fee to be levied is under the old Act or under the amended Act. Under Schedule 1, articles 4 and 5, the court-fee for application for review of judgment is either the whole or half of "the fee leviable on the plaint or memorandum of appeal," and the decision turns on the interpretation of that phrase.

It may be construed in at least four different ways:—

(1) as the fee actually levied on the plaint or memorandum of appeal when admitted,

(2) as the proper fee to be levied on the plaint or memorandum of appeal at the time of presentation thereof,

(3) as the fee which would have been properly levied on the plaint or memorandum of appeal if that had been put in at the time of the presentation of the application for review, and

(4) as the proper fee to be levied if the applicant for review were then putting in a plaint or memorandum of appeal for the same relief.

As to (1) it seems clear that it is not a proper construction of the phrase. In the case of a suit or appeal in *forma pauperis* no fee is actually levied on admission. Again the Court of appeal may, in certain circumstances, increase or decrease the fee actually paid, and it is clearly more reasonable to suppose that the legislature meant the fee which was the proper fee to be levied and not the fee actually levied.

As to (2), an adherence to this construction would mean that, even though the review application only relates to a small portion of the relief asked for in the plaint or memorandum of appeal, the applicant for review would have to pay the full stamp paid on the plaint or

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memorandum of appeal. This again seems to me hardly acceptable. This view however has found favour in the Calcutta High Court [*Nandilal Agrani* v. *Jogendra Chandra Dutta*(1)] which refuses to follow an earlier decision of this Court, 7 Madras High Court Reports, Appendix, page 1, to which I shall allude later on. Such a construction would in this Court at least make an application for review much more expensive than an appeal.

As to (3), it would imply that where an applicant for review is the defendant and the appeals have been by the plaintiff all through, and the review application is thus the first motion of his for any relief, his application would have to be valued not on any sums paid by himself for the relief sought for by him but on the stamp paid by the opposite party for the relief sought for by it, which may obviously have no sort of relation to the relief which the review applicant wants. This again seems hardly a reasonable construction of the phrase.

Construction (4) implies that the applicant pays not for the relief sought for by any one else over which he has no control, but on the relief sought by himself, and he thus pays naturally and equitably on that relief as if it were a plaint or memorandum of appeal by himself for that relief. This appears to be the most reasonable interpretation of the phrase and it is the interpretation put upon the phrase by this Court so long ago as 1872 (see 7 Madras High Court Reports, Rulings Appendix, page 1), and this interpretation has been practically followed ever since by this Court. The Bombay High Court has taken a similar view in *In re Manohar G. Tambekar*(2). It follows therefore that the court-fee will be the court-fee payable as if, on the date when the

(1) (1923) 28 C.W.N., 403. (2) (1882) I.L.R., 4 Bom., 26.

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review application was put in, the applicant was filing a plaint or memorandum of appeal for the same relief, i.e., in the present case the court-fee leviable will be the court-fee which falls to be levied under the amended Court Fees Act calculated as if the application for review were a plaint or memorandum of appeal for the relief sought for.

The next point is whether court-fee must be paid on the mesne profits up to the date of the review application. Now it is plain that in this matter the review application has to be considered as if it were a memorandum of appeal, and on such a memorandum of appeal there is no doubt that the applicant who seeks to be relieved from the payment of such mesne profits must pay court-fee on such mesne profits up to the date of his appeal memorandum; see *Brahmayya* v. *Lakshminarasimham*(1) and *Balarama Naidu* v. *Sangan Naidu*(2). When the mesne profits have been ascertained, the court-fee is payable on the ascertained rate. Where the mesne profits have not been ascertained the fee is chargeable on the valuation of mesne profits in the plaint. The petitioner therefore must pay on the mesne profits which in this case are payable on the ascertained rate, calculated up to the date of the application.

The last point is, at what rate, the old rate or the new rate, must the fee on these mesne profits be levied. The answer to point (1) answers this point also. It must be paid as if the applicant was now putting in a memorandum of appeal and he must therefore pay according to the new scale.

The court-fee levied by the office is quite right.

N.R.

(1) (1893) I.L.R., 16 Mad., 310. (2) (1922) I.L.R., 45 Mad., 280.

APPELLATE CIVIL.

Before Mr. Justice Jackson.

1926, August 16.

SUNDARA NAICKER (PETITIONER—DEFENDANT), PETITIONER,

v.

POTTI NAICKER (COUNTER-PETITIONER—PLAINTIFF), RESPONDENT.*

Ss. 13 *and* 73 *of the Madras Village Courts Act (Act I of* 1889) *as amended by Madras Act II of* 1920—*Wide discretion of Munsif under sec.* 73—*No interference by High Court on revision—Suit fordamage to growing crops —Growing crops, personal property within sec.* 13 *of the Act.*

Section 73 of the Madras Village Courts Act (Act I of 1889) gives a District Munsif the widest discretion to interfere or not with the decision of a Village Court. He may refuse to interfere even if the conditions imposed by the section are complied with and the High Court will not ordinarily interfere in revision with the exercise of such discretion.

A suit for the value of growing crops destroyed by the defendant is a suit for the value of 'personal property' within the meaning of section 13 of the Act.

PETITION under sections 115 of Act V of 1908 and 107 of the Government of India Act, praying the High Court to revise the order of K. BALAJI RAO, District Munsif of Sattur, in Original Petition No. 24 of 1924 (Suit No. 4 of 1924, Panchayat Court of Sippiparai).

The plaintiff sued the defendant in the Village Court for Rs. 29, being the value of some cotton crop raised by the plaintiff in his field and alleged to have been damaged by the defendant's driving through the same carts loaded with seedlings. The defendant sent by post a written statement to the effect (*a*) that the

* Civil Revision Petition No. 140 of 1925.

Court had no jurisdiction, (*b*) that the track used by his carts was the usual track and (*c*) that the plaintiff had not sustained any damage. The Court gave a decree for the plaintiff for Rs. 29, after declaring the defendant *ex parte*. Thereupon the defendant filed a petition before the District Munsif of Sattur under section 73 of the Madras Village Courts Act, for setting aside the decree, stating:—(*a*) that he was present on the day of hearing, (*b*) that some of the members of the Village Court were his enemies and were partial to the plaintiff, being his relations and (*c*) that the Court had no jurisdiction. All these were denied by the plaintiff. The District Munsif dismissed the petition stating that he saw no sufficient cause to disturb the decree. The defendant filed this Revision Petition.

Section 13 (1) of the Madras Village Courts Act, is as follows:—

"The following are the suits which shall be cognizable by Village Courts (namely)—claims for money due on contract, or for personal property, or for the value of such property, when the debt or demand does not exceed in amount or value the sum of [rupees fifty] whether on balance of account or otherwise."

Section 73 of the Act is as follows:—

"The District Munsif may, on a petition being presented within sixty days from the date of any decree or order of a Village Court by any party deeming himself aggrieved by such decree or order, set aside such decree or order on the ground of corruption, gross partiality or misconduct of the Village Court, or of its having exercised a jurisdiction not vested in it by law, or otherwise acted illegally or with material irregularity; or that the decree or order is clearly unjust [* * *] and may pass such other decree or order as he thinks fit; provided that no decree or order of a Village Court shall be set aside without notice to the opposite party. Pending disposal of any such petition the District Munsif may stay execution of the decree or order.

A petition under this section may be entertained after sixty days by the District Munsif if he is satisfied with the cause

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shown for the delay. Except as provided in this section, every decree and order of a village Court shall be final."

T. M. Ramaswami Ayyar for petitioner.

K. S. Ramabhadra Ayyar for respondent.

JUDGMENT.

Petitioner seeks to revise the order of the District Munsif, Sattur, in O.P. No. 24 of 1924, declining to act under section 73, Madras Act I, 1889. A District Munsif has the widest discretion under this section and even if facts are established bringing the case within one of the three categories which may warrant revision as set forth in the section, he may still exercise his discretion, whether he will interfere. Therefore, it can only be in very rare and exceptional cases that the revisional powers of this Court will be attracted by any proceedings of a District Munsif under section 73. The petitioner would have been on stronger ground if he had moved this Court to revise the judgment of the Panchayat Court itself; but in a petition confined to the decision of the Munsif, it cannot be said that he failed to exercise jurisdiction; for he heard arguments from both sides and it cannot be said, that he ought of necessity to have set aside the decree because he has full discretion in the matter. Nor in a revisional proceeding of this sort, can it be said, that to state that he sees no sufficient cause to disturb the decree of the lower Court, is to write an inadequate order.

Two grounds are urged which would be more germane to a petition against the original decree. Firstly that the Panchayat Court heard no evidence. This is inferred from the record. "Witnesses examined for the plaintiff, nil"; but it seems probable that the plaintiff himself was examined and there is no suggestion to the contrary in the present petition.

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Secondly that a party cannot sue under Madras Act I, 1889, for the value of damaged crops, inasmuch as it is not a claim for the value of personal property as contemplated by section 13. Personal property is not defined in the Act and presumably, it means movable property and movable property as defined by the Transfer of Property Act includes growing crops. If the cause of action is the destruction of a growing crop, a party may sue for its value in the village court.

The petition is dismissed with costs.

N.R.

PRIVY COUNCIL.*

1927, March 21.

VIBHUDAPRIYA THIRTHA SWAMIYAR (PLAINTIFF), APPELLANT,

v.

LAKSHMINDRA THIRTHA SWAMIYAR (DEFENDANT), RESPONDENT.

[On Appeal from the High Court at Madras.]

Hindu Law—Religious endowment—Math—Loan contracted by Mahant for purpose of math—Liability of succeeding Mahant—Receiver of math income.

Where the deceased head of a math has borrowed money for the purpose of discharging duties for which he is responsible as head, and the money has been legitimately applied to that purpose, it can be recovered from the succeeding head of the math. The decree should provide, as in *Niladri Sahu* v. *Mahant Chaturbhuj Das,* (1927) I.L.R., 6 Pat., 139; 53 I.A., 253, that on default in payment by the successor a receiver be appointed of the income of the math so that his beneficial interest therein may be applied to discharge the decree.

Cases as to the validity of permanent alienations of math property, such as *Palaniappa Chetty* v. *Sreemath Devasikamony*

* *Present*: LORD PHILLIMORE, LORD CARSON, LORD DARLING, and Mr. AMEER ALI.

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Pandara, (1917) I.L.R., 40 Mad., 709; 44 I.A., 147, are distinguishable.

APPEAL (No. 54 of 1924) from a decree of the High Court (November 8, 1922) varying a decree of the Subordinate Judge of South Kanara.

The appellant, in his capacity of head of the Admar Math, instituted a suit against the respondent, as representing the Sirur Math, to recover money borrowed by the respondent's deceased predecessor in the office of head of the latter math.

The money had been borrowed towards the expenses of a periodic festival at a temple, which by ancient usage included the feeding of all Brahman pilgrims, and for rebuilding the dining hall.

The facts appear fully from the judgment of the Judicial Committee. The Subordinate Judge held that the respondent's math was liable, and made a decree accordingly.

An appeal to the High Court was allowed, and a decree made dismissing the suit as against the respondent representing the Sirur Math, and directing that the suit amount should be recovered from the personal assets (if any) of the late head of that math in the hands of the respondent.

KRISHNAN, J., said that before the borrowing could be justified it must be shown that the late head was under a legal obligation to incur expenditure in the manner and to the extent which he did; in the opinion of the learned Judge that had not been shown.

RAMESAM, J., referred to the great increase during recent times in the feeding charges in connexion with the Pariyaya; he considered that, as stated in the judgment of the Board in *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara*(1), it would be a misapplication

(1) (1917) I.L.R., 40 Mad., 709; 44 I.A., 147.

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of the word "custom" to say that the maths were bound by custom to feed every Brahman who came to the Pariyaya. He considered that the head of a math could bind his successor only for justifiable necessity.

Sir George Lowndes, K.C., and *Narasimham* for the appellant.—The debt is binding on the math. The true test was that laid down in *Sammantha Pandara* v. *Sellappa Chetti*(1), in a passage cited by the Board with approval in *Vidya Varuthi* v. *Balusami Ayyar*(2), namely, was the debt truly contracted for the purpose of the math. The High Court wrongly applied the test of legal necessity applicable to the validity of an alienation of math property. The feeding of pilgrims was part of the duties for which the deceased head was responsible according to the ancient usage of the math. The expense incurred in connexion with the festival was in the discretion of the head, subject to his acting reasonably. It is uncontradicted that the head was economical, and that the income of the math and the savings were not sufficient to meet this periodic expenditure, borrowing having been resorted to by previous heads. Even if necessity is the test, there was necessity having regard to the duties to be performed. In *Niladri Sahu* v. *Chaturbhuj Das*(3), the building of accommodation for visitors to a math was held to be a necessity; so here the rebuilding of the dining hall was a necessity. The appellant is willing that the loan should be repaid out of the math income as in that case. The absence of a charge upon the income of the math does not preclude the appellant from recovering: *Srimath Devasikamani* v. *Noor Mahomed Routhan*(4), *Lakshmindrathirtha* v.

(1) (1879) I.L.R., 2 Mad., 175, 179.
(2) (1921) I.L.R., 44 Mad., 831, 844; 48 I.A., 302, 315, 316.
(3) (1927) I.L.R., 6 Pat., 139; 53 I.A., 253.
(4) (1908) I.L.R., 31 Mad., 47.

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Raghavendra Rao(1), *Sundaresan Chettiar* v. *Viswanada Pandara*(2).

Dunne, K.C., and *Dube* for the respondent.—A series of decisions of the Board show that no charge on, or alienation of, math property is effective unless it is shown to be for unavoidable necessity: *Murugesam Pillai* v. *Manickavasaka Pandara*(3), *Palaniappa Chetty* v. *Devasikamony Pandara*(4). The test to be applied in the case of borrowing is the same. The passage in *Sammantha Pandara* v. *Sellappa Chetti*(5) referred to a borrowing for necessity. The High Court rightly found on the evidence that there was no necessity to borrow. There is no evidence to support a legal custom whereby there was an obligation to feed every Brahman pilgrim, and to borrow to fulfil that obligation.

Sir George Lowndes, K.C., replied.

The JUDGMENT of their Lordships was delivered by

MR. AMEER ALI.

Mr. AMEER ALI.—The appellant in this case is the Matadhipathi or superior of the Admar Math at Udipi in the South Kanara District, and he sues the defendant, the present Matadhipathi of another institution called the Sirur Math (in the same town) for certain moneys which he alleges are due to him by the defendant's predecessor in office. The defendant is a minor and defends this action by his father as guardian.

The plaintiff alleges that the predecessor of the defendant borrowed the money for the purposes of the math, and the transactions ranged over a long period from 1902 until about the time of his death in 1916; that a settlement of account was arrived at on the 14th

(1) (1920) I.L.R., 43 Mad., 795. (2) (1922) I.L.R., 45 Mad., 703.
(3) (1917) I.L.R., 40 Mad., 402; 44 I.A., 98.
(4) (1917) I.L.R., 40 Mad., 709; 44 I.A., 147.
(5) (1879) I.L.R., 2 Mad., 175, 179.

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August in that year and an acknowledgment was signed by the deceased Matadhipathi (Exhibit C on the record).

The Sirur Matadhipathi died on the 27th September, 1916, and the plaintiff brought his suit against his successor on the 14th August 1919. It should be mentioned that as the deceased Matadhipathi had made no nomination in his lifetime the superior of the connected Sodi Math appointed the defendant as his successor.

The plaintiff's claim was denied on behalf of the defendant; the acknowledgment (Exhibit C) was charged to be a forgery, and it was further contended that even if the debts were genuine the assets of the math were not liable for the money borrowed by the deceased Swami.

The case went to trial before the Subordinate Judge of South Kanara who held that the impugned transactions were true, and that Exhibit C was genuine, and that the debts were contracted by the deceased Matadhipathi for legitimate purposes, and that the math assets were liable for their satisfaction. He accordingly decreed the plaintiff's claim.

From his decree there was an appeal to the High Court of Madras, which differing from the trial Judge dismissed the plaintiff's suit, in so far as it sought to make the assets of the math answerable for the debt. The learned Judges held in substance that the plaintiff had failed to show that the debts for which the suit was brought were contracted for necessary purposes and that consequently the math was not liable. They, however, decreed the claim in regard to the personal assets of the deceased that had come into the defendant's hand.

The plaintiff has appealed from the decree of the High Court to His Majesty in Council and the main

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question for decision is with regard to the liability of the math assets for the satisfaction of his debt.

It is in evidence that in the town of Udipi there are eight maths each presided over by a superior or *Swamiar*. They appear to form four groups connected by a tie which permits in case of the superior of one Math dying without nominating a successor the superior of the other Math to *appoint* a successor to the deceased *Swamiar*.

Besides these Maths there is a temple dedicated to Krishna, one of the manifestations of Vishnu, perhaps the most popular deity forming the Hindu Triad. Admittedly it has no superior but the affairs of the Krishna Temple are managed by the superiors of the eight maths in turn.

The important ceremonies connected with the temple of Krishna are performed during the *Pariyaya* which lasts from the 15th January in one year to the middle of January two years later. During this period the superior of the math whose turn it is, usually called the *Pariyaya Swami*, has absolute power over the performance of the rites and ceremonies.

The South Kanara Manual, published under the authority of Government, contains the following description regarding these maths :—

"The temple of Krishna, at Udipi, is said to have been founded by Madhavacharya himself who set up in it the image of Krishna originally made by Arjuna and miraculously obtained from a vessel wrecked on the coast of Tuluva . . . Besides the temple at Udipi he established eight 'Mathas' or sacred houses, each presided over by a *Sanyasi* or *Swami*. These exist to this day and each *Swami* in turn presides over the temple of Krishna for a period of two years and spends the intervening fourteen years touring throughout Kanara and the adjacent parts of Mysore levying contributions from the faithful for the expenses of his next two years of office, which are very heavy as he has to defray not only the expenses of the public worship and of the temple and Matha establishments, but must also feed every Brahman who comes to the place."

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Madhavacharya, who was born in the 12th century of the Christian era, is credited with introducing vaishnavism cult or the Krishna cult in Southern India.

The evidence in this case fully accords with the description in the Manual.

The plaintiff in support of his claim examined besides himself a number of witnesses on whom the Subordinate Judge relied. Among them is an old servant of the Sirur Math who had been in service for 25 to 30 years. He speaks to the rebuilding of the Dining Hall which had become dilapidated and to the expenses connected with the *Pariyaya*.

Another witness is the superior of one of the other maths in Udipi, Sudindra Thirtha, who speaks as follows :—

"I am one of the *Swamis* of the eight maths at Udipi. There is a custom that these eight maths should perform *Pariyaya* in the Shri Krishna Math . . . The *Swami* of each of the eight maths should perform *Pariyaya* for a period according to turn. The said custom of performing *Pariyaya* prevails from the days of Madhavacharya. Provisions have to be kept ready for the *Pariyaya*. Rice has to be stored. This storing commences from about a year before the *Pariyaya*."

After stating the quantities of provisions to be stored for the festival he describes in the following terms the expenses he himself incurred whilst he was in charge of the *Pariyaya* :—

"I have performed two *Pariyayas*. My second *Pariyaya* was from 17th January 1912 to 16th January 1914. I have incurred a debt of Rs. 30,000 during the said *Pariyaya* period. It was a debt contracted to conduct the *Pariyaya*. The *Pariyaya* of the Sirur Math commences after the *Pariyaya* of my math is over. A debt of Rs. 25,000 was contracted during my first *Pariyaya*. I know Lakshmi Samudra Thirtha Swami (the deceased superior) was not extravagant but was very frugal in expenditure. My math has an income of about Rs. 10,000 per annum excluding assessment. The math of Krishna has an annual income of about 500 muras of rice and Rs. 500 in cash

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from lands. Besides this it gets a total tasdick of Rs. 13,000 per annum from the British Government and Mysore State. The *Swami* of the *Pariyaya* Math has to meet the rest of the expenditure either from the accumulations of the income already made or by borrowing funds. During the *Pariyaya* period of two years offerings by devotees or pilgrims may amount to Rs. 25,000. But Rs. 12,000 have to be spent out of it for making presents to them. It is not possible to meet the expenditure of the *Pariyaya* period from the income of the abovementioned math of Shri Krishna, i.e., tasdick income from lands, and offerings from devotees and pilgrims. At the *Pariyaya* festival about 10,000 persons are fed per day."

The plaintiff himself, who is the superior of the Admar Math, speaks thus of the heavy expenses incurred in performing the worship and the attendant ceremonies:—

"The aforesaid sums were borrowed by the late Sirur Swami for the expenses of his *Pariyaya*. Udipi Krishna Temple has lands and also gets *tasdick* and these are got by the *Pariyaya* Swami for the time being. Those incomes are not sufficient for the expenses of the *Pariyaya*. The *Pariyaya* Swami also gets *kanikas* (offerings or presents) from votaries and pilgrims during the *Pariyaya* period. The income of the math of the *Pariyaya* Swami is also utilized for the *Pariyaya* expenses. All these incomes are not sufficient to meet the expenses of the *Pariyaya*. The *Pariyaya* Swami before his turn of *Pariyaya* commences has to store articles, viz., rice, firewood and other provisions and also to grow plantain plantations. For all these the income of the Krishna Temple is not available. I have heard that Sirur Math has an income of about Rs. 16,000 a year. As the income of the Sirur Math and that of the Krishna Temple and also the offerings of the votaries were not sufficient for the *Pariyaya* expenses, the late Sirur Swami had to incur debts. The Bhojanasala (Dining Hall) constructed by the late Sirur Swami would cost about Rs. 20,000."

In the Manual there is a further reference to the *Pariyaya*:—

"The periodical change of the Swami presiding over the temple of Krishna is the occasion of a great festival known as the *Pariyaya* when Udipi is filled to overflowing by a large

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concourse of Madhwas not only from the district but from more distant parts, especially from the Mysore territory."

Mr. Justice KRISHNAN in his judgment in the case remarks:

"there are no doubt certain poojas and ceremonies which have necessarily to be performed and any reasonable expenditure incurred for carrying them out will be binding on the math. But there is no obligation to have the ceremonies performed on the scale that the Sirur Swami did."

It is admitted that no scale of expenditure is fixed for the performance of the ceremonies beyond recognized custom and usage. They have to be performed according to the practice which has prevailed for centuries. The dining hall was falling to pieces, and the Government appears to have intimated to the superior that unless it was rebuilt and put in proper order its contribution would be withdrawn. It is in evidence that in executing the necessary repairs considerable cost was incurred. It can hardly be said that the expenditure for these purposes was not legitimate.

According to Mr. Justice RAMESAM, the second Judge, the necessity for the debt in order to bind the *math* must be "justifiable." He says:

"It is idle to pretend that the feeding could have gone on anything like this scale in all the six centuries during which these maths existed or even in the earlier years of the last century."

Referring to the case of *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi*(1), the learned Judge observes:

"It would be an instance of the misapplication of the word 'custom' and of forgetfulness of essentials of a custom which modifies the ordinary law to say that the maths are bound by custom to feed every Brahman that comes to the *Pariyaya* (as is stated in the South Kanara Manual). The numbers may increase as the years roll on and the result of carrying out the idea of feeding every one that comes may be the destruction of

(1) (1917) I.L.R., 40 Mad., 709; 44 I.A., 147.

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the institutions themselves. The Swamis have a wide power over their income and Courts do not ordinarily scrutinize their manner of exercising it so long as they do not seek to bind their successors. If a successor is sought to be bound the borrowing must be for justifiable necessity."

The learned Judge seems to have misapprehended the effect of their Lordship's judgment in *Palaniappa Chetty's* case. In that case one head of a math had purported to alienate in perpetuity certain lands of the institution; and the impugned alienation was attempted to be supported by an alleged custom. The remarks of the Board relate to this contention; they lay down no general rule.

He seems also to have overlooked the fact that the facilities for travelling afforded by the present conditions of the country materially account for the larger influx of pilgrims and worshippers, without imputing blame or dereliction of duty to the *Swami*. As pointed out in the case of *Vidya Varuthi* v. *Balusami Ayyar*(1), these superiors "have ample discretion in the application of the funds of the maths, but always subject to certain obligations and duties equally governed by custom or usage." In the South Kanara Manual also, there is an account of the vast concourse that flocks to the temple of Krishna on the recurring *Pariyaya* and the duty sanctioned by ancient practice which rests on the superior in charge.

These Matadhipathis have a difficult task to perform; unaided by any established rule they are expected to exercise control over the numbers of pilgrims, who come to the temple in order to participate in the festivals and share in the food offerings. Even if it were permissible for the superior to exclude a certain number from being fed, their Lordships doubt whether popular sentiment would sanction his so doing. The

(1) (1921) I.L.R., 44 Mad., 831 (P.C.); 48 I.A., 302.

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obligations under which they labour are regulated by custom, which are of long standing and have been observed for centuries.

What their Lordships have to see in this case is, firstly, whether the debts were contracted by the deceased *Swami* for his own purposes or for the purposes of the temple and in discharge of the duties under which he lay in the performance of the worship and the feeding of pilgrims; and, secondly, whether the moneys so borrowed were legitimately applied for those purposes.

In *Niladri Sahu* v. *Chaturbhuj Das*(1), the superior of a math desirous of improving the houses for the lodgment of Rajas and other rich devotees who visited his math for the purpose of worship, built fitting habitations for them and attached the same to his institution. It was found that the revenue of the math, although sufficient to meet the ordinary expenses of the worship, was insufficient to defray the cost of the construction, maintenance and management of these new buildings.

The superior accordingly began to borrow, from time to time, from moneylenders various sums of money to pay for these constructions. It was also found that the borrowed money was applied partly to the performance of the necessary worship; and that the math was making use of the buildings constructed by the superior. The Board directed the appointment of a receiver in respect of the usufruct, which ordinarily went to the superior to apply the same for the payment of the debts contracted by him.

Their Lordships think that the proper course to take in the present case should be the same, viz., to remit the case to the High Court, to send it down to the

(1) (1927) I.L.R., 6 Pat., 139; 53 I.A., 253.

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Subordinate Judge with the following directions: that in case the guardian of the defendant does not pay within three months from the arrival of the record the sum sued for, plus interest at the contractual rate until payment, the Trial Court should appoint a receiver for the rents and issues of the math property and the proceeds from offerings, etc., and after payment of all expenses connected with the math and the performance of the ceremonies and festivals and a reasonable provision for the maintenance of the Matadhipathi, the balance should be applied in discharge of the plaintiff's debt until such debt has been paid off. The order of the High Court will be discharged.

The appellant is entitled to his costs in all the Courts, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Chapman Walker* and *Shephard*.

Solicitor for respondent: *H. S. L. Polak*.

A.M.T.

PRIVY COUNCIL.*

1927, March 28.

KRISHNAMURTHI AYYAR (DEFENDANT), APPELLANT,

v.

KRISHNAMURTHI AYYAR AND ANOTHER (PLAINTIFFS), RESPONDENTS.

[On Appeal from the High Court at Madras.]

Hindu Law—Adoption—Rights of adopted son—Will—Diversion of property from adopted son—Ante-adoption agreement by natural father—Custom—Consensus of judicial decision.

Having regard to a consensus of judicial decision, excepting that in *Jagannadha* v. *Papamma*, (1893) I.L.R., 16 Mad., 400,

* *Present*: VISCOUNT DUNEDIN, LORD SALVESEN and Sir JOHN WALLIS.

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an arrangement made on the adoption of a Hindu whereby the widow of the adoptive father is to enjoy his property during her lifetime, or for a less period, that arrangement being consented to by the natural father before the adoption, is to be regarded as valid by custom. But an agreement or consent by the natural father is not effectual in law or by custom to validate any other disposition, taking effect after the adoption and curtailing the rights of the adopted son as a co-sharer.

Consequently, a will by which a testator gave part of his property to his intended adopted son, part to his widow for life, part to kindred, and part to charity is not binding upon the adopted son, although before the adoption took place the natural father executed a deed by which he consented to the provisions of the will and gave his son in adoption subject thereto.

Review of the authorities in Madras and Bombay.

Balkrishna Motiram v. *Shri Uttar Narayan Dev*, (1919) I.L.R., 43 Bom., 542, approved.

Observation in *Bhasba Rabidat Singh* v. *Indar Kunwar*, (1889) I.L.R., 16 Calc., 556, 564; 16 I.A., 53, 59, followed.

APPEAL (No. 65 of 1925) from a decree of the High Court (February 8, 1924) affirming a decree of the Subordinate Judge of Mayavaram.

The suit was brought by the respondents for possession of certain immovable property with mesne profits. They claimed title under the will of a deceased Hindu, Ramakrishna Ayyar. The appellant, a minor (defendant No. 3) pleaded that the will, which devised the testator's property in part to the appellant, in part to the testator's widow for life, in part to charity, and in part to the respondents, who were relatives of the testator, was not binding upon him. The appellant's natural father, before the adoption took place, had executed a deed consenting to the provisions of the will.

The Subordinate Judge held that, the adoption subject to the agreed dispositions being beneficial to the appellant, the will was valid. The decision was

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affirmed by the High Court (SPENCER, Officiating C.J., and KUMARASWAMI SASTRI, J.).

The facts and the grounds of the decision in the High Court appear from the judgment of the Judicial Committee.

DeGruyther, K.C., and *Narasimham* for the appellant.—The appellant upon adoption became a co-sharer with the testator, and entitled to all the rights of a natural son, subject to minor exceptions which do not apply: *Nagindas Bhugwandas* v. *Bachoo Hurkissondas*(1), Mayne's Hindu Law, paragraph 184. The appellant's natural father was not competent to agree that the rights which under Hindu Law the appellant would acquire by the adoption should be curtailed. There is no decision of the Privy Council determining the question, but an observation in the judgment delivered by LORD MACNAGHTEN in *Bhasba Rabidat Singh* v. *Indar Kunwar*(2) supports the appellant's contention. In certain cases in India ante-adoption agreements by the natural father limiting the son's rights have been held valid. In the majority of these cases, however, the validated provision was only in favour of the testator's widow; the decisions are consequently distinguishable as a widow is entitled to maintenance. The reasons assigned in the decisions in India in support of such agreements by the natural father vary; it is submitted they are not satisfactory in law. The appellant's contention is supported by the referring judgments in *Visalakshi Ammal* v. *Sivaramien*(3) and in *Vyasacharya* v. *Venkubai*(4), also by *Balkrishna Motiram* v. *Shri Uttar Narayan Dev*(5) and by *Jagannadha* v. *Papamma*(6); in Mayne's Hindu Law, paragraph 196, no definite opinion

(1) (1916) I.L.R., 40 Bom., 373; 43 I.A., 56.
(2) (1889) I.L.R., 16 Calc., 556; 16 I.A., 53.
(3) (1904) I.L.R., 27 Mad., 577 (F.B.).
(4) (1913) I.L.R., 37 Bom., 251 (F.B.).
(5) (1919) I.L.R., 43 Bom., 542.
(6) (1893) I.L.R., 16 Mad., 400.

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is expressed, but in West and Bühler, 3rd edition, paragraph 1101, the view is that such agreements are inoperative. In addition to the Madras and Bombay decisions referred to in the judgment reference was made to *Bepin Behari Bundopadya* v. *Brojo Nath*(1), *Panchanon* v. *Binoy Krishna*(2), *Kalidas* v. *Bijai Shankar*(3), and *Purshottam* v. *Rukhmabai*(4).

Kenworthy Brown for the respondents.—An agreement such as that now in question is valid if the adoption subject to its terms is for the benefit of the adopted son. There is a concurrence of judicial decisions dating from 1869 by Judges familiar with Hindu Law and customs supporting the validity of such agreements. The respondents rely more particularly upon the judgments in *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai*(5) and *Visalakshi Ammal* v. *Sivaramien*(6). The referring orders relied on were merely opinions, and may have been made before the learned Judges had considered the whole current of authority. One of the referring Judges in the case last mentioned was a party to the Full Bench decision, and the other was a party to *Ganapati Ayyan* v. *Savithri Ammal*(7). Neither *Vinayak Narayan Jog* v. *Govindrav Chintaman Jog*(8), nor *Basava* v. *Lingangauda*(9) were cases of dispositions merely for the maintenance of the adoptive father's widow. The only decision against the respondents is *Balkrishna Motiram* v. *Shri Uttar Narayan Dev*(10), and that is in conflict with other decisions of the Bombay High Court; further there was nothing there to prevent the adoptive father from at once partitioning. There is no decision of the Board conflicting with the decisions in India;

(1) (1882) I.L.R., 8 Calc., 357.
(2) (1918) 27 C.L.J., 274.
(3) (1891) I.L.R., 13 All., 391.
(4) (1914) 16 Bom. L.R., 57.
(5) (1887) I.L.R., 11 Bom., 381.
(6) (1904) I.L.R., 27 Mad., 577 (F.B.)
(7) (1898) I.L.R., 21 Mad., 10.
(8) (1869) 6 Bom. H.C.R., 224.
(9) (1895) I.L.R., 19 Bom., 428.
(10) (1919) I.L.R., 43 Bom., 542.

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Ramasami Aiyan v. *Venkataramaiyan*(1) shows that the agreement is not a nullity. Even if an ante-adoption agreement is contrary to the original conception of Hindu Law, it may well be that the law has developed by custom.

DeGruyther, K.C., replied.

The JUDGMENT of their Lordships was delivered by

VISCOUNT DUNEDIN.

VISCOUNT DUNEDIN.—Ramakrishna Ayyar was a Hindu gentleman in possession of ancestral lands extending to some 135 acres. He was not living joint with any relative, and he was childless. On the 23rd March 1910, he made a will by which he disposed of his property roughly as follows:—Twelve acres in charity; 44 acres to his wife for her life; 45 acres to the son of a distant connexion, whom he designated as being his adopted son, the appellant in the present suit, and the rest to persons who were connexions, but were in no case within the degrees entitled to maintenance, and who are the respondents in the present suit. After the death of the widow, part of the land which she held for life was to go to the appellant, and part to the respondents. On the same day, the natural father of the appellant executed a deed in the following terms:—

"The deed of consent for adoption executed on the 23rd March 1910, in favour of Ramakrishna Ayyar, son of Venkatachala Ayyar, Brahman, Saivite and Mirasidar, residing in Kunnam, Shiyali Taluk, by Natesa Ayyar, son of A. Ramaswami Ayyar, Brahman, Saivite and Mirasidar, residing in Kunnam Village of the said taluk:—

'You have this day executed a Will and have alienated your own properties. When you asked me to give you my son Krishnamurthi in adoption subject to the condition that he should take only such properties as were given him by the said Will and be bound by the alienations made thereunder, I consented to it and admitted the alienations made in the said

(1) (1879) I.L.R., 2 Mad., 91; 6 I.A., 196.

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will, and, in pursuance of the arrangement that Krishnamurthi should take only such of the properties as were left to him thereunder, I have executed this deed of consent for adoption in support of my having this day given the said Krishnamurthi my son, in adoption.'"

Immediately thereafter the adoption took place with all due ceremony.

Ramakrishna Ayyar died in April 1911, and his wife in June 1911. The present suit was raised in 1918 by the respondents to obtain possession of the properties left them by the will. It was directed against certain parties who were in possession and were alleged to be holding benami for the appellant and also against the appellant.

The persons who were holding as alleged eventually renounced all claim to the property. The appellant, through his guardian, alleged that the adoption had taken place before the date of the will, but it was found, in fact, and is not now contested, that the will was executed *unico contextu* with the deed of consent by the natural father, and that both were executed in view of the adoption which took place subsequently with all due ceremony. It is also admitted that the natural father was a poor man and had two other sons at that time, and has had two subsequently. The sole question in the case is, therefore, whether the will, taken along with the deed of consent, is binding on the appellant so as to cut down what would have been his rights had he been a natural instead of an adopted son.

The learned Subordinate Judge held that the deed was binding in respect of the consent of the natural father; he considered that an adoption, even on such terms, was obviously a beneficial arrangement for the appellant, and that the validity, as he phrases it, of such conditional adoption was settled for Madras by the cases

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in *Lakshmi* v. *Subramanya*(1), *Ganapati Ayyan* v. *Savithri Ammal*(2) and *Visalakshi Ammal* v. *Sivaramien*(3). He accordingly decreed in favour of the respondents. His view was confirmed by the learned Judges of the High Court. They also considered that so soon as it was shown that the arrangement as a whole was beneficial to the adopted son, and that but for the arrangement the adoption would not have taken place, the natural father could give a consent which validated the arrangement as against the adopted son if, when he came to be of age, he sought not to acquiesce therein.

This is most clearly explained by one of the learned Judges :—

"I am of opinion that where an adoption is made by a Hindu who at the time of adoption had an absolute power of disposal over the property, an agreement between the natural father and adoptive father as regards alienations which the adoptive father wants to make either by a document *inter vivos* or by will binds the adopted son in all cases where such an agreement would be for his benefit, and that the only question which Courts ought to consider is whether the transaction is for the benefit of the boy to be adopted.

"If the adopting father would not make the adoption but for the conditions agreed to by the natural father, and if in spite of those conditions the adopted son would be benefited, there is no reason why the transaction should not be tested like any other agreement entered into by the natural father as guardian of his own son. In the present case the agreement is clearly for the benefit of the appellant, as he gets properties of large value which he would not have got but for the adoption and there can be little doubt that he would have remained a poor man if the natural father had not agreed to the adopting father making the will and the adoption being conditional on the said disposition."

This view is really based on the case of *Visalakshi Ammal* v. *Sivaramien*(3), which will be presently

(1) (1889) I.L.R., 12 Mad., 490. (2) (1898) I.L.R., 21 Mad., 10.
(3) (1904) I.L.R., 27 Mad., 577 (F.B.).

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examined. The appellant has appealed to the King in Council.

The question is a very important one of general interest. There is a very large body of authority in decided cases which touches it, but it is not concluded by any judgment of this Board. The argument for the appellant is simple enough. An adopted son, from the moment of adoption, occupies the place of a natural son. A natural son, in the case of ancestral property, becomes a co-sharer with his father, with the rights of survivorship and of partition as to the whole ancestral property. This is an incident of Hindu law arising from status. No consent by his natural father could affect that position. His power is limited to the giving or withholding of giving his son in adoption, but if he gives, his power ends.

The present will purports to infringe his rights in three particulars:—(1) The gift to charity; (2) the gift to persons outside the family; and (3) the postponement of the son's own right in certain lands till his father's death, and in others till his mother's death.

The argument for the respondents is that, in any view, the law has by custom been relaxed, and that the general proposition which is stated in the view of the High Court is based on authoritative decision and is now the law.

As in several of the decisions to be examined there has been the suggestion that the matter has been decided by this Board, it may be well at once to mention cases where the question has been approached.

The case of *Ramasami Aiyyan* v. *Venkataramaiyan*(1) was as follows:—There was a widow and a son who had been adopted by the husband in his lifetime.

(1) (1879) I.L.R., 2 Mad., 91; 6 I.A., 196.

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During the lifetime of that son, two-thirds of the ancestral property was alienated; the son then died, and the widow, who had been given power to adopt by the deceased husband, then adopted another son. At the time of the adoption the natural father entered into an agreement that the adopted son should not challenge the alienation which had been made. When that son came of age, he entered into an agreement which the Board held was a ratification of the agreement made by his natural father. The general question is dealt with as follows:—

"How far the natural father can by agreement before the adoption renounce all or part of his son's right so as to bind that son when he comes of age is also a question not altogether unattended with difficulty, although the case of *Chitko Raghunath Rajadiksh* v. *Janaki*(1) certainly decides that an agreement on the part of the father that his son's interests shall be postponed to the life interest of the widow is valid and binding. In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was not void, but was, at the least, capable of ratification when his son became of age."

It seems impossible to hold, as some seem to have held, that this is inferentially a judgment on the general question. The whole point there was that, however the general question stood, there was an agreement which was not void in the sense of being an agreement that was *funditus* null, e.g., an agreement that marriage should be for a limited period, and that, therefore, as there was ratification, there was no need to decide the general question.

The other case was that of *Bhasba Rabidat Singh* v. *Indar Kunwar*(2). The facts were that a widow, with power to adopt, adopted a son and at the

(1) (1874) 11 Bom. H.C.R., 199.
(2) (1889) I.L.R., 16 Calc., 556; 16 I.A., 53.

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same time she obtained a document from the natural father consenting to her being in possession of the whole property during her lifetime. The suit was raised by the nearest relatives to declare the adoption invalid. The Board held that the adoption was duly performed and was recorded in a deed of adoption which made no mention of any condition. No other deed could, therefore, affect the adoption, but Lord MACNAGHTEN, in the course of his judgment, said:—

"It is difficult to understand how a declaration by [the natural father], or an agreement by him, if it was an agreement could prejudice or affect the rights of his son, which could only arise when his parental control and authority determined."

It is clear that there is here no judgment on the point, for the judgment merely declared the adoption valid and did not determine any case between the widow and son, but Lord MACNAGHTEN's dictum shows an obvious leaning to the view that an agreement by the natural father should not prejudice the right of the adopted son. It follows, as already said, that the question is not absolutely decided by any judgment of this Board.

Their Lordships will, therefore, turn to the numerous decisions in India. It will be convenient to take the Madras and Bombay decisions separately. But first it will be well to point out that there are distinctions to be drawn between the various cases that arise, but whether these distinctions create any difference in principle is another question. The distinctions to be drawn are these: First, whether the agreement, which is *ex hypothesi* always made by the natural father, and is also *ex hypothesi* an agreement, but for which the adoption of the son would not have taken place, is made with the adoptive father, who is the unfettered owner of the whole property (the fact in the present case), or whether it is made with the widow, who has got from

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her deceased husband a power of adoption, but who only herself possesses a widow's estate. Second, whether diminutions of the right of the adopted son go only to protect and define in quality the widow's estate, which ordinarily by adoption would be swept away, or whether they go farther and give part of the ancestral property to persons outside the family altogether.

It will be convenient to deal with the Bombay cases first, as they begin at the earlier date. *Vinayak Narayan Jog* v. *Govindrav Chintaman Jog*(1). In this case, by a will, the testator, who was a separated person, divided his property practically into two parts, and gave one to his widow absolutely and the other to his adopted son. The son was a nephew, and it was found that the whole arrangement was known to all members of the family. It was acquiesced in by the natural father of the boy. The High Court held that the provision for the adopted son was adequate and that the will could not be challenged by the adopted son. The judgment went on two grounds. First, that although an alienation of the whole estate would be bad and inconsistent with the duties cast upon an adopted son, still, if the provision was adequate, there was no reason why it should not stand. Second, that as the adopted son proposed to take what he could under the will, he could not, on the principle of approbate and reprobate, refuse to acknowledge its validity. It is to be observed that this second view scarcely does justice to the opposing argument. The son did not propose to take his half under the will; he proposed to take the whole in right of his position as a son. There is, however, one other sentence which would seem to point to the right of the testator to make an adequate provision for the widow instead of allowing

(1) (1869) 6 Bom. H.C.R., 224.

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her life interest to be entirely destroyed by the adoption.

Chitko Raghunath Rajadiksh v. *Janaki*(1). This was an adoption by a widow, subject to a stipulation that the widow should enjoy the whole property during her life, giving the boy maintenance. Held a good stipulation. HARIDAS, J., puts it partly on what may be called conditional adoption, a view which it is hard to agree to, and partly on approbate and reprobate. To the argument that it was a condition repugnant to Hindu Law, he says that there is no text to that effect. WESTROPP, C.J., in *Radhabai* v. *Ganish Tatya Gholap*(2), *obiter*, takes these two cases as deciding the general point.

After this case in date comes the case before this Board in 6 I.A., 196.

Accordingly, in *Ravji Vinayakrav Jagganath Shankarsett* v. *Lakshmibai*(3), it was sought to urge that this Board's decision had overturned the authority of the former cases, because their Lordships held that the general question was still open. The facts were practically the same as in the first case, i.e., adoption by a widow and a contemporaneous agreement with the natural father that the widow should have full enjoyment for her life. There is a long and very careful judgment by FARRAN, J. It is too long to quote in full, but may be summarized thus:—The early Bombay Shastris or Pandits were logical in holding the strict view. But custom and practice may modify the strict view. The possibility of such an agreement is in no way negatived by a direct text. Fair arrangements for protection of the widow's interest are commonly made and supported. He then prays in aid the judgment of

(1) (1874) 11 Bom. H.C.R., 199. (2) (1879) I.L.R., 3 Bom., 7.
(3) (1887) I.L.R., 11 Bom., 381.

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this Board in 6 I.A., but here their Lordships think he is somewhat misled as to the sense in which the word "void" was used. Then, after saying that it is the general law that the guardian of an infant can bind the infant when the contract is made *bona fide* for his interest, he sums up the matter thus:—

"I cannot but think that this principle ought to guide the Court in considering whether agreements like the one under consideration can be upheld or not. If the stipulations are unreasonable, such as giving to the widow an absolute power of disposition over the property, they should be rejected as *ultra vires* of the father; if reasonable such as only to define a limit of the son's enjoyment of the property, then they should be upheld. The reasoning in the judgment of the Court in the *Chitko* case(1), goes far beyond this view, but the actual decision of the Court is in accordance with it."

Basava v. *Lingangauda*(2). This was a case where the man who adopted a son conveyed by a deed of gift, which was referred to in the deed of adoption, part of the ancestral property to his daughters, and the natural father was a party to the deed of adoption. Held that the deed of gift was good and binding on the adopted son. The case is taken as plain, and not argued.

The next case is *Vyasacharya* v. *Venkubai*(3). The facts were: Adoption by a widow and a gift of part of the property to her own daughters. Assented to by the natural father at the time of the adoption. BEAMAN and HEATON, JJ., referred to a Full Bench the general question: "Whether the terms of an agreement entered into between the natural and adoptive parents as conditions of the adoption are binding upon and can be enforced against the adopted son?" but they added that, if that question was too wide, it ought to be considered in the light of the facts of the case. This was the view taken

(1) (1874) 11 Bom. H.C.R., 199. (2) (1895) I.L.R., 19 Bom., 428.
(3) (1913) I.L.R., 37 Bom., 251 (F.B.).

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by the Full Bench, SCOTT, C.J., CHANDAVARKAR, BATCHELOR, and RAO, JJ. They held that "an agreement by which the adoptive widow is to be allowed to retain her life interest, notwithstanding the adoption, differs in fact and in principle from an agreement under which a power is conferred upon her which, as a widow enjoying a life estate, she could by no other means obtain." On the facts, therefore, they held the agreement not binding, holding, first, that the condition was unreasonable and took the test proposed by FARRAN, J., and, second, that it was covered by a case of *Venkappa* v. *Fakirgowda*(1), only reported in the Bombay Law Reporter where a widow was given power to give the property to her own brother, and the condition was held to be bad.

Then came the case of *Balkrishna Motiram* v. *Shri Uttar Narayan Dev*(2). This was a gift of an annual sum as a charge on the ancestral property for a charity made by the adopting father and agreed to by the natural father at the time of the adoption. The gift was held bad. HAYWARD, J., delivering the judgment, examined the cases and sums up thus:—

"It would appear to have been established by these decisions that agreements for reasonable provision for widows ought to be upheld as valid according to general custom modifying the strict terms of Hindu Law. But no authorities have been quoted before us in favour of any other persons in such connexion or in support of a general extension of the modification so as to include, as here claimed, reservations in favour of charities and religious endowments."

To sum up the Bombay cases. As a question of actual decision, the Courts have always upheld the grant to the widow of her interest for life, and that whether the stipulation had been made by the husband while still alive, or by herself, it being always the case that the agreement was anterior to or contemporaneous with the

(1) (1906) 8 Bom. L.R., 346. (2) (1919) I.L.R., 43 Bom. 542, 549.

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adoption itself, and that the natural father concurred. But when the gift is to outsiders it has been held invalid, and that whether made by the widow or the adopting father himself. The reasons given have varied. Some have put the deviation from strict principle on custom, some on the view of approbate and reprobate, and in one case upon the view that the father as guardian can bind an infant by any contract which is for his benefit.

To turn now to Madras.

Lakshmana Rau v. *Lakshmi Ammal*(1). There is, at page 163, a general remark by TURNER, C.J., against the validity of conditions imposed by agreement with the natural father, but the remark is based on an erroneous view of the judgment of this Board in 6 I.A., 196 and is really of no authority. The case itself turns on a speciality.

Lakshmi v. *Subramanya*(2). This was a case where the adoptive father stipulated that certain lands should be enjoyed by the widow for life. This was agreed to by the natural father. It was held binding. The reasons given by the learned Judges were dissimilar. MUTTUSWAMI AYYAR, J., held that this was just an arrangement for fixing maintenance. SHEPHARD, J., held that the father, being at the moment undisputed owner of the property, could do what he liked with it, and that the effect of what he did was really to withdraw that portion of the ancestral property. He repudiated the idea of reasonableness being a test.

Narayanasami v. *Ramasami*(3). This was precisely the same case as the last and, being decided by the same Judge, SHEPHARD, J., followed the last case, the other Judge simply following the decision and not going into the reasons.

(1) (1882) I.L.R., 4 Mad., 160. (2) (1889) I.L.R., 12 Mad., 490.
(3) (1891) I.L.R., 14 Mad., 172.

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Jagannadha v. *Papamma*(1). This was a case of adoption by a widow. The agreement was that the widow was to have half the property. COLLINS, C.J., and HANDLEY, J., held the agreement not binding. They rested on Lord MACNAGHTEN'S dictum in 16 I.A. and distinguished this from the case in 12 Madras in their own Court by which they were bound on two grounds, that in that case the arrangement was by the father himself, whereas here it was by the widow.

Ganapati Ayyan v. *Savithri Ammal*(2). This was a disposition in charity by the adoptive father, who at the same time gave his widow power to adopt. She adopted; the natural father acquiesced. Held binding. SHEPHARD, J., held that it had been settled by 12 and 14 Madras. SUBRAHMANYA AYYAR, J., agreed.

Visalakshi Ammal v. *Sivaramien*(3). Adoption by a widow. Agreement come to by natural father that, in the event of disagreement between widow and adopted son, widow should enjoy half the property until her death. Referred to Full Bench. The order of reference drawn by SUBRAHMANYA AYYAR, J., contains a weighty argument in favour of what may be called the strict view. He argues :—

1. That there is no reason against an adoptive father doing anything in a question with an adopted son which he could have done with a natural son.

2. That if the adoption by a widow takes place after the death of the adoptive father, all the provisions of the adoptive father will stand, because the will speaks at his death and takes out of the property whatever is dealt with before the adoption takes place.

3. But further than that the arrangement cannot go, because it is allowing the adoptive father, or the

(1) (1893) I.L.R., 16 Mad., 400. (2) (1898) I.L.R., 21 Mad., 10.
(3) (1904) I.L.R., 27 Mad., 577 (F.B.).

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widow, to do something which is incompatible with the proper position of an adopted son.

4. That it is just as impossible for the natural father to do, on behalf of the son to be adopted, anything as regards what is to happen after the adoption as it is for the adoptive father to have acted as to his rights before adoption.

5. Approbate and reprobate cannot apply, for that implies election, and there is no election open to the adopted son. If, on the contrary, it is looked on as a condition, this condition is repugnant and must be disregarded.

The result must be to hold the present case not binding.

But before the Full Bench, BENSON, DAVIES and RUSSELL, JJ., all concurred in thinking that 6 I.A., 196 indicated that the natural father was not incapable of giving a consent. If that is the position, the only question that remains is, Is it fair and reasonable?—that is to say, Is it for the minor's benefit? Then take FARRAN'S, J., test as to the power of the father. They point out that there is no authoritative text forbidding such an arrangement. They consider a fair and reasonable disposition not inconsistent with Hindu Law, and therefore they upheld the arrangement.

To sum up the Madras cases. As regards decision, the general result has been to validate the arrangements so far as provision is made for the widow, just as in Bombay, but one case, *Jagannadha* v. *Papamma*(1), is the other way, and the referring judgment of SUBRAHMANYA AYYAR, J., is also of that way of thinking. As regards reasons, again they vary, some going on the power of the adoptive father to do what he likes, some

(1) (1893) I.L.R., 16 Mad., 400.

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on fair and reasonable arrangements, and some on approbate and reprobate.

It will be apparent from this examination that it is not possible to reconcile all the decisions, and still less the reasons on which they have been based. Their Lordships will, therefore, examine the matter on principle. When a disposition is made *intra vivos* by one who has full power over property under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given power to adopt. For the will speaks as at the death of the testator, and the property is carried away before the adoption takes place. It is also obvious that the consent or non-consent of the natural father cannot in such cases affect the question. But it is quite different when the adoption is antecedent to the date at which the disposition is meant to take effect. The rights which flow from adoption are immediate, and the disposition, if given effect to, is inconsistent with these rights and cannot of itself *vi propria* affect them. There are two propositions so well settled that no authority need be cited. They are, first, that the natural father loses all power over the son from the moment when he is adopted, and, second, that the adopted son has in his new family precisely the same rights as a natural son, save only when the question is one that raises a competition between the natural and the adopted son. Can, then, the consent of the natural father who judges, and, *ex hypothesi*, rightly judges, that it is more expedient for the boy to be adopted, even though his rights are limited, than not to be adopted at all, make any difference? The doubt expressed by Lord MACNAGHTEN

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in *Bhasba Rabidat Singh's case*(1), seems unanswerable. How can the consent of the natural father take any effect on the rights of the boy which only arise when his rights as a natural father are non-existent? But if the father cannot do it by virtue of any power in himself, can he do it as guardian of the infant so as to bind him? FARRAN, J., who is an exponent of this view in the case reported at 11 Bom., 381, was curiously misled by an undue veneration for Mr. Mayne. He quotes a sentence from Mr. Mayne's work as follows:—

"He (the minor) will also be bound by the act of his guardian when *bona fide* and for his interest and when it is such as the infant might reasonably and prudently have done for himself if he had been of full age."

This quotation is from the third edition of Mayne's work, and as a universal proposition is obviously unsound. Accordingly, in the fourth edition, which was published soon after the date of the judgment in question, and in all subsequent editions, Mr. Mayne inserted between the words "guardian" and "when *bona fide*" the words "in the management of the estate," which turns an inaccurate proposition into an accurate one. But it is no longer of service to FARRAN, J., in the matter in hand, for assuredly the natural father is not managing the estate of his child when the estate referred to is the estate which he will only get after adoption by another person. Therefore, reverting again to Lord MACNAGHTEN's dictum, it seems impossible to ascribe any value to the guardianship power of the natural father to bind the son as to property in which he cannot have an interest until the time when the guardianship has ceased.

Next, can the case be solved by the doctrine of approbate and reprobate? Their Lordships think clearly not, for the doctrine of approbate and reprobate assumes

(1) (1889) I.L.R., 16 Calc., 556, 564; 16 I.A., 53, 59.

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election, and the adopted son has no election. He cannot undo the adoption and be as he was. The same fact destroys the idea of conditional adoption. The adoption cannot be undone; it cannot, therefore, be conditional.

It will be seen from these views that in their Lordships' opinion the only ground on which such arrangement can be sanctioned is custom. They are of opinion that there is such a consensus of decision in the cases with the exception of the case of *Jagannadha* v. *Papamma*(1), that they are fairly entitled to come to the conclusion that custom has sanctioned such arrangements in so far as they regulate the right of the widow as against the adopted son. It seems part of the custom that one *sine qua non* of such an arrangement should be the consent of the natural father. But if this is looked at narrowly, it is only because it is a part of the custom that it is either here or there. This leads to the remark that there is a good deal of looseness in the discussions in the judgments as to reasonableness. Some look at it from the point of view if whether, in view of the adoption only being granted on condition of the arrangement, this is, in the circumstances, reasonable for the boy. It would seem that it might well be assumed that if a natural father consented to give his son in adoption, he would only do it if it were reasonable, i.e., for the boy's benefit in the circumstances. Others look at it from the point of view whether the adoption will put the boy in a reasonable position, i.e., not subject him to the duties of a son to do worship for his adoptive father without giving him sufficient advantages to enable him to do so. But the consensus of judgments seems to solve these two questions in this way, namely, that the consent of the

(1) (1893) I.L.R., 16 Mad., 400.

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natural father shows that it is for the advantage of the boy, and that the mere postponement of his interest to the widow's interest, even though it should be one extending to a life interest in the whole property, is not incompatible with his position as a son. Their Lordships are, therefore, prepared to hold that custom sanctions such arrangements.

As soon, however, as the arrangements go beyond that, i.e., either give the widow property absolutely or give the property to strangers, they think no custom as to this has been proved to exist and that such arrangements are against the radical view of the Hindu law. Their Lordships are, therefore, against the idea of a general proposition that all arrangements consented to by a natural father, and of benefit to the boy in the sense that half a loaf being better than no bread, he is better with an adoption with truncated rights than with no adoption at all, are valid. They would further say that the remark made by some learned Judges that there is no text prohibiting such arrangements seems to them to go exactly to the opposite effect. Inasmuch as what is sought to be done is admittedly contrary to the strict and natural view of the Hindu law as to the true position of the adopted son in his new family, it would seem more to the point to say that there is no text which sanctions any contrary arrangement.

Applying these views to the present case, it follows that their Lordships consider that the will here can have no effect, and that the appeal must be allowed and the suit dismissed. The appellant must have his costs before this Board and in the Courts below.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondents: *Douglas Grant* and *Dold.*

A.M.T.

SPECIAL BENCH.

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

1926, April 23.

THE COMMISSIONER OF INCOME-TAX, MADRAS, PETITIONER,

v.

MANGALAGIRI SRI UMAMAHESWARA GIN AND RICE FACTORY, LTD., GUNTUR, RESPONDENT IN REFERRED CASE No. 4 OF 1925

AND

GUNTUR MERCHANTS GIN AND RICE FACTORY, LTD., GUNTUR, RESPONDENT IN REFERRED CASE No. 6 OF 1925.*

Indian Income-tax Act (XI of 1922), sec. 10 (2) (vi)—Assessee leasing his machinery and plant to another for rent, himself undertaking to bear loss due to depreciation—Assessee entitled to deduction on account of depreciation.

If *A* leases to *B*, his buildings, machinery and plant for a certain rent and undertakes himself to bear the loss arising from depreciation on account of *B* working the machinery, etc., the lessor *A*, if assessed to income-tax on his rent is entitled to a deduction allowable under section 10 (2) (vi) in respect of loss caused by such depreciation. In order to claim this deduction it is not necessary that the assessee himself should use the machinery and cause the wear and tear, the assessee's business of leasing his machinery being also a business, within the meaning of the section, in which the depreciation ensues.

CASE stated under section 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, in the matter of assessment on the respondents abovenamed, the question referred being "Whether the allowance provided in section 10 (2) (vi) of the Act is admissible in computing the income of an assessee who has leased out his plant, machinery and buildings?"

* Referred Cases Nos. 4 and 6 of 1925.

COMMISSIONER OF INCOME-TAX, MADRAS v. GIN AND RICE FACTORY, GUNTUR.

The necessary facts are found in the judgment of BEASLEY, J.

Ch. Raghava Rao (with *A. Sundaram Ayyar*) for the assessee.—The articles of the company empower it to lease the mill to others; hence leasing is its business. The depreciation to its plant and machinery having arisen in the course of that business and the company having under the lease deed, itself undertaken to make the necessary repairs due to depreciation, it is entitled to the deduction allowable under section 10 (2) (vi). Without paying for the repairs it cannot earn the rent income as lessor; *Smith* v. *Anderson*(1), *Inland Revenue Commissioners* v. *Korean Syndicate, Ltd.*(2).

M. Patanjali Sastri for the Crown.—The depreciation mentioned in section 10 (2) (vi) of the Act is in respect of "such buildings, machinery and plant" as are mentioned in clause (iv) of the same section, i.e., the depreciation must be due to their use in the business of the assessee. Here the depreciation does not arise from the letting by the assessee. It is due to their working by the lessee who is not the assessee; hence the deduction on account of depreciation is not allowable; *Union Cold Storage Company, Ltd.* v. *Jones*(3), and on appeal *Union Cold Storage Company, Ltd.* v. *Jones*(4), and *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*(5). The company's normal business is direct milling, and not letting. It temporarily abandoned milling and let the mill to others. Such letting cannot be termed its business.

Ch. Raghava Rao in reply.—In this case, leasing was authorized by the articles. In *Union Cold Storage Company, Ltd.* v. *Jones*(3), it was not so. Section 10 (2) (vi) does not say that the depreciation must directly arise from the user.

JUDGMENT.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—The assessees in this case are a limited company registered on the 11th January 1921 which is the owner of a mill equipped with machinery for the milling of rice. The company elected not to work its mill on its own account but leased it out to another firm in consideration of Rs. 1,500 per annum

(1) (1880) 15 Ch. D., 247 at 258, 260. (2) [1921] 3 K.B., 258.
(3) (1923) 8 Tax Cases, 725. (4) (1924) 8 Tax Cases, 757 at 742.
(5) [1915] A.C., 433 at 463 and 464.

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COUTTS TROTTER, C.J.

which it is entitled to do under the provisions of its memorandum and articles of association. I think it is clear that the assessees cannot come to Court and ask for deductions on the footing that they are carrying on a business of rice milling. The business they are carrying on is that of lessors of a building which derives its lettable value from the fact that it is equipped with certain machinery which is available for the purpose of milling rice. And of course it is on that lettable value that the lessors have been assessed. It seems to me that this is not the infrequent case of the same building and its contents being taxable both in the case of the lessors and the lessees. Different deductions will be allowable in the case of the lessors and the lessees. The lessors as carrying on the business of letting a rice mill can justly deduct from their assessment any sum which is due to depreciation of the lettable value of the property by reason of wear and tear of machinery which falls upon them under the contract of lease. Similarly the lessees being taxable as carrying on the business of rice milling will be entitled to a deduction of such repairs as fall upon them under the lease. The Crown does not suffer from the fact that the parties can distribute the incidence of the liability for repairs as they choose, because only one total sum can be allowed as deduction. If that principle be right, it answers the question raised by the case and it is not our function to apportion which deduction can be rightly claimed by the lessors and which by the lessees which is a matter for the Commissioner to work out as a question of fact.

KRISHNAN, J.

KRISHNAN, J.—This is a reference under section 66 (2) of the Indian Income-tax Act XI of 1922; the question referred for our decision is

"whether the allowance provided in section 10 (2) (vi) of the Act is admissible in computing the income of an assessee who has leased out his plant machinery and buildings."

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KRISHNAN, J.

The Commissioner has answered the question in the negative.

Section 10 (2) (vi) is as follows :—

"In respect of depreciation of such buildings, machinery, plant or furniture being the property of the assessee a sum equivalent to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed."

The assessee here is a limited company formed primarily for the purpose of milling rice; and to carry out that object the company had acquired buildings, mill machinery and plant. They did not however carry on that business. There is a provision in the memorandum of association authorizing the directors to lease out the mill to third parties for rent if it is beneficial to the company to do so; acting under this authority the mill was leased out to certain lessees for a fixed annual rent for a period of three years. The arrangement was that the lessees were to work the mill and take the profits, and do the necessary repairs to it and hand it back at the end of the period to the lessors in proper working order; the lessors were however to bear the loss by depreciation by wear and tear caused by the working of the mill. The company is assessed on the rent received by them. It is clear from the facts that the company was carrying on the business of letting the mill for purpose of being worked by the lessees.

As very correctly observed by the learned Commissioner of Income-tax, two conditions must be fulfilled by the assessees before they become entitled to the deduction claimed for depreciation, under section 10 (2) (vi); the property depreciated must belong to the assessees and must be "used for the purpose of the business." The first condition is admittedly fulfilled. But the Commissioner thinks the second is not. I am inclined to think he is not right in that view. The business here is the business of leasing the buildings

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and mill machinery for being worked as a mill: The rent received is not only for the use of the mill but also to cover the necessary wear and tear. A portion of that rent represents the loss by wear and tear. The lease being of the mill as a working concern it is not straining the language of clause (vi) to hold that the machinery and buildings are used for the purpose of the lease and that the depreciation caused to them by wear and tear arises, so far as the assessees are concerned, from that user. Though the direct cause of the wear and tear may be the working of the mill by the lessees, such working is authorized by the lease and is part of the business of the lease; that part of the rent which represents the loss due to depreciation is not really income to the lessors but is meant to make good the loss on capital value of the machinery. I agree with the learned Chief Justice in holding that the assessees here are entitled to a deduction for depreciation of their buildings, machinery and plant which under the lease they have to bear. What that amount properly is for the year of assessment is for the taxing authorities to find. My answer to the reference on the facts of this case is as stated above.

BEASLEY, J.

BEASLEY, J.—The only point upon which I had any doubt was whether it could be said that the assessees were themselves carrying on business, because it is not only necessary for an assessee before becoming entitled to the deduction for depreciation under section 10 (2) (vi) of the Act to be the owners of the property in respect of the property depreciated but that also that property must be used for the purpose of the business. There is no doubt of course that the assessees are the owners of the property; but is the property used for the purpose of the business? This is a case of a limited company formed for the purpose of milling rice

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and in pursuance of that object the company acquired buildings, mill, machinery and plant. The company did not carry on the business of milling rice; it availed itself of the authority given to it of leasing out the mill for a fixed annual rental. The lessees worked the mill and took the profits and under the lease had to do the necessary repairs to the mill. They had not however to bear loss by depreciation by wear and tear and it is in respect of the latter loss that the company claims the deduction under section 10 (2) (vi). The Commissioner of Income-tax has held that the property is not used by the assessee for the purpose of the business, but I agree with the learned Chief Justice and with my brother KRISHNAN, J., that the view he has taken is incorrect. The company could either work the mill itself or could let it out to others to do so. One is the business of milling and the other is the business letting out the mill for others to do so. Both, in my view, are equally a business, and my answer, therefore, to the reference would be that the company is entitled to a deduction for depreciation of the buildings, machinery and plant.

Government will pay the assessees in each case Rs. 100 for their costs.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Krishnan and Mr. Justice Curgenven.

1923, November 12.

KODURU VENKUREDDI AND ANOTHER (FIFTH AND SIXTH DEFENDANTS), APPELLANTS,

v.

MAGUNTA VENKU REDDI AND OTHERS (PLAINTIFF AND FIRST TO THIRD DEFENDANTS), RESPONDENTS.*

Hindu Law—Joint family—Suit for partition by a son against his father and his other sons, impleading alienees of the share of one of the sons—Personal debt of the father incurred prior to suit for partition—Debt neither illegal nor immoral—Liability of sons' shares for the father's debt incurred prior to partition suit—Right of alienees of son's share—Alienees' rights, whether subject to liability for father's debts—Suit by creditor pending suit for partition—Decree, exonerating alienees—Res judicata.

Where a personal debt, not being of an illegal or immoral character, was incurred by a Hindu father, and subsequently a suit for partition was instituted by one of his sons against the father and his other sons impleading also alienees of the share of one of the sons, and it appeared that the father's creditor had, pending the partition suit, sued to recover his debt from the father, his sons and the alienees and obtained a decree against the father personally and the joint family estate, the alienees being, however, exonerated,

Held, that the liability of the alienees of the son's share for the father's debt was not *res judicata* by the judgment in the creditor's suit; that, in the suit for partition, the Court should provide for the payment of the father's debt which was incurred prior to the suit, out of the joint family estate of the father and his sons, before directing partition of the estate by metes and bounds, and that the alienees of the son's share were entitled to their vendor's share, only subject to such liability.

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* Second Appeal No. 1269 of 1923.

VENKUREDDI v. VENKU REDDI.

SECOND APPEAL against the decree of T. JIVAJI RAO, Additional Subordinate Judge of Nellore in A.S. No. 12 of 1922, preferred against the decree of T. M. VENKATARAGHAVA ACHARIYAR, Principal District Munsif of Nellore, in O.S. No. 1431 of 1916.

The material facts appear from the judgment.

A. Krishnaswami Ayyar (with *B. Somayya*) for appellants.—The son is not liable after partition for a pre-partition debt of his father. There is no charge, in respect of the father's promissory note debt, on the son's share. The father cannot ask the son to pay. The creditor can proceed against the son's share, if he was undivided, but not after partition.

K. Krishnaswami Ayyangar for respondent.—The father's debt should be paid first, then the joint family assets should be divided. See Mayne's Hindu Law, page 441, paragraph 308.

The alienees (appellants) came in, pending the partition suit; hence their claim is affected by the rule of *lis pendens*; the alienees are entitled only to whatever property can be assigned to their alienor. The alienor's share will be reduced by the father's debts. Reference was made to section 52 of the Transfer of Property Act.

A. Krishnaswami Ayyar in reply.—The pious obligation is not a charge on the son's share—*See* Mayne's Hindu Law, page 411, paragraph 307-A. After severence, the father cannot sell the son's share for his (father's) pre-partition debt. After a suit for partition has been instituted, the father cannot insist on his pre-partition debt being paid out of the son's share. By filing a plaint for partition, there is a severence of status; then in the partition suit the father cannot ask for provision for payment of his debts. The creditor of the father may proceed against the son's share before partition but not thereafter. There is no *lis pendens* in such a case. An execution creditor of the son and execution purchaser of his share will not be subject to this pious obligation.

JUDGMENT.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—I have had the advantage of perusing the judgment about to be delivered by my learned brothers. I agree with them and have nothing to add.

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KRISHNAN, J.

KRISHNAN, J.—The question referred in this case to the Full Bench is "where a father or a managing member of a joint Hindu family contracts a simple debt and then there is a partition among the members of the family, can the creditor proceed against the property allotted to the other members for such a debt." When the appellant opened his case in the Full Bench it was found that the question formulated did not properly arise and it was decided that it need not be considered but that the whole Second Appeal should be treated as before the Full Bench for disposal. We have thus heard arguments in the Second Appeal.

The Second Appeal arises in a suit brought by a Hindu son against his father and his two younger brothers, defendants 1 to 3, for a partition of their joint family property and the delivery over to him of his share. The fourth defendant was joined as an *illatom* son-in-law but his claim was disallowed by the trial Court and he is not before us. Fifth and sixth defendants are the purchasers of the second defendant's share in the family property when this suit was pending before the District Munsif and they were added as parties by an order of Court. They are the appellants before us.

The only point argued in the Second Appeal relates to a debt incurred by the father, the first defendant, on a promissory note executed by him on a date prior to the suit to a third party. That creditor had brought a suit on his note while this suit was pending and had obtained a decree against the father personally and against the joint family property; the father and all the sons were parties to that suit as also defendants 5 and 6. These latter were exonerated as they could not be made liable on the promissory note which they had nothing to do with.

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In ascertaining the net assets available for partition the lower Courts have held the debt abovementioned to be a debt payable out of the family property and have made the second defendant's share liable for a proportionate share of the debt and declared the fifth and sixth defendants entitled as purchasers only to such a reduced share. They contend in Second Appeal that they should get the whole share without the liability for the debt.

It is not denied that the debt was a proper debt of the father, being neither immoral nor illegal. It is a debt which on account of the law of the pious obligation of the Hindu son to pay his father's just debts out of the joint family estate, was payable from the estate. The debt had become a decree debt during the pendency of this suit, by which the joint family estate was expressly made liable. It is first argued in Second Appeal that as in the suit on the promissory note in which defendants 5 and 6 were parties they were exonerated, the debt should be held to be not chargeable on the second defendant's share in their hands. As pointed out by the learned Subordinate Judge they were exonerated because they could not be made liable on the note as they had nothing to do with it. Nevertheless a decree was passed against the joint family estate. These defendants are not therefore entitled to rely on the decree to say that that estate should not be charged in their hands with the liability for the debt. The purchaser of an undivided share of a Hindu co-parcener, it has been held, gets only an equity to enforce partition and takes the share when partitioned subject to all the liabilities on it in the hands of his vendor. Clearly therefore the fifth and sixth defendants can get the second defendant's share only subject to the liability for the debt, if it is subject to that liability in second defendant's hands. Furthermore the parties here were

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co-defendants in the suit on the note and there was no contest and no decision between them on any point and consequently no question of *res judicata* arises and defendants 5 and 6 cannot rely on the judgment against the plaintiff.

The learned vakil then raised a novel point and argued that in a partition suit between a Hindu father and sons the father must be left to pay all the debts incurred by him, even if they are just debts, out of his own share and that the shares of the sons are not liable for them. He contends that as soon as the partition suit is brought there is a severance of status between the father and the sons and the shares of the sons are not liable for the father's debts thereafter. This argument may be sound with reference to the debts incurred by the father after the partition suit has been brought, but as regards debts previously incurred, it is clearly erroneous. The fallacy is in failing to note that what is decided in a partition suit is the rights and liabilities of parties on the date of the plaint. The decree refers back to the date of suit; unless indeed the partition suit is based on an antecedent severance of status when the Court will have to decide the rights and liabilities as on that date and pass a decree accordingly. In either case the date to which the decree refers will be the date when the severance took place. As on that day the father's power to sell the joint property for his just debts is subsisting, the Courts have to recognize in their decree the existence of such debts as are payable out of the joint estate and make the necessary provision for their liquidation before directing partition by metes and bounds. For purposes of partition, an account has to be taken of the debts and liabilities binding on the estate. In the case of a managing member of a joint family, all debts which he has incurred for proper legal

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KRISHNAN, J.

necessity of the family he is entitled to have paid out of the joint property before the shares are allotted to the several co-parceners; and in the case of a father he can ask all his debts which are neither immoral nor illegal to be so paid out of the joint estate of himself and his sons before partition whether such debts be shown to be for legal necessity or not. That view has been long recognized and the practice of our Courts has been in conformity with it. No authority has been cited to the contrary by the learned vakil for the appellant and I see no reason to depart from it.

The only two points urged in Second Appeal failing, it must be dismissed with costs of respondents 1 and 4.

CURGENVEN, J.

CURGENVEN, J.—I agree that this Second Appeal must be dismissed with costs. It is immaterial that the appellants were exonerated in the suit upon the promissory note. We have to consider the family assets and liabilities as they stood on 21st November 1926, when the plaintiff filed his suit for partition. At that date, among the debts was this debt of the father's not contracted for any illegal or immoral purpose. No authority has been produced for the position that, upon a partition, the sons do not share liability with the father for such a debt. Such a doctrine would be in conflict with the indisputable principle that the family property is liable for a father's untainted debts. In the partition, therefore, the share of the second defendant would have to be ascertained with reference to this debt as well as to other debts binding upon the family members; and it follows that the share of the appellants who have succeeded by purchase to his rights and liabilities, must be ascertained in the same manner.

K.R.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, and Mr. Justice Srinivasa Ayyangar.

1926, December 8.

THE OFFICIAL ASSIGNEE OF MADRAS (APPLICANT), APPELLANT,

v.

O.R.M.O.R.S. FIRM (GARNISHEE), RESPONDENT.*

Presidency Towns Insolvency Act (III of 1909), sec. 116—Order of adjudication, based on certain acts of bankruptcy—Conclusiveness of the order as to character of the acts—Effect of order only as to acts furnishing grounds for adjudication—Order as to character of the acts, whether binding on transferees—Duty of Official Assignee to apply under the Act to set aside transfers, etc., comprised in the acts on which adjudication was based—Application by Official Assignee—Cause of action—Fraudulent preference—Conversion—Amendment.

An order of adjudication, based on certain acts of the insolvent being regarded as acts of bankruptcy, is not conclusive as to the character of such acts in all its legal consequences; the decision as to the character of such acts, apart from its furnishing ground for adjudication as insolvent, is not binding on the parties affected thereby who have not had any opportunity of being heard in the matter; but the Official Assignee is bound to take the ordinary procedure prescribed by the Insolvency Act to set aside the fraudulent preferences and payments, if any, constituted by such acts on which the adjudication was founded.

The expression "duly made" in section 116 of the Presidency Towns Insolvency Act, construed.

Where an Official Assignee applied to recover an amount from a garnishee alleging a case of fraudulent preference but the facts proved showed a case of conversion, the Official Assignee was not entitled to amend his petition at a late stage, or to withdraw his application.

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* Original Side Appeal No. 24 of 1926.

OFFICIAL ASSIGNEE OF MADRAS v. O.R.M.O.R.S. FIRM.

Duty of Official Assignee, more than the lay public, in making such applications, to set out the exact grounds or cause of action properly and definitely, pointed out.

APPEAL from the judgment of Mr. Justice BEASLEY, passed in the exercise of the insolvency jurisdiction of the High Court in Application No. 197 of 1925 in Petition No. 316 of 1923.

The material facts appear from the judgment.

S. Doraiswami Ayyar for appellant.

Nugent Grant (with *B. C. Sankara Narayana*) for respondent.

JUDGMENT.

The Official Assignee of Madras who is the appellant in this case took out a garnishee application in the matter of the Insolvency of M. R. V. S. M. Doraiswami Chetti & Co., against the respondent firm, for an order declaring that a sum of Rs. 10,000 which belonged to the insolvents, came into the hands of the respondent firm and was a payment made by the insolvents when they were in insolvent circumstances and that the same was a fraudulent preference and asking for consequent reliefs.

Mr. Justice BEASLEY by whom the application was heard dismissed it with costs holding that what was proved by the Official Assignee at the hearing of the application could not possibly be held to constitute any payment by the insolvents by way of undue or fraudulent preference. The learned Judge also incidentally refused the application of the Official Assignee for amendment of the application or even the withdrawal of the application with liberty to make a fresh application. In brief the conclusion arrived at by the learned Judge was that the facts proved, established, if anything, only a conversion by the respondents of moneys belonging to the insolvents and that as there was no voluntary

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payment by the insolvents, no question could possibly arise of any fraudulent preference. It may, to begin with, be observed that however summary such proceedings in insolvency may be and we might indeed say, because the proceedings are summary, it is incumbent on the Official Assignee making such applications to set out the exact ground or cause of action properly and definitely so as to give sufficient notice thereof to the other side. However much the vagueness of pleading by or on behalf of the lay public may be regarded as excusable, no similar reasons are available in the case of a law officer of the Crown like the Official Assignee.

Mr. S. Doraiswami Ayyar, the learned Counsel for the appellant, attempted to argue that the case really set up by the Official Assignee in the report on which the application was based was one of conversion, if not in the main, at least in the alternative. It is impossible to accede to such an argument. Apart altogether, from the terms of the notice of motion, the report of the Official Assignee leaves no doubt whatever that the case set up and sought to be made out by him was one exclusively of fraudulent preference. The report speaks of a member of the insolvent firm endorsing the hundies to the respondent firm ostensibly for collection and concludes by saying that the insolvents were great friends of the respondents, that the payment of the amount by the insolvents to the respondents was made at a time while the insolvents were heavily involved in debts and were unable to pay their debts in full, and that the payment was, therefore, a fraudulent preference and void against him. It has not been argued before us that, if the case set up by the Official Assignee should be regarded as one of fraudulent preference, the decision by the learned Judge was anything but right. The learned Counsel for the appellant did not argue that in the circumstances the learned Judge's order

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refusing any amendment or withdrawal of the petition especially at the stage when the case of both sides had been closed and also argued, could be regarded as wrong.

There was, however, a new point on which the case for the appellant was in the last resort strenuously pressed by his learned Counsel. The point was new, not only as not having been taken in the first Court before the learned Judge or even indicated in the grounds of appeal to this Court, but new also in the sense of its being entirely novel. We, however, allowed the point to be raised and argued having regard specially to its importance and the far reaching consequences of the correct view turning out to be as contended for on behalf of the Official Assignee.

The contention may be briefly set out as follows:— For an order of adjudication in insolvency some ground or grounds of insolvency have to be made out, and the order is based on such ground or grounds and the Official Assignee's title is by statute made to relate back to the date of the first of the acts of insolvency on which the order is founded. The adjudication of a person as a bankrupt affects his status and has been recognized to be a judgment *in rem*. As the adjudication itself is based on a decision with regard to the particular act or acts of insolvency, it follows that the adjudication comprises also the commission of the particular act or acts of bankruptcy and is binding on all the world including persons who are not parties to the order in the same manner and to the same extent as a judgment *in rem*. The order of adjudication therefore is as regards the particular act or acts of bankruptcy on which it is founded, an adjudication with regard to the commission thereof and is valid and binding on all the persons until set aside by any party interested.

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The argument in this case was that the adjudication of the insolvent was based on the insolvent having committed an act of fraudulent preference with regard to the sum of Rs. 10,000 received by the garnishee, and that as the garnishee has not had the order of adjudication set aside, he is not entitled to be heard to argue that his receipt of the sum of Rs. 10,000 was not by way of fraudulent preference.

In the first place it must be observed that the act of a particular person when adjudged to be an act of bankruptcy has reference mainly to such act regarded as a ground for adjudication. As a person may hold several characters, so an act may also have several characters and when some act of the bankrupt is adjudged to be an act of bankruptcy it is in its character as a ground for adjudication and it does not necessarily follow that the adjudication extends to and comprises all the legal consequences in all the various aspects of the act. If such had been intended, the Insolvency Act would undoubtedly have provided for it.

It may further be observed that, if such consequences had been contemplated by the act, the sections which deal with the avoidance of voluntary transfers and fraudulent preferences and similar matters would have excluded from the necessity of such avoidance, by excepting the transfers, preferences, etc., which have already been made the ground of adjudication.

The result of the contention put forward by Mr. S. Duraiswami Ayyar would, in all cases where the adjudication is founded on alleged fraudulent transfers or preferences, be to adjudicate about such transfers and preferences finally and conclusively without even an opportunity to the parties thereby affected, to be heard in the matter. No doubt if it is clear from the statute that such a result was intended, the mere fact that the

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provision is unreasonable or unjust could not possibly affect the question. But we are not satisfied that there is any such clear indication in the Act. On the other hand section 116 which deals with the conclusiveness of the order of adjudication is in the following terms:—

"(1) A copy of the official gazette containing any notice inserted in pursuance of this Act shall be evidence of the facts stated in the notice.

(2) A copy of the official gazette containing any notice of an order of adjudication shall be conclusive evidence of the order having been duly made, and of its date."

It is significant that according to this section the conclusiveness is stated to be only with regard to the order having been duly made and of its date, and that as regards the other facts the notification is said to be only evidence of such facts.

It has not been proved in this case that the notification published in the official gazette comprised the ground of adjudication or the acts of bankruptcy, and even if it did, it follows that such notification would only have been evidence of the facts, not conclusive evidence.

The learned counsel for the appellant relied strongly on the decision of *Hawkins and another* v. *Duche and Sons and another*(1). That case is clearly distinguishable from the present because the order of adjudication in that case referred to the partnership, and the section speaks of the notification being conclusive evidence of the order of adjudication having been duly made. The observations of the learned Judge in the matter are clearly *obiter* and the learned Judge expresses himself not without doubt.

Mr. S. Duraiswami Ayyar also referred to the case of *Ex parte Learoyd, In re Foulds*(2). All that was decided in

(1) (1921) 37 T. L.R., 748. (2) (1878) L.R., 10 Ch.D., 3.

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that case was that an order of adjudication in bankruptcy was conclusive till set aside not only as to the order but also as to the acts of bankruptcy on which it was based. The judgment in that case cannot be regarded as deciding any question with regard to the necessity or otherwise of the Official Assignee or trustee seeking to set aside preferential alienations and payments made by the insolvent although the order of adjudication might have been founded thereon.

The learned counsel for the appellant also referred to the case of *Ex parte Tucker, In re Tucker*(1). That case refers only to the operation of the date of the act of bankruptcy on which the adjudication purports to be founded and the right of third parties affected thereby to have the same set aside. The date to which the title of the Official Assignee relates back, is a matter dealt with by the statute itself and therefore the case cannot be regarded as having any bearing on the question now before us.

The whole question really resolves itself into whether the legislature by the use of the expression "duly made" in section 116 contemplated not merely that the acts of bankruptcy on which the order of adjudication is founded should be regarded as acts of bankruptcy but also further to give such findings the legal consequences of a decision against the parties who have not had any opportunity of being heard in the matter. We consider that such an interpretation and such far-reaching consequences are not warranted by the mere use of the expression "duly made." We think it more reasonable to suppose that it is only in their character as acts of bankruptcy that the adjudication is said to be founded on them and that if the Official Assignee should, in

(1) (1879) L.R., 12 Ch. D., 308.

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such cases, also desire to obtain a decision against third parties, he should adopt the ordinary procedure indicated in the Act.

We have, therefore, come to the conclusion that the order of the learned Judge was right and the appeal fails and is dismissed with costs.

V. Varadaraja Mudaliar, Attorney for Appellant.

V. Krishnan, Attorney for Respondent.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Reilly.

1926, September 8.

SWAMINATHA ODAYAR (DEFENDANT), APPELLANT,

v.

SUBBARAMA AYYAR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 55 (4) (b)—Vendor's lien—Vendee executing a promissory note to a third party for the whole or part of purchase-money—Vendor's lien, whether extinguished—"Contract to the contrary," meaning of—Limitation Act (IX of 1908), sec. 19—Acknowledgment—Deposition—Acknowledgment, whether must be express or can be implied from facts and circumstances or as a matter of law.

Where, at the instance of a vendor of immovable property, a promissory note was executed by the vendee to another person for the whole or part of the purchase-money, and both the vendor and the holder of the note sued to recover such amount personally as well as by sale of the property,

Held, that the holder of the note was the only person competent to sue on the note, whether he was beneficially entitled to the note or was a benamidar for the vendor:

* Appeal Suit No. 169 of 1924.

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Reoti Lal v. *Manna Kunwar*, (1922) I.L.R., 44 All., 290 and *Subramanya Tevan* v. *Arunachala Tevan*, (1908) 18 M.L.J., 186, followed;

that the vendor's lien for unpaid purchase-money under section 55 (4) (*b*) of the Transfer of Property Act was extinguished by the execution of the promissory note, as it was a "contract to the contrary" within the section; but the vendor was entitled to a personal decree on the note, as the holder agreed to such a decree.

Cases of extinguishment of vendor's lien by execution of a promissory note or a bond, etc., discussed.

An acknowledgment of liability under section 19 of the Indian Limitation Act, 1908, need not be express but may be implied from facts and circumstances under which a statement in a deposition was made, but it cannot be implied as a matter of law.

Maniram Seth v. *Seth Rupchand*, (1906) I.L.R., 33 Calc., 1047 (P.C.), applied; *Kandasami Reddi* v. *Suppammal*, (1922) I.L.R., 45 Mad., 443, followed; *Ranganayakulu Ayya* v. *Subbayan*, (1909) 5 M.L.T., 71, disapproved.

APPEAL from the decree of V. BASHYAM AYYANGAR, the Subordinate Judge of Kumbakonam, in Original Suit No. 15 of 1922.

The suit is to recover an amount due on a promissory note executed by the defendant in favour of the second plaintiff, the mother of the first plaintiff, for part of the purchase-money due under a sale deed in respect of lands sold by the first plaintiff to the defendant. The plaintiffs claimed to recover the amount from the defendant personally and by the sale of the property sold to the defendant, on the allegation that the promissory note was executed benami for the first plaintiff. The promissory note was executed on 5th September 1917, and this suit was instituted on 11th February 1922, and the plaintiffs relied in bar of limitation on an alleged acknowledgment contained in a deposition of the defendant. The Subordinate Judge, who tried the suit, held that the promissory note was

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benami for the vendor, that the vendor's lien was not lost, that the suit was not barred by limitation and passed a decree for sale of the property. The defendant appealed.

S. Varadachariar and *R. Rajagopala Ayyangar* for appellant.—The vendor's lien is extinguished in this case, by reason of the execution of the suit promissory note. Though the execution of a promissory note to the *vendor himself* may not be "a Contract to the Contrary" within section 55 of the Transfer of Property Act, so as to extinguish the vendor's lien under the section, the execution of a promissory note to a *third party* extinguishes the vendor's lien. The lien will be extinguished, even though the holder is only a benamidar for the vendor. Even if the holder is a benamidar he (benamidar) only can sue on the note. See *Ramanuja Ayyangar* v. *Sadagopa Ayyangar*(1), *Subba Narayana Vathyar* v. *Ramaswami Aiyar*(2). The vendee cannot be liable to the vendor on a charge under section 55 (4) (*b*) and at the same time be liable to the holder on the promissory note. See *Krishnaswami Aiyangar* v. *Subramania Ganapatigal*(3). In a previous suit by the vendee for possession of the lands under the sale, the vendor (who was defendant) did not ask for payment of the amount of this promissory note. That shows that the mother (holder of the note) was the real and beneficial owner. The present claim is barred by the rule of *res judicata* or Order II, rule 2, Civil Procedure Code. If there is no lien, the suit is barred by limitation. There is no acknowledgment of a subsisting liability within section 19 of the Limitation Act. The deposition of the defendant does not amount to an acknowledgment, as there is no admission that the liability was subsisting at the time of the acknowledgment: Reference was made to the following cases *Muthukumara Mudaliar* v. *Chockalinga Mudaliar*(4), *Kalathil Kambel Achuthan* v. *Kunnumbrath Abdu*(5), *Maniram Seth* v. *Seth Rupchand*(6).

T. M. Krishnaswami Ayyar.—The vendor's lien was not lost by the execution of the promissory note. The promissory note was not valid as there was no delivery to the payee. Delivery is

(1) (1905) I.L.R., 28 Mad., 205. (2) (1907) I.L.R., 30 Mad., 88.
(3) (1918) 35 M.L.J., 304. (4) (1923) 17 L.W., 674.
(5) (1925) 21 L.W., 593. (6) (1906) I.L.R., 33 Calc., 1047 (P.C.).

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necessary under section 46 of the Indian Negotiable Instruments Act. The payee was not present when the note was executed, and it was left with a third party. Even if it was valid, it does not extinguish the statutory charge, as it does not amount to a contract to the contrary. Even if vendor's lien was affected by the execution of the note, the lien was revived as the vendor and the holder are willing to give up their rights under the note.

The acknowledgment of liability under section 19 of the Limitation Act need not be express but may be implied. See *Kandasami Reddi* v. *Suppammal*(1), *Subbarama Aiyar* v. *Veerabadra Pillai*(2), *The Official Assignee of Madras* v. *Subramania Aiyar*(3).

JUDGMENT.

RAMESAM, J.

RAMESAM, J.—The facts out of which this appeal arises are in the main undisputed and may be shortly stated. The first plaintiff obtained some lands under a will. On 16th August 1917 he entered into an agreement to sell the said lands to the defendant for Rs. 15,250 and on that day obtained a cash advance of Rs. 1,250 towards the consideration. On the 24th of August, further sum of Rs. 220 was paid towards the consideration. On the 5th September 1917 a sale deed was executed, a further sum of Rs. 1,780 being paid in cash. There remained an amount of Rs. 12,000 due towards the consideration. The sale deed provided that Rs. 6,000 was to be paid before the Sub-Registrar and the other Rs. 6,000 was to be paid to the first plaintiff's mother Sithalakshmi Ammal, who is the second plaintiff. Accordingly on the same day the defendant executed a promissory note for Rs. 6,000 in favour of the second plaintiff. Soon after the first plaintiff refused to register the sale deed contending that it was nominal. The

(1) (1922) I.L.R., 45 Mad., 443. (2) (1921) 41 M.L.J., 217.
(3) (1924) 46 M.L.J., 1.

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defendant obtained compulsory registration of the sale deed. But the Rs. 6,000 was not paid before the Sub-Registrar. The defendant then filed a suit O.S. No. 269 of 1919 in the Court of the District Munsif of Valangiman for possession of the lands sold. The first plaintiff who was the only defendant in that suit contended that the sale deed was a nominal transaction. The District Munsif dismissed the suit. On appeal by the plaintiff therein (the present defendant) the Subordinate Judge of Kumbakōnam decreed the suit. He also passed a decree for the payment of Rs. 6,000 which was originally intended to be paid before the Sub-Registrar, to the defendant therein (the present first plaintiff). This was on 21st January 1921. There was a Second Appeal to the High Court which was dismissed on the merits of that suit. One of the grounds in Second Appeal was that the learned Judge ought to have recorded a distinct finding in regard to the six thousand Rupees promissory note and made provision for its payment also. On this ground the learned Judges who disposed of the Second Appeal said:—

"As regards the sum of Rs. 6,000 payable to the defendant's mother it is admitted a promissory note has been executed and that a suit is pending. There is no necessity to provide for payment to her in this suit especially as she is not a party."

In the interval between the disposal of the appeal by the Subordinate Judge and the disposal of the Second Appeal the present suit was filed on 11th February 1922 to recover the sum due on the promissory note (Exhibit B). It is alleged in the plaint that the second plaintiff was not a party to the contract, that the promissory note was executed by the defendant in the name of the second plaintiff but really for the benefit of the first plaintiff. It is also alleged that the promissory note was not delivered to the first plaintiff at the date of the execution, that the note was kept with one

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Nataraja Pillai as an intermediary and that it was obtained from Nataraja Pillai long after the appeal judgment of the Subordinate Judge in the former suit. This last allegation is denied by the defendant. The Subordinate Judge said nothing on this point. He found that the second plaintiff is a mere benamidar for the first plaintiff, that the suit was not barred and decreed the suit. He also found that the plaintiff is entitled to the vendor's lien for unpaid purchase-money and gave a decree for sale. The defendant appeals. It may be observed at the outset that the burden of proving that the promissory note was not delivered on the date of the execution is on the plaintiffs. No attempt has been made to prove the allegation and I think it must be found that the promissory note was delivered to the first plaintiff on the date of the execution and that the story about its being kept with Nataraja Pillai is a myth.

One point argued by the appellant is, that as a result of the former litigation it must be taken as having been impliedly decided in it that the second plaintiff was the person entitled to the beneficial interest in Exhibit B. I do not think so. Any question relating to the note arose for the first time only after the Subordinate Judge found that the sale deed was not nominal. We do not know what happened before the Subordinate Judge at the time of delivering the judgment in that suit. The High Court merely abstained from expressing any opinion on this matter for the reason that a separate suit had been filed and that the present second plaintiff was not a party to that litigation. It cannot be said that any conclusion is necessarily implied in the course taken by the learned Judges.

The next important point argued by the appellant is, that the second plaintiff is the only person competent to

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sue on Exhibit B and therefore the vendor's lien was extinguished. On the other hand, it is contended for the respondents that there is nothing to show that the second plaintiff ever accepted the note and therefore the right to the balance of the purchase-money remained with the first plaintiff and with it the vendor's lien. It is admitted by the defendant in his former deposition, now filed as Exhibit E, that the second plaintiff was not present when Exhibit A was executed. Until, therefore, the second plaintiff accepts the note, the note has not become operative. Seeing that the defendant has performed what was required of him by the first plaintiff at the time of the transaction one would expect that, if the second plaintiff refused to accept the note, the first plaintiff would have communicated such a fact within a reasonable time to the defendant and demanded the balance of the purchase-money as on a failure of consideration. It is doubtful whether in such a case, the vendor's lien was at first extinguished, and if so, would revive. But it is unnecessary to express any opinion on that matter. No such notice was given by the first plaintiff and he behaved throughout as if he was content that the right in the note should remain in the second plaintiff. It is really unnecessary to consider whether the first plaintiff was the person beneficially interested in the note. Probably, he was and is, though, at the same time, it must be remarked that no formal evidence has been adduced by the plaintiffs on the matter as they ought to have done. But whoever the person entitled to the beneficial interest may be, the only person that is entitled to sue on it is the second plaintiff, though it may be that after the money was recovered she would have to pay it to the first plaintiff. It was held in *Reoti Lal* v. *Manna Kunwar*(1) that a person whose

(1) (1922) I.L.R., 44 All., 290.

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name does not appear in the promissory note cannot sue on it alleging that the payee was a benamidar for himself [see also *Subramanya Tevan* v. *Arunachala Tevan*(1)]. Mr. T. M. Krishnaswami Ayyar appearing for the respondents contended that the note itself not having been delivered to the payee who was not present at the time was a void note. I cannot agree with this contention. The first plaintiff purported to act as agent of the second plaintiff in taking the note and it was open to the second plaintiff to ratify his act, though until it is so ratified the second plaintiff does not step into the transaction. In the present case, the second plaintiff is willing to have a decree in her favour if the Court finds that the first plaintiff is not entitled to sue. This ratification is good enough. I must, therefore, hold that the second plaintiff is the only person entitled to sue on Exhibit B. The question that arises on this finding is, whether the vendor's lien is lost. The following propositions are undisputed :—

1. A mere direction by the vendor to the vendee to pay the whole or a part of the purchase-money to a third person does not extinguish the lien *Sivasubramania Ayyar* v. *Subramania Ayyar*(2).

2. If such direction is followed by mere payment of the third person but not by a fresh contract by the vendee with the third person so as to effect a complete novation, the lien is not lost. *Thyagaraja Mudaliar* v. *Seshappair*(3).

3. Where it was intended that the vendee should execute a mortgage deed and extinguish the lien but the mortgage deed was not completed by registration and remained a simple bond, the lien is not extinguished. *Ranganayaki Ammal* v. *Parthasarathi Ayyangar*(4).

(1) (1908) 18 M.L.J., 186.
(2) (1916) I.L.R., 39 Mad., 997 (F.B.).
(3) (1919) 10 L.W., 518.
(4) (1919) 10 L.W., 550.

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4. Where the vendor obtained a promissory note not from the vendee but from a third person at the instance of the vendee and the third person did not pay, even then, if the third person's note or bond was only an additional security to the vendee's liability and not in substitution of it, the lien is not lost. Compare *Balagurumoorthy* v. *Nagulu*(1).

5. Where the vendor himself takes a promissory note or bond and where the right in it was assigned by him to a third person or where his right was attached in execution of a decree and purchased by a third person the vendor's right to the lien passes to the third person under section 8 of the Transfer of Property Act and is available to the assignee or purchaser. *See Sambasiva Iyer* v. *Venkatarama Iyer*(2).

But if in this last case the vendor took a negotiable instrument and the instrument is not assigned but endorsed under the Law Merchant, it is doubtful if section 8 of the Transfer of Property Act will apply and the endorsee will be entitled to the lien. It is unnecessary to express an opinion on that matter now.

But where a complete novation is effected and a new contract between the vendee and a third person was effected in substitution of the vendee's liability to the vendor this amounts to a contract to the contrary within the meaning of section 55 of the Transfer of Property Act and the lien is extinguished. I am willing to concede that, even in such a case, if the document taken is not a negotiable instrument but only a bond and if it is taken benami for the benefit of the vendor so that he may still sue on it, the arrangement being known to the vendee, the vendor's lien remains, provided he is not prejudiced. But where the document taken is a negotiable promissory note so as to disable the vendor

(1) (1921) 14 L.W., 191. (2) (1926) M.W.N., 569.

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from suing even if he is the person beneficially interested in the money after its recovery the lien must be held to be lost, as ostensibly the payee of the note is the only person entitled to sue. The note might have been endorsed not to the vendor but to any third person. To say that the note in the hands of the payee has got the lien attached to it involves anomalous positions. Anyhow, there is nothing to show that the vendee knew the benami nature of the note. I therefore hold that the second plaintiff is not entitled to the vendor's lien in this case.

As the suit was filed more than four years after the execution of Exhibit B the question next arises whether the suit is barred by limitation. The plaintiffs rely upon the defendant's deposition, Exhibit E, as an acknowledgment to save limitation. The material passage in the deposition runs thus :—

"I was directed to pay Rs. 6,000 to defendant's mother Seethalakshmi Ammal in Exhibit B. I executed a pro-note in her favour on the date of Exhibit B immediately after Exhibit B was written and delivered the said pro-note to Subbarama Ayyar. I owed Rs. 6,000 more under Exhibit B."

* * * *

"Defendant did not tell me why he wanted me to pay Rs. 6,000 to his mother. I have not received any notice. I have not received any notice from defendant's mother about the pro-note I executed in her favour. I did not enquire if the pro-note I executed to defendant's mother for Rs. 6,000 did or did not reach her. She was not present when I executed the note and delivered it to defendant."

The appellant contends that this does not amount to an acknowledgment. A case decided by MILLER, J., and reported in *Ranganayakalu Aiya* v. *Subbayan*(1), was relied on for the respondents' contention that this deposition amounts to an acknowledgment. This decision

(1) (1909) 5 M.L.T., 71.

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of MILLER, J., has been adversely commented on in various later decisions. In *Subbarama Aiyar* v. *Veerabadra Pillai*(1), NAPIER, J., observed :—

"It may not necessarily always be that deduction to be drawn."

In *Kandasami Reddi* v. *Suppammal*(2), AYLING, J., after quoting the last sentence of NAPIER, J., referred to the observation in *Andiappa Chetty* v. *Alasinga Naidu*(3).

"Each case must be treated on its own merits"

and then said :

"From the language used and the circumstances in which the acknowledgment is made it must be decided whether it amounts to an implied acknowledgment of subsisting liability."

Earlier in the judgment he observed (after citing the decision of the Privy Council in *Maniram Seth* v. *Seth Rupchand*(4).

"I can see no ground whatever for holding that their Lordships were considering anything but the circumstance of that case or intended to lay down any rule of legal *inference*."

Mr. Rajagopala Ayyangar in replying for the appellant contended that the acknowledgment in a deposition must be express and not implied. He relied on *Venkata* v. *Parthasaradhi*(5). But the authorities cited in this decision and *Maniram Seth* v. *Seth Rupchand*(4), show that in the language of AYLING, J. already cited it need not be express and may be a matter of inference. It can be implied from the facts and the surrounding circumstances and not implied as a matter of law, as MILLER J., seemed to have thought. This is also the view of SCHWABE, C.J., and KRISHNAN, J., in *The Official Assignee of Madras* v. *Subramania Aiyar*(6).

When we look at the circumstances of this case, we find that the defendant when he was examined as his

(1) (1921) 41 M.L.J., 217.
(2) (1922) I.L.R., 45 Mad., 443.
(3) (1913) I.L.R., 36 Mad., 68.
(4) (1906) I.L.R., 33 Calc., 1047 (P.C.).
(5) (1893) I.L.R., 16 Mad., 220.
(6) (1924) 46 M.L.J., 1.

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first witness in the former suit was anxious to show that the sale deed was not nominal and that some consideration was paid for it. If any payment was made towards the promissory note he would have stated it. If no payment was made, his position in that case was one of willingness to pay the amount due on the note and the amount to be paid before the Sub-Registrar. The whole tenor of the deposition was that while he was willing to perform his side of the contract the vendor would not allow him to do so and prevented him from making further payments by the attitude he took. The deposition clearly implies that the note was real and subsisting and on account of no fault of his, no further payments were made towards it, but that he is willing to pay it if the other side was willing to receive it. I think there is an acknowledgment of subsisting liability in this case. This case is stronger than the decision of SCHWABE, C.J., and KRISHNAN, J., above mentioned, where, an omission in a written statement to deny the allegation in a plaint is all that we have. This case is similar to the decision in *Maniram Seth* v. *Seth Rupchand*(1), where also it was an inference from the circumstances. Mr. Rajagopala Ayyangar relied on *Muthukumara Mudaliar* v. *Chockalinga Mudaliar*(2). Neither from the report nor from the printed papers is it clear why the former deposition was made and I do not think that case helps us in deciding the present case.

In the result, I hold that the suit is not barred by limitation. The decree of the lower court will be vacated and a personal decree will be passed for the amount sued for in favour of first plaintiff, as the second plaintiff consents to such a decree.

The order as to costs in the Court below will stand.

In Appeal, each party will bear its own costs.

(1) (1906) I.L.R., 33 Calc., 1047 (P.C.).
(2) (1923) 17 L.W., 674.

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REILLY, J.—So far as this suit is a suit on the promissory note, Exhibit B, the learned Subordinate Judge has found that it is not time-barred because it is saved by an acknowledgment made by defendant in his deposition, Exhibit E, in the previous suit, which contains a statement that he executed the note without any denial that the liability under the note was then subsisting. The Subordinate Judge has relied on *Subbarama Aiyar* v. *Veerabadra Pillai*(1). One of the reasons for the decision of the learned Judges in that case was a dictum of MILLER, J., in *Ranganayakalu Aiya* v. *Subbayan*(2).

"An acknowledgment of liability existing at a past date without any allegation that the liability has since ceased is presumed to be acknowledgment of liability when the statement is made."

That MILLER, J., stated as the effect of the decision of the Privy Council in *Maniram Seth* v. *Seth Rupchand* (3). With the greatest respect I do not think it can be doubted that MILLER, J., read more into the decision in Muniram Seth's case than can be found in it and stated his proposition too widely. I entirely agree with AYLING, J.'s interpretation of Muniram Seth's case in *Kandasami Reddi* v. *Suppammal*(4), which has been approved in 46 M.L.J., 1. In some cases an admission of liability in the past with no denial that the liability continues may imply an admission that the liability continues. Whether there is such an implied admission is a matter of evidence, not of legal presumption. Before deciding the question whether there is such an implied admission we must examine the context of the admission of a liability in the past and the circumstances in which it was made and consider whether the maker of that

(1) (1921) 41 M.L.J., 217.
(2) (1909) 5 M.L.T., 71.
(3) (1906) I.L.R., 33 Calc., 1047 (P.C.).
(4) (1922) I.L.R., 45 Mad., 443.

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admission had any need or incentive in the circumstances to deny the continuance of the liability if he could do so and whether he had an opportunity of denying it. When the admission of a liability in the past is made in a deposition given in Court we must be particularly careful to consider whether the witness had an opportunity of denying the continuance of the liability, remembering that a witness under examination is not always at liberty to say all that he may wish to say or that he may think it necessary to say in order to protect his own interests but has to answer the questions put to him. With this warning in mind let us examine what defendant said in his deposition in the previous case. The important words appear to me to be

"I was directed to pay Rs. 6,000 to defendant's mother, Seethalakshmi Ammal in Exhibit B (the sale deed). I executed a pro-note in her favour on the date of Exhibit B immediately after Exhibit B was written and delivered the said pro-note to Subbaramier."

Now in that suit the present defendant was trying to show that the sale was a real transaction which the present plaintiff 1 denied. Defendant was anxious to show that he had done his part in the matter and was explaining in his deposition all that he had done in making part payments and in other ways. He had just mentioned that he had made three such payments. And he went on after the part of his deposition now in question to explain why he did not pay the remaining Rs. 6,000 of the purchase-money, as intended, before the Sub-Registrar. In the circumstances it is clear that it was very much to his interest, when he mentioned this promissory note, to mention also any payment which he had made under it. And it must be noticed that the part of his deposition which I have quoted was made in examination in chief. Defendant's vakil, who had just elicited his evidence about part payments made, must

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have been fully aware that evidence that any payment had been made towards the discharge of the promissory note would strengthen his case, and it cannot be supposed that he would not have given defendant an opportunity of mentioning any such payment. In the circumstances I think it is clear that defendant's statement that he executed the promissory note coupled with his failure to mention any payment towards the discharge of it was an implied admission that the liability under the note was then subsisting. I agree therefore in finding that defendant made an acknowledgment within the meaning of section 19 of the Limitation Act, which saves the suit on the note from being time-barred.

2. Curiously enough Mr. Krishnaswami Ayyar for plaintiffs has been at pains to argue before us that the promissory note, Exhibit B, though it is in part the basis of plaintiffs' suit, is not valid because it was never delivered to plaintiff 2, the payee named in it. In the plaint it is stated that Exhibit B was not delivered to either plaintiff but was left with one Nataraja Pillai. In the defendant's written statement it is alleged that Exhibit B was delivered to plaintiff 1 on behalf of plaintiff 2, who is his mother. The only oral evidence on this question is that of defendant, whose deposition, Exhibit E, in the previous suit was admitted by consent. In that deposition defendant states that he delivered the promissory note to plaintiff 1 immediately after the sale-deed was written. Plaintiff 1 did not go into the witness box to deny this. Nataraja Pillai was not examined, and it appears that, though he had given evidence in the previous suit, plaintiffs omitted to apply, perhaps advisedly, that his deposition should be admitted as evidence in this suit. On the record as it stands the only reasonable finding is that the promissory note,

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Exhibit B, was delivered by defendant to plaintiff 1 on the date of its execution, which is the date of the sale-deed. The sale-deed, Exhibit A, recites that plaintiff 1 has directed defendant to pay the Rs. 6,000 which is represented by this promissory note to plaintiff 2, his mother. It is admitted that plaintiff 2 was not present when the sale-deed and promissory note were executed. In the circumstances it may clearly be inferred that plaintiff 1, when he took delivery of the promissory note from defendant, represented himself as his mother's agent in this matter. There is no evidence when plaintiff 1 handed the note over to plaintiff 2; but it must be held to have reached her eventually because she and plaintiff 1 jointly have produced it in this suit. And the fact that she has sued on the note shows that she ratified plaintiff's action in taking delivery of it as her agent. Whether plaintiff 2 as payee of the note was only a benamidar for plaintiff 1, as now represented by them, or not the contention that the note is not valid because it was never delivered to the payee fails.

3. But in spite of the existence of the promissory note, Exhibit B, plaintiff 1 contends that he is still entitled to enforce his charge under section 55 (4) (*b*) of the Transfer of Property Act for the part of the purchase-money for which Exhibit B was executed, and the learned Subordinate Judge has found that he is so entitled. On this part of the case Mr. Krishnaswami Ayyar for plaintiffs, as I understand him, has argued alternatively, (1) that the promissory note, Exhibit B, is invalid and therefore the statutory charge for unpaid purchase-money has never been affected by it, (2) that, even if Exhibit B is valid, the statutory charge persists concurrently with the liability under Exhibit B and (3) that on plaintiffs giving up their claim under Exhibit B, as they are prepared to do, the charge, if it

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was ever defeated or affected by Exhibit B, revives and can be enforced. The first of these contentions has been disposed of by the finding that Exhibit B is valid. In regard to the second contention it is true that, when the vendor of immovable property takes a promissory note from the vendee in his own favour for the whole or part of the purchase-money or when he directs the vendee to pay the whole or part of the purchase-money to a third party, the vendor does not thereby lose the charge for unpaid purchase-money given by section 55 (4) (*b*) of the Transfer of Property Act. In neither of those cases, it will be seen, does the vendee put himself under liability to anyone but the vendor. But, when the vendee at the instance of the vendor executes a promissory note for the purchase-money or part of it in favour of a third party, the position is altered. The vendee in that case puts himself at the mercy of the third party, even if that party is only a benamidar for the vendor. If in those circumstances the vendor's charge on the property for the amount of the promissory note remained, the vendee would be liable to be sued for the same purchase-money by two parties independently. In my opinion there is no doubt that, if by agreement between the vendor and vendee, the vendee puts himself under an enforceable liability to a third party for the whole or part of the purchase-money, then in respect of the whole purchase-money or the part of it, as the case may be, there is a "contract to the contrary" within the meaning of section 55 of the Act and the vendor's statutory charge on the property is so far defeated. A contract between the vendor and vendee by which a third party obtained the right to exact by suit the purchase-money or part of it from the vendee is inconsistent with the vendor retaining a charge to enforce payment to him of the same purchase-money.

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The right to sue for the purchase-money cannot reside in one person and the right to enforce the security for its payment in another. The position in my opinion is the same so far as the vendee is concerned whether the third party is a benamidar for the vendor or not, unless it is shown that the vendee was aware that the third party was only a benamidar for the vendor and knowingly dealt with the vendor under the benamidar's name, in which case there would be no "contract to the contrary" within the meaning of section 55 of the Act. If the third party to whom the vendee puts himself under an enforceable liability for the purchase-money is a benamidar for the vendor but the vendee is unaware of that, I do not see how the nature of the document which the vendee executed in favour of the third party whether it be a bond or a promissory note can affect the question whether the vendor's charge is extinguished. Though the vendor may sue the vendee on a bond of which he is the real obligee but which runs in favour of a benamidar, the benamidar may sue on it in his own name without making the vendor a party and the vendee cannot resist his suit. A contract between the vendor and the vendee by which the vendee makes himself liable to be sued for the purchase-money by a third party, whom he does not know to be a mere benamidar for the vendor, or by the assignees of that third party is in my opinion essentially inconsistent with the retention by the vendor of his charge to secure the payment of the purchase-money even when it may be open to the vendor to prove that the third party is a mere benamidar for him and to sue the vendee on his obligation to the third party. It is the nature of the contract between the vendor and the vendee to which we must look, and that is not affected by the existence of an undisclosed benamidar. In this case it is not pleaded

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that defendant was aware that plaintiff 2 was a benamidar for plaintiff 1. In regard to Mr. Krishnaswami Ayyar's third contention, when once there is "contract to the contrary" within the meaning of the section and the vendor's charge is so defeated, I do not see how the statutory charge can be revived. There appears to be no provision in the Act which could have that effect. Nor in my opinion is the position altered if the vendor takes a promissory note executed by the vendee in favour of a third party for the purchase-money or part of it but afterwards fails to hand it over to the payee: so far as the vendee is concerned the "contract to the contrary" has been made, and it cannot be rescinded by the vendor. This first point, though mentioned in the argument, does not really arise for decision in the present case as it has been found that the promissory note, Exhibit B, was delivered to plaintiff 2, who sues on it.

4. I agree therefore that plaintiff 1 has no charge on the property sold for the Rs. 6,000 now in question but that plaintiff 2 is entitled to a personal decree against defendant for the amount due under the promissory note, Exhibit B, and that, as she is willing that the decree be made in favour of plaintiff 1, it should be so made. The Subordinate Judge has made only an ordinary mortgage decree for sale in favour of plaintiff 1, that should be set aside and a personal decree made against defendant in favour of plaintiff 1 in its stead with costs in the lower Court. I agree that in this Court each party should bear his own costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Jackson.

1926, November 16.

NELLIAPPA ACHARI AND OTHERS (DEFENDANTS), APPELLANTS,

v.

PUNNAIVANAM ACHARI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Hindu Law—Mutt—Head of mutt, whether a trustee—Some properties in question belonging to the mutt—Civil Procedure Code (Act V of 1908), sec. 92—Suit under sec. 92 for removal and for a scheme, whether competent.

Where the properties in question belong to a mutt, the head of the mutt is answerable for maladministration as a trustee in a general sense, though he may not be an express trustee in the English sense.

Section 92, Civil Procedure Code, is applicable to such a case, and a suit can be instituted for removal of the head of the mutt and for a scheme, after obtaining the sanction prescribed by the section.

Ram Parkash Das v. *Anand Das*, (1916) I.L.R., 43 Calc., 707 (P.C.), and *Vidya Varuthi* v. *Balusami Ayyar*, (1921) I.L.R., 44 Mad., 831 (P.C.), relied on; *Nataraja Tambiran* v. *Kailasam Pillai*, (1921) I.L.R., 44 Mad., 283 (P.C.), explained.

APPEAL against the decree of R. NAGESWARA AYYAR, Subordinate Judge of Tinnevelly, in Original Suit No. 58 of 1922.

The material facts appear from the judgment.

K. Rajah Ayyar and *V. Ramaswami Ayyar* for appellants.

T. R. Ramachandra Ayyar, *N. A. Krishna Ayyar* and *K. Venkateswara Ayyar* for respondents.

* Appeal No. 197 of 1924.

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JUDGMENT.

ODGERS, J.—This is an appeal from the judgment and decree of the Subordinate Judge of Tinnevelly. The suit was brought by five persons with the sanction of the Advocate-General under section 92 of the Civil Procedure Code against the head of the mutt, Parasamaya Kolarinatha Swamigal and his two sons, for a declaration that certain properties belong to the Parasamaya Kolarinatha Madam at Tinnevelly, that the defendants were in unlawful possession of the property and for a scheme. The defendants in their written statement denied that the properties in question were endowed for a public, religious and charitable trust or that the muttam was of a public, religious and charitable character. They allege that the properties were the private property of the head and that from time immemorial the head of the mutt had been treated as the administrative and disciplinary authority over the five sections of the Viswa Brahmans in the Tamil districts of South India, Travancore, Cochin and Malabar.

The Subordinate Judge held, *inter alia*, on the first two issues (which are the only ones in question in the present appeal), that the mutt was a public, religious and charitable institution within section 92 and that some portions of the properties were held in trust for the institution by the head of the mutt for the time being and were not the absolute private property of the Madathipathi.

A question as to the validity of defendant 1's adoption was also raised. On the appeal these questions were raised, viz., (1) estoppel by reason of the judgment in Original Suit No. 4 of 1919 on the file of the Temporary Subordinate Judge of Tinnevelly, Exhibit B, (2) no vacancy in the office because defendant 1 had

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acquired title to it by adverse possession, and (3) the incompetency of the suit under section 92. The first two points were given up and the appeal confined to the last point, the contention being that the head of this mutt is not a trustee. The mutt now appears to be very poor owning only 11 marakkals of land and its affairs have been "in confusion" for several years. There is evidence that besides the *per capita* cotnribution of the Sishyas there are some lands in Kandyapperi and Shoranadai. It is said that the latter is held by the Swami, on express trusts. That the lands are mutt property is, I think, undoubted. Exhibits FFF, FFF-1, GGG, GGG-1, in Appeal No. 321 of 1912 on the file of the High Court, show that in some instances pattas are granted in the official name of the Swami and there is no mention of the mutt and in others the word "Mutt" is appended. It was argued that the properties were the personal properties of the head, but the argument was not seriously pressed. It was recognized that the Swami took the properties burdened with obligations to devote the income to the purposes for which the institution was founded and was precluded from alienating the corpus, but it is said that he is not a trustee either express or constructive so as to fall under section 92, Civil Procedure Code. I very much doubt, and in fact I am not prepared to hold on the evidence, that he is an express trustee of any of the properties. That the properties or some of them belong to the mutt there can be, I think, no question. The matter was considered by WALLIS, C.J., and HANNAY, J., in Appeal No. 321 of 1912 (Exhibit A), and they held that at least some of the properties belonged to the mutt and that there was evidence that the income derived from the properties was solely employed for religious, public, and charitable purposes. Assuming then that some of

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the properties in question were mutt properties, what is the position of the head with regard to them? This had led to an argument on the whole question as to whether the head is or is not a trustee. I proceed to state the inferences I draw from the principal cases on the point. There is no need to go into the history of these mutts in Southern India. This has been done in *Sambandha Pandara Sannadhi* v. *Kandasami Thambiran*(1) and is recapitulated in the referring judgments of MUNRO and ABDUR RAHIM, JJ., in *Kailasam Pillai* v. *Nataraja Tambiran*(2). In *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*(3) the head of a mutt was said to be a tenant for life of the corpus with full powers over the income. He had powers to alienate the corpus for purposes necessary for the maintenance of a mutt. He was a corporation sole and consequently he did not forfeit his office through lunacy. He was not a trustee in the sense understood in the law of trusts. In the opinion of BHASHYAM AYYANGAR, J., the principles of English Law as to appointments of new trustees are inapplicable to the case of hereditary trustees in India and other trustees having a beneficial interest in the mutt properties as in the case of the head of a mutt. This decision, though not overruled (and it was no doubt correct in its conclusions) has been criticised in *Vidyavaruthi* v. *Balusami Ayyar*(4) by the Privy Council. Beyond the opinion that a head of a mutt is not a trustee in the English Law sense, we do not derive much guidance from this decision in the present case. The next case was *Kailasam Pillai* v. *Nataraja Tambiran* (2); there the referring Bench thought the swami was a trustee vested with a wide discretion as to the mode in which to apply its profits and receipts for the upkeep

(1) (1887) I.L.R., 10 Mad., 375.
(2) (1910) I.L.R., 33 Mad., 265 (F.B.).
(3) (1904) I.L.R., 27 Mad., 435.
(4) (1921) I.L.R., 44 Mad., 831 (P.C.).

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of the institution, relying on *Sammantha Pandara* v. *Sellappa Chetty*(1). As they opined that this was at variance with *Vidyapurna Thirthaswami* v. *Vidyanidhi Thirthaswami* (2) they referred to the Full Bench the question whether the head of a mutt holds its properties as a life tenant or a trustee. The Full Bench held that there could be no categorical answer to this question, each case depending on the conditions on which the properties were given or which may be inferred from the long-continued and well-established usage and custom of the institution. WALLIS, J., said, at page 279:

"In the present case it seems to me that gifts made to heads of mutts without any mention of the purposes to which they were to be applied cannot be considered to have been given upon trust for charitable purposes." . . . "Further in my opinion where gifts were given to heads of mutts without any specific trust the inference suggested by the circumstances of the case and by usage is that it was not intended to fetter the donees by any trusts in dealing with the gifts or to make them accountable in a Court of law for their manner of dealing with them. The ascetic character of the donees and the great reverence in which they were held would, I think, have rendered such restrictions in the eyes of the donors both unnecessary and unbecoming. The fact that the heads of mutts have more or less frequently abused their position is not of itself a sufficient reason for treating them as trustees of mutt endowments."

The case *Kailasam Pillai* v. *Nataraja Thambiran*(3) went to the Privy Council after remand which was disposed of in *Kailasam Pillai* v. *Nataraja Thambiran*(4).

This comprised two suits, Appeal 317, for a declaration that there was no lawful trustee of the Tiruvannamalai Mutt and Devasthanams and another, Appeal 318, sought for a declaration only in respect of the devasthanam. The reason for filing the two

(1) (1878) I.L.R., 2 Mad., 175.
(2) (1904) I.L.R., 27 Mad., 435.
(3) (1910) I.L.R., 33 Mad., 265 (F.B.).
(4) (1917) 32 M.L.J., 271.

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suits was that it was considered doubtful if the head of the mutt was a trustee under section 539, Civil Procedure Code. The District Judge held that the head was not a trustee and no suit lay for his removal under section 539. An attempt was made on the appeal to show that the Full Bench decision was wrong as opposed to *Ram Parkash Das* v. *Anand Das*(1) but the Court held that they were bound by the Full Bench decision and accordingly agreed with the learned Judge and dismissed the suit so far as it related to the head of the mutt and its endowments.

The appeal to the Privy Council is reported in *Nataraja Thambiran* v. *Kailasam Pillai*(2). The relevant portion of their Lordships' judgment is on page 288 and runs as follows:—

"The trial Judge found in Suit No. 1 of 1905 that there was no evidence to show that the head of the mutt was a trustee of the mutt or of its properties, and by his decree dismissed the suit. The trial Judge apparently considered that, so far as that suit was concerned, it was not necessary to find whether Nataraja was a trustee of the devasthanams and the properties with which they were endowed; that decree in Suit No. 1 of 1905 was appealed to the High Court, and neither on that appeal, nor in these consolidated appeals, was any attempt made to challenge the correctness of the finding of the trial Judge in Suit No. 1 of 1905, that there was no evidence to show that the head of the mutt was a trustee of the mutt or its properties."

In *Muthusamiyer* v. *Sree Sreemethanithi Swamiar*(3) MILLER, J., held that the corpus was inalienable, but that the income was at the disposal of the swami subject only to the upkeep of the mutt. There may be properties vested in him as trustee.

In *Balaswamy Ayyar* v. *Venkataswamy Naiken*(4) a case on article 134 of the Limitation Act, 1908, SADASIVA AYYAR and BURN, JJ., following the Privy

(1) (1916) I.L.R., 43 Calc., 707 (P.C.). (2) (1921) I.L.R., 44 Mad., 283 (P.C.).
(3) (1915) I.L.R., 38 Mad., 356. (4) (1917) I.L.R., 40 Mad., 745.

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Council in *Ram Prakash Das* v. *Anand Das*(1), held that the head of a mutt was a trustee of the mutt properties. The Calcutta case was the case of a Mahant and their Lordships say:

"The Mahant, in their Lordships' opinion, is not only a spiritual preceptor but also a trustee in respect of the asthal over which he presides."

Again,

"The whole assets are vested in him as the owner thereof in trust for the institution itself"

And again

"The nature of the ownership is, as has been said, an ownership in trust for the mutt or institution itself, and it must not be forgotten that although large administrative powers are undoubtedly vested in the reigning mahant, this trust does exist, and that it must be respected" (page 714).

This case went on appeal to the Privy Council in *Vidya Varuthi* v. *Balusami Ayyar*(2). There was no question of a specific trust in the case and the Privy Council held that article 134 only relates to a specific trust and to property "conveyed in trust to a trustee." Their Lordships explained the use of the words "trust" and the "trustee" in the passage quoted above.

"They used the term 'trustee' in a general sense, as in previous decisions of the Board, by way of a compendious expression to convey a general conception of these obligations," i.e., "the duties and obligations attached to the office of a superior."

Again they say,

"These men (heads of mutts) had and have ample discretion in the application of the funds of the institution but always subject to certain obligations and duties, equally governed by custom and usage." "In no case was the property conveyed to be vested in him (head) nor is he a trustee in the English sense of the term though in view of the obligations and duties vesting in him, he is answerable as a trustee in the general sense for maladministration."

(1) (1916) I.L.R., 43 Calc., 707 (P.C.). (2) (1921) I.L.R., 44 Mad., 831 (P.C.).

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In refusing to adopt the authority for their present purpose of *Dattagiri* v. *Dattatraya*(1), their Lordships also said

"It seems to their Lordships that the distinction between a specific trust and a trust for general pious and religious purposes under the Hindu and Muhammadan Law was overlooked and the case was decided on analogies drawn from English Law inapplicable in the main to Hindu and Muhammadan institutions."

This is the latest pronouncement of the Privy Council and, with the exception of one other case to be mentioned hereafter, that concludes my examination of the law on the present point. It seems to me that their Lordships in *Vidya Varuthi* v. *Balusami Ayyar*(2), do recognize that the head of a mutt may be answerable as a trustee "in a general sense" for maladministration and that he has to administer a trust for general pious and religious purposes in view of the duties and obligations attached to his office. If these are not merely voluntary, viz., if the head is bound to carry them out, it seems to me that he must be answerable if he does not, notwithstanding that he may have a very wide discretion as to the application of the mutt funds and other properties for this purpose. If the public or a portion thereof are interested in the performance of these duties and obligations which are or ought to be employed at least as to some part of them in the maintenance of a public and religious and charitable endowment (see Exhibit A) the only way the public can interfere is by a suit under section 92, Civil Procedure Code. I am by no means convinced that "any express or constructive trust" in section 92 is confined to what may be called the English Law sense, at all events as regards the words "constructive trust." It seems to me to mean more than an express or specific trustee taking advantage

(1903) I.L.R., 27 Bom., 363. (2) (1921) I.L.R., 44 Mad., 831 (P.C.).

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of his position as such, e.g., to grant leases in his own name or to make profits by means of unauthorized investments of trust property. It embraces, I think, all cases where the property is used for the purposes described subject to duties and obligations as stated by the Privy Council and a head of a mutt is one of these cases. The matter is well summed up by the learned author of the latest edition of Mr. Mayne's work (our present Chief Justice), at page 627. After pointing out that the head of a mutt is not a trustee (which I take to mean a trustee in the English Law sense as pointed out by the Privy Council) except with regard to specific trusts he says,

"He may have obligations similar to those of a trustee, he will almost invariably be under a legal obligation to support his disciples and perform the usual ceremonies."

The last case I desire to refer to is *Shripatprasad* v. *Lakshmidas*(1). Mr. AMIR ALI in giving the judgment of the Privy Council in *Vidya Varuthi* v. *Balusami Ayyar*(2), said that the mutts of Southern India corresponded with and their general characteristics were almost identical with similar institutions in Northern India and Bombay. The 25 Bom. L.R. case concerned an Acharya, who, as in the case before us, was bound to be a married man. PRATT, J., assumes that the institution involved resembled a mutt and examined the Privy Council cases on the subject which have been reviewed above. He held that *Vidya Varuthi* v. *Balusami Ayyar*(2), did not relate to moral obligations only but only obligations in their usual sense as used in a Court of Law and read the words "constructive trustee" in section 92 as including a person holding a particular fiduciary position whose doings as such can be enforced in a Court of

(1) (1923) 25 Bom. L.R., 747. (2) (1921) I.L.R., 44 Mad., 831 (P.C.).

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Law. This would include Mahants, Shebaits, Muttuvallies, as their fiduciary positions

"would be that of a manager or custodian of properties held for public purposes of a charitable and religious nature."

PRATT, J., also held that *Vidya Varuthi* v. *Balusami Ayyar*(1), lent no support to the contention that spiritual head of a mutt does not occupy a fiduciary position and is not liable to suit under section 92.

The appeal therefore fails and must be dismissed with costs.

JACKSON, J.

JACKSON, J.—In this appeal it is admitted on behalf of the appellants that the plaintiffs are not barred by limitation, and on behalf of respondents that 1st defendant was not estopped, and therefore the sole question for determination is whether the Parasamaya Kolarinatha Matam is an express or constructive trust created for public purposes of a charitable or religious nature within the terms of section 92 of the Code of Civil Procedure.

This mutt is described in paragraph 8 of the lower Court's judgment. It is the duty of the head of the mutt or Swami to perform its ceremonies and to give Upadesam and religious instruction to its disciples. It is proved by Exhibit G that a gift was made to the mutt before 1779. Certain pattas stand in the name of the mutt or of its spiritual head. Exhibit E to Exhibit E-8, Exhibit F. The buildings have been repaired by public subscription, Exhibit PP, and admittedly subscriptions are collected from the supporters of the mutt which has a wide spiritual jurisdiction over the south of this Presidency, Cochin and Travancore.

I do not think, nor indeed was it argued that an institution of this character differs materially from the mutt of Northern India described in *Ram Parkash Das* v.

(1) (1921) I.L.R., 44 Mad., 831 (P.C.).

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Anand Das(1). No doubt succession in that mutt is by selected disciples, and in this mutt, where the head is not celibate, through father and son, but the difference is not material. Again the Patharakudi Mutt, described in *Arunachellam Chetty* v. *Venkatachalapathi Guruswamigal*(2), appears to be similar in all essentials to the mutt of this suit.

In regard to each of these mutts, the Judicial Committee has laid it down as a general rule that the head holds the property as the owner thereof in trust for the institution itself, admitting however that in some cases it may be proved that the property is held on different conditions; *Arunachellam Chetty* v. *Venkatachalapathi Guruswamigal*(2). This in terms reaffirms the decision in *Sammantha Pandara* v. *Sellappa Chetti*(3) which is repeated in *Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*(4) :—

"The ascetic . . . came to own the matam in trust for the maintenance of the mutt."

Against this position the appellants direct a double attack, contending (1) that the Judicial Committee has negatived these pronouncements in *Vidya Varuthi* v. *Balusami Ayyar*(5), (2) that the true proposition of law is to be found in the group of cases, *Vidyapurna Tirtha-Swami* v. *Vidyanidhi Tirtha Swami*(6), *Kailasam Pillai* v. *Nataraja Tambiran*(7), and *Kailasam Pillai* v. *Nataraja Tambiran*(8), *Nataraja Thambiran* v. *Kailasam Pillai*(9).

Vidya Varuthi v. *Balusami Ayyar*(5) is an appeal from the judgment of this court reported in 40 Madras, 745, where it was ruled that the head of a mutt held the property simply as a trustee, and that, in as much as alienated property had been possessed adversely to the trustee for more than twelve years,

(1) (1916) I.L.R., 43 Calc., 707, p. 713 (P.C.).
(2) (1920) I.L.R., 43 Mad., 253 (P.C.).
(3) (1879) I.L.R., 2 Mad., 175.
(4) (1887) I.L.R., 10 Mad., 375, p. 386
(5) (1921) I.L.R., 44 Mad., p. 831.
(6) (1904) I.L.R., 27 Mad., p. 435.
(7) (1910) I.L.R., 33 Mad., 265 (F.B.).
(8) (1917) 32 M.L.J., 271.
(9) (1921) I.L.R., 44 Mad., 283 (P.C.).

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Article 134, Schedule I, Indian Limitation Act, was applicable to the case. In *Vidya Varuthi* v. *Balusami Ayyar*(1) it is pointed out that the word "trustee" is used in two senses. It may be used in a general sense by way of a compendious expression to convey a general conception of the obligations attached to the office (page 838) or it may be used in the English sense of the term where the property has been "conveyed in trust" (page 843). There is a "distinction between a specific trust and a trust for general pious or religious purposes" (page 849). Trustee in inverted commas in the head-note refers to the first category the specific trust and *Vidya Varuthi* v. *Balusami Ayyar*(1), in no way detracts from the clear authority of *Ram Parkash Das* v. *Anand Das*(2) and *Arunachellam Chetty* v. *Venkatachalapathi Guruswamigal*(3) in regard to the trust for general pious or religious purposes.

For his second attack Mr. Rajah Ayyar takes as his starting point *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*(4), where it is held that the real and precise jural character of the head of a mutt is that of a corporation sole. He has an estate for life in the permanent endowments of the mutt, and an absolute property in the income, subject only to the burden of maintaining the institution. He cannot alienate the corpus of the endowment or the income beyond his own lifetime except for purposes plainly necessary for the maintenance of the mutt. The property is like the benefice of a bishopric of the Christian Church. The learned Judges who laid down this proposition do not seem to have been aware that they were traversing *Sammantha Pandara* v. *Sellappa Chetti*(5) and *Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*(6), which

(1) (1921) I.L.R., 44 Mad., 831 (P.C.). (2) (1916) I.L.R., 43 Calc., 707, 713 (P.C.)
(3) (1920) I.L.R., 43 Mad, 253 (P.C.). (4) (1904) I.L.R., 27 Mad., 435.
(5) (1879) I.L.R., 2 Mad., 175. (6) (1887) I.L.R., 10 Mad., 375.

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are only referred to as authority for the definition of a mutt, not as authority for the proposition that the head of a mutt is a trustee (no doubt they both in similar language, decline to follow *Sammantha Pandara* v. *Sellappa Chetti*(1) in holding that a debt incurred by the head for proper purposes is binding on his successor, but that is a different matter). It remained for the referring Judges in *Kailasam Pillai* v. *Nataraja Thambiran*(2), to perceive that 27 Madras in denying that the head of a mutt was a trustee, was opposed to 2 Madras and 10 Madras. Accordingly they put this question before a Full Bench: Does the head of a mutt hold the properties constituting its endowments as a life tenant or as a trustee? The Officiating Chief Justice held that the purposes for which the head of the mutt holds the mutt and its endowments in trust are the maintenance of the mutt, the support of its head and of its disciples and the performance of religious and other charities in connection with it according to usage. And it was only after defraying the established charges of the institution that the head of a mutt could be said in regard to the surplus, to be restricted merely by a moral obligation. It cannot be predicated that the head of a mutt as such holds the properties constituting its endowments as a life-tenant or as a trustee. The incidents attaching to the properties depend in each case upon the conditions on which they were given or which may be inferred from the long-continued and well-established usage and custom of the institution in respect thereto.

It may be remarked here that if usage establishes as trust the obligation of maintaining a mutt, supporting its head and disciples and performing religious and other charities, small room is left for any other form of nure regulated only by moral obligation. WALLIS, J.,

(1) (1879) I.L.R., 2 Mad., 175. (2) (1910) I.L.R., 33 Mad., 265 (F.B.).

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endorsed the opinion of the Officiating Chief Justice. He also agreed with the decision in 27 Madras as to the position of the head of a mutt with regard to the mutt properties, and held that he cannot be regarded as a trustee of the mutt endowments, except in so far as it may be shown that any particular endowment was granted to him on trust. That the learned Judge would allow a trust to be inferred from long-established usage and practice can only be gathered from his opening sentence that he agrees with the Officiating Chief Justice. SANKARAN NAYAR, J., in regard to property which was generally devoted to the institution to be enjoyed by a Pandara Sannadhi and his successors, held that there was no trust. But each head of the mutt must pass on the property unencumbered and unalienated. The disciples are entitled to be maintained out of the income and as regards any surplus the Pandara Sannadhi has an unfettered discretion. In such cases, there is no trust. He may be trustee in regard to specified properties and he is under a legal obligation (not *qua* trustee) to maintain the mutt and to support its disciples. He is not a trustee, in the absence of evidence to the contrary and he is not a life-tenant. The referring Judges took the reply to their question to be that in the absence of evidence to the contrary the head of a mutt is not a trustee *Kailasam Pillai* v. *Nataraja Tambiran*(1). Accordingly they remanded the suit and the District Judge found that there was no evidence to show that the head of the mutt was a trustee. On appeal it was not contended that there was such evidence; but the Appellate Court was asked and declined to reconsider the question of law in the light of *Ram Parkash Das* v. *Anand Das*(2). Therefore when the case reached the Privy Council there was a concurrent finding of fact that in this mutt there was no evidence that its head held as trustee and the Judicial

(1) (1917) 32 M.L.J., 271. (2) (1916) I.L.R., 43 Calc., 707 (P.C.).

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Committee left that finding undisturbed, *Nataraja Thambiran* v. *Kailasam Pillai*(1). It must be remembered that as early as 1879 this Court declined to treat mutts as all coming under the same description. In some cases the property may be held on different conditions and subject to different incidents *Sammantha Pandara* v. *Sellappa Chetti*(2), and this was approved in *Arunachelam Chetty* v. *Venkatachalapathi Guruswamigal*(3). Therefore before the Privy Council there was no occasion to dispute the finding of fact on general grounds as being opposed to the recognized definition of a mutt; because it has always been held that apart from the facts the word mutt has no special connotation.

The circumstances of this case as detailed above cannot be held to warrant the appellant's plea that they detract from the clear authority of *Ram Parkash Das* v. *Anand Das*(4), and in *Vidya Varuthi* v. *Balusami Ayyar* (5), the Judicial Committee has itself condemned the attempt to compare the head of a mutt with a beneficed clergyman of the Church of England. This group of cases clustered round *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*(6), can only be regarded as an episode standing apart the main course of judicial decision from *Sammantha Pandara* v. *Sellappa Chetti*(2), to *Arunachellam Chetty* v. *Venkatachalapathi Guruswamigal*(3).

I therefore agree that the Parasamaya Kolarinatha Matam is a constructive trust as contemplated by section 92 of the Code of Civil Procedure, and this appeal must be dismissed with costs.

K.R.

(1) (1921) I.L.R., 44 Mad., 283 (P.C.). (2) (1879) I.L.R., 2 Mad., 175.
(3) (1920) I.L.R., 43 Mad., 253 (P.C.). (4) (1916) I.L.R., 43 Calc., 707 (P.C.).
(5) (1921) I.L.R., 44 Mad., 831 at 839 (P.C.).
(6) (1904) I.L.R., 27 Mad., 435.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Reilly.

1926, November 19.

A. L. P. R. PERIAKARUPPAN CHETTY (PLAINTIFF), APPELLANT,

v.

R. M. A. R. ARUNACHELAM CHETTY AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Joint family—Self-acquisition—House built on ancestral site—No co-parceners at the time of building—Use of self-acquired funds for building—Adoption of a son, subsequent to construction—Son and father living in the house—Superstructure, whether joint family property—Mixing of funds, effect of—Intention to make it joint family property, necessity for—Evidence—Presumption.

Where a Hindu, who had no co-parceners, built a house worth about forty thousand rupees, with his self-acquisitions, on an ancestral site worth a few rupees, and several years thereafter adopted a son and lived with him in the house but did not otherwise evidence an intention of treating the house as joint family property, on a creditor of the son claiming to attach and sell the son's share in the house and site,

Held, that the mere fact that the superstructure, which was built out of self-acquired funds, was raised on the ancestral site, did not render it joint family property;

that the presumption was that the father intended it to be his self-acquired property, especially when there were no other co-parceners;

that it would not become joint family property unless he had intended to make it such property, and the mere fact that he allowed his major son to live in the house along with himself, did not disclose an intention to make it joint family property; and

that, consequently, the father was solely entitled to the superstructure and to a half of the site, and the son's creditor

* Appeal No. 325 of 1925.

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was entitled to attach and sell the son's half share only in the site and not the superstructure:

Vithoba Bava v. *Hariba Bava*, (1869) 6 Bom. H.C.R., 54 (A.C.J.), followed;

Lala Muddun Gopal Lal v. *Khikhinda Koer*, (1891) I.L.R., 18 Calc., 341 (P.C.), referred to;

Subbiah v. *Gundlapudi*, (1923) I.L.R., 46 Mad., 104, distinguished.

APPEAL against the decree of V. S. NARAYANA AYYAR, Subordinate Judge of Sivaganga, in Original Suit No. 58 of 1923.

The material facts appear from the judgment.

A. Krishnaswami Ayyar (with *M. Patanjali Sastri*) for appellant.—Where a Hindu, who has at the time no co-parceners with him, builds a house on a small ancestral site, it does not ipso facto become incorporated into joint family property. It is not a matter of law, but is still only a rule of evidence: See Trevelyan's Hindu Law (second edition), page 370; *Lahaso Kuar* v. *Mahabir Tiwari*(1). Reference was made to *Vithoba Bava* v. *Haliba Bava*(2) and *Lala Muddun Gopal Lal* v. *Khikhinda Koer*(3).

S. Varada Achari for respondent.—There has been a mixing of self-acquired funds with ancestral property. The self-acquired property was not kept separate. It acquired the character of joint property, as its character was not kept distinct. Reference was made to *Subbiah* v. *Gundlapudi*(4).

JUDGMENT.

KUMARASWAMI SASTRI, J.

KUMARASWAMI SASTRI, J.—The plaintiff is the appellant. The second defendant is the adopted son of the plaintiff and the first defendant is an attaching creditor who obtained a decree against the second defendant and attached the second defendant's interest in the house and ground now in dispute, alleging that the property is the joint family property of the plaintiff and the second defendant and that the second defendant is

(1) (1915) I.L.R., 37 All., 412. (2) (1869) 6 Bom., H.C.R., 54 (A.C.J.)
(3) (1891) I.L.R., 18 Calc., 341 (P.C.). (4) (1923) I.L.R., 46 Mad., 104.

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entitled to a half share therein. The plaintiff's case is that the property is his self-acquisition and that the second defendant has no interest. He filed a claim which was disallowed and hence the suit out of which this appeal arises.

The plaintiff adopted the second defendant in the year 1914 when he was about ten years old. The finding of the Subordinate Judge which is amply supported by the evidence is that the only property which the plaintiff and his brothers got from their father was a thatched house and that all the other properties to which the plaintiff is now entitled are his self-acquisitions. As this finding is not disputed by the respondent except to the extent that the house now attached though built out of self-acquisitions has become joint family property owing to its having been built on the ancestral house site, it is not necessary to refer to the evidence in detail.

It is contended by the appellant that the learned Subordinate Judge was wrong in finding that any portion of the house stands on the ancestral house-site on which the thatched house stood. He states that the thatched house was on a plot adjacent to the land on which the house in question was built, that it was only about 10 or 12 feet broad and is now a pathway, the old thatched house, a shed, having fallen down several years ago. His case is that he got the site on which the house is built on partition from his brother who purchased the site.

We do not think the appellant has made out this case. Plaintiff admits that the disputes which led to the partition between himself and his brother were in 1891 that there was an arbitration and a "muri" evidencing the partition. This *muri* is not produced nor is there any document showing that the plot was

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purchased by his brother. No accounts are produced to evidence the purchase by the brother and there is nothing except the plaintiff's statement to show that the land on which the house stands was the self-acquisition of the plaintiff's brother which plaintiff got on partition.

The probabilities are against this story. It is hardly likely that the site on which the thatched ancestral house stood was only 10 or 12 feet broad, especially as the evidence shows that several members were living in it and that plaintiff's marriage was celebrated in it. It appears from the evidence that what the plaintiff says is a pathway has really been incorporated in the house. There is an arch put up and there are steps on it leading to the house. The Subordinate Judge does not believe the evidence on plaintiff's side as to the house being built on a site acquired by plaintiff from his brother and we do not see sufficient grounds to differ from him.

There can be little doubt that the house on the site was built by the plaintiff long before the adoption, out of his self-acquisitions. When he built the house he was the sole owner of the site and had no co-parceners who had any claim. The site when he built was worth very little, the thatched house which stood on it having fallen down and the question is whether the fact that he built on the site a house worth according to the evidence Rs. 30,000 or Rs. 40,000 would give his adopted son, who was adopted long afterwards and who never contributed anything, a claim to a half-share. The second defendant far from earning anything got into bad ways and incurred debts.

The only grounds on which the second defendant can acquire any interest in the house are that the plaintiff though he built the house with his own funds made it

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joint family property because he built it on the ancestral site and so mixed up his self-acquisition with the joint family property by building a house on the site, and (2) he intended it to become joint family property to enure for the benefit of co-parceners who may come into existence in future.

As regards the question of intention there is no evidence that the plaintiff by any act or declaration evidenced an intention of treating the property as joint family property. A person who by his own exertions makes considerable acquisitions presumably wants to keep his acquisitions to himself. It would be a violent presumption to draw that a person, who builds with his acquisitions a house worth Rs. 30,000 or 40,000 on a site worth a few rupees, intended to impress on it the character of joint family properties, especially when at the time of building he had no son, natural or adopted, or any co-parceners. As observed by Mayne, the question whether a person has by his acts made property which was originally his self-acquisition joint property

"is entirely one of fact to be decided in the light of all the circumstances of the case; but a clear intention to waive his separate rights must be established and will not be inferred from acts which may have been done merely from kindness or affection."

Mayne's Hindu Law, paragraph 278, page 360.

The fact that after adoption the second defendant lived with his adoptive father in the house would not affect the question as amongst Hindus an adult son usually lives with his father even when there is no joint family property and it cannot be said that a father whose property is self-acquired intends to make it joint family property simply because he does not turn out his son as soon as he is of age and can earn his living. In the present case the second defendant was not earning or contributing anything to the family, but on the contrary

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was a spendthrift. In *Lala Muddun Gopal Lal* v. *Khikhinda Koer*(1), their Lordships of the Privy Council observe

"Their Lordships think it would not be reasonable or conducive to the peace and welfare of families to construe acts done out of kindness and affection to the disadvantage of the doer of them by inferring a gift when it is plain that no gift could have been intended."

I do not think that, by building with self-acquired funds on the ancestral site worth a few rupees a superstructure costing several thousands, the house became joint family property. As pointed out before, the adoption was several years after the building of the house and when the plaintiff was the only person entitled to the site. If the adopted son had been in existence before the building commenced and had sued for a partition he would only have been entitled to a half share in the land and there is no reason why he should be in a position to claim a half share in the building simply because he was adopted some years afterwards. When a person builds with his self-acquisitions on land which is ancestral and in which a person subsequently gets an interest by birth and when it cannot be said that the builder built with knowledge of another person's rights in the land and without his consent or against his will the proper rule on partition is to allot the building and site to the person who built the superstructure and taking into consideration the value of the site to give the share of its value or equivalent joint property to the other co-parcener. I can find no decisions which compel me to hold that the co-parcener claiming a share is entitled under such circumstances to the value of the building also or to require its demolition.

(1) (1891) I.L.R., 18 Calc., 341 (P.C.).

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In *Vithoba Bava* v. *Hariba Bava*(1), it was held that where a member of an undivided family built at his own expense a house on ground belonging to the joint family the other co-parceners were only entitled to a share equal to the value of their shares in the site. SIR RICHARD COUCH observed.

"According to the Hindu Law if one builds a house on ancestral land with separate funds of his own the other members of the family have only a claim on him for other similar land equal to their respective shares [2 Macnaghten's P.H.L., page 152]. The plaintiff in this case must therefore be compensated for his share of the ground used for building the house."

Reference is made to Macnaghten's Hindu Law, Vol. II, page 134, where we find the following reply given by the Pandit to the question as to the son's rights when a father with his funds purchased a zamindari and built a house on land purchased.

"If the grandfather of the respondent purchased the zamindari singly, with the produce of his separate industry, and without any aid from funds ancestral or paternal, such zamindari is property exclusively his, in which no other can have a right to participate. And if he obtained a burmotur sunnud for land in his own name (which appears he did) no one else can participate in it. And supposing him to have built a brick house on ancestral land, with separate funds of his own, even in that case such houses should not be property in which shares might be claimed by any co-parceners he might have. Co-parceners in the land would only have a claim on him for other similar land equal to their respective shares. Such is the custom or unwritten law. On the mere circumstance of messing conjointly co-partnership in property does not follow."

I have been unable to find anything in the Hindu texts or commentaries laying down a rule to the contrary.

Where co-parceners do not object to the building it is clear that on partition they will not be allowed the

(1) (1869) 6 Bom. H.C.R., 54 (A.C.J.).

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value of the building or require the building to be demolished, *Lahaso Kuar* v. *Mahabir Tiwari*(1), and the case is stronger where the co-parcener was not in existence and the builder was the only person then entitled to the land.

Subbiah v. *Gundlapudi*(2) relied on by respondents' vakil was a case where a tenant-in-common built on a portion of the land without the concurrence of the other co-owners and there were other co-owners whose consent was necessary and the case is clearly distinguishable. If the case lays down a principle at variance with the rule in *Vithoba Bava* v. *Hariba Bava*(3), and to give a member of a joint family a right to buildings put up irrespective of the source of the money or the existence of other co-parceners at the time of the building or any equities, I must respectfully dissent from the view. *Vithoba Bava* v. *Hariba Bava*(3), embodies an equitable rule and there is nothing in Hindu texts or commentaries at variance with the ruling. I think that MUKERJEE, J., has laid down the correct rule in *Upendranath Banerjee* v. *Unnes Chander Banerjee*(4). I am of opinion that the only right of the second defendant is to get a half share in the land and that the first defendant, an attaching creditor, will only be entitled to attach and sell the right title and interest of the second defendant in the land on which the superstructure stands. The decree of the lower Court will be modified by declaring that plaintiff is solely entitled to the superstructure and to a half of the land on which it is built, that the second defendant is entitled to a half share of the land only, and that the first defendant is only entitled to attach and sell the right title and interest of the second defendant in his share of the land. As the appellant, though

(1) (1915) I.L.R., 37 All., 412.
(2) (1923) I.L.R., 46 Mad., 104.
(3) (1869) 6 Bom. H.C.R., 54 (A.C.J.).
(4) (1886) 12 L.J., 25.

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he has failed as regards the exclusive claim to the land, has succeeded as to the superstructure we direct that the first respondent do pay appellant Rs. 250 for his costs in appeal and Rs. 250 as costs in the lower Court. Second respondent will bear his own costs throughout.

REILLY, J.—I agree that the site on which the plaintiff built the house in question was ancestral property in his hands. It is undisputed that, when the plaintiff built the house, he was sole owner of the land; it had come to him on partition, and at that time he had no son. It is also undisputed that he built the house with self-acquired funds. Mr. Varadachariar contends that by the very act of building the house on ancestral land the plaintiff made the house ancestral property; the house and the funds which it represented were "mingled" or "blended" with the land on which the house stood and were, therefore, impressed with the character of the land as ancestral property. That contention appears to me to involve some misconceptions. A Hindu's property is either ancestral property (which, if he is a member of a joint family, is joint family property) or his own separate property, which is often, described generally as self-acquired property. Strictly nothing which is not in relation to its owner for the time being directly or indirectly ancestral in origin can become ancestral property in his hands; though by his volition the incidents of ancestral property may be attached to it. That criticism of Mr. Varadachariar's contention is, however, little more than a question of words. The important point is that we should keep clearly in mind how the characteristics and incidents of ancestral property become attached to property which is not ancestral but is the separate or self-acquired property of the owner for the time being. We speak of that result being caused by the separate property being

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"blended" with the ancestral property or, in the usual case of the owner of the separate property being a member of a joint family, of the separate property being "thrown into the common stock." These are in practice convenient expressions; but they may at times obscure the essence of the matter. The separate property of a Hindu ceases to be his separate property and acquires the characteristics of his joint family or ancestral property, not by any physical mixing with his joint family or ancestral property, but by his own volition and intention, by his waiving or surrendering his special right in it as separate property. It is unnecessary to labour that point, as it underlies all the authoritative decisions on the subject from *Hurpurshad* v. *Sheo Dyal*(1), onwards, though in few of them is it expressed. A man's intention can be discovered only from his words or from his acts and conduct. When his intention in regard to his separate property is not expressed in words, we must seek it in his acts and conduct, in the way in which he has dealt with the property or has allowed others to deal with it. It is in this way that acts of "mingling", "blending" and "throwing into the common stock" have assumed so much importance in cases of this sort as indications of the owner's intention. But it is the intention which we must seek in every case, the acts and conduct being no more than evidence of the intention. The fact that the manager of a joint family, who has his own separate property, keeps money which is the income of the joint family property and money which is the income of his separate property in the same box or the same money bag and cannot say of any coin to which income it belongs, indicates nothing if he keeps separate accounts

(1) (1876) 3 I.A., 259.

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of the two incomes. Nor would paying both incomes as received into the same account in a Bank by itself alter the position so long as he maintained, separate accounts of them. But, if no separate accounts of receipts and expenditure under the two heads were maintained, or if the general expenditure for the support of the whole joint family were provided from the box or money bag or Bank account on a scale which exhausted the whole of both incomes or much exceeded the income from the joint family property for a considerable time, an inference or intention to surrender the separate right to the joint family might properly be drawn in many cases. We cannot, however, appreciate the significance of an act until we know the circumstances in which it is done. Similar acts in different circumstances may have very different significance. If the case is one of a sonless man, who has ancestral property in which for the time being he alone is interested, either because he is the last surviving member of his joint family or because, like the plaintiff in this case, the ancestral property has come to him on partition, and he has also self-acquired property, there may be much greater difficulty in ascertaining his intention in regard to his self-acquired property. If he puts the receipts from both classes of his property into one pocket and spends them indiscriminately on his own needs—even if he keeps no accounts at all, can we safely infer that he intends to give up his separate right in his self-acquired property? To give up that right might affect him very seriously if afterwards he begot or adopted a son. But for the moment the indiscriminate use of the two incomes and the inability to say how much of one or of the other remains is of no consequence to him. In such circumstances the mixing up of the two incomes, the indiscriminate use of

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them and the failure to maintain accounts provide no safe basis for any inference of an intention to give up the separate right in the self-acquired property. Now let us apply the same principles to the building of a house with self-acquired funds on ancestral land. If a member of a joint family with his own separate funds builds a house on joint family land and lives in it with the other members of the family as the family house, we may often infer that his intention is to waive any right to the house as his separate property. But, if on part of the joint-family land he builds with his separate funds a house in which he lives with his wife, or wife and children alone, can we draw the same inference? Mr. Varadachariyar contends that the mere building of the house on joint family land is such a physical mingling of it with the land that the characteristics of the land must attach to it. But the owning of a house by one man and of the land on which it stands by another is a matter of such ordinary occurrence that we cannot ignore it when trying to ascertain the intention of the builder in such a case. In *Vithoba Bava* v. *Hariba Bava*(1), the principle that a member of a joint family building a house with his own funds on joint family land may retain the house as his separate property was recognized and was the basis of the decision. No case to the contrary has been quoted before us. The fact that a house is built by one member of a joint family on joint family land cannot therefore be regarded as sufficient by itself to show that he intended to waive his right to the house as his separate property if he built it with his separate funds. It is still more difficult to infer such an intention when the house is built with his separate funds on his ancestral land by a man who

(1) (1869) 6 Bom. H.C.R., 54 (A.C.J.).

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has at the time no co-parcener. In the absence of other evidence we should have to go out of our way to read into his action an intention to waive his separate property in the house for the benefit of a son whom he might beget or adopt at some future date. In the present case it was not until many years after he built the house in question that the plaintiff adopted defendant 2. It is pointed out that, after the adoption, defendant 2 lived in the house with the plaintiff. But that indicates nothing as to the plaintiff's intention in regard to the house. If the house had been built not only with the plaintiff's separate funds but also on land which was his separate property, it would still have been natural for defendant 2 to live in the house with the plaintiff after the adoption. There appears to be no evidence that before the adoption or after the adoption or at the time of the adoption the plaintiff ever did anything to indicate an intention to waive his right to the house as his separate property.

I agree therefore that the house is the plaintiff's separate property and is not liable to attachment in execution of defendant 1's decree against defendant 2 and that a declaration should be made accordingly in respect of the house but not of its site. Defendant 2's interest in the site is liable to attachment and can be brought to sale in execution, if necessary. If it is bought at the execution sale by any one but the plaintiff, the purchaser will be able to sue for partition and the plaintiff will then be able to buy the interest attached and sold, if he wishes to do so, at a valuation under the Partition Act.

I agree with the order proposed by my learned brother as to costs.

K.R

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice.*

[ON REFERENCE UNDER SECTION 98, CIVIL PROCEDURE CODE, OWING TO DIFFERENCE OF OPINION BETWEEN KRISHNAN AND VENKATASUBBA RAO, JJ.]

1926, December 10.

SECRETARY OF STATE FOR INDIA IN COUNCIL (PLAINTIFF AND DEFENDANT IN O.S. NOS. 4 AND 7 OF 1921), APPELLANT IN BOTH APPEALS,

v.

VOLKART BROTHERS (DEFENDANTS AND PLAINTIFFS IN THE SUITS), RESPONDENTS IN BOTH APPEALS.*

Lease for 99 years—Covenant for renewal for a further period of 99 years—"On such terms and conditions as should be judged reasonable"—Covenant, whether uncertain and void—Lessee assigning a portion of the premises to another—Lessee, whether competent to enforce specific performance of covenant for renewal of the whole or portion—Specific Relief Act (I of 1877), ss. 14 to 17, effect of.

A lease for 99 years, granted by the East India Company in 1821, contained a clause for renewal for another like period on the lessee paying a sum of money and "upon such terms and conditions as should be judged reasonable;" the entire leasehold interest became, by subsequent assignments, eventually vested in the plaintiffs, who in their turn assigned a major portion of the holding to a third party. Shortly before the expiry of the original lease period, the plaintiffs tendered the due amount and asked for renewal of the lease; but the lessors, who had previously to the tender given notice to the plaintiffs to quit the holding, refused to renew; the lessors sued to eject the plaintiffs, while the latter sued for specific performance of the covenant for renewal, in respect of the entire holding, or of the portion in their possession, without impleading the assignees of the other portion:

Held by COUTTS TROTTER, C.J., (agreeing with VENKATASUBBA RAO, J.), that the covenant to renew was not unenforceable

* Appeal Nos. 434 of 1922 and 279 of 1923.

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on account of uncertainty, *Gourlay* v. *The Duke of Somerset*, (1815) 19 Ves., 429;

and that assignees of a portion only of the originally demised lands can sue for specific performance of a covenant for renewal, in respect of such portion only, without the assignees of the other portions.

A covenant to renew is, of all covenants, the clearest case of a covenant which must run with the land and is apportionable and can be specifically enforced by the assignee of a portion of the holding. *Simpson* v. *Clayton*, (1838) 8 L.J. (C.P.), 59, followed.

There is nothing in the Indian Specific Relief Act (I of 1877) to forbid each assignee of the lessees from suing for specific performance of the covenant to renew *qua* his portion.

Held by KRISHNAN, J. (*contra*), that the covenant for renewal of the lease "upon such terms and conditions as shall be judged reasonable," is too vague, uncertain and unenforceable, and hence void;

that the covenant for renewal is a single and indivisible covenant which cannot be apportioned between the various assignees;

that sections 14 to 17 of the Indian Specific Relief Act (I of 1877) govern this case, and specific performance of part of the contract cannot be directed as the case did not fall under the exceptions specified in sections 14 to 16 of the Act. *Safiur Rahman* v. *Maharamunnissa*, (1897) I.L.R., 24 Calc., 832, and *Graham* v. *Krishna Chunder Dey*, (1925) I.L.R., 52 Calc., 335 (P.C.), relied on.

APPEALS against the decrees of C. G. AUSTIN, District Judge of South Malabar, in Original Suits Nos. 4 and 7 of 1921.

The material facts appear from the judgment of VENKATASUBBA RAO, J. The appeals were originally heard by KRISHNAN and VENKATASUBBA RAO, JJ., but as their Lordships differed on certain points of law, the appeals were referred to a third Judge on the points of law. The appeals were then heard by the learned CHIEF JUSTICE, who delivered his opinion agreeing with VENKATASUBBA RAO, J., and remitted the appeals for disposal by the Division Bench.

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KRISHNAN, J.—I had the advantage of reading the judgment of my learned brother but I regret I am unable to concur with it.

The facts of these two cases and the terms of the covenant we are concerned with have been stated in full by the District Judge and by my learned brother and I need not repeat them.

A covenant for renewal is undoubtedly a covenant running with the land and it is only on that ground that the respondents, Messrs. Volkart Brothers, can claim any right to enforce the covenant in question here. When the period of the prior lease expired in 1920 the Cochin Club and the respondents were jointly entitled to the leasehold property; the former being entitled to a major portion and the latter to a smaller part. If the covenant to renew in this case is a legally enforceable one, the two parties would be jointly entitled to enforce it. The Cochin Club not having joined in this litigation but having settled their dispute with the Government the question is whether the respondents could by themselves enforce the covenant for renewal either with reference to the whole plot included in the lease Exhibit A or with reference to the plot in their possession.

As regards the claim to get a renewal of the whole plot I agree with my learned brother that it is manifestly untenable. If the respondents could ask for it, the Cochin Club could ask for it with greater reason as they own the major portion of the property. The two rights would at once conflict and it is therefore clear that neither party could separately ask for it though they could do so jointly. In fact the learned Counsel for the respondents saw the unsupportability of his position and conceded that his clients could not enforce a renewal of the whole plot.

Can they then ask for a renewal of the plot they are in possession of? My learned brother thinks they can, but I am sorry I have to differ from him. To allow them to do it, is, it seems to me, to enforce specific performance of a part of the contract to renew which is forbidden by section 17 of the Specific Relief Act, unless the case can be brought under sections 14, 15 or 16. Their Lordships of the Privy Council have recently laid down "that sections 14 to 17 of the Act constitute with regard to specific performance of part of a contract, a complete code, within the terms of which relief of that character must be brought if it is to be granted." See

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Graham v. *Krishna Chunder Dey*(1). Section 14 obviously does not apply. Section 15 cannot either be applied as it assumes that the party claiming specific performance is entitled to have the whole contract performed. My learned brother has also given other reasons for holding that the section does not apply. Section 16 also does not apply as we have not got here, in my opinion, a part of a contract which stands on a separate and independent footing from the rest. If the suit contract could be divided up into two contracts, one with the respondents for their plot and another with the Cochin Club for theirs, the section may apply. But I am unable to see what justification there is for holding that lessees can by their own unilateral act without any reference to or consent of the lessor split up into two his contract for a single lease to renew the whole plot as one block. The United Company entered into a single contract to renew with reference to the whole of the land; I am unable to see how they can be compelled to perform that contract piecemeal. If the respondent's contention is correct a landlord may be called upon in a conceivable case to split up his property into 100 or more bits and to grant separate leases of each to 100 or more different individuals. It is sufficient to say that that is not what he bargains for when he agrees to give a renewal of the whole. The suggestion that when the lessee assigns his right to two or more people and gives them possession of separate plots in the property there results as many covenants to renew as there are assignees seems to me to be altogether unreasonable and I think it is entirely unsupported by authority. We may have such a state of affairs in the case of covenants to repair. For in those cases the landlord is not called upon to do anything more than what he has undertaken to do, namely, to repair. That principle cannot be applied to covenants for renewal for if such a covenant is treated as split up, the landlord will be compelled to do what he did not agree to, namely, to lease his land in parts; it may seriously prejudice him.

A covenant for renewal is in my opinion a single indivisible covenant which cannot be apportioned between various assignees. No authority has been cited to show that it is apportionable. Cases bearing on the apportionment of rent or referring to covenants for repairs are not in my opinion in point as they are

(1) (1925) I.L.R., 52 Calc., 335 (P.C.).

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not *pari materia* with covenants to renew which are covenants to create new rights. I think therefore the cases cited by my learned brother *Twynam* v. *Pickard*(1), *Roberts* v. *Holland*(2), *United Dairies* v. *Public Trustee*(3), and *Salts* v. *Battersby*(4), are not really relevant.

The only case cited which has anything to do with a renewal is the case of *Simpson* v. *Clayton*(5). That was a case where the assignee of a five-sixth share of a sub-lease was allowed to maintain an action against the lessor, the mesne landlord, for damages for the latter's breach of covenant to obtain a renewal of his own lease from the main landlord, without joining the owner of the one-sixth share. It was in no sense a suit for specific performance of any covenant to renew; it was a suit for damages for breach of a covenant to obtain a renewal. Damages being apportionable the suit was allowed to be maintained. But the case had nothing to do with enforcement of specific performance of any agreement to renew or with the splitting up of such an agreement. If such a case as *Simpson* v. *Clayton*(5), arises in this country it may be a question whether that decision is consistent with section 49 of the Contract Act. But taking it as good law even in this country, the case has in my opinion no bearing on the point before us. On the other hand the present case is governed by the principle laid down in *Safiur Rahman* v. *Maharamunnessa Bibi*(6). The respondents and the Cochin Club became jointly entitled to specific performance of the covenant to renew. Whether the contract is made originally with two or more persons or two or more became jointly entitled to its benefit, some alone cannot enforce specific performance when the others do not join. That is clearly laid down in *Safiur Rahman* v. *Maharamunnessa Bibi*(6). It seems to me therefore that it is a fatal defect to the respondents' suit that they are entitled only to a portion of the land included in Exhibit A and that the Cochin Club has not joined in the suit.

The next question on which also I regret I am unable to agree with my learned brother is whether the covenant we are considering is not too vague and uncertain to be specifically enforced. I think it is. The relevant words are "upon such terms and conditions as shall be judged reasonable." The only matters settled are the parties, the property, the period of the

(1) (1818) 2 B. & Ald., 105.
(2) [1893] 1 Q.B., 665.
(3) [1923] 1 K.B., 469.
(4) [1910] 2 K.B., 155.
(5) (1838) 8 L.J. (C.P.), 59.
(6) (1897) I.L.R., 24 Calc., 832.

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lease and the premium of 100 pagodas payable for renewal. All other terms and conditions are left unsettled. The words "as shall be judged reasonable" do not in any way help to fix the other terms and conditions. It is not even said who is to judge; however that may be, the exercise of judgment can come into play only after the terms and conditions are proposed by the parties. I do not read the covenant as meaning that only the terms and conditions of the old lease itself which are judged to be reasonable are to be embodied in the new lease. The parties have taken care by the language used to retain their right to propose any terms they think fit so long as they are reasonable. No doubt, as the learned District Judge says, even if a contract is vague in its language, if it is capable of being made certain, it can be enforced; section 29 of the Contract Act states this principle. To apply this principle, however, the contract must be capable of being made certain by evidence, or otherwise, independent of the volition of the parties for if the parties are to propose the terms, it will be making a new contract not already made. In the present case the covenants to be put into the new lease will depend upon what the parties propose even though the Court may exercise its judgment in finding out what is reasonable and what is not. Any particular covenant which one party proposes however reasonable it may be, may not be agreed to by the other party and he will be perfectly entitled to object. The terms therefore in this case except those fixed by the contract are in my opinion quite unsettled and we cannot get rid of the vagueness of the contract by any amount of evidence.

No doubt where there is a term to pay a "reasonable" rent of a "fair" or a "proper" rate or to hold on "usual terms and conditions" the contract could be made certain by taking evidence and it could therefore be enforced. As examples of such cases see *New Beerbhoom Coal Company* v. *Bularam Mahata*(1), *Ali Mahamad Bepari* v. *Nayan Rajah Bhuiya*(2), *Hart* v. *Hart*(3). But where the clauses to be inserted in the contract are themselves uncertain the contract cannot be enforced. The cases cited by the District Judge, namely, *Wood* v. *Midgley*(4), *Taylor* v. *Portington*(5), *Rummens* v. *Robins*(6), are examples of this.

(1) (1880) I.L.R., 5 Calc., 932. (2) (1903) 15 C.L.J., 122.
(3) (1881) 18 Ch. D., 670.
(4) (1854) 5 DeG.M. & G., 41; 43 E.R., 784.
(5) (1855) 7 DeG.M. & G., 328; 44 E.R., 128.
(6) (1865) 3 DeG. J. & S., 88; 46 E.R., 571.

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My learned brother has relied on the case of *Gourlay* v. *The Duke of Somerset*(1), as being in favour of his view. But on examination, I think it will be found that it is in line with the cases above referred to. In that case the parties had agreed to a lease where it was stipulated after settling the other terms that "all such *usual* and *proper*, conditions, reservations and agreements as shall be judged reasonable and proper by John Gale, land surveyor, and in case of his death by some other proper and competent person, to be mutually agreed upon by the said parties" should be included in it. Gale had not settled the terms but the Master of the Rolls held that Gale's agency was not of the essence of the contract and that the contract being binding and concluded between the parties who had nothing further to agree to, it was open to the Court to ascertain what the usual and proper covenants are which are reasonable to be put into the deed and the learned Judge referred the case to the Master to settle the lease. As I have already observed the meaning of the expression "usual terms and conditions" is capable of being made certain by evidence, quite independent of the wishes of the parties; and this case is one of those cases which have adopted that view; it does not carry the matter any further. I am on the whole of opinion that the covenant before us in the present case is uncertain and not capable of being definite and is not therefore specifically enforceable.

As regards the objection based on the tender of Rs. 100 by the respondents to the Collector instead of 100 pagodas I entirely agree with my learned brother that there is no substance in it. The respondents offered to pay Rs. 350 as soon as the mistake was discovered.

In the view I take A.S. No. 279 of 1923 must be allowed and the suit dismissed with costs throughout.

In A.S. No. 434 of 1922, the Government will be entitled to a decree for possession but before disposing of the appeal issues 5 and 6 have to be decided. The learned District Judge has given no findings on them. I would therefore call for findings on those issues by the District Judge on the evidence on record to be submitted in three months from this date and give 10 days for objections.

VENKATASUBBA RAO, J.—In both these appeals the Government is the appellant. There were two suits tried by the

(1) (1815) 19 Ves., 429.

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District Judge of South Malabar, one was a suit in ejectment by the Government and the other was a suit for specific performance by Messrs. Volkart Brothers. These two suits arose out of the same set of facts and the learned District Judge dismissed the Government's suit for possession and decreed the suit of Messrs. Volkart Brothers for specific performance.

By an indenture, dated the 6th of June 1821, between the United Company of Merchants in England trading in the East Indies of the one part and Mr. Francis Schuler of the other part, the said United Company granted a lease of land in British Cochin of the extent of four cawnies and odd for a period of 99 years to the said Mr. Schuler. The lease deed contains a clause for renewal which runs as follows :—

"And also he, the said Mr. Francis Schuler, his heirs, administrators or assigns fulfilling the covenants and agreements contained in the said indenture and on his part to be performed and yielding at the end and expiration of the aforesaid term of 99 years unto the said United Company, their successors or assigns the full and just sum of 100 pagodas current money of Fort St. George then the said lease should and might be renewed for a further term of 99 years upon such terms and conditions as should be judged reasonable."

Mr. Francis Schuler assigned his interest in the lease deed and there have been several subsequent assignments and in the year 1907 the entire leasehold interest became vested in Messrs. Volkart Brothers. In 1913 or 1914, the Government acquired 30 cents from Messrs. Volkart Brothers, paying them a price of Rs. 1,538–2–0. Some time later on the 29th of October 1914, Messrs. Volkart Brothers, by Exhibit 2, assigned their leasehold interest in acres 3–70 to the Cochin Club receiving a sum of Rs. 18,461–14–0 as consideration. Exhibit 2 provides that in a certain event the Cochin Club would be bound to reconvey to Messrs. Volkart Brothers, a small part of the premises assigned to them. I may observe that we are not concerned with this clause.

On the 5th of June 1920 the period of the original lease expired. A few weeks before it actually expired, Messrs. Volkart Brothers requested the Government to grant them a renewal for a fresh period of 99 years in pursuance of the term in the lease deed. The Government replied that as the lands were required for Government purposes, the request of Messrs. Volkart Brothers could not be complied with.

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In February 1921, the Government filed a suit in ejectment and in November 1921 Messrs. Volkart Brothers filed their suit for specific performance. Practically the same points were raised in both the suits.

The Government has raised three points :—(1) That Messrs. Volkart Brothers, who were bound to tender 100 pagodas (Rs. 350), tendered only Rs. 100 and that they thus committed default in regard to compliance with the terms of the lease deed relating to renewal.

(2) The provision in the lease deed that renewal shall be granted on such conditions as shall be judged reasonable is vague and uncertain and cannot be enforced.

(3) (*a*) That the extent of the land in the possession of Messrs. Volkart Brothors was only acres 1–10, they having assigned to the Cochin Club acres 3–70 and that they are not consequently entitled to claim specific performance in respect of the land including the land that has been asssigned to the Cochin Club.

(*b*) It is also urged on behalf of the Government that Messrs. Volkart Brothers are not entitled to claim specific performance even in respect of acres 1–10 in their possession on the ground that there cannot be specific performance of a part of the contract.

In regard to the first point the matter stands thus :— The term expired on 5th June 1920. A few weeks before the expiry of the term, Messrs. Volkart Brothers wrote to the Collector of Malabar a letter, dated the 15th of May 1920, Exhibit 3. In that, they said that the lease deed provided for the payment of 100 pagodas "which we understand to be equivalent to Rs. 100." And they requested the Government to grant them a renewal for a further period of 99 years and along with the letter they sent the Collector the sum of Rs. 100. As the learned District Judge has pointed out, there can be no doubt that 100 pagodas do not mean 100 rupees, but mean Rs. 350. On behalf of the Government it is urged that by sending Rs. 100 instead of Rs. 350, Messrs. Volkart Brothers broke their part of the contract. Can it be said that the conduct of Messrs. Volkart Brothers is such as to amount to a prospective refusal to perform the contract, in other words that by sending Rs. 100 instead of Rs. 350, they evidenced an intention not to be bound by the contract? They say in their letter in very guarded language that they understood 100

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pagodas to mean 100 rupees. They do not make a positive assertion to that effect. It is well known that pagoda has ceased to be current coin and although the term is still employed to denote Rs. 3-8-0, it is very probable that there are sections of people who are not familiar with that term. Before it can be said that they repudiated the contract, it must be shown that they did an act before the time of performance arrived, which amounted to a refusal to perform the contract or which showed an intention to break it. This is entirely wanting in the present case. Then there is the more important fact that before the receipt by the Collector of Exhibit 3, he wrote on 19th May 1920 Exhibit 4 informing Messrs. Volkart Brothers that they were bound to surrender the land under the lease deed and calling upon them to give up possession. Messrs. Volkart Brothers had an option to ask for a renewal and the Government were not justified in calling upon them to deliver up the property on the expiry of the original term. If Exhibit 3 constitutes a repudiation (and in my opinion, as I have shown, it does not) the Government did not accept the repudiation as an immediate breach, but what we find is, that before the Government became aware of the so-called repudiation, they themselves broke the contract by insisting in Exhibit 4, in contravention of the terms of the lease, upon immediate surrender. It is significant that prior to the suit the Government did not treat Exhibit 3 as a repudiation, for the only ground urged by them for refusing to renew the lease was that the Government required the land for their own purposes. This is the attitude taken up by the Government in Exhibit 5, which the Collector wrote to Messrs. Volkart Bros. on the 20th May 1920 after receipt by him of Exhibit 3. It seems to me that the first contention of the Government is therefore untenable. The learned Government Pleader, it may be observed, though he did not actually give up the point apparently realizing that there was no substance in this ground, did not seriously press it upon us, and I think very rightly, in his argument.

Now I pass on to the second question, is the agreement for renewal too vague and uncertain to be enforced? On behalf of the Government it is urged that an agreement to grant a renewal "On such terms and conditions as shall be judged reasonable" is void for uncertainty. There is no uncertainty in respect of the subject matter of the contract. Nor is there any uncertainty in regard to the parties to it. Then the question

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arises, 'Is there any uncertainty in regard to the rent or in regard to the other terms?" As is pointed out in *Fry on Specific Performance* the completeness of a contract must be considered in these four aspects. (See 6th edition, page 157.) A contract to sell at a *fair price* or at a *fair valuation* has been repeatedly held to be capable of being specifically enforced. When the contract appoints a way of determining the price, the point has often arisen whether it can be specifically enforced and the test that is laid down may be thus stated: Is the way of determining the price an essential or a non-essential term? If it is essential and the mode of ascertainment has failed, the Court will not enforce specific performance. If it is non-essential or merely subsidiary and the mode of ascertainment has failed, the Court will have recourse to some other means of determining the fair price and of giving effect to the contract between the parties. In the second case, that is where the way of determining the price is non-essential, the Court will treat the contract as one to sell at a fair price. This distinction was clearly brought out in *Milnes* v. *Gery*(1). In that case there was a contract for sale of land at a price to be fixed by one valuer appointed on each side or their umpire. The valuers could not agree. The contract was held to be incomplete, and Grant, M.R., refused to supply the defect by appointing other persons as valuers, on the ground that to do so would be to execute a contract different from that of the parties. It was observed that if it was merely a contract to sell at a fair price that was a matter which the Court could ascertain. The case of *Gourlay* v. *The Duke of Somerset*(2), illustrates the second part of the rule. In that case, there was a contract to grant a lease *to contain such conditions as AB should think reasonable and proper* and the Court held the intervention of AB not to be of the essence of the contract, and referred the case to the Master to settle the lease.

I have referred to this topic for the purpose of making my reference to *Gourlay* v. *The Duke of Somerset*(2) intelligible and to elucidate the point decided in it. That case seems to me to have a most direct bearing upon the point under discussion. Its importance lies in this: It decides that a contract to grant a lease on such conditions as shall be *reasonable and proper* (without any further qualification) is a contract which is capable of specific performance. It of course assumes that the

(1) (1807) 14 Ves. Jun., 400. (2) (1815) 19 Ves., 429.

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contracting parties and the subject matter appear in the contract. Though this case is dealt with in *Fry on Specific Performance,* in connexion with the subject—completeness of the contract in regard to price—its authority is more extensive as not only the price but also the other terms were stipulated to be those that were to be proper and reasonable. It has also been held that the Courts will specifically enforce an agreement to execute a deed "with usual clauses" or "with usual covenants." See *Leake on Contracts,* 7th edition, page 863:

"It is perhaps impossible to lay down any general rule as to what is sufficient certainty in a contract; but it may be safely stated that the certainty required must be a reasonable one, having regard to the subject matter of the contract and the circumstances under which and with regard to which it was entered into." *Fry on Specific Performance, 6th edition, page* 179. Let us see what are the facts of the present case. A lease for 99 years was entered into in 1821 and the parties contemplated renewal for a further period of 99 years. The parties naturally thought that it would be unwise to fix in 1821 what the rent in 1920 was to be. They foresaw that such different conditions would then obtain that it would be imprudent to fix the rent a century in advance. The stipulation is not that the parties might fix such rent as they chose, but they are enjoined to fix a reasonable rent. It is an ordinary function of the Court to decide what is reasonable. In sale of goods, for instance, the Court is called on to decide what is reasonable time. Then again what is reasonable care or what is reasonable enquiry—these are questions which the Court is often invited to decide. I find no difficulty in regard to a contract which leaves the parties to fix a reasonable rent. If they will not agree upon a reasonable rent, the Court will intervene and fix it. In *New Beerbhoom Coal Company* v. *Bularam Mahata*(1), their Lordships held a contract to grant a patta at *a proper rate* was not void for uncertainty, as upon a proper enquiry the Court would be able to determine a *proper and reasonable rent.*

Then in respect of the other terms, it seems to me that we must have regard (in the language of the passage above referred to) to the circumstances under which and with regard to which, the contract was entered into. The lease deed

(1) (1880) I.L.R., 5 Calc., 932 (P.C.).

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contains the terms of the original lease and the meaning of the parties, I take to be, is, that they considered those terms to be reasonable subject to such alterations as might be rendered necessary by the changed conditions obtaining at the time of renewal.

The lease deed contains the usual covenants, those relating to payment of rent, maintaining and preserving the premises, assigning the lease wholly or in part, re-entry and quiet possession. In the view of the parties these were proper terms. The question is, at the present day and in the circumstances now obtaining, do these terms require any modification and if so in what respects? If the parties cannot agree, there is nothing to prevent the Court from settling the lease on such terms as are reasonable. As a matter of fact, it has not been shown by reference to any specific term, that the Court will meet with any difficulty in deciding what shall be reasonable.

That what is required is reasonable and not absolute certainty, is illustrated by many English cases.

Great Northern Railway Company v. *Manchester, Sheffield and Lincolnshire Railway Company*(1), *Jenkins* v. *Green*(2).

Section 29 of the Contract Act reproduces the English rule on the subject. It runs thus:—

"Agreements, the meaning of which is not certain, or capable of being made certain, are void."—Illustration (*e*) says that an agreement to sell one thousand maunds of rice at a price to be fixed by C, is not void for uncertainty. The words in the present case are "conditions as shall be judged reasonable." There is a standard of reasonableness which the Court recognizes and the terms are therefore capable of being made certain. In my opinion the judgment of the District Judge on this point is correct and the second contention of the Government also fails.

I shall deal in two parts with the last point taken by the Government. First, are Messrs. Volkart Brothers entitled to ask for a renewal of the lease in respect of not only acres 1–10 in their possession but also acres 3–70 which was assigned to the Cochin Club? It is difficult to imagine how the lessees can claim renewal of a lease in regard to a part of the premises in which they have ceased to possess any interest. If it is open to Messrs. Volkart Brothers to enforce the covenant in regard to the entire

(1) (1851) 5 DeG. & Sm., 138; 64 E.R., 1053.
(2) (1858) 27 Beav., 437; 54 E.R., 172.

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property, it follows that the Cochin Club will have a similar right and this consideration alone apart from other reasons shows how untenable this part of Messrs. Volkart Brothers' case is. As this point, however, has not been seriously pressed by their learned Counsel, I do not propose to pursue the matter further.

The Government next urge that Messrs. Volkart Brothers are not entitled to claim specific performance even in respect of acres 1–10 on the ground that the Court will not as a general rule compel specific performance of a contract, unless it can execute the whole contract. This aspect of the case presents considerable difficulty but I have come to the conclusion that the claim of the lessees must be upheld. It is settled law that a covenant for renewal runs with the land (*Redman's Landlord and Tenant*, 8th edition, page 698; *Foa's Landlord and Tenant*, 6th edition, page 471). In the case of covenants running with the land liabilities are imposed and corresponding rights are conferred upon the assignee. If the assignment is only of a part of the entire reversion, there is what is called a severance of the reversion and similarly if the assignment is only of a part of the lessee's interest, there is what is called a severance of the term. It has been held that covenants are divisible and upon a severance of the land or of the reversion the covenants run with the severed parts. (*Redman*, page 703, *Foa*, page 469.) In *Twynam* v. *Pickard*(1) the plaintiff who was the assignee of a reversion of part of demised premises claimed damages for breach of covenant for not repairing that part of the premises the reversion of which had been conveyed to him. In other words, one of several entitled to the reversion claimed to enforce the covenant in respect of that part of the property which vested in him. It was held that the action was maintainable and that the plaintiff would recover the amount claimed. "I have always understood it to be clear law" says, BAYLEY, J., "that covenant was maintainable by the assignee of the reversion in part." In *Roberts* v. *Holland*(2), one Ellis Humphreys demised a farm to certain lessees whose interest became vested in the defendant Holland. Under Humphrey's will the reversion became severed and vested in several tenants in common of which the plaintiff was one. The question was whether for a breach of the covenant, one of the several tenants in common could maintain an action without joining the other tenants as co-plaintiffs. It was held that such an action lay. WILLS, J., observed that the covenant became

(1) (1818) 2 B. & Ald., 105. (2) [1893] 1 Q.B., 665.

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equivalent to six separate covenants on which separate actions could be brought. The learned Judge further remarked "that shows that where the co-tenants have separate interests there are in effect separate covenants." CHARLES, J., was of the same opinion. The following passage in the judgment of KENNY, J., in *Dooner* v. *Odlum*(1) is cited with approval (except in regard to a minor point) by GREER, J., in *United Dairies* v. *Public Trustee*(2).

"But, while many of those cases turned on points of pleading, it will be found that throughout all of them the principle was recognized that, in order to free the assignee of part of the lands from payment of the entire rent, he must hold the part in physical severalty. When he does so there is no privity of estate, as between him and the reversioner, in the entire of the lands. If the share be not held in severalty—whether it be held jointly or in common with others—he is owner with those others of the whole estate, and would be liable for the whole rent." In *Salts* v. *Battersby*(3) a part of the leasehold interest became vested in the defendant who was sued by the lessor for the whole of the rent reserved by the lease. The following passage from the judgment of DARLING, J., may be usefully quoted:—

"It is conceded that the claim is wrong and the defendant, instead of being liable for the whole of the reserved rent, is only liable for so much of it as is properly apportioned to the land which he holds, and the only question which we have to decide is upon what principle the apportionment is to be made." The point actually decided (by DARLING and BUCKNILL, JJ.) is, that the apportionment is to be made not with reference to the bare acreage of the several portions of the land but their relative values at the date of the severance. The most direct authority on the point however is *Simpson* v. *Clayton*(4). A lessor, who himself holding only for years determinable on lives, covenanted with his lessee to use his utmost endeavours to procure upon the dropping of such lives a renewal of his own lease. It was held that an assignee of $\frac{5}{6}$ of a sub-lease could recover damages from his mesne landlord for breach of t e covenant for renewal of the head lease without joining in the action his co-assignees. Two points were decided in that case. First, that a covenant to

(1) (1914) 2 Ir., 411. (2) [1923] 1 K.B., 469 at 473.
(3) [1910] 2 K.B., 155. (4) [1838] 8 L.J. (C.P.), 59.

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produce a renewal is a covenant running with the land. Secondly, it will be observed that the under-lease vested in several persons and the plaintiff represented only a portion of that interest. It was held that the plaintiff and the other assignees had separate and distinct interests in the term and that the damages are in their nature severable and may be apportioned according to the value of the share of each. This, though an old case, is cited in all the leading text-books without its authority being questioned. (See for instance *Woodfall's Landlord and Tenant*, 20th edition, page 319.) This case no doubt dealt with a covenant to procure a lease but it cannot stand on a different footing from a covenant for renewal.

The question, as I have said, is not free from difficulty but on an examination of such authority as there is, I have come to the conclusion that when there is an assignment, each assignee holding his part in physical severalty, there come into existence in the words of WILLS, J., in *Roberts* v. *Holland*(1) as many covenants as there are assignees on which separate actions can be brought.

In this view the contract becomes a divisible contract and the rule that specific performance will not be granted of a part only does not apply, for, that assumes that the contract is entire and indivisible. (*Fry on Specific Performance, 6th edition, page* 383; also *sections* 16 *and* 17 *of the Specific Relief Act.*) Any exceptional cases of hardship fall under this section.

Before concluding my judgment there is just one point I have to notice. There was some argument as to the applicability of section 15 of the Specific Relief Act. In my opinion, it does not apply to the facts of the present case. Indeed such a case cannot possibly come under the section. The Government, it cannot be said, is unable to perform the whole of their part of the contract. Such obstacle to its complete performance as exists, comes from the fact that the lessees have not the right in law to demand the performance of the whole contract. On the part of the Government there was neither a physical nor a legal obstacle which stood in their way, when the reversion fell in, of leasing the whole property, had they chosen to do so. Even now in regard to the portion leased to the Cochin Club, they

(1) [1893] 1 Q.B., 665.

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are merely tenants at will and the Government can, if it likes, lease the property to Messrs. Volkart Brothers. The latter's part of the contract, namely, to pay the rent, they are quite able to perform and in no sense can section 15 be said to be applicable.

The parties subsequent to the decision of the lower Court have agreed, without prejudice to their rights of appeal, that the renewal shall be at a rent of Rs. 600 per annum. This sum will be therefore mentioned as rent in the lease deed to be executed. In regard to the settling of the other terms of the lease, the case must be posted for argument.

Both the appeals fail and they are accordingly dismissed with costs.

By Court.—As we have differed in our opinions regarding the following points of law arising in the case, we refer those points for decision by a third Judge under section 98, Code of Civil Procedure, 1908. The two points are :—

(1) Is the suit for specific performance of the covenant to renew maintainable by Messrs. Volkart Brothers as brought with reference to the plot of land in their possession ?

(2) Is the covenant to renew in Exhibit A unenforceable on account of uncertainty ?

The appeals came on for hearing before the CHIEF JUSTICE in pursuance of the aforesaid Order of Reference.

Government Pleader (*C. V. Anantakrishna Ayyar*) for appellant.

R. N. Aingar and (*O. T. G. Nambiar, King and Partridge, Attorneys*) for respondents.

JUDGMENT.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—On the second point raised by the learned Judges "Is the covenant to renew in Exhibit A unenforceable on account of uncertainty ?", I really have had no doubt since this case started. The English authorities are clear that if all that is left at large is something readily determinable on the materials afforded by the contract, then the Court is not precluded from interfering because something is left open. The cases are cited by my brother VENKATASUBBA RAO in his

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judgment and I need not go over the same ground. I content myself with saying that a case of renewal is very different from a case of a fresh contract and I am of opinion that the necessary certainty is obtained when you have regard to that fact, and that obviously no covenant would be held reasonable in this case which was in conflict with the provisions of the original lease; otherwise the covenant would not be a covenant of renewal and the lease would be reduced to waste paper. In my opinion the only subject matter really affected by the clause in this lease can be the rent, and, as the learned District Judge pointed out in his very careful judgment, it is natural enough that people who are providing for a renewed lease after the lapse of a century, should leave open things which are liable to be affected by the state of the market. One can hardly think of a clearer case than that of rent. Why the clause is worded "Upon such terms and conditions as shall be judged reasonable" is no doubt because they thought it might not be reasonable to fix a rent after the lapse of the first century for the whole of the next century and it may be that it would be reasonable to insert a provision that the rent should be on a sliding scale and should be adjusted at 10 or 15 years' interval. However in my opinion the covenant is clearly not too vague to be enforced.

What has given me much more trouble is the question as to whether the plaintiffs in this case, who are assignees of a portion only of the originally demised land, can sue without the assignees of the other portions or of the whole. I am not an authority on covenants running with the land, and profess to no more than a faint recollection of Spencer's case which I read in my student days. But I see there is direct authority for the proposition that a covenant to renew,

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according to TINDALL, C.J.'s judgment in *Simpson* v. *Clayton*(1) is of all covenants the one that he would select as the clearest case of a covenant which must run with the land. If it runs with the land, it appears to me clear that it is apportionable, and that is what *Simpson* v. *Clayton*(1) in fact decided. It is said that *Simpson* v. *Clayton*(1) is distinguishable on the ground that that suit was brought for damages. But as I pointed out in the course of the argument, it appears to me that if a person can get damages from his immediate landlord for failing to put himself in a position to be able to renew, that carries a clear implication that such a person can, if the landlord has put himself in a position to renew, demand specific performance; and I am content to rest it on the authority of that case, and to concur in the opinions expressed by the learned District Judge and my brother VENKATASUBBA RAO. To my mind there is nothing in the statute, to put it no higher, to forbid this construction being adopted though I do not for a moment say that there are express words to say that each person can sue for specific performance *qua* his portion; but in my opinion it does not forbid it either. I therefore agree with VENKATASUBBA RAO, J., and the District Judge's judgment will stand.

The case will go back to the bench for final disposal.

These Appeals coming on for final hearing after the expression of the aforesaid opinion of the third Judge in pursuance of the Order of Reference of this Court under section 98 of the Code of Civil Procedure, 1908, the Court delivered the following

JUDGMENT:—

Following the opinion of the learned Chief Justice as the third Judge under section 98 of the Code of

(1) (1838) 8 L.J. (C.P.), 59.

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Civil Procedure these appeals will be dismissed with costs. The records will be returned to the Lower Court for any further proceedings that may be necessary in O.S. No. 99 of 1921.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Odgers.

1927, January 6.

RAMALINGAM CHETTIAR (FIRST DEFENDANT), APPELLANT,

v.

A. L. S. P. P. L. SUBRAMANIA CHETTIAR AND OTHERS (PLAINTIFF-DEFENDANTS 2 to 5), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Appeal dismissed—Right of some respondents to urge disputes against other respondents—Power of Court under rule 33—Rule 33, limitation of its applicability—Mortgage bond—Interest at 24 per cent payable in six months—On default 24 per cent compound interest with six-monthly rests, whether penalty.

Rule 33 of Order XLI, Civil Procedure Code, should be limited to cases, where in interfering on behalf of the appellant it becomes necessary to alter the decree in favour of some respondent against other respondents, lest injustice should result; it is only then that the Court should act under the rule.

The rule does not give a right to a respondent to urge something in his favour against another respondent which has nothing to do with the result of the appeal, without his filing an appeal or memorandum of objections himself.

Rangam Lal v. *Jhandu*, (1912) I.L.R., 34 All., 32 (F.B.); *Gangadhar* v. *Banabashi*, (1915) 22 C.L.J., 390 and *Abjal Majhi* v. *Intu Bepari*, (1915) 22 C.L.J., 394, followed.

A stipulation in a mortgage bond that the principal together with interest at 24 per cent per annum shall be paid in six months' time from the date of the bond, but that, on default of

* Appeal No. 106 of 1925.

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such payment, the principal shall be payable, on demand, with *compound interest at the same* rate, with six-monthly rests, from the date of the bond, is not by way of penalty and should not be relieved against.

Sundar Koer v. *Rai Sham Krishen*, (1907) I.L.R., 34 Calc., 150 (P.C.); *Malli Chettiar* v. *Veeranna Thevar*, (1921) 41 M.L.J., 470; and *Aziz Khan* v. *Duni Chand*, (1918) 23 C.W.N., 130 (P.C.), relied on.

APPEAL against the decree of R. S. SANKARA AYYAR, Additional Subordinate Judge of Coimbatore, in Original Suit No. 79 of 1924.

C. V. Anantakrishna Ayyar and *K. S. Venkatarama Ayyar* for appellant.

A. Krishnasami Ayyar and *M. Patanjali Sastri* for plaintiff-respondent.

T. R. Ramachandra Ayyar for defendants 2 to 5—Respondents.

After the hearing of the appeal was over, Mr. T. R. Ramachandra Ayyar for respondents 2 to 5 urged his case under Order XLI, rule 33 on behalf of the minor respondents as follows :—

The guardian of the minor respondents did not act properly and represent the case of the minors. There should be re-trial of the case.

[*A. Krishnasami Ayyar* for plaintiff (respondent) objected to the minors being heard as the appeal had been dismissed, and there was no cross-appeal or memo. of objections on behalf of the minor respondents. A suit may have to be brought by the minors, if their guardian acted improperly.]

T. R. Ramachandra Ayyar (continuing).—Order XLI, rule 33, is wide enough to include the present case of the minor respondents in this appeal. A suit may also lie. But this matter can also be urged in this appeal itself. An appeal lies on the ground that the guardian in the lower Court did not act properly in conducting the suit, *Erfanuddin Molla* v. *Badan Sheikh*(1), *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*(2), *Jawahar Bano* v. *Shujaat Husain Beg*(3).

(1) (1919) 51 I.C., 583 (588). (2) (1917) I.L.R., 44 Calc., 759 (P.C.).
(3) (1921) I.L.R., 43 All., 85.

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A. Krishnasami Ayyar for plaintiff-respondent.—Order XLI, rule 33, can be used only in making adjustments as between parties in consequence of the appeal being allowed in whole or in part. It is only a consequential provision: See *Gangadhar* v. *Banabashi*(1), *Abjal Majhi* v. *Intu Bepari*(2). This rule corresponds to Order LVIII, rule 4, in the English Rules of Practice. In England rule 4 gives the rehearing of the whole case, not so in India. Reference was made to *Kshum Chand Bhuturia* v. *Ghane Muhammad Saha*(3), *Rangam Lal* v. *Jhandu*(4), *Shib Chandra* v. *A. C. Dulcken*(5).

JUDGMENT.

KRISHNAN, J.

KRISHNAN, J.—The first point taken in this appeal by the first defendant-appellant is that the arrangement as to interest at 24 per cent per annum amounts to an unconscionable bargain and that in any event the stipulation to pay compound interest at the same rate of 24 per cent with six-monthly rests is one by way of penalty and should be relieved against. It is pointed out that the transaction is a hypothecation and that the property hypothecated forms ample security for the amount borrowed, Rs. 25,000.

No doubt the rate of interest agreed to is high but I am not prepared to say that it is so exceedingly high as in itself to lead to the inference of the bargain being an unconscionable one. There is no evidence of any domination of the will of the debtor by the creditor. The money was borrowed for speculating in cotton and the first defendant apparently expected to make large profits in it and agreed of his own accord to pay the high interest for cash down hoping that he would be able to repay the debt in six months, for that is the due date fixed for repayment in the hypothecation deed. Things did not turn out as he expected; hence the

(1) (1915) 22 C.L.J., 390. (2) (1915) 22 C.L.J., 394.
(3) (1917) 38 I.C., 361. (4) (1912) I.L.R., 34 All., 32 (F.B.).
(5) (1918) 28 C.L.J., 123.

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trouble. But there was no trace of any undue influence in the bargain. The arrangement to pay compound interest was also a part of the bargain, as the plaintiff as a money lender would be able to earn interest on the interest money due by the first defendant on the hypothecation, if paid to him. He, therefore, naturally stipulated for interest on interest and it was also agreed to by the first defendant. That a stipulation by way of compound interest is not necessarily a penalty has been laid down by the Privy Council in *Sundar Koer* v. *Rai Sham Krishen*(1), see also *Malli Chettiar* v. *Veeranna Tevan*(2). It is true that the rate of 24 per cent compound interest is somewhat excessive especially in a hypothecation. But considering that the Privy Council has granted compound interest at 25 per cent in *Aziz Khan* v. *Duni Chand*(3), I am not prepared to say the mere fact of the rate being somewhat exorbitant will establish that the stipulation is one by way of penalty. There are no other circumstances in favour of the contention of the first defendant. The suggestion that the plaintiff was in the habit of accepting 15 per cent when a debt was repaid even though the stipulated rate was 24 per cent and that therefore in this case also we must hold that the intention was only to collect the lower rate is manifestly untenable. The giving np of a portion of interest was purely a matter of grace in those cases; it cannot be used for construing suit arrangement as meaning 15 per cent for that will be against section 92, Evidence Act. The Subordinate Judge has given some relief by changing the six-monthly into yearly rests and there is no appeal against it. I can see no proper ground for further relieving against the covenant entered into by the first defendant with the

(1) (1907) I.L.R., 34 Calc., 150. (2) (1921) 41 M.L.J., 470.
(3) (1918) 23 C.W.N., 180 (P.C.).

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plaintiff with open eyes. On the evidence in the case I do not consider that the agreement to pay enhanced interest is a penalty.

The next point taken is that the repayment of Rs. 16,000 and odd should be credited towards principal and not towards interest as plaintiff has done. If when making the payment the debtor had appropriated his payments towards principal it should have been so appropriated but as he did not do so it was open to the creditor to appropriate towards interest. Section 60 of the Contract Act is clear on the point. The allegation that interest was paid separately from time to time is not proved.

The points taken in the appeal failing, the appeal fails and must be dismissed with costs. At this stage Mr. T. R. Ramachandra Ayyar appearing for respondents 2 to 4, who are the sons of the first defendant, wanted to contend that at any rate so far as his clients were concerned the decree of the lower Court should be altered by exempting their share of the hypothecated property from liability for the decree amount, their contention being that the money lent itself did not belong to the plaintiff but to their mother-in-law and that there was no necessity to borrow any money for a speculative cotton trade and that in any event the agreement to give such an exorbitant rate of interest was entirely without necessity and was not binding on them. It will be seen that what these defendants want to urge is practically an independent appeal which has nothing to do with the result of the appeal by their father. They not having filed any appeal or memo. of objections themselves, the objection was taken that they could not be heard to urge the points proposed to be urged. The objection is a valid one; the decree against them was passed more than one year ago and has now

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become final. It is, however, urged by their learned vakil that he is entitled to ask us under Order XLI, rule 33, Civil Procedure Code, to pass such a decree as the lower Court ought to have rightly passed and that he is, therefore, entitled to urge the objections that he proposes to that decree. No doubt the language of rule 33 is somewhat wide but as held by the Calcutta High Court in *Gangadhar* v. *Banabashi*(1), and again *Abjal Majhi* v. *Intu Bepari*(2), the rule should not be construed too widely lest it lead to an abrogation of the rules of the Civil Procedure Code, the Court Fees Act, and the Limitation Act. It should be limited to cases where in interfering on behalf of the appellant it becomes necessary to alter the decree in favour of the respondent or respondents against other respondents, lest injustice result. The illustration shows the scope of the rule, for on the appeal of *K*, the case being decided in his favour, the plaintiff-respondent *A* should be given a decree against respondent *Y* to prevent injustice. The rule cannot be properly read as giving a right to a respondent to urge something in his favour against another respondent which has nothing to do with the result of the appeal, without his filing an appeal or memo. of objections himself. The same view was accepted by the majority in *Rangam Lal* v. *Jhandu*(3); it is only where in granting relief to the appellant it is essential to re-adjust the decree between the respondents that the Court should act under rule 33. I, therefore, hold that the arguments on the merits by Mr. Ramachandra Ayyar cannot be heard. If, as he says, the Court-officer—guardian, who acted for the minors in the lower Court, did not do his

(1) (1915) 22 C.L.J., 390. (2) (1915) 22 C.L.J., 394.
(3) (1912) I.L.R., 34 All., 32 (F.B.).

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duty and did not represent their case properly, he must take appropriate steps as advised to get the necessary relief.

The appeal is dismissed with costs of the plaintiff.

ODGERS, J.—In this case the plaintiff, a Nattukottai Chetti, sued the defendants—who consist of a father and his minor sons (defendants 2–4). The fifth defendant is a lessee of the property hypothecated to the plaintiff as he alleges for necessary purposes. The suit is to recover on this hypothecation which was for Rs. 25,000 (Exhibit A) to be repaid in six months from its date (31st January 1918) at 2 per cent per mensem. In default of payment, the interest was to be compounded half-yearly from the date of the bond to date of payment. The Additional Subordinate Judge decreed the suit but gave the plaintiff compound interest with yearly instead of half-yearly rests. The first defendant appeals to us first on the ground that the rate of interest is excessive. There is no question of section 16 of the Indian Contract Act here—and therefore no question of undue influence or of a person in a position of domination over another. The cases quoted on that point are, therefore, not applicable. Now that the Privy Council has said that compound interest is not by itself a penalty, that should not be relieved against, *Sundar Koer* v. *Rai Sham Krishen*(1). Reliance is placed for the appellant on the ruling in *Venkataramiah Pillai* v. *Subramania Pillai*(2), but this ruling has been disapproved by AYLING, J., and myself in *Malli Chettiar* v. *Veeranna Thevan*(3) and I do not see any reason to reconsider the opinion I formed in the last-mentioned case, where we held that a stipulation to pay compound interest from the date of default at the same rate as

(1) (1907) I.L.R., 34 Calc., 150 (P.C.). (2) (1917) 37 I.C., 799.
(3) (1921) 41 M.L.J., 470.

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simple interest is not a penalty within section 74, Contract Act. This is really the case here, as for the first six months (or first year under the decree) the interest would of course be simple, so the date of the bond is really the date of default also in this case. No question of necessity is raised by the appellant here —so the case *Kruthiventi Perraju Garu* v. *Sitaramachandraraju Garu*(1) (to which I was a party) and *Ram Bhujwan* v. *Nathu Ram*(2), have really no bearing on the present. On the other hand the Privy Council allowed 25 per cent compound interest in *Aziz Khan* v. *Dhuni Chand*(3) and 24 per cent which in default was to be compounded was allowed by the Calcutta High Court following the Privy Council ruling in *Ajimuddin Sircar* v. *Rafatulla Mandal*(4).

In my opinion there is no ground for holding the interest in this case to be a penalty. The Court should be cautious in interfering with a contract made between the parties who were as far as we know at arms length and each perfectly independent of the other, and in making another contract for them or relieving a party against the results of his default. It was also said that the rate should be reduced because the plaintiff in some other transactions had not insisted on the full contract rate. This is not a legal argument. The other point is as to the payment of Rs. 16,000 by plaintiff. Was it towards principal or interest? The appellant's vakil complains that only the ledger of plaintiff was produced not the chittas or day books. There is also some story of the plaintiff having maintained a book of his own which was taken away by plaintiff's agent. This was not argued by Mr. C. V. Anantakrishna Ayyar. As to plaintiff's books, they appear to prove the accounts

(1) (1925) 48 M.L.J., 584. (2) (1923) 44 M.L.J., 615.
(3) (1918) 23 C.W.N., 180 (P.C.). (4) (1919) 50 I.C., 383.

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set out by plaintiff who was under the circumstances entitled to appropriate the money paid towards interest under section 60 of the Contract Act and the defendant has, we must take it, nothing to put against them. The loan took place in Palladam through an agent of plaintiff whose chief place of business is Devakottai. The point fails. The figures are admitted to be correct. In my opinion the appeal should be dismissed with costs.

In the course of the argument Mr. T. R. Ramachandra Ayyar intervened on behalf of the minors. He alleged that they had not been properly represented in the Court below and that we could and ought to take notice of the fact and to allow the case to be re-opened and re-argued on their behalf. I presume it is intended to argue that the father had no right to bind the minors' interests, if Mr. T. R. Ramachandra Ayyar's intervention is allowed. The minors have not appealed but Mr. T. R. Ramachandra Ayyar relies on the provisions of Order XLI, rule 33. The father (first defendant) in this case appears quite properly to have declined to be the guardian *ad litem* of his minor children. The plaintiff's agent swore that the mother was also unwilling to be appointed. Consequently on 25th September 1924 the Head Clerk of the Court was appointed guardian of the minors. On 19th December 1925 nearly fifteen months after the appointment of the Head Clerk and a month before the hearing of the case the mother moved for her appointment as guardian—on the ground that the interests of the minors were being neglected and no proper defence had been put in on their behalf—the Court guardian having adopted the defence of defendant 1 and put the plaintiff to strict proof that the debt was binding on the minors. They were unrepresented at the trial. The mother asked for

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stay of further proceedings. This was apparently refused, but the mother was brought on as guardian on 22nd February 1926 by an order of this Court. She still did not ask to be joined as an appellant in the appeal which was not heard by us till 20th December 1926. She had managed to obtain a stay of execution from April 1925 to March 1926 by means of these guardianship proceedings. It seems to me that these facts have only to be stated to disentitle the mother to the exercise of any discretion in her favour at our hands. The rule relied on by Mr. T. R. Ramachandra Ayyar is no doubt very wide in its language. Literally applied it might be taken to mean that as long as there is one appellant out of perhaps 50 on the record that is quite sufficient to enable the Appellate Court to pass a decree in favour of the other 49 if it finds in favour either wholly or partially of the single appellant. This is of course absurd. The rule is taken from a (much longer) rule in the English Annual Practice, Order LVIII, rule 4, and was incorporated in the Code of 1908 in order to allow the Appellate Court to do complete justice between the parties. The question of the ambit of the rule does not seem hitherto to have arisen in this Court. Mr. T. R. Ramachandra Ayyar relies on a case reported in *Erfanuddin Molla* v. *Badan Sheikh*(1), where a single Judge of the Calcutta High Court held that if it appears on an examination of the record that a minor has not been properly represented the decree cannot stand although the minor may not have appealed which he could not do as he was not properly represented. We have nothing here but the mother's affidavit that there was any valid defence to be put forward for the minors. The Subordinate Judge dealt with the binding nature of the debt on them; and the story as to the money

(1) (1919) 51 I.C., 583.

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having been advanced through the Nattukottai Chetty by the plaintiff's own mother-in-law strikes me as most improbable. It cannot be believed for a moment. *Jawahar Bano* v. *Shujaat Husain Beg*(1) has no application to the present case. The Judges referred to *Rangam Lal* v. *Jhandu*(2) and distinguished the case before them on the ground that if the plaintiff's suit were simply dismissed they would be deprived of the amount to which they had been found entitled. The case was peculiar as three appeals were disposed of in one judgment. I do not think that *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*(3) helps Mr. T. R. Ramachandra Ayyar either. There the second defendant did not appeal, but the High Court awarded to plaintiffs a sum of money which had been awarded directly to him by the trial Judge. Their Lordships pointed out that the whole decree was under appeal by the appeal of defendant 1. The rule of the Civil Procedure Code relied on here was not cited. On the other hand there is authority, though not of this Court, as to the limits of the rule. There are three cases, *Gangadhar* v. *Banabashi*(4), *Abjal Majhi* v. *Intu Bepari*(5) and *Akimannassa* v. *Bepin Behari*(6) first two of which it is laid down that the exercise of the rule is to be limited to cases where the Court has interfered in favour of the appellants and further interference is required to adjust the right of parties. It cannot be invoked to enable a party to ignore the other provisions of the Code or the provisions of statutes like the Limitation and Court Fees Acts. The third case is really not in point here—a plaintiff who had not cross-appealed or filed a memo. of objections was allowed to withdraw from the suit on appeal and to bring a fresh

(1) (1921) I.L.R., 43 All., 85.
(2) (1912) I.L.R., 34 All., 32.
(3) (1917) I.L.R., 44 Calc., 759 (P.C.).
(4) (1915) 22 C.L.J., 390.
(5) (1915) 22 C.L.J., 394.
(6) (1915) 22 C.L.J., 397.

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suit on the same cause of action as he had been placed in a position of embarrassment by the decree of the trial Court which the High Court held to be unsatisfactory. In *Shib Chandra* v. *A. C. Dulcken*(1) MOOKERJEE, J., thought the rule must be cautiously applied, where in fact recourse to it was necessary to prevent an injustice from being done. In *Kshum Chand Bhuturia* v. *Ghane Muhammad Saha*(2) another Bench of the Calcutta High Court followed the cases in *Gangadhar* v. *Banabashi*(3), and *Abjal Majhi* v. *Intu Bepari*(4). Lastly, three learned Judges of the Allahabad High Court in *Rangam Lal* v. *Jhandu*(5) in considering the rule drew attention to rule 22 of the same order and observed that if a respondent wished to take exception to so much of the decree as was against him he must comply with its provisions. They continued

> "where for example it is essential in order to grant relief to an appellant that some relief should at the same time be granted to the respondent also, the Court may grant relief to the respondent although he has not filed an appeal or preferred an objection."

In my opinion these rulings as to the ambit of the rule under discussion are sound and no authority has been shown to us to convince us to the contrary. The intervention on behalf of the minors must be disallowed

K.R.

(1) (1918) 28 C.L.J., 123.
(2) (1917) 38 I.C., 361.
(3) (1915) 22 C.L.J., 390.
(4) (1915) 22 C.L.J., 394.
(5) (1912) I.L.R., 34 All., 32 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Madhavan Nayar.

1926, October 8.

MAMILLAPALLI KOTAPPA AND 2 OTHERS (DEFENDANTS), APPELLANTS,

v.

PAMIDIPATI RAGHAVAYYA AND 4 OTHERS (PLAINTIFFS), RESPONDENTS.*

Mortgage—Puisne mortgagee paying off decree on prior hypothecation—Suit thereafter for redemption of puisne mortgage—Lapse of twelve years from date of hypothecation on date of suit—Right of puisne mortgagee to be paid the decree amount.

When a puisne mortgagee pays off a decree on a prior hypothecation, he is subrogated to the right of the prior hypothecatee. He is not entitled to enforce the decree as such but can only enforce his charge arising by subrogation. The period within which he should enforce it is 12 years from the date on which a suit on the hypothecation should have been brought and not 12 years from the date of payment. Hence, if in a suit for redemption by the mortgagor to redeem the puisne mortgage, more than 12 years had elapsed from the date on which a suit on the hypothecation should have been brought, the puisne mortgagee cannot resist redemption by claiming also the amount he had paid in addition to the amount due on his mortgage. *Parvati Ammal* v. *Venkatarama Iyer*, (1924) 47 M.L.J., 316, considered; *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh*, (1912) I.L.R., 39 Calc., 527 (P.C.), *Gopi Narain Khauna* v. *Bansidhar*, (1905) I.L.R., 27 All., 325 (P.C.), applied.

SECOND APPEAL against the decree of the Court of the Subordinate Judge of Bapatla in Appeal Suit No. 61 of 1923 preferred against the decree of the Court of the District Munsif of Ongole in Original Suit No. 608 of 1921.

* Second Appeal No. 1803 of 1923.

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

B. Somayya for appellants.

A. Venkatachalam for respondents.

JUDGMENT.

WALLACE, J.

WALLACE, J.—I agree generally with the judgment just read by my learned brother. I only wish to add some remarks chiefly with reference to my judgment in *Parvati Ammal* v. *Venkatarama Iyer*(1).

In that judgment I have dealt with most of the cases which have been cited before us. It has been strongly and with reason relied upon by the appellant in this case, but has also been quoted in support of a view which has never been expressed therein, though I must now concede that the main position which I took up there requires reconsideration. In that case the question arose of the rights of a puisne mortgagee who had paid up an execution sale amount for which the property had been brought to sale on a prior mortgagee's decree. The proposition for decision in that case I state at page 318:

> "The point for decision is whether, when she paid it off, she is to be subrogated to it (the charge which she paid off), in its original form as a mortgage charge, or to it in the form into which it had developed, namely, the right to sell the property in discharge of the mortgage decree. I think the latter view is the correct one."

Then at page 319 I went on to say that, since the mortgage charge had become unenforceable as such "because it has developed into a decree charge," I could not see why the puisne mortgagee should be relegated to the unenforceable charge and denied the enforceable one. The appellant's contention here now is that in using the words "decree charge" I intended

(1) (1924) 47 M.L.J., 316.

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to lay down that some sort of new mortgage charge was created which could somehow be enforced in some other way than the decree could be enforced, and was somehow exempt from the incidents and conditions under which the decree must be enforced, and that particularly therefore the limitation period within which it can be enforced would be 12 years from the date of the decree although the decree itself must be enforced within three years. This interpretation of the words "decree charge" is, I should have thought, obviously untenable on the whole trend of that judgment. The mortgage charge had become merged in a decree and was inseparable from it and was subject to the conditions which govern the enforcement of the decree. The "decree charge" is simply the right which the decree gave to sell the property in discharge of the prior mortgagee's debt. At page 320 of that judgment I went on to say:

"I hold therefore that plaintiff is subrogated to the decree charge held by the prior mortgagee, i.e., the right to hold the property to sale to discharge the decree debt; and that right is free of any restriction that it should be worked out within the period of limitation for the enforcement of the original mortgage."

That is all I then said on the question of the puisne mortgagee's rights. Of the manner in which these rights should be worked out I indicated that in view of the Privy Council ruling in *Gopi Narain Khauna* v. *Bansidhar*(1), the proper method for the puisne mortgagee in that case was by suit. But the period of limitation within which these rights should be worked out did not arise in that case.

In the present case the important questions are: what is the method by which the puisne mortgagee should work out his rights as subrogee under the first

(1) (1905) I.L.R., 27 All., 325 (P.C.).

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mortgage which has become merged in a decree, and what is the period of limitation within which he should do so? The obvious straightforward method would be to allow him to take over the execution of the decree. This was the old view taken by this Court in *Bavanna* v. *Balaguruvi*(1); but this view has been overruled by the Privy Council in *Gopi Narain Khauna* v. *Bansidhar*(2), where it was pointed out that such a method is impossible when the decree itself does not provide for such a substitution of the original decree-holder, and the Committee further indicated that the proper course was to ensure that the decree will provide for such substitution. That is easy when the puisne mortgagee is a party to the prior mortgage suit; then it will be his business to ensure that the decree properly provides for his rights, if he pays up the auction amount in order to prevent the property being brought to sale. But when he is not a party, he cannot influence the form of the decree. Probably in all cases whether the puisne mortgagee is a party to the suit or not, the Court would be well advised to adopt the form of decree recommended by the Privy Council. In the present case, however, that form has not been adopted, and the only remedy open is by way of suit.

What then is the nature of that suit? Is it to be a suit to enforce the original mortgage now merged in a decree, or is it a suit declaring the puisne mortgagee's right to execute that decree? In my judgment in *Parvati Ammal* v. *Venkatarama Iyer*(3), I indicated my view rather tentatively that the suit should be a suit to declare the right of the puisne mortgagee to sell the property in discharge of the mortgage decree, that is, a right to execute the decree, and such right, I think,

(1) (1899) 9 M.L.J., 177. (2) (1905) I.L.R., 27 All., 325 (P.C.).
(3) (1924) 47 M.L.J., 316.

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I indicated plainly enough, would in my view be subject to the conditions which otherwise govern the execution of the decree; that is, it would only be possible under the conditions and subject to the law of limitation under which the decree itself was enforceable; the charge being merged in the decree and inseparable from it, would, for the very reason that it is merged in the decree, be unenforceable when the decree itself is unenforceable as a decree. Even on this view, the present appellant would be out of Court, since on the date of the plaintiff's suit, the prior mortgagee's decree was over three years old. But on further consideration I must admit that the technical difficulties in the way of this view are harder to surmount than those in the way of the view that the charge which the puisne mortgagee is entitled to enforce is the original mortgage charge in its form of a mortgage charge which must be enforced in that form although it has become merged in a decree. This, I think, is the logical result of the decision of the Privy Council in *Gopi Narain Khauna* v. *Bansidhar*(1), which becomes clear when the case is closely studied. On the facts of that case the position was reduced to this. The first and second defendants were the original prior mortgagees and the second defendant's right passed somehow—it is not quite clear—to the first defendant; so that he remained the sole prior mortgagee. He and the plaintiff were in the position of the second mortgagee. First defendant on the footing of the prior mortgage had got a decree for foreclosure, plaintiff being a party to that decree. In order to prevent a decree absolute for foreclosure in that suit against him, plaintiff paid up the decree amount. He and the first defendant on their

(1) (1905) I.L.R., 27 All., 325 (P.C.).

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own second mortgage had also got a decree for foreclosure which became absolute so far as the mortgagor and a third mortgagee were concerned. Thus these two became the owners of the property subject to the first defendant's right to foreclose them by virtue of his own foreclosure decree on the first mortgage which the plaintiff had paid up. Then the question was how the plaintiff was to enforce the charge which he had acquired by virtue of his payment. Although he was a party to the first mortgagee's suit, he had neglected to get a proper form of decree permitting him to execute that decree. So he filed a fresh suit for foreclosure on the footing of the first mortgage, he being subrogated under that mortgage by virtue of section 74 of the Transfer of Property Act. The Privy Council sustained that action and permitted him thus to sue, not to establish a right to execute the first mortgagee's decree but to establish the right to enforce the charge under the original first mortgage, even though it had at that stage become merged in a decree; and the plaintiff was given a decree,—he and the first defendant being equal owners by virtue of the second foreclosure decree absolute, subject to the plaintiff's right under section 74 to enforce the first mortgage for his payment of Rs. 15,000,—that, if the first defendant did not pay up a half of that amount within a specific time he was debarred from redeeming his share. Thus the plaintiff's remedy was held to be a suit on his subrogated rights under the first mortgage charge. So far as the first mortgagee was concerned, the charge was satisfied. So far as the mortgagor was concerned, the charge had only been transferred from the first mortgagee to the second mortgagee, who had now put himself in the proper legal position to enforce it. No question of limitation arose in that case since the mortgages were

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in 1889 and the plaintiff's second foreclosure suit was in 1898. But it is clear from what my learned brother has said that the charge is enforceable only within the period of limitation for such a charge, that is, the usual twelve years.

In the present case also it does not appear to be open to the appellant to resist redemption until the sum of Rs. 623 is paid, on the ground that he is entitled on the terms of the original contract to remain on the land until redeemed, as the original mortgage rights to which he has succeeded by virtue of section 74 were not those of a usufructuary mortgagee, but only those of a simple mortgagee. This appeal will be dismissed and the memorandum of cross objections allowed as provided for in my learned brother's judgment.

MADHAVAN NAYAR, J.

MADHAVAN NAYAR, J.—This second appeal arises out of a suit filed by the plaintiffs for the redemption of two items of property. Plaintiffs Nos. 1 to 3 are the owners of the property and the plaintiffs Nos. 4 and 5 are their lessees. The suit properties had been mortgaged by the predecessors of the plaintiffs usufructuarily to the first defendant on 19th September 1901. The defendants contended that the plaintiffs are not entitled to redeem Item No. 1 as they have parted with it and that they are entitled to remain in possession of Item No. 2 till they are paid in addition to the mortgage amount the sum of Rs. 623-8-3, which they were compelled to pay in order to save the property from sale in execution of the hypothecation decree in Original Suit No. 336 of 1903. As regards the first item the lower Appellate Court agreeing with the District Munsif upheld the plea of the defendants and dismissed the plaintiffs' suit. As regards the second item the plaintiffs were given a decree for its redemption, but it was held by the lower Appellate Court differing from the District Munsif that

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they were not bound to pay the first defendant the additional amount claimed by him as in its view the first defendant's right to recover that amount was barred by limitation on the date of the suit. As regards the second item the defendants have filed a second appeal, while as regards the first item the plaintiffs have filed a memorandum of objections. The entire case is thus before us in second appeal.

I shall deal with the case of the parties as regards each item separately.

Item No. 1.—This item is the northern half of survey No. 47. The first defendant is admittedly in possession of this half and he obtained possession as a mortgagee from the plaintiffs' predecessors. The plaintiffs sold the northern half to plaintiff's witness No. 2 under Exhibit B in 1912, but the sale did not take effect and plaintiffs' witness No. 2 is now in possession of the southern half. It is alleged that on account of this sale the plaintiffs have lost the right to redeem this property. The plea is clearly unsustainable. The ineffective sale of the northern half to plaintiffs' witness No. 2 does not in any way affect the plaintiffs' right to redeem this item. As already observed, the first defendant is a mortgagee. The sale to plaintiffs' witness No. 2 has not affected his possession of this item in any way and the plaintiffs have not lost their title to it. As the mortgagee of this item he cannot dispute the right of the mortgagors to redeem it. The decree of the lower Appellate Court has provided for the payment of the full mortgage amount. Setting aside the lower Court's decree I would allow the memorandum of objections and give the plaintiffs a decree for the redemption of this item.

Item No. 2.—To understand the points involved in deciding the appeal as regards this item, it is necessary to state a few facts. Before the mortgage to the first

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defendant this item had already been mortgaged to another person in 1897. The first defendant is the second mortgagee. The prior mortgagee instituted a suit, Original Suit No. 336 of 1903, on his mortgage and brought the property to sale, but it was not sold as the first defendant herein paid up the decree amount, Rs. 623-8-3 with interest. This amount was paid on 23rd October 1915. The plea of the first defendant now is that the plaintiffs are not entitled to redeem this item unless he is paid this amount in addition to the amount of his own mortgage. The payment by him of the sum that he now claims is not disputed. The lower Appellate Court disallowed the first defendant's claim as it held that his right to recover it was barred by limitation on two alternative grounds: Ground No. (1): The first mortgage came into existence in 1897. The present suit was instituted in 1920. It is admitted that a suit by the first mortgagee to recover the amount of his mortgage in 1920 would be barred by limitation. The first defendant has the right to enforce the security by virtue of subrogation. As the prior mortgagee's suit to enforce the security is barred by limitation, the present first defendant's right, viewing it as a claim to enforce the security by virtue of subrogation, is also barred by time. In support of this ground the learned Judge relies on *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh*(1) and *Sibanand Misra* v. *Jagmohan Lal*(2). Ground No. (2): if the first defendant is entitled to sustain an action for reimbursement as distinguished from his right to enforce his security by virtue of subrogation, the learned Judge was of opinion that the cause of action for such a suit was the date of payment, i.e., 23rd October 1915. As more than three years

(1) (1912) I.L.R., 39 Calc., 527 (P.C.). (2) (1922) 68 I.C., 707.

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had elapsed from that before the present suit was filed, the first defendant could not claim the amount in 1920. This view is supported by the decision in *Sibanand Misra* v. *Jagmohan Lal*(1). (See the closing portion of the judgment.)

The appellants argue that the first ground is untenable and that the first defendant's right to recover the amount is not barred as when he paid the amount on 23rd October 1915 he must be considered to have obtained a charge on this item of property and that this charge can be enforced at any time before the expiry of twelve years from the date of payment. This view is supported by the decision in *Shib Lal* v. *Munni Lal*(2). The apellants quote *Parvati Ammal* v. *Venkatarama Iyer*(3) also in their favour.

A subsequent mortgagee has the right to pay off the prior mortgagee. By making such payment he acquires in respect of the property all the rights and powers of the mortgagee whom he has paid off. One of such rights is this power to enforce his charge against the property subject to the law of limitation. If, therefore, at the time when the subsequent mortgagee seeks to enforce the security by virtue of subrogation, a suit by the first mortgagee is barred by time, the subsequent mortgagee's right is also barred. This principle was laid down in the decision in *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh*(4). If this decision is applied to the present case, then the first defendant's right to recover the amount by enforcing the charge must be held to be barred because the first mortgage was in 1897 and the present suit was instituted in 1920. But it is argued that the decision is inapplicable because the first mortgage in this case had ripened into a decree

(1) (1922) 68 I.C., 707. (2) (1922) I.L.R., 44 All., 67.
(3) (1924) 47 M.L.J., 316. (4) (1912) I.L.R., 39 Calc., 527 (P.C.).

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when the payment was made by the second mortgagee; and that from this follows the consequence that he gets a charge over the property which can be enforced within the usual period of limitation for the enforcement of a charge, the period of limitation being calculated from the time when the payment was made. The argument seems to be that, after the decree, a new charge comes into existence and that the puisne mortgagee subrogates himself into the position of the decree-holder and obtains this charge over the property on the date when he paid off the amount on the prior mortgage. This argument is supported, as already observed, by the decision in *Shib Lal* v. *Munni Lal*(1) and by the observations of my learned brother in *Parvati Ammal* v. *Venkatarama Iyer*(2).

Does the fact that payment was made by the second mortgagee after the first mortgage had ripened into a decree make any difference as regards the date from which the period of limitation for enforcing the charge thus obtained by the payment is to be calculated? I think not. The question presents two aspects for consideration: Does the second mortgagee, when he pays the amount of the first mortgage after a decree had been obtained on it by the first mortgagee, get a charge over the properties by virtue of section 74 of the Transfer of Property Act just as in an ordinary case of subrogation, or does he get it by subrogating himself into the position of the decree-holder as distinguished from the position of the first mortgagee? Whether the payment by the puisne mortgagee is made after obtaining a decree by the first mortgagee or before, if the puisne mortgagee gets his right to enforce the security by virtue of section 74 of the Transfer of Property Act, then it seems to me that he is bound to enforce his right within the period

(1) (1922) I.L.R., 44 All., 67. (2) (1924) 47 M.L.J., 316 at 319.

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of limitation allowed to the first mortgagee. The decision in *Gopi Narain Khauna* v. *Bansidhar*(1) though it is not directly relevant as it does not deal with the question of limitation, gives us considerable help in answering both aspects of the question above mentioned. Briefly stated, in that case, the second mortgagee, who had paid off the first mortgagee the amount due to him after a decree on the first mortgage, instituted a suit to enforce the charge which he had acquired by virtue of his payment. The Privy Council held that he was entitled to establish by a suit his right to enforce the charge under the first mortgage, even though it had by that time become merged in a decree. In the course of the judgment, their Lordships made the following remarks:—

> "It is true that Gaya Prasad (the puisne mortgagee) having made that payment (as he had the right to do) acquired under section 74 of the Transfer of Property Act all the rights and powers of the mortgagees as such. But this would not have the effect of reviving or giving vitality to a decree which, by its terms, had become discharged."

The learned Judges also pointed out that on payment by the second mortgagee of the amount due to the first mortgagee into Court and acceptance of that sum by him

> "the decree was spent and became discharged and satisfied"

and consequently the second mortgagee does not obtain the status of a decree-holder. It cannot therefore be said that he subrogated himself into the position of the decree-holder. If the second mortgagee thus gets his right by subrogation under section 74 even in a case where the first mortgage has been paid off after a decree, then it follows that he as subrogee can exercise the rights of the prior mortgagee only within the period of limitation allowed to him. The fact that a decree has

(1) (1905) I.L.R., 27 All., 325 (P.C.).

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been passed and the mortgage has become merged in a decree does not therefore make any difference. The obtaining of a decree does not put an end to the charge on the property; after the passing of the decree the charge attaches itself to the decree and the puisne mortgagee by making the payment gets entitled by virtue of section 74 of the Transfer of Property Act to enforce that charge. It is conceded in *Shib Lal* v. *Munni Lal*(1) that the puisne mortgagee obtains the charge under section 74 of the Transfer of Property Act. If so, there is no justification for the conclusion that the period of limitation should be calculated from the date of payment as if a new charge had come into existence by such payment. In view of the observations of their Lordships of the Privy Council in *Gopi Narain Khauna* v. *Bansidhar*(2) the arguments advanced on behalf of the appellants cannot be accepted. My conclusion is supported by the decision of COUTTS and DAS, JJ., in *Sibanand Misra* v. *Jagmohan Lal*(3). For these reasons I hold that the Privy Council decision in *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh*(4) applied to the present case also and that the first defendant's right to claim the additional amount, viewed as a claim to enforce the security, is consequently barred by limitation.

If his right to recover the amount is considered merely as a right for the reimbursement of the money (ground No. 2), then the three years' period under article 61, schedule I, of the Limitation Act during which the right may be exercised having admittedly passed he is now precluded from claiming the amount in this case. See *Shib Lal* v. *Munni Lal*(1) and *Sibanand Misra* v. *Jagmohan Lal*(3).

(1) (1922) I.L.R., 44 All., 67. (2) (1905) I.L.R., 27 All., 325 (P.C.).
(3) (1922) 68 I.C., 707. (4) (1912) I.L.R., 39 Calc., 527(P.C.).

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I would therefore confirm the decree of the Appellate Court as regards this item and dismiss the second appeal with costs.

The memorandum of objections is allowed with costs throughout. As we have allowed the memorandum, the lower Appellate Court's direction as regards the mesne profits with reference to item 2 will apply to item 1 also. The first Court will hold an enquiry and pass a decree accordingly.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Madhavan Nayar.

MUTHUKUMARASWAMI PILLAI, APPELLANT (PETITIONER),

v.

MUTHUSWAMI THEVAN, RESPONDENT (RESPONDENT).*

1926, September 29.

Execution—Sale of property not belonging to judgment-debtor and purchase by decree-holder and satisfaction—Art. 166, *Limitation Act* (*IX of* 1908)—*Application by decree-holder to set aside sale and for further execution, after thirty days after sale—Maintainability of.*

A decree-holder got the properties of some one other than the judgment-debtor sold in execution of his decree, purchased them himself and entered up satisfaction. More than thirty days after the sale, he found out his mistake and applied for further execution by setting aside the sale.

Held, that the application for further execution was unsustainable as the sale though of a stranger's property was not void and as the prayer for setting it aside, which was a necessary preliminary for further execution, could not be granted, being barred by article 166 of the Limitation Act. *Thakur Barmha* v. *Jiban Ram Marwari* (1914) I.L.R., 41 Calc., 590 (P.C.) and

* Appeal against Appellate Order No. 94 of 1924.

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Tirbhuvan Bahadur Singh v. *Rameshar Baksh Singh* (1906) I.L.R., 28 All., 72 (P.C.), distinguished.

APPEAL against the Order of the Second Additional Subordinate Judge of Tinnevelly in Appeal Suit No. 52 of 1923 (Appeal Suit No. 316 of 1923 on the file of the District Court of Tinnevelly) preferred against the order of the Court of the District Munsif of Tenkasi in E.P. No. 536 of 1922 (in S.C.S. No. 619 of 1915 on the file of the Court of Subordinate Judge of Tinnevelly).

The facts are given in the judgment.

P. N. Marthandam Pillai for appellant.

R. Krishnaswami Ayyangar for respondent.

JUDGMENT.

This Civil Miscellaneous Second Appeal is against the Order of the lower Appellate Court declining to grant an execution application of the appellant under the following circumstances :—

The appellant obtained a decree against one Muthusami Thevan. In execution of that decree he attached certain property, brought it to sale and purchased it in Court auction himself on 6th October 1922. He was under the *bona fide* impression that the property belonged to his judgment-debtor, whereas it has now turned out that it really belonged to a *dayadi* of the judgment-debtor of the same name. When the Court sale was confirmed, satisfaction of the decree was recorded on 8th November 1922. Appellant, having discovered his mistake on 18th December 1922 applied to the executing Court to have the sale and the proceedings of the Court in satisfaction set aside and applied for further execution by way of attachment and sale of the real property of the judgment-debtor. Both the lower Courts have held that the application is out of time, holding that the appellant cannot succeed unless he has the sale set

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aside under Order XXI, rule 91, Civil Procedure Code, the limitation for which application is 30 days from the date of sale under article 166 of the Limitation Act.

The appellant's main contention is that the execution sale being *ex-hypothesi* a sale of property which was not the judgment-debtor's property, is void and without jurisdiction, and therefore it is not necessary for him to set aside at all. If this view is negatived, then he falls back on the argument that, as his present application is an ordinary execution application, the time limit for which is three years, it is not governed by the thirty days' limitation prescribed for the application under Order XXI, rule 91, Civil Procedure Code.

As to the first contention, we are clear that the sale is not a void one. The argument put forward is that the Court has no jurisdiction to sell in execution any property which is not the property of the judgment-debtor and section 60, Civil Procedure Code, is called in aid. We do not think that is the proper section which gives the Court power to attach and sell property in execution of a decree. That is merely a section which distinguishes which species of a judgment-debtor's property may be sold in execution of a decree. The more proper section is section 51 (*b*), which is general in its terms and empowers the Court on the application of the decree-holder to attach and sell in execution any property. This section of course has to be interpreted with some common sense and does not mean that the Court is empowered to attach and sell property which it and all the parties know before the attachment to be not the property of the judgment-debtor. The common sense interpretation is that the Court has authority and jurisdiction to attach and sell in execution any property which the decree-holder puts forward as the property of his judgment-debtor, for attachment and sale. If the contention of the appellant were

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accepted, it would mean that a Court in selling property in execution gives a guarantee that the property sold is the property of the judgment-debtor, which is opposed to one of the fundamental principles of Court sale. It has been invariably laid down in this country and elsewhere that a Court sale carries no guarantee, that the property is the property of the judgment-debtor and that the auction-purchaser takes the risk, and bears the loss if it is subsequently discovered not to be the property of the judgment-debtor. There is therefore no warrant for the proposition that a sale by the Court of property which subsequently turns out not to belong to the judgment-debtor is void, and, in this view, it makes no difference that the auction-purchaser is the decree-holder. The principle of *caveat emptor* will apply to the decree-holder auction-purchaser equally as to any other auction-purchaser. The appellant cites a ruling in *Radha Kishun Lal* v. *Kashi Lal*(1), for the proposition that a decree-holder is in a more favourable position than a stranger auction-purchaser. But, if the decree is satisfied, the decree-holder is no longer in the position of a decree-holder; his status has altered into that of auction-purchaser. Suppose, for example, that he had had to pay more for the property than the decree amount, he is not the decree-holder in respect of that sum and in the matter of any claim to refund of that amount on the sale being set aside he is only in the position of auction-purchaser and could not under the present law recover it unless he had applied within thirty days of the sale. We are not able to accept the distinction drawn in the above Patna case. In fact, it is one of the decree-holder's duties to see that the property sold was the property of his judgment-debtor, and if he makes a mistake he must take the consequence. The law does not permit him to treat his sale as a void sale

(1) (1923) I.L.R., 2 Pat., 829.

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and ignore it and put in a further execution application as if it had never taken place. It cannot be reasonably contended that the question whether a Court has jurisdiction or not to sell the property rests on the problematic decision of a problematic claim, and that a Court which allows a claim to property sold thereby declares its own lack of jurisdiction in the proceedings of an attachment and sale which led up to the claim proceeding. The logical result of that would be that the Court had no jurisdiction to decide the claim and therefore no jurisdiction to decide that it had no jurisdiction, a topsy-turvy result.

It follows then that, before appellant can again apply to execute the decree, which has been recorded as satisfied by the previous Court sale, he must have the sale set aside, the ground for the application being naturally that his judgment-debtor had no saleable interest in the property sold. To such an application Order XXI, rule 91 in terms applies and it must be put in within thirty days of the sale. Admittedly, appellant's application was not put in within that time. He says, however, that because his main relief sought for is further execution, he is entitled to a larger period of limitation for such a further execution application, and puts forward the analogy of a suit for possession by a person who cannot get possession unless he sets aside an adoption, in which case it has been held by the Privy Council that the Limitation for the suit is not the lesser period for the suit for a declaratory decree that the adoption is invalid but the larger period of twelve years—See *Tirbhuwan Bahadur Singh* v. *Rameshar Bakhsh Singh*(1) and *Velaga Mangamma* v. *Bandlamudi Veerayya*(2). We can see no analogy between that

(1) (1906) I.L.R., 28 All., 727 (P.C.).
(2) (1907) I.L.R., 30 Mad., 308.

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case and the present. In the present case we are concerned with the processual law which obviously prohibits execution being taken out for a satisfied decree unless the proceedings which resulted in the record of satisfaction are set aside, and the same law says that such proceedings can only be set aside by an application within thirty days of the sale. Appellant cannot get round this limitation period by merely putting in a fresh execution application. The whole purpose of Article 166 will be defeated if such a contention is upheld. When no application has been put in within the time fixed in rule 91, the sale is confirmed and becomes absolute under rule 92, and no one can disturb it on the grounds mentioned in rule 91.

The appellant relies strongly on a passage in a decision of the Privy Council in *Thakur Barmha* v. *Jibhan Ram Marwari*(1). In that case a share of a Mahal had been proclaimed for sale subject to a mortgage and it was pleaded that, notwithstanding the words of the proclamation, the sale was not subject to the mortgage, since a correction had been published before the sale in the local gazette. The Privy Council held that what was sold was what was proclaimed, and then remarked :

> "if by a mistake the wrong property was attached and sold, the only course was for the decree-holder to commence execution proceedings over again."

No question of the period of limitation within which this could be done and no question whether the sale was a void sale and could be ignored was raised in that case, and we do not therefore find it of any assistance. Nor does the case in *Sivarama* v. *Ramu*(2) help. That turned on the language of section 315 of the old Civil Procedure Code, which gave an auction-purchaser two

(1) (1914) I.L.R., 41 Calc., 590 at 599. (2) (1885) I.L.R., 8 Mad., 99.

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chances of recovering his money if the judgment-debtor had no saleable interest in the property sold, viz., a chance under section 313 within thirty days before the confirmation of the sale, and another under section 315 by application after the confirmation of the sale. But the latter remedy has been omitted in the present Code and, therefore, is no longer available. This is clearly pointed out in *Tirumalaisami Naidu* v. *Subramanian Chettiar*(1), *Ram Sarup* v. *Dalpat Rai*(2), and *Habib-ud-din* v. *Hatim Mirza*(3). The ruling in *Ramineedi Venkata Appa Rao* v. *Lakkoju China Ayyanna*(4) was also governed by the provisions and principles of the old Civil Procedure Code. The other cases cited by the appellant seem to us to have no useful bearing on the matter.

Respondent contended before us that no Civil Miscellaneous Appeal lies. Even if it does, we consider that the lower Appellate Court was right and dismiss this appeal with costs. The Civil Revision Petition is also dismissed.

N.R.

(1) (1917) I.L.R., 40 Mad., 1009. (2) (1921) I.L.R., 43 All., 60.
(3) (1925) I.L.R., 6 Lah., 283. (4) (1907) I.L.R., 30 Mad., 209.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Madhavan Nayar.

1926, November 19.

VASIREDDI VEERAMMA (PLAINTIFF), APPELLANT,

v.

MARUPUDI BUTCHAYYA AND 4 OTHERS (RESPONDENTS), DEFENDANTS.*

Suit for mere declaration of adoption, with no consequential relief as to lands, houses, etc.—Valuation for jurisdiction—Section 12, Madras Civil Courts Act (III of 1873).

A suit for a mere declaration of the factum and validity of an adoption, without any consequential relief regarding lands or houses likely to be affected by the declaration has, for purposes of jurisdiction, to be valued, according to section 12 of the Madras Civil Courts Act, on the basis of the market value of the lands or houses likely to be affected by such declaration and not either according to plaintiff's pleasure or according to the valuation under the Court Fees Act as if it were a suit for possession of such lands or houses. *Rachappa Subrao* v. *Shidappa Venkatrao* (1919) I.L.R., 43 Bom., 507 (P.C.), applied.

APPEAL against the Order of the Court of the Additional Subordinate Judge of Bāpatla in Original Suit No. 2 of 1923.

The facts appear from the judgment.

Ch. Raghava Rao for appellant.

P. Kameswara Rao and *B. Somayya* for respondents.

JUDGMENT.

WALLACE, J.

WALLACE, J.—This appeal is against the Order of the lower Court holding that it has no jurisdiction to entertain the appellant's plaint and returning it for

* Appeal against Order No. 874 of 1924.

presentation to the proper Court. The point at issue is one of valuation for the purposes of jurisdiction. The suit is for a declaration that the plaintiff's husband was adopted to one Ramasami. Twelve items of property are scheduled in the plaint, of which No. 1 is said to be in possession of the plaintiff. No. 2 was alienated by Ramasami's widow and Nos. 3 to 10 has been alienated by the plaintiff herself. Item 11 is a vacant site and item 12 a channel. The cause of action is that the alienees from the plaintiff have been sued by the first defendant to recover the items alienated by plaintiff on the footing that there had been no such adoption and that first defendant has got a decree. Plaintiff was not a party to that suit, but the alienees are now threatening to enforce against her indemnity clauses in their favour and therefore she has brought the present suit to remove this cloud on her title to alienate in order that her alienees may have a clear title.

The question at present for decision is, what is the proper value for the purposes of jurisdiction of this suit. The Subordinate Judge has held that it should be valued as if it were a suit for possession of the above twelve items, in which case the valuation for jurisdiction would be the same as for court fee purposes. For example, in the case of land he has taken not the market value but 5 times the assessment and on that footing the valuation comes below Rs. 3,000. The appellant contends first, that in such a case the Court is bound to accept the plaintiff's valuation for the purposes of jurisdiction and secondly, that if this view is wrong the proper valuation is the market value of the 12 items.

We have heard a lengthy and able discussion on both sides on the principles of the Suits Valuation Act and sections 12 and 14 of the Madras Civil Courts Act, which is the relevant statute law on the point. The

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Suits Valuation Act VII of 1887 is naturally the statute to be followed if there is any section directly *ad hoc*, but there is not. No rules have been framed by the local Government under section 3 of the Act, nor does the present suit come under the categories mentioned in sub-rule (1); it comes under Schedule II, Article 17, of the Court Fees Act. Section 8 of the Suits Valuation Act does not apply, because this is not a case in which the court fee is payable *ad valorem*, and section 9 does not apply. So we are driven back on sections 12 and 14 of the Madras Civil Courts Act III of 1873. I think it is clear that section 14 does not apply. The scope of that section may be gauged by a reference to section 6 of the Suits Valuation Act. This section is to be wholly repealed if and when rules under section 3 are promulgated. Section 3 relates only to particular categories of suits of which the present suit is not one. Obviously therefore the framing of rules under section 3 and therefore the repeal of section 14 of the Civil Courts Act will not affect a suit like the present, and it follows that section 14 is not intended to apply and does not apply to such a suit. Reference may be made to *Chalasamy Ramiah* v. *Chalasamy Ramasami*(1). Hence the lower Court is wrong in holding that section 14 has any application. This is important as will appear later on, since it implies that the *subject-matter* of the present suit is not land, house or garden.

Section 12 then, the general section, as amended by Act III of 1916, remains, whereby it is declared that the jurisdiction of a Subordinate Judge extends to all civil suits and the jurisdiction of a District Munsif to such suits of which the amount of value or the subject-matter does not exceed Rs. 3,000. Two points then arise for

(1) (1912) 13 I.C., 903.

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decision—(1) What is the subject-matter of the present suit, and (2) What is the value of that subject-matter? As to (1) it has been noted above that the subject-matter of the suit is not the land or other properties which may be affected directly or indirectly by the declaration of adoption. The subject-matter is clearly the fact and validity of the adoption. The plaintiff is not in any sense suing for possession of the property. She is in possession of some and need not sue for that and she does not want possession of the remainder. The term "subject-matter" is obviously not to be confined and applied only to what is capable of valuation in money. There are many suits which are incapable of such valuation, for example, suits for restitution of conjugal rights, suits for precedence in ceremonial worship, and so on. The test simply is, what is the nature of the relief sought, and in the present case that is the fact and validity of the alleged adoption.

The next point is how that is to be valued. The answer to this question cannot be wholly gathered from the statute law. The definition of "value" in the Madras General Clauses Act I of 1891, section 3 (32), takes us no further; but I am clear that the word "value" in section 12 of the Civil Courts Act means *market value*. The general principle as to valuation of suits and appeals is laid down in sections 12 and 13, and the exception is in section 14. Another exception is in section 8 of the Suits Valuation Act. In these two cases valuation for jurisdiction and valuation for court fees are to be the same; in others the general principle that valuation is to be based on market value must apply. This has been laid down in *Rachappa Subrao* v. *Shidappa Venkatrao*(1), a Privy Council case, and *Rattayya* v. *Brahmayya*(2). The former case was a suit

(1) (1919) I.L.R., 43 Bom., 507. (2) (1925) 49 M.L.J., 309.

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for a declaration of adoption and the Privy Council held decidedly that the test was not the notional value imposed by the Court Fees Act and the Suits Valuation Act but the real value of the property. Here the conflict was between the valuation for the purposes of jurisdiction calculated on the court fee paid and the real value of the property. The notional value of land as equivalent to so many times the assessment was not in issue. The Privy Council held that the jurisdiction was determined by the real value of the land affected and not by its notional value. In *Rattayya* v. *Brahmayya*(1) it is clearly laid down that the word "value" in section 12 of the Civil Courts Act means market value. In *Keshava* v. *Lakshminarayana*(2) where the suit was to set aside an adoption, the Court appears to have accepted the valuation given by the Commissioner who presumably estimated the market value. On the other hand in *Chingacham Vitil Sankaran Nair* v. *Chingacham Vitil Gopala Menon*(3), a suit for mere declaration of title to land, the value of the land had been calculated at five times the assessment; but the Court did not consider whether this method of calculation was correct, since in any case, whichever method was adopted, the proper forum was the Subordinate Judge's Court; so it was not necessary to go into that point in that case.

It does no doubt seem an anomaly that a suit for a mere declaration of title to property should in certain cases have to be filed in a Court higher than the Court in which a suit for the property itself or a suit for a declaration of title with consequential relief should be filed. But that is the result of an anomaly in the law itself which lays down that in the latter cases a mere artificial method of valuation at so many times

(1) (1925) 49 M.L.J., 309. (2) 1883) I.L.R., 6 Mad., 192.
(3) (1907) I.L.R., 30 Mad., 18.

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the assessment is to be adopted. The anomaly is due to the statute law and not to the general principle. No case has been brought to our notice which lays down that in a suit for a declaration of title to property the method of calculating the value of the property is the court fees method and not the real value. The respondent relies on *Ganapati* v. *Chathu*(1) in which it is laid down generally that the valuation in a suit for a declaration of title by the party in possession shall be as if it was a suit for possession. But that can be interpreted in two ways, either as laying down that the value of the subject-matter is to be the value of the property or as laying down that the method of calculating the valuation of the subject-matter is to be the method of calculating that value in a suit for possession. The decision is not clear that the latter interpretation is meant. Section 4 of the Suits Valuation Act is also relied upon. No doubt if rules had been framed under section 3 the method of calculation argued for by the respondent would come into force but the section seems to imply rather that if this method is to be employed it is necessary that the rule should have been framed under section 3. The principle would be a good principle, but, so far, it has not been embodied in any rule or statute.

The general principles deducible for valuation for purposes of jurisdiction where no special method of valuation has been provided by statute, then, would seem to be (1) that where the subject-matter of a suit is wholly unrelated to anything which can be readily stated in definite money terms, then the plaintiff, having to put some money value for the purpose of jurisdiction, must put a more or less arbitrary value,

(1) (1889) I.L.R., 12 Mad., 223.

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and, there being no factors in the case from which the Court can say his valuation is wrong, or dishonest, the Court will accept that valuation. Such is the case of a suit for restitution of conjugal rights—see *Aklemanneesa Bibi* v. *Mahomed Hatem*(1) and *Zair Husain Khan* v. *Khurshed Jan*(2) or a suit for a declaration that the plaintiff is a member of a charity committee—see *Murza Hyder Alli Sahib* v. *Hussain Raza Sahib*(3), and (2) that where the subject-matter is so related to things which have a real money value that the relief asked for will affect these, then the value of the suit for the purpose of jurisdiction is to be taken as the market value of the property affected, such, for example, as a suit for a declaration of fishery rights—see *Mohini Mohan Misser* v. *Gour Chandra Rai*(4) or a suit to set aside an award—*Venkatachalam Pillai* v. *Srinivasa Iyer*(5) or a suit regarding liability to pay royalty—see *Ryrappan Nambiyar* v. *Chathukutti Nambiyar*(6). But the market value must be the market value of the whole of the property affected and not merely the plaintiff's share. This has been laid clearly in *Keshava* v. *Lakshminarayana*(7) and *Ibrayan Kunhi* v. *Komamutti Koya*(8).

In applying these principles to the present suit which is a suit for a declaration without consequential relief, the appellant contends that the first principle applies, that is, that the Court cannot refuse to accept the plaintiff's valuation unless it holds that that valuation is dishonest. There is a good deal to be said logically for this position, but clearly it has not been adopted in this Presidency as the law. The argument would involve the application of this criterion to all suits

(1) (1904) I.L.R., 31 Calc., 849.
(2) (1906) I.L.R., 28 All., 545.
(3) (1914) 24 I.C., 310.
(4) (1920) 56 I.C., 762.
(5) (1923) 18 L.W., 399.
(6) (1924) 46 M.L.J., 377.
(7) (1883) I.L.R., 6 Mad., 192.
(8) (1892) I.L.R., 15 Mad., 501.

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under Schedule II, clause (17) of the Court Fees Act whereas in many such suits, as noted above, the Court has not adopted that principle. The present case cannot therefore come under the first category but must fall under the second, the valuation to be adopted for the purposes of jurisdiction being the actual market value of the property.

The Subordinate Judge is, therefore, wrong in calculating the value as the court fees value of the property. Adopting the market value as given in the plaint which is not challenged except as regards item 1 for which we will adopt the Commissioner's figure of Rs. 1,825 the total value for the purpose of jurisdiction would come to over Rs. 3,000 and the proper Court for the purpose of jurisdiction would be that of the Subordinate Judge. We must, therefore, reverse the order of the lower Court, and direct the Additional Subordinate Judge to entertain the suit.

The respondent has filed a Memorandum of Objections on the matter of costs. The Subordinate Judge directed that costs before him should be costs in the cause, but that is, obviously a wrong order since the appellant might not present his plaint again and the respondent would then lose his costs. However, as it is, as we find in favour of the appellant, he is entitled to and will get his costs in both Courts.

MADHAVAN NAYAR, J.—I agree.

MADHAVAN NAYAR, J.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Curgenven.

1926, December 10.

MOIDEEN MEERA SAHIB, PETITIONER (RESPONDENT),

v.

CRUZ MICHAEL FERNANDO, RESPONDENT (PETITIONER).*

Rule 4, clause (3) of Rules for Elections under Madras Local Boards Act (XIV of 1920)—Elections to Union Boards—Jurisdiction of District Court to transfer part-heard case—Objection to personation of a voter.

Rule 4, clause (3) of the rules for the conduct of election enquiries framed under the Madras Local Boards Act (XIV of 1920) enables a District Court to transfer to a Munsif's Court even a part-heard case in the case of elections to Union Boards. *Zamindar of Bodakimidi* v. *Kumari Lahiri* (1918) M.W.N., 772, followed.

Even if no objection is taken at the time of election to the voting of any person personating a real voter, the same can be taken at the election enquiry.

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 Order of the Court of the District Munsif of Srivaikuntam, dated the 7th day of August 1926, in O.P. No. 346 of 1925 (O.P. No. 58 of 1925 on the file of the District Court of Tinnevelly).

The necessary facts are given in the judgment.

Rule 4, clause (3) is given in the judgment.

S. Rajagopala Achariyar for petitioner.

K. R. Rama Ayyar for respondent.

JUDGMENT.

This Civil Revision Petition has been presented against the Order of the District Munsif of Srivaikuntam in O.P. No. 346 of 1925, which comprised an enquiry

* Civil Revision Petition No. 914 of 1926.

under the rules relating to election disputes. The election in question was to Ward No. 10 of the Union Board of Alwarthirunagari. There were three candidates—the petitioner, the respondent and one Alagapiran Ayyangar. Of the 35 voters, 29 cast their votes—15 in favour of the present petitioner and 14 in favour of the respondent, the third candidate getting no vote at all. The petitioner was accordingly declared elected whereupon the respondent filed this petition before the District Court objecting to the election. The learned District Judge issued summons to some of the witnesses, actually examined one witness and allowed certain documents to be filed and then transferred the case for disposal to the District Munsif of Srivaikuntam. Some of the witnesses whom it was desired to examine were said to be absent in Colombo and the respondent applied for a commission, which was objected to by the petitioner but was granted and was returned executed in due course. Subsequently the petitioner, alleging, it is said, that being a Village Munsif he was unable to spare time then for the enquiry and that he had no facilities for examining the witnesses on commission, asked that they should be summoned to appear in person or that a second commission should be issued. There has been a great deal of delay, very largely due to the petitioner's own fault, in the conduct of this enquiry and the District Munsif refused to grant an adjournment for this purpose and proceeded to dispose of the petition, finding that in the case of three votes instanced by the respondent the voters must have been impersonated. He accordingly passed an order unseating the petitioner and directing that the respondent should be declared to have been elected.

The first objection raised to this order in revision is that the Court should have granted the adjournment asked for. I do not think that there is any substance

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in the contention that the petitioner as Village Munsif was precluded from attending to the case. It has not even been alleged before me that he put in a formal application for leave to the Revenue authorities and that it was refused. It appears that the election took place as far back as the 27th May 1925, and the District Munsif's order was not passed until the 6th of August 1926. I think that he was fully justified in bringing the proceedings to an end under the circumstances.

The next point has to do with the action taken by the learned District Judge in transferring the case after it had been partly heard by him. It is said that in so doing he acted *ultra vires* and that the District Munsif had not jurisdiction to take up the enquiry and conclude it, whether or not he would have been competent to have tried it *de novo* upon its transfer to him. Under sub-rule (3) of rule 4 of the rules for the conduct of enquiries and decision of disputes relating to elections

> "a District Judge or Subordinate Judge may in the case of Union Board Elections direct any Court Subordinate to him to hold the enquiry."

The question is whether the words "to hold the enquiry" can be taken to cover the conclusion of an enquiry which has been initiated in the higher Court. I have been referred to *Kumaraswami Reddiar* v. *Subbaraya Reddiar*(1) as authority to the contrary. That was a case which was decided under section 13 of the Madras Civil Courts Act, III of 1873, which enables the District Judge to refer any appeals from the decrees and orders of District Munsifs, preferred in the District Court, to any Subordinate Judge within the District. Following certain decisions under section 25 of the Civil Procedure Code of 1882 and under section 6 of Act VIII of 1859 it was held that there was no such power in the case of

(1) (1900) I.L.R., 23 Mad., 314.

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a part-heard appeal. So far as the Civil Procedure Code is concerned the introduction of the words "at any stage" into the present section 24, which corresponds to the old section 25, makes this decision no longer good law and, as has been pointed out in *Palanisami Cowndan* v. *Thondama Cowndan*(1) it was never the law applicable to the trial of suits, inasmuch as Order XVIII, rule 52, makes it clear that a suit may be transferred even when part-heard. The argument has been used that rule 6 of the rules for the conduct of enquiries, which provides that every election petition shall be enquired into as nearly as may be in accordance with the procedure applicable under the Civil Procedure Code of 1908 to the trial of suits, attracts the provisions of section 24. I think it may at least be said that on the analogy presented by section 24, the transfer, after part hearing, of an enquiry of this nature, which resembles in all essential respects a suit, would be permissible. In *Zamindar of Bodokimidi* v. *Kumar Lahiri*(2) the question arose whether the transfer of a suit by the Agent to the Governor in Ganjām to the Special Assistant Agent, under the Agency Rules, after he had partly heard it, was within his competence. The phrase used by the rule in question was

> "may refer any suit for the decision of the Divisional Assistant"

and it was decided that although the words "at any stage" occurring in section 24 of the Civil Procedure Code were not to be found in the rule, yet there was no ground for limiting the Agent's power of transfer to suits in which no proceedings were taken at all before they were transferred. KRISHNAN, J., pointed out that

> "the rule did not in terms restrict the power of transfer to a stage before the first hearing"

(1) (1903) I.L.R., 26 Mad., 595. (2) (1918) M.W.N., 772.

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and this observation is as pertinent to the present case as it was to that one. Again in *Alagu Ambalam* v. *Emperor*(1) the power of a District Magistrate to withdraw an appeal from a Subordinate Court was considered, and it was held that there was nothing in the Code of Criminal Procedure to limit the power of withdrawal in such a way, for instance, as to exclude from it part-heard cases. Applying the principle of these decisions to the present case I consider that there is nothing in the rules which incapacitated the District Judge from taking the course which he adopted. It may be further pointed out that the objection is of a technical character, that there is nothing to show that it in any manner prejudiced the petitioner, and that he failed to take any objection to it before the lower Court. I accordingly find no substance in this point.

It is next said that under rule 3 of the same rules

"if any candidate claims a declaration that he himself or any other candidate has been duly elected he shall join as respondents to his petition all other candidates who were nominated for the election but had not withdrawn before the polling."

Admittedly the third candidate, Alagapiran Ayyangar, was not joined in this petition and notwithstanding the omission the learned District Munsif has given a declaration, as prayed, that the respondent has been properly elected. It must be found accordingly that there was a breach of the terms of rule 3 and the question I have to consider is whether in revision this Court should interfere and set aside the order. I am not impressed by the argument that it was not a matter for the petitioner to raise. If any rule has been broken the petitioner may certainly take advantage of the fact and endeavour to get a decision passed in favour of his

(1) (1908) I.L.R., 31 Mad., 277.

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opponent set aside. But there is in the first place the circumstance that the third candidate obtained not a single vote in his favour and did not himself prefer any objection before the lower Court. It is fairly certain therefore that had he been impleaded, the outcome of the proceedings would not have been different. Added to this, no objection was raised by the petitioner before the lower Court and I think, proceeding on the analogy afforded by Order I, rule 13 read with section 99, Civil Procedure Code, he should not, except in unusual circumstances, be allowed to press it in revision. As I have said, the election took place so far back as 27th May 1925, more than 18 months ago, and some substantial grounds not unconnected with the merits of the case should be put forward for further interference. I do not think that this objection is otherwise than a formal one and I therefore refuse to allow it.

The remaining point, in which also I see no substance, is that the persons who seem to have impersonated voters Nos. 26 and 30 were not challenged at the time of the election and therefore the evidence relating to the invalidity of these votes cannot be received. No provision has been shown me according to which this objection can be sustained and I think it is quite clear that irregularities of this kind, although not brought to light at the time of election, can be enquired into and acted upon under the rules.

The Civil Revision Petition fails on all points and is dismissed with costs.

N.R

APPELLATE CRIMINAL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

1926, April 6.

RAJA RAO *alias* VIDIACHAR (COUNTER-PETITIONER), PETITIONER,

v.

KING-EMPEROR, RESPONDENT. *

Criminal Procedure Code, 1898, *sec.* 476—*Nature of enquiry under.*

In a proceeding under section 476 of the Criminal Procedure Code, the nature, method and extent of the preliminary enquiry being at the discretion of the Court holding it, the enquiry need not be such as to satisfy the Court that an offence has actually been committed, the Court only having to decide (*a*) whether an offence of the kind contemplated by the section appears to have been committed and (*b*) whether in the interests of justice it should be further enquired into.

Abdul Ghafur v. *Raza Hussain,* (1912) I.L.R., 34 All., 257, approved.

Ganeshvar Paharaj v. *King-Emperor,* (1921) 6 Patna L.J., 146, dissented from.

In re Perumalla Venkata Subbiah, (1923) 44 M.L.J., 74, dissented from.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the orders of the Court of the District Magistrate of Coimbatore in Criminal Appeals Nos. 18 and 19 of 1925 against the orders of the Court of the Stationary Second-class Magistrate of Dhārāpuram in M.C. Nos. 5 and 6 of 1925 respectively.

K. S. Jayarama Ayyar and *P. J. Kuppana Rao* for the petitioners.

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

* Criminal Revision Case No. 711 of 1925.

JUDGMENT.

WALLER, J.—The petitioners seek to have revised the order of the District Magistrate, Coimbatore, dismissing their appeals under section 476-B, Criminal Procedure Code. They were witnesses for the Crown in C.C. No. 134 of 1925 on the file of the Sub-Magistrate, Dhārāpuram.

That case ended in the discharge of the accused. The Sub-Magistrate held a preliminary enquiry under section 476, Criminal Procedure Code, and ordered complaints to be filed against the petitioners before the First-class Magistrate at Erode.

Mr. Jayarama Ayyar's main ground of complaint is that his clients were not allowed to cross-examine the witnesses who gave evidence against them at the preliminary enquiry. He conceded that a Magistrate is under no necessity to hold any enquiry at all, but contends that, if he does decide to enquire, the enquiry must be what some of the decisions on the point describe as a "real enquiry." By that expression is, I understand, meant an enquiry at which the future accused is entitled to be present, to cross-examine the witnesses against him and even—vide *Ganeshwar Paharaj* v. *King-Emperor*(1)—to produce evidence in his defence. I venture to doubt whether anything of the sort was intended by the legislature. What a Court has to decide under section 476 is, (*a*) whether an offence of the kind contemplated appears to have been committed; and (*b*) whether it is expedient in the interests of justice that it should be further enquired into. In order to arrive at a decision, the Court may, if it thinks fit, hold such preliminary enquiry as it considers necessary. The nature, method and extent of the preliminary

(1) (1921) 6 Patna L.J., 146.

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enquiry are, it seems to me, entirely at its discretion. The enquiry need not be such as to satisfy the Court that an offence actually has been committed, but merely that an offence appears to have been committed. What Mr. Jayarama Ayyar asks for, and some of the rulings quoted grant, is the equivalent of a full dress trial, which cannot, I think, have been in the mind of the legislature.

This is the view taken in *Abdul Ghafur* v. *Raza Hussain*(1). Other Allahabad cases have been cited to the contrary effect, but they have not considered the above ruling and none of them appears in the authorized reports. The latest Madras decision is reported in *Perumalla Venkata Subbiah, In re*(2), where it was held that, in the particular circumstances, the party should have been given an opportunity to cross-examine the witnesses against him. With great respect I prefer the Allahabad view above referred to. I cannot believe that the law intends that a Court which has complete discretion to refuse to hold any enquiry at all must, if it holds an enquiry, issue notice to the party and give him the equivalent of a full dress trial.

The enquiry that many of the rulings prescribe seems to me to go far beyond the essential requirements of section 476. As I have pointed out above, it is not necessary to find anything more than that an offence appears to have been committed, which ought to be enquired into further. I think that Mr. Jayarama Ayyar's first objection is groundless. His final request shows the complete undesirability of the procedure which he has been advocating. He asks for a transfer of the cases outside Coimbatore District on the ground that the District Magistrate has expressed a strong opinion on the merits. He has no legitimate cause for

(1) (1912) I.L.R., 34 All., 267. (2) (1923) 44 M.L.J., 74.

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complaint. The appeals were argued on the merits at great length. Petitioners invited the opinion of the District Magistrate and cannot complain when they have been given what they asked for. If the correct procedure under section 476 were that advocated by Mr. Jayarama Ayyar a discussion of, and decision on, the merits would be inevitable in every case. My own view is that the preliminary enquiry under that section should be of a nature merely to satisfy the Court that an offence "appears" to have been committed. Nothing more is necessary and a long discussion of a decision on the merits is as undesirable as it is unnecessary.

I see no reason to suppose that the Magistrate before whom the complaints have been presented has been influenced by the opinion of the District Magistrate. The petitions are dismissed.

DEVADOSS, J.—I agree. — DEVADOSS, J.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Curgenven.

KANAGAMMAL (PETITIONER) PETITIONER,

v.

PANDARA NADAR (COUNTER-PETITIONER), RESPONDENT.*

1926 November 2.

Criminal Procedure Code (Act V of 1898), sec. 488—Maintenance Order—Duration of—Cancellation by Court—Wife returning to live with husband—if order automatically cancelled.

The general principle of law that an order whose term is not fixed, and whose currency is not made expressly dependent upon the continued existence of some circumstance or set of circumstances, remains in force until it is cancelled, is, *prima facie*, applicable to maintenance orders passed under section 488 of the Criminal Procedure Code. The husband may, on proof

* Criminal Revision Case No. 250 of 1926.

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of circumstances specified in section 488 (5) or section 499, obtain the cancellation or modification of the original order, as the case may be; and until he does that, the original order must be deemed to be still in force. The mere fact that a wife has returned to live with her husband will not bring the order to an end automatically, and on her separating from him again, she can enforce it. *Shah Abu Ilyas* v. *Ulfat Bibi* (1897) I.L.R., 19 All., 50 and *Parul Bala Debi* v. *Satish Chandra Bhattacharjee* (1923) 75 I.C., 529, referred to. *Phul Kali* v. *Harnam* (1888), 8 A.W.N. 210, 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 Subdivisional Magistrate of Tuticorin, dated 29th September 1925, in M.C. No. 26 of 1925.

P. N. Appuswami Ayyar and *P. R. Srinivasan* for petitioner.

V. Rajagopala Achari for respondent.

Public Prosecutor for the Crown.

JUDGMENT.

In 1921 the petitioner applied for and obtained an order against her husband, the counter-petitioner, under section 488, Code of Criminal Procedure, for the payment of maintenance for herself and her daughter at the rate of Rs. 10 per mensem. Subsequently, during the years 1922–23, she returned to the counter-petitioner and lived with him, bearing him another child. She then left him again and in 1924 applied to execute the maintenance order, but her petition was dismissed. Then she came up to this Court in revision (Criminal Revision Case No. 52 of 1925) and JACKSON, J., cancelled the Subdivisional Magistrate's order rejecting her application, leaving it to him either to give her arrears under the old order or, if it was found that the order was no longer in existence, to let her file a fresh application. Accordingly on 22nd August 1925 she filed a petition

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for eleven months' arrears of maintenance up to that date. The learned Subdivisional Magistrate, in the order which it is now sought to revise, held that the reconciliation between husband and wife had brought the old order to an end automatically so that it lay on the petitioner to adduce further proof that she was entitled to maintenance. The point now arising for decision therefore is whether the original order granting maintenance may be deemed to be still in existence.

It is a general principle of law that an order whose term is not fixed, and whose currency is not made expressly dependent upon the continued existence of some circumstance or set of circumstances, remains in force until it is cancelled; and *prima facie*, this rule applies to maintenance orders passed under section 488, Code of Criminal Procedure; sub-section (5) of that section provides that in certain specified circumstances, where a wife is living in adultery, where without sufficient reason she refuses to live with her husband, or where the parties are living separately by mutual consent, the Magistrate shall cancel the order. It is also open to the Court, under section 489, to make an alteration in the allowances on proof of a change in the wife's circumstances. In such cases, it will be for the counter-petitioner to obtain either the cancellation or the modification of the original order, and until he does that, the original order must be deemed to be still in force. The mere fact, for instance, that a wife is living in adultery, will not bring the order to an end automatically. If it did so there would be no need for the Court to cancel it. And similarly the mere fact that a wife has returned to live with her husband will not have this effect, although it is true that the Code makes no provision for its cancellation upon such an event occurring.

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Nor does it make any provision, to take another example, for cancelling the order upon proof that the husband has divorced his wife. A case of the latter kind came before the Allahabad High Court in *Shah Abu Ilyas* v. *Ulfat Bibi*(1), and it was held to be the duty of the Court, if the plea of divorce were established, to decline to enforce the order which it had discretion to do under section 490, Code of Criminal Procedure, and so, if a wife returns to live with her husband, it would be open to the Court to decline to enforce the order, whether or not it would have the power, in the absence of any statutory provision, to cancel it. The order would remain in suspense. This was the view taken in *Parul Bala Debi* v. *Satish Chandra Bhattacharjee* (2) where a wife had temporarily returned to her husband and had left him again.

"A mere temporary stay of this kind, though it may have suspended the operation of the order, had not the effect of cancelling it in the way that it could be cancelled under section 488 (5) of the Code."

A contrary view seem to have been taken by STRAIGHT, J., in the case referred to by the learned Joint Magistrate *Phul Kali* v. *Harnam*(3), viz., that upon a wife voluntarily returning to her husband the order would permanently "become ineffectual," notwithstanding that at the date of the subsequent proceedings, she had left him again, but I think with respect, that this is not the correct position.

It was accordingly open to the petitioner to apply for the execution of the order, as still subsisting. The counter-petitioner might then have resisted the application upon any of the grounds specified in sub-section (5). To enable this course now to be adopted, I set aside the Subdivisional Magistrate's order, dated 29th September

(1) (1897) I.L.R., 19 All., 50. (2) (1923) 75 I.C., 529.
(3) (1888) 8 A.W.N., 210.

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1925, and direct him to restore to file the petition, dated 22nd August 1925, and to dispose of it in the light of the foregoing observations. If the counter-petitioner fails to show that the petitioner is now disentitled to maintenance under sub-section (5), it will be for the court to consider with effect from what date the payment of arrears should be enforced. Under the second proviso to section 488 (3) the court's power extends to the recovery of arrears falling due over a period of one year next before the date of application, that date being 22nd August 1925, but it does not follow that the power should be fully exercised, and I observe that the petitioner herself only asked for the recovery of eleven months' arrears.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

1926, December 2.

MIR ANWARRUDIN (PETITIONER), COMPLAINANT IN BOTH CASES,

v.

FATHIM BAI ABIDIN AND ANOTHER (ACCUSED), RESPONDENTS.*

Indian Penal Code, sec. 499, exception 9—Statements by a lawyer acting in course of professional duties prima facie defamatory—Necessary in interests of client—Presumption of good faith—Proof of malice, overrides presumption—Absolute privilege, if available in India.

When a lawyer is acting in the course of his professional duties and is thus compelled, to put forward everything that may assist his client, good faith is to be presumed, and bad faith is not to be presumed merely because the statement is *prima facie* defamatory, but there must be some independent allegation and proof of private malice from which, in the circumstances of the case, the Court considers itself justified in

* Criminal Revision Case No. 615 of 1926 and No. 700 of 1926.

inferring, that the statement was made, not because it was necessary in the interests of the client, but that the occasion was wantonly seized as an opportunity to vent private malice. Even the presence of malice will not override the presumption of good faith, when the statement made was obviously necessary in the interests of the client, and where the lawyer could not omit to make it without gravely imperilling the interests of his client, and would, in fact, not be discharging his duty to his client unless he made it.

In re Nagarji Trikamji, (1895) I.L.R., 19 Bom., 341, *Nikunja Behari Sen* v. *Harendra Chandra Sinha*, (1914) I.L.R., 41 Calc., 514, *Niren Narayan Singh* v. *Emperor*, (1927) 27 Cr.L.J., 1090, *McDonnel* v. *Emperor*, (1927) 27 Cr.L.J., 321, followed.

Dubitante: The Indian law on the subject being found within the four corners of the Indian Penal Code, whether a complaint for defamation against a lawyer for matters uttered in Court in the course of his professional duties cannot be entertained. *Sullivan* v. *Norton*, (1887) I.L.R., 10 Mad., 28 (F.B.), questioned. *Tiruvengada Mudali* v. *Tirupurasundara Ammal*, (1926) I.L.R., 49 Mad., 728 (F.B.), referred to.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, 1891, praying the High Court to revise the orders of the Court of the Chief Presidency Magistrate, Egmore, dated 22nd July 1926, and 29th July 1926, and passed in Application No. 2618 of 1926, and the orders of the said Court, dated 30th July 1926, 12th August 1926, 13th August 1926, and 24th August 1926, and passed in Application No. 1770 of 1926.

The facts necessary for this report appear in the judgment.

Petitioner in person.

K. P. Krishna Menon for Crown Prosecutor for the Crown.

A. S. Natarajan for respondent in Criminal Revision Case No. 615 of 1926.

V. L. Ethiraj for respondent in Criminal Revision Case No. 700 of 1926.

JUDGMENT.

These are two petitions to revise the orders of the Chief Presidency Magistrate dismissing under section 203 of the Criminal Procedure Code two complaints by the petitioner for defamation. The counter-petitioner in Criminal Revision Case No. 700 is a vakil of this Court. The petitioner, who is an advocate of this Court, was prosecuting in his own name two cases of defamation, one against Murad Ali and one against Fathim Bai Abidin the statements complained of being both of the same nature, to the effect that the complainant had infected his wife with venereal disease. In the course of his argument for the defence in Murad Ali's case, his vakil, the counter-petitioner in case No. 700, made an oral statement that the defamatory statement was in substance true and had been set out as a fact in a judgment of this Court reported in *In the matter of an Advocate*(1). In the course of his argument for the defence in the other case, the same vakil put in to the Magistrate written notes of defence arguments which contained the same statement. The petitioner charged the vakil for defamation on the footing of this oral statement and these written notes of arguments, and charged also the accused in the "notes of argument" case for defamation in that she had instructed her vakil to publish in his argument for the defence the defamatory matter. These complaints have been dismissed and the petitioner comes up in revision.

The second case No. 615 of 1926 may be shortly disposed of. There is no evidence to show what the instructions of the lady to her vakil were and this Court cannot assume against her that she instructed him in the definite terms used by the vakil in his argument.

(1) (1923) I.L.R., 46 Mad., 903.

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That complaint was therefore rightly dismissed and I dismiss Criminal R.C. No. 615.

As to case No. 700, the Magistrate has dismissed that complaint mainly on his view of the law as it stands at present that a complaint for defamation against a lawyer for matters uttered in Court in the course of his professional duties cannot be entertained. In an early Full Bench case in this Court *Sullivan* v. *Norton*(1) it was laid down that such utterances by a lawyer in the course of his professional duties and required by his duty to his client are absolutely privileged. This Full Bench ruling has not been overruled, but, undoubtedly, another Full Bench decision in *Tiruvengada Mudali* v. *Tirpurasundari Ammal*(2) though not referring to this Full Bench case, had doubted the correctness of the application to Criminal Law in India of the English common law doctrine of absolute privilege. If I may say so with respect, I share that doubt and am of opinion that the Indian Law on the subject is to be found within the four corners of the Indian Penal Code. I am, however, sitting as a single Judge, bound by the 10 Madras Full Bench case, which has not been overruled, and have two alternative courses open to me, either to dismiss the petition on the ground that it is covered by the Full Bench case or to refer the Full Bench case for reconsideration. The latter I am not prepared to do in this case because it appears to me that, even on the interpretation of the Indian law of defamation as set out by various High Courts in reported rulings, the present complaint is not maintainable. There is a course of such decisions which, interpreting the ninth exception to section 499, Indian Penal Code, definitely lays down that, when a lawyer is acting in the course of his professional duties

(1) (1887) I.L.R., 10 Mad., 28. (2) (1926) I.L.R., 49 Mad., 728.

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nd is thus compelled, subject to the disciplinary action f the Court, to put forward everything which may ssist his client, good faith is to be presumed, and bad aith is not to be assumed merely because the statement *prima facie* defamatory, but that there must be some ndependent allegation and proof of private malice from hich in the circumstances of the case the Court onsiders itself justified in inferring that the statement as not made because it was necessary in the interests f the client but that the occasion was wantonly seized s an opportunity to vent private malice. This is the eneral principle to be gathered from the decisions of e High Court of Bombay, *In re Nagarji Trikamji*(1) f Calcutta, *Nikunja Behari Sen* v. *Harendra Chandra inha*(2), of Patna, *Niren Narayan Singh* v. *Emperor f Burma*(3), and *McDonnel* v. *Emperor*(4). I entirely gree with this exposition of the law.

I take it that this principle implies and carries with this other principle, that even the presence of malice ill not override the presumption of good faith, where e statement made was obviously necessary in the terests of the client, and where the lawyer could not nit to make it without gravely imperilling the interests his client and would in fact not be discharging his ity to his client unless he made it; that is, that, even ough some private malice is gratified by the publition of the statement, if such publication was peratively called for in the interests of his duty to s client, the presence of such malice will not negative e presumption of good faith.

That principle seems to me to apply directly to the esent case. The petitioner complains that the agistrate has not heard all the evidence that he was

(1) (1895) I.L.R., 19 Bom. 341. (2) (1914) I.L.R., 41 Calc., 514.
(3) (1927) 27 Cr. L.J., 1090. (4) (1927) 27 Cr.L.J., 321.

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prepared to adduce on the matter of independent malice due to personal enmity. I am prepared to assume that to be so. Even so, if counter-petitioner's duty to his client imperatively demanded that the statement should be made, good faith is present, sufficient good faith to remove the offence out of the category of defamation. That the counter-petitioner's duty to his client imperatively demanded that the statement should be made, seems to me unquestionable. The truth of the statement complained of in the cases in which he was appearing for the defence was an essential element of the defence, and the vakil would have been gravely lacking in his duty to his client if, when he had the truth of that statement definitely set out in a public Law Report, he omitted to bring that to the notice of the Court before whom he was arguing. It has of course been pointed out that the Law Report merely deals with the "matter of Mr. A." without setting out the present petitioner's name in full. But the petitioner has never argued that the report does not refer to him, nor in the circumstances of the case was such an argument possible. The case was fully reported in the newspapers at the time and no Court could or would have listened to an argument that the Law Report did not refer to the present petitioner. I am clearly of opinion therefore that the publications complained of were imperatively necessary for the conduct of the defence in the cases in which the counter-petitioner was appearing professionally and that therefore they were made in good faith and cannot be made the subject of a charge for defamation. I am therefore not prepared to interfere, and dismiss this petition also.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Waller and Mr. Justice Madhavan Nayar.

SUNDARESWARA SRAUTHIGAL, PETITIONER—FIRST ACCUSED,

1927, March 4.

v.

KING-EMPEROR, RESPONDENT.*

Indian Penal Code, sec. 341—Agraharam road—Vested in a municipality—Public street—All members of public entitled to equal rights—Obstruction to lawful user—Wrongful restraint—Conviction for, if proper.

All members of the public have equal rights in public streets vested in a municipality, and one section of the community cannot interdict another section of the community from the lawful use of the public streets.

Where the accused, a Brahman, obstructed the complainant an Izhuva convert to Arya Samaj, from using a road in an *agraharam*, the road in question being vested in a municipality, *held*, that he had no right to so obstruct, and that he was rightly convicted under section 341, Indian Penal Code.

Sadagopa Chariar v. *Krishnamoorthy Rao*, (1907) I.L.R., 30 Mad., 185 (P.C.), *Manzur Hasan* v. *Muhammad Zaman* (1925) I.L.R., 47 All., 151 (P.C.), *Muchumarri Malliah* v. *Yerravulu Ganganna*, (1926) 94 I.C., 226, followed.

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 Palghat Division in Calendar Case No. 28 of 1926.

T. R. Ramachandra Ayyar, P. S. Narayanaswami Ayyar and *K. R. Narayanaswami Ayyar* for the petitioner.

Public Prosecutor for the Crown.

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* Criminal Revision Case No. 603 of 1926.

SUNDA-RESWARA SRAUTHIGAL v. KING-EMPEROR.

JUDGMENT.

The complainant (P.W. 1) an Izhuva convert to Arya Samaj, who is employed as a clerk in the District Registrar's Office, Palghat, was sent by the District Registrar to Govindarajapuram gramam to transact some official business. While he was returning after finishing his work he was stopped in the middle of the road at New Kalpathy by the petitioner, a Brahman, and was taken to task for passing along the agraharam road. The petitioner was then charged before the Subdivisional Magistrate of Palghat with the offence of wrongful restraint under section 341 of the Indian Penal Code. On the evidence the Subdivisional Magistrate found that P.W. 1 went to Govindarajapuram to execute the orders of the District Registrar, that there is no evidence to support the suggestion of the defence that he went along the Kalpathy road in order to insult and annoy the Kalpathy Brahmans, that the street along which he passed is a public street and that the charge of wrongful restraint brought against the petitioner was proved to the hilt. He was accordingly convicted of an offence under section 341 of the Indian Penal Code and sentenced to pay a fine of Rs. 30, or in default to undergo simple imprisonment for a week. He was also ordered to execute a bond with sureties for keeping the peace for a period of one year. The petitioner has filed this criminal revision petition against the above conviction and sentence.

The main facts of the case and the conclusions of the learned Subdivisional Magistrate on the evidence except as regards the *bona fides* of the petitioner are not disputed before us. What is mainly argued is that the complainant has not proved that he has a right to proceed along the street in question and that, even if he has proved that he has such a right, the Subdivisional

SUNDA-RESWARA SRAUTHIGAL v. KING-EMPEROR.

Magistrate should not have convicted the petitioner as he obstructed the complainant believing, in good faith, that he had a lawful right to do so. A judgment in Criminal Appeal No. 12 of 1879, on the file of the Sessions Court of South Malabar and various orders of the Government which could not be filed before the Sub-divisional Magistrate owing to his refusal to grant an adjournment have been brought to our notice by Mr. Ramachandra Ayyar to show that Izhuvas and other members of the theendal caste have no right to use the agraharam street. These documents do not afford us much help. Except scanty references to a custom which would confine the use of these streets to Brahmans and Nayars, such abundant proof as one would expect in support of a custom has not been put forward in this case.

Confining ourselves to the evidence before us we have no doubt that the conviction should be upheld. It is amply proved that the road in question is vested in the Palghat Municipality, that it is subject to its control and that the municipality spends public money for its maintenance (see the evidence of D.W. 1, a Brahman, First-grade Pleader, residing in Govindarajapuram). He also says "Dr. Krishnan (a Tiyya) comes to agraharam. . . . I have invited Dr. Krishnan to my house and I did no purification ceremony." When the streets are public streets vested in a municipality all members of the public have equal rights. Decisions of this Court and of the Privy Council have upheld such rights, see *Sadagopa Chariar* v. *Krishnamoorthy Rao* (1). We have not been referred to any case upholding the right of one section of the community to interdict another section of the community from the lawful use of the public street.

(1) (1907) I.L.R., 30 Mad., 185 (P.C.).

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In a recent decision of the Privy Council in *Manzur Hasan* v. *Muhammad Zaman*(1), it has been laid down in clear terms that any member of the public has got a right to use a public street in any lawful manner. As pointed out by KRISHNAN and ODGERS, JJ., in *Muchumarri Malliah* v. *Yerravulu Ganganna*(2), this was the view taken by the Madras High Court, and the Privy Council has accepted the Madras view as correct. In these circumstances, we must hold that P.W. 1 has a right to use the Kalpathy road and that the petitioner has no right to obstruct him from doing so.

As regards the question of his *bona fides*, the facts show that the petitioner cannot claim good faith to justify his conduct. Evidence shows that there was recently a case against P.W. 1 for passing along the Kalpathy road and he was acquitted and that the present petitioner was in Court during the trial of the case. Having knowledge of that case, if he was actuated by *bona fides*, the petitioner should not have now obstructed P.W. 1 from proceeding along the road. The petitioner was recently convicted of affray in the Kalpathy road. The Magistrate notes that the punishment awarded in that case has had no effect in deterring him from committing offences involving a breach of the peace. He has now been convicted under section 341 of the Indian Penal Code. In these circumstances, we think that his conviction and sentence and also the order directing him to execute a bond for keeping the peace should stand. This Criminal Revision Petition is dismissed.

B.C.S.

(1) (1925) I.L.R., 47 All., 151 (P.C.). (2) (1926) 94 I.C., 226.

APPELLATE CIVIL—FULL BENCH.

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

1927, January 5.

BHAVIRISETTI LAKSHMINARASIMHAM (PETITIONER), APPELLANT,

v.

VETCHA LAKSHMINARASIMHAM AND FOUR OTHERS (RESPONDENTS), RESPONDENTS. *

Civil Procedure Code (Act V of 1908), sec. 64 and O. XXI, r. 53 (6)—Attachment of a decree, when complete and effective—Notice to judgment-debtor under rule 53 (6), whether necessary for completion of attachment—Service of notice on Court which passed the decree, necessary for completion of attachment—Bona fide *payment by judgment-debtor without notice of order of attachment, whether valid.*

Notice under Order XXI, rule 53 (6), Civil Procedure Code, to the judgment-debtor of an attached decree, is not necessary for the purpose of completing the attachment of the decree; the attachment is effectuated by the service of notice on the Court which passed the decree.

Rule 53 (6) merely provides, in cases of *bona fide* transactions by judgment-debtors, an exception to the general rule embodied in section 64, which invalidates alienations, payments and adjustments as against claims enforceable under the attachment.

If, therefore, the judgment-debtor of the attached decree had no notice of the order of attachment at the time when the payment and adjustment pleaded were made, then even though the attachment had already become complete and effective, the payment and adjustment should be recognized by the Court.

APPEAL against the order of the Subordinate Judge of Guntūr, in Appeal No. 3 of 1924 preferred against the order of the Additional District Munsif of Guntūr, in E.P. No. 62 of 1922 in O.S. No. 327 of 1921.

* Appeal against Appellate Order No. 102 of 1924.

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The material facts appear from the following Order of Reference to a Full Bench passed by WALLACE and MADHAVAN NAYAR, JJ.:—

ORDER OF REFERENCE TO A FULL BENCH.

"The question for decision in this appeal is simple, but the answer is difficult. The question is, when does an attachment under Order XXI, rule 53, Civil Procedure Code, by a Court of a decree passed by another Court become operative and bring the provisions of section 64, Civil Procedure Code, into force? Rule 53 is so loosely drafted that we can see no less than six possible answers to this quetion: (1) when the attaching Court signs the notice under rule 53 (1) (*b*); (2) when it actually issues that notice; (3) when that notice reaches the Court which passed the decree; (4) when the notice prescribed by sub-section (6) to be given to the judgment-debtor is signed; (5) when that notice is issued, and (6) when that notice is served on the judgment-debtor or given to him. Answers (1) and (4) may be dismissed at once. It has never been held by this Court and would be contrary to common sense to hold, that a mere signing without promulgation or issue of the order or notice can operate to effect an attachment. Answer No. (2) also seems opposed to common sense. If the Court which passed the decree is to be prohibited from doing something, the natural commencement of the prohibition would be the time when the prohibition reaches it and it is aware of the prohibition. Until it is aware of the prohibition there is no reason why it should stay its hand. As to No. (3), the main question is whether the rule contemplates that the order of attachment does not become operative until the notice spoken of in sub-section (6) should also have gone out, that is, whether the attachment is effected by the receipt of a notice under sub-section (1) (*b*) by the Court which passed the decree *plus* the giving of a notice under sub-section (6) to the judgment-debtor. If the answer is "no" then answers Nos. (5) and (6) do not arise. If the answer is "yes" then they have to be further considered. We shall, therefore, direct our attention first to this point.

The language of the rule is, the attachment shall be made by the issue to the Court which passed the attached decree "of a notice by the Court which passed the decree sought to be executed," and textually implies that when that notice is issued; (or is, as we hold, received by the Court which passed the

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attached decree) the attachment is "made" that is, takes effect. But there is a good deal to be said for the argument that the rule has to be read as a whole, and that when the rule also prescribes other necessary proceedings to be carried out, these also have to be carried out before the attachment takes effect. Rule 54, for example, says that the attachment shall be made by an order prohibiting the judgment-debtor from doing so and so, and it also goes on to say that that order "shall be proclaimed," and it has been held, and, if we may say so with respect, rightly held, by this Court that until the order has been so proclaimed the attachment does not take effect. (*Ramanayakudu* v. *Boya Pedda Basappa*(1), which has been approved in a Full Bench ruling in (*Sinnappan* v. *Arunachalam Pillai*(2)). In the Division Bench ruling, the learned Judges say "We think that, in order to make the order prohibitive, the person prohibited must have the opportunity afforded by the publication mentioned in clause (2) of rule 54 of knowing that he is so prohibited."—[*Note.*—We have looked up the original record and find that the word "application" as printed is a misprint for "publication".] So that, before the attachment under section 54 becomes operative, the prohibition must have been brought to the notice of the person prohibited.

This principle, will not, however, carry us further than this, that when it is laid down that an attachment has to be made by a prohibitory order, that attachment takes effect from the time when that order is brought to the notice of the person prohibited. Under rule 53 the attachment is made by a prohibitory order to the Court which passed the decree and it would not come into effect therefore until that order has reached the Court. But the rule does not go further and say that the notice to the judgment-debtor under sub-section (6) is a part of the machinery by which the attachment is to be made. The sub-section speaks of a separate notice for which a special application *ad hoc* is to be made and which is not said to be requisite before the attachment is made. A point worth noting is that though sub-section (6) was a new introduction into the Code of 1908 no *form* of notice under it has been added to the forms at the end of the first schedule. The essence of the attachment under rule 53 appears to be the prohibitory order to the Court which passed the decree, and not any notice either to the decree-holder or to the judgment-debtor of the attached decree, and the Court which passed the

(1) (1919) I.L.R., 42 Mad., 565. (2) (1919) I.L.R., 42 Mad., 844 (F.B.).

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decree, on receiving the prohibitory order, is bound to refuse to execute the decree for the benefit of the decree-holder of the attached decree. On receipt of that prohibitory order by the Court which passed the decree, the attachment takes effect, and it follows from section 64 that then no payment made by the judgment-debtor of the attached decree to the decree-holder shall be recognized as against the claims of the attaching decree-holder under the attached decree. In this view sub-section (6) would seem to be not only superfluous but misleading, and this is a strong argument against it.

The language of the sub-section certainly warrants a contention that, if payments and adjustments of the attached decree made by the judgment-debtor *after* receipt of the notice under it shall not be recognized by any Court, then such payments or adjustments made *before* the receipt of the notice should be recognized. But such an interpretation would obviously conflict with section 64, if the attachment is effected as soon as the notice under sub-section (1) is served on the Court which passed the decree. It may be that sub-section (6) which is a new sub-section, was introduced with reference to rule 2 of Order XXI. See *Gopal Nanashet* v. *Joharimal*; and *Dada Balshet* v. *Joharimal*(1). If the sub-section were not there, then the judgment-debtor of an attached decree making a payment at any time under the attached decree could claim that that payment should be recorded and certified under rule 2 and therefore should be recognized by the Court.

On the other hand, to hold that the attachment has no effect until the notice in sub-section (6) had been served on the judgment-debtor of the attached decree, would imply, first, that under rule 53, clause 2, the Court which passed the decree could go on executing it for the benefit of the attaching decree-holder although there was no attachment in force, and secondly, that the Court which passed the decree, which had received a prohibitory order that it was not to allow execution of the decree, would nevertheless be bound to execute it unless and until a notice under sub-section (6) had been given to the judgment-debtor. These are absurd positions for the Court to be put in. It is argued that if the judgment-debtor of the attached decree comes to the Court which passed the decree and endeavours to make a payment under the decree to his own

(1) (1892) I.L.R., 16 Bom., 522.

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decree-holder the Court itself would bring the attachment to his notice, and therefore he would have had notice of it. But that would not be a compliance with sub-section (6) because the notice there has to be one made on an application by the attaching decree-holder. Further, sub-section (6) does not say that any notice is to go to the decree-holder of the attached decree, and if he applies to execute his decree, the Court, which *ex hypothesi* has received an order prohibiting it from executing, nevertheless, would have to execute it, unless and until it is informed that the attaching decree-holder has taken out in the Court making the attachment the notice under sub-section (6). That again seems an absurd position. Again the decree-holder and the judgment-debtor of the attached decree might go on adjusting the decree out of Court. The decree-holder hearing that there has been an attachment and therefore that he is not going to get any benefit for himself from the decree might even give up his claims under the decree out of Court and declare the decree satisfied, although there was a prohibitory order to the Court which passed the decree directing that the decree shall not be executed. On the other hand, it seems anomalous that a prohibitory order known *ex hypothesi* only to the Court which passed the decree and not to the parties to that decree should operate to bar payments or adjustments of the decree even out of Court, and it has to be admitted that in most other attachments under Order XXI some form of information of the prohibitory order to the party prohibited is provided for.

Of reported rulings directly on the point there are very few in this Court: in fact, we have traced only two and these are directly at variance. In *Kuppuswami Ayyar* v. *Kuppuswami Ayyar*(1) a Bench of this Court has held that a notice under sub-section (6) is not necessary for the effectual completion of the attachment. In *Nagu Reddiyar* v. *Veerappa Mudaliyar*(2) a single Judge deliberately refused to follow that view. We are ourselves inclined to adopt the view in *Kuppuswami Ayyar* v. *Kuppuswami Ayyar*(1) but recognizing that this is a point which must probably arise as an every-day occurrence in executing Courts, we think that it is necessary to refer the matter for the decision of a Full Bench. We accordingly do so, the question referred being, 'Is the notice under rule 53 (6) to the

(1) (1918) 24 M.L.T., 495. (2) (1921) 13 L.W., 34.

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judgment-debtor of the attached decree necessary before the attachment comes into force?' The Full Bench might also suggest, if they think fit, that rule 53 be amended so as to make it plain what it actually means. A notice to the decree-holder of the attached decree would probably meet the case better than a notice to his judgment-debtor."

ON THIS REFERENCE—

B. Somayya for appellant.—The attachment of the decree was effected on 5th January 1922 by service of notice on the Court which passed the decree. The attachment was complete. The judgment-debtor produced a receipt of payment to the decree-holder of the attached decree. The receipt is dated 6th January 1922. The payment or adjustment subsequent to the attachment is invalid under section 64 of the Code. Notice under rule 53 (6) to judgment-debtor is not necessary. Attachment is complete on service of notice on the Court which passed the decree. There was only an adjustment of the decree, not even payment after the attachment. Order XXI, rule 53 (6) only says payment by judgment-debtor after notice to him is bad, and says nothing about payment or adjustment before notice to judgment-debtor but after attachment; it does not say that payments so made after attachment are valid.

Ch. Ragava Rao for respondents.—Attachment is complete only after notice under Order XXI, rule 53 (6) is issued to the judgment-debtor. In any event, a *bona fide* payment by judgment-debtor, without notice to him of the attachment, under rule 53 (6), is valid and binding, notwithstanding the attachment. The principle of the Full Bench decision in *Sinnappan* v. *Arunachalam Pillai*(1) is applicable.

OPINION.

The question referred to the decision of the Full Bench in this case is as follows:

"Is the notice under rule 53 (6) to the judgment-debtor of the attached decree necessary before the attachment comes into force?"

The learned Judges who made the reference have also added,

(1) (1919) I.L.R., 42 Mad., 844 (F.B.)

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"The Full Bench might also suggest, if they think fit, that rule 53 be amended so as to make it plain what it actually means. A notice to the decree-holder of the attached decree would probably meet the case better than a notice to his judgment-debtor."

The question propounded refers to rule 53 (6) of Order XXI of Schedule I, Civil Procedure Code. The learned Judges who have made the reference appear to have thought that there was a conflict of view between the decision in the case of *Kuppuswami Ayyar* v. *Kuppuswami Ayyar*(1) and that in *Nagu Reddiyar* v. *Veerappa Mudaliyar*(2). We do not understand the learned Judge in the latter case to have expressed any opinion with regard to the question of coming into force or completion of the attachment. It seems to us quite clear that that decision was based entirely on the construction of clause 6 of rule 53 of Order XXI, Civil Procedure Code. It is not however possible to agree with the view of ABDUR RAHIM, J., in the former case at page 497 that the words in the said clause "either through the Court or otherwise" refer to payment or adjustment and not to notice. The interpretation placed by the learned Judge on those words is opposed to all cardinal rules of construction. We are satisfied that the provision made in rule 53 (6) is only a special case of the application of a well-known principle of justice and equity intended for the protection of parties to a *bona fide* transaction without notice. Clause 6 above referred to has, in our judgment, nothing whatever to do with the completion or non-completion of the attachment or its coming into force.

Mr. Somayya for the appellant contended before us that clause (6) should be confined to the invalidation of payments and adjustments made by the judgment-debtor

(1) (1918) 24 M.L.T., 495. (2) (1921) 13 L.W., 34.

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under the decree attached after receipt by him of the notice and cannot be held by implication to validate such payments or adjustments made before the receipt of such notice. It is impossible to accede to such a contention. Indeed Mr. Somayya himself shrank from saying that actual payments in cash were not to be protected, but contended that adjustments stood on a different footing. We see no logic in this; provided they were made in good faith and without notice, payments and adjustments must stand or fall together. The necessary implication of the provision in clause 6 of rule 53 is that it is only after the judgment-debtor under the attached decree receives either through Court or otherwise notice of the order of attachment that any payment or adjustment made by him to his decree-holder will not be recognized by the Court and that therefore, if such judgment-debtor should in ignorance of such attachment have made any payment or adjustment, it should be regarded as a payment or adjustment properly made under the decree to the rightful person. No question can in such a case arise with regard to any payments not really made or any adjustments not *bona fide* effected. We are inclined to agree with the view taken by ABDUR RAHIM, J., in *Kuppuswami Ayyar* v. *Kuppuswami Ayyar*(1), that notice to the judgment-debtor of the attached decree under rule 53 (6) is not necessary for the purpose of completing the attachment and that the attachment is complete before any such notice is issued. Rule 53 (1) provides that the attachment of a decree shall be made, if the decree sought to be attached was passed by another Court, then by the issue to such other Court of a notice in the terms hereinafter referred to. There is no room for any doubt or

(1) (1918) 24 M.L.T., 495.

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ambiguity in the language employed. The expression "by the issue to such other Court of a notice" is apt and sufficient to indicate that for the making of the attachment the notice should be to the Court which passed the attached decree. It cannot of course be contended that the moment a mere order of attachment is passed by the Court seeking execution the attachment becomes complete. The Code undoubtedly contemplates in all cases of attachment some kind of service or posting or publication or proclamation for the purpose of effectuating an attachment, and in the case of the attachment of a decree the form of effectuation provided is the service of notice on the Court which passed the attached decree. The decision of the Full Bench in *Sinnappan* v. *Arunachalam Pillai*(1), proceeded on a construction of rule 54 of Order XXI and only held that the proclamation prescribed in clause (2) of the rule was the mode in which the attachment ordered should be effected. The conclusion was based on the collocation of the clauses in the rule and the necessity in every case of the order made being served or promulgated. With reference to rule 53 we are unable to regard the provision in clause (6) for notice as a prerequisite for the completion of the attachment. But though on general principles after completion of the attachment any dealing in regard to the attached property is forbidden, it does not follow that persons who act *bona fide* without notice should in no case be protected. It has been strenuously contended by the learned vakil for the appellant that section 64, Civil Procedure Code, provides that

"when an attachment has been made, . . . any payment to the judgment-debtor of any debt, dividend or other

(1) (1919) I.L.R., 42 Mad., 844 (F.B.).

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moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment."

But the rules in the first schedule of the Procedure Code are under terms of section 121, Civil Procedure Code, made part of the Code itself and it therefore follows that clause (6) of rule 53 merely provides an exception to the general rule embodied in section 64. If, therefore, in the present case it has been found, as it appears to have been, that the judgment-debtor of the attached decree had no notice of the order of attachment at the time when the payment and adjustment pleaded were made, then it follows that even though the attachment had already become complete and effective, the payment and adjustment should be recognized by the Court and the question whether or not the notice provided for in clause (6) is necessary for the attachment being complete or coming into force, does not directly arise. But the question has been referred to our decision and we think that it logically follows from what we have said that the notice to the judgment-debtor referred to in rule 53 (6) of Order XXI, Civil Procedure Code, is not necessary to make the attachment come into force. In the view we have taken, rule 53 (6), Civil Procedure Code, is quite plain nor do we regard it as necessary or useful to suggest the desirability, by any new rule, of providing for notice to the decree-holder of the attached decree, because to do so would only be to afford further time and opportunity for fraudulent dealings with regard to attached decrees.

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Kumaraswami Sastri and Mr. Justice Reilly.

1927, January 20.

TANGILLA NARASIMHA SWAMI, DARMAKARTA OF SRI KODANDA RAMACHANDRA MOORTY (FIRST DEFENDANT), APPELLANT,

v.

MAMIDI VENKATALINGUM AND TWO OTHERS (PLAINTIFF AND SECOND AND THIRD DEFENDANTS), RESPONDENTS.*

Hindu Law—Trusts for public religious purposes—Gift to God—Almighty—Agreement, reciting creation of gift and appointment of trustee and providing for making of a formal document—Necessity for registration of the agreement—Indian Registration Act (XVI of 1908), sec. 17 (2) (v)—Indian Trusts Act (V of 1882), ss. 1 and 5—Gift to the Almighty, whether gift to a living person—Transfer of Property Act (IV of 1882), ss. 5 and 123, applicability of to such gifts.

Where a Hindu executed an agreement, which recited that a person had been constituted trustee and certain lands had been dedicated to God Ramachandra Moorti, and also provided that he would execute a formal conveyance and put him in possession of the lands, whenever the trustee required, and would meantime be accountable for the rents, on a suit instituted by a creditor of the donor to establish his right to attach the property as that of the donor on the ground that no trust or gift was validly created for want of a registered document,

Held, that, as the document was merely one which recorded a past transaction and gave another party a right to call for a formal document, it was exempted from registration under section 17 (2) (*v*) of the Registration Act: *Rajangam Ayyar* v. *Rajangam Ayyar*, (1923) I.L.R., 46 Mad., 373 (P.C.), referred to;

that the document, constituting a trust of property for a public religious purpose, falls within the saving clause of section 1 of the Indian Trusts Act, and that consequently section 5 of the

* Second Appeal No. 71 of 1924.

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Act, which relates to creation of trusts and requires registration of deeds of trust, does not apply to the document;

that a gift to God—Almighty (as in this case), is not a gift to a *living* person within the meaning of the Transfer of Property Act, and that, consequently, section 123, read with section 5 of the Act, does not apply to such a gift, so as to require a registered document for its creation.

Though an idol is considered by a fiction of law a juristic person clothed for some purposes with rights of persons, yet a juristic person is not a living person for all purposes.

Pallayya v. *Ramavadhanulu*, (1903) 13 M.L.J., 364; *Ramalinga Chetty* v. *Sivachidambara Chetty* (1919) I.L.R., 42 Mad., 440; and *Tammireddy* v. *Gangireddy*, (1922) I.L.R., 45 Mad., 281, followed; and the principle of *stare decisis* applied.

SECOND APPEAL against the decree of P. RAMA RAO, Subordinate Judge of Narasapur, in Appellate Suit No. 210 of 1922, preferred against the decree of P. T. JAGANNATHA ACHARI, Principal District Munsif of Narasapur, in Original Suit No. 710 of 1920.

The material facts appear from the judgment of KUMARASWAMI SASTRI, J. The material terms of the agreement, Exhibit I, were as follows:—

(*Agreement, dated 14th January* 1916.)

Agreement for the sale of inam land executed and delivered on the 14th day of January 1916, in favour of one Tengella Narasimhaswami, son of Reddayya, Telaga and resident of Panditavillur, Narasapur Taluk, by Adedepalli Venkataratnam, son of Lakshminarayana of the aforesaid village is as follows:—

The other terms are set out in the judgment of the Full Bench at page 691.

The Second Appeal originally came on for hearing before His Lordship, the CHIEF JUSTICE, who made the following

ORDER OF REFERENCE TO A FULL BENCH:—

I think the most convenient course in this case will be to refer the whole case, which of course turns on the construction

NARASIMHA SWAMI v. VENKATA-LINGUM.

of Exhibit I, to a Full Bench. The appellant relies upon an authority, *Pallayya* v. *Ramavadhanulu*(1), which I confess myself quite unable to understand. Towards the beginning of the judgment the deed is described as a dedication of the land to the idol. In the next paragraph the learned Judges speak of the dedication of the idol and land to the public. Those two expressions seem to me to be quite inconsistent and I think it had better be laid down whether that case is an authority that is to be followed, and an authority for what proposition. In the present case the matter is complicated by the fact that although there is a categorical statement that there has been a grant of the land to the idol, there is also a recital at the beginning that the agreement embodied in the document was an agreement in favour of Narasimhaswami who by the instrument is constituted Dharmakartha. The question will be whether the learned Judge was right in law in holding that Exhibit I was a document which required registration.

ON THIS REFERENCE—

C. Rama Rao for appellant (First defendant).—Exhibit I, though not registered is admissible in evidence. It is an agreement in respect of certain inam lands. It recites a past transaction as to appointment of the first defendant as trustee and endowment of the suit lands for the idol. The trust was already created. A trust in favour of an idol does not require a registered document for its creation. Further this document entitles another person to get a registered document, and so does not itself require to be registered, see Registration Act, section 17 (2) V. The Indian Trusts Act is not applicable to public religious trusts, see section 1 of the Act. The decision in *Pallayya* v. *Ramavadhanulu*(1) governs this case. It has been followed in *Ramalinga Chetty* v. *Sivachidambara Chetty*(2), *Venkatachelapathi Aiyar* v. *China Muna Chakrapani Aiyar*(3), and in *Tammireddy* v. *Gangireddy*(4). Reference was also made to *Manohar Ganesh Tambekar* v. *Lakshmiram Govindaram*(5), *Bhuggobutty Prosonno Sen* v. *Gooroo Prosonno Sen*(6).

(1) (1903) 13 M.L.J., 364. (2) (1919) I.L.R., 42 Mad., 440.
(3) (1922) 42 M.L.J., 258. (4) (1922) I.L.R., 45 Mad., 281.
(5) (1888) I.L.R., 12 Bom., 247.
(6) (1898) I.L.R., 25 Calc., 112.

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P. Somasundarum (with him *P. Satyanarayana*) for respondents.—This is a gift to an idol. Though an idol is a juristic person, the Transfer of Property Act applies, as in the case of a Corporation. Section 123 of the Act requires that a gift of lands, more than Rs. 100 in value, can only be made by a registered instrument. As an idol is a juristic person, he can take a gift. See *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick* (1). Section 123 of the Transfer of Property Act does not make an exception in favour of gifts to idols, nor does the Registration Act exempt them. Reference was made to *Vidya Varuthi* v. *Balusami Ayyar*(2), *Ramalinga Chetti* v. *Sivachidambara Chetty*(3), Mayne's Hindu Law, page 615 (footnote).

An idol is a Juristic person and a living person within the meaning of the Transfer of Property Act.

JUDGMENT.

KUMARASWAMI SASTRI, J.

KUMARASWAMI SASTRI, J.—This Second Appeal arises out of a suit to set aside an order passed against the plaintiff who attached the properties in execution of a decree which he obtained against the second defendant. A claim was preferred by the first defendant alleging that the land was dedicated by the second defendant to Sri Kothanda Ramachandra Moorthi Varu and that possession was given to him as Dharmakartha. The District Munsif dismissed the plaintiff's suit on the ground that the property passed to the temple but this decree was reversed by the Subordinate Judge on the ground that Exhibit I which is produced as evidence of dedication requires registration and as it was not registered no title passed to the idol. It is contended in Second Appeal by the appellant that the document does not require registration (1) as it is a document constituting a religious trust and neither section 5 of the Trusts Act nor section 123 of the Transfer of

(1) (1925) 51 I.A., 245.
(2) (1921) I.L.R., 44 Mad., 831 at 839 (P.C.).
(3) (1919) I.L.R., 42 Mad., 440 (442).

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Property Act apply, (2) that the dedication to the temple was made before the date of the instrument, and the document merely records what happened, (3) that the document should be treated as an agreement to transfer the property to the trustee whenever he required a conveyance and that such a transaction is covered by the proviso to section 17 of the Registration Act, (4) that subsequent to Exhibit I a registered document was executed as provided in the agreement and that although the registered document was after the attachment it is not invalid as it was executed in pursuance of a prior arrangement.

The following facts are not disputed. The second defendant became ill about 8 years before the date of Exhibit I and in pursuance of a vow then made he built a temple and installed the idol of Sri Kothanda Ramachandra Moorthi there. He wanted to endow land for the worship of the idol and obtained a sale-deed of the land which is now in dispute, in 1913. In 1916 Exhibit I was executed. Exhibit I purports to be merely an agreement between the first and second defendants. The material portion runs as follows :—

"I have constituted you as Dharmakartha to Sree Kodanda Ramachandra Moorthy Garu consecrated by me in the aforesaid village and to arrange for the performance of daily offerings of lighting, dhoopam and naivedyam, etc, as also for the Kalyana Utsavam to be performed every year and for paying wages to the archaka, musicians, etc., the servants of the temple, and I have this day granted the inam worth Rs. 3,000 with fruit trees, etc., as gift to Sree Kothanda Ramachandra Moorthi towards the expenses of lighting, dhoopam and naivedyam for Kalyana Utsavam, etc. Therefore whenever you want I would execute on proper stamp paper on any day from this date as desired by you and at my cost. With the aforesaid stipulations, this agreement is executed stipulating that I should deliver possession of the said land on the very day I execute the gift deed, that I should tender proper accounts for the money that I might

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realize by renting out the said land. I made you believe that I did not alienate the said property before this either by sale, mortgage, etc., and I executed this agreement."

Then follows the description of property. I think the effect of the document is to recite the fact that the second defendant constituted the first defendant as Dharmakartha, conferring on him the trusteeship in respect of the land dedicated to the idol and promising to grant a conveyance to the first defendant as Dharmakartha whenever he required it. The document specially states that it is an agreement between the parties. It does not state that the constitution of the Dharmakartha or the gift was to be by virtue of that document but it refers to the two acts having been already done, and states that the second defendant would execute the deed and deliver possession of the property to the Dharmakartha whenever he wants it, he the second defendant being in the meantime accountable. In deciding whether a document requires registration or not, one has to take the document as a whole and construe it with reference to the terms and not as to what might have been the intention. In *Rajangam Ayyar* v. *Rajangam Ayyar*(1) it has been held by their Lordships of the Privy Council that a document which does not by itself convey property but merely gives a right to call for another document does not require registration. I may point out in this connexion that, if Exhibit I was really a deed which appointed the first defendant as Dharmakartha and which transferred the property to the temple, there was no necessity for the important clause that the second defendant would, whenever the first defendant wanted, execute on a proper stamp paper a formal deed of conveyance or why he should reserve possession till the execution of such a deed but in the meantime hold

(1) (1923) I.L.R., 46 Mad., 373 (P.C.).

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himself accountable for the rents and profits. A trust is in effect the gift of property or an interest in property to a person or institution by or through the intervention of a trustee and this document evidences such a transaction. In this view it is clear that the document comes within the saving clause of section 1 of the Trusts Act and section 5 which relates to the creation of trusts and which requires registration of deeds of trusts relating to immovable property does not apply. If the document is merely one which records a past transaction and gives another party a right to call for a formal document, it is exempted under the Registration Act. In any view the document in my opinion does not require registration.

It has been argued that a gift to an idol of lands over Rs. 100 requires registration and that a mere recital in another document of a gift which had been made would not pass property. It has been held that dedication of property to God by a Hindu does not require any document and that propety can be validly dedicated without any registered instrument. It should be noted that in the present case the deed Exhibit I states that the property was "granted to God Sree Kodanda Ramamoorthy." It is a gift not to a specified idol but to the Almighty Sri Kodandarama Moorthi. This distinguishes the present case from the cases where the grant is made to a particular idol installed in a particular temple. In *Pallayya* v. *Ramavadhanulu*(1) it was held by BENSON and BHASHYAM AYYANGAR, JJ., that a declaration of trust in relation to immovable property for a public religious purpose is not governed by the Indian Trusts Act which by section 1 declares it inapplicable to religious trusts. It was also held that

(1) (1903) 13 M.L.J., 364.

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KUMARA-SWAMI SASTRI, J.

section 123 of the Transfer of Property Act has no application to dedication of land to the public as the section only applied to cases when the donee is an ascertained or ascertainable person by whom or on whose behalf a gift can be accepted or refused. There seems to be a slight verbal error in this report. I think that, having regard to the document set out in the beginning of the report, the words in the judgment should be "the gift of land to the idol and dedication of the temple to the public" instead of "dedication of the idol and land to the public." Otherwise there will be the inconsistency pointed out by the CHIEF JUSTICE in the referring order.

In *Ramalinga Chetti* v. *Sivachidambara Chetty*(1) it was held by SESHAGIRI AYYAR and PHILLIPS, JJ., that the dedication of property to an idol of a temple is not required by law to be in writing and may be made orally. In *Tammireddy* v. *Gangireddi*(2), SPENCER, J., and myself agreed with the view taken in *Ramalinga Chetti* v. *Sivachidambara Chetty*(1) and held that no document was necessary for the dedication of property to a charity.

We have not been referred to any case where it has been held that an oral gift for a religious purpose requires registration. In this connection I may point out that section 123 of the Transfer of Property Act only applies to transfers by one living person to another. Section 5 of the Act runs as follows :—

"In the following sections 'transfer of property' means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons; and to 'transfer property' is to perform such act."

(1) (1919) I.L.R., 42 Mad., 440. (2) (1922) I.L.R., 45 Mad., 281.

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It is difficult to see how a gift to God Sri Kothandarama Moorthi can be a gift to a living person.

It has been argued for the respondent that an idol is in law recognized to be a juristic person capable of holding property and it must be held that a gift to an idol is a gift to a living person. A juristic person is not necessarily a living person and the fact that for some purpose the law by a fiction invests non-animate bodies with the rights of persons would not make juristic persons living persons for all purposes. It is unnecessary to pursue this point further as the document is not a gift to an idol but to Sri Kothandarama Moorthy, the Almighty, and by no stretch of imagination, legal or otherwise, can it be said that the Almighty is a living person within the meaning of the Transfer of Property Act. I see no reason to differ from the Madras cases cited above where the law has been settled for several years. I think the principle of *stare decicis* should be applied unless there are strong reasons to the contrary, as otherwise it would unsettle many titles.

I am of opinion that Exhibit I does not require registration even if it confers any present title as it is a religious trust exempted by section 1 of the Trusts Act. If it is treated only as referring to a past gift, the Transfer of Property Act has no application to the gift as it is a gift in favour of the Almighty and could be validly created without any document.

Although the case for the plaintiff was that the transaction was in fraud of creditors, no attempt was made to prove it before the District Munsif who finds that the gift was a perfectly *bona fide* one. This finding is not disputed before us. I am of opinion that the appeal should be allowed and the decision of the Subordinate Judge reversed and that of the District Munsif

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REILLY, J.

restored with costs throughout. In this judgment the CHIEF JUSTICE concurs.

REILLY, J.—I agree that the suit should be dismissed with costs throughout and that Exhibit I does not require registration either as an instrument of trust or as a gift deed. The trust to which it relates is a religious trust. The gift to which it refers appears to have been made otherwise than by Exhibit I; and, if it were intended to be made by Exhibit I, then, as it was not a gift to a "living person" within the meaning of section 5 of the Transfer of Property Act, the document would not require registration.

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kumaraswami Sastri, Mr. Justice Ramesam and Mr. Justice Beasley.

1927, March 8.

NARAYANA AYYANGAR AND 2 OTHERS (PLAINTIFFS), PETITIONERS,

v.

K. VELLACHAMI AMBALAM AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Chit Fund, promotion of—'Lottery' within sec. 294-A, Indian Penal Code—'Wagering Contract' within sec. 30 of the Contract Act.

The promotion of a chit fund wherein the number of subscribers is determined beforehand and in which every subscriber is entitled by its rules to get from the promoters of the fund the whole of the capital subscribed for by him either before or at the closing of the fund at a fixed time is neither an offence within section 294-A of the Indian Penal Code nor a "wagering contract" within section 30 of the Indian Contract Act, even

* Civil Revision Petition No. 366 of 1924.

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though some of the subscribers become by the rules entitled to get much more than they paid and such persons are determined by the drawing of lots. *Shanmuga Mudali* v. *Kumaraswami Mudali*, (1925) I.L.R., 48 Mad., 661, approved. *Veeranan Ambalam* v. *Ayyachi Ambalam* (1925) 49 M.L.J., 791, overruled. Loss of interest for those who get paid only their capital at the closing of the fund is no loss in law.

PETITION under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Principal District Munsif of Manamadura in S.C.S. No. 546 of 1923.

In this case the defendants were the promoters of the chit fund in question. According to the rules framed by them for the fund they proposed to work the chit as soon as 500 people became subscribers, each agreeing to subscribe 1 rupee a month. The rules further provided that the chit was to run for 50 months and at the end of each month Rs. 50 was to be given by the defendants to the person who was determined by the casting of lots out of the 500. Any person whose name was so drawn by lot either in the first month or in any of the succeeding 49 months got Rs. 50 and he was thenceforward relieved from paying the further monthly instalments. After the 50th lot was cast the chit fund was to be closed and all the remaining 450 people were to be given by the defendants each Rs. 50. Under such rules the plaintiffs who subscribed for two chits subscribed Rs. 36 for 18 months at the rate of Rs. 2 a month. As the defendants refused to run the chit fund after the 18th month the plaintiffs brought this suit for Rs. 36 and interest. The defendants pleaded that the chit fund was a lottery, that the transaction between the parties amounted to a wagering contract and that it was therefore unenforceable. Upholding the defendants' plea, the Munsif dismissed the suit. Hence this revision petition by the plaintiffs.

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ORDER OF REFERENCE TO A FULL BENCH BY WALLER, J.

Petitioners were subscribers to a chit fund. They sued to recover from the stakeholders Rs. 36, being the amount paid by them for 18 instalments at Rs. 2 a month. The defendants set up the usual dishonest plea that the fund was a lottery and their plea was accepted by the lower Court. Two questions arise:

(1) Whether the fund is a lottery;

(2) If it is, whether the subscriptions are recoverable.

On both of these questions there is a great conflict of authority. The cardinal feature of this fund and of all the other funds dealt with in the decisions cited before me is this:—that lots are drawn for prizes monthly and that the winners get Rs. 50 the full amount of the chit—without any liability for further subscriptions. After the 50th drawing, the unsuccessful subscribers get back the full amount of their subscriptions, but without interest.

On the first question, PHILLIPS J., held in *Sankunni* v. *Ikkora Kirtti*(1) that a chit fund of this description was a lottery. The question arose again before KRISHNAN and ODGERS, JJ. They agree with PHILLIPS, J., on the first question, but disagreed on the second. KRISHNAN, J., thought that the arrangement to give prizes was separable from the main contract, which was to return the subscriptions. ODGERS, J., held that the subscriber was not entitled to recover. In *Shanmuga Mudali* v. *Kumaraswami Mudali*(2), RAMESAM and VENKATASUBBA RAO, JJ., dissented from these two decisions on the first question and held that a fund of this kind was not a lottery at all. In *Veeranan Ambalam* v. *Ayyachi Ambalam*(3), SPENCER and MADHAVAN NAYAR, JJ., declined to follow this decision and held that such a fund was a lottery. On the second question they disagreed with KRISHNAN, J., and agreed with ODGERS, J.

I am informed that there are several unreported decisions on these questions. It is evident that funds of this sort are numerous. The promoters do not seem to have been proceeded against under the Criminal Law and the public must be in a state of complete uncertainty as to the legal position. The judiciary in the mufassal are in the same difficulty. It

(1) (1919) M.W.N., 570. (2) (1925) I.L.R., 48 Mad., 661.
(3) (1925) 49 M.L.J., 791.

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seems to me essential that the controversy should be set at rest as soon as possible. I therefore order that this petition be placed before the Honourable the CHIEF JUSTICE with a view to its being referred to a Full Bench.

On this reference coming on before the Full Bench (SPENCER, RAMESAM and BEASLEY, JJ.)—

A. V. Narayanaswami Ayyar for petitioners.—No offence as is described in section 294-A, Indian Penal Code, has been committed in this case. No lottery office was kept inviting any and every one of the public to come and take part in the chit. The number of subscribers was determined beforehand. There was no gaming or wager involved in this transaction. If any transaction involves a risk or loss of one's money under cirumstances which depend upon chance, then it is a wager. *See Shunmuga Mudali* v. *Kumaraswami Mudali*(1) and *Thacker* v. *Hardy*(2) *Carlill* v. *Carbolic Smoke Ball Company*(3), 15 Halsbury's Laws of England, pages 268, 269. *Hampden* v. *Walsh*(4). In this case no subscriber had any chance of losing what he subscribed. At the worst those who had not the fortune to get prizes got their subscriptions in full at the closing of the fund without interest. *Veeranan Ambalam* v. *Ayyachi Ambalam*(5) holds that loss of interest for such people is a clear loss caused by the casting of lots and that that makes the transaction a wager. It is wrong. Loss of interest is no loss but only absence of gain; 15 Halsbury, 268, 269. He relied on *Shanmuga Mudali* v. *Kumaraswami Mudali*(1) and the arguments therein and English and Indian cases quoted therein. *Richards* v. *Starck*(6) relied on in *Veeranan Ambalam* v. *Ayyachi Ambalam*(5) has not been rightly decided. This decision is also opposed to two earlier decisions of the Court of Appeal, viz., *Fuller* v. *Perryman*(7) and *Hirst* v. *Williams and Perryman*(8).

S. R. Muttuswami Ayyar for respondent.—Whether the chit fund amounts to a wagering contract or not it certainly amounts to a lottery. There is a distribution of prizes by lot or chance which is the only definition of lottery given in dictionaries and also in judicial decisions. No element

(1) (1925) I.L.R., 48 Mad., 661.
(2) (1878) 4 Q.B.D., 685, 695.
(3) [1892] 2 Q.B., 484.
(4) (1876) 1 Q.B.D., 189, 192 and 197.
(5) (1925) 49 M.L.J., 791.
(6) [1911] I K.B., 296.
(7) (1894) 11 T.L.R., 350.
(8) (1895) 12 T.L.R., 128.

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of risk or loss is necessary in a lottery; *Kamakshi Achari* v. *Appavu Pillai*(1), *Taylor* v. *Smetten*(2), *Reg* v. *Harris*(3), 15 Halsbury, section 605; *Willis* v. *Young and Stembridge*(4), *Hunt* v. *Williams*(5).

In this case an office also was kept inviting the public to join the chit. See the Rules Book of the chit fund. So this chit fund is forbidden by law. The promoter has committed an offence under section 294-A, Indian Penal Code, and the plaintiffs by joining it have abetted it. So the contract is void under section 23 of the Indian Contract Act and therefore unenforceable. *In re Duraiswami Mudali*(6) is a decision directly in my favour and has not been noticed in *Shanmuga Mudali* v. *Kumaraswami Mudali*(7).

A. V. Narayanaswami Ayyar replied.

JUDGMENT.

SPENCER, J.—This suit was brought to recover Rs. 55-15-6 alleged to be due from the first defendant, who promoted a chit fund to which the plaintiffs and others subscribed for 15 months till it was stopped.

The Principal District Munsif of Manamadura, dismissed the suit upon the preliminary point that this chit fund constituted a lottery and that a suit to recover money contributed to a lottery would not lie. The first defendant raised this defence among others in his written statement; but no evidence was taken to establish whether this particular chit fund was a lottery. It is essential to know how it was organized and advertised and whether any one who liked could join by merely paying subscriptions. The rules of the fund as given in the printed book filed with the plaint are not sufficient to make this clear. The learned District Munsif, from his observation in paragraph 7 of his judgment, appears to have held the opinion that the

(1) (1863) 1 M.H.C.R., 448, 449.
(2) (1883) 11 Q.B.D., 207.
(3) (1866) 10 Cox C.C., 352.
(4) [1907] 1 K.B., 448.
(5) (1888) 52 J.P., 821.
(6) (1890) 1 Weir, 251.
(7) (1925) I.L.R., 48 Mad., 661.

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existence of a wager was the only test whether there was or was not a lottery. But this is not a necessary consequence. If the only defence to this suit had been that the contracts between the individual subscribers and the promoter of the chit fund amounted to wagering contracts, then other considerations would arise for determination in respect of the plaintiffs' right to recover sums paid by them upon a consideration that failed.

Before the dismissal of the suit upon this preliminary point can be upheld, we must call for a finding to be returned within one month of the reopening of this Court after the ensuing summer vacation, whether an offence as defined by section 294-A of the Indian Penal Code was committed when the chit transaction in suit was formed and whether all who joined in the transaction including the plaintiffs were guilty of an offence. Either side may adduce evidence upon this point.

Ten days will be allowed for objections.

RAMESAM, J.—I agree that the finding has to be called for.

BEASLEY, J.—I agree.

In compliance with the above order, the District Munsif of Manamadura submitted the following finding stating that neither side offered any evidence on the question and proceeded as follows:—

"The plea was raised by the defendants. The onus is on them. Nothing is placed before me by them wherefrom I could determine how the chit fund was organized and advertised and whether any one who liked could join by merely paying subscriptions, points considered to be essential for a satisfactory solution of the question whether the chit fund was a lottery. As observed in the order of remand, the rules of the fund as given in the printed book filed with the plaint are not sufficient to make this clear. In spite of facilities having been afforded to defendants, they have not chosen to appear before me and let in evidence though I waited till this day. I must therefore answer the question in the negative."

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The Civil Revision Petition coming on for final hearing, the Court (KUMARASWAMI SASTRI, RAMESAM and BEASLEY, JJ.) delivered the following

JUDGMENT:—

RAMESAM, J.

RAMESAM, J.—This case has been referred to a Full Bench on account of a conflict between the earlier decisions of this Court. The question is whether the terms of a chit fund transaction cannot be enforced in a court of law. There are only two conceivable grounds on which courts can refuse to enforce the terms of a chit fund: (1) that it is an unlawful transaction as it involves the commission of an offence under section 294-A of the Indian Penal Code—(vide sections 23 and 24 of the Contract Act), (2) that it amounts to a wagering contract and is therefore void under section 30 of the Contract Act. In the present case we called for a finding as to whether an offence has been committed and the finding is that none has been committed as no office or place for the purpose of drawing any lottery was kept. The only other ground is whether it amounts to a wagering contract and I think this is all what SPENCER, J., meant in *Veeranan Ambalam* v. *Ayyachi Ambalam*(1), where he says:—

"The civil law, however, goes further and prevents obligations arising out of lotteries being enforced in a court of law whether the lottery is held in an office to which the public have access or in a private place,"

though he uses the word "lottery" and not the words "a wagering contract." In my judgment in *Shanmuga Mudali* v. *Kumaraswami Mudali*(2) also I concluded by saying that the chit fund before us was not a lottery and I did not use the words "wagering contract." It would be convenient to use the latter

(1) (1925) 49 M.L.J., 791. (2) (1925) I.L.R., 48 Mad. 661.

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term as that is the phrase used in the Contract Act. In *Hampden* v. *Walsh*(1) a "wager" was described as a contract by A to pay money to B on the happening of a given event in consideration of B paying money to him on the event not happening. In *Thacker* v. *Hardy*(2) COTTON, L.J., says:—

"The essence of gaming and wagering is that one party is to win and the other to lose upon a future event which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A will lose; but turns out the other way he will win."

In *Carlill* v. *Carbolic Smoke Ball Company*(3) HAWKINS, J., defines a wager thus:—

"A wagering contract is one by which two persons professing to hold opposite views touching the issue of a future uncertain event mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum of stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties . . . if either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract."

In my opinion almost all the varieties of chit funds that have come up before the courts in this Presidency including the present chit fund do not satisfy the above definitions and are not wagering contracts. It is said that there is an element of uncertainty in all of them and there is an inequality between the position of the parties. Some draw money early and are in a position to make larger gain by interest, others draw late and lose interest. In my opinion, loss of interest is not loss strictly so called. It may be failure to make a profit. If a person makes a hand loan to a friend and gets back

(1) (1876) 1 Q.B.D., 189 at 194. (2) (1878) 4 Q.B.D., 685.
(3) [1892] 2 Q.B., 484, 490.

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his money after some time without any interest, he does not lose any part of his money but only fails to make a profit, namely, interest. There are so many varieties of interest ranging from zero to very high rates of interest. It cannot be said that any one is bound to earn a particular rate and that not earning a particular rate is loss. It is clear that in most chit fund transactions, no subscriber loses the money he has contributed ; and so long as getting back the actual amount of subscription is always assured the interval of time however long it may be is immaterial and it cannot be said any subscriber loses. But even otherwise the definitions as given by the English Judges are not satisfied by these chit funds. I therefore adhere to the opinion expressed by me in *Shanmuga Mudali* v. *Kumaraswami Mudali*(1) that these are all perfectly lawful transactions covered by the decision in *Wallingford* v. *Mutual Society*(2) and they are enforceable in courts. The opposite conclusion of SPENCER and MADHAVAN NAIR, JJ., in *Veeranan Ambalam* v. *Ayyachi Ambalam*(3) was mainly based upon a judgment of CHANNEL, J., in *Richards* v. *Starck*(4). That case never went up to the Court of Appeal and as pointed out in Halsbury's Laws of England, Vol. XV, p. 269, it is inconsistent with two earlier decisions of the Court of Appeal which were not considered by CHANNEL, J., viz., *Fuller* v. *Perryman*(5) and *Hirst* v. *Williams and Perryman*(6) decided by ESHER, M.R. SMITH and RIBGY, L. JJ. These cases were not considered by CHANNEL, J., and are clearly inconsistent with his judgment. Following these decisions and *Wallingford* v. *Mutual Society*(2) and the definitions of 'wagering contract' already cited, I am of opinion that

(1) (1925) I.L.R., 48 Mad., 661.
(2) (1880) 5 A.C., 685.
(3) (1925) 49 M.L.J., 791.
(4) [1911] 1 K.B., 296.
(5) (1894) 11 T.L.R., 350.
(6) (1895) 12 T.L.R., 128.

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the suit chit fund is not a wagering contract and there is no objection to enforce its terms in a Court of Law.

In this view, it is unnecessary to consider the further contention of the petitioner that, even if the transaction itself is void as a wagering contract, the money paid can be refunded. Vide *Barclay* v. *Pearson*(1) and *Hampden* v. *Walsh*(2) already cited.

In conclusion I may say that if it is considered that chit fund transactions require to be regulated in the interests of the public to avoid the perpetration of fraud on poor and innocent persons, legislation on the lines of the Provident Fund Act is the proper course and not to declare them illegal by the straining of the law relating to wagering contracts. The decision of the court below is reversed and the suit remanded for disposal according to law. The petitioner will get costs of his petition. The costs of the lower court will abide and follow the result.

KUMARASWAMI SASTRI, J.—I agree.

KUMARASWAMI SASTRI, J.

BEASLEY, J.—I agree.

BEASLEY, J.

N.R.

(1) [1893] Ch., 154.
(2) (1876) 1 Q.B.D., 189.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Odgers.

1926, November 17.

F. G. NATESA AYYAR AND OTHERS (3RD, 4TH AND 5TH CLAIMANTS), APPELLANTS,

v.

KAJA MARUF SAHIB (1ST CLAIMANT), RESPONDENT.*

Land Acquisition Act (I of 1894), ss. 18, 19 and 30—Sale by landlord of his kudivaram interest for cash and certain money rent payable every year—Land acquired under Land Acquisition Act—Compensation—Apportionment of—Dispute between landlord and purchasers of kudivaram—Right of landlord, whether merely to capitalized value of rent—Interest of landlord after sale of kudivaram.

Where a landlord sold his kudivaram interest in the land to certain individuals under a sale deed whereby the vendees, besides paying a certain amount in cash, were to pay also rupees four every year to the landlord and subsequently the land, comprising both the melvaram and kudivaram interests, was acquired by the Government under the Land Acquisition Act, and disputes arose as to the apportionment of the compensation amount between the landlord and the vendees of kudivaram.

Held, that the landlord, after the sale of the kudivaram, has not merely a right to receive the rent from the vendees, but has several other rights, such as, the right to get back the land on forfeiture of the permanent tenancy, and other rights in the land;

that it would be quite unfair and inequitable to value the melvaramdar's interest at a capitalized value at 20 years' purchase of the rent reserved in his favour;

and that the apportionment of one-third of the compensation amount to the landlord was not improper.

APPEAL against the decree of C. S. MAHADEVA AYYAR, Subordinate Judge of Trichinopoly, in Original Petition

* Appeal No. 352 of 1925.

No. 7 of 1924 (in Original Petition No. 163 of 1922 on the file of District Court of Trichinopoly).

NATESA AYYAR *v.* KAJA MARUF SAHIB.

The material facts appear from the judgment.

T. V. Muthukrishna Ayyar for appellants.

K. Aravamudu Ayyangar for respondent.

JUDGMENT.

KRISHNAN, J.

KRISHNAN, J.—This is an appeal in a land acquisition matter as between the landlord and the persons who claimed the land under him under a permanent lease. The actual appellant is said to be a purchaser from a purchaser of the permanent lease. The case has come before the courts because the parties did not agree to the apportionment between them of the compensation awarded which came to about Rs. 1,400 odd. Out of this the Subordinate Judge has granted about two-thirds to the permanent tenants and about a third to the landlord. Now it is very strongly contended before us by Mr. Muthukrishna Ayyar for the permanent tenants that the landlord is only entitled to have a capitalized value of the Rs. 4 rent payable by the permanent tenant to the landlord for the land and therefore the amount given to him should be reduced to Rs. 80 taking the capitalization at 20 years' purchase the balance should be given to the permanent tenants. The rights of the parties really depend upon the document executed by the landlord under which he parted with his rights in this land to the permanent tenant. That document is Exhibit A. It is a sale of the landlord's kudivaram interest in the land to certain individuals. The value put upon over 8 acres of this land under Exhibit A is Rs. 150. Besides paying the Rs. 150 the permanent tenants were to pay also Rs. 4 every year to the landlord. The document speaks of itself not as a sale of the land itself but as sale of the kudivaram interest. Now it is contended

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that all the interest that the landlord has reserved to himself at the time of the acquisition of this land is the right to receive Rs. 4 from the tenants and that he has only a right to be compensated for that sum of money; in other words, if we give him a capitalized sum which would bring him Rs. 4 at a reasonable rate of interest, say 5 per cent that will be the only compensation that he is entitled to. This argument overlooks the fact that the landlord does not part with all his interest in the land by this sale. He has only sold the kudivaram interest. The melvaram interest is with him. It is difficult to say exactly what these two interests are. Kudivaram interest, one understands, is the interest the man in occupation of the land gets in the land for cultivating the land or utilizing the land for any purpose for which it has been given. He gets possession of the land and he has also the user of the land. The melvaramdar has the rest of the interest in the land in himself. It is not merely a right to receive rent; he has got several other rights. For example, he could recover the land itself from the tenant, i.e., if the tenant denies his title there might be a forfeiture of the permanent tenancy. In that case the landlord would get back the land. There are other rights which the melvaramdar has in the land. To value the melvaramdar's interest merely at 20 years' purchase of the rent that is reserved in his favour would, it seems to me, be quite unfair so far as he is concerned. It is not an easy thing in any case to apportion the value of land between two persons who have got somewhat indefinite rights in the land such as the melvaramdar and the kudivaramdar. The Subordinate Judge has divided the compensation as between the landlord and the tenant at one-third and two-thirds. I am not satisfied that it is really erroneous. The suggestion made by the learned vakil for the appellant seems to

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me on the face of it inequitable. When the land was leased out under Exhibit A, it was apparently a waste land fit only for pasturage of cattle and consequently valued at a very low figure. Now that the Railway Company has come forward and acquired the land the compensation has been given for it apparently on the footing of a building site. This enhanced value is not due to the exertion either of the landlord or the tenant. It is a sort of windfall which has come to both the parties. There is no reason why one alone should have the whole of it and not the other. If we give the landlord only Rs. 80, we will be ignoring altogether the general rights as melwaramdar which is in him. It seems to me therefore that this is not a fit case for interference in appeal. I would therefore dismiss the appeal with costs.

ODGERS, J.

ODGERS, J.—I agree. What we have to do is to see what the interests of the respective parties are under Exhibit A in the lands which have been acquired compulsorily under the Land Acquisition Act and as far as possible to value those interests equitably between the parties. Now the difficulty in this case is largely caused by the expression used in Exhibit A, "Kudivaram" and "Melwaram," because it is only faintly suggested that this is a settled estate such as would fall under the Act of 1908. There was no question that it is not so. The landlord reserved a ceratin interest in this property. I think it is incorrect to say that Exhibit A is an out and out sale subject to the reservation of a quit-rent in favour of the landlord. In fact, it, in terms, purports to be only an absolute sale of the kudivaram right. It may be that other rights are inherent in the landlord who is styled the melwaramdar in this document. In any case, the land in 1909 was practically waste land. It has now increased enormously in value owing to its proximity to the new railway works of the South Indian Railway

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now being erected near Trichinopoly. As my learned brother has said, it is not owing to any exertions or expenditure on the part of either the landlord or the tenure holder that this increase in value has come about. It is a pure piece of good fortune. Had Exhibit A been an absolute sale of the land, of course, there would have been no question, but that the whole of the money paid by Government would go to the purchaser. But that is not so and it seems to me it would be eminently unfair to say under the circumstances that all that the melwaramdar is entitled to is the capitalized value of Rs. 4 a year. The case, *Dinendra Narain Roy* v. *Tituram Mukerjee*(1), was pressed upon, but as pointed out in *Sri Rajah Bammadevara Venkata Narasimha Nayudu Bahadur* v. *Subbarayudu*(2), it is not clear exactly what was the tenure and its terms which existed between the parties in the Calcutta case. Here, I think, it is quite clear from Exhibit A that something more than a mere quit-rent of Rs. 4 a year was intended to be reserved to the landlord. I am not satisfied that the Subordinate Judge was wrong in law and I consider it would be unfair to disturb his decision unless one was really satisfied that it was wrong in law and could not be sustained. I therefore agree that the appeal fails and should be dismissed with costs.

K.R.

(1) (1903) I.L.R., 30 Calc., 801. (2) (1913) I.L.R., 36 Mad., 395.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Curgenven.

SATRAJI DONGERCHAND FIRM (FIRST PLAINTIFF), APPELLANT,

1926, December 14.

v.

MADHO SINGH AND ANOTHER (DEFENDANT AND SECOND PLAINTIFF), RESPONDENTS.*

Pensions Act (XXIII of 1871), ss. 3, 11 and 12—Political pensions, meaning of—Political prisoner under Regulation III of 1818—Allowance granted by Government of India to such prisoner—Arrangement between Government of India and Foreign State (Panna State) that the allowance should be paid by the latter into Government treasury for payment—Allowance, whether ceases to be political pension—Pensions Act, applicability of—Agreement by the pensioner with his creditor, empowering latter to draw amounts from time to time in discharge of his debt—Validity of—Transfer of Property Act (IV of 1882), sec. 6, clauses (d) and (g)—Specific performance of agreement, suit for, whether maintainable.

A pension payable to a political prisoner by the Government of India under a statutory obligation to maintain that person as, for instance, under Regulation III of 1818, does not cease to be a political pension because the Government of India under some arrangement gets a foreign State to remit the amount to the Government Treasury for payment, but falls under the Pensions Act (XXIII of 1871).

An agreement entered into by such a pensioner with his creditor irrevocably empowering the latter to draw the amounts from the Treasury from time to time in discharge of his debt and to pay a portion to the pensioner, is void under the provisions of the Pensions Act (XXIII of 1871), as well as under section 6, clauses (*d*) and (*g*), of the Transfer of Property Act, and cannot be specifically enforced.

* Appeal No. 141 of 1926.

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Muthusami Naidu v. *Prince Alagia Manavala Samala Raja*, (1903) I.L.R., 26 Mad., 423, followed; *Bishambar Nath* v. *Imdad Ali Khan*, (1891) I.L.R., 18 Calc., 216 (P.C.), explained; *Rajindra Narain Singh* v. *Sundara Bibi*, (1925) I.L.R., 47 All., 385 (P.C.), distinguished.

APPEAL against the decree of H. R. BARDSWELL, District Judge of Bellary, in Original Suit No. 17 of 1926.

The material facts appear from the judgment.

B. Somayya for appellant.—Though a right to future maintenance cannot be attached or transferred, the Court will grant equitable execution: See *Rajindra Narain Singh* v. *Sundara Bibi*(1). This is not a case of political pension, as the money-allowance was not paid out of the revenues of the Government of India but out of the amount paid by the foreign State (Panna Darbar). See *Bishambar Nath* v. *Imdad Ali Khan*(2), which gives a definition of political pension.

C. Sambasiva Rao (with him *T. M. Venugopala Mudaliar*) for first respondent.—The pension need not be paid by the British Indian Government out of its revenues, in order that the pension may be a political pension. It is enough if the Government of India is responsible for the payment: See *Bishambar Nath* v. *Imdad Ali Khan*(2); and *Muthusami Naidu* v. *Prince Alagia Manavala Samala Raja*(3). This is a political pension under section 6 (*g*) of the Transfer of Property Act as well as the Pensions Act, and is not assignable. Further, it is a purely personal allowance restricted in its enjoyment to the grantee personally and falls under section 6, clause (*d*) of the Transfer of Property Act, and cannot be transferred.

In any event specific performance of the agreement cannot be granted in this case. Section 22 of the Specific

(1) (1925) I.L.R., 47 All., 385 (P.C.).
(2) (1891) I.L.R., 18 Calc., 216 (P.C.), at 223.
(3) (1903) I.L.R., 26 Mad., 423.

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Relief Act makes the relief discretionary; specific enforcement of an agreement to give a security cannot be directed; there was no expectation raised in the creditor, when he took up the promissory notes.

JUDGMENT.

KUMARASWAMI SASTRI, J.

KUMARASWAMI SASTRI, J.—The Maharaja of Panna who is the respondent was deposed by the Government of India who acting under the powers given to it by Regulation III of 1818 directed that the ex-Maharaja should be confined as a State prisoner in Bellary. Exhibit X refers to the proceedings of the Government. An allowance was fixed for his maintenance as required by Regulation III of 1818 and this allowance was ultimately increased to Rs. 2,000 a month. It appears from the exhibits filed in this case that the allowance was sent to the Collector of Bellary by the Panna Darbar and was being disbursed by him. The ex-Maharaja borrowed moneys under three promissory notes, from the appellant. Under Exhibit A, dated the 10th of January 1924, he promised to pay Rs. 20,000, under Exhibit B, dated the 20th October 1924, he promised to pay Rs. 28,000 and under Exhibit C, dated the 18th of April 1925, he promised to pay Rs. 2,000. There is a dispute as to the amount which was actually advanced, the ex-Maharaja pleading failure of consideration for a large portion of the amounts claimed under the three promissory notes. It is, however, unnecessary to consider in this appeal what the actual amount due would be. In order to enable the appellant to recover the moneys lent by him the ex-Maharaja executed a power-of-attorney Exhibit D, dated the 10th of January 1924, in favour of the appellant firm. In Exhibit D, he authorizes the appellant firm to be his true and lawful agent and to sign and receive on his

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behalf from the Bellary Treasury allowances that would become due to him each month and to disburse the amount on his behalf and he agrees to ratify and confirm all acts done on his behalf by the appellant firm. Some differences arose after Exhibit D, but they seem to have been composed and on the 22nd of March 1925 the ex-Maharaja wrote Exhibit E, to the Treasury Deputy Collector, Bellary, stating that he had settled his differences with the appellant firm and requesting the Deputy Collector to continue the payments to the appellant firm under the power-of-attorney already given. The ex-Maharaja requests the Deputy Collector to pay the appellant the allowance for 45 months consecutively from the 1st of April 1925 as per the power-of-attorney executed by him. He says that he would not ask the payment to be made to any other person during that period. On the date of Exhibit A, the ex-Maharaja also executed an agreement Exhibit F, as to how the debt was to be discharged. He promises to pay the sum of Rs. 20,000 by instalments of Rs. 800 to Rs. 1,000 every month commencing from February 1924 and in order to secure the regular payments of the instalments he authorizes the appellant firm to draw the monthly allowance from the treasury and pay themselves the amount. On the 15th of April 1925 he writes Exhibit G, to the appellant firm promising not to cancel the power-of-attorney till their debt is discharged on the instalment system and he authorizes them to draw his allowance from the Government treasury, pay themselves the instalments due and to pay over the balance to him. On the 30th of August 1925 he addressed Exhibit H to the Treasury Deputy Collector of Bellary withdrawing the power-of-attorney. Owing to his withdrawal of the authority given, the Collector declined to pay the allowance

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to the appellant and referred him to a suit to enforce any remedies which he may have. The present suit was filed by the plaintiffs for specific performance of the agreement by the ex-Maharaja to allow the appellant firm to draw the allowance payable to him from the treasury, pay themselves the amount due to them and hand over the balance to the ex-Maharaja. Various defences were raised but it is only necessary to consider the pleas that the suit is barred as the amount payable is a political pension under Act XXIII of 1871, that it is not liable to be attached or transferred both under the Civil Procedure and the Transfer of Property Act and that specific performance ought not to be decreed of the arrangement set out in the plaint. The District Judge was of opinion that the Pensions Act (XXIII of 1871) did not apply as the allowance was not paid by the British Government but by the Panna Darbar. He was also of opinion that section 60, Civil Procedure Code, and section 6 of the Transfer of Property Act would not apply. He however held that the agreement was not specifically enforceable as damages would be an adequate relief.

The first question is as to the nature of the allowance which is payable to the ex-Maharaja of Panna. The ex-Maharaja was a political prisoner detained under the provisions of Regulation III of 1818. The Regulation casts on the Government of India the duty of making an allowance for the maintenance of a person interned under its provisions. I find it difficult to see why such an allowance should not be a political pension simply because the Government of India on whom the duty is cast by the law arranges with the Panna Darbar instead of paying it out of its own funds. It seems to me to be clear from the exhibits filed in this case that the allowance payable to the ex-Maharaja by

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the Government was by some arrangement between the Government and the Panna Darbar paid by the Panna Darbar into the Government treasury for the purpose of being disbursed to the ex-Maharaja. The Pensions Act (XXIII of 1871) refers to pensions and grants by Government of money or land revenue. Section 3 only defines "grant of money or land revenue" and says that it includes anything payable on the part of the Government in respect of any right, privilege, perquisite or office. It does not define the word "pension," nor is there anything in the Act which says that the pension must be paid from the British revenues. Section 11 expressly states that no pension granted or continued by Government on political considerations, or as a compassionate allowance and no money due or to become due on account of any such pension or allowance shall be liable to seizure, attachment or sequestration by process of any Court in British India at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a decree or order of any such Court. Section 12 makes assignments in anticipation of pension void. It seems to me that there is nothing in the Pensions Act to exclude allowances granted by the British Government to political prisoners from its operation in cases where the British Government by some arrangement with a foreign State collects the allowance which it fixes from the foreign State. I think the present case falls under the Pensions Act. In *Muthusami Naidu* v. *Prince Alagia Manawala Samala Raja*(1), it was held that the pensions granted to the descendants of the Kings of Ceylon who were residing in Tanjore were political pensions exempt from attachment under section 266 (*g*) of the old Civil Procedure Code which corresponds to section 60 (*g*) of the present

(1) (1903) I.L.R., 23 Mad., 423.

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Code. BENSON, J., was of opinion that pensions granted or paid by a State for reasons of State do not lose their character as political pensions by reason of any arrangements for the purpose of the payment made by the Government with somebody else, and that section 266 does not restrict the exemption to political pensions granted by the Government of India.

Reference was made by the vakil for the appellant to *Bishambar Nath* v. *Imdad Ali Khan*(1), in support of his contention that in order to constitute a payment of political pension it should be paid directly by the Government out of its own funds and the following observations of their Lordships of the Privy Council were relied on:

> "It is probable (although the point is not one which it is necessary to determine in this case) that the enactments of section 266 (*g*) of the Code were not meant to cover pensions payable by a foreign State, when remitted for payment to their pensioner in India but these enactments certainly include all pensions of a political nature payable directly by the Government of India. A pension which the Government of India has given a guarantee that it will pay, by a treaty obligation contracted with another sovereign power, appears to their Lordships to be, in the strictest sense, a political pension. The obligation to pay, as well as the actual payment of the pension, must, in such circumstances, be ascribed to reasons of State policy."

The pensions which are referred to by their Lordships payable by a foreign State are evidently pensions which the British Government was under no obligation to pay but which were remitted by the foreign State for payment to their pensioner resident in India. There is nothing in the observations of their Lordships to show that a pension payable to a political prisoner under a statutory obligation to maintain that person ceases to

(1) (1891) I.L.R., 18 Calc., 216 (P.C.).

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be a political pension because the Government of India under some arrangement gets a foreign State to remit the sum to the Government treasury for payment. In this case the Panna Darbar makes the payment by reason of some agreement or understanding with the Government of India and any arrangement between the Government of India and the Panna Darbar would in my opinion not affect the question as to the allowance being a political pension. Moreover as pointed out in the 26 Madras case the word "political pension" is a general term and the source from which the money is derived is not an element which should be taken into consideration so long as the payment is made by the Government through its treasury. The cases to which reference was made by appellant's vakil do not touch the present case. In *Ranee Annapurni Nachiar* v. *Swaminatha Chettiar*(1), the question arose as to whether future maintenance payable to a Hindu widow can be attached and it was held that a right to future maintenance was not property within the enabling words of section 6 of the Transfer of Property Act, or an interest in property restricted in its enjoyment to the owner personally within the meaning of paragraph (*d*), and the mere fact that a transfer is not recognized by the Transfer of Property Act is not conclusive on the question of the validity. In *Subraya* v. *Krishna*(2), the question was whether the right of a widow to future maintenance under a registered deed and charged on immovable property is capable of being transferred before the maintenance became due, and it was held that the right under a contract to a definite amount for future maintenance is property within the enabling words

(1) (1911) I.L.R., 34 Mad., 7. (2) (1923) I.L.R., 46 Mad., 659 (F.B.).

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of section 6 of the Transfer of Property Act but that the question still remained whether it was an interest in property restricted in its enjoyment to the owner personally and that this question is not one capable of a general answer but must depend upon the facts of each case to be ascertained from the wording of the document and the surrounding circumstances at the time of its execution. *Asad Ali Molla* v. *Haidar Ali*(1) was a case where a decree for maintenance was assigned. These cases in my opinion do not cover the question now raised. It is clear that the amount payable to the ex-Maharaja is not an amount that has been fixed by any decree or order of Court nor is the amount given to him from time to time one which he could claim as a matter of right but it is in the discretion of the Government to allow such a sum as it thinks proper. It is open to the Government to reduce the sum to any figure which it thinks proper and the ex-Maharaja would have no legal redress. There is, therefore, very little analogy between the cases of political pension granted under Regulation III of 1818 and cases of maintenance which under Hindu Law is payable to a widow or to a junior member of an impartible estate. I am also of opinion that section 6 of the Transfer of Property Act would prevent the assignment of a political pension. Clause (*d*) prohibits the transfer of an interest in property restricted in its enjoyment to the owner personally and clause (*g*) states that stipends allowed to military and civil pensioners of Government and political pensions cannot be transferred. I have already given my reasons for holding that the allowance granted to the ex-Maharaja is a political pension. I think it is also restricted in its enjoyment to the owner personally

(1) (1910) 12 C.L.J., 230.

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as Regulation III of 1818 expressly states that the allowance is to be for the maintenance of the political pensioner and for that purpose only. Reference has been made to the recent decision of their Lordships of the Privy Council in *Rajindra Narain Singh* v. *Sundara Bibi*(1), where their Lordships observed that the proper remedy in a fit case where a person wants to proceed against a maintenance grant is to get a Receiver appointed for the realization of the rents and profits of the property, with directions to pay out of the same a sum sufficient and adequate for the maintenance of the judgment-debtor and his family and apply the balance towards the liquidation of the decree. In this case the property proceeded against in execution of the decree was an amount due to the judgment-debtor out of the rents and profits of immovable property granted to him in lieu of maintenance without power of transfer, and their Lordships, while holding that such a right is not attachable and liable to be proceeded against, point out the remedy which in their opinion was the proper one in a fit case. Their Lordships in this case indicate a remedy which might be available to a decree-holder in a fit case, where he has obtained a decree against the judgment-debtor and seeks to proceed by way of execution against the properties which are assigned to him for maintenance. But this is no authority for holding that the Court can grant specific performance of an agreement enabling a person to draw a political pension and appropriate the whole or any portion of it towards the payment of a debt. What we are concerned with is the right to enforce specific performance of a contract like the present. I am of opinion that specific performance was rightly refused by the District Judge.

(1) (1925) I.L.R., 47 All., 385 (P.C.).

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The appeal fails and is dismissed with costs of the first respondent.

CURGENVEN, J.—This appeal arises out of a suit instituted by two Marwadi firms doing business at Bellary against the ex-chief of Panna, who since 1902 has resided at that place as a State prisoner. On 10th January 1924 the defendant executed to the plaintiffs a promissory note for Rs. 20,000 and, on the same day, two other documents, (1) a power-of-attorney, Exhibit D, appointing the first plaintiff his agent for the purpose of drawing his monthly allowance of Rs. 2,000 and (2) an agreement to pay the loan of Rs. 20,000 in monthly instalments of Rs. 800 to Rs. 1,000 and not to revoke the power-of-attorney until the whole was paid. The defendant subsequently borrowed further sums of Rs. 28,400 and Rs. 2,000 from the plaintiffs, and eventually resiled from his agreement, securing payment to himself of the whole allowance by the local treasury. The suit was accordingly brought for specific performance of the agreement, and for an injunction restraining the defendant from drawing the allowance in violation of the terms of it. A number of issues were raised, but the broad question we are now concerned with is whether the contract between the parties is of such a nature that specific performance of it should be decreed.

The three documents executed on 10th January 1924 are to be read as components of a single transaction, and it has not been seriously disputed that they created an agency coupled with interest, or that the right to exercise such an agency may, in suitable circumstances, be specifically enforced. The interest which the defendant purported to transfer at the same time as he created the agency was a right to a portion of each succeeding month's allowance, as it fell due. The

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question which immediately arises is whether the allowance, while still in prospect, was alienable.

Under paragraph (*d*) of section 6 of the Transfer of Property Act "an interest in property restricted in its enjoyment to the owner personally cannot be transferred by him," and under paragraph (*g*) of the same section political pensions cannot be transferred. Dealing first with the former clause, the application of this provision to a right of future maintenance was considered in *Ranee Annapurni Nachiar* v. *Swaminatha Chettiar*(1). and it was held that such a right was neither property within the enabling words of section 6 nor an interest in property restricted in its enjoyment to the owner personally within the meaning of paragraph (*d*) so that the question had to be considered apart from the provisions of the Act. That was a case of a Hindu widow's maintenance allowance, and upon a similar case arising in *Subraya* v. *Krishna*(2), a reference was made to a Full Bench on the ground that the decision in *Ranee Annapurni Nachiar* v. *Swaminatha Chettiar*(1) appeared to be at variance with section 6 of the Transfer of Property Act. While deciding that in the particular instance in question the widow's right to future maintenance was inalienable, the Full Bench abstained from pronouncing upon the general question, holding that each such case must be examined for an answer to the question whether the right is restricted in its enjoyment to the owner personally. I propose, therefore, to apply this test here. The defendant is a State prisoner, placed under restraint "in conformity to the orders of the Governor-General in Council and the provisions of Regulation III of 1818" as the warrant filed as Exhibit XI in the suit shows.

(1) (1911) I.L.R., 34 Mad., 7. (2) (1923) I.L.R., 46 Mad., 659 (F.B.).

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As such he is in receipt of the allowance in question, and if we turn to the regulation we find in the preamble an expression of the need, that, in the case of every State prisoner, "suitable provision be made for his support according to his rank in life" and in section 7 that the officer in whose custody the State prisoner is placed shall take care that the allowance fixed for his support is duly appropriated to that object. It is true that an attempt has been made to argue that, because the allowance is met from the revenues of the Panna State, and not of the Government of India, it is not such an allowance as the regulation provides for, but we have not to look to the source but to the authority, and though the Panna Darbar may formally sanction or approve the rate of maintenance, there can be no doubt that it is the Government of India which had made itself responsible for ensuring that it is furnished. I think therefore that this allowance is subject to the provisions of Regulation III of 1818, and the words I have quoted show clearly that it is to be appropriated to the support of the State prisoner, and to no other purpose. The Government, having regard to the defendant's rank, have fixed this allowance at Rs. 2,000 per mensem, and it is not open to him to defeat the purpose of that arrangement by alienating a portion of it and contriving to live on the remainder, nor is it open to the Court, whether directly or indirectly, to enforce such an alienation. That the future instalments of maintenance are inalienable is clear. I think, from another consideration, that neither the allowance-holder nor his alienee can enforce by process of law the payment of the allowance. If the Government of India chose to revoke the allowance to-morrow, or to reduce it by one-half, they would be free to do so. The recipient has no such enforceable right as, for instance, the widows had in the

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cases above cited, and the consequence is that he had nothing beyond an expectation to transfer. On this ground it cannot be said that there was a transfer of property within the meaning of section 6 of the Transfer of Property Act. And, whether or not that be a conclusive argument against its transferability, the fact that the grant is revokable at the will of the grantor shows plainly, I think, that it was intended to be purely personal to the grantee.

These considerations appear to be sufficient to dispose of the plaintiffs' claim, which may also, in my view, be successfully resisted on the ground that the allowance is in the nature of a political pension, and so is inalienable under paragraph (*g*) of section 6. Reference may be made to *Muthusami Naidu* v. *Prince Alagia Manavala Samala Raja*(1) for a refutation of the argument that because the source from which the payment is made is not the Government of India's revenues—in that case the funds were provided by the Ceylon Government—the allowance is not a "political pension" within the meaning of the proviso to section 60 (1) of the Code of Civil Procedure, or, as here, section 6 of the Transfer of Property Act. The same case is authority for holding that for a pension to be "political" it must be granted or paid by a State for reasons of State, which appears to apply to the allowance now in question.

There remains the point whether, assuming the allowance to be alienable, the claim to specific performance is such as the Court should allow. Under paragraph (*n*) of the proviso to section 60 (1), Code of Civil Procedure, a right to future maintenance is not liable to attachment or sale under a decree of Court, and I do not think that a Court, which has discretion

(1) (1903) I.L.R., 26 Mad., 423.

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whether or not to enforce specific performance, should permit a creditor to achieve by one means what he is debarred from doing by another. The force of this argument is not, I think, weakened by the circumstance that as was held by the Judicial Committee in *Rajindra Narain Singh* v. *Sundara Bibi*(1), a decree-holder may in a fit case, obtain what is known as equitable execution by the appointment of a receiver to realize and distribute the debtor's income according to the Court's directions. In deciding whether to permit such a course the Court, I conceive, would be guided by much the same considerations as would weigh with it in granting or refusing specific relief; and what would be a "fitting case" from the one point of view would be equally so from the other. It is accordingly no answer to say that the Court has jurisdiction to apply this method of execution.

I agree that this appeal should be dismissed with costs of first respondent.

K.R.

(1) (1925) I.L.R., 47 All., 385 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Curgenven.

1926, December 6.

K. R. M. SINGARAM CHETTIAR (SEVENTH DEFENDANT), APPELLANT.

v.

K. SRINIVASA AIYANGAR AND 12 OTHERS (PLAINTIFFS 1 TO 7 AND DEFENDANTS 1, 2, 4 TO 6 AND 8), RESPONDENTS.*

Sec. 10 *of the Religious Endowments Act* (XX *of* 1863)—*Election to vacancy in temple committee on the authority of managing member and not on the authority of the committee—Election on basis of old voters' list in spite of objection, validity of.*

Where in accordance with the rules framed for the conduct of business of a temple committee, a member of the committee made a requisition in time to reopen a resolution of the committee fixing a date for filling up a vacancy in the committee, on the grounds that the voters' list on which the election was sought to be held was very old and required to be revised by the inclusion of names of new and eligible voters who had applied to be included and that the election should be held only after the revision of the list,

Held, that an election held on the basis of the old list without complying with the requisition of the member and on the authority of the managing member of the committee alone and not on the authority of the committee as required by section 10 of the Religious Endowments Act is invalid and should be set aside. *Tiruvengada* v. *Ranga* (1883) I.L.R., 6 Mad., 114, considered.

SECOND APPEAL against the decree of the Court of the Subordinate Judge of Kumbakonam in Appeal Suit No. 109 of 1923, preferred against the decree of the Court of the District Munsif of Kumbakonam in Original Suit No. 122 of 1920.

* Second Appeal No. 730 of 1924.

The necessary facts are given in the judgment.

S. Muthayya Mudaliyar and *T. S. Venkatesa Ayyar* for appellant.

T. V. Muthukrishna Ayyar, N. Kunjithapatham and *K. Narasimha Ayyangar* for respondent.

JUDGMENT.

KUMARASWAMI SASTRI, J.—This Second Appeal arises out of an election to a temple committee and the question is whether the election of the seventh defendant is valid. A vacancy was caused in the Devasathanam Committee by the death of one Ponnusami Nadan. Thereupon there was a resolution passed on the 18th January 1920 that the first defendant who was said to be the managing member should issue notices in connexion with it, appoint the tellers and take the necessary steps for holding an election that the voters' list prepared in 1908 be the basis for such an election and that the election be fixed to take place on the 22nd February 1920. The sixth defendant objected to this resolution on the ground that a correct list of voters had not been prepared in spite of the resolution of the committee to that effect passed on December 18, that the list of 1908 was old and defective and did not contain the names of more than 5 per cent of the legitimate number of voters. Both the Courts find that there was a valid rule or practice of the committee by which if a member calls for a reconsideration of a resolution passed within 24 hours after the passing of such a resolution it was to be kept in abeyance and not acted upon until it was reconsidered and reaffirmed. Acting under this rule the sixth defendant who was a dissenting member called for a reconsideration both of the date of the election and of the footing on which it was to be held, namely, the electoral roll of 1908. He wanted a new list to be

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prepared as the old list was very antiquated. It appears that a new list was prepared but only wanted confirmation. It also appears that as many as 180 voters who had a right to vote were not in the 1908 list but wanted their names to be included in the present list and to this effect they put in their applications. Upon this requisition of the sixth defendant for reconsideration, a meeting was held on the 1st February 1920 but as there was no quorum the meeting was again held on the 11th February and there were about 40 subjects on the agenda but the meeting dispersed without any business being transacted and it was adjourned to the 24th February. Again the election was adjourned to the 14th March 1920 with the hope that something will be done by that time but nothing was done. Even on the 24th February 1920 nothing could be done as there was not a majority of four members of one view as was required by the by-laws for a resolution to be passed. Then the meeting was adjourned to the 2nd March but there was no quorum even then. Then the first defendant took upon himself to pass proceedings and directed that an election was to be held on the 14th March and an election was in fact held on that day. The question is whether that election is valid. I am clearly of opinion that the election held under such circumstance is clearly void as has been found by the Subordinate Judge. First of all there was no resolution which could be enforced fixing the date of the election. The basis on which the election was to take place, namely, the electoral roll, was still under consideration and there was application for registration as voters and until the matter was considered, the resolution fixing the date of the election had no validity or effect. Further it is not shown that the authority of the first defendant alone is sufficient to proceed with the election.

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It was virtually carrying into effect a resolution which was not validly disposed of. The sixth defendant objected to the list of 1908 being used for election in 1920; that it was long out of date and could not now be used and that 180 members, who had the requisite qualifications to vote had applied and their applications were kept pending while the election was allowed to be proceeded. There was nothing in the rules that their names could not be entered in the new list as eligible to vote for the 1920 election. I do not see how the resolution of the 18th January can be divided into two separate and independent portions, as the District Munsif has done, one of them as having authorized the holding of election and the other as having authorized its being held on the footing of the voters' list of 1908. I do not see how it can be held that the date of the election was irrevocably fixed for the date on which it was held, while the basis on which the election was to be held was not yet disposed of and was the subject of reconsideration. I agree with the Subordinate Judge that it was only a single resolution kept in abeyance and was the subject of reconsideration. It is clear that rule 14 requires that there shall be a register of voters eligible to vote for the election and that rule was not complied with inasmuch as there was no correct list of voters in 1920. I think that the election held in these circumstances is not valid.

Reference was made to *Tiruvengada* v. *Ranga*(1) to show that it is not material whether the list of voters was of 1908 or any other year. It is said that even if the list is quite out of date it does not matter. It is sufficient for our purpose to state that the question now raised goes far beyond that. In this case, there was no

(1) (1883) I.L.R., 6 Mad., 114.

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resolution at all under which an election can be validly held and again there arises the further question of how far an election held is valid which does not dispose of the application of persons who claim to have a right to vote in the election and which application ought to have been considered. I am of opinion that where the validity of the list on which the election is to be held is in question and where the applications of persons who are qualified to vote and who claim to be enlisted as voters are not considered, an election held on the basis of a list which was several years old would not justify the election as a valid one. To hold otherwise would be a negation of all elective principles and actually vest in the trustees the power to disenfranchise voters who are duly qualified to vote and are entitled to exercise their right. I think that the broad rule laid in *Tiruvengada* v. *Ranga* (1) that a list however inadequate would not invalidate an election requires reconsideration. The facts of this case however are not similar and the ruling has no application. I think the Subordinate Judge's judgment is correct and the Second Appeal fails and is dismissed with costs.

CURGENVEN, J.

CURGENVEN, J.—I agree. There are two clear reasons for holding with the learned Subordinate Judge that the election was not validly held, firstly that it was not duly authorized by the committee, and, secondly, that the basis of it, namely the voters' list, had not been revised. As regards the first point, section 10 of the Religious Endowments Act, XX of 1863, requires that when a vacancy arises the remaining members of the committee shall among other things fix a date for the election of a successor. My learned brother has summarized the effect of the several meetings held on the 18th January and

(1) (1883) I.L.R., 6 Mad., 114.

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subsequently, and I think it is sufficient therefore to draw attention to the so-called "Proceedings" of the 2nd March 1920, from which it is evident that the committee had left the matter in abeyance pending disposal of the sixth defendant's objection with regard to the voters' list and that objection had still not been disposed of. It is then recited that as the period of three months prescribed for the election would soon terminate, it was not possible to postpone the matter any further. There is clearly an implied admission here. I think that the projected course was irregular owing to a lack of any clear expression of the committee's will that the election should be held on the date on which it was in fact held. Accordingly the provisions of section 10 were not complied with and the election was unauthorized.

With regard to the second point, the voters' list dated from 1908 and such a list cannot be held to be in compliance with rule 14 which requires that the committee should keep a register of voters. A list so antiquated cannot be a register of voters at all, because a very large proportion of persons eligible to vote were omitted from it. This is clear from the circumstance that as 180 applications had been received for inclusion in the list and were still kept pending, a circumstance which I think clearly differentiates the facts of this case from those considered in *Tiruvengada* v. *Ranga*(1). I am unable to accept the suggestion that the matter was of no practical importance, because the majority of votes obtained in the event was such that even if all the 180 had been included on the other side the result would have been the same. Unless there is some provision to the contrary, the validity of the

(1) (1883) I.L.R., 6 Mad., 114.

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election depends upon the regularity of the procedure according to which it is held and not upon the results, which may by accident be the same as if it had been regularly conducted.

I have only to notice one more objection, which is that both the plaintiffs were in the 1908 list of registered voters and accordingly that they had no grievance which entitled them to bring a suit under section 92, Civil Procedure Code. That section enables any two or more persons that have an interest in the trust to sue for certain reliefs and it is not necessary that they should have been personally affected by any act done by the person or persons sued. It is sufficient that they have enough of an interest in the trust to see that the trust is properly conducted and that the terms whereby it is regulated are complied with. I think accordingly that the plaintiffs were fully competent to sue under section 92, Civil Procedure Code. In the result I agree with my learned brother that the Second Appeal fails and should be dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace and Mr. Justice Madhavan Nayar.

P. NATESA MUDALIAR (APPELLANT) ACCUSED,

v.

KING-EMPEROR.*

1926, September 22.

Madras City Municipal Act, sec. 288—Operation of—If proof of nuisance a pre-requisite to—Person to determine what constitutes nuisance—Interpretation by reference to marginal notes.

Under section 288 of the Madras City Municipal Act the question whether the machinery is or is not a nuisance is for the Commissioner alone, and it need not be proved that the machinery is a nuisance before any part of the section comes into operation. Any one erecting machinery, whether it constitutes a nuisance or not, has to obtain the permission of the Commissioner

The construing of a section of a statute by referring to the marginal note is not a legitimate method of construction.

In re Smith (1925), 45 M.L.J., 731, dissented from.

APPEAL against the order of the Court of the Presidency Magistrates, Georgetown, Madras, in case No. 30993 of the Calendar for 1924.

P Sankaranarayana for the appellant.

Crown Prosecutor for the Crown.

JUDGMENT.

The appellant has been convicted of erecting, without the permission of the Commissioner of the Madras Municipal Corporation, machinery by the use of which smell, noise, vibration, etc., are produced. This is an offence by virtue of sections 288 and 357 and schedule 7 of the Act. Admittedly he has put up an electric

* Criminal Appeal No. 331 of 1926.

NATESA MUDALIAR v. KING-EMPEROR.

motor-driving mill and the evidence shows that this machinery emits disagreeable odours and produces considerable noise.

It is contended first that this is not machinery. This contention deserves no consideration.

Next, it is urged that the appellant had only substituted this motor for an oil-engine for which he had taken out permission. But even so, it is obvious that he had erected this machinery.

Finally, it is urged that the machinery is not a nuisance. But that is no defence to the case. The wording of section 288 is plain, that the question whether the machinery is or is not a nuisance is one for the Commissioner alone, and if he finds that it is a nuisance he may refuse permission altogether. Whether it is a nuisance or not a nuisance is immaterial, permission has to be obtained in either case, and may be withheld in the former case.

It is, however, brought to our notice that one learned Judge of this Court has, in a ruling in *In re Smith*(1), taken a different view, namely, that it must be proved that the machinery is a nuisance before any part of the section comes into operation. With all deference we are unable to agree with this view. To hold so would result in this, that the section empowers the Commissioner to grant a licence for what is a public nuisance and what he himself considers a public nuisance. The learned Judge was constrained to support his reading of the section by referring to the marginal note, but it has been frequently held that that is not a legitimate canon of interpretation. See the Privy Council case in *Balraj Kunwar* v. *Jagatpal Singh*(2). The section as it stands is to our minds perfectly plain; any one

(1) (1925) 45 M.L.J., 731. (2) (1904) I.L.R., 26 All., 393 (F.C.) at 406.

NATESA MUDALIAR v. KING-EMPEROR.

erecting machinery must get the permission of the Commissioner (whether permission is equivalent to *licence* is a matter which we need not consider in this case) and the Commissioner may refuse permission if the machinery in his opinion constitutes a nuisance to the neighbourhood. The section is a very salutary one in the interests of the general public. We can therefore see no reason to interfere and we dismiss this appeal.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson.

SAMIULLAH SAHIB AND EIGHTEEN OTHERS (ACCUSED 1 TO 9 AND 11 TO 20), PETITIONERS*

1926, September 9.

v.

KING-EMPEROR.

Persons separately engaged in fishing in prohibited waters—No common object or common intention—Joint trial under ss. 379 and 447, Indian Penal Code—Same transaction—s. 239, Criminal Procedure Code—Applicability of.

Where a number of persons were all separately engaged in fishing, and were merely several poachers gathered in the same place at the same time, and there was no evidence of a common object or a common intention, and the said persons were tried together for offences under sections 379 and 447 of the Indian Penal Code as having been committed in the course of the same transaction, and convicted, *held*, that the accused ought not to have been tried together and that such joint trial was not a mere irregularity.

Whenever the applicability of section 239 of the Criminal Procedure Code is doubtful, it is far better that the accused should be tried separately. *Mala Makalakati Subbadu* v. *King-Emperor*, (1915) 28 M.L.J., 281, followed, *Emperor* v. *Rafuz-Zaman*

* Criminal Revision Case No. 33 of 1926.

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Khan, (1926) I.L.R., 48 All., 325, and *Choragudi Venkatadri* v. *Emperor* (1910) I.L.R., 33 Mad., 502, referred to.

PETITION, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Subdivisional Magistrate of Bandar in Calendar Case No. 9 of 1925.

V. L. Ethiraj and *K. Chathukutti Nambiar* for the petitioners.

Public Prosecutor for the Crown.

JUDGMENT.

The petitioners have been fined Rs. 15 under sections 379 and 447 of the Indian Penal Code for stealing fish in the course of the same transaction. They were all separately engaged in fishing and there is no evidence of common object or common intention, they were merely several poachers gathered in the same place at the same time. The question is whether under section 239 (*a*), Code of Criminal Procedure, they can lawfully be tried together.

The Subdivisional Magistrate has stated the difficulty in his third paragraph without solving it. Apparently the Prosecuting Inspector undertook to prove common intention but he has not done so. Even if ten people go separately and steal grain from a granary there must be a presumption of common intention before they can be tried together. The accused certainly cannot be held responsible for the wording of the charge sheet.

It cannot be said that these nineteen accused were not prejudiced by being tried together; nor had the Magistrate jurisdiction to try them. It is not a mere irregularity. See *Mala Makalakati Subbadu* v. *Emperor*(1),

(1) (1915) 28 M.L.J., 381.

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which lays down the law more unequivocally than the head note to the report would suggest.

My attention has been directed by the Public Prosecutor to *Emperor* v. *Rafuz-Zaman Khan*(1) which traverses though not in terms the leading Madras case *Choragudi Venkatadri* v. *King Emperor*(2), where ABDUR RAHIM, J., has held that community of purpose is a necessary element if the transaction is to be regarded as the same. In the Allahabad case three persons gave three practically identical false statements describing how a man was killed. It was held that their joint trial was regular, because

> "the act of each accused may be wholly independent of the act of the other and in that sense there may be no community whatever; but there may still be community of purpose in the sense of identity of purpose and the acts committed in the same transaction."

And above, we prefer the phrase "identity of purpose" to the phrase "community of purpose." The latter phrase is ambiguous, in that it may mean only "identity of purpose" or it may suggest that the purpose of each was not only the same but was known to the others or in other words "conspiracy." We do not consider "conspiracy" in any way a necessary element. Therefore it is held to be sufficient for the purpose of section 239 if there has been identity of purpose exclusive of any idea of conspiracy; and the ruling might run, "there may still be identity of purpose and then the acts will be acts committed in the same transaction." There is no need to import the word "community" at all if it is only to mean identity.

The Public Prosecutor would argue from this that the present petitioners had an identical purpose, fishing

(1) (1926) I.L.R., 48 All., 325. (2) (1910) I.L.R., 33 Mad., 502.

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in prohibited waters, and therefore they may be tried together.

But this is to confuse identical with similar. The purpose of the fishermen was that each would catch fish; each was not interested in what others caught and the more remote consequence of their act, the wrongful loss to the owner, was no actual part of their purpose. But in the Allahabad case the purpose of the perjurers was to deceive the Judge; they were not severally composing fiction as if the perjury were an end in itself. With the fisherman the catch is the thing and not the consequence; with the perjurer the consequence and not the lie.

The terms of the section itself offer the best solution of these problems. Were the offences committed in the course of the same transaction; or, in other words, were the offenders putting through the same thing? *A*, *B* and *C* travel in the same train without tickets; the purpose of each is to be conveyed without paying; it is a similar purpose but not identical, because *A* does not intend that *B* and *C* shall escape paying and so with *B* or *C*. They cannot be jointly tried. *A*, *B* and *C* travel in compartments reserved for other communities, as a protest against the railway policy. There is no evidence that they have conspired, but if their purpose is to protest their purpose is identical. They are putting through the same thing and it is the same transaction. They can be tried jointly.

But this is not put forward as a general rule for solving the section. The only general rule is that whenever the applicability of section 239 is doubtful, it is far better that it should not be applied and that accused should be tried separately. It must be clearly understood that discussions with regard to particular circumstances neither add nor detract from the meaning

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of the statute. As BENSON, J., observes in *Choragudi Venkatadri* v. *King-Emperor*(1) it is neither necessary nor advisable to attempt to define the expression "the same transaction" which the legislature has left undefined; but there is usually no great difficulty in deciding whether any particular case comes within the rule. In *Emperor* v. *Rafuz-Zaman Khan*(2) the same emphasis is laid upon the circumstances of the case, and the Court ends by finding as a matter of fact that there was conspiracy or prior consultation. Probably cases which can be tried together, although there has been no prior consultation, are rare. In the present case not only is there no evidence of prior consultation, but there is no identity of purpose, and the trial must be held to have been irregular. The accused are acquitted and the fines ordered to be refunded. There seems no necessity to order a retrial in such a petty matter, because the proceedings themselves have been deterrent and their acquittal does not affect the question whether petitioners have a right to fish in these waters.

B.C.S.

(1) (1910) I.L.R., 33 Mad., 502. (2) (1926) I.L.R., 48 All., 325.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson.

1926, September 14.

IN RE RAJU ACHARI (1ST ACCUSED), PETITIONER.*

Criminal Procedure Code (Act V of 1898) as amended by sec. 72 of Act XVIII of 1923—Accused unrepresented by legal practitioner—Required to state forthwith if he wishes to cross-examine prosecution witnesses—Magistrate recording no reason—If mere irregularity—Sec. 256, if applicable to summary trials.

Under section 256 of the Criminal Procedure Code (Act V of 1898) as amended by section 72 of Act XVIII of 1923, a magistrate must record his reasons, where he asks an accused, who is not represented by a legal practitioner, forthwith to state whether he wishes to cross-examine the prosecution witnesses, and failure to so record his reasons is not a mere irregularity curable under section 573 of the Criminal Procedure Code.

When the legislature specially amplifies a mandatory section, no rule of construction will allow the courts to treat it as directory.

Subrahmania Ayyar v. *King-Emperor*, (1902) I.L.R., 25 Mad., 61 (P.C.), followed; *Mussamat Ghasiti* v. *The Crown*, (1925) I.L.R., 6 Lah., 554, dissented from; *Phuman Singh* v. *The Crown*, (1925) All. I.R. (Lah.), 339, referred to,

Section 256 is applicable to a summary trial.

Umaji Krishnaji v. *Emperor*, (1926) 93 I.C., 159, dissented from.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, praying the High Court to revise the conviction of, and sentence passed upon the petitioner herein, on 12th March 1926 by the Court of the Honorary Presidency Magistrate, Royapettah (Egmore), in Calendar Case No. 5099 of 1926.

S. Venkataraman for the petitioner.

Crown Prosecutor for the Crown.

* Criminal Revision Case No. 305 of 1926.

JUDGMENT.

Petitioner has been convicted under sections 323 and 4, Indian Penal Code, by the Honorary Presidency agistrate, Royapettah, and seeks to set aside the con- ction because the Magistrate asked him forthwith ether he wished to cross-examine the prosecution tnesses without recording his reasons under section 6, Code of Criminal Procedure.

It was probably intended by the Code as originally amed that in warrant cases the Magistrate should amine the prosecution witnesses in chief, and, if neces- ry, frame a charge without the intervention of the cused. At the next hearing, the accused could engage vakil and cross-examine the prosecution witnesses. cused persons however considered, probably not with- t reason that by the time the case reached the charge the Magistrate had only heard one side his opinion ight be too firmly fixed to be shaken. They preferred erefore to cross-examine the prosecution witnesses at e outset. In such cases, a second cross-examination ter the charge might often seem a waste of time, and agistrates were disposed to call upon the accused to cross-examine immediately after they had framed the arge. The accused would protest that they were ll entitled to the interval which would be allowed em if they had not chosen to cross-examine and when e Magistrate proved obdurate, dissension and a sense injustice often supervened.

Therefore by section 72, Act XVIII of 1923, section 6 was amended by inserting after the words "to ate" the words "at the commencement of the next aring of the case or, if the Magistrate, for reasons to recorded in writing, so thinks fit, forthwith."

This appears to be a very sensible solution of the ifficulty. The Magistrate still controls the procedure,

In re RAJU ACHARI.

but if his ruling runs counter to the wishes of the accused he must support it by reasons. Where the accused is represented by a vakil from the outset he may generally be asked under the section if he wishes to cross-examine forthwith, for the simple reason that the accused will not be prejudiced and it is convenient to arrange a date for the subsequent attendance of the prosecution witnesses before they disperse.

If, however, he is asked forthwith, with a view to recalling the witnesses forthwith, fuller reasons will be required because it is usually convenient to the accused to have an interval in which to study the depositions already on record, and discover material for the cross-examination of the witnesses.

If an accused is not represented by a vakil, reason must be shown for not postponing the question to the next hearing by which time he can have consulted a vakil.

In the present case, the accused who was not represented by a vakil, was required forthwith to state if he wished to cross-examine, and the Magistrate recorded no reasons.

It is argued on behalf of the Crown that this is an irregularity curable under section 537, Code of Criminal Procedure. It is difficult to apply this section to the facts of a case of this nature, for when can it be said that no failure of justice has been occasioned by refusing an accused an opportunity to consult a legal adviser? Nor do I think it applicable in law.

Before it was amended, section 256 was undoubtedly mandatory. If a Magistrate omitted altogether to ask the accused if he wished to cross-examine the prosecution witnesses, it could not be said to be a mere irregularity. And when the Legislature specially amplifies a mandatory section, there is, in my opinion, no

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rule of construction which will allow the Courts to treat it as directory. No doubt a contrary opinion is expressed but without argument, in *Mussammat Ghaisti* v. *The Crown*(1) and I can only say that I respectfully differ. In *Phuman Singh* v. *The Crown*(2), CAMPBELL, J., holds that a contravention of section 256 is covered by section 537; but notes the difficulty which I have mentioned above of holding as a matter of fact that accused has not been prejudiced. As regards the law in that case, I doubt if it can really be argued that because section 535, Criminal Procedure Code, validates a conviction which is attacked merely because no charge has been framed, therefore section 537 validates a trial in which section 256 has been contravened. The safest guide in these questions is the well-known ruling of the Judicial Committee. Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity, *Subramania Ayyar* v. *King-Emperor*(3).

In Bombay it has been held that section 256 is not applicable to a summary trial, *Umaji Krishnaji* v. *Emperor*(4), and again I must express my dissent. It is argued that section 262, which provides that the procedure of warrant cases shall apply to warrant cases summarily tried except where otherwise mentioned, does not make section 256 applicable to summary trials, because section 263 relieves the Magistrate of the necessity of framing a formal charge—section 256 "clearly implies that the Court has had a charge read. . . . . It is only then that the occasion arises under which the accused is required to state whether he wishes to cross-examine." But there is no such clear implication in

(1) (1925) I.L.R., 6 Lah., 554.
(2) (1925) All. I.R. (Lah.), 339.
(3) (1902) I.L.R., 25 Mad., 61 (P.C.).
(4) (1926) 93, I. C., 159.

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section 256, which makes no reference at all to a charge, and only happens to come below section 255 because in the natural order of things the indictment precedes the defence. Whether an accused is tried under Chapter XXI or Chapter XXII, and whatever form the charge may take he must be called upon to plead, and section 256 which provides for the defence is applicable to either sort of trial. MADGAVKAR, J. (93 I.C., 159) holds that in a summary trial there can be no reason for re-cross-examination, but seems to overlook a case like the present case where the accused is put on his defence before he is represented by a vakil.

The petition is allowed and petitioner ordered to be retried by the Chief Presidency Magistrate, or any Magistrate having jurisdiction to whom he transfers the same.

The conviction and sentence are set aside and the fine if paid is to be refunded.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

1926, December 10

JAYACHANDRA CHETTI AND ANOTHER (ACCUSED 1 AND 3), PETITIONERS,

v.

KING-EMPEROR, RESPONDENT.*

Madras Abkari Act (I of 1886), ss. 55 and 56—Person carrying arrack if in possession—Meaning of "possession"—Possession of illicit quantity in breach of licence, permit or rule—Offence under ss. 55 or 56—Arrest and detention of persons suspected of abkari offences—Ss. 34 and 40 confused and irreconcilable.

"Possession" in the Madras Abkari Act has its ordinary meaning, and a person who is carrying arrack is in possession of it.

Possession of an illicit quantity of arrack in breach of a licence or permit or rule under the Act comes under section 55 (*a*) and not section 56 (*b*), and renders the possessor liable to arrest under the Act.

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 Saidapet in Criminal Appeal No. 40 of 1926 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Saidapet in C.C. No. 1378 of 1925.

The facts necessary for this report appear in the judgment.

V. L. Ethiraj, V. Rajagopala Achariyar and *A. S. Natarajan* for petitioners.

R. N. Aiangar for *Public Prosecutor* for the Crown.

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* Criminal Revision Case No. 506 of 1926.

JAYACHANDRA CHETTI v. KING-EMPEROR.

JUDGMENT.

The first petitioner in this case had been convicted of escaping from lawful custody, and the second petitioner of rescuing him from lawful custody, the first petitioner having been arrested by the Abkari Sub-Inspector for being in possession of an illicit quantity of arrack, and second petitioner has also been convicted of assaulting the Sub-Inspector. The assault and the rescue have been held to have been proved as facts by both the lower Courts and that concurrent finding of fact has not been disputed, as it could not easily have been disputed, before this Court exercising its powers of revision. The facts are that the first petitioner is a servant of the second accused who holds an arrack licence for certain premises, that the first petitioner was conveying without a permit from second accused's shop to his house a quantity of arrack in excess of the amount which the second accused or any one else is permitted to hold under the rules outside licensed premises, that the first petitioner was caught by the Abkari Sub-Inspector in possession of this arrack and arrested, and that when the Sub-Inspector was taking him to the police station, accused 2 and the second petitioner came up, assaulted the Sub-Inspector and rescued the first petitioner who made good his escape.

In this Court it is pleaded that the custody of the first petitioner by the Abkari Sub-Inspector was not lawful and therefore no offence has been committed. This plea rests on three contentions, (1) that the first petitioner was not in possession, within the legal meaning of that word, of the arrack, (2) that the original offence was not one for which he could be arrested, and (3) that the action of the Sub-Inspector in taking him to the police station was contrary to law. As to the first point, the contention is that the 1st petitioner

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was really "transporting" arrack and was not in possession of it within the legal meaning of the term. No authority has been cited for this position. No doubt he was transporting the arrack, but I do not see how it can be said that he was not also in possession of it. In the absence of any indication in the Abkari Act to the contrary, 'possession' has its ordinary meaning and the first petitioner was certainly in possession of the arrack when he was carrying it. I see no force in this point.

As to the second point the argument is based on a contention that the offence comes under section 56 and not section 55 of the Abkari Act, and that section 34 gives no authority to an Abkari Officer to arrest for an offence under section 56. The question is, does the present offence fall under section 56 (*b*), and if it does, does that prevent it falling also under section 55 (*a*)? The wording of section 56 (*b*) is very clumsy; "Whoever does anything in breach of the conditions of his licence not otherwise provided for in this Act." This language is, to say the least, very dubious English, but I take it to mean, "whoever does anything which amounts to a breach of the conditions of his licence, which breach is not otherwise provided for in this Act;" that the breach will be punishable under this section if it is not already designated as punishable under some other section. A breach under section 56 (*b*) is a breach distinct from those provided for under section 55. Breaches under section 56 are, apparently from the fact that they do not entail liability to arrest, of a less heinous kind than those under section 55. I have no doubt that possession of an illict quantity of arrack in breach of the licence or permit or rule under the Act comes under section 55 (*a*) and therefore does not come under section 56 (*b*). Therefore on the second point I hold that the first petitioner was lawfully liable to arrest under section 34.

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As to point 3, it involves a consideration of section 40 (1) which lays down that on arrest the arrested person shall, if bail is not accepted, be forthwith forwarded to an Abkari Inspector, or, if there is no such officer within ten miles, to the nearest police station. There is no doubt that in this case there was an Abkari Inspector in Madras within ten miles of the scene of arrest. There is no doubt also that the Abkari Sub-Inspector who effected the arrest was taking the first petitioner to the police station; he definitely says so in his evidence, and it was when the first petitioner was almost at the police station that he was rescued.

Section 40 (1) as it stands seems impracticable to work. The arresting officer and the person arrested are to start off at once on a wild goose chase after an Abkari Inspector, who is a touring officer and may be anywhere within a circle of ten miles from the scene of arrest. The section would seem to indicate that this is the proper procedure. If any attempt is to be first made to find out the whereabouts of the Inspector within the circle, it is not clear what is to be done with the arrested person while this enquiry is being made. A reference to section 34 proviso still further increases the difficulty of knowing what is the proper procedure. In that proviso, if the arresting officer is not authorized to admit to bail, he must forward the arrested person forthwith to an officer empowered to grant bail if there is such an officer within five miles. If such an officer is a Police Inspector who is at the police station, then obviously the arrested person must be sent to the police station for the purpose of admitting to bail. It follows then that if the arresting officer can admit to bail he cannot send the arrested person to the police station; but if he cannot admit to bail, then he can send the arrested person to the police station, a rather topsy-

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turvy result. Whether the Abkari Sub-Inspector in this case was empowered to grant bail, does not appear to have been put in issue in the case. Before the lower Appellate Court the petitioners argued that he was not so empowered. If so, then section 34 proviso would apply and the Abkari Sub-Inspector was in law bound to send him to an officer who could grant bail, such as the Police Inspector, and the taking of the first petitioner to the police station would then seem to be perfectly lawful. I am of opinion that if the petitioners wanted to make anything of this point, they should have done so before the trial court when it could have been put in issue whether the arresting officer had or had not power to grant bail. This was not done. There is no definite fact proved from which I can conclude that section 40 and not section 34 proviso applies to this case. Nor am I prepared at this stage to call for information.

I find therefere no case has been made out for revision and I dismiss this petition.

I would respectfully urge on Government the necessity of revising these provisions of the Abkari Act. This Court has in two other cases, namely, Crl. R.C. Nos. 515 of 1924 and 368 of 1925, pointed out how confused and irreconcilable these sections regarding arrest and detention of persons suspected of committing abkari offences are and what difficulties are put in the way of the courts which endeavour to interpret them.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

1926, December 21.

MARUTHUMUTHU KUDUMBAN (PETITIONER), FIRST ACCUSED,

v.

KING-EMPEROR.*

Criminal Procedure Code (Act V of 1898), sec. 174—Inquest under—Copies of statements made at—Accused's right to obtain—Same procedure as under section 162—Post-mortem certificate—Inquest report—Accused's right to copies of.

Statements made at an inquest under section 174 of the Code of Criminal Procedure are statements made to a Police Officer "in the course of an investigation under the chapter" under section 162, and not being public documents, an accused is not entitled to copies of such statements.

An accused is entitled to copies of the *post-mortem* certificate and of the inquest report (excluding statements therein).

In re *Peramasami Naidu* (1924) 22 L.W., 784, referred to.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Stationary Sub-Magistrate of Periyakulam, dated 13th December 1926, and made in R.C. No. 20 of 1926.

F. S. Vaz for petitioner.

K. N. Ganpati for *Public Prosecutor* for the Crown.

JUDGMENT.

The investigation under section 174 of the Code of Criminal Procedure is made by the police officer, and the statements are, therefore, statements made to a police officer "in the course of an investigation under this chapter" under section 162 of the Code of Criminal Procedure. The fact that the inquest is held in the

* Criminal Revision Case No. 985 of 1926.

presence of two or more respectable inhabitants does not render the statements taken there any the less statements made to a Police Officer. Such statements are, therefore, not public documents of which accused is entitled to a copy and the procedure which governs the grant of copies of statements under section 162 of the Code of Criminal Procedure, governs also the grant of copies of statements made at the inquest.

The latest ruling of the Court on this subject is reported in *Peramasami Nayudu, In re.*(1)

As to the *post-mortem* certificate, I can see no objection to the grant of a copy of that and in practice I think that when the medical officer is not examined at the beginning of the enquiry, a copy of the *post-mortem* certificate ought to be given to the accused for the purpose of enabling him to conduct his defence. The same remark will apply to the inquest report (excluding statements made therein) when the investigating police officer is not examined at the beginning of the enquiry.

With these remarks the petition is dismissed.

B.C.S.

(1) (1924) 22 L.W., 784 ; 91 I.C., 532.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson.

THE PUBLIC PROSECUTOR, APPELLANT,

v.

1927, January 7.

K. SAIDALI KUTTI AND SONS, ACCUSED.*

Madras Local Boards Act (XIV of 1920), Sch. VII, cl. (c)—"Storing or otherwise dealing with"—Forwarding agent—Collection of packages of fish—Kept in shed or godown with a view to consignment—If comes within mischief of Sch. VII, cl (c).

A forwarding agent, who collects packages of fish and keeps them in a shed or a godown for a day or two with a view to their subsequent consignment elsewhere, is "storing or otherwise dealing with" fish within the meaning of Schedule VII, clause (*c*) of the Madras Local Boards Act. The shortness or otherwise of the period does not affect the question.

A man who handles goods in any way is dealing with them and storing for private purposes apart from trade is "dealing with." *Emperor* v. *Wallace Flour Mill Co.*, (1905) I.L.R., 29 Bom., 193. *N. E. Ry. Co.* v. *Mayor, etc. of Kingston-upon Hull*, (1891) 55 J.P., 518, referred to.

APPEAL under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the accused by the Sub-Magistrate of Tirur in Calendar Case No. 163 of 1926.

Public Prosecutor for the Crown.

P. Govinda Menon for accused.

JUDGMENT.

Appeal by Government against acquittal of accused in Calendar Case No. 163 of 1926 on the file of the Court of the Sub-Magistrate of Tirur. Accused was prosecuted by the Ponnani Taluk Board for failure to take out licence under Schedule VII (*c*), Madras Act XIV

* Criminal Appeal No. 507 of 1926.

of 1920 for a shed in which he stored or otherwise dealt with fish. Accused is admittedly a forwarding agent who collects packages of fish and consigns them elsewhere. A day or two may elapse before consignment when accused keeps the fish in a rented shed. Is this storing or otherwise dealing with? The Sub-Magistrate answers the question in the negative without any argument. The case is not parallel with that in *Emperor* v. *Wallace Flour Mill Company*(1) where it was held that oil stored for the lubrication of a machine on the premises was not stored within the mischief of section 394, City of Bombay Municipal Act. When goods are kept in a shed or godown with a view to their subsequent consignment is the best illustration of storage proper. Nor does the shortness of the period affect the question. In a business like accused's one package may only be stored a couple of nights, but it is succeeded by other packages, and the storing is practically continuous.

The phrase "dealing with" which must not be confounded with "dealing in" makes the clause even wider. A man who handles goods in any way is dealing with them, and storing for private purposes apart from trade is 'dealing with.' See *N.E.Ry. Co.* v. *Mayor, etc. of Kingston-upon-Hull*(2) quoted in Stroud's Judicial Dictionary. Coals for the owner's own use were "dealt with."

In these circumstances the order of acquittal is set aside and accused is found guilty under sections 193 and 207 of Madras Act XIV of 1920 and sentenced to a fine of rupees five, in default, one week's rigorous imprisonment.

B.C.S.

(1) (1905) I.L.R., 29 Bom., 193. (2) (1891) 55 J.P., 518.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson.

KAMISETTY RAJA RAO (COMPLAINANT), PETITIONER,

1927
January 11.

v.

T. RAMASWAMY (1ST ACCUSED), RESPONDENT.*

Public officials—Immunity from prosecution without sanction—Extent of—Act arising out of abuse of official position, and not purporting to be official—Municipal Chairman—Threatening injury to voter's property with intent to influence his vote—Complaint under section 54 (*a*) *of the Madras District Municipalities Act* (*V of* 1920)—*Sanction under section* 197 *of the Criminal Procedure Code* (*Act V of* 1898) —*If necessary.*

The privilege of immunity from prosecution without sanction accorded to public officials only extends to acts which can be shown to be in discharge of official duty, or fairly purporting to be in such discharge. A prosecution for an offence arising out of an abuse of official position by an act not purporting to be official does not require sanction under section 197 of the Code of Criminal Procedure.

Where a complaint against a Chairman of a Municipal Council charged him with an offence under section 54 (*a*) of the Madras District Municipalities Act (V of 1920) in that he threatened a voter with injury to his property, with intent to induce such voter to vote for a candidate or to abstain from voting, held that sanction under section 197 of the Code of Criminal Procedure (Act V of 1898) was not necessary for the institution of the complaint.

Sheik Abdul Kadir Saheb v. *Emperor*, (1916) M.W.N., 384, at 388, followed. In re *Gulam Muhammad Sharif-ud-daulah*, (1886) I.L.R., 9 Mad., 439, dissented from. *Municipal Commissioners of the City of Madras* v. *Bell*, (1902) I.L.R., 25 Mad., 15, referred to.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to

* Criminal Revision Case No. 771 of 1926.

revise the order of the Court of the District Magistrate of Guntūr in Case No. 4 of 1926, dated 24th August 1926.

K. S. Jayarama Ayyar for petitioner.

V. L. Ethiraj for respondent.

Public Prosecutor for the Crown.

JUDGMENT.

Petitioner seeks to revise the order of the District Magistrate, Guntūr, in C. C. No. 4 of 1926 refusing to take cognizance of a complaint against the Chairman of the Municipal Council, Tenali, under section 54 (*a*), Act V of 1920, because sanction had not been obtained under section 197 of the Code of Criminal Procedure.

2. The offence in question is threatening a voter with injury to his property with intent to induce such voter to vote for any candidate or to abstain from voting.

The petitioner would have it that this was done while the chairman was acting or purporting to act in the discharge of his official duty within the terms of section 197 of the Code of Criminal Procedure.

3. The section presents no difficulty if the obvious intention of the legislature is borne in mind. It is no part of British policy to set an official above the common law. If he commits a common offence he has no peculiar privilege. But if one of his official acts is alleged to be an offence, the State will not allow him to be prosecuted without its sanction, for the obvious reason that otherwise official action would be beset by private prosecution. Judges would be charged with defamation, policemen with wrongful restraint, and distrainers with theft. This privilege of immunity from prosecution without sanction only extends to acts which can be shown to be in discharge of official duty, or fairly purporting to be in such discharge.

RAJA RAO v. RAMASWAMY.

Thus, if the chairman had dismissed the petitioner, sanction would have to be obtained, because obviously he would have acted in his official capacity. Nor would it avail the petitioner to say that the chairman had dismissed him for no fault as a municipal servant, for the dismissal would at any rate purport to be in his official capacity. But a threat of dismissal because of the way in which he chose to vote cannot be said either to be or to purport to be in exercise of the chairman's official capacity, no more than if the chairman had hurt or robbed the petitioner it could be said to be in exercise of official capacity.

4. But the petitioner argues that the threatening, hurting or robbing would be in exercise of official capacity, if the chairman's office put him in a position in which he could commit these offences.

Suppose the chairman hurt the petitioner while reprimanding him for some short-coming as a municipal servant, or wrongfully threatened to dismiss him, taking advantage of the fact that in other circumstances connected with municipal administration he has the power to dismiss, could it then be said that he purported to act in his official capacity? In short, does an offence arising out of abuse of official position by an act not purporting to be official necessitate sanction under section 197 of the Code of Criminal Procedure? In my opinion it does not and the same opinion is expressed by the present Chief Justice sitting as a single Judge in *Sheik Abdul Kadir Sahib* v. *Emperor*(1):

"The offence of criminal breach of trust is not an offence which is committed by the chairman in his capacity of public servant as such."

(1) (1916) M.W.N., 384 at 388.

RAJA RAO v. RAMASWAMY.

That is to say, he was never appointed with the intention that his official functions would embrace criminal breach of trust, "his capacity of public servant being only that which puts him, so to speak, in a position in which such an offence can be committed."

That is to say, it is not enough for him merely to be in an official position which he may abuse. He must act in his official capacity. The head-note perhaps does not put this very clearly; and another reason why section 197 often occasions difficulty is the sense in which acting is commonly understood in this country. "Offence alleged to have been committed while acting in the discharge of his official duty", some persons are prone to interpret as meaning "any offence committed by him while he is in office." That, as I have shown above, is quite wrong; and "acting" here refers to the specific action which comprises the offence. The section might run

"is accused of any action done by him in the discharge of his official duty, alleged to be an offence."

5. It is interesting to note that the section still causes difficulty because it was newly drafted in 1923 to clear up the ambiguity of the wording in the 1898 Code, which itself was an attempted improvement upon that of 1872. These variations must be kept in view in examining the case law, though, I think, that, throughout, the legislature has been endeavouring to state the same thing only in different words.

6. In *Imperatrix* v. *Lakshman Sakharam Vaman Hari and Balaji Krishna*(1) it appears that some sort of Munsif fabricated an entire civil suit as heard by himself from the plaint to the decree, and the learned Judges held that sanction was necessary. The 1872 Code, section 466, ran

(1) (1878) I.L.R., 2 Bom., 481.

RAJA RAO v. RAMASWAMY.

"An offence committed by a public servant in his capacity as such public servant"

And this was held to extend to all acts ostensibly done by a public servant, that is, to acts which would have no special signification (significance?) except as acts done by a public servant.

I confess to some difficulty in following this decision. If the ingenious man had forged the record as coming before some other Court, there presumably would be no question of sanction, and why must there be sanction because he selected his own Court? The forgery and fabrication were not done in his capacity as public servant. Perhaps he signed the decree in that capacity.

7. However this ruling seems to have been approved by a single Judge of this Court in *In re Gulam Muhammad Sharif-ud-daulah*(1). There a Judge of the Court of Small Causes was accused of using, when on the Bench, defamatory language to a witness. It was held that a Judge on the Bench cannot act in a private capacity. It is probably to avoid any difficulty arising out of the word capacity that the word now finds no place in the section. It could never have been intended by the legislature that a Judge as soon as he takes his seat upon the Bench can only act in an official capacity. Suppose that instead of defaming he had shot the witness. This authority is questioned in *Sheik Abdul Kadir Saheb* v. *Emperor*(2) and I concur. It is also dissented from in *Nando Lal Basak* v. *Mitter*(3). In *Municipal Commissioners for the City of Madras* v. *Bell*(4) one Major Bell, a public servant, was prosecuted for bringing timber into this town in contravention of section 341 of the then Municipal Act, and the

(1) (1886) I.L.R., 9 Mad., 439.
(2) (1916) M.W.N., 384.
(3) (1899) I.L.R., 26 Calc., 852.
(4) (1902) I.L.R., 25 Mad., 15.

RAJA RAO v. RAMASWAMY.

question again arose whether sanction was necessary. The point is well put by MOORE, J.:

"It cannot be held that the offence of bringing wood into the city of Madras without a licence is one which could be committed by a public servant only, or that such an offence involves as one of its elements that it was committed by (e.g.) the Superintendent of the Gun Carriage Factory."

Applying these words to the present case, it cannot be held that threatening the voter with injury could be committed by a public servant only, or such an offence involves as one of its elements that it was committed by a chairman of a Municipality. No doubt it was the accident of his position which gave the major timber to bring in, or the chairman a servant to threaten, but neither the illicit import nor the illicit threat were acts committed in the discharge of official duty. Therefore I hold that sanction was not necessary in respect of the complaint under section 54 (*a*), Act V of 1920, and direct the District Magistrate to proceed according to law. His order is cancelled. It will be noted that this proceeding is confined to the complaint under section 54 (*a*).

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Curgenven.

1927, January 26.

M. A. RAZACK (ACCUSED), PETITIONER,

v.

KING-EMPEROR, RESPONDENT.*

Madras City Municipal Act (IV of 1919), *ss.* 233, 357 *and* 392—*Essence of an offence under section* 233—*Maintaining an already constructed building without licence—Conviction under section* 233 *read with section* 357—*if legal—Omission to take out licence—Limitation under section* 392.

The essence of an offence under section 233 of the Madras City Municipal Act is the act of constructing or reconstructing and not merely that of maintaining an already constructed building in existence.

Hence the period of limitation under section 392 for a prosecution in respect of an omission to take out a licence under section 233 is twelve months from the date of construction or reconstruction.

Where a complaint was made against the accused that he had a shed of inflammable material without a licence contrary to section 233 and the magistrate recorded the plea of the accused as guilty and added that the accused explained at the same time that he had had the shed of inflammable material for the last eight years without paying any fee to the Corporation, *held* that in view of the explanation of the accused it was impossible to conclude that the accused could have pleaded guilty to an offence which contained the factors required by section 233.

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 Third Presidency Magistrate, Madras, dated 27th May 1926, in Calendar Case No. 10143 of 1926.

K. S. Jayarama Ayyar and *S. Nagaraja Ayyar* for petitioner.

* Criminal Revision Case No. 735 of 1926.

P. Govinda Menon for *Crown Prosecutor* for the Crown.

JUDGMENT.

This is a Criminal Revision Petition against the conviction by the Third Presidency Magistrate, Madras, of the petitioner for an offence under section 357 of the Madras City Municipality Act, IV of 1919. The complaint made against him was that on or about the 10th January 1926 he had a shed of inflammable materials in Moore Market compound without licence from the Commissioner, contrary to section 233. The learned Magistrate has recorded the plea of the accused as guilty and states that he explained at the same time that he had the shed of inflammable materials for the last eight years without paying any fee to the Corporation. In view of this explanation it is impossible to conclude that the accused can have pleaded guilty to an offence which contained the factors required by section 233. According to that provision no inflammable structure is to be constructed or reconstructed except with the permission of the Commissioner. The word used in the previous act in lieu of "constructed" was "made" and it is quite clear that that word led to a difference of opinion as to whether its meaning was in fact "constructed" or merely "composed of." In *Crown Prosecutor* v. *Audikasavalu Nayudu*(1), SUNDARA AYYAR and SPENCER, JJ., held that it meant the former, whereas in *Corporation of Madras* v. *Varadachariar*(2), SADASIVA AYYAR and NAPIER, JJ., put the latter construction on the term. It has however now been made unambiguous and it is clear that the essence of the offence is the act of constructing or reconstructing and not merely that of maintaining an already constructed building in

(1) (1912) M.W.N., 84. (2) (1919) I.L.R., 42 Mad., 7.

RAZACK v. KING-EMPEROR.

existence. With this section is to be read section 392, which imposes a general period of limitation of six months in respect of acts which constitute an offence and a particular period of 12 months in respect of an omission to take out a licence. But it is evident from the facts, which do not seem to be disputed, that this period had long expired and therefore the conviction under section 233 cannot be sustained and I must accordingly set it aside.

From the minutes of a meeting of the Corporation, dated the 16th January 1923, not put in evidence before the lower Court but produced by the petitioner, it would appear that the petitioner with others was allowed to maintain his tea-shop without a licence, and from another notice of the Corporation, dated 30th August 1923, that he was permitted to continue in occupation until further orders. It is stated that subsequently the Corporation has required him to take out a licence in respect of his tea-shop structure and that he has refused to do so and that it was that that gave occasion to the prosecution. If that be so, the nature of the prosecution seems to have been misconceived, though it may be true that the Corporation has the means of enforcing the taking out of a licence. As to this I express no opinion, but if so, these proceedings will not prevent them from taking the proper steps. The Criminal Revision Petition is allowed and the fine and licence fee, if paid, will be refunded.

B.C.S.

SPECIAL BENCH.

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

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

v.

LINGA REDDY, RESPONDENT.*

1927, April 27.

Income-tax Act (XI of 1922), sec. 2 (1)—Land leased for manufacture of salt—Profits derived from manufacture of salt on the lands leased—Licensee, whether liable to assessment to income-tax in respect of such profits—Lands so used, whether used for agricultural purposes—"Agricultural purpose," meaning of.

Income derived from manufacture of salt in agricultural lands is *not* agricultural income within the meaning of section 2 (1) of the Income-tax Act (XI of 1922); and consequently the licensee of a salt factory is liable to be assessed to income-tax in respect of profits derived from manufacture of salt on such lands.

CASE stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, in the matter of Linga Reddi, Nellore District (Mypad), a licensee of Krishnapatam Salt Factory.

The question referred by the Commissioner of Income-tax, Madras, for the opinion of the High Court was as follows :—

"Whether the income derived by manufacture of salt in agricultural lands is agricultural income within the meaning of section 2 (1) of the Income-tax Act ?"

T. V. Venkatarama Ayyar for assessee.—Land let out for manufacture of salt is agricultural land. The process of manufacture of salt is a process in agriculture. The land is ploughed and furrowed as in cultivation, and the soil is prepared

* Referred Case No. 2 of 1926.

COMMISSIONER OF INCOME-TAX, MADRAS, v. LINGA REDDY.

for producing salt. Land let out for salt manufacture is already liable to land-tax or salt-tax. The lessee cannot also be made liable to income-tax. The Court will not encourage double taxation : see *Chief Commissioner of Income-tax* v. *Zamindar of Singampatti.*

M. Patanjali Sastri, for the Referring officer, not called upon.

JUDGMENT.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—In my opinion this case is unarguable. The assessee was a licensee of the Krishnapatam Salt Factory in the Nellore District. From the manufacture of salt on the land of which he was the lessee he made a profit of some Rs. 7,000 which has been assessed to income-tax. He now contends that this is agricultural income, that it is revenue derived from the land which is used for agricultural purposes and therefore not taxable. To my mind it would be a gross misnomer to hold that "agricultural purposes" could be held to cover the process of flooding the land occupied, by letting in the sea water and then extracting the sodium chloride from it by eliminating the other chemical constituents. In my opinion the assessment was right and must be confirmed. The answer to the specific question referred is in the negative. The assessee will pay the costs of this reference. Counsel's fee Rs. 250.

WALLACE, J.

WALLACE, J.—I agree.

BEASLEY, J.

BEASLEY, J.—I agree.

K.R.

(1) (1922) I.L.R., 45 Mad., 518 (F.B.).

SPECIAL BENCH.

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

1927, May 4.

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

v.

A. T. K. P. L. S. P. SUBRAMANIAM CHETTIYAR, RESPONDENT.*

Income-tax Act (XI of 1922), *ss.* 4 (1), (2), 10 *and* 13—*Loan or advance made, by a person owning a business at Rangoon, to his partnership business in Penang—Interest on advance credited in Rangoon accounts, though no cash was received from Penang—Mercantile basis of accountancy adopted in the Rangoon accounts—Income, whether accrued without or within British India—Liability to income-tax, whether under sec.* 4 (1) *or sec.* 4 (2).

An assessee, who had a business of his own in Rangoon and a partnership business at Penang, advanced a sum of money from the Rangoon funds to the Penang business ; it appeared that interest on that advance was credited in the accounts of the Rangoon business, though no amount was actually received from Penang ; the assessee had chosen to adopt the mercantile basis in his accounts. On his being assessed to income-tax in respect of such interest, the assessee contended that he was not liable, as it was not income which accrued, arose or was received in British India ;

Held, that the interest in question was not profit or gain arising without British India, but was income which properly accrued or arose in British India within section 4 (1) of the Indian Income-tax Act (XI of 1922).

The assessee, having chosen to adopt the mercantile basis of accountancy in keeping his accounts, it is upon that basis, and upon that basis alone, that he was to be assessed to income-tax, under sections 10 and 13 of the Act.

CASE stated under section 66 (3) of the Income-tax Act (XI of 1922) in pursuance of the order of the High Court

* Referred Case No. 8 of 1926.

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in O.S.A. No. 89 of 1924, calling on the Commissioner of Income-tax to refer the question of law in the case.

The material facts appear from the judgment. The questions referred are stated in the beginning of the judgment.

K. S. Krishnaswami Ayyangar for the assessee.—The advance was not a loan. A person cannot lend to a firm or partnership comprising of himself and others as partners—see *Kashinath Kedari* v. *Ganesh*(1), *Lakshmanan Chetty* v. *Nagappa Chetty*(2), *Commissioner of Income-tax* v. *Arunachalam Chettiar*(3); Lindley on Partnership, pages 150 and 151, as also pages 490 and 491. Legally a partner cannot be a creditor or debtor of a firm of which he is also a partner: See *Ellis* v. *Kerr*(4).

The interest in question was not received by the Rangoon firm. Book entries are not receipts of income. Book entries are not bases for assessment, as they are not receipts of income. See *Standard Life Assurance Co.* v. *Allan*(5), *Gresham Life Assurance Society, Ltd.* v. *Bishop*(6), *Aurangabad Mills, Ltd., In re*(7). Section 13 of the Indian Income-tax Act cannot enlarge the area of taxation laid down in section 4.

M. Patanjali Sastri for the Referring officer.—Section 4 (1) refers to income derived in British India. This income accrued or arose in British India. Receipt in British India need not be shown: See *Re Rogers Pyatt Shellac & Co.* v. *Secretary of State for India*(8), *Commissioners of Taxation* v. *Kirk*(9), Lindley on Partnership, page 686.

The JUDGMENT of the Court was delivered by

BEASLEY, J.

BEASLEY, J.—Two questions are referred to us for decision: (1) In the circumstances of this case can the interest on the loans or advances made by the assessee to the partnership firm at Penang be said to be income accruing or arising in British India within the meaning of section 4, clause (i) of the Indian Income-tax Act, and (2) if

(1) (1902) I.L.R., 26 Bom., 739.
(2) (1918) 34 M.L.J., 408.
(3) (1924) I.L.R., 47 Mad., 660 at 665.
(4) [1910] I. Ch., 529.
(5) (1901) 4 Tax Cases, 446 (455).
(6) [1902] A.C., 287 (294).
(7) (1921) I.L.R., 45 Bom., 1286.
(8) (1925) I.L.R., 52 Calc., 1 (34).
(9) [1900] A.C., 588.

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the answer to the above question is in the negative and if the income is one accruing or arising without British India to a person resident in British India, is the income one received in British India so as to make it taxable under section 4 read with sections 6, 10 and 13 of the Act?

The assessee has a business of his own in Rangoon carried on by an agent, and is interested with another or others in a money-lending business in Penang in which he is the chief partner. From the Rangoon business under his orders a sum of Rs. 78,768-7-3 was transferred in cash to the Penang business. In the books of the Rangoon business a sum of Rs. 12,174 is entered as interest on that money from Penang and the assessee has in respect of that interest been assessed under section 4, sub-section (1) of the Indian Income-tax Act as income accruing, arising or received in British India. The assessee contends that interest so credited in the Rangoon books is interest earned outside British India, that is foreign income and that the crediting of interest in the Rangoon books is merely a book entry and that there has in fact been no actual receipt of the money in Rangoon and that therefore it is not income arising under section 4, sub-section (1) of the Indian Income-tax Act and is not income arising under section 4, sub-section (2) of the same Act because it has never been received in British India. The short answer to that contention in our view is that this interest is not a profit or gain arising without British India. The Income-tax Commissioner does not seek to tax anything that the Rs. 78,768 may have earned in Penang. What he has done is to assess the profits of the Rangoon business under section 10 of the Indian Income-tax Act computed in the manner directed by section 13 of the same Act. Section 13 was no doubt introduced to obviate

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many difficulties. It is a great advantage to both traders and Income-tax officers. It is open to a trader to adopt either the mercantile basis of accounting or the cash basis. He is not forced to adopt one in preference to the other but he cannot adopt both. The assessee in common with most of the business firms in India has chosen to adopt the mercantile basis of accountancy and not the cash basis. He cannot for the purpose of more conveniently carrying on his own business adopt the mercantile basis and then for the purpose of income-tax assessment adopt the cash basis. What is done in accordance with the mercantile basis is that the debit entries made on account of interest due by the assessee to his creditors in foreign places are treated as payments of interest though interest has not actually been paid and such debits are allowed as an expenditure in computing the profits of the assessee's business in British India. Similarly credit entries made on account of interest due by debtors in foreign places to the assessee are treated as payments though that interest has not actually been paid, and admittedly in this case this basis has been adopted and no question as to whether or not interest has actually been received or has actually been paid can under this basis possibly arise. What the assessee seeks to do is, whilst adopting the mercantile basis in regard to all the other entries of interest in his accounts, to adopt an entirely different basis, i.e., cash basis for the purpose of this one entry and to argue that interest has never been received in British India, although it is entered as a profit in exactly the same way as all the other credits of interest are, all the other entries being treated on the mercantile basis as money actually received. The assessee has chosen to adopt the mercantile basis. His own accounts are dead against him and in our view preclude him from arguing here, as

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he does, that this interest is income arising outside British India, and not received in British India because in law the transfer, called in the assessee's books an advance to the Penang firm, cannot be a loan. In our view once an assessee has adopted the mercantile basis of accountancy it is upon that basis and upon that basis alone that he is to be assessed. It would be an impossible position if an assessee after having adopted the mercantile basis were to call upon the Income-tax Officers to make a long and difficult inquiry with regard to the various items entered as profits in the accounts of the assessee in order to prove that those sums were actually received in British India. The interest is treated like all the other interest in the assessee's books as a receipt of profit. The money transferred is treated as an advance. The interest is treated as interest on that advance in just the same way as all other interest is treated as interest on loans made to others. Not only that, interest chittas were actually sent to Penang in respect of this interest. The case of *the Gresham Life Assurance Society, Ltd.* v. *Bishop*(1) was referred to by the assessee as a case in support of his contention. But that case has no application to this case, as that was a case of a foreign income whereas in this case on the facts, that is to say the mercantile basis of accountancy voluntarily adopted by the assessee, the interest is income which properly arises under section 4, sub-section (1) of the Indian Income-tax Act. Our answer to the first question referred to us is in the affirmative and in view of this answer the second question does not arise. The assessee will pay the costs of this reference Rs. 250 to the Commissioner of Income-tax.

K.R.

(1) [1902] A.C., 287.

APPELLATE CIVIL.

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

1927, May 4.

SRI RAJAH RAO VENKATAKUMARA MAHIPATHI SURYA RAO BAHADUR VARU, MAHARAJA OF PITHAPURAM (DEFENDANT), APPELLANT,

v.

SRI RAJAH RAO VENKATA MAHIPATHI GANGADHARA RAMA RAO BAHADUR (PLAINTIFF), RESPONDENT.*

Letters Patent, cl. 15—Judgment—Leave to sue on the Original Side, granted—Application to revoke leave—Order of refusal, whether and when appealable.

An order of a single Judge of the High Court refusing to revoke an order granting leave to sue on the Original Side of the High Court, *is not appealable*, under clause 15 of the Letters Patent, if the question of jurisdiction of the High Court to entertain the suit is still open to the defendant and can be raised on an appropriate issue at the trial of the suit; but if the order has finally shut out the defendant from thereafter pleading that the suit should have been dismissed on the point of jurisdiction, then the order is a judgment and is appealable—*Tuljaram* v. *Alagappa Chettiar*, (1912) I.L.R., 35 Mad., 1, applied.

APPEAL from the judgment of SRINIVASA AYYANGAR, J., passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in Civil Suit No. 242 of 1926.

This appeal arises out of an application by the defendant (the Maharaja of Pittapuram) to revoke an order granting leave to the plaintiff to sue on the Original Side of the High Court to recover the zamindari of

* Original Side Appeal No. 51 of 1926.

Pithapuram, including in the suit a bungalow called "Dunmore House" within the jurisdiction of the Original Side of the High Court. The learned Judge refused to revoke the *ex parte* order granting leave to sue. The defendant preferred this appeal under the Letters Patent against the order of refusal.

Nugent Grant (with *C. Rama Rao* and *V. C. Gopalaratnam*) for respondent, took a preliminary objection that no appeal lay under clause 15 of the Letters Patent, as the order appealed against was not a judgment. An order granting leave is not a judgment, though an order refusing leave may be a judgment: See *Official Assignee of Madras* v. *Ramalingappa*(1); *Tuljaram* v. *Alagappa Chettiar*(2); *Harish Chunder Chaudhry* v. *Kali Sundari Debi*(3); *In the matter of the petition of Kali Soondary Dobia*(4) and *DeSouza* v. *Coles*(5).

A. Krishnaswami Ayyar (with him *Vere Mockett, P. Kameswara Rao, V. Radhakrishnayya* and *S. Venkatesa Ayyangar*) for appellant.—An appeal lies against the order, as it is a judgment. The learned Judge decided a question of jurisdiction to sue, in granting leave. He adjudicated on the right to sue in the High Court, which suit but for leave would not lie in the High Court. It is a barred claim elsewhere and ought not to be allowed to be sued in the High Court. See *Hadjee Ismail Hadjee Habeeb* v. *Hadjee Muhomed Hadjee Joosub*(6); *Vaghoji* v. *Camaji*(7); *Tuljaram* v. *Alagappa Chettiar*(2); *Krishna Reddy* v. *Thanikachala Mudaly*(8). The Court, before granting leave must decide whether the plaintiff has a real cause of action or makes only a bogus allegation to give jurisdiction: *Harendra Lal Roy Chowdhuri* v. *Haridusi Debi*(9); See *Johnson* v. *Taylor Brothers & Company, Ltd.*(10); *Hemelryck* v. *William Lyall Shipbuilding Co., Ltd.*(11); *Rosler* v. *Hilbery*(12); *Societé Generale de Paris* v. *Dreyfus Brothers*(13).

The bungalow, which is alleged to be bought by defendant as a trespasser out of the income of the zamindari property does

(1) (1926) I.L.R., 49 Mad., 539.
(2) (1912) I.L.R., 35 Mad., 1.
(3) (1882) I.L.R., 9 Calc., 482 (P.C.).
(4) (1881) I.L.R., 6 Calc., 594.
(5) (1868) 3 M.H.C., 384.
(6) (1874) 13 Beng. L.R., 91.
(7) (1905) I.L.R., 29 Bom., 249.
(8) (1924) I.L.R., 47 Mad., 136.
(9) (1904) I.L.R., 41 Calc., 972 (P.C.).
(10) [1920] A.C., 144.
(11) [1921] 1 A.C., 698.
(12) [1925] 1 Ch., 250.
(13) (1888) 37 Ch.D., 215.

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not become zamindari property: see *Ran Bijai Bahadur Singh* v. *Jagatpal Singh*(1).

The JUDGMENT of the Court was delivered by

WALLACE, J.—This is an appeal against the order of SRINIVASA AYYANGAR, J., refusing to revoke an order giving leave to sue on the Original Side of this Court. The plaintiff is suing to recover from the defendant possession of certain zamindari property. All the property except a bungalow called "Dunmore House" is outside the jurisdiction of this Court. He filed his suit on the Original Side on what is stated to be the last day before it would be barred here by limitation. Leave to sue was asked for *ex parte* without notice to the defendant, and, in view of the urgency of the matter, was granted by the learned Judge. Later on the defendant put in an application to revoke the leave, principally on the ground that the inclusion of "Dunmore House" was specious and *malafide* being a mere device to give the High Court a fictitious jurisdiction in order to get round the bar of limitation, since the suit was already barred by time in the mufassal and could not have been entertained unless this Court was persuaded to entertain it. The learned Judge has refused to revoke his order and the defendant comes up here on appeal.

The learned Judge in his order says: "I cannot possibly hold the inclusion of the claim in respect of Dunmore House as *bona fide*" and has "practically no doubt" that Dunmore House "has been included in the plaint merely for the purpose of making it appear that some portion of the land claimed was situate within the jurisdiction of this Court," and he holds that the present case is "undoubtedly a fit and proper case in which, ordinarily speaking, leave to institute the suit should not have been granted and therefore a proper

(1) (1891) I.L.R., 18 Calc., 111 (P.C.).

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case in which the leave granted *ex parte* should be revoked." But because of some special circumstances he refused to revoke his order, these circumstances being chiefly (*a*) concern for the plaintiff because he had paid a large Court fee which he will lose as it has not been the practice of this Court to return a plaint, (*b*) concern for the defendant because he may, if the leave is revoked, be driven to face another suit in another Court and (*c*) the desirability that the suit should not be disposed of by a Mufassal Subordinate Judge. It will be observed that these special circumstances have nothing to do with the question of jurisdiction or limitation. The first is an appeal *ad misericordiam*. The second is not put forward by the defendant himself and the third pre-supposes that the suit is maintainable, that is, is not barred by limitation in the Mufassal Court, while the *ex parte* order was obtained on the footing that the suit would be barred by time in the Mufassal Court.

However the main point argued before us is whether an appeal lies at all against such an order. An order refusing to revoke a grant *ex parte* of leave to sue is in essence an order granting after contest leave to sue. Now, if the plaintiff's suit was really on the date of presentation here barred by time in the mufassal, and if the *ex parte* leave to sue ought not, as the learned Judge holds, to have been given in the first instance, but if nevertheless the learned Judge has decided finally, even if he has decided wrongly, that he has jurisdiction to entertain the suit, then, plaintiff's suit being on a proper application of the law still-born the grant of leave to sue is giving life to a dead suit, and inflicting on defendant an injury *prima facie* irreparable, unless an appeal lies.

As to whether an appeal does lie, the only direct authorities on this question are in *Hadjee Ismail Hadjee*

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Habbeeb v. *Hadjee Mahomed Hadjee Joosub*(1), where the Calcutta High Court held that an appeal lies from an order granting leave to the plaintiff to sue and in *Vaghoji* v. *Camaji*(2) where it was held that an appeal lay against an order on the Original Side dismissing an application to rescind a leave to sue granted. In the latter case it was held that the order then under appeal being on the question of whether the suit was one for land so as to come under clause 12 of the Letters Patent, was decisive.

Without laying down any general proposition that a leave to sue is always a judgment under clause 15 of the Letters Patent and therefore subject to appeal, we think that in any particular case the proper test as to whether the order is or is not a judgment has been laid down by the late Chief Justice Sir ARNOLD WHITE in *Tuljaram* v. *Alagappa Chettiar*(3) a ruling which has been consistently adopted in this Court as laying down the guiding principle. There at page 7 he says:

"The test seems to me to be not what is the form of the adjudication but what is its effect in a 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."

In that view it appears to us that it cannot be maintained with reason that the grant of leave to sue is not a judgment within the meaning of clause 15 of the Letters Patent, if the order has *finally* shut out the defendant from now pleading or being heard on the question that the suit should have been so dismissed on

(1) (1874) 13 Beng. L.R., 91. (2) (1905) I.L.R., 29 Bom., 249.
(3) (1912) I.L.R., 35 Mad., 1.

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the point of jurisdiction. If this refusal to dismiss the suit is in effect a final judgment against a dismissal of the suit on the ground of jurisdiction, a judgment which cannot be attacked in appeal because the matter of jurisdiction will not *ex hypothesi* be made a matter of issue in the suit, then it will in our view be a judgment within the scope of the test set out in 35 Madras. But if the question of the jurisdiction of this Court to entertain the suit is still open for decision at the trial of the suit, then in our view the order passed is not of a final nature and would not be a judgment. Mr. Grant for the plaintiff stated before us that the plaintiff's position was that the question of jurisdiction is still open for decision on an appropriate issue in the suit. The defendant's learned Vakil was doubtful if that was so and whether the order granting leave to sue did not finally dispose of the question of jurisdiction. That we think is not necessarily so. A Court has always jurisdiction to try on an appropriate issue in a suit whether it has jurisdiction or not to try the suit, that is, to set in motion the process by which the various points at issue between the parties including that of jurisdiction fall to be decided.

In the present case the leave of the Court has been obtained under clause 12 of the Letters Patent on the footing that part of the property sued for is situated within the local limits of the Original Jurisdiction of this Court. But, if subsequently on a full trial on the point it appears that the inclusion of Dunmore House was not due to a *bona fide* claim to that house but was merely a device by which the law of limitation might be evaded, the Court has power still to give the proper relief. It appears to us therefore that the order under appeal is not a judgment within clause 15 and an

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appeal does not therefore lie. It would be well if in the trial of the suit this question of jurisdiction be tried and decided as a preliminary issue. We therefore dismiss the appeal but make no order as to costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Devadoss.

1927, February 16.

THE OFFICIAL ASSIGNEE OF BOMBAY (SECOND DEFENDANT), APPELLANT,

v.

OBLA KUNA MUNA SUNDARACHARI AND OTHERS (PLAINTIFFS AND FOURTH DEFENDANT), RESPONDENTS.*

Mortgage—Suit for sale in a Sub-Court—Suit against Official Assignee and insolvent mortgagor—Transaction, fraudulent under sec. 53 of Transfer of Property Act—Presidency Towns Insolvency Act (III of 1909), ss. 4, 7, 55 and 56—Jurisdiction of Sub-Court to determine question under sec. 55 of the latter Act—Special Act—Special forum, Insolvency Court—Provincial Insolvency Act (V of 1920), ss. 53 and 54—Jurisdiction of Civil Courts to determine questions raised under either Act.

Any question as to the invalidity of a transaction, raised by the Official Assignee under the special provisions contained in sections 55 and 56 of the Presidency Towns Insolvency Act, can be determined only by the Insolvency Court constituted under the Act, and not by the ordinary Civil Court.

The principle of the decisions holding that only Insolvency Courts have jurisdiction to determine questions under sections 53 and 54 of the Provincial Insolvency Act, should be applied to cases falling under sections 55 and 56 of the Presidency

* Appeal No. 85 of 1925.

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Towns Insolvency Act: *Mariappa Pillai* v. *Raman Chettiar*, (1919) I.L.R., 42 Mad., 322, and *Official Receiver, Coimbatore* v. *Palaniswami Chetty*, (1925) I.L.R., 48 Mad., 750, followed.

Where, therefore, in a suit for sale on a mortgage instituted in a Sub-Court against the Official Assignee and others, the Court found that the transaction was not voidable under section 53 of the Transfer of Property Act, the Court had no jurisdiction to determine, at the instance of the Official Assignee, whether it was void as against him under section 55 of the Presidency Towns Insolvency Act, but a decree should be given to the mortgagee, leaving it open to the Official Assignee to apply to the Insolvency Court to set aside the transaction if he could show that the case fell within section 55 of the latter Act.

APPEAL against the decree of A. V. RATNAVELU PILLAI, First Additional Subordinate Judge of Madura, in Original Suit No. 1923 (Original Suit No. 201 of 1922 on the file of the Subordinate Judge of Madura).

The material facts appear from the judgment.

Advocate-General (*T. R. Venkatarama Sastri*) with *K. Bashyam Ayyangar* for appellant.—The Presidency Towns Insolvency Act does not confer on the Insolvency Court exclusive jurisdiction to avoid transactions. So Civil Courts also have jurisdiction to annul or determine the validity of a transaction under sections 55 and 56. The defendant need not take legal proceedings to set it aside, but can impeach it as a defendant: see the decision in S.A. No. 360 of 1916. See also *Ramaswami Chettiar* v. *Mallappa Reddiar*(1), a decision under section 53 of the Transfer of Property Act. The unreported decision in S.A. No. 360 of 1916, is, however, dissented from in *Mariappa Pillai* v. *Raman Chettiar*(2). The decisions under sections 53 and 54 of the Provincial Insolvency Act are not applicable to cases falling under sections 55 and 56 of the Presidency Towns Insolvency Act; the language of these latter sections is different in material respects: the word used in sections 55 and 56 of the latter Act is "void" and not "voidable" as in the former Act, and the words "may be annulled by the Court" used in the former Act are omitted in the latter Act. The sections are merely declaratory of rights and leave the jurisdiction of Courts unspecified and unaffected.

(1) (1920) I.L.R., 43 Mad., 760. (2) (1919) I.L.R., 42 Mad., 322.

OFFICIAL ASSIGNEE, BOMBAY, v. SUNDARA-CHARI.

C. V. Anantakrishna Ayyar for respondents.—The Presidency Towns Insolvency Act gives exclusive jurisdiction to Insolvency Courts to set aside transactions under sections 55 and 56 of the Act. The Insolvency Act is a special Act and creates a special forum for taking proceedings under the Act. See sections 3, 4 and 7 of the Act. The Act confers exclusive jurisdiction on Insolvency Courts for the exercise of the powers conferred by the Act. The provisions of sections 53 and 54 of the Provincial Insolvency Act are similar to sections 55 and 56 of the Presidency Towns Insolvency Act, though the language is slightly different.

JUDGMENT.

This appeal arises out of a suit to recover Rs. 27,666-6-9 with costs and further interest allowed to be due on a mortgage executed on 1st November 1921 by the first defendant in favour of the plaintiffs. The first defendant was adjudicated an insolvent in the Bombay High Court in March 1922. The date of adjudication does not appear, but it was some time between the 7th and the 15th of March 1922. The Official Assignee of Bombay is the second defendant in the suit. The third defendant, the Madura Mills Company, were the lessees of the mortgage properties; but their lease expired and they have disclaimed all interest, so that it is unnecessary to consider them any further.

First defendant dies after suit and his widow has been brought on record as his legal representative. The Official Assignee who contested the suit raised several defences. The first was that no money was due on the mortgage as no consideration was paid. The second was that the mortgage was executed really *benami* for the first defendant (insolvent) and therefore conferred no right on the plaintiffs. In paragraph 7 of his written statement it was stated that the first defendant was adjudicated an insolvent in the Bombay High Court and that the mortgage, having been

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executed within two years prior to adjudication and not being *bona fide* and without any consideration, is void as against the Official Assignee under section 55 of the Presidency Towns Insolvency Act. Paragraph 8 runs as follows:—

"Some of the creditors of the insolvent have moved this defendant to apply to the Bombay High Court under the above-said section for getting the suit hypothecation deed annulled, and this defendant intends to apply under the above section, as soon as possible as the Bombay High Court has re-opened on the 8th January 1922 after the Christmas holidays."

Paragraph 9 is as follows:—

"As this defendant intends to make an application to the Bombay High Court under section 55, this defendant prays that this Court may be pleased to post this suit to a date two months hence so as to enable this defendant either to get it stayed till the disposal of the application or to get it transferred to the Bombay High Court to be tried along with the application."

No application was made. The issues raised were:—

1. Is the plaint bond true, valid and supported by consideration? or

2. Is it only a nominal transaction intended to defraud first defendant's creditors?

3. To what relief, if any, are plaintiffs entitled?

The Subordinate Judge on a careful consideration of the evidence and the accounts filed came to the conclusion that the plaint mortgage was fully supported by consideration and that it was not a nominal transaction intended to defraud first defendant's creditors. No issue was raised as to whether, even if there was consideration, the transaction could be void as falling within section 55 of the Presidency Towns Insolvency Act, being within two years of the adjudication and not being *bona fide*, probably because this matter was reserved as mentioned in the written statement, to the Bombay

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High Court. The Subordinate Judge having found that the transaction was not benami, and was for consideration, considered the provisions of law applicable in the suit as framed before him whether, under section 53 of the Transfer of Property Act, on the finding that there was consideration, the fact that preference was given to one creditor over another would make the transaction void or voidable in a suit between the mortgagor and the mortgagee. He relied on the decision of the Privy Council in *Musahar Sahu* v. *Lala Hakim Lal*(1). On appeal the learned Advocate-General did not argue that the document was not supported by consideration. The only point as regards consideration which he said was suspicious and which requires scrutiny was item 10. As regards this item, the Subordinate Judge deals with it at page 19 of his judgment. The account book of the mortgagee and the day book and ledger of the mortgagor agree as regards the amount, but the way in which the money was appropriated differs. We cannot, on this circumstance alone, without any further evidence and also in view of the fact that there was a settlement of accounts which is not impeached before us, hold that this item has not been proved. Admittedly the amount was received and a difference in the entries between the book of the mortgagor and that of the mortgagee would not make the debt not due. For the purpose of the appeal we have to treat it on the footing that this document is fully supported by consideration. If the case was to be decided under section 53 of the Transfer of Property Act without reference to the Insolvency Act, we think the Subordinate Judge was right in holding that the transaction could not be said to be void on the ground that it was intended to defeat or

(1) (1916) I.L.R., 43 Calc., 521.

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defraud creditors. All we can hold on the evidence is that one creditor was more diligent than others in getting a security for the money due to him. The main ground of argument put forward by the learned Advocate-General was that the Subordinate Judge was wrong in thinking that the question of *bona fides* ought to be decided only with reference to the Transfer of Property Act and not with reference to section 55 of the Presidency Towns Insolvency Act. His argument is that in dealing with the question with reference to the Insolvency Act we must take all the circumstances into consideration, and we must see whether the man was at that time really in involved circumstances unable to meet his debts and whether this is not a transaction which is a fraudulent preference in favour of one creditor putting the property out of reach of the general body of creditors in favour of one who had at the date of the transaction no special reason for getting the preference. He points out that it is not shown that any money was borrowed for the purpose of the business to be conducted, that the actual lending of the money stopped at the settlement of the accounts in 1919, that subsequently till we come to the date of the transaction we find only interest being credited in the book and then on the date of the transaction a small sum of Rs. 500 is shown as paid in cash for the bond and Rs. 150 for the stamp expenses and that there is no evidence that this Rs. 500 was paid for any business or anything that would indicate the *bona fides* of the transaction. He also points out that admittedly there were other dealings between the mortgagor and the mortgagee which on the books produced in Court showed that moneys were due by the mortgagee to the mortgagor at the date of the execution of the mortgage. No doubt these sums were unascertained and had to be ascertained by looking into

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the accounts. But he points out that between 1919, the date of the settlement, and the date of the mortgage there was ample time to look into the accounts especially as dealings stopped shortly after 1919 and that where a person who is unable to pay his debts chooses to execute a mortgage in favour of one creditor without looking into the accounts which show that some amount is due to him from the creditor and without setting off the amount due to him against the amount due by him, the transaction could not be prima facie said to be bona fide especially when the mortgagee was a partner with the plaintiff with regard to the unsettled accounts. It is argued by Mr. C. V. Ananthakrishna Ayyar for the respondent that considerations based upon the voidability of a transaction under section 55 of the Presidency Towns Insolvency Act cannot be gone into by any Court except an Insolvency Court constituted under the Presidency Towns Insolvency Act and the Subordinate Judge had no jurisdiction to declare the transaction voidable under section 55. So far as the decisions under the Provincial Insolvency Act are concerned, it has been held that no Court except an Insolvency Court having jurisdication could declare a transaction voidable under section 53 of the Provincial Insolvency Act. This is clear from the decision in *Mariappa Pillai* v. *Raman Chettiyar*(1), and the decision in *The Official Receiver, Coimbatore* v. *Palaniswami Chetti*(2). The latest decision, 48 Mad., 750, goes so fully into the question that it is unnecessary for us to do anything further than to refer to the decision as laying down the law on the subject so far as the Provincial Insolvency Act is concerned. Our attention was drawn to an unreported decision in S.A. No. 360 of 1916; but

(1) (1919) I.L.R., 42 Mad., 322. (2) (1925) I.L.R., 48 Mad., 750.

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this decision was dissented from in *Mariappa Pillai* v. *Raman Chettiyar*(1) and we are not prepared to follow it. The question therefore is whether the same principle has to be applied when the case falls under the Presidency Towns Insolvency Act.

The main argument of Mr. Bhashyam Ayyangar is that in section 53 the concluding words are "be voidable as against the receiver and may be annulled by the Court," and section 54 also contains the words "be deemed fraudulent and void as against the receiver, and shall be annulled by the Court." Whereas in section 55 of the Presidency Towns Insolvency Act the words are "be void against the Official Assignee" and in section 56 the words are also "and void as against the Official Assignee." He argues that, as the words are different, the two sections 55 and 56 can only be declaratory leaving the jurisdiction unaffected thus enabling him to raise the question in all Courts when he wants to avoid a transaction specified in those two sections. He refers us to *Ramaswami Chettiar* v. *Mallappa Reddiar*(2), which is a Full Bench decision of this Court dealing with section 53 of the Transfer of Property Act where it was held that a representative suit was not necessary and the right was retained to any creditor if the case fell within the scope of that section and that the same principle has to be applied to a case under the Insolvency Act. We do not think that the omission of the words "may be annulled by the Court" in sections 55 and 56 makes any difference in dealing with the provisions of the Presidency Towns and Provincial Insolvency Acts. We cannot distinguish the two decisions 48 Mad. and 42 Mad. on this ground. The Presidency Towns Insolvency Act constitutes a

(1) (1919) I.L.R., 42 Mad., 322. (2) (1920) I.L.R., 43 Mad., 760.

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special tribunal or forum for the determination of questions arising under the Act. The Courts having jurisdiction in insolvency under this Act are the High Courts of Judicature at Fort William, Madras, Bombay and Rangoon and the Court of the Judicial Commissioner of Sindh. Section 4 says,

"All matters in respect of which jurisdiction is given by this Act shall be ordinarily transacted and disposed of by or under the direction of one of the Judges of the Court, and the Chief Justice or (Judicial Commissioner) shall from time to time assign a Judge for that purpose."

Section 7 of the Act says—

"Subject to the provisions of this Act, the Court shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."

We think that the language is clear and that when a special forum is constituted by a special Act, questions arising under that Act must, in the absence of anything to the contrary in the Act or any other enactment, be determined by the forum constituted by the Act, so that any question as to the voidability of a transaction in so far as it is raised by the Official Assignee under the special provisions of that Act has to be determined by the Court constituted by that Act which would have jurisdiction to determine that question. Sections 55 and 56, we may point out in this connexion, are special provisions relating to insolvency and it is only in insolvency that these transactions can be impeached as voidable, if they do not fall under section 53 of the Transfer of Property Act, so that a transaction not falling under the Transfer of Property Act can only be avoided by sections 55 and 56 of the Presidency Towns

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Insolvency Act. It is therefore difficult to say that on principle there is any reason to draw any distinction between the provisions of the Provincial and the Presidency Towns Insolvency Acts in so far as questions falling exclusively within sections 55 and 56 of the Presidency Towns Act and sections 53 and 54 of the Provincial Act are concerned. This being so, we think that the Subordinate Judge had no jurisdiction to go into the question as to whether on the facts the transaction would be void under section 55. We think the correct procedure is for the Official Assignee to move the Bombay High Court under this section for an order. As we are of opinion that the Subordinate Judge has no jurisdiction to go into this question there can be no plea of *res judicata*, or any difficulty on the Official Assignee, though a party to the suit, moving the Bombay High Court.

In these circumstances, we think that the only course is to affirm the decree of the Subordinate Judge and to hold that the mortgage was executed for consideration and was not benami for the mortgagor, leaving it open to the Official Assignee to apply to the Bombay High Court to set it aside if he could show that the case falls within section 55. As the Subordinate Judge had no jurisdiction to go into that question we in appeal have equally no jurisdiction to give any opinion on the contention of the Advocate-General which may or may not be right.

The result is the appeal fails and is dismissed with costs to be paid by the Official Assignee out of the assets of the insolvent.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Devadoss.

1927, February 2.

S. P. M. MUTHIAH CHETTIAR AND OTHERS (DEFENDANTS 1, 2 AND 4), APPELLANTS,

v.

MUTHU K. R. A. R. KARUPPAN CHETTI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Indian Contract Act (IX of 1872), Sec. 15—Coercion—Ratification—Agent for a term—Refusal to give up accounts, bonds, etc., at the end of his term to a new agent, unless release was given by principal—Release so given, whether voidable for coercion—Authority of counsel to bind clients by making statement ratifying release—Special authority, whether necessary—General authority, whether can be implied and sufficient.

An agent for a term, refused to hand over the account books, bonds, etc., of the business at the end of the term to a new agent sent in his place, unless the principal gave him a release from all liability in respect of his agency; such a release had to be and was given, and the new agent got the account books, bonds, etc., from him. As some of the mortgage bonds, relating to property in the foreign State of Johore, stood in the agent's name, a suit had to be brought, under the law of Johore, to get a transfer to the principal's name and was instituted in the Supreme Court of Straits Settlements; the defendant agreed not to contest the suit, on the plaintiffs' ratifying the original release. Counsel for the plaintiffs therein made a statement embodied in the order of that Court to the effect "that the said release was and is in full force and of full effect," and a consent order was passed by the Court transferring the bonds to the names of the plaintiffs. On a suit being instituted by the principals to set aside the release deed and for directing the defendant to render an account of his agency,

*Appeal No. 140 of 1925.

Held, that the release deed was given by the plaintiffs under coercion of the defendant within the terms of section 15 of the Indian Contract Act, and was voidable at their instance;

but that there was a valid ratification of the release by the plaintiffs by reason of the statement made by the plaintiffs' counsel in their suit in the Supreme Court;

that counsel should, under the circumstances, be held to have been specially authorized to make the statement;

that, even if counsel was not specially authorized, the circumstances of the case fully justified the conclusion that he acted within his authority in making the statement;

and that, consequently, the plaintiffs were not entitled to set aside the release deed and call on the defendant to account.

Rules regarding competency of counsel to compromise suits, make admissions, or confess judgment, so as to bind their clients, discussed.

APPEAL against the decree of R. NARASIMHA AYYANGAR, Subordinate Judge of Sivaganga, in Original Suit No. 27 of 1924.

The material facts appear from the judgment.

C. V. Ananthakrishna Ayyar and *C. S. Rama Rao Sahib* for appellants.

A. Krishnaswami Ayyar for respondents.

JUDGMENT.

DEVADOSS, J.

DEVADOSS, J.—The plaintiffs are a firm of Nattukottai Chetties carrying on banking business in Singapur and other places. They allege in the plaint that they appointed the defendant as their agent to conduct business in Singapur for a period of three years and as his conduct was found not to be satisfactory they sent another agent after the expiry of the three years' period and wrote to the defendant to hand over the business with the account books, documents and cash on hand to the new agent, that the defendant refused to hand over charge of the business to the new agent until and unless the accounts between

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him and the plaintiffs were settled and the letter containing the terms of the agency written by him to the plaintiffs called the salary chit, was returned to him and a release deed was executed in his favour releasing him from all claims against him with reference to his agency, that as the defendant was obdurate and as the plaintiffs feared that they might suffer heavy loss by the stoppage of business they consented to authorize their new agent to give a release to him, that the defendant after getting the release deed and the return of the salary chit handed over the account books, vouchers and cash on hand to the new agent and that the release deed was obtained under coercion and is therefore voidable at their instance. They further allege that the defendant had improperly debited them with the loss sustained by him in his own private transactions in dollars and that he lent large sums of money without proper security and contrary to orders. The plaintiffs pray that the release deed be declared void as having been obtained under coercion and that the defendant be directed to render an account of the transactions during the period he was their agent. The defendant in his written statement denies that the release deed was obtained under coercion and avers that he acted honestly and diligently in his capacity as agent, that he did not wrongly debit the plaintiffs with his losses, that he did not improperly lend money to the customers and that the plaintiffs are estopped by their conduct from denying the validity of the release deed.

The preliminary issues were framed by the Subordinate Judge:—

(1) Whether the acquittance granted to the defendants was done under the circumstances detailed in the plaint and hence voidable; and are the plaintiffs entitled to call for an account of the defendants?

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(2) Whether the allegations in paragraphs 29 and 30 of the written statement are true, and does it estop the plaintiffs from going behind the acquittance?

The Subordinate Judge held that the release deed was obtained from the plaintiffs' agent under coercion and that they did not ratify the release deed and directed an account to be taken. The defendant has preferred this appeal.

The first question for decision is whether Exhibit IV, the release deed, was obtained under coercion and as such voidable at the instance of the plaintiffs.

[Their Lordships then dealt with the evidence as to coercion and proceeded as follows:]

The question is, do the above facts make out that the defendant got the release, Exhibit IV, from the plaintiffs under circumstances which amount to coercion. He was in possession of the documents, account books and cash belonging to the plaintiffs. After he was asked to hand over charge to Adaikalavan Chetty he had no right to withhold from the plaintiffs' new agent their property. Adaikalavan Chetty remained there for about four months before he could get possession of the account books, etc., in order to carry on the business. The stoppage of the business was likely to cause heavy loss to the plaintiffs. Coercion is defined in section 15 of the Contract Act as "Committing or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement." The defendant, having withheld from the plaintiffs their property which they asked him to hand over to Adaikalavan Chetty, has brought himself within section 15 of the Contract Act, and the release deed he obtained under the circumstances is voidable at the

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instance of the plaintiffs. We therefore agree with the lower Court in finding the first issue against the defendant.

Issue II.—Though the defendant in paragraph 31 of his written statement used the word estoppel, what is pleaded is not an estoppel in the ordinary sense, but ratification of the arrangement under Exhibit IV. No doubt, even a ratification may amount to an estoppel; but it would be more correct to put the question in the following form: whether the plaintiffs ratified the arrangement under Exhibit IV and if so, whether they could go behind it? After the execution of Exhibit IV the account books, cash on hand and the voucher were handed over to Adaikalavan Chetty by the defendant and he executed a power-of-attorney in Adaikalavan Chetty's favour so as to enable him to realize the loans outstanding on mortgages. Adaikalavan Chetty died in August 1922 and the plaintiffs sent a third agent named Arunachellam Chetty. It was necessary that Arunachalam should get a fresh power-of-attorney from the defendant in order to realize the loans outstanding on mortgages. Exhibit O was written by the solicitors of the plaintiffs to Muthiah Chetti on 5th April 1923 in which they informed him of the death of Adaikalavan Chetty in August 1922 and asked him whether he was "willing to execute a fresh power-of-attorney in favour of the present agent to enable him to deal with the mortgages and any other matters that may arise." The defendant's solicitors wrote Exhibit Q on 13th April that their client had no objection to executing transfers of the mortgages in the names of the proprietors meaning the plaintiffs and that before agreeing to do so he required the plaintiffs to personally execute a release deed in his favour and that he was not satisfied with the release executed by Adaikalavan Chetty

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in his favour. The plaintiffs' solicitors answered Exhibit Q on 14th April that every thing had been done at the defendant's request and there was no reason why he should require a fresh release and that their clients were unwilling to accede to that request. The defendant's solicitors wrote to say that their client regretted that he could not see his way to execute a transfer of the mortgages unless the proprietors personally executed a release in his favour. An originating summons was then taken out by the plaintiffs' solicitors for a vesting order in respect of the mortgages standing in the name of the defendant, and the vesting order Exhibit V was made by the Supreme Court of the Straits Settlements.

A difficulty arose as regards the mortgage property within the State of Johore as according to the law of Johore a mere vesting order would not entitle the plaintiffs to sue on the mortgages obtained in the name of their agent, the defendant. The plaintiffs' solicitors wrote to the defendant's solicitors on 15th August 1923:

> "We find that there are certain difficulties in connexion with the making of a vesting order in Johore and that it would therefore be necessary to sue for a declaration and an order to execute transfers."

The defendant's solicitors replied

> "that in view of the position he (the defendant) has taken up with regard to the Singapore property he regrets he is unable to execute transfers of the mortgage properties in Johore, and that he will not oppose any order in the action if they undertake not to ask for any costs."

The defendant seems to have changed his mind as is clear from the letter of the plaintiffs' solicitors to his solicitors, dated 24th September 1923. He seems to have insisted that the counsel for the plaintiffs should make a statement that the plaintiffs ratified the arrangement under Exhibit IV before he could undertake not

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to contest the claim and to facilitate the passing of a decree in plaintiffs' favour. As a mere vesting order on originating summons would not satisfy the requirements of the law obtaining in Johore the plaintiffs' solicitors filed suit No. 817 of 1923 in the Supreme Court of the Straits Settlements at Singapore praying

"for an order directing the defendant to execute in the name of Moona Etana Toona Kana Roona Ahna Roona Muthiah Chetty in manner conforming with the law of Johore such memoranda or other documents as may be necessary according to the law of Johore to transfer each of the said charges to the plaintiffs or their present agent Moona Etana Toona Kana Roona Ahana Roona Arunachalam Chetty, son of Annamalai Chetty."

The defendant through his solicitors agreed to accept service of notice and the stipulation was that the draft judgment should be approved by the defendant's solicitors. In accordance with the arrangement the draft judgment was submitted to the defendant's solicitors as appears from the correspondence printed on page 102 of the printed papers. The defendant's solicitors made certain alterations. This was on 28th September 1923. On 10th October 1923 they sent the transfers in duplicate to the defendant's solicitors for his signature. The plaintiffs' counsel ratified the arrangement under Exhibit IV as appears from the order of the Supreme Court of the Straits Settlements of Singapore, dated 2nd October 1923. The relevant passage is as follows:—

"And the plaintiffs by their counsel acknowledging that the said release was and is in full force and of full effect, and by consent, it is this day adjudged and ordered by consent, that the defendant do execute in the name of Moona Etana Toona Kana Roona Ahana Roona Muthiah Chetty . . ."

The question is whether this statement amounts to a ratification of Exhibit IV by the plaintiffs and whether the plaintiffs are bound by the statement of their counsel that the release was and is in full force and of full effect. The defendant knew or had reason to

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believe that the plaintiffs would challenge the validity of Exhibit IV and he evidently consulted his solicitors as to the best course to be adopted and on their advice he insisted upon a second release deed from the plaintiffs failing which upon a clear statement that the plaintiffs ratified the arrangement evidenced by Exhibit IV. It is clear from the correspondence that it was finally arranged that the defendant should not contest the suit and that the plaintiffs' counsel should make a statement ratifying the release deed, Exhibit IV, and that the draft judgment should be approved by the defendant's solicitors and thereupon the plaintiffs' counsel made the statement above extracted.

It is contended by Mr. Krishnaswami Ayyar for the plaintiffs that the counsel had no authority to make the statement that "the plaintiffs acknowledge that the said release was and is in full force and of full effect", and that it is for the defendants to show that the counsel was specially authorized to make it. The Subordinate Judge has dealt with this point in an unsatisfactory manner. He observes in paragraph 60:—

"From the correspondence to which I have referred above (Exhibits O series) it was seen that first defendant wanted to have Exhibit IV established by the execution of a fresh release deed by the principals in person. That was not agreed to and first defendant, I think, has been able to get reference made to the release deed somehow."

and he holds that the admission contained in the judgment does not affect the plaintiffs as an affirmance of the transaction of release.

That the plaintiffs' counsel made the statement contained in the order of the Supreme Court cannot be seriously disputed. The only question is whether he had authority to bind his clients by the statement he made. Mr. Krishnaswami Ayyar contended on the

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authority of *Digbijoy Roy* v. *Shaikh Ata Rahman*(1) *Nando Lal Bose* v. *Nistarini Dassi*(2) and *Swinfen* v. *Swinfen*(3) that the counsel had no authority to make the statement and that the statement would not bind the plaintiffs. In *Digbijoy Roy* v. *Sheikh Ata Rahman*(1), it was held that although a pleader has no power to compromise a suit unless he is specially authorized in that behalf he can bind his client by an admission of a question of fact provided that question of fact falls within the scope of the suit in which he has been retained. In *Nando Lal Bose* v. *Nistarini Dassi*(2), the counsel retained in one case consented to a compromise which affected other suits in which he was not retained. The compromise was objected to and before the decree was drawn up one of the parties applied for an order to stay the drawing up of the compromise decree and to have the alleged compromise set aside and the suit retried. STANLEY, J., dismissed the application; and on appeal MACLEAN, C.J., and two other Judges allowed the application. The learned CHIEF JUSTICE observes at p. 438 :—

"There cannot, I think, be any reasonable doubt at the present day that counsel possesses a general authority—an apparent authority, which must be taken to continue until notice be given to the other side by the client that it has been determined, to settle and compromise the suit in which he is actually retained as counsel, and in the exercise of his discretion to do that which he considers best for the interest of his client in the conduct of the particular case in which he is so retained. Here, however, the compromise extended to collateral matters, to matters quite outside the scope of the particular case in which Mr. Mitter was retained as counsel, and in order to bind the client, it must be shown that Mr. Mitter had, from his client, a special authority to compromise, and compromise upon the definite terms which are set up by the present respondents."

(1) (1912) 17 C.W.N., 156. (2) (1900) I.L.R., 27 Calc., 428.
(3) (1857) I.C.B. (N.S.), 364; s.c. (140 E.R., 150).

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and refers to *Strauss* v. *Francis*(1), *Swinfen* v. *Swinfen*(2) and *Matthews* v. *Munster*(3), for the authority of a counsel to compromise on behalf of his client. This case is distinguishable on the facts. Here, there was no settlement of collateral matters. It was necessary to prove to the Court that the mortgages which were standing in the name of the defendant were taken for the benefit of the plaintiffs, that the defendant was a trustee for the plaintiffs and that the agency having terminated he was bound to make over the mortgage deeds to the plaintiffs. It cannot therefore be said that the ratification of the release deed, Exhibit IV, was a matter collateral to the subject matter of the suit in which the statement ratifying the deed was made. The defendant insisted upon his being given a full discharge as regards the agency and he was not satisfied with the release executed by the agent of the plaintiffs, and it was necessary for obtaining the order prayed for to make out that the defendant had ceased to be the plaintiffs' agent; and if for obtaining the relief therein prayed the statement insisted upon by the defendant with reference to the agency during the currency of which the mortgage deeds were obtained is made, it cannot be said that the counsel settled a matter collateral to the suit. In *Swinfen* v. *Swinfen*(2), the power of a counsel for compromising matters in dispute was considered at length. There are some observations of CROWDER, J., which may be taken as lending support to Mr. Krishnaswami Ayyar's contention. He observes at 461:—

"I am not aware that any counsel engaged in making terms, ever supposed for a moment that his opponent had power to bind his client without express instructions."

(1) (1866) L.R., 1 Q.B., 379. (2) (1857) 1. C.B. (N.S.), 364.
(3) (1887) L.R., 20 Q.B.D., 141.

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There are a number of cases which take a liberal view of the authority of a counsel to compromise suits in which he is engaged. In *Elworthy* v. *Bird*(1), Sir John Leach, M.R., observes,

"In the absence of evidence, a Court will conclude that he had authority, for it is not to be presumed that counsel would enter into an agreement without authority. There is in this case evidence on both sides, but after duly considering it I come to the conclusion that counsel had authority which would bind his client."

In *B. N. Sen & Bros.* v. *Chuni Lal Dutt & Co.*(2), the plaintiffs instituted a suit for the recovery of the price of goods sold and delivered to the defendants and for damages in respect of goods of which it was alleged the defendants had refused to take delivery making a total claim of Rs. 25,508. The defendants admitted that there was due from them to the plaintiffs a sum of Rs. 12,611 in respect of goods sold and delivered but claimed that there was due to them from the plaintiffs a sum of Rs. 58,000 in respect of various transactions between the parties. At the hearing of the suit the defendants' counsel in the absence of the defendants and without their express authority, assented to a decree in favour of the plaintiffs for Rs. 22,117, without prejudice to the right of the defendants, if any, to proceed with their claim in their own suit. It was admitted that the attorney for the defendants, who was present in Court never asked the learned counsel to settle the suit, nor did he put any limitation on the authority or discretion of the learned counsel in any respect to compromise the suit. SANDERSON, C.J., and RICHARDSON, J., held that the settlement was a matter within the apparent general authority of the counsel and was binding on the defendants. The following observation of the

(1) (1829) Tamlyn, 38; 48 E.R., 16. (2) (1924) I.L.R., 51 Calc., 385.

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learned CHIEF JUSTICE may well be applied to the present case:—

"In my judgment there is no evidence in this case that there was any limitation placed upon the authority of the learned counsel . . . I have a strong suspicion that the course which the learned counsel took on behalf of the defendants was a wise one, having regard to the nature of the suit and the admissions which the defendants made in the suit. At all events I am satisfied that the settlement was made within the authority of the learned counsel."

There are numerous cases, English and Indian, on the question of a counsel's power to make admissions in, or refer to arbitration or compromise, suits in which he is instructed. A mere reference to the following cases would be sufficient as it is neither profitable nor necessary to consider them all in detail. *Bhutnath* v. *Ramlall*(1) *Swinfen* v. *Lord Chelmsford*(2) *Swinfen* v. *Lord Chelmsford*(3) in the Court of Exchequer; *Chambers* v. *Mason*(4), *Strauss* v. *Francis*(5), *Dwar Buksh Sirkar* v. *Fatik Jali*(6). *Beery* v. *Mullen*(7), goes the length of laying down that,

"The compromise made by a solicitor or counsel is binding on the client though it may have been made against his express directions unless the client has revoked the authority of the counsel or solicitor to compromise on his behalf and communicated the revocation to the other side. This must be done before the decree or order is sealed."

The following propositions are deducible from the authorities:—

(1) A counsel has authority to make admissions in Court on behalf of his client on matters of fact relevant to the issues in the case in which he is engaged. Admissions on questions of law would not bind the client.

(1) (1900) 6 C.W.N., 82 at 87. (2) (1859) 1 F. and F., 619.
(3) (1860) 29 L.J., Ex. 382. (4) (1858) 5 C.B. (N.S.), 59.
(5) (1866) L.R., 1 Q.B., 379. (6) (1898) 3 Calc.W.N., 222.
(7) (1871) 5 I.R., 368.

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(2) A counsel has authority to confess judgment, withdraw or compromise, or refer to arbitration the suit in which he is instructed if his doing so is for his client's advantage or benefit even though he has no express authority from his client.

(3) A counsel cannot without express authority agree to compromise or refer to arbitration matters unconnected with the subject matter of the suit in which he is instructed.

(4) Where in the course of a suit a counsel makes an admission as to a collateral matter, or gives up a doubtful claim which is not a subject matter of the suit, there is a presumption that the counsel acts under instructions if the admission or the giving up of the doubtful claim is for the benefit of the client.

(5) It is a question of fact in each case whether the counsel acts under instructions when he compromises or refers to arbitration matters not involved in the suit and the Court on a consideration of the probabilities and the circumstances of the case can find that the counsel acted on instructions even though there is no direct evidence on the point.

(6) A counsel has no power to make an admission in, or compromise or refer to arbitration, a suit if he is instructed not to do so, without express authority from his client.

The plaintiffs were anxious to have the mortgage deeds in order to enforce the rights under them without delay as the fall in the price of rubber made the securities doubtful and they probably acted upon the principle of the apothegm "a bird in the hand is worth two in the bush," and consented to ratify the release deed and thereby secure the mortgage deeds without delay rather than pursue a doubtful remedy against the defendant.

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All the circumstances of the case and the evidence on record, the non-examination by the plaintiffs of their agent, Arunachalam, who instructed the counsel in the proceedings before the Supreme Court of the Straits Settlements, the absence of any statement in the second plaintiff's deposition that he or his brother, the first plaintiff, did not empower Arunachalam to make the statement as to ratification contained in the judgment of the Supreme Court of Singapore, the urgency with which the mortgage deeds were required by the plaintiffs and the speedy manner in which the suit was decreed in plaintiffs' favour owing to the defendant's consent to accept service and remain *ex parte* and the readiness with which the defendant executed the transfer deed within a fortnight of the approval of the draft judgment by his solicitors, lead to the irresistible conclusion that the plaintiffs' counsel was specially authorized to make the statement that the plaintiffs acknowledged that the said release was and is in full force and of full effect.

Even if the counsel was not specially instructed to make the statement, we hold that the circumstances of the case and the evidence on record fully justify the conclusion that he acted within his authority in making the above statement. A decree has been passed embodying the statement by the Supreme Court of Singapore and in pursuance of that decree the defendant signed the transfer deeds. But for the statement the plaintiff would not have got speedily and in the manner they got what they wanted. We have therefore no hesitation in holding that the plaintiffs by their counsel ratified the arrangement evidenced by Exhibit IV and they cannot now sue to set it aside.

In the result the appeal is allowed and the plaintiffs' suit dismissed. But considering the conduct of the

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DEVADOSS, J. KUMARASWAMI SASTRI, J.

defendant we think he ought not to get his costs. We therefore direct that each party do bear his costs throughout.

KUMARASWAMI SASTRI, J.—I agree and have nothing useful to add.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Ramesam.

1927, March 22.

K. M. CHOKKALINGAM CHETTIAR (PLAINTIFF), APPELLANT,

v.

AT. AR. ATHAPPA CHETTIAR (FIRST DEFENDANT), RESPONDENT.*

Indian Registration Act (XXI of 1908)—Bona fide *purchase of property for the purpose of facilitating registration of a transaction*—Bona fide *inclusion of such property in a mortgage document—Fraud on registration—Validity of registration of the document.*

Where a person *bona fide* buys property for the purpose of facilitating registration of a transaction and also *bona fide* includes it in a sale or mortgage, he cannot be held to commit a fraud on registration which would render the whole transaction invalid.

APPEAL against the decree of T. M. FRENCH, Subordinate Judge of Ramnad at Madura, in Original Suit No. 63 of 1921.

The material facts appear from the judgment.

A. Krishnaswami Ayyar (with *K. Balasubrahmanya Ayyar*) for appellant.

K. Rashyam Ayyangar for respondent.

* Appeal No. 290 of 1923.

CHOKKALINGAM CHETTIAR v. ATHAPPA CHETTIAR.

JUDGMENT.

This appeal arises out of a suit filed by the plaintiff as assignee of a deed of mortgage, Exhibit A, dated the 14th June 1913, executed by the first defendant in favour of the second defendant, his son-in-law. The assignment by the second defendant to the plaintiff is Exhibit B, dated the 20th July 1914. The second defendant at the time of the execution of Exhibit B also executed a security bond Exhibit F, indemnifying the plaintiff. The second defendant, according to the plaint, made several payments which are set out in the plaint, amounting in all to Rs. 12,307-0-3 and the present suit is filed for the recovery of the balance of Rs. 6,529-4-6 with costs and further interest. The mortgage deed recites the consideration and also states that two items of property were mortgaged. One is a house in Devakottai and the other is a house in Erode. The house in Erode was purchased under a sale deed Exhibit I on the 13th June 1913 for Rs. 200 and this was included in the deed of mortgage. The property purchased under Exhibit I was afterwards reconveyed to the vendor under Exhibit II, and Exhibit III recites that the Rs. 200 for which it was reconveyed should be paid to the mortgagee, thereby making it clear that on the date of the reconveyance the property was treated as subject to the mortgage. Two defences were raised for purposes of this appeal. It is said that item I, which was the property purchased in Erode, was purchased not *bona fide* with the object of acquiring the property but was purchased for the purpose of giving jurisdiction to the Erode Registrar to register the document, that no property was intended to be passed and that the transaction was intended for the purpose of effecting a fraud on registration. The other defence is that there was no consideration for the mortgage document

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itself as it was executed to prevent the second defendant from ill-treating or discarding his wife, the daughter of the first defendant. The Subordinate Judge found both these points in favour of the defendant and dismissed the suit. We shall first deal with the question of consideration.

[Their Lordships then dealt with the evidence and concluded that the mortgage document was supported by consideration and then proceeded as follows :—]

The next question for consideration is as regards the validity of the registration. The case for the respondent is that there was no intention to purchase the property, that no consideration was paid for it and that the whole transaction was a device to get Exhibit A executed and registered at Erode. There is no doubt that the parties wanted to get the document registered at Erode. But the question is whether in effecting that intention they really did anything which would invalidate the document. It will be a broad proposition unsupported by any authority to say that where a person *bona fide* buys property for the purpose of facilitating registration of a transaction and also *bona fide* includes it in a sale or mortgage, that he commits a fraud on registration, which would render the whole transaction invalid. In such a case nobody is cheated. There is the intention to buy the property. The title of the property is in the person who conveys it, or mortgages it. Under the Registration Act a copy of the registered document is sent to the other district where the other property is situated and the mere fact that a man wants to facilitate a transaction should not in our opinion render the transaction invalid if there is no other objection to the transaction. In cases where a non-existing property is mentioned or in cases where property which is existing but which does not belong to the mortgagor or vendor

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is mentioned or in cases where the parties enter into a nominal transaction without any intention of title passing and yet the sale is registered, in such cases it may be said that there is a fraud with the object of defeating the provisions of the Registration Act. Here both the parties were aware of what was going on and nobody is cheated by it. Having regard to the evidence we are not justified in holding that there was no intention to purchase the property and include it under the mortgage. The fact that in our opinion weighs against the theory of any intention to defraud is that the reconveyance is about a year after the purchase and the reconveyance expressly states that the Rs. 200 which is the consideration for the reconveyance is to go in discharge of the mortgage debt. When we look at the case from the point of view of the recitals in the document it is difficult to hold that there was no intention to include the property under the mortgage security. Where a person "includes" the property in the mortgage security and asks the transferee to pay the Rs. 200 in discharge of the mortgage debt his intention is clear that the property should be included in the mortgage. Against this what have we got? We have only the statement of the 1st defendant and the statement of the vendor, who has himself transferred the property to some third person. There is nothing against his interest now because even if his evidence is disbelieved, he still remains the owner of the property competent to transfer it. We cannot say that the evidence of this D.W. 1 is entitled to any credit having regard to the recitals in the document. In the view we take of the case, we think it is unnecessary to consider the cases quoted by Mr. Bashyam Ayyangar for the respondent. We think that the plaintiff has proved his case. We reverse the decree of the Subordinate Judge

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with costs here and the Court below. There will be the usual mortgage decree to the plaintiff for the amount claimed with interest from the date of plaint till the date of realization.

Time for redemption is six months from this day.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Curgenven.

1927, March 2.

HAJI SHAKOOR GANI SAIT (PLAINTIFF)

v.

THE B.I.S.N. CO., LTD., BY AGENTS, BINNY & CO. (MADRAS), LTD. (DEFENDANTS).*

Bill of Lading—Exemption for loss, etc., in respect of "re-shipped or re-exported goods"—Sugar once imported into Calcutta from Java but exported from Calcutta to Madras in another ship.

A clause in a bill of lading exempted the shipowner from liability for any loss in respect of "re-shipped or re-exported" goods.

Held, that the re-shipment or re-exportation need not be in the course of the voyage covered by the bill of lading, and that sugar which had been once imported into Calcutta from Java and from there shipped by the shipper to Madras in the bags in which the sugar had come from Java was "re-shipped and re-exported" within the meaning of the above clause.

CASE stated under section 69 of the Presidency Small Cause Courts Act in New Trial Application No. 201 of 1925 preferred against the decree in Suit No. 2129 of 1924.

The facts and the material clauses of the bill of lading are given in the judgment.

V. Thiyagarajan for plaintiff.—The defendant company is liable for slackage as the goods are not "re-shipped or

* Referred Case No. 9 of 1926.

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re-exported goods". Re-shipment must be in the course of the same voyage and does not refer to different voyages as in this case. These are not "re-exported goods" as there was no exportation after importation. "Re-exportation" has reference to exportation to foreign countries. A shipowner is a common carrier and as such is liable to deliver the goods in the same condition and order without any diminution in weight unless any clause in the bill of lading protects him otherwise; See 26 Halsbury, page 202, Carver on Carriage by Sea, 9th Edition, pages 73, 103 and 159. There is no such clear clause of exemption in this bill of lading. Even if the bill of lading states that "the weight contents and value are unknown" as in this case, the shipowner's liability to carry the goods as they were handed over exists; *Lebeau* v. *General Steam Navigation Company*(1). This clause and the concluding clause in the bill of lading clearly show that "weight" is different from "contents" and that the shipowner is liable in respect of weight and contents: "Contents" means quantity. If there is any ambiguity in or inconsistency between the clauses of the bill of lading, the bill affords no protection to the shipowner. *Nelson Line (Liverpool), Ltd.* v. *James Nelson & Sons, Ltd.*(2). Reference was made to *Stuart* v. *The British and African Steam Navigation Company*(3) and *New Chinese Antimony Company, Ltd.* v. *Ocean Steamship Company, Ltd.*(4), Legget on Bills of Lading (1880) Edition, pages 94, 215 and 418.

C. Sidney Smith for defendant.—The clauses relating to re-shipment and re-exportation and condition of goods—completely protect the shipowner. These are "re-shipped and re-exported goods." Transhipment is in the same voyage and refers to cases where there is no landing. Re-shipment is after landing. The reason for exemption in the case of re-shipped goods is because the owner of the goods generally does something to the goods before re-shipment. Exportation does not necessarily mean exportation to a foreign country. Exportation from one part to another in the same country also comes under the term. See Stroud's Judicial Dictionary and The Proprietors of the *Stockton and Darlington Railway* v. *Barrett*(5). "Re-exportation and re-shipment" are used in a narrow sense; See the use of the word re-exported in section 42 of the Sea Customs

(1) (1872) L.R. 8 C.P., 88.
(2) [1908] A.C., 16.
(3) (1875) 32 L.T. (N.S.), 257.
(4) [1917] 2 K.B., 664.
(5) (1844) 11 Cl. and F., 590; 8 E.R., 1225.

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Act (VII of 1878), which uses the word and lays down that on goods "re-exported" from one part to another in India the customs duty payable is very small. "Contents" means kind of goods and not quantity.

JUDGMENT.

ODGERS, J.

ODGERS, J.—This is a reference by the Chief Judge and Judges of the Madras Court of Small Causes through their Registrar under section 69 of the Presidency Small Cause Courts Act submitting for the opinion, of the High Court the following questions :—

(1) The goods, in question in this suit, namely, sugar, having been found to be imported into Calcutta from Java, and from there shipped by the plaintiff to Madras in the bags in which sugar had come from Java under the bills of lading covering the carriage thereof from Calcutta to Madras, do such goods come under the category of "re-shipped or re-exported goods" within the meaning of the bills of lading in question?

(2) If such goods do come under such category in the clause in question in the bill of lading, is the shipping company protected from liability for loss or slackage in such consignments, the stipulation in such bill of lading being that they are "not responsible for the condition or contents of re-shipped or re-exported goods"?

The plaintiff in suit No. 2129 of 1924 in the Small Cause Court sued the British India Steam Navigation Co., Ltd., for Rs. 1,200 odd for slackage in three consignments of sugar from Calcutta to Madras. The three consignments were (1) on 15th December 1922, 377 bags of white Java sugar per S.S. "Mantola," (2) on 20th December 1922, 1,630 bags of white Java sugar per S.S. "Tregonnel" and (3) on 10th February 1923, 2,380 bags of white Java sugar per S S. "Margha." On arrival at Madras certain bags in all the consignments were found torn and re-stitched and there was a very considerable slackage on the value claimed in all the three consignments. The defendants denied liability on two grounds (1) that the sugar was packed in single gunnies and (2)

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ODGERS, J.

that under the bill of lading the goods had been re-shipped or re-exported and they were therefore not liable for their condition or contents. The learned Chief Judge who tried the case found the slackage alleged in the plaint was proved and that the packing in single gunnies was sufficient. He also held that the goods had been re-shipped or re-exported because they had been imported into Calcutta from Java and were re-shipped or re-exported to Madras in the same bags in which they had come from Java. In the Full Bench Application No. 201 of 1925 this latter was the only question argued and as the Full Bench of the Small Cause Court entertained reasonable doubts as to how these words should be construed the reference comes before us. The point urged before the Full Bench and apparently also before the learned Trial Judge was that the clause in the bill of lading relating to re-shipment or re-exportation must be confined to the course of the voyage to which the contract evidenced by the bill of lading relates. It is, therefore, necessary in order to answer the questions that have been referred to us to refer somewhat in detail to the bill of lading, Exhibit A-1. The opening words are:

"Shipped in good order and condition."

Then follows :

"the said goods to be carried and delivered, subject to the terms and conditions of this bill of lading in the like good order and condition at the port of Madras to the consignee or their assigns."

It may here be noted that the consignor and the consignee are the same person as the plaintiff carried on business in both Calcutta and Madras. As pointed out by Carver in his standard work on Carriage by Sea, section 73, the general statement "in good order and condition" amounts to an admission by the shipowner

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that so far as he and his agents have had the opportunity of judging, the goods were so shipped. The next observation to make is that the company is at liberty

"to tranship or land and store the goods either on shore or afloat and to re-ship and forward same at the company's expense but at shipper's or consignee's risk."

That is obviously a transhipment and re-shipment in the course of the voyage, as for instance when the original ship in which the goods are laden is disabled and unable to continue her voyage she is allowed to land the goods and re-ship and forward them at her expense but at the shipper's risk. As was said in *Stuart* v. *The British and African Steam Navigation Company*(1)—

"the transhipment at the shipper's risk only extends the rights and liabilities of the parties under the bill of lading to the rest of the voyage; with this, that any expense that is incurred must be paid by the ship, the risks remaining the same"—(Per Pollock, B.).

So that as regards this transhipment and re-shipment it is a matter which the shipowner is entitled to undertake and over which the shipper has no control.

The bill of lading is stated to be issued subject to the following further conditions:—

"Weight, contents and value when shipped unknown. The company is not to be resposible for any loss or damage or delay whatsoever directly or indirectly resulting from insufficiency of the address, or packing internal or external nor for condition or contents of re-shipped or re-exported goods."

Where "weight, contents and value unknown" is inserted, it has been held in *New Chinese Antimony Company, Ltd.* v. *Ocean Steamship Co., Ltd.*(2) that the onus is on the plaintiffs, the shippers, to prove the quantity shipped, as the bill of lading is under these circumstances not even *primâ facie* evidence of quantity.

(1) (1875) 32 L.T. (N.S.), 257.

(2) [1917] 2 K.B., 664.

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The effect of these words is that the shipowner declines to accept the declaration of the shipper and according to the learned Judges in *Lebeau* v. *General Steam Navigation Company*(1), their insertion

"completely does away with the statement made by the shipper with respect to the nature of the goods and both parties must then be taken to agree to the bill of lading in a modified form by which there is no binding statement as to the contents of the package, but the carrier undertakes in his capacity as carrier to carry the case whatever it contains."

However this may be, we are primarily concerned with the words "condition or contents of re-shipped or re-exported goods." It was pressed upon us that contents must mean specie, that is to say, if the bags described as containing Java sugar in fact contain sand, the shipowner will not be responsible. Even if this is so, the exception as to 'condition' might well be held to absolve the shipowner from liability because it is but reasonable to infer that the bags having been torn and re-stitched part of their contents had been abstracted or lost owing to the tearing and that therefore, provided that these bags are re-shipped or re-exported goods, the shipowner would not be responsible for their external condition on account of the exception. But it appears to us that contents must in these instances also include the internal condition of the package and that where the shipowner states that the weight is unknown when shipped he cannot be responsible for the internal condition or contents of the package should it turn out to weigh less than the shipper is prepared to prove it weighed when he put the bags on board the ship.

This paragraph of the bill of lading obviously refers to matters within the control of the shipper; insufficiency of the address or packing, internal or external, are

(1) (1872) L.R., 8 C.P., 88.

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matters with which the shipowner has nothing to do. It is, therefore, reasonable to suppose that the following clause "nor for condition or contents of re-shipped or re-exported goods" has also to do with something inherent in the goods themselves which is, so to speak, in the disposition of or within the knowledge of or under the control of the shipper and not the shipowner. The whole of this clause has nothing to do with the incidents of the voyage, and it seems to us that from the collocation of the clause there is no ground for referring the words "re-shipped or re-exported" to the preceding clause "to tranship, re-ship and forward." It is also perfectly clear that a shipowner cannot ordinarily re-export. That must be a matter under the control of a shipper. We therefore think that the contention that this clause relates to re-shipment or re-exportation in the course of the voyage covered by the bill of lading and not to goods which had been previously re-shipped or re-exported, cannot be sustained.

Exportation does not necessarily mean exportation to a foreign country. See The Proprietors of the *Stockton Darlington Railway* v. *Barrett*(1), where the House of Lords held that goods shipped from Stockton to London were exported goods.

As to whether these goods are in fact re-shipped or re-exported, the evidence of P.W. 3 is clear. He is the plaintiff's gumasta and he clearly says that the sugar was laden on board the defendant's vessels in the same gunnies as they were shipped in Java. Mr. A. Wright who has experience in the shipping department of Messrs. Binny & Co. says that re-exported goods are goods which are unloaded from a ship and lie at the port for some time and *then the owner re-exports them to another port.* (The italics are ours.)

(1) (1814) 11 Cl. and F., 590; 8 E.R., 1225.

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The only other reference to re-shipped goods is in the last paragraph but one of the bill of lading which refers to action on the part of third parties, i.e., neither the shipper nor the ship-owner, such as strikes, war, sanitary regulations, etc. When these prevent the ordinary discharge of cargo the ship-owner may tranship or land or otherwise dispose of the goods and may re-ship thence to destination as soon as conveniently may be. One such very common occurrence is illustrated by the recent strike in the Port of Colombo where goods destined for Colombo were over-carried to Madras or Calcutta, re-shipped there and returned to Colombo when the conditions were favourable for landing. This is what is called over-carrying. The bill of lading concludes:

"The company shall not be responsible for loss or damage of any kind which may result directly or indirectly from the above causes or any of them and the delivery by the Company of packages externally in good condition as received shall be conclusive evidence of delivery of full weight and contents."

The concluding words lend some weight to the argument for the plaintiffs that weight is different from contents. But, as we have already pointed out, even if weight is to be excluded in the "condition or contents of re-shipped or re-exported goods" which we very gravely doubt, for the reasons above given, the company would not be responsible under this clause for the condition of such goods, nor, it seems to us, for the results or consequences of such condition. In "a Treatise on the Law of Bills of Lading" published in 1880 there is an interesting form of the bill of lading employed by the defendant company in those days. One of the clauses is as follows: "This bill of lading is issued subject to the following conditions: Weight, contents and value when shipped unknown. Neither Company (that is to say, neither B.I.S.N. Co., Ltd., or

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ODGERS, J.

the Transhipping Co., the P. & O. Co.) is to be responsible for leakage or breakage or other consequence arising from the insufficiency of the address or package or for damage, leakage or breakage to re-exported goods."

We are not unmindful that a ship-owner can only contract himself out of the performance of his duties as a common carrier by clear and unambiguous language [*Nelson Line (Liverpool), Ltd.* v. *James Nelson & Sons, Ltd.*(1)]. In this case for the reasons stated we are of opinion that the language of the bill of lading is sufficiently clear and unambiguous though the attention of the ship-owners may be drawn to the dicta of Lord Halsbury in the case cited.

We are, therefore, of opinion that under the circumstances set out in question (1) the goods in question do come under the category of re-shipped or re-exported goods within the meaning of the bill of lading. We are also of opinion with regard to the second question that the defendant company is protected from liability for loss or slackage in such consignments by the stipulation in their bill of lading that they are not responsible for the condition or contents of re-shipped or re-exported goods.

These are our answers to the questions submitted.

N.R.

(1) [1908] A.C., 16.

APPELLATE CIVIL.

Before Mr. Justice Jackson.

ERCHAMVEETTIL PARKUM KOTTAYI CHATHUKUTTY, (PLAINTIFF), APPELLANT,

1927, February 8.

v.

CHANGANATHA PARKUM THOTTATHIL KUNHAPPU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

The Malabar Compensation for Tenants' Improvements Act (Madras Act I of 1900)—Sec. 3 "Improvements"—Whether Act applies to non-agricultural holdings.

Malabar Compensation for Tenants' Improvements Act (Madras Act I of 1900) applies only to improvements effected in agricultural holdings and vacant building sites. Hence if a shop in an urban area is let to a tenant who agrees by his lease to remove at the end of the term a bakery oven erected by him thereon, he is not entitled to any compensation for the oven at the time of eviction.

SECOND APPEAL against the decree of V. P. ROW, District Judge of North Malabar, in Appeal Suit No. 270 of 1922, preferred against the decree of S. GOPALA AYYAR, District Munsif of Nadapuram, in Original Suit No. 1190 of 1920.

In this case the plaintiff let to the defendant a shop in a town in Malabar for 5 years, the tenant agreeing to remove a bakery oven erected by him thereon, when surrendering the shop at the end of 5 years. At the end of 5 years the plaintiff sued to recover arrears of rent and the land. The defendant pleaded, *inter alia*, that he should be paid compensation for the oven. The District Munsif allowed the suit declining to grant

* Second Appeal No. 963 of 1924.

CHATHU-KUTTY v. KUNHAPPU.

any compensation. On appeal the District Judge allowed compensation. Hence this second appeal by the plaintiff.

K. V. Madhavan Nayar, A. V. K. Krishna Menon and *K. Kuttikrishna Menon* for appellant.

A. K. Balakrishnan for first respondent.

JUDGMENT.

The short point for determination in this appeal is whether the tenant of a shop in Malabar comes within the purview of Act I of 1900 Madras. Curiously enough, the question appears to be *res integra.* Although it must have been decided times without number in the lower Courts, nevertheless, there is no ruling of this Court in the matter. In section 3, 'tenant' is defined as including a person who is lessee of land. 'Holding' in sub-section (3) of section 3 has no larger connotation than is implied by the language of sub-section (1). Improvements are set forth in section 4 and there is nothing in that list which could include the improvement of urban dwellings. I think it is entirely foreign to the intention of the Act to hold that because a house or a shop must necessarily stand upon land, therefore, whenever a house or a shop is leased the tenant is lessee of land within the meaning of the Act; and if there happen to be some small yard appurtenant to the shop that would make no difference. I think it has invariably been held in Malabar that the Act applies to agricultural holdings and also to what are known as Kudiyiruppu or vacant sites available for buildings and does not apply to sites which are already mainly occupied by houses or shops. It follows therefore that the respondent in this appeal can derive no benefit from the provisions of the Act and he must be held to the terms of his contract, Exhibit C, by which he has undertaken to remove the oven—I do not

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know why the translator of this Court should call it a bread safe—at the expiry of his lease. The appeal is accordingly allowed and the decree of the District Munsif is restored with costs throughout.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Curgenven.

W. ELLIOT, OFFICIAL RECEIVER, CUDDAPAH (PETITIONER), APPELLANT,

1927, April 12.

v.

MOPPARAPU SUBBIAH (RESPONDENT), RESPONDENT.*

Provincial Insolvency Act (V *of* 1920), *ss.* 53 *and* 75 (3)—*Appeal filed without leave—Petition for leave after filing of appeal, validity of appeal—Debtor in insolvent circumstances transferring all his movable and immovable properties to trustee for distribution among his creditors—Trustee, whether a purchaser in good faith and for valuable consideration—Indian Trusts Act* (*II of* 1882), *ss.* 4, 5 *and* 6.

In cases of appeals under section 75 (3) of the Provincial Insolvency Act (V of 1920) it is not necessary that leave to file the appeal should be obtained before filing the appeal; it may be obtained after. *Anantanarayana Ayyar* v. *Sankaranarayana Ayyar,* (1924), I.L.R., 47 Mad., 673, followed.

A deed of trust by a person of his properties for payment of his debts is not valid unless it is an actual transfer of his properties and otherwise conforms to the provisions of sections 4, 5 and 6 of the Indian Trusts Act.

If the intention to transfer both movables and immovables by means of a deed is one and indivisible and if the transfer of the immovables is invalid for some reason, e g., non-registration of the deed, the transfer of the movables too cannot take effect.

A trader who could not pay his debts in the ordinary course and who was in financial difficulties transferred to a

* Appeal against Order No. 482 of 1925.

OFFICIAL RECEIVER, CUDDAPAH v. SUBBIAH.

trustee all his movable and immovable properties for distribution among his creditors and filed his petition for adjudication as an insolvent within three months of the transfer. *Held*, that the trustee who took the properties for such distribution with knowledge of the debtor's circumstances was not a purchaser in good faith and for valuable consideration within section 53 of the Provincial Insolvency Act. *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar*, (1916) 30 M.L.J., 415, dissented from; *Ex parte Hillman, In re Pumfrey*, (1879) 10 Ch. D., 622, followed.

APPEAL against the order of J. K. LANCASHIRE, District Judge, Cuddapah, dated 13th April 1925, in I.A. No. 219 of 1925, in I.P. No. 13 of 1924 and petition to the High Court for leave to appeal against the above order.

B. Somayya for appellant.

E. Krishnamurti for respondent.

JUDGMENT.

ODGERS, J.

ODGERS, J.—When this appeal first came on, we adjourned it to see if the appellant, the Official Receiver of Cuddapah, had obtained leave of the District Court to appeal or if not to enable him to apply to it for the leave. This is required as the matter falls under section 75 (3) of the Provincial Insolvency Act and the appeal is not as of right. The District Judge has now on application made to him held that the appellant should have applied for leave prior to filing the appeal in the High Court. The words of the sub-section are

> "may appeal to the High Court by leave of the District Court or of the High Court"

and the question is do they enact that leave is a condition precedent to appeal. It is contended that it must be so, otherwise the provisions as to limitations for filing the appeal would be unmeaning. There is no doubt that this appeal was filed within 90 days but the

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objection is that it was not really an appeal when it was filed as it was not accompanied by a leave to appeal or a petition asking for the same. It seems to me that it is a mistake on the part of the officer who admits these appeals not to examine them to see if leave has either been obtained or there is at least a petition for it. The words of WALSH, J., in *Balli* v. *Nand Lal*(1) at page 775 may be quoted in this connexion. The question may have to be raised hereafter as to whether in view of the provisions as to limitation, an appellant under section 75 (3) must *first* be granted leave or must obtain leave *before* he appeals, but for our present purpose it is enough to say that the question seems not to have been so far raised and such authority as there is seems in favour of granting leave with retrospective effect. In *Ananthanarayana Ayyar* v. *Sankaranarayana Ayyar*(2), SPENCER and DEVADOSS, JJ., held that an application for leave may be filed after the period of limitation had elapsed and that an appeal could not be held to be out of time for that reason. If it were it could be excused under section 78. In Civil Miscellaneous Appeal No. 314 of 1924, RAMESAM and MADHAVAN NAYAR, JJ., permitted an appeal to be amended so as to make it one filed under section 75 (3); they then gave leave to appeal. That appeal was originally filed as of right under section 75 (2). We had ourselves adjourned the case to allow petitioner to obtain leave to appeal from the District Court. This was clearly a recognition of the retrospective effect of the Court's leave. In *Balli* v. *Nand Lal*(1), there was no leave and the Court allowed the case to be argued as the practice of the Court was not thoroughly settled. The same remark seems to apply here and it would be a good thing to settle the practice. The Allahabad Court therefore looked into the appeal

(1) (1916) 33 I.C., 773. (2) (1924) I.L.R., 47 Mad., 673.

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and found there were no grounds to support it. WALSH, J., said he could regard it as a sufficient ground to refuse leave if he found that such an appeal had been admitted as a matter of course when there is only an appeal by leave. PIGGOTT, J., pointed out that there had been cases in that Court where leave to appeal had been granted after hearing the arguments but that such proceeding should not form the general practice; it was however nowhere assumed that leave was a condition precedent to the right of appeal. We have also been referred to a somewhat similar case under the Pensions Act; *Muhammad Azmat Ali Khan* v. *Lalli Begum*(1), where the words are

"except as hereinafter provided no civil Court shall entertain any suit"

and a civil Court

"shall take cognizance of any such claim upon receiving a certificate from the Collector."

Their Lordships held that the Court might proceed with the suit after receipt of the certificate, for the suit had been begun without it. It therefore seems to me that as the authorities go at present the District Judge was wrong and we have power to grant the leave now for which a petition has been put in; and we have heard sufficient of the case to lead us to think that it is a case in which leave ought to be granted. The merits will therefore be argued.

CURGENVEN, J.

CURGENVEN, J.—I agree.

This appeal against Order again coming on for hearing the Court delivered the following

JUDGMENT:—

ODGERS, J.

ODGERS, J.—I have already dealt with the question as to the necessity of leave being obtained as a condition

(1) (1882) I L.R., 8 Calc., 422 (P.C.).

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precedent to the right of appeal I now come to consider the case on its merits.

The learned District Judge has held that in respect of Exhibit I which is a transfer of the entire property of the insolvent in trust for distribution to his creditors, the trust is inoperative with respect to the immovables which therefore become vested in the Official Receiver but that it is operative as regards the movables which are therefore vested in the trustee. It is perfectly obvious on the face of it that it is highly inconvenient, to say the least, that part of the assets of an insolvent should be administered under the direction of the Court, i.e., by the Official Receiver, and part should be administered privately by the trustee who presumably would be more or less guided by the wishes of the insolvent himself, so that *prima facie* one is not inclined to uphold an order of this sort. But of course if it is correct in law there is nothing more to be said. Mr. Somayya for the appellant has strongly urged on us that, apart from all other considerations, the principle enunciated in *Manmohan Das* v. *N. C. Macleod*(1), is the one to be applied here. In that case the Bombay High Court held relying on *Marks* v. *Feldman*(2), that a transaction such as the one in question though perfectly valid as between the parties, if bankruptcy supervenes and the transferor is adjudicated, becomes a fraudulent preference and invalid against the assignee, not under any express provision in the Bankruptcy Laws, but as contrary to the spirit and principle of those laws; and Sir LAWRENCE JENKINS, C.J., says that the principle enunciated in *Marks* v. *Feldman*(2) does not depend on the doctrine of relation back which under the English Law goes back to the first available act of bankruptcy but under the Indian only to the date of the petition. It

(1) (1902) I.L.R., 26 Bom., 765. (2) (1870) L.R., 5 Q.B., 275.

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has been strongly contended on the other side that the whole theory of *Manmohan Das* v. *N. C. Macleod* (1) is wrong now-a-days because it is based on section 24 of the Insolvent Debtors Act which was the only section under which a fraudulent preference could then come and secondly that the English case on which it is based does really depend in spite of the declaration of KELLY, C.B., on the theory of relation back in the English Law. It is further contended that now that we have sections 53 and 54 in the Act invalidating certain transactions by the insolvent there is no scope for the importation of a general principle such as may have been imported with justification under the old section 24. The argument is that the Act is self-sufficient and self-contained and that unless a transaction is voidable by its provisions it must be held protected. Interesting as the discussion in *Manmohan Das* v. *N. C. Macleod*(1), is it is not to my mind necessary to decide at the present moment whether in fact there is the principle *dehors* the insolvency law which would render invalid the transfer to an assignee of his entire property by a man subsequently adjudicated.

The terms of Exhibit I in this case are important. It is dated 10th January 1924 and is called an agreement of consent executed by the insolvent. The deed recites that his cloth business is in difficulties, his creditors are worrying him and he has no means to fully discharge their debts. So he has put in possession of the trustee his entire properties, accounts, documents relating to the business, piece-goods and the house. He also promises to deliver some bundles of cloth to the trustee on the next day and recited delivery of the lock and key of the shop in token of having put the trustee in

(1) (1902) I.L.R., 26 Bom., 765.

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possession thereof. The trustee is to sell, all the piece-goods, accounts, documents, etc., but when sold the transferor himself is to execute a sale-deed of the house. Towards the end of the document he again repeats "I have you put in possession of all the documents relating to piece-goods, accounts, etc." Exhibit II is a document of even date by 10 of the creditors out of 40, called an agreement, consenting to the sale of this property of the insolvent and a payment of Rs. 250 to the insolvent. It is perfectly clear to my mind that this document is really not a transfer but one constituting the so-called trustee Subbayya an agent for the sale of this property. If I am wrong and it is a transfer, then the question is, does it infringe the provisions of section 53 of the Provincial Insolvency Act which begins "any transfer of property" and this transfer of property is said in section 2 (*f*) of the Act to include "transfer of any interest in property and the creation of any charge upon property." It is all very well to say that the Insolvency Act is self-contained, but any transfer of property must mean, I think, a transfer recognized by the general law. If this is a transfer and if it is a trust for creditors, it must conform to the requirements of the Law of Trusts, that is to say, sections 4, 5 and 6 of the Trusts Act must be satisfied. If so, a mere declaration of trust with regard to movables is clearly not enough as laid down in *Alagappa Chettiyar* v. *Laksmanan Chettiyar*(1), a decision of a Bench of this Court where the learned Judges were of opinion that there were no words of transfer to be found in the document, and no distinction either with regard to the immovables or the movables; and SESHAGIRI AYYAR, J., said that the document was one and indivisible and it was never the intention of the

(1) (1918) 51 I.C., 253.

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parties that the movable property should be taken without the immovables, and that if there were no words conveying the immovable property you cannot say there is anything in the document which would convey the movable. There may be provisions in a document of transfer which are separable and the invalid part may then be separated from the valid part and the latter can be given effect to while the former fails, and some attempt has been made here to introduce the analogy of partition deeds of both immovable and movable properties. The answer to that is that here it is perfectly obvious from Exhibit I that the trustee was intended to take everything. "I have put in your possession my entire properties" and in the next sentence the house is mingled with the accounts and the documents and the piece-goods. If this document therefore is to be construed as one entire document, if one part of it is bad, the whole of it is bad. That is really enough to dispose of the matter. But I think that under the provisions of section 53, the transfer, if it is a transfer, may also be impugned. In other words, the trustee is not a purchaser in good faith and for valuable consideration. It is true that in *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar*(1) SADASIVA AYYAR and MOORE, JJ., held that the responsibility undertaken by a person to whom properties are transferred in consideration of his taking such onerous work fell within the expression "valuable consideration." Hence the creditors in that case who undertook to be trustees of the insolvent's properties for the benefit of the rest and had been discharging the duties of trustees came within the protection afforded to trustees for valuable consideration. With great deference, I am unable to agree with the

(1) (1916) 30 M.L.J., 415.

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decision unless it can be distinguished on the ground that we have no proof here that the transferee ever undertook any onerous work or had been discharging the duties of a trustee. It seems to me perfectly clear from the judgment in *Ex parte Hillman*; *In re Pumfrey*(1) that a trustee of a post-nuptial settlement of leaseholds for the benefit of the settler's wife and children is not a "purchaser" within section 91 of the Bankruptcy Act. JESSEL, M.R., said that the word "purchaser" means a "buyer" in the ordinary commercial sense. In *Hance* v. *Harding*(2) this case in 10 Ch.D. was explained. In the former case, the father of the settlor had conveyed certain lease-hold properties to trustees on trust for the benefit of the settlor's children. At the same time the settlor assigned a policy of insurance on his life to the same trustees for a like purpose. There was no intention to delay or defeat the creditors of the settlor and the transaction was perfectly *bona fide*. The only point was whether the settlement was valid, and the settlor's father, the settlor having become bankrupt, was a purchaser in good faith and for valuable consideration. The Court of Appeal held that he was because the father gave something in order to induce the son to give something. In this there was ample *quid pro quo* and this was the meaning to be applied to the word "purchaser." As pointed out in *Ex parte Hillman*; *In re Pumfrey*(1) the trustees had not given something to procure something for other persons nor did they give anything at all. The case in 10 Ch.D. according to Lord ESHER, decided that such purchasers as those were not purchasers within the section; there must be valuable consideration. Both cases were considered in *In re*

(1) (1879) 10 Ch. D., 622. (2) (1888) 20 Q.B.D., 732.

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Pope, Ex parte Dicksee(1) by the Court of Appeal. In that case there was a settlement, post-nuptial, made by a bankrupt within two years of his bankruptcy in favour of his wife and children in consideration of the wife refraining from taking divorce proceedings against the bankrupt. The majority of the Court of Appeal held that there was valuable consideration according to the findings of fact in the Court below and that the purchaser is equivalent to a buyer, following *Hance* v. *Harding*(2). On the other hand, it is something more than a conveyancing term and is not satisfied by a deed such as an assignment of leaseholds, which might render the assignee a purchaser within the Statute of 27 Elizabeth, Ch. 4.

I therefore think that Exhibit I comes within the mischief of section 53 and that the trustee so-called is not a purchaser in good faith and for valuable consideration. That he was not a purchaser in good faith is, I think, evident from the mere recitals in the deed. He must have known from these that the transferor so-called could not pay his debts in the ordinary course of business and was in financial dificulties.

It has been observed that although the assignment of all the man's property is an act of insolvency under the Provincial Insolvency Act (6) (*a*), it is not for that reason necessarily void. This has recently been pointed out by COUTTS TROTTER, C.J., and V. V. SRINIVASA AYYANGAR, J., in *the Official Assignee of Madras* v. *O.R.M.R.S. Firm*(3) that though an act of bankruptcy is a ground for adjudication it does not necessarily follow that the adjudication extends to and comprises all the legal consequences in all the various aspects of the act. By that I understand the learned

(1) [1908] 2 K.B., 169. (2) (1888) 20 Q.B.D., 732.
(3) (1927) I.L.R., 50 Mad., 541.

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Judges to mean that although a certain act of a man may be sufficient to adjudicate him an insolvent it does not necessarily mean without more that the act is for example a fraudulent preference under section 54. For these reasons the order of the District Judge cannot be supported with regard to the movable properties mentioned.

The Civil Miscellaneous Appeal must therefore be allowed with costs.

CURGENVEN, J.

CURGENVEN, J.—Within three months of presenting his petition, the debtor in Insolvency Petition No. 13 of 1924 on the file of the District Court of Cuddapah executed a deed under which he purported to transfer the whole of his property, movable and immovable, to a trustee (now the respondent) for the purpose of realizing its value and distributing the proceeds amongst his creditors. This transaction has been impugned by the Official Receiver, and in his order now under appeal the learned District Judge, while holding that the assignment was invalid so far as it related to the immovable property, upheld it as regards the movables.

Three separate lines of argument have been employed to show that the assignment deed is voidable or void,

(*a*) under section 53 of the Provincial Insolvency Act.

(*b*) as opposed to the spirit and policy of the insolvency law ;

(*c*) as regards the movables as not meeting the requirements of the Trust Act.

With regard to (*a*), section 53 declares to be voidable as against the receiver a transfer of property made within two years of the order of adjudication and otherwise than "in favour of a purchaser or encumbrancer for good faith and for valuable consideration."

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This transaction took place within the two years; and it is therefore for consideration whether the three conditions required to protect it from voidability, that the transferee is a purchaser or encumbrancer, that he acted in good faith, and that there was valuable consideration were satisfied.

It would seem at first sight that both the first and the last were wanting. As to the first, there is no suggestion that the transferee is an "encumbrancer" and if by "purchaser" is meant a "buyer" as that term is used in the Transfer of Property Act, it would require him to be a party to a "sale" as defined in section 54 of that Act, a definition which cannot be made applicable to a transfer of the nature under consideration. A more extended significance has, however, been given to the term "purchaser" in *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar*(1), a case decided under section 35 of the Provincial Insolvency Act of 1907, corresponding to the present section 53, by SADASIVA AYYAR and MOORE, JJ. That too related to a transfer of property by a person who subsequently was adjudicated, for the purpose of distributing his assets among his creditors. SADASIVA AYYAR, J., appears to assume that "purchaser" means no more than "transferee." MOORE, J., following an English case, *Hance* v. *Harding* (2), held that "purchaser" in the section is used not in the ordinary legal sense of one who has bought a property under a contract of sale and purchase, but means a person who has given valuable consideration. The facts of *Hance* v. *Harding*(2) were these. The settlor, by a post-nuptial settlement made in pursuance of an arrangement between himself and his father, assigned a policy of insurance upon his life to trustees on trust for

(1) (1916) 30 M.L.J., 415. (2) (1888) 20 Q.B.D., 732.

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the benefit of his children, the settlor's father at the same time conveying certain leasehold property to the trustees on similar trusts. The settlor became bankrupt and the Official Receiver claimed the money payable under the policy on the ground that the policy was void under section 91 of the Bankruptcy Act of 1869 which, like the Indian Act, exempts a transfer "in favour of a purchaser or encumbrancer in good faith and for valuable consideration." It was found that the transaction was entered into in good faith and not with any intention to defeat or defraud the settlor's creditors. Lord ESHER, M.R., after exonerating the parties from any imputation of improper motive, proceeded to hold that the settlor's father was a purchaser within the meaning of the section because he had given something to get something for other persons, viz., the family of his son, and he has given it to induce his son to give up his interest in the insurance policies; that is to say, he held that a "purchaser," as used in this context, means no more than a transferee for valuable consideration. Sir JAMES HANNEN, the other learned Judge, who decided this case, makes this clear by saying that the word must not be treated as a conveyancing term, but must be considered as applying to cases where there is a *quid pro quo*. Reference is made in this case to a decision of the Court of Appeal, *Ex parte Hillman*; *In re Pumfrey*(1), where a construction has been given to the word "purchaser" as used in this connexion. JESSEL, M.R., who delivered the leading judgment in that case, expressed the view that it meant a "buyer" in the ordinary commercial sense, not a "purchaser" in the legal sense of the word. The question arose in that case whether an assignment on

(1) (1879) 10 Ch. D., 622.

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trust for the benefit of the settlor's wife and children was void under section 91 of the Bankruptcy Act upon the settlor being adjudicated a bankrupt, and Lord ESHER says:

"it is impossible to say that in any sense of the word the trustee for the settlor's wife and children is a "buyer" of the settled property."

No distinction can, I think, be drawn between the circumstances of that case, in its essentials, and the present case of a transfer to a trustee for the benefit of the creditors. As is pointed out in *Hance* v. *Harding*(1), not only were the trustees of the settlement in the earlier case not purchasers but also they had given nothing at all in the shape of consideration; and so too here, if there was a transfer it appears to me that it was without consideration. It is true that in *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar*(2) in similar circumstances, consideration was found to have been given on the ground that it was constituted by the responsibility undertaken by the transferee as trustee. In support of this proposition, SADASIVA AYYAR, J., relied upon *Narayan Coomari Debi* v. *Shajani Kanta Chatterjee*(3). In that case however there was an agreement to pay an executor, a salary in consideration of discharging his duties as executor, and it is clear that the rendering of services which the executor was under no legal obligation to render was good consideration for the remuneration. But can it be said here that the assumption by the transferee of responsibility for distributing the assets, although it satisfies the definition of consideration as something done or promised at the desire of the transferor, was consideration for the

(1) (1888) 20 Q.B.D., 732. (2) (1916) 30 M.L.J., 415.
(3) (1895) I.L.R., 22 Calc., 14.

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transfer? What really happened as it seems to me, was that the trustee here gave his services gratuitously and without consideration of any benefit accruing to him from the transfer, which was merely an arrangement enabling him to render those services. For this reason and following *Ex parte Hillman*; *In re Pumfrey*(1), I must respectfully differ from the view taken in *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar*(2) and hold that there was no consideration. In applying the section, it remains to consider whether the transfer was "made in good faith." On behalf of the respondent it is argued that this condition was satisfied inasmuch as there was no intention to benefit one or more creditors at the expense of the remainder. No doubt it may be said that the parties to the transaction in good faith intended to secure an equitable distribution of assets. But I am inclined to think that something further is needed in order to exempt the transfer upon this ground. It is not disputed that the transferor was at the time in embarrassed circumstances or, in fact, actually insolvent. He filed his petition less than three months later. A transferee who takes without knowledge of his transferor's financial condition may be exonerated on the ground of good faith, but can the same be said with regard to a transfer which is in violation of the principles of the insolvency law? An act is not done in good faith, which is done without due care and attention; and it seems to me that had the parties exercised due care and attention, and acquainted themselves with the effect of their action, they would have discovered that it did violate those principles. The transfer by a debtor of all or substantially all his property to a third person for the benefit of his creditors

(1) (1879) 10 Ch. D., 622. (2) (1916) 30 M.L.J., 415.

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generally is by section 5 of the Provincial Insolvency Act declared to be an act of insolvency. The effect of such an act, both under English and under Indian Law, has been considered by JENKINS, C.J., and STARLING, J., in *Manmohandas* v. *N. C. Macleod*(1) a decision which has a bearing upon another aspect of the present case. Two debtors executed a deed of assignment to trustees in favour of their creditors, and the transfer as an act of insolvency, was made the foundation for a petition by certain creditors who did not assent to it. The question was whether the deed could be avoided. The insolvency law then in force was the Indian Insolvency Act (11 and 12 Vic. C. 21) and the learned Judges give reasons which it is unnecessary to consider, for their inability to avoid the transactions under section 24. They then consider whether it is voidable or void upon other grounds. Under the English Law, an act of insolvency such as this, is *ipso facto* void, but one reason at least for this is that a bankruptcy relates back to any acts of bankruptcy which the debtor may have committed, whereas in India the vesting of an insolvent's property takes effect by relation only from the filing of the petition. The doctrine of relation back therefore cannot be invoked to invalidate the transferee's title. The learned Judges, however, refer to

"the view repeatedly enunciated, that an assignment by a trader of all his assets is vitiated by the fact that it contravenes the spirit of the Bankruptcy laws, and is void, not merely because the title of the assignee prevails by relation back."

In particular, they derive authority for this view from the Privy Council case *Khoo Ewat Siew* v. *Wooi Taik Hwat*(2) and apply it to the case before them as not being dependent upon the theory of relation back. I am not at the moment concerned with the

(1) (1902) I.L.R., 26 Bom., 765. (2) (1892) I.L.R., 19 Calc., 223.

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voidability of the transfer as an act of insolvency, but only with the contention that it contravenes the principles of the Insolvency law. That proposition, I think, cannot be questioned. The Insolvency law provides machinery for the preservation and distribution of an insolvent debtor's assets and any private arrangement which would defeat that purpose must be in conflict with the intention of the law.

"It has undoubtedly been long settled"

says Lord ELDON in *Dutton* v. *Morrison*(1)

"that if a trader conveys all his estate and effects, that is an act of bankruptcy, as it seems upon two principles, first, that by that act the trader unnecessarily perhaps not intending it, deprives himself of the power of carrying on his trade—secondly, that he endeavours to put his property under a different course of application and distribution among his creditors from that which would take place under the Bankrupt law."

In my view the parties to such a transaction cannot be said to be acting in good faith if the consequence of their act is such an infringement. I think therefore that neither was the transfer for valuable consideration nor was it undertaken in good faith and that, if it amounted to a valid transfer at all, it is voidable under section 53.

The second ground for avoiding the transfer deed is (*b*) that it is opposed to the spirit and policy of the Insolvency law. I have already substantially dealt with this point in considering the question of good faith under section 53 and inasmuch as I have held that the assignment is voidable under that section it seems unnecessary to establish that it would be also voidable as offending against the general principles of insolvency. For such a proposition, as I have already said, the decision in *Manmohandas* v. *N. C. Macleod*(2), affords authority. That decision however was under

(1) (1809) 17 Ves. Jun., 193 ; 34 E.R., 77. (2) (1902) I.L.R., 26 Bom., 765.

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the old Indian Insolvency Act, which contained no provision similar to the present section 53. It is therefore arguable that since statutory provision is now made for the avoidance of transfers as such and not merely of fraudulently preferential transfers, the transfer must be avoided under that section or not at all. Assuming that section not to apply to a case of this description, it would certainly be anomalous that an insolvent could transfer the whole of his property to a trustee for distribution and on the next day file his petition, whereupon the receiver would be incapable of touching any of the estate. It would be an anomaly that the Insolvency Act should make such a transfer an act of insolvency and yet contain no provision for setting it aside. I have no doubt that the framers of the Act deemed that section 53 would sufficiently provide for such a case, as I think it does. That being so I do not think it is necessary to look outside the Act for grounds for declaring the transfer void.

(*c*) The third and the last line of argument is that the assignment deed does not satisfy the requirements of the Trusts Act and that for more than one reason. Under section 4 the purpose for which a trust may be created must be lawful and a purpose is not lawful if it is of such a nature that, if permitted, it would defeat the provisions of any law. In my view the purpose of the trust here is designed to defeat the provisions of the Insolvency Act. Apart from this, under section 5 no trust in relation to movable property is valid unless the document declaring it, if it be non-testamentary, is registered or unless the ownership of the property is transferred to the trustee. As already stated, the document in the present case is unregistered so that no trust would have been created unless the ownership of the movables was transferred to the trustee. I am

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unable to extract such a conclusion from the trust deed, Exhibit I. It recites no doubt that the debtor puts his trustee in possession of all his properties but there is nothing to show that more was meant than that he should hold them for purposes of sale, and in fact in the case of the only piece of immovable property, a house, he himself undertakes to execute a sale-deed in respect of it to any purchaser, which shows that he at least retained the ownership of the house. I think it may be inferred that he also retained his title to the movables. If this be so, then there was neither a valid trust nor a valid transfer, so that it would not even be necessary to resort to section 53 of the Act to recover the property. A further argument has been used that the transfer purported to be of the entire effects of the debtor and that he had no intention of making a transfer of only a part. Since therefore the transaction so far as the immovable property is concerned has been set aside the whole should be set aside. There is some authority for this view in *Pothi Naicken* v. *Naganna Naicker*(1), a case relating to partition, where it was held that in the absence of any clear intention that the movables should be partitioned apart from the immovables, the document which for want of registration could not affect the immovables did not even affect the movables. The principle would appear to be that when there is an entire contract and part of it cannot be enforced, the whole of it goes, whereas it is otherwise when an instrument contains two or more distinct contracts in which case they are severable. It is unnecessary in the present case to stress the inconvenience which would arise from an administration of the immovable property by a receiver under the Insolvency Act and of

(1) (1915) 30 M.L.J. 62.

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the movables by a private person, and I think it may well be taken not to have been the intention of the executant of the deed that this consequence should ensue. I consider accordingly that under the Trusts Act also the deed would be invalid.

I agree therefore with my learned brother that the order of the learned District Judge so far as it declares the respondent to be a duly constituted trustee in respect of the movable property should be set aside with costs and the Official Receiver empowered to take possession of the movables as well as of the house.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson.

1926, August 2.

V. RAMANATHAM (ACCUSED), PETITIONER,

v.

KING-EMPEROR.*

Indian Factories Act (XII of 1911), ss. 2 [(2), (3)], 41, and 46—Groundnut decorticating room in a building—Drying yard five or six yards away from wall of building—If part of "factory"—Children employed in drying, cleaning and sorting kernels—If incidental to or connected with article subject of process—Liability of occupier.

Where a drying yard was situated about five or six yards from the wall of a building in which a groundnut decorticating machine was installed, but the said yard had no connexion with machinery, and children were employed in the yard for cleaning, drying and sorting the groundnut kernels, *held*, that the drying yard was part of the factory within the meaning of section 2 (3) of the Indian Factories Act, and that the occupier (or manager) was liable under section 41 as having employed children in

* Criminal Revision Case No. 47 of 1926.

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work incidental to a manufacturing process or connected with the article, subject of the process, within the mischief of the Act.

Law v. *Graham*, [1901] 2 K.B., 327 and *Paterson* v. *Hunt*, (1909) 101 L.T., 571, referred to.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Subdivisional Magistrate of Vizianagram, dated 5th September 1925, in Calendar Case No. 33 of 1925.

G. Lakshmanna for petitioner.

Public Prosecutor for the Crown.

JUDGMENT.

The petitioner seeks to revise the Judgment in Calendar Case No. 33 of 1925 on the file of the Subdivisional Magistrate, Vizianagram, whereby he has been fined Rs. 25 under section 41, Indian Factories Act, XII of 1911, for employing children in his factory in contravention of section 23.

2. The first ground taken is that the drying yard in which the children were employed does not form part of the factory.

This place is five or six yards from the wall of the building and has no connexion with machinery or any work incidental to the manufacturing process (D.W. 1).

A factory as defined by section 2 (3) means any premises wherein, or within the precincts of which. . . . Pausing here for a moment, it may be observed that these terms, premises or precincts, are the most comprehensive that can be conceived. "Premises" means the main building and its appurtenances, and lest it should omit part of the establishment, "precincts" are added which means any adjunct. Therefore factory includes everything, machine rooms, sheds, godowns, yards. If within these premises or precincts mechanical power is

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used in aid of any process for altering for transport or sale of any article then these premises or precincts are a factory. The definition does not run, if in any part of such premises mechanical power is used then such part is a factory. The vital question would be, is mechanical power in aid of a manufacturing process used in the premises. If the answer is, yes, in the decorticating room, then the whole premises, including the yard, are a factory, and not merely the decorticating room, as petitioner contends.

In support of this contention Mr. Lakshmanna relies upon *Law* v. *Graham*(1), where it was held that premises occupied by a mechanical bottle washer, and used for bottling beer by hand were not a factory. But the decision of this case turned upon the question whether washing the bottles was a manufacturing process. Lord ALVERSTONE, C.J., conceded that putting beer into bottles, might by a somewhat strained construction of the words, be said to be an adapting of the article for sale. But he held that the washing of bottles by mechanical means cannot be fairly called a process which is used "in aid of" the bottling of beer. To put the present case on all fours with *Law* v. *Graham*(1) one must postulate premises wherein the children put groundnuts into bags, and somewhere on these premises is a machine for washing the bags, and no other machinery for any other purpose, then such premises will not be a factory, for the reason that the machinery is not in aid of a manufacturing process, not for the reason that the machinery is in some other portion of the premises. But if in the premises there is machinery admittedly in aid of the process, then the premises would be a factory.

(1) (1901) 2 K.B., 327.

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In *Paterson* v. *Hunt*(1), the premises consisted of two rooms separated by a closed door. In one room several girls sorted rags by hand and in the other room a mechanical shaker for cleaning the rags was occasionally used for some of the rags. Lord ALVERSTONE held that the process in question, sorting rags for sale, was not adapting for sale. This ruling would help the petitioner if the process in his factory were confined to sorting groundnuts, a portion of which was occasionally cleaned by a mechanical shaker. But the fact that a mechanical decorticator is used on the premises carries the present case beyond the scope of *Paterson* v. *Hunt*(1). DARLING, J., puts the point succinctly. "I cannot come to the conclusion that there was here any manufacturing process whatever . . . ." 'here,' of course, referring to the whole premises, and not to that portion of the premises occupied solely by manual workers. In the present case it cannot possibly be said that there is no manufacturing process whatever on the premises.

Part of the premises used solely for some purpose other than the manufacturing process carried on in the factory, may under section 149 of the English Factory and Workshops Act 1, Ed. VII, C. 22, constitute a separate factory, or be excluded from the operation of the Act; Halsbury, Vol. 14, pages 443-444; but these circumstances do not assist the interpretation of the Indian Act. On the first ground I hold that the drying yard does form part of the factory.

It is next urged that there was no employment of children in the factory as contemplated by the Act. Under section 46 if a child is found in any part in which children are employed and in which work

(1) (1909) 101 L.T., 571.

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incidental to any manufacturing process is being carried on he shall be deemed to be employed in the factory until the contrary is proved. Under section 2 (2) a person who works in a factory in any kind of work incidental to the manufacturing process or connected with the article, subject of the manufacturing process, shall be deemed to be employed therein.

The question then arises whether sorting groundnuts can be said to be incidental to the process or connected with the article subject of the process. The article, subject of the decorticating process, being groundnut, it must be held that sorting that article is work connected with the article, subject of the manufacturing process. No doubt mere sorting was held to be no manufacturing process in the case of rags, *Paterson* v. *Hunt*(1), but then the rags were not subject of any manufacturing process on the premises. They were simply collected, and the only mechanical process, which brought the case as their Lordships observed near the line, was the intermittent use of the shaker for some of the rags. The regular use of the decorticator for all the groundnuts leaves no room for doubt that the article has been subject of manufacturing process.

It must be held, therefore, that the children were employed within the mischief of the Act.

Once it is found that the children were employed in the factory it is immaterial who actually paid them their wages; the occupier or manager is liable under section 41.

No other ground was raised, and there is no reason to revise the judgment of the lower Court.

The petition is dismissed.

B.C.S.

(1) (1909) 101 L.T., 571.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson.

CHITRALA RAMIAH (FIRST ACCUSED), PETITIONER,

v.

NATUKULA RAMIAH AND ANOTHER (COMPLAINANT AND SECOND ACCUSED), RESPONDENTS.*

1926, August 3.

Same issue agitated both in civil and criminal Courts—If civil proceeding to be given precedence over criminal—General rule applicable.

There is no invariable rule that when the same issue is agitated both on the civil and criminal side, the civil shall take precedence of the criminal Court. Each case must be considered on its own merits, and the only general rule that can be adumbrated is that every Court should be left as far as possible to dispose of the cases on its file with the utmost expedition.

Ram Saran Singh v. *Nikhad Narain Singh,* (1925) A.I.R. (Patna), 619.

Sheikh Bahatur v. *Nobadali* (1924) A.I.R. (Calc.), 634, followed.

PETITION under section 344 of the Code of Criminal Procedure, 1878, and section 107 of the Government of India Act, praying the High Court to stay proceedings in Preliminary Register Case No. 4 of 1926, on the file of the Court of the Second-class Magistrate of Giddalur pending disposal of Original Suit No. 148 of 1926, on the file of the Court of the District Munsif, Markapur.

K. B. Ranganatha Ayyar for petitioner.

K. Krishnaswami Ayyangar for first respondent.

No one appeared for the second respondent.

JUDGMENT.

The petitioner, an accused in P.C. 4 of 1926 on the file of the Stationary Sub-Magistrate, Giddalur,

* Criminal Miscellaneous Petition No. 308 of 1926.

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applied for stay of that criminal proceeding during the pendency of Original Suit No. 148 of 1926 which he subsequently instituted in the Court of the District Munsif of Markapur. The Sub-Magistrate refused the application and hence this petition.

Applications of this sort are sometimes argued as if there were an invariable rule that when the same issue is agitated both on the civil and the criminal side, the civil shall take precedence of the criminal Court. This is not so. Each case must be considered on its own merits and the only general rule that can be adumbrated is that every Court should be left as far as possible to dispose of the cases on its file with the utmost expedition. This rule is in the interests not only of public administration but also of private persons involved in criminal proceedings; for no one wishes to have a criminal charge kept hanging indefinitely over his head. If authority were required for the above proposition, there is the Patna ruling:—"It is the policy of the law to go on immediately with the inquiry." *Ram Saran Singh* v. *Nikhad Narain Singh*(1), which is founded on *Sheikh Bahatur* v. *Nobadali*(2). Another Patna ruling on which the petitioner relies *Phuleshra Kuer* v. *Emperor*(3), proceeds on the assumption that there may be manifest and irreparable injustice done in the criminal Court, but, with all respect, I do not think that such an assumption can properly be made when the integrity of the Court is not impugned. It must be assumed that in either Court justice will be done and which Court precedes the other is merely a question of convenience. Of course, in those cases arising out of a disputed title on which it is difficult to draw the line between bona fide claim and criminal trespass, if the title is already

(1) (1925) A.I.R. (Patna), 619. (2) (1924) A.I.R. (Calc.), 634.
(3) (1921) 62 I.C., 185.

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the subject matter of a civil suit before the institution of criminal proceedings, it may be advisable for the criminal to abide the civil trial; this is laid down in *Khobhari Rai* v. *Bhagawat Rai*(1) and relied upon by the petitioner, but the facts are far removed from those of his case.

I have considered the petition on the merits, but this Court will not ordinarily interfere, if the Court refusing to act under section 344, Criminal Procedure Code, has exercised a judicial discretion. This too is laid down in *Ram Saran Singh* v. *Nikhad Narain Singh*(2).

The petition is dismissed.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

1926, December 2.

DEENADAYALU NAIDU AND TWO OTHERS (ACCUSED), PETITIONERS,

v.

RATNA PADAYACHI (COMPLAINANT), RESPONDENT.*

Cattle Trespass Act (I of 1871), *sec.* 20—*Criminal Procedure Code (V of* 1898), *ss.* 4 (*c*), 29—*Magistrate authorized to receive and try charges—If special authorization necessary regarding offence under sec.* 20.

Section 20 of the Cattle Trespass Act empowers any Magistrate, authorized under the Criminal Procedure Code by the District Magistrate to take cognizance of offences, to take cognizance of an offence under that section.

Emperor v. *Vishwanath Vishnu,* (1920) I.L.R., 44 Bom., 42, approved.

Budhan Mahto v. *Issur Singh,* (1907) I.L.R., 34 Calc., 926, referred to.

(1) (1917) 41 I.C., 147. (2) (1925) A.I.R. (Patna), 619.
* Criminal Revision Case No. 157 of 1926.

DEENADAYALU NAIDU v. RATNA PADAYACHI.

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 Magistrate of Musiri, in Criminal Appeal No. 11 of 1925, preferred against the judgment of the Court of the Stationary Second-class Magistrate of Musiri in Calendar Case No. 214 of 1925.

The facts are shortly these: First accused was a maistri and the second and third accused were lascars in the Public Works Department. The complainant filed Criminal Case No. 214 of 1925 before the Stationary Sub-Magistrate of Musiri against them with having, under the Cattle Trespass Act, illegally seized his goats which were grazing in patta lands and with having driven them to a pound and the first accused was further charged with having vilely abused the complainant. The Sub-Magistrate held that the seizure of the goats was illegal and the accused were ordered to pay compensation under section 22 of the Act, and the first accused was also convicted under section 504, Indian Penal Code. On appeal (Criminal Appeal No. 11 of 1925) the Subdivisional Magistrate of Musiri confirmed the conviction and sentence. Against that judgment a Criminal Revision Petition was preferred in the High Court.

Section 20 of the Cattle Trespass Act runs as follows:—

> Any person whose cattle have been seized under this Act, or having been so seized, have been detained in contravention of this Act, may, at any time within ten days from the date of the seizure, make a complaint to the Magistrate of the District or any Magistrate authorized to receive and try charges without reference by the Magistrate of the district.

B. Pocker for petitioners.

M. Damodaran Nayudu for respondent.

Public Prosecutor for the Crown.

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JUDGMENT.

The main point argued in this revision case is whether the inclusion in section 4 (*c*) of the Criminal Procedure Code in the definition of "Offence" of an "act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act" renders it unnecessary for a Magistrate who is generally empowered under the Criminal Procedure Code to receive complaints of offences to be specially authorized by the District Magistrate to receive complaints under that section of the Cattle Trespass Act. Section 29 of the Criminal Procedure Code is relied on. So far as sub-section 1 is concerned, it is argued that the offence can only be tried by the Court mentioned in section 20 of the Cattle Trespass Act, that is, by the Magistrate authorized to receive and try charges without a reference by the District Magistrate. So far as sub-section (2) is concerned, it is argued that, as the offence is not punishable with imprisonment or fine as such, it has no place in the eighth column of the second schedule and therefore that that schedule does not apply. I am inclined to agree with the second contention although there are cases which have held that the compensation which may be awarded under section 22 is of the nature of a fine. But I think the first contention does not carry the petitioner so far as he wishes to go. Granted that the only Court which can try the case is a Magistrate authorized in the language of section 20 of the Cattle Trespass Act, that language appears to me to mean a Magistrate authorized to receive and try complaints generally and not merely complaints under that section. I am not clear why the vague word "charges" is used, but, had the intention of the legislature been to confine the authorization to charges under that section, I think it would have said so. It is

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true that, if "charges" means generally complaints of offences, it was not necessary to amend the definition of "offence" under the Criminal Procedure Code of 1898, because a Magistrate authorized to try offences generally would under section 20 have authority to try a complaint under that section. But the amendment was probably due to certain rulings which lay down that an act in respect of which a complaint could be laid under section 20 was not an offence—*See Pitchi* v. *Ankappa*(1) and *Kottalanada* v. *Muthayya*(2). I hold then that section 20 means that any Magistrate authorized under the Criminal Procedure Code by the District Magistrate to take cognizance of offences is thereby authorized to take cognizance of an offence under this section. This is the view held in *Emperor* v. *Visvanath Vishnu*(3) and derives support from that in *Budhan Mahto* v. *Issur Singh*(4) although the point now taken based on the wording of the section was not specifically raised. There is, therefore, no lack of jurisdiction and this objection fails.

It has been further urged that a joinder of charges for offences under section 20 of the Cattle Trespass Act and section 504 of the Indian Penal Code was illegal. No objection was taken to this joinder until now. The insult complained of was so near in point of time and place that it may reasonably be held to have formed part of the same transaction. I am not prepared to hold the joinder illegal.

I therefore dismiss this petition.

B.C.S.

(1) (1886) I.L.R., 9 Mad., 102.
(2) (1886) I.L.R., 9 Mad., 374.
(3) (1920) I.L.R., 44 Bom., 42.
(4) (1907) I.L.R., 34 Cal., 926.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson.

PUBLIC PROSECUTOR (APPELLANT)

v.

P. A. S. RANGANAYAKULU CHETTY (ACCUSED), RESPONDENT.*

1927, February 28.

Madras District Municipalities Act (V of 1920), sec. 249—Machinery likely to be dangerous to human life—Outside public, if limited to—Madras Local Boards Act (XIV of 1920), sec. 193—Effect of—One statute cancelling another—Test of.

Machinery likely to be dangerous to human life within the terms of Schedule V (*q*) of the Madras District Municipalities Act is not confined to machinery dangerous to the outside public. Human life means the life of any person whether he be within or without the premises of the factory.

Section 249 of the Act has not been impliedly repealed by section 193 of the Madras Local Boards Act, as the two are not mutually destructive.

APPEAL under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the accused by the Subdivisional First-class Magistrate of Salem in C.A. No. 91 of 1925 against the conviction and sentence by the Second-class Magistrate of Salem in C.C. No. 1077 of 1925.

Public Prosecutor for appellant.

K. P. Sarvothama Rao, for the accused, (*amicus curiae*).

JUDGMENT.

Appeal under section 417, Code of Criminal Procedure, against the acquittal of accused in C.C. No. 1077 of 1925 on the file of the Court of the Sub-Magistrate, Salem Town (Criminal Appeal No. 91 of 1925 on the

* Criminal Appeal No. 274 of 1926.

PUBLIC PROSECUTOR v. RANGANAYAKULU CHETTY.

file of the Court of the Subdivisional Magistrate, Salem).

The accused was charged under sections 249 and 338, Madras Act V of 1920, for using a rice mill within three miles of Salem Municipality without a licence.

The learned Magistrate has acquitted accused for two reasons both of which are unsound. He thinks that machinery likely to be dangerous to human life within the terms of Schedule V (*q*) of the Act is confined to machinery dangerous to the outside public. It would be a queer machine in a factory that jeopardised the passers-by, and of course human life means the life of any person whether he be within or without the premises of the factory. The Health Officer has clearly deposed that the factory is dangerous to health, and it is difficult to understand why the Magistrate goes out of his way to argue round that fact. A process may still be unwholesome though it neither emits a smell nor breeds bacteria.

hen it is argued that section 249 has been repealed, because Local Boards have similar powers of licensing under section 193 of Madras Act XIV of 1920. Each local authority is invested with similar power because each authority has similar responsibility. To take the present case, the Health Officer of the Municipality and the Health Officer of the District may each find that lung disease is prevalent, and each trace it to the rice mill; and each ask his governing body to take necessary steps. The point in Maxwell which the learned Magistrate overlooks is that for one statute to cancel another they must be mutually destructive; for example, the legislature would not have constituted two distinct bodies to name the streets in a town. The question is whether the legislature can be said not to have intended the two rights to exist together (see Halsbury, Vol. 27,

PUBLIC PROSECUTOR v. RANGANAYAKULU CHETTY.

paragraph 323, where the case law is cited). There is no reason to presume that the legislature did not want both the Municipality and the District Board to be vigilant in the interests of public health; in fact the natural presumption is exactly the other way. The Subdivisional Magistrate admits that he has found the law difficult, and in such matters he will derive his best guidance from common sense, which leads to the same destination as properly understood law.

The appeal is allowed and the judgment and sentence of the Sub-Magistrate are restored and the order of the Subdivisional Magistrate reversed.

B.C.S.

SPECIAL BENCH.

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

1927, February 7.

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

v.

T.S. FIRM, TANJORE AT NEGAPATAM, ASSESSEE.*

Income-tax Act (XI of 1922), *sec.* 4 (2)—*Resident in British India, meaning of—Test of residence of firm—Residence of partners, whether relevant in determining residence of firm —Central control and management of the whole business, necessary—Possibility of two or more places of residence of firm—Delegation of a portion of the business, insufficient, but one of a portion of the management as a whole, necessary.*

A firm or partnership resides for the purposes of income-tax at the place where its real business is carried on; and the real

* Referred Case No. 23 of 1925.

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business is carried on where the central management and control of the whole of its business actually abides: *De Beers Consolidated Mines, Ltd.* v. *Howe*, [1906] A.C., 455, followed.

There may be two such places of residence but the suggested second residence must not merely have a delegation of management of some portion of the partnership business, however extensive, but a delegation of some portion of the management of the business as a whole: *Swedish Central Railway Company, Ltd.* v. *Thompson*, [1925] A.C., 495, followed.

The question as to where the individual partners actually had their places of residence is a wholly irrelevant consideration in determining the place of residence of the firm.

Where, therefore, it appeared that a firm of partners were carrying on business as bankers, money-lenders and cloth merchants in several places inside and outside British India, that the partners regularly resided at a place within the foreign State of Pudukottah, wherefrom they exercised a general supervision and direction of their whole business inside and outside British India, that they had several branches in British India generally controlled from Madras and also branches outside British India but no part of the control of the overseas branches ever passed through Madras or any other branch in British India, and that profits earned outside British India were remitted to the Madras branch, *held*, that the firm had for purposes of income-tax its place of residence only outside British India, and at no place within British India, and was consequently not liable to assessment of income-tax, for profits so remitted into British India from outside, under section 4 (2) 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, in his letter No. 1516 of 1925, dated 20th November 1925.

The material facts appear from the letter of reference sent by the Commissioner of Income-tax, Madras, to the Registrar of the High Court for favour of a decision by the High Court on the question referred by him. The material portions of the letter were as follows:—

"The assesees are a well-known Nattukottai Chetti firm of bankers, money-lenders and merchants. The firm has been

COMMISSIONER OF INCOME-TAX, MADRAS, v. T.S. FIRM.

registered under section 2 (14) of the Income-tax Act at Madras, on the 18th December 1922. The business is carried on through agents at Madras, Rangoon, Negapatam, Pegu, Pyapon, Henzada and also at various places in Straits Settlements. Under section 64 of the Income-tax Act, Negapatam, has been declared to be the principal place of business. In the assessment year (1924–25), a sum of Rs. 1,00,671 was remitted from Singapore and Penang to the Madras office and was then transferred to an account called the 'Cuddalore account' kept at Madras. It was not the profit of the year of account but profit of the previous years in Singapore and Penang and liable to assessment as it was remitted to British India, if the assessees are residents of British India. . . . The account in which personal drawings of the partners are adjusted is kept at Madras . . . The partners of the firm undoubtedly do reside for the greater part of the year at Ramachandrapuram, Pudukottah State, i.e., outside British India. There they have palatial residences, and from there they keep in touch with the actions of the agents and do exercise a very real control over the business. No business is carried on by the firm in the Pudukkottah State, the bulk of the Madras Presidency business is done at Madras itself . . . The partners visit Madras frequently throughout the year to give oral instructions to the agents, to interview the banks and generally to supervise the business. They also attend certain annual festivals at certain temples. . . . The partner who really controls the business was in Madras for about ten days. . . . He was also in Madras in the year 1924–25 . . . The partners have residences within the Madras Presidency at Madras and at Cuddalore."

On these and other facts and circumstances referred to in his letter, the Income-tax Commissioner was of opinion that the firm had two places of residence one at Ramachandrapuram in the Pudukottah State, and another at Madras and that consequently the firm was liable for assessment for the profits remitted from its overseas branches to Madras.

A. Krishnaswami Ayyar and *M. Subbaroyar* for assessee.

M. Patanjali Sastri for the Referring officer.

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COUTTS-TROTTER, C.J.

JUDGMENT.

COUTTS TROTTER, C.J.—The question propounded for our decision is as follows:—"In the circumstances of this case, can the assessees, the T.S. Firm, be said to be resident in British India?"

The Income-tax Acts take residence as the test which is no doubt easy enough to apply in the case of an individual but leads to difficulties when you are dealing either with a limited company or a partnership because, as Lord LOREBURN pointed out in *De Beers Consolidated Mines, Ltd.* v. *Howe*(1), it is artificial to talk of the residence of a company which is necessarily a metaphorical expression, as "a company cannot eat or sleep though it can keep house and do business." He goes on to cite some earlier decisions and concludes thus,—earlier decisions which he holds as laying down the rule that a company resides for the purpose of income-tax where its real business is carried on, and he adds:

"I regard that as the true rule, and the real business is carried on where the central management and control actually abides."

The question was carried further in the case of *Swedish Central Railway Company, Ltd.*, v. *Thompson* (2) There the contention was that a company could have more than one residence because the central management and control might be divided between two places of business, so that a company could be said to have two residences. I cite a passage from the judgment of Viscount CAVE, the last paragraph of page 501:

"The effect of this decision is that, when the central management and control of a company abides in a particular place, the company is held for purposes of income-tax to have a residence in that place; but it does not follow that it cannot

(1) [1906] A.C., 455. (2) [1925] A.C., 495.

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COUTTS-TROTTER, C.J.

have a residence elsewhere. An individual may clearly have more than one residence. See *Cooper* v. *Cadwalader*(1) and on principle there appears to be no reason why a company should not be in the same position. The central management and control of a company may be divided, and it may keep house and do business in more than one place; and if so, it may have more than one residence."

If therefore it can be shown that the central management and control of a company or partnership, by which words I understand the management and control of the whole of its business, was divided between two localities, each of them may be said to be a residence of the company for the purposes of the Income-tax Act. But I read the learned Lord CHANCELLOR as emphasizing the words "central management and control" by which I understand that the suggested second residence must not merely have a delegation of management of some portion of the partnership business, however extensive, but a delegation of some portion of the management of the business as a whole. With these considerations to guide me, I approach the Commissioner's findings of fact in this case. Unfortunately he had directed himself to the view that what he was largely concerned with was the question of where the individual partners actually had physical places of residence and part of his reasoning, at any rate the finding that the concern was assessable at Madras was, because the partners from time to time came over to Madras to look into the affairs of the Madras branch or perhaps of all the branches in British India and resided in a house in Madras belonging to the firm in Coral Merchant Street for varying periods. That in my opinion is a wholly irrelevant consideration. The firm for the present purposes may be considered to

(1) (1904) 5 Tax Cas., 101.

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COUTTS-TROTTER, C.J.

have had three classes of activities. In Ramachandrapuram the partners regularly resided in what the Commissioner calls palatial residences and there exercised a general supervising and directing power over the whole of the business. Secondly, it had many branches in British India, which, I think he means to suggest, were generally controlled from Madras. Finally there were branches entirely outside British India in the Malay States and elsewhere and it is with the profits earned in these branches that we are concerned in this case. Had it been found as a fact that the control of the whole business, that is to say, the business including the branches outside British India was exercised both from Ramachandrapuram and Madras, it may very well be that the principle of the Swedish Central Railway Company's case would apply and that the central management of the business as a whole might be considered to be split up between Ramachandrapuram and Madras. I cannot see anything in the findings to give the slightest colour to any suggestion of the kind or to hint that any part of the control of the overseas branches ever passed through the Madras or any other branch in British India. In these circumstances I am of opinion that the question propounded to us must be answered in the negative.

It was suggested in the course of the argument that the case might be sent back for fresh findings of fact in view of the observations of this Court and the test laid down by us. I cannot accept such a course because I think that the findings of fact must be taken to be complete and, though no doubt the Commissioner's mind was not applied to the exact point to which we think it ought to have been applied, I cannot doubt that, if any evidence had been available as to any kind of management or supervision being exercised from

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COUTTS-TROTTER, C.J.

British India over the overseas branches, the commissioner would have stated it as supporting his case and set it out.

The Commissioner will pay the assessee's costs of this reference. Fees Rs. 250.

My learned brothers have seen this judgment and concur in it.

K.R.

SPECIAL BENCH.

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

1927, March 28.

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

v.

S.K.R.S.L. FIRM, SIVAGANGA CIRCLE, OKKUR, ASSESSEE.*

Income-tax Act (XI of 1922), ss. 4 (2) and 66—Reference by Commissioner—Profits earned or accrued outside British India—Remitted into British India—Profits accrued both beyond and within three years of remittance—Presumption, whether remittance related to earlier or later profits—Burden of proof on assessee.

When a man has profits earned more than three years before the year of assessment and also profits earned within that period, to his credit, in a trade carried on by him outside British India, there is no presumption that a remittance made to him in British India, of a sum which might fall in either set of profits, is made from the earlier profits and not from the later.

The effect of section 4 (2) of the Income-tax Act (XI of 1922) is to cast upon the assessee the burden of proving that the profits accrued or arose outside British India more than three years before they were received or brought into British India.

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* Referred Case No. 10 of 1926.

COMMISSIONER OF INCOME-TAX, MADRAS, v. S.K.R.S.L. FIRM.

CASE stated by the Commissioner of Income-tax, Madras, on reference to the High Court made under section 66 of the Income-tax Act (XI of 1922), in pursuance of the order of the High Court directing a case to be stated.

The material facts appear from the order of reference. The material portions of the said order were as follows :—

"The assessee has a business in Ceylon, the profits of which were standing to his credit there, about Rs. 89,552, earned subsequent to March 1920 together with about Rs. 77,524 earned prior to that date. During the year of account, viz., on 31st August 1923, there was a remittance of profits to the extent of Rs. 50,000 from Ceylon to Rangoon. That remittance is taxable under section 4 (2), if the profits remitted were earned subsequent to March 1920. It is not taxable if the remittance came from profits earned prior to April 1920. There is nothing in the facts of the case to show definitely which profits yielded the remittance."

"The assessee holds, I understand, on the authority of Clayton's case, that there is a presumption that the remittance came from the earlier profits. I am of opinion that Clayton's case is inapplicable, and that there is a presumption that the remittance came from the later profits. To my mind this case is governed by the case of *Scottish Provident Institution* v. *Allan*(1), where it was held that there is a presumption that a remittance is from income rather than from capital. Now profits of one year, if they are not spent, become capital of the next year. All the profits of the years prior to the year of assessment have become capital and would not be assessable but for the special provisions of section 4 (2), which enables us to tax what would otherwise be capital. The distinction to be drawn in this case is therefore between capital and income, and not one between older and newer profits. Applying the Scottish Provident Institution decision to the special circumstances of India in which four years' profits are to be deemed to be income, I am of opinion that there is a legal presumption that the remittance came from the later profits rather than from the earlier."

(1) [1903] A.C., 129 ; S.C., 4 Tax Cas., 591.

COMMISSIONER OF INCOME-TAX, MADRAS, v. S.K.R.S.L. FIRM.

K. S. Krishnaswami Ayyangar with *K. S. Rajagopalachari* for assessee.—Profits made outside British India, and remitted to British India, are taxable, if they accrued within three years of their remittance to British India, and they are exempt from assessment, if made beyond three years of their remittance. In this case profits, to the extent of about Rs. 71,000, were made more than three years prior to remittance into British India, and profits amounting to about Rs. 80,000 were made within three years but were not entered in the accounts. Remittance of Rs. 50,000 was made. The question is out of which profits was the remittance made. The Commissioner held that profits not remitted for some years became capital, and current profits remained as profits. There is no authority for the proposition that if profits are not remitted for some years, they automatically become capital. This is not a case of conflict between capital and profits, but one between two sets of profits only. When there is no evidence as to out of which item of the profits the remittance was made, there is a presumption that it came out of the earlier item, because law presumes that a man does a thing in his interest, and not against his interest. If there is no evidence whatever, the finding of fact of the Commissioner is not sustainable. If there is no legal evidence at all for the finding, it is a matter of law and the High Court can interfere.

M. Patanjali Sastri for the Referring officer.—The Commissioner has found on evidence referred to in his review order, and not merely on presumption.

JUDGMENT.

The question referred to us is in the following terms :—

"When a man has profits earned more than three years before the year of assessment and also profits earned within that period to his credit in a trade carried on by him outside British India, is there any presumption that a remittance made to him in British India for a sum which might fall in either set of profits is made from the earlier profits and not from the later?"

Under section 4 (2) of the Act profits and gains of a business accruing or arising without British India to

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a person resident in British India shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India and to be profits and gains of the year in which they are so received or brought, notwithstanding the fact that they did not so accrue or arise in that year, provided that they are so received or brought in within three years of the end of the year in which they accrued or arose. That appears to us to be a clear intimation that sums remitted to British India are to be deemed to have accrued or arisen in the year of remission unless they accrued or arose more than three years before. We entertain no doubt that the effect of that must be to cast upon the assessee the burden of proving that the profits accrued or arose more than three years back, a matter after all peculiarly within his knowledge and not within the knowledge of the income-tax authorities. That is an answer to the reference and it is clear that the Commissioner acted on that principle, and whether he came to a right conclusion of fact in the light of it is not for us. It is no doubt true that, in appending reasons for his own opinion on the point he was referring as he is directed under the Act to do, he enounced some very dubious propositions of law. That does not alter the position that in paragraph 5 of his review order he dealt with the question of fact unvitiated by any such misdirection of himself and dealt with it adversely to the assessee. The answer to the reference is in the negative.

The assessee must pay Rs. 250 for the costs of the Commissioner.

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir William Phillips, Kt., Officiating Chief Justice, Mr. Justice Beasley and Mr. Justice Anantakrishna Ayyar.

1927, August 19.

DAIVANAYAKA REDDIYAR AND TWO OTHERS (DEFENDANTS), APPELLANTS,

v.

RENUKAMBAL AMMAL (PLAINTIFF), RESPONDENT.*

Appeal, forum of, whether High Court or District Court—Sec. 13 of Madras Civil Courts Act (III of 1873)—Change in Court Fees Act between date of suit and date of appeal—Retrospective effect.

If the value of a suit at its institution exceeds Rs. 5,000 according to the Court Fees Act then in force, an appeal from a decree therein lies (with reference to section 13 of the Madras Civil Courts Act) only to the High Court and not to the District Court though on the date of filing the appeal the suit would have had to be valued at less than Rs. 5,000 owing to an amendment of the Court Fees Act in the interval. *Colonial Sugar Refining Company* v. *Irving*, [1905] A.C., 369, followed.

APPEAL against the decree of C. S. MAHADEVA AYYAR, Subordinate Judge of Cuddalore, in Original Suit No. 11 of 1921.

By the Madras Court Fees Amendment Act (V of 1922) which came into force on 18th April 1922 section 7 (2) of the Court Fees Act (VII of 1870) was amended as follows :—

"In suits for maintenance and annuities or other sums payable periodically—according to the value of the subject-matter of the suit, and such value shall be determined to be *in suits for maintenance, the amount claimed to be payable for one year and in other suits* to be ten times the amount claimed to be payable for one year."

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* Appeal No. 226 of 1923.

DAIVANAYAKA REDDIYAR v. RENUKAMBAL AMMAL.

In this case the suit was filed on 21st March 1921. The decree of the trial Court was passed on 13th March 1923 and the appeal to the High Court was presented on 19th July 1923.

The facts are given in the Order of Reference.

This Appeal coming on for hearing the Court (KUMARASWAMI SASTRI and DEVADOSS, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

The respondent's vakil takes the preliminary objection that the appeal does not lie to the High Court but to the District Court. The plaintiff, a widow, claimed maintenance at the rate of Rs. 100 a month including value of cloths, etc., and valued her claim in the plaint at ten times the amount payable for one year, under section 7, clause 2 of the Court Fees Act. She also claimed past maintenance and a house to reside in. The total value of her claim according to the plaint is Rs. 14,600. The Subordinate Judge of Cuddalore gave her a decree for maintenance at Rs. 60 a month together with past maintenance. He also decreed that she should be given possession of a house for her residence during her life. The defendants have preferred this appeal against the decree of the Subordinate Judge. In their appeal they have valued the relief for maintenance at the amount allowed for one year under the Court Fees Amendment Act, section 5. The total value of the appeal together with the past maintenance and the value of the house is Rs. 2,633-5-4. The respondent's vakil contends that though the suit was valued at more than Rs. 5,000 under the law in force at the time of the filing of the plaint, yet the valuation of the suit according to the amended Court Fees Act at the time the appeal was presented would have been less than Rs. 3,000 and therefore the appeal to this Court is incompetent. But for the amendment of the Court Fees Act the appeal would have been valued at Rs. 14,600, as in the plaint. It is admitted that the monetary jurisdiction of the Court is determined by the value of the claim in the plaint and not by the value of the relief decreed. Under section 13 of the Madras Civil Courts Act III of 1873 "when the amount or value of the subject-matter of the suit exceeds Rs. 5,000 the appeal shall lie to the High Court." It is urged

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that the subsequent change in the law as to valuation makes the value of the relief in the plaint less than Rs. 5,000 and therefore the appeal lies only to the District Court, and reliance is placed for this contention upon two recent decisions of this Court in A.S. No. 32 of 1924 and in A.S. No. 415 of 1923.

In A.S. No. 32 of 1924, RAMESAM and JACKSON, JJ., held that the appeal lay to the High Court against the decree in a suit in which the relief claimed was valued at less than Rs. 5,000 according to the Court Fees Act before its amendment by the Madras Act V of 1922 but which had to be valued at more than Rs. 5,000 under the amended Act. The learned Judges relied upon *Muttammal* v. *Chinnana Goundan*(1), and the proceedings of the High Court in (1870) 5 M.H.C.R., xliv. This case is converse to the present one. The point now raised was decided in A.S. No. 415 of 1923 which was also a suit for maintenance and PHILLIPS and ODGERS, JJ., held following the decision in A.S. No. 32 of 1924 that the appeal did not lie to the High Court as according to the valuation under the amended Court Fees Act, the relief claimed in the plaint was less than Rs. 5,000. In *Muttammal* v. *Chinnana Gounden*(1), the plaintiff sued to recover one-eighth of a mitta and obtained a decree. The defendant resisted the execution of the decree and claimed to be in possession of the lands as purchaser at a Court sale in execution of another decree. His objection was disallowed by the District Munsif and on appeal the District Judge upheld the decision of the District Munsif. The High Court set aside the order of the District Munsif and the District Judge and the petition was registered as a suit under the directions of the High Court. The District Munsif gave a judgment in favour of the defendant. The plaintiff appealed to the High court. The first ground of appeal was that the District Munsif had no jurisdiction because the value of the property in dispute was Rs. 9,000. A preliminary objection was taken by the respondent that no appeal lay to the High Court. KINDERSLEY and MUTTUSWAMI AYYAR, JJ., overruled the objection and observed "We think that the subject-matter in appeal should be valued for the purpose of jurisdiction according to the law in force at the date of the appeal and not of the suit which led to it." They held that according to the law in force at the date of appeal, the subject-matter of the suit exceeded Rs. 5,000 in

(1) (1882) I.L.R., 4 Mad., 220.

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value and therefore whether the District Munsif had or had not jurisdiction the appeal lay to the High Court. By proceedings, dated the 15th of November 1870, the High Court gave this ruling "The High Court are of opinion that the valuation of an appeal must be according to the Act in force at the time of its presentation, and that the original valuation under a law obsolete at the period of appeal can have no influence on the decision." (5 M.H.C.R., xliv.)

We should have felt bound to follow the decision in *Muttammal* v. *Chinnana Gounden*(1), and the two recent decisions in A.S. No. 32 of 1924 and A.S. No. 415 of 1923, but for the high authority of Lord MACNAGHTEN who delivered the judgment of their Lordships of the Privy Council in *Colonial Sugar Refining Company* v. *Irving*(2). In that case an appeal was presented to the Privy Council against the decision of the Supreme Court of Queensland. During the pendency of the suit in the Supreme Court, the Judiciary Act of 1903 was passed and by section 39, sub-section (2), right of appeal to the Privy Council from the decision of the Supreme Court was taken away but a right of appeal was given from the Supreme Court to the High Court of Australia. The respondent moved the Privy Council by a petition to have the appeal dismissed on the ground that the appeal did not lie as of right to the King in Council. Their Lordships rejected the petition holding that the matter was not one of procedure only but one touching a right in existence at the passing of the Act and that "the Judiciary Act was not retrospective by express enactment or by necessary intendment." Lord MACNAGHTEN observed "The only question is, was the appeal to His Majesty in Council a right vested in the appellant at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act restrospectively unless a clear intention to that effect is manifested."

(1) (1882) I.L.R., 4 Mad., 220. (2) [1905] A.C., 369.

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It does not appear that this decision was brought to the notice of the learned Judges who decided the two appeals in A.S. No. 415 of 1923 and A.S. No. 32 of 1924.

An appeal to a certain forum is a vested right. It cannot be denied that an appeal to the High Court on facts is considered to be a very valuable right and it cannot be taken away except by an express statute. The present suit was valued at more than Rs. 5,000 and if the suit was decided on the date it was filed, namely, 21st March 1921, there would have been no question as to the maintainability of the appeal in the High Court. The Court Fees Act is only a fiscal enactment and in most cases the valuation for purposes of jurisdiction is the same as that for purposes of court fees. The jurisdiction value determines the forum for the appeal and the right of appeal to the High Court which either party to the suit had on the date of the plaint and some time after cannot be taken away by an enactment which amends some of the provisions of the Court Fees Act for the purpose of charging court-fees. As the decisions in A.S. No. 32 of 1924 and in A.S. No. 415 of 1923 are not reconcilable with the observations of their Lordships of the Privy Council, in *Colonial Sugar Refining Company* v. *Irving*(1) to which the attention of the learned Judges does not seem to have been directed, and as the point is of considerable importance and is likely to arise in many cases, we refer the following question to the Full Bench :—

"Does the appeal against the decree in a suit in which the valuation of the relief claimed according to the law in force at the date of the plaint was more than Rs. 5,000, but at the time of the appeal is less than Rs. 5,000 owing to the amendment of the Court Fees Act, lie to the High Court or to the District Court?"

ON THIS REFERENCE—

E. V. Sundara Reddi (with *T. Rangachari*) for appellant.—Appeal in this case lies only to the High Court and not to the District Court. Subsequent change in the law of court-fees cannot take away a right of appeal to the High Court which was vested in a party at the time of suit. *Colonial Sugar Refining Company* v. *Irving*(1). (He was stopped.)

K. V. Krishnaswami Ayyar and *N. S. Srinivasa Ayyar* for respondent.—The appeal in this case lies only to the District

(1) [1905] A.C., 369.

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Court. In cases of this class the exact appellate forum (whether High Court or District Court) will vary according to circumstances, as it is left to be determined by section 13 of the Madras Civil Courts Act, according to the value of the subject-matter of the suit, which valuation has been held by *Muttammal* v. *Chinnanna Goundan*(1), to be the valuation of the suit as on the date of the appeal. If the law relating to its valuation is changed before filing the appeal the change must take effect. *Colonial Sugar Refining Company* v. *Irving*(2) is distinguishable as the appellate forum therein was determined by the Queen's Ordinance of 1860 to be the Privy Council. Moreover the right of appeal therein was not repealed by the Judiciary Act, 1903, of Australia and the Privy Council held that if it really repealed the right retrospectively that Act was *ultra vires*. This is only *obiter dictum*. The Madras Court Fees Amendment Act of 1922 does not deal with any right of appeal and does not retrospectively take away any such right, as it merely prescribes a new method of valuation of the subject-matter of suit in this class of suits. There is no vested right of appeal to any particular Court and a right of appeal can be taken away with retrospective effect by subsequent enactment. See *Canada Cement Co.* v. *East Montreal (Town of)*(3). Even supposing that a right of appeal cannot be taken away retrospectively by a substantive enactment, if a processual law has determined the right to appeal to a particular Court, that processual law can itself take away retrospectively that right and vest it in another Court. See *Muttammal* v. *Chinnana Gounden*(1), Appeal No. 415 of 1923 (unreported) and A.S. No. 32 of 1924 (unreported).

E. V. Sundara Reddi for appellant.—The value of the suit when filed must be taken as constant for purposes of Appeal and Second Appeal with reference to section 13 of the Madras Civil Courts Act; *See Muthusami Pillai* v. *Muthu Chidambara Chetti*(4), *Kannayya Chetti* v. *Venkata Narasayya*(5). Right of appeal is not a matter of procedure but a substantive right. *Colonial Sugar Refining Company* v. *Irving*(2), *Salimamma* v. *Valli Husanabba Beari*(6). Right of appeal to a particular

(1) (1882) I.L.R., 4 Mad., 220. (2) [1905] A.C., 369.
(3) [1922] A.C., 205 at pp. 249 and 254. (4) (1874) 7 M.H.C.R., 356.
(5) (1917) I.L.R., 40 Mad., 1 (F.B.) at p. 8.
(6) (1911) 21 M.L.J., 764.

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Court is a vested right; *Ratanchand Shrichand* v. *Hanmantrav Shivbakas*(1).

N. S. Srinivasa Ayyar in reply.—The last case was a case of a pending appeal.

OPINION.

The question that has been referred for decision is,

"Does the appeal against the decree in a suit in which the valuation of the relief claimed according to the law in force at the date of the plaint was more than Rs. 5,000, but at the time of the appeal is less than Rs. 5,000 owing to the amendment of the Court Fees Act, lie to the High Court or to the District Court?"

This question has been referred to us because there are two unreported decisions of this Court which hold that the valuation must be determined according to the amended Act and, according to that valuation, the appeal will lie either in the High Court or in the District Court. In neither of these cases was any reference made to the decision of the Privy Council in a case from Queensland, *Colonial Sugar Refining Company* v. *Irving*(2). In that case in certain suits a right of appeal to the Privy Council was given by an Ordinance of 1860. Subsequently by the Judiciary Act of 1903 the decision in those suits was held to be final subject to an appeal to the High Court of Australia. The question for decision was whether in a suit filed before the passing of the Judiciary Act of 1903 the appeal still lay to the Privy Council or to the High Court in Australia, and it was held that the new enactment could not take away a vested right, unless in express terms it had retrospective effect. The remarks of Lord MACNAGHTEN in his judgment are entirely applicable to the present case:

"To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very

(1) (1869) 6 Bom. H.C.R., 166. (2) [1905] A.C., 369.

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different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal."

This clearly disposes of the point before us, for the question is whether the amendment of the Court Fees Act which came into force after the present suit was filed would deprive the plaintiff of a right of appeal to this Court which he had when he filed the suit. Under section 13 of the Civil Court Act, appeals from subordinate Courts lie either to the District Court or to the High Court, according to whether the value of the subject-matter of the suit is over or below Rs. 5,000. It is argued that this section does not confer any right of appeal to the High Court in definite classes of suits, but that the right of appeal is merely given to the Court authorized to hear appeals and the question of whether that Court is the District Court or the High Court depends on the valuation of the suit at the time of filing the appeal. It is difficult to treat this argument as in any way distinguishing the case from that of *Colonial Sugar Refining Company* v. *Irving*(1), for in both cases there was, when the suit was filed, a vested right of appeal to a particular tribunal, which is taken away by a subsequent enactment. According to the argument, when the right is taken away by a subsequent alteration in a mere fiscal enactment, the case is not the same as when the right depends on substantive law. This is untenable. It has been held by the Privy Council that this cannot be done and we are bound by that general expression of the law and must follow it. We may also refer to a case decided in *Ratanchand Shrichand* v. *Hanmantrav Shivbakas*(2), where the same principle was enunciated.

(1) [1905] A.C., 369. (2) (1869) 6 Bom. H.C.R. (A.C.J.), 166.

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Respondent relies on some observations in *Canada Cement Co.* v. *East Montreal (Town of)*(1). These observations do seem to give some support to the contention that a right of appeal can be taken away by a subsequent enactment, but there is no decision to that effect and no reference whatever to the previous decision of the Court in *Colonial Sugar Refining Company* v. *Irving*(2). The observation is obiter and can, therefore, have no force as against the prior decision which we must follow.

The answer to the question before us may also be put upon another ground and that is that the forum of appeal from a Subordinate Judge's Court depends on the value of the subject-matter of the suit. Presumably the value of the subject-matter of the suit is its value at the time of filing. Such value has to be set forth in the plaint and court-fees paid accordingly. It is, however, contended that the value varies according to the particular enactment in force at the time; and that, although it may have a particular value when it is filed, the value of the suit can be changed if the law in respect of valuation is altered. This contention was distinctly negatived so long ago as 1874 in *Muthusami Pillai* v. *Muthu Chidambara Chetty*(3), where it was held that it is the money value of the original suit that fixes the jurisdiction throughout the subsequent litigation in its several stages. If this is so, the value of the subject-matter of the suit is the same throughout and it cannot be altered after the decree has been passed simply by an alteration in a fiscal enactment. To hold otherwise would lead to very great difficulties in the question of jurisdiction. A suit which when filed was within the jurisdiction of the District Munsif might subsequently

(1) (1922) 1 A.C., 249 at 254. (2) [1905] A.C., 369.
(3) (1874) 7 M.H.C.R., 356.

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become one which must necessarily be filed in a Subordinate Court or *vice versa*.

For both these reasons, therefore, we hold that in the suit referred to, the appeal lies to the High Court.

N.R.

APPELLATE CIVIL.

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

1927, January 6.

SRI RANGA THATHACHARIAR (PLAINTIFF), APPELLANT,

v.

SRINIVASA THATHACHARIAR *alias* SRINIVASA RAGHAVACHARIAR (FIRST DEFENDANT), RESPONDENT.*

Hindu Law—Minor—Suit by minor for partition—Preliminary decree—Division of status, whether from date of plaint or of preliminary decree—Manager, accountability of—Nature of liability of manager to account—Difference as to nature of accountability, prior to and after suit—Civil Procedure Code (Act V of 1908), O. XLI, rule 22—"Decree" in rule 22, meaning of—Respondent's right to support decree on other grounds, in what cases permitted, without filing an appeal or memorandum of objections.

In a suit for partition instituted on behalf of a Hindu minor, if the Court holds that a division is necessary in the interests of the minor and passes a preliminary decree for partition, it must be deemed that the divided status of the plaintiff dates from the date of the plaint and not from that of the preliminary decree; and the fact that the preliminary decree was passed on a consent statement of the parties does not make any difference: *Krishnaswami Thevan* v. *Pulukaruppa Thevan*, (1925) I.L.R., 48 Mad., 465, followed; *Chelimi Chetty* v. *Subbamma*, (1918) I.L.R., 41 Mad., 442, distinguished.

In an ordinary suit for partition, in the absence of fraud or other improper conduct, the only account the kartha or manager is liable for is as to the existing state of the property divisible and the parties have no right to look back and claim relief

* Appeal No. 134 of 1923.

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against past inequality of enjoyment or other matters; but it is open to the plaintiff to prove specifically fraud, misappropriation or other improper conduct on the part of the manager with respect to such management; the same rule of accountability of the manager applies in a suit for partition by a minor, as regards his management prior to suit; but subsequent to the date of suit, the plaintiff and the defendant (the manager) are only tenants-in-common or co-sharers, and therefore the manager is strictly bound to account for all receipts and expenses and can take credit only for such expenses as have been incurred for the benefit or necessity of the estate, and the net income after deduction of such expenses will have to be divided among the sharers according to their shares.

Though the word "*decree*" has been used in Rule 22 of Order XLI, Civil Procedure Code, what the rule contemplates really is the *decision* by the Court below, and it merely enables the decision arrived at to be supported on grounds other than those on which the lower Court proceeded; and under that rule it is not open to a respondent to have adjudicated by the Appellate Court rights or causes of action which have been decided against him in the Court below and in respect of which he has filed no appeal or memorandum of objections.

APPEAL against the decree of P. SUBBAYYA MUDALIYAR, the Subordinate Judge of Coimbatore, in Original Suit No. 93 of 1918.

This is a suit for partition instituted by a minor through his mother as next friend against the first defendant who was his step-brother and other persons. The lower Court passed a preliminary decree for partition on a consent statement of the parties filed in the Court. The Court held that the parties became divided in status on the passing of the preliminary decree, and further held that the first defendant, as manager of the family, was not liable to account, except as manager of a joint family, until the date of the preliminary decree, and subsequent to that date he was liable to account as a tenant-in-common. A final decree was also passed on the basis of the preliminary decree. The lower Court had disallowed certain items of expenses against the

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first defendant, as not properly debitable to the plaintiff. The plaintiff preferred an appeal against the final decree. The defendant, without preferring an appeal or a memorandum of objections, endeavoured to support the decree, by showing that certain items disallowed to him in the lower Court ought to have been allowed in his favour, and thus the decree should not be altered on appeal.

S. Varadachariar and *N. C. Vijiaraghavachari* for appellant.

S. Panchapagesa Sastri and *C. V. Rajagopalachari* for respondent.

JUDGMENT.

This is an appeal preferred by the minor plaintiff against the final decree for partition passed by the Subordinate Judge of Coimbatore in a suit for partition instituted by the minor plaintiff represented by his mother as next friend against the first defendant, who is his step-brother, and several others. The plaintiff is the son of the late Varadachariar, a resident of Coimbatore, by his third wife and the first defendant is the son by his second wife. Both the plaintiff and the first defendant were minors at the time of their father's death which occurred in November 1913. The first defendant became major in December 1916 and since then he was acting as the manager of the family and the plaintiff is still a minor. The plaintiff's suit for partition was instituted on the 14th August 1918 and a preliminary decree for partition was passed on the 7th April 1921. One of the questions involved in this case is, when did the plaintiff and the first defendant become divided in status? The determination of this question is necessary in order to fix the extent and nature of the liability of the first defendant to account for the management of

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the family properties and the income derived therefrom. The form of account to be ordered as against the first defendant as manager of the family till severance in status as between him and the plaintiff would be different from the form of account to be ordered against the first defendant after such severance. The learned Subordinate Judge held that it was the preliminary decree for partition passed by the Court on 7th April 1921, that effected a division in status and on that basis he fixed the accountability of the first defendant. The correctness of that view is challenged before us in this appeal.

The contention which was strongly pressed before us by Mr. Varadachariar on behalf of the appellant is, that in a suit for partition launched on behalf of a minor, if the Court holds that a division is necessary in the interests of the minor and passes a preliminary decree for partition, it must be deemed that the divided status of the plaintiff dates from the plaint at least. It is now settled that a clear and unambiguous expression of intention to become divided made by an adult coparcener to the knowledge of the other members of the family effects a severance of the joint status so far as the person who expresses his individual volition is concerned. *Girja Bai* v. *Sadashiv Dhundiraj*(1). In the Full Bench decision of this Court reported in *Soundararajan* v. *Arunachalam Chetty*(2), it has been held that the filing of a plaint claiming partition amounts to an unambiguous manifestation of intention on the part of the plaintiff within the meaning of the ruling of the Privy Council in *Suraj Narain* v. *Iqbal Narain*(3). In a later decision of the Privy Council in *Kawal Nain* v. *Budh Singh*(4), their Lordships reiterated this principle and observed at page 498:—" A decree may be necessary for

(1) (1916) I.L.R., 43 Calc., 1031 (P.C.).
(2) (1916) I.L.R., 39 Mad., 159.
(3) (1913) I.L.R., 35 All., 80.
(4) (1917) I.L.R., 39 All., 496.

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working out the result of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgment or not." That is the law as regards a major coparcener filing a suit for partition. But if a minor coparcener institutes such a suit by his next friend, it has been held by this Court in *Chelimi Chetty* v. *Subbamma*(1), that the mere filing of a plaint on behalf of a minor would not *ipso facto* effect a severance of the joint family status, for in such a suit it is for the Court to determine whether the partition asked for will be beneficial to the minor. The same view has been followed in *Lalta Prasad* v. *Sri Mahadeoji Birajman Temple*(2). If such a suit proceeds to the stage of a decree in the plaintiff's favour on the Court finding that the partition would conduce to the best interests of the minor, the further question is whether the severance of the joint status takes place only from the date of the preliminary decree or from the date of the plaint. On this question there is the direct authority of a recent decision of a Bench of this High Court reported in *Krishnaswami Thevan* v. *Pulukaruppa Thevan*(3). It has been held in that case, distinguishing the decision in *Chelimi Chetty* v. *Subbamma*(1), that a suit by a minor for partition, if it ends in a decree for partition, has the effect of creating a division of status from the date of the plaint. In that case the question to be decided was whether the birth of another coparcener in the family subsequent to the institution of the suit by the minor plaintiff and before the passing of a preliminary decree had the effect of diminishing the share which the plaintiff had on the date of the institution of the suit and for deciding that question it had to

(1) (1918) I.L.R., 41 Mad., 442. (2) (1920) I.L.R., 42 All., 461.
(3) (1925) I.L.R., 48 Mad., 465.

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be determined whether the plaintiff became divided in status from the date of the plaint itself or from the date of the preliminary decree for partition. SPENCER, J., in considering the effect of the decree for partition in such a suit stated at page 468 :—

"Therefore in my judgment the only sound principle will be to regard the prayer in the minor's plaint for division as a conditional request that, provided that the Court sees fit, it may declare the status of the minor divided as from the date of the plaint. It is true that there can be no division of status, unless the Court sees fit to decree it, but there is no reason why the Court should not make its decree take effect from the date of the institution of the suit."

On the footing that by reason of the Court passing a decree in favour of the plaintiff for partition it effected a severence in the status of the family from the date of the plaint, it was held that the share which the plaintiff owned on the date of the plaint was not liable to be reduced by the subsequent birth of a member in the family. This decision having been given subsequent to the disposal of the suit by the Subordinate Judge, he could not consider the effect of it before arriving at his conclusion.

The view taken in the decision in *Krishnaswami Thevan* v. *Pulukaruppa Thevan*(1) does not appear to be really in conflict with the principle laid down in *Chelimi Chetty* v. *Subbamma*(2). In the latter case the partition suit filed by the minor had not reached the stage of a decree when the question arose for decision as to whether a division in status had been effected by the filing of a plaint on behalf of the minor plaintiff. The only point which directly arose for consideration was whether the filing of a plaint asking for partition *ipso facto* effected a severance of the family status and it was answered in the negative. As to what would be the result if in such

(1) (1925) I.L.R., 48 Mad., 465. (2) (1918) I.L.R., 41 Mad., 442.

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a suit the Court had passed a preliminary decree for partition, there was no necessity to decide in that case. In the 48 Madras case such a question arose directly for decision and was decided. Accepting the principle that in a suit for partition brought by the minor it is for the Court to determine whether the partition would be advantageous to the minor or not and that a severance in the status of the family could not be effected by the individual volition of the minor's guardian or next friend, still, when the Court thinks fit on a consideration of the circumstances set forth in the plaint to decree partition of the family properties, the imprimatur of the Court must be deemed to have been placed on the allegations made in the plaint justifying the effecting of a partition. That being so, the Court must be deemed to have determined that, even on the date of the plaint, it would have allowed a partition to be effected as it was beneficial to the minor. Though the enquiry has necessarily to be made by the Court subsequent to the filing of the plaint, it is the state of affairs that existed on the date of the suit that determine the exercise of the Court's discretion. It seems to us therefore that the principle of the decision in *Krishnaswami Thevan* v. *Pulukaruppa Thevan*(1), has to be applied to the present case. We hold that the plaintiff must be deemed to have become divided in status from the first defendant from the date of the plaint, namely 14th August 1918, by reason of the Court having passed a preliminary decree in this suit allowing the partition of the family properties.

It is urged on the first defendant's side that the Court passed a preliminary decree in this case on the 7th April 1921 in accordance with a consent statement filed by the parties and not upon an enquiry as to

(1) (1925) I.L.R., 48 Mad., 465.

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whether a partition would be for the benefit of the minor or not. The soundness of this argument is open to doubt. The first defendant, who was contesting the plaintiff's claim for partition, subsequently consented to the passing of a preliminary decree in his favour and thereby abandoned the pleas which he raised in opposition to the plaintiff's claim for partition. Virtually the abandonment of his contentions by the first defendant had the effect of leaving unchallenged the allegations made in the plaint for showing that the partition is necessary and beneficial to the minor and therefore the Court thought fit to pass a preliminary decree in plaintiff's favour. The fact that the preliminary decree in this case was passed on a consent statement does not make any difference.

The finding of the lower Court on this point is modified and we hold that the plaintiff became divided in status from the first defendant, not from the date of the preliminary decree (7th April 1921), but from date of the institution of the suit, namely, 14th August 1918.

The form of account to be ordered depends upon this finding. The lower Court directed accounts to be taken on the basis that the plaintiff and the first defendant became divided in status only from 7th April 1921. So long as the family was in a state of non-division the liability to account on the part of the first defendant as the manager or Kartha of the family would be as stated in the decision in *Parameshwar Dube* v. *Govind Dube*(1). It was held in that case that in an ordinary suit for partition, in the absence of fraud or other improper conduct, the only account the Kartha or manager is liable for is as to the existing state of the property divisible and the parties have no right to lock

(1) (1916) I.L.R., 43 Calc., 459.

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back and claim relief against past inequality of enjoyment of the members or other matters. With reference to the management of the first defendant prior to the date of the plaint, the mode of his accountability is as stated above and it is open to the plaintiff to prove specifically any fraud or misappropriation or other improper conduct on the part of the first defendant with respect to such management and, in the absence of such proof, what the Court has to proceed upon is the assets of the family as they existed at the date of the suit, but subsequent to the date of the suit, the plaintiff and the first defendant were only tenants-in-common or co-sharers and therefore the first defendant is strictly bound to account for all receipts and expenses and, as observed by the lower Court, can take credit only for such expenses as have been incurred for the benefit or necessity of the estate, and the net income after deduction of such expenses will have to be divided equally between him and the plaintiff. As the accounts have to be taken in accordance with the above findings, a remand of the suit is necessitated and the lower Court should give the necessary directions for taking accounts in the light of the above observations and finally determine how much amount should be decreed to the share of the plaintiff or of the first defendant.

This appeal having been posted for being spoken to, the JUDGMENT of the Court was delivered by

SRINIVASA AYYANGAR, J.

SRINIVASA AYYANGAR, J.—On behalf of the respondent it has now been sought to be argued that he would be entitled under the provisions of rule 22 of Order XLI, Civil Procedure Code, to support the decree given by the lower Court for the particular amount even on grounds which may relate to the portion of the adjudication or decision by the lower Court not appealed against or in respect of which no

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objections have been filed by the respondent. It is contended that the expression "support the decree" in rule 22 merely refers to the amount for which the decree is passed and because the expression "decree" is used in that rule it authorizes or enables the respondent to make out a case for a decree for that amount by questioning some adjudication by the lower Court with regard to rights found against the party by the lower Court and in respect of which no appeal or objection has been filed. For this purpose the learned Vakil for the respondent has referred to two cases decided by the Chief Court of Punjab *Muhammad Ali* v. *Parma Nand*(1), and *Shankar Lal* v. *Madari Singh*(2). In the former case what was really held was that even though one item in an account may be found by the Court of Appeal against the respondent and on that footing the amount for which a decree has been granted by the lower Court may have to be reduced, still the decree might be supported by showing that in respect of some other item the Court below made a mistake. But when the relief granted depends upon the adjudication by the lower Court with respect to rights or causes of action, it is inconceivable that such decision or adjudication shall be sought to be attacked in the appellate Court without any notice whatever to the other party. Though the word "decree" has been used in rule 22, it is clear that what the rule contemplates really is the decision by the Court below and merely enables the decision arrived at by the lower Court to be supported on grounds other than those on which the lower Court proceeded. We are satisfied that under that rule it is not open to a respondent to have adjudicated by the appellate Court

(1) (1918) 45 I.C., 232. (2) (1910) 7 I.C., 484.

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rights or causes of action which have been decided against him in the Court below and in respect of which he has filed no appeal or memorandum of objections.

There is however one point to which the learned Vakil for the respondent has drawn our attention. On the decision of this Court it has been directed that the plaintiff would be entitled to have an account from the first defendant from the date of the plaint instead of from the date of the preliminary decree as directed by the lower Court. There are some items which have been allowed by the lower Court to the plaintiff in its judgment, and it is possible that some of those items which have been allowed to the plaintiff relate to the period subsequent to the institution of the suit. If on the taking of the accounts directed by this Court it should be found by the lower Court that any of the items already allowed to the plaintiff relate to the period subsequent to the institution of the suit, those items should be deleted and be merely included in the taking of the accounts and all such items if so found would have to be deducted from the amount already allowed to the plaintiff. Similarly if in respect of any of the other matters it should be found that any items relate to the period subsequent to the institution of the suit and therefore liable to be included in the account ordered to be taken, those items would also be excluded by the Court.

The Court fees paid by the appellant for the appeal and by the respondent for the memorandum of objections will be refunded to them respectively. The appellant will have the costs of the appeal.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Ramesam.

1927, March 18.

MADDIRALA JAGANNADHAM AND ANOTHER, (FIRST AND SECOND DEFENDANTS), APPELLANTS,

v.

MADDIRALA VENKATASUBBA RAO AND OTHERS (PLAINTIFF AND DEFENDANTS 3 AND 29), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), *sec.* 11—Res judicata—*Suit by reversioners—Plea of* jus tertii *in his father set up by defendant—Plea negatived and decree passed for plaintiffs—Subsequent suit by defendant, based on title vested in his father as the nearest reversioner—Question covered by plea of* jus tertii—*Decision in previous suit, whether* res judicata—*Pedigree, proof of—Name of common ancestor, not known—Whether proof of relationship, necessarily fails.*

In a suit by certain persons as reversioners to recover an estate, the defendant set up a plea of *jus tertii* in his father as the nearest reversioner who was alive at the time of the suit but was not joined in the suit; the plea was negatived and decree passed for the plaintiffs. Subsequently, the then defendant, after his father's death, instituted the present suit to recover the estate from the then plaintiffs, tracing his title through his father in whom he alleged the estate had vested in his lifetime as the nearest reversioner; on the latter pleading the bar of *res judicata*,

Held, that the decision in the previous suit on the reversionary right of the plaintiff's father raised by the plea of *jus tertii*, was not *res judicata* on the same question in the present suit, based on the title of the father as the nearest reversioner.

In proving a pedigree, although a person claiming as heir must show all the stages of relationship from a common ancestor, it is not the law that, if the name of the common ancestor is not known, it must be held that the relationship is not proved.

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* Appeal No. 375 of 1923.

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Kedarnauth Doss v. *Protab Chunder Doss*, (1881) I.L.R., 6 Calc., 626, explained. *Roe. d. Thorne* v. *Lord*, (1776) 2 Bl.W., 1099; 96 E.R., 649, referred to.

APPEAL against the decree of K. SUNDARAM CHETTI, the Subordinate Judge of Guntūr, in Original Suit No. 90 of 1921.

The material facts appear from the judgment.

B. Somayya for appellants.

Ch. Raghava Rao for respondent.

JUDGMENT.

RAMESAM, J.

RAMESAM, J.—This appeal arises out of a suit by a reversioner to recover certain properties of a deceased person named Punnayya. Defendants 1 and 2 claim to be nearer heirs than the plaintiff. The plaintiff is the son of Pakeerayya. His present suit is based on the ground that his father who survived the deceased was a nearer heir than the defendants and after the property vested in Pakeerayya he succeeded to his right. The learned Subordinate Judge found in favour of the plaintiff and gave a decree. The defendants appeal.

The first question argued in appeal is the question of *res judicata*. Immediately after the death of Pakeerayya there was a suit by the present defendants to recover the property in which the defendant was the present plaintiff. But the father of the present plaintiff was not a party to the suit. In that suit the defendant, that is, the present plaintiff, pleaded his own title and did not rely upon any title of Pakeerayya because he could not, as Pakeerayya was then living. He merely put forward the title of Pakeerayya as *jus tertii*. As the plea was found against him, the plaintiffs in that case were given a decree. On appeal an attempt to file some documents and prove the title of Pakeerayya was disallowed. So far as the former litigation is concerned,

all we have is that the defendant in the case raised a plea of *jus tertii*. It cannot be said for the purpose of section 11 that the decision on a plea of *jus tertii* is a decision between the parties litigating under the same title when the *jus tertii* is put forward and actually relied on in a later case by the third person. All that can be said is that, in the former suit, it was raised as a defence. It cannot be said that the defendant was actually relying upon that title or litigating under it. Now the present plaintiff who claims as the heir of Pakeerayya litigates under it. Mr. Somayya who appears for the appellants concedes that the judgment in the former suit does not bind Pakeerayya himself, or his assignees, or his heirs. It is merely an accident in this case that the heir of Pakeerayya happens to be the very person who put forward the plea of *jus tertii*. That is only an accidental circumstance. It might happen to be a different person. It is therefore clear that there is no *res judicata* by reason of the judgment in the former litigation.

The second point argued is the question on the merits, namely, as to who is the nearer heir.

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

The result is that the plaintiff's case is made out and the decree of the lower Court is right.

One question of law was raised by the learned vakil for the appellants. He refers to *Kedarnauth Doss* v. *Protab Chunder Doss*(1) and says that the name of the common ancestor is not proved. On the face of Exhibit A it is true that we do not know the name of the common ancestor and we start with three cousins as ancestors. It is said that without the name of the

(1) (1881) I.L.R., 6 Calc., 626.

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common ancestor a pedigree cannot be proved. In *Kedarnauth Doss* v. *Protab Chunder Doss*(1) Sir RICHARD GARTH, C.J., says :—

"I believe that the rule of evidence there in cases like the present is correctly laid down in the last edition of Roscoe's *Nisi Prius* Evidence, page 1010, that where the plaintiff claims as a collateral heir, he is bound to allege and prove his title *through the common ancestor in all its stages*; and one most important stage is of course the common ancestor himself."

And the other Judge, PONTIFEX, J., does not say anything on this matter. He simply says,

"The plaint ought to have stated the descent from a common ancestor, and the evidence ought to have supported such statement."

But even the Chief Justice's judgment merely says that the allegation in the evidence of a person claiming as heir must show all the stages of relationship from the common ancestor. To this proposition nobody objects. When a person claims to be a "gnati" of the fourth or fifth degree, it is not sufficient if all that appears in the case is that he may be a cousin of the tenth or twelfth degree. What he claims must be alleged and proved. It does not mean that if the name of the common ancestor is not known it must be held that the relationship is not proved. It does not mean that if two people have been proved to be brothers, their descendants are not related to one another merely because the name of the father of the two brothers is not known. No doubt, if a witness comes and swears that he knows the names of the two brothers, but he is not able to give the name of their father, it may be a circumstance to be taken into consideration in deciding whether the witness should be believed or not. The fact that a witness is unable to give the name of the common ancestor may be a cogent reason why he should

(1) (1881) I.L.R., 6 Calc., 626.

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be disbelieved. But if we are otherwise clear that two people are grandsons of brothers, the mere fact that the name of the common ancestor is not known cannot be made a reason for holding that the relationship is not proved at all. There can be no such legal proposition. We do not think that the learned Chief Justice meant to say any such thing or lay down any such proposition. Anyhow the authority relied on by the Chief Justice does not support this proposition. In the 18th edition of Roscoe's *Nisi Prius* Evidence, published in 1907, the passage is at page 1038 and runs thus :

"If the plaintiff claims as collateral heir he must prove the descent of himself and the person last seized from a common ancestor ; or at least from two brothers or sisters ; *Roe d. Thorne* v. *Lord*(1)."

This passage merely shows that there must be at least two brothers or sisters. Looking at the case itself which is reported in *Roe d. Thorne* v. *Lord*(1) all that we have got is this :

"The Court took time to consider till this present term, when not being able to agree in opinion concerning the necessity that a person claiming to be heir shall state in evidence a pedigree either proving the deceased and the claimant to be descended from some common ancestor, or at least from two brothers or sisters (which was allowed to be an immediate descent) or whether vague evidence of heirship, without such deduction, is proper to be left to a jury, etc."

The contrast is between definite evidence of common ancestry or brothers' ancestry as against vague evidence of common ancestry. Of course vague evidence will not prove definite pedigree or descent. Definite descent from brothers is certainly common ancestry. There can be no legal proposition that because the name of the common ancestor is not known, the relationship cannot beheld to be proved. *Kedarnauth Doss* v. *Protab Chunder*

(1) (1776) 2 Bl. W., 1099 ; s.c., 96 E.R., 649.

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Doss(1) cannot be regarded as an authority for such a proposition, as is sometimes supposed. In this case there is a clear statement by the defendants' ancestors that Madiraju, Narayanappa, and Lingaraju were grandsons of brothers. At that time there was no motive for making an inaccurate statement and the pedigree was not in dispute.

Acting on Exhibit A-1, I accept the conclusion of the learned Subordinate Judge and dismiss this appeal with costs.

The memorandum of objections also fails and is dismissed with costs.

KUMARASWAMI SASTRI, J.—I entirely agree.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Jackson.

1927, February 25.

SRI RAJAH SATRUCHERLA SIVASKANDA RAJU BAHADUR GARU, APPELLANT,

v.

SRI SRI SRI RAMACHANDRA DEO MAHARAJULAM GARU, RAJA OF JEYPORE AND OTHERS, RESPONDENTS.*

Execution—Ss. 21, 37, 38, 150, *Civil Procedure Code* (*V of* 1908)—*Preliminary mortgage decree—Transfer of territorial jurisdiction thereafter to another Court—Passing of final decree by the first Court without objection—Right of the first Court to order sale of mortgage properties.*

After the passing of a preliminary mortgage decree, the Court that passed it ceased to have territorial jurisdiction over any of the mortgaged properties. After a final decree was passed by the same Court without any objection by the mortgagor, the mortgagee applied to that Court for sale.

(1) (1881) I.L.R., 6 Calc., 626.

*L.P.A. No. 37 of 1927.

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Held (1) that that Court had no power to order a sale of the properties, though it can receive an application for sale and transmit it to the Court having territorial jurisdiction and (2) that omission to object to the jurisdiction of that Court to pass the final decree estops the mortgagor only from disputing the validity of the final decree but does not estop him from objecting to the jurisdiction of that Court to order a sale.

APPEAL under clause (15) of the Letters Patent preferred against the order of the Hon'ble Mr. Justice CURGENVEN, dated 6th January 1927, and made in C.M.P. No. 3718 of 1916 in A.A. No. 363 of 1926, preferred to the High Court against the order of the Court of the Subordinate Judge of Vizagapatam in E.P. No. 25 of 1925 in O.S. No. 22 of 1913 on his file.

The facts are given in the judgment.

T. Rangachariar and *Y. Suryanarayana* for appellant.

A. Krishnaswami Ayyar and *P. Somasundaram* for respondents.

JUDGMENT.

WALLACE, J.

WALLACE, J.—This Letters Patent Appeal is against the decision of CURGENVEN, J., in the matter of an order by him on C.M.P. No. 3718 of 1926, dated 6th January 1927, refusing to set aside a Court sale in execution of a mortgage decree against the appellants. The chief point raised is a question of the jurisdiction of the Sub-Court, Vizagapatam, to sell the property in execution as the property is not within its territorial jurisdiction. The learned Judge has not dealt with this point, but has merely dismissed the petition for stay.

It is not in dispute that between the date of the preliminary decree in the mortgage suit and the final decree the local area in which this property lies was taken away from the jurisdiction of the Sub-Court. The question for decision is whether in execution of the

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final decree the Court which passed the decree retains jurisdiction to sell the property which has passed out of its jurisdiction. This is a vexed question which has been the subject of a large number of decisions in this Court and in the Calcutta High Court. It is quite clear from the authorities in these rulings that there are two main principles of decision which are inherently irreconcilable. The first is that a Court which ordinarily has no power to sell property outside its local jurisdiction cannot gain that power merely because it has passed the decree against that property while it was within its jurisdiction; that is, there is no reason why a Court should have greater powers over property at a later stage of a suit than it had at the beginning; and the second principle is that when a Court has once got jurisdiction over property it cannot lose it. I incline to the former principle in view of the practical difficulties which will attend the acceptance of the latter. The latter view clearly to my mind implies that the Court which passed the decree never loses its jurisdiction to execute that decree and the learned vakil for the respondent goes so far as that. I shall consider the effect of that proposition from two points of view, first, whether the provisions of the Code bear it out, and second, as to the practical difficulties in working.

As to the first point, if the Court which passes the decree never loses its jurisdiction to execute it, then the contingency provided for in section 37 (*b*), Civil Procedure Code, of the Court of first instance losing its jurisdiction to execute a decree could not have been contemplated at all. The phrase "Court of first instance" there is obviously used in the sense of the Court which originally passed the decree—compare the use of the same phrase in clause (*a*)—and was probably used to avoid employing in the definition of the phrase

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"Court which passed the decree" the very phrase which was being defined and also perhaps to exclude by using that phrase a Court of intermediate appeal. The respondents' vakil argues that section 37 (*b*) is only ancillary to (*a*) and is brought into operation only when there has been an appeal and a decision by the appellate Court. I cannot accept that contention which would amount to saying that the Code has made no provision for the case of the execution of a decree which has not been appealed against, when the Court which originally passed the decree has ceased to exist. The learned vakil refers us to section 150 to explain this lacuna. But apart from the improbability of the legislature relegating to a different part of the Code one aspect of the problem which was before them when section 37 was drawn up, section 150 in terms only applies to cases of transfer from a Court and not to cases of a Court ceasing to exist. I am of opinion therefore that the Code does not authorize the idea that a Court which originally passed a decree never loses its jurisdiction to execute it. Pressed to its logical conclusion, this argument would mean that the Court to which territorial jurisdiction has been transferred has no jurisdiction to execute, because the contingency which gives it jurisdiction to execute, namely, the ceasing of jurisdiction in the Court which originally passed the decree, will never occur. It has never been yet held so far as I know, that the Court to which territorial jurisdiction has been transferred does not have jurisdiction to execute the decree. A ruling which might be cited to the contrary, viz., *Kali Pado Mukerjee* v. *Dino Nath Mukerjee*(1) has been explained in *Jahar* v. *Kamini Debi*(2) to be not a real case of transfer of territorial jurisdiction. In most of the reported rulings under this clause (37) (*b*), it has

(1) (1898) I.L.R., 25 Calc., 315. (2) (1901) I.L.R., 28 Calc., 238.

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been taken almost for granted that the usual case to which the phrase "has ceased to have jurisdiction to execute it" applies is the case where between the date of decree and the date of execution application territorial jurisdiction over the property has passed from the Court of original trial to another Court.

The practical difficulties of holding the proposition are that by force of section 37 itself and section 38, two Courts at least would have concurrent powers to execute the same decree, and simultaneous executions, simultaneous sales, simultaneous enquiries into claim petitions, and so on, under the same decree would be going on in different Courts. The difficulties of that procedure far outweigh any hardship in asking the decree-holder to go for execution and Court sale to a Court which has territorial jurisdiction over the property even when it was not the Court which originally passed the decree.

The proposition generally laid down in the reported authorities is that a Court has no power to sell property outside its territorial jurisdiction. Territorial jurisdiction is a condition precedent to the Court selling the property. See *Prem Chand Dey* v. *Mokhoda Debi*(1), *Subbiah Naicker* v. *Ramanathan Chettiar*(2), *Venkatasami Naik* v. *Sivanu Mudali*(3), *Veerappa Chetty* v. *Ramasami Chetty*(4), *Guruswami Naicker* v. *Mahommadhu Rowther*(5), *Viswanadhan Chetty* v. *Murugappa Chetty*(6), and *Maharajah of Jeypore* v. *Rajah Lakshminarasimha Garu*(7) and the same conception underlies the Full Bench decision in *Seeni Nadan* v. *Muthusamy Pillai*(8). See also the Full Bench decision in *Prem Chand Dey* v. *Mokhoda Debi*(1) and *Begg, Dunlop & Co.* v. *Jagannath*

(1) (1890) I.L.R., 17 Calc., 699 (F.B.) at 703.
(2) (1914) I.L.R., 37 Mad., 462 at 472.
(3) (1919) I.L.R., 42 Mad., 461.
(4) (1920) I.L.R., 43 Mad., 135.
(5) (1923) I.L.R., 46 Mad., 83.
(6) (1917) 33 M.L.J., 750.
(7) (1923) 18 L.W., 747.
(8) (1919) I.L.R., 42 Mad., 821 (F.B.).

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Marwari(1). Some inroad on that general proposition has no doubt been made by rulings which have held that, where the Court is executing a mortgage decree for sale, and the property under mortgage is partly within and partly without its territorial jurisdiction, the Court has power to sell all the property. That has been allowed on the footing that the execution of a mortgage decree for sale is analogous to a decree for specific performance—see *Abdul Hadi* v. *Kabultunnissa*(2). So far however that proposition has not been laid down in any ruling by this Court, and no ruling has gone so far as to lay down that when the property in the mortgage decree lies wholly outside the territorial jurisdiction of the Court, the Court can sell the property in execution of the mortgage decree for sale, and I am not, as at present advised, prepared to make this further inroad on the general principle. Section 37 however does not forbid the view laid down in the Full Bench case in *Seeni Nadan* v. *Muthusamy Pillai*(3) that, though the Court which originally passed the decree has no jurisdiction to execute it because of the transfer of territorial jurisdiction, it has power to entertain an execution application and transmit it to the Court having territorial jurisdiction to execute it. On this point, respondents' vakil contends, first, that, if that is what the Full Bench decides, the decision was otiose, because no one doubts that the Court which passed the decree has power to transmit it for execution to the Court having jurisdiction to execute, and second, that the Full Bench case really implies that the Court which originally passed the decree has not lost its power to execute it; that is, if it has power to transmit, it must also have the power to execute. As to the first

(1) (1912) I.L.R., 39 Calc., 104.
(2) (1924) 80 I.C., 901.
(3) (1919) I.L.R., 42 Mad., 821 (F.B.).

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contention, the decision was necessary because a decision in *Subbiah Naicker* v. *Ramanathan Chettiar*(1), had laid down that, if the Court which originally passed the decree had lost territorial jurisdiction, it could not entertain and transmit an execution application. As to the second contention, while the judgment of the late Chief Justice may be taken to go so far as the learned vakil wants, those of the other two Judges quite clearly do not, and it is noteworthy that, *Subbiah Naicker* v. *Ramanathan Chettiar*(1), was not overruled by the Full Bench. *Subbiah Naicker* v. *Ramanathan Chettiar*(1), therefore, remains good law, except in so far as it has been modified by the Full Bench ruling. That is, the net result is that when the territorial jurisdiction of the Court which passed the decree is taken away between the stage of the decree and execution, it has power to entertain an execution application for transmission to the Court having territorial jurisdiction but has no power to sell the property. It is to the convenience of decree-holders, and there is nothing in the Code to prohibit it, that they should be able to apply in execution to the Court where they obtained their decree, and should not have to hunt about to find out whether or not the territorial jurisdiction has been in the interval taken away from that Court. The latter Court will know best whether or not it has territorial jurisdiction and, if it has not, will transfer the decree for execution to the Court having such jurisdiction. The Full Bench view has been taken by a Bench of this Court in *Manavikraman* v. *Ananthanarayana Ayyar*(2), and this is also the *ratio decidendi* of *Jahar* v. *Kamini Debi*(3); see also *Udit Narain Chaudhuri* v. *Mathura Prasad*(4). I therefore in this case follow

(1) (1914) I.L.R., 37 Mad., 462.
(2) (1924) 46 M.L.J., 250.
(3) (1901) I.L.R., 28 Calc., 238.
(4) (1908) I.L.R., 35 Calc., 974.

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the Full Bench view as I understand it to be and as I have set it out above.

The next point urged by the respondent relates to the application of section 21, Civil Procedure Code. That the principle of section 21 applies also to execution proceedings has been laid down in several rulings of this Court—see *Manavikraman* v. *Ananthanarayana Ayyar*(1), *Ramani* v. *Narayanaswami Ayyar*(2), and *Chokkalinga Pillai* v. *Velayuda Mudaliar*(3). The argument here is that, as the transfer of territorial jurisdiction was between the passing of the preliminary decree and the passing of the final decree and as the appellant made no objection to the passing of the final decree, he has waived his right to object to the jurisdiction. Such a contention might be upheld if it was a matter of law that the Court which originally passed the decree always has the right to execute it. But I have held that that is not the law. Waiver of a right to object to jurisdiction before the passing of the final decree will not therefore imply a waiver of the right to object in execution proceedings to a sale of the property. The appellant is no doubt barred from pleading in execution proceedings that the final decree was passed without jurisdiction—see *Zamindar of Ettiyapuram* v. *Chidambaram Chetty*(4), but in my view he is not barred from pleading that the Court has no right to sell in execution property which is not within its territorial jurisdiction. The view of one of the learned Judges in *Rajagopala Pandaratthiar* v. *Thirupathia Pillai*(5) has been pressed upon our attention. Now in that case the transfer of territorial jurisdiction was made while the execution proceeding was pending, and the objection regarding this jurisdiction

(1) (1924) 46 M.L.J., 250.
(2) (1924) 47 M.L.J., 192.
(3) (1924) 47 M.L.J., 448.
(4) (1920) I.L.R., 43 Mad., 675 (F.B.).
(5) (1926) I.L.R., 49 Mad., 746.

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was not taken in these proceedings at the earliest opportunity. Hence section 21 was applied and it was held that the judgment-debtor could not take such objection at a later stage. This is the ground on which MADHAVAN NAIR, J., disposed of the case. But VENKATASUBBA RAO, J., while giving that ground also as one of the grounds for dismissal of the appeal, in itself a sufficient ground for doing so, went into other grounds, namely, that the rule about territorial jurisdiction does not apply to the execution of mortgage decrees, and he relied on certain Calcutta cases, without however considering the Full Bench case in *Prem Chand Dey* v. *Mokhoda Debi*(1), which is also a case of a mortgage decree. So that the observation of the learned Judge that the decisions of the Calcutta High Court on this point have been uniform does not appear to be just. The cases in *Maseyk* v. *Steel & Co.*(2), *Gopi Mohan Roy* v. *Doybaki Nundun Sen*(3), and *Tincouri Debya* v. *Shib Chandra Pal Chowdhury*(4), on which he relies, are cases in which part of the mortgaged property still remained under the jurisdiction of the Court which originally passed the decree, and *Kartick Nath Pandey* v. *Tiluk Dhari Lall*(5), on which he also relies, was practically overruled by the Full Bench in *Prem Chand Dey* v. *Mokhoda Debi*(1). I am not therefore prepared to follow the learned Judge in holding that in all cases of mortgage decrees, not merely cases in which part of the property is still within the jurisdiction of the Court but also cases in which the property is wholly outside its jurisdiction, the Court which originally passed the decree retains jurisdiction to sell in execution. I am of opinion that *Subbiah Naicker* v. *Ramanathan Chettiar*(6),

(1) (1890) I.L.R., 17 Calc., 699 (F.B.). (2) (1887) I.L.R., 14 Calc., 661.
(3) (1892) I.L.R., 19 Calc., 13. (4) (1894) I.L.R., 21 Calc., 639.
(5) (1888) I.L.R., 15 Calc., 667. (6) (1914) I.L.R., 37 Mad., 462.

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so far as it lays down the opposite of this proposition, has not been overruled by the Full Bench case in *Seeni Nadan* v. *Muthuswamy Pillai*(1). I hold therefore that the lower Court has no jurisdiction to sell the property in execution, and that the sale cannot therefore go on.

I would set aside the order of the learned Judge and direct that the sale be stayed. The appellant will get his costs in this appeal and C.M.A. (one vakil's fee).

The C.M.A. No. 363 of 1926 is also allowed, and the order for sale is cancelled. The E.P. No. 25 of 1925 of the Sub-Court will be regarded as an application to transmit for execution to the Court having jurisdiction to sell and will be dealt with by that Court as such. No order necessary on C.M.P. No. 300 of 1927.

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

N.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Curgenven.

1927, March 3.

SRINIVASA AYYANGAR (PLAINTIFF AND FIRST RESPONDENT), APPELLANT,

v.

THE OFFICIAL ASSIGNEE, MADRAS, AND 2 OTHERS (DEFENDANTS, 1, 3 AND 4 PETITIONERS AND RESPONDENTS, 2 AND 3), RESPONDENTS.*

O. XLIII, r. (1) (*w*)—*O. XLVII, r.* 7—*Sec.* 115, *Civil Procedure Code—Appeal—Order granting review on ground of new evidence—Order not stating that the new evidence was important—Appealability of—Revision of.*

Although Order XLIII, rule (1) (*w*) of Civil Procedure Code allows an appeal against an order under rule 4 of Order XLVII granting an application for review, yet, the Order XLIII,

(1) (1919) I.L.R., 42 Mad., 821.
* Civil Miscellaneous Appeal No. 41 of 1927.

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rule (1) (*w*) is subject to the restrictions and limitations placed by Order XLVII, rule 7. Hence no appeal lies against an order granting review if the appeal is not on any of the grounds mentioned in Order XLVII, rule 7.

If a Judge grants a review on the ground of discovery of new matter or evidence, the fact that he does not state in the order granting the review that the new matter is important within the meaning of Order XLVII, rule 1, is no ground for revising the order under section 115, Civil Procedure Code.

APPEAL against the order of the District Court of West Tanjore, dated 22nd December 1926, and passed in O.P. No. 116 of 1926 in O.S. No. 14 of 1925.

The facts are given in the judgment.

N. Sivaramakrishna Ayyar for appellant.

C. A. Seshagiri Sastri and *N. Swaminadhan* for respondents.

JUDGMENT.

ODGERS, J.

ODGERS, J.—This is an appeal against the order of the learned District Judge of West Tanjore and also an application to convert S.R. No. 3185 of 1927 into a Civil Revision Petition. The suit O.S. No. 14 of 1925 was brought by the plaintiff in *forma pauperis* praying that a certain sale deed by the fourth defendant (who is the father of the plaintiff) in favour of the second defendant may be declared inoperative and invalid and not binding on the plaintiff. The second defendant became insolvent and his estate was vested in the Official Assignee of Madras. The suit proceeded and a decree was made in favour of the plaintiff. In that state of things the Official Assignee of Madras applied for a review of judgment on the ground of the discovery of new and important matters of evidence which had come to light after judgment had been pronounced. These new matters are two letters marked A and B which have been placed before us, the first from P.W. 3

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to the second defendant, and the latter a similar letter from P.W. 1. The order of the learned Judge allowed the review and in the course of it he has stated that "under the circumstances stated by the Official Assignee in his affidavit I think the documents now produced have to be considered in evidence" and he continued, "What bearing they have on the questions involved in the suit is another matter." It is not contended before us on behalf of the plaintiff who is seeking to impugn this order of the learned Judge that the matter is not new or that the Official Assignee could have discovered it previously or anything of that sort. The learned District Judge's order is attacked simply and solely on the ground that he has not found that the matter is important as required by Order XLVII, rule 1, Civil Procedure Code. An argument of considerable length has been addressed to us on the question as to whether a matter of this sort is appealable. In other words the conflict (which from the decisions of this Court appears to have lasted for some time) between the provisions of Order XLIII, rule 1 (*w*) and Order XLVII, rule 7 of Civil Procedure Code again appears in the case before us. The learned vakil for the appellant presses upon us that although rule 7 (*b*) of Order XLVII says that an order granting the application may be objected to on the ground that it is in contravention of rule 4, sub-rule (2), we must read into the sub-rule everything after sub-clause (*c*) of rule 1. In other words, this must be imported into sub-rule (2) of rule 4 to form a condition precedent before the Court is at liberty to form an opinion that the application for review should be granted. It will be easily seen that this is only another way of saying that an order under rule 1 is appealable by implication. As against this we have the precise and definite provisions of rule 7 which allows an appeal under certain

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conditions and to an extent limited to certain matters and it seems to me that there is abundant authority in this Court for holding not that you are to take the general provisions of Order XLIII, rule (*w*), and say that they dominate the provisions of rule 7, Order XLVII but to the exactly contrary effect, viz., that the provisions of Order XLIII, rule (*w*) are to be read subject to the provisions of Order XLVII, rule 7. For instance, there is the case of *Tholan* v. *Kunhikutty*(1), where it is clearly laid down that an order granting a review can be appealed against only on one of the grounds set out in Order XLVII, rule 7. The question was argued at length on the opposition of Order XLIII, rule 1 (*w*) to Order XLVII, rule 7. *Srinivasa Ayyar* v. *Nataraja Ayyar*(2), is to the same effect and *Maduru Brahmayya* v. *Vedula Vellamma*(3). This body of authority seems to me to be sufficient to show that the matter is not appealable. The case of *Ramanadhan Chetti* v. *Narayanan Chetti*(4), has been quoted *contra*, but the learned Judges evidently entertained some doubt as to the sustainability of their view because they say "should this view not be correct, it must be held that the Court had power to revise" and that is really the next question that arises here.

It is said that we ought to interfere in revision with the order of the learned Judge because the order as it stands is not in accordance with law. Our attention has been called to the case in *Brown* v. *Dean*(5), which was a case arising out of section 93 of the County Courts Act and the question was as to the grounds on which a County Court Judge may order a new trial. The learned Lord CHANCELLOR said that where the ground is

(1) (1913) 24 M.L.J., 93. (2) (1915) 2. L.W., 366.
(3) (1916) 31 M.L.J., 509. (4) (1904) I.L.R., 27 Mad., 602.
(5) (1910) A.C., 373.

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the alleged discovery of new evidence it must at least be such as is presumably to be believed and if believed would be conclusive. That opinion was not concurred in by Lord SHAW or rather the learned Lord refused to go the whole length of the proposition of the Lord CHANCELLOR. It is a grave question whether, in a matter of this sort, where an order allows a review and defers consideration of the new evidence and the arguments thereon to a future day a Court is called upon to see that the evidence if believed would be conclusive. I cannot say that this has been laid down and if it has been laid down by the House of Lords then I would say that it is not a decision binding on us and not a matter in connexion with reviews such as we have to deal with here. The real question is, assuming we can interfere in revision under section 115, as I think we can, are we satisfied that the order of the learned Judge is not really in accordance with law simply on the ground that he did not find that the new matter was important. It has been pointed out in one of the cases cited above, a Judge is not likely to entertain a review of his own judgment unless he is *prima facie* satisfied that the new matter *is* important, and it seems to me from a perusal of these documents that they may well be of such importance as to merit consideration in conjunction with the other evidence on a review of the learned Judge's decision. The plaintiff claims that the documents simply go to re-establish the position in which he stands as the decree-holder. On the other side it is said that they will go to demolish the decision arrived at by the learned Judge that there was no financial pressure on this family of the fourth defendant at the time when he sold the property to the second defendant. I think that is what the learned Judge meant when he said "what bearing they have on the questions involved in

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the suit is another matter." However that may be, it is of course a matter with which we are not concerned at present. There is no question that the matter is new and I think we may say from a perusal of the documents that the matter is probably important. Are we to exercise our discretion in favour of the appellant-petitioner and allow a revision of the Judge's order simply because it is not said in so many words that the matter is important? It seems to me that we should not do so. The result will be the same whether we direct the learned Judge to revise his order by putting in the word "important" because there can be no doubt to my mind that he does consider the matter important as he has ordered review of his own judgment, or, if we dismiss the Revision Petition the matter will go on and be investigated with the aid of the new evidence. It seems to me, therefore, there is really no point in interfering in this case in revision and I would dismiss both the applications on the ground of non-maintainability for the reasons above stated.

The appeal will be dismissed with costs. The petition to convert the appeal into a Civil Revision Petition will be dismissed without costs.

CURGENVEN, J.—I agree.

N. R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Curgenven.

1927, April 12.

R. S. M. VENKATALINGAMA NAYANIM BAHADUR VARU, RAJAH OF KALAHASTI (30TH COUNTER-PETITIONER), APPELLANT,

v.

RAO MUNI VENKATADRI RAO GARU (PLAINTIFF), RESPONDENT.*

Order XXI, rule 2, Civil Procedure Code (V of 1908)—Uncertified oral agreement to vary a decree and to execute the decree as varied—Agreement, whether an adjustment—Section 92, Evidence Act (I of 1872), bar to proof of such oral agreement—Sec. 6, Impartible Estates Act (II of 1904)—Decree against impartible estate without objection—Public policy—Maintainability of objection in execution.

An agreement which does not extinguish a decree as such but which substitutes a varied or modified decree capable of execution is not an adjustment of the decree within Order XXI, rule 2, Civil Procedure Code. Moreover if the so-called adjustment is not certified and recorded by Court it is no bar to further execution of the decree. An agreement to adjust is equivalent to an adjustment. By reason of section 92, Evidence Act, an oral agreement varying or modifying the decree cannot be pleaded in answer to an application for execution of the decree. Second Appeal No. 62 of 1920 (unreported), followed; *Debendra Narain Sinha* v. *Sourindra Mohan Sinha*, (1914) 24 I.C., 391, dissented from.

Section 6 of the Madras Impartible Estates Act (II of 1904) enacts a rule of public policy. Hence even if a decree had been passed, without objection, for the sale of an impartible estate, the objection that the section prohibits the sale can be taken in execution. *Raja of Vizianagara* v. *Dantivada Chelliah*, (1905) I.L.R., 28 Mad., 84, followed.

APPEAL against the order of the Court of the Subordinate Judge of Chittoor, dated 25th July 1925, and made in

* Appeal against Order No. 556 of 1925.

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E.P. No. 41 of 1924 in Original Suit No. 103 of 1916.

The facts are given in the judgment of CURGENVEN, J.

L. A. Govindaraghava Ayyar for appellant.

P. Venkataramana Rao for respondent.

JUDGMENT.

ODGERS, J.

ODGERS, J.—This is an appeal against the order of the Subordinate Judge of Chittoor ordering an execution to proceed. The appellant is the thirtieth defendant in the case. The first defendant died and the thirtieth defendant was brought in as the legal representative of the first defendant, the Raja of Kalahasti. The suit was to recover money paid by the plaintiff on behalf of the defendants for cess, peshkash, etc. The plaintiff owns two villages in the zamindari and obtained a decree in the suit which makes the defendants jointly and severally liable, and not only directs recovery by the sale of the assets of the late first defendant in the hands of the thirtieth defendant but it is also said that in a portion of the decree, not printed, certain villages now held by the thirtieth defendant are ordered to be sold to satisfy the decree. The first thing to be noticed is that there has been no appeal and the reason that is given to us for that is this. Thirtieth defendant wanted to appeal, but the plaintiff assured him orally that proceedings would be taken against him only in respect of his proportionate liability. So the question has arisen whether this is an adjustment of the decree out of Court under Order XXI, rule 2, and further whether the oral agreement is inconsistent with the decree. A further point is raised by Mr. L. A. Govindaraghava Ayyar, for the appellant, and that is, that under the Impartible Estates Act (and it is not disputed, the estate of the thirtieth defendant is such an estate), it cannot be sold without the consent of the Collector and that the decree in so far as it asks for

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such a sale is void. The thirtieth defendant put in a defence in his character as legal representative and contended that he was not personally responsible, that he had succeeded to the impartible estate, that the plaintiff was not entitled to the first charge on the villages in the B schedule or the jodi right of agraharam in C schedule, that the liability of the first defendant to the plaintiff for non-payment of peshkash is one which cannot be enforced against this defendant or against any portion of the estates of Kalahasti which may have devolved on him by succession. The ninth issue raises the question which of the defendants, if any, to what extent, they are liable and whether the defendants, or any of them are personally liable. The Subordinate Judge found that the plaintiff was entitled to recover from the thirtieth defendant the decretal amount from the assets of the first defendant in his hands and as the peshkash is the first charge on the zamindari the plaintiff was entitled to enforce this charge against the villages in the possession of the thirtieth defendant and on his jodi right over the villages in the plaint C schedule and the villages in A, B, and D schedules which have not been separately registered and the proportionate peshkash unascertained.

On the matter coming before the Subordinate Judge he decided that it was not a plea of adjustment under Order XXI, rule 2 and that if it were, it would be barred by the limitation of 90 days. The Subordinate Judge however based his finding on his view that an agreement of this sort cannot be proved as it is not only contrary to the provisions of section 92 of the Evidence Act, but against the policy of the Civil Procedure Code. Any order for adjustment to be valid must comply with the requirements of Order XXI, rule 2; that is to say the decree-holder must certify the adjustment and

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the same must be recorded by the Court. If it has not been certified or recorded as aforesaid, it shall not be recognized by any Court executing the decree. Whether or not there has been an adjustment here within the meaning of the rule, it is perfectly clear that it has not been certified to the Court. The learned Vakil for the appellant urges that the case ought to be sent down to the Subordinate Judge to find as to the truth or otherwise of the fact of the adjustment. Adjustment is said in *Venkataswami* v. *Kotilingam*(1), to be some method of settling the decree which is not provided for in the decree itself. If the decree-holder can still execute the decree in spite of the adjustment, then there has been no adjustment at all. Much stress is laid on *Debendra Narain Sinha* v. *Sourindra Mohan Sinha*(2), a case of the Calcutta High Court—and *Ananda Priya Baishnavi* v. *Bijoy Krishna Ray*(3), simply follows it,—where the learned Judges held that section 92 of the Evidence Act does not apply to decrees and therefore oral evidence may be admissible in proof of an alleged oral agreement between the decree-holder and judgment-debtor. This is based on the assumption that the words "as between the parties to any such instrument or their representatives in interest" are to be read along with the words "contract, grant or disposition of property" and also along with the words "or any other matter required by law to be reduced to the form of a document." On this assumption the learned Judges proceed to hold that the object of the Legislature was to deal with only two classes of cases, namely first, contracts, etc., reduced to writing by the act of parties as mentioned in section 91, and secondly, contracts, etc., required by law to be reduced to the form of writing; in other words, the

(1) (1925) 49 M.L.J., 730. (2) (1914) 24 I.C., 391.
(3) (1925) 91 I.C., 705.

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expression "any matter required by law to be reduced to the form of a document," is controlled by the expression "as between the parties to any such instrument or their representatives in interest" and has in section 92 a much narrower scope than in section 91. This case though not quoted was obviously before two other Judges of the same High Court in *Ananda Priya Baishnavi* v. *Bijoy Krishna Ray*(1), and was followed. It is to the same effect, i.e., that section 92 of the Evidence Act only refers to "dispositive" documents, in other words, the words "any other matter required by law to be reduced to the form of a document" are *ejusdem generis* with contracts, grants or dispositions of property." This case *Debendra Narain Sinha* v. *Sourindra Mohan Sinha* (2) has been disapproved by NAPIER and KRISHNAN, JJ., in S.A. No. 62 of 1920. They agree in saying that there is no warrant for the narrow construction placed on the material words by the Calcutta High Court, and, if I may say so, I respectfully agree with their opinion. In *Lachhman Das* v. *Baba Ramnath Kalikamliwala*(3), the judgment-debtor alleged an oral agreement and the decree-holder denied such an adjustment taking place. Both the Judges held that such an agreement as alleged could not be set up under Order XXI, rule 2, as a bar to execution and one of the learned Judges, WALSH, J., also held that under section 92 of the Evidence Act it could not be set up as it was clearly a new agreement contradicting or varying the terms of the original decree.

Further it was contended by Mr. L. A. Govindaraghava Ayyar that under Order XXI, rule 2, there must be an actual payment in order to be an adjustment and not a promise. He quotes *Lodd Govindass* v.

(1) (1925) 91 I.C., 705. (2) (1914) 24 I.C., 391.
(3) (1922) I.L.R., 44 All., 258.

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Ramdoss(1) for that proposition, where the learned Judges held that an adjustment extinguishes the decree either in whole or in part and that a transaction by which the parties do vary the mode in which the reliefs granted by the decree are to be realized in execution is not an adjustment of a decree but it is an attempt to vary the terms of the decree. Such a variation is against the policy of the Civil Procedure Code and cannot be allowed as it is an attempt by the parties to alter the decree by methods which are not those recognized by way of review or appeal by the Code. It seems to me that this is enough to dispose of the first two points.

The third point is that even in execution the executing Court ought to have held that the decree is void in so far as it seeks to render liable the impartible properties of the thirtieth defendant. The preliminary decree in this suit was passed on the 30th September 1920 and the final decree on the 27th July 1922. There was no appeal against the preliminary decree and this point was never even taken in the executing Court before the Subordinate Judge. It is taken here in an appeal from an executing Court for the first time. But the question turns on whether section 6 of Act II of 1904 contains an absolute prohibition against the alienation of this impartible estate such as to render it incapable of being bound by the debts of the late Raja. It was held in *Venkatalingama* v. *Arunachellam Chettiar*(2), by KRISHNAN, J., and myself that no portion of the estate in the hands of the son could be made liable for a decree which had been passed against the late holder of the estate for misappropriating certain moneys that belonged to a temple. The policy of this Act is stated to be the preservation of the property in the family of the Zamindar who is practically for the

(1) (1915) M.W.N., 225. (2) (1924) 19 L.W., 132.

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time being in the position of a life-estate holder with powers of dealing with the estate under certain contingencies. I was at first inclined to think that the circumstances of this case, namely, the land itself being made liable for the Government revenue, would take it out of the line of cases where the land has been held, as in the 19 L. W. case to be inalienable for what may be called the private debts or defaults of the holder. There is, however, a line of cases which hold that, although the ordinary rule may be that you cannot go behind a decree in the executing Court, still, if there is a prohibition enacted by the Legislature on considerations of public policy, that prohibition is absolute and must be given effect to when the executing Court has it brought to its notice. For instance, in *Raja of Vizianagara* v. *Dantivada Chelliah*(1) (SUBRAHMANYA AYYAR and SANKARAN NAYAR, JJ.) it was held that a decree directing the sale of lands prohibited from being attached and sold by section 5 of the Madras Hereditary Village Offices Act was *ultra vires*. As the learned Judges point out there, if the interdiction upon alienation by parties or attachment or sale by the Court were merely for the benefit of private persons, they can waive the benefit introduced in their favour. But where the prohibition has some object of public policy in view, the rule is that the prohibition must be enforced literally and strictly and in these circumstances it must be taken to be absolute and to deprive Civil Courts of all jurisdiction to give a direction for sale of such property in question. So again in *Mayan Pathuti* v. *Pakuran*(2) by SUBRAHMANYA AYYAR and DAVIES, JJ. That was a sale in contravention of section 99 of the Transfer of Property Act; and SUBRAHMANYA AYYAR, J., points out that, if you could say that the section was enacted for the protection

(1) (1905) I.L.R., 28 Mad., 84. (2) (1899) I.L.R., 22 Mad., 347.

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of public interests and the law was to be regarded as laying down a rule of general policy rendering the prohibition absolute, the sale would be void. If, on the other hand, it were introduced simply for the benefit of a particular class of persons, the sale would only be voidable. Further again in *Rangasamy Naicken* v. *Thirupathi Naicken*(1), it was observed that, if a decree is passed by a Civil Court which had absolutely no jurisdiction to pass it, the party to the proceeding may impeach it as a nullity though it has not been set aside in an appeal or otherwise. So also in *Lakshmi Bibi Kujrani* v. *Atal Bihary Haldar*(2), a sale in contravention of the provisions of Chota Nagpur Tenancy Act and in *Katwari* v. *Sitharam Tiwari*(3) a sale in contravention of section 20 of the Agra Tenancy Act. Finally WALLACE and JACKSON, JJ., in *Sivaskanda Raju* v. *Raja of Jeypore*(4) have, I understand, decided in considering the Full Bench ruling in *Zamindar of Ettayapuram* v. *Chidambaram Chetty*(5), that the waiver of objection to the passing of the final decree did not carry with it the waiver of the right to object in execution to sale of the properties outside the jurisdiction of the court. That of course was a case of territorial jurisdiction, but it appears to me that the same principle must apply. Therefore there seems to me to be a considerable body of opinion that, although a final decree may be passed without objection or even by consent, still the parties have no power by their act, nor indeed has the Court power, to evade the clear provisions of a statute if it is passed in the interests of public policy and not merely to benefit a particular class or individual. With some hesitation and with some regret, considering the course

(1) (1905) I.L.R., 28 Mad., 26. (2) (1913) I.L.R., 40 Calc., 534.
(3) (1921) I.L.R., 43 All., 547. (4) (1927) I.L.R., 50 Mad., 883.
(5) (1920) I.L.R., 43 Mad., 675.

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this case has taken in the Court below, I have come to the conclusion that this objection urged by the learned Vakil for the appellant, though it is urged in appeal from an executing Court, must be given effect to.

The result is that the appeal must be allowed. As this has been taken as pointed out for the first time in the High Court, I am not disposed to make any order as to costs.

CURGENVEN, J.

CURGENVEN, J.—In or about 1827 the then Raja of Kalahasti which at that time was not, as it has subsequently become, an impartible estate, made a gift of three villages, Anjur, Pallam and Adaram to his daughter and son-in-law on the occasion of their marriage. Attached to this gift was an obligation to pay a sum equivalent to Rs. 800 to the Raja as the proportionate share in the peshkash. A few years later the Raja took back Adaram, at the same time relieving the donees of their liabilities to make the contribution, so that they held the other two villages as a tenure similar to free-hold. The present respondent has succeeded to the possession of Anjur upon these terms, while Pallam is in the hands of the second defendant in the suit out of which this appeal arises. Various others of the zamindari villages were from time to time alienated to persons represented by others among the defendants. In Fasli 1324 the Raja failed to pay the peshkash and road-cess, amounting to some Rs. 14,000 upon the villages, in his possession, and eleven villages, including the respondent's village, Anjur, were advertised for sale. Anjur was in fact ordered to be sold first, and to avert this, the respondent was forced to pay a sum of nearly Rs. 13,000 in order to obtain the release of his property from attachment. Accordingly he sued the Raja and others holding portions of the estate for reimbursement of this sum. While the suit was proceeding, the Raja

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(second defendant) died and his successor was added as thirtieth defendant. A decree was passed in the terms set out by my learned brother, against the assets of the first defendant in the hands of the thirtieth defendant and against various others of the defendants, making them jointly and severally liable for a certain sum. It is said that the thirtieth defendant who is the appellant here, resolved to appeal against this decree in so far as it did not make his liability proportionate only to the extent of the estate still in his possession, and that he desisted from so doing upon receiving an undertaking from the decree-holder that he would not proceed against him beyond this limit. Nevertheless an execution petition was filed praying for the sale of certain of the appellant's villages in discharge of the whole amount recoverable from him under the decree. The petition was resisted upon the ground of the alleged undertaking, and it is from the order of the learned Subordinate Judge of Chittoor directing execution to proceed that this appeal is preferred.

The agreement, if in fact it was entered into, was oral, and the question how far such an agreement can be pleaded in bar of execution has been discussed under two aspects:—

(*a*) that it was an agreement to adjust, if not an adjustment of the decree;

(*b*) that it was an oral agreement varying the terms of the decree.

Now, as to (*a*), it is clear that if the agreement amounted to an adjustment of a portion of the decretal amount, it would be invalid as not certified under Order XXI, rule 2 (3) of the Code of Civil Procedure. It has not been very strenously argued that it does amount to an adjustment, and if we adopt SADASIVA

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AYYAR, J.'s, definition in *Lodd Govindass* v. *Ramdoss*(1) of that term as

> "a transaction which extinguishes the decree as such in whole or in part and results in a satisfaction of the whole or a portion of the decree in respect of the particular relief or reliefs granted by the decree,"

the agreement cannot be said to conform to that description. The further argument that a mere agreement to adjust, which falls short of an adjustment, need not be certified under Order XXI, rule 2, in order to bar execution, appears to me to be wholly untenable. If there must be not only an adjustment, but, further, a certification of it, *a fortiori* an agreement to adjust cannot avail the judgment-debtor.

I think it is clear that the alleged agreement falls under (*b*) above; it modifies the decree by restricting the appellant's liability in a manner for which the decree does not provide. As an oral agreement, I hold that it offends against the terms of section 92 of the Indian Evidence Act. The learned Judges who decided *Debendra Narain Sinha* v. *Sourindra Mohan Sinha*(2), considered that the words "any matter required by law to be reduced to the form of a document," being controlled by the words "as between the parties to any such instrument or their representatives in interest," must be construed as meaning "contracts, grants, or other dispositions of property which are required by law to be reduced to the form of a document." With great respect, I do not feel constrained by the language of the section to narrow its scope in this manner, more especially as it seems as objectionable that the parties to a decree should orally vary its terms as that they should so vary the terms of any "dispositive" instrument. It does not therefore seem reasonable to attribute to the

(1) (1915) M.W.N., 225 at 226. (2) (1914) 24 I.C., 391.

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Legislature an intention to permit the one while prohibiting the other. Nor do I see any difficulty in applying the phrase "the parties to any such instrument" to a decree-holder and a judgment-debtor. I prefer therefore to adopt the construction favoured in *Lachhman Das* v. *Baba Ramnath Kalikamliwala* (1), and by NAPIER and KRISHNAN, JJ., in S.A. No. 62 of 1920 and to hold that section 92 does preclude the proof of an oral agreement modifying the terms of a decree.

The appellant has for the first time raised a further objection in this Court, that section 6 of the Impartible Estates Act is a bar to the execution of the decree against any villages in the estate, the consent of the Collector to the creation of a charge upon the estate, in respect of debt incurred for the payment of land revenue, which that section requires, not having been obtained. This was a matter which might have been taken into consideration in framing the decree itself. Neither was this done, nor was an appeal against the decree preferred, nor did the appellant even raise the point before the lower Court in the execution petition.

In all ordinary circumstances, therefore, it would be necessary to disallow it, and to adhere to the general principle that an executing Court cannot inquire into the validity of the decree. But there is a class of cases to which, I think, these considerations do not apply, namely, where execution of the decree would involve the infraction of a provision of law enacted in the public interest. The consideration that the parties may not have raised the point does not apply, because it may not have been in their interest to do so; and however far the doctrine that the executing Court should enforce the decree as it stands may be pushed, it cannot extend to an enforcement which involves breach of such a

(1) (1922) I.L.R., 44 All., 258.

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provision. It is the duty of the Court, however and whenever such a consequence becomes apparent to it, to stay its hand. It is of course otherwise when the provision of law is designed to protect the interests only of the class of persons to whom the judgment-debtor belongs, so that it may be dispensed with without infringing any public right or public policy. (Maxwell on Interpretation of Statutes, 6th Edition, page 678.)

This principle has been applied in a Madras case, *Raja of Vizianagara* v. *Dantivada Chelliah* (1), where the Maharaja of Vizianagram obtained a decree for the sale of a land under a mortgage. After the decree was passed it came to light that the land was a service inam, being the emoluments attached to the office of the village carpenter. Section 5 of the Madras Hereditary Village Offices Act (III of 1895) declares that such emolument shall not be liable to be transferred or encumbered in any manner whatsoever, nor shall any Court attach or sell them. It was contended that notwithstanding this prohibition, the decree for sale must be carried out. The learned Judges (SUBRAHMANYA AYYAR and SANKARAN NAYAR, JJ.), held that if the interdiction upon alienation were merely for the benefit of particular persons, it might be waived; but where the prohibition had some object of public policy in view the rule was to enforce the prohibition literally and strictly. Finding that section 5 had been framed on considerations of such a policy, they declined to order the sale. The same principle underlies the decision in *Vasanji Haribhai* v. *Lallu Akhu* (2), where a mortgage suit was brought in respect of a land held upon a certain special tenure without obtaining the Collector's sanction, as required by law, and the decree was held to be void for that reason.

(1) (1905) I.L.R., 28 Mad., 84.

(2) (1885) I.L.R., 9 Bom., 285.

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The distinction between a rule of law founded upon general policy and a rule enacted for the benefit of persons in the situation of the judgment-debtor is brought out in *Mayan Pathuti* v. *Pakuran*(1), where the question which arose was whether a sale under a mortgage decree in contravention of section 99 of the Transfer of Property Act (now Order XXXIV, rule 14 of the Code of Civil Procedure) was void. It was held that the object of the rule being to protect only persons concerned with the right to redeem mortgaged property, it could not be held to be void. For another instance of the effect of the introduction of a provision of law founded upon public policy, reference may be made to *Lakshmi Bibi Kujrani* v. *Atal Bihary Haldar*(2), where the Chota Nagpur Tenancy Act, 1908, came into force between the passing of the preliminary and final decrees in a mortgage suit. The Act disabled the Courts from passing a decree or order for the sale of the right of a ryot in his holding, and it was held that neither should the final decree have been passed, nor, if passed, should the property in question have been sold in execution. A plea of estoppel against the judgment-debtor was urged, but the answer made to it was that he could not be estopped from bringing to the notice of the Court what the Court must be taken to have known of itself, that there was a distinct provision of law which prevented the sale of the property. A Full Bench of the Allahabad High Court had held to the same effect upon the general question in *Katwari* v. *Sita Ram Tiwari*(3). *Raja Ramachandra Suru Harischandra Deo Garu* v. *Akella Venkatalakshminarayana*(4), is a case under section 4 of the Impartible Estates Act, which prohibits a proprietor from alienating any portion of the

(1) (1899) I.L.R., 22 Mad., 347.
(2) (1913) I.L.R., 40 Calc., 534.
(3) (1921) I.L.R., 43 All., 547.
(4) (1919) 37 M.L.J., 65.

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estate except for family necessity. The learned Judges refer to the policy underlying the Act, and decide that a mortgage decree for sale is unenforceable unless the terms of section 4 are satisfied. Another case under the same section is *Venkatalingama* v. *Arunachalam Chettiar*(1), decided by my learned brother and KRISHNAN, J. There however no question of refusing to enforce the decree arose, as it was a money decree but it was held that the decree-holder could not proceed against the estate unless he showed that the debt was binding on the family.

The provision of law, which, it is said, will be infringed by the sale directed under the decree is section 6 of the Madras Impartible Estates Act II of 1904. It lays down that

> "the proprietor of an impartible estate shall be incapable of alienating or binding by his debts such estate or any part thereof beyond his own life-time for the payment of land revenue due to Government, unless he shall have first obtained the consent in writing of the Collector of the district in which the estate is situated."

The Act of which this section forms part applies, as the schedule shows, to a large number of estates throughout the Madras Presidency. Besides section 6, section 4, as I have already mentioned, also imposes a restriction upon the power of alienation by the proprietor for the time being, and it cannot be doubted that the object of the Act is the preservation of these estates in the hands of successive heirs, as a measure of public policy. Now if section 6 incapacitates a proprietor from alienating the estate or any part of it, or binding it by his debts, beyond his own life-time, for the payment of land revenue, it is clear, I think, that he cannot do this indirectly by failing to pay the land revenue with the

(1) (1924) 19 L.W., 132.

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result that, after his death, the estate becomes bound in respect of a liability incurred on his behalf by a person interested to pay it. Under section 69 of the Contract Act a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other. The illustration furnished to this section affords a curiously close parallel to the present case; and there can be no question, I think, that, as soon as the decree-holder paid the arrears of land revenue, his right to reimbursement became a debt due to him from the Zamindar. (Cf. section 35 of the Madras Revenue Recovery Act, II of 1864, which makes such a sum, when paid by a *bona fide* mortgagee or other incumbrancer "a debt from the defaulter"). For that debt, now that the Zamindar who incurred it is dead, the estate cannot be proceeded against. It can be of no avail to urge that section 6 does not impose an absolute bar, inasmuch as the bar may be removed by the consent in writing of the Collector. That consent was not obtained, and the prohibition accordingly stands good. I conclude therefore that the relief prayed for in the execution petition of 26th July 1924, and allowed by the learned Subordinate Judge in his order under appeal must be refused, and I would allow the Civil Miscellaneous Appeal and dismiss the petition. I agree in making no order as to costs.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

SIVARAMA MUDALIAR (COMPLAINANT), PETITIONER,

v.

MUTHANNANAIENGAR (ACCUSED), RESPONDENT.*

1927, February 4.

Madras Local Boards Act (XIV of 1920), ss. 166 (1) *and* 207—*Liability of licence-holder for act of his servant—Person licensed to ply car for hire on specified roads—Conductor employed by him plies for hire on road not covered by licence—Employer charged under ss.* 166 (1) *and* 207 *of the Madras Local Boards Act—Plea, act was done through conductor's ignorance and employer was unaware of act—Principle applicable—Act of servant is act of master.*

Where a person was licensed under the Madras Local Boards Act to ply his motor car for hire on certain specified roads, and a conductor employed by him plied the car for hire on a road not covered by the licence and the employer was charged with an offence under section 166 (1) of the Madras Local Boards Act, punishable under section 207 of the same Act, and he pleaded that the conductor plied the car on that road through ignorance and that he himself was not aware of the servant's act,

Held, that the principle to be applied in the case was that which applied in the case of other licence-holders, such as holders of abkari licences and licences under the City Police Act; that the licence-holder having undertaken to conform to the terms of the licence and to be responsible that no breach of it took place, it was the licence-holder who did everything that was done under cover of the licence, that the act of the servant of a licence-holder was the act of his master, and that the licence-holder was in law responsible for all that his servant did. 1 Weir, 647, *Velayuda Mudali* v. *King-Emperor*, (1920) I.L.R., 43 Mad., 438, *Queen-Empress* v. *Tyab Ali*, (1900) I.L.R., 24 B., 423, *Emperor* v. *Babu Lal*, (1912) I.L.R., 34 All., 319, *Emperor* v. *Jwala Prasad*, (1923) I.L.R. 45 All., 642, referred to

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to

* Criminal Revision Case No. 855 of 1926.

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revise the judgment of the Court of the Taluk Magistrate of Tiruppattur, dated 5th August 1926, in Calendar Case No. 197 of 1926.

V. L. Ethiraj and *E. Antony Lobo* for petitioner.

R. N. Aingar for *Public Prosecutor* for the Crown.

JUDGMENT.

This petition is against the acquittal of the counter-petitioner by the Taluk Magistrate of Tiruppattur. The petition is presented on behalf of the President, District Board, Ramnad. The counter-petitioner holds from the District Board a licence, Exhibit I, dated 15th April 1926, for plying motor vehicles for hire. The licence limits the plying to certain roads and explicitly prohibits the plying of vehicles for hire on roads Nos. 17 and 18. It was admitted by the counter-petitioner before the lower Court that a conductor employed by him plied his car for hire on road No. 17. Obviously then there was a breach of the licence. The defence of the counter-petitioner in the lower Court was that the conductor plied the car on that road through ignorance and that he himself was not aware of the act. No evidence was taken and, on this plea alone, without any evidence as to whether it was true or not, the lower Court accepted the defence and, holding that the licensee is not responsible for the acts of his conductor, has acquitted him. The District Board contends that the lower Court's view of the law is fundamentally wrong and I must agree.

The licence does not cover plying on road No. 17. Therefore the plying on that road was without a licence. This was an offence under section 166 (1) of the Local Boards Act, punishable under section 207. The plying was under cover of a licence given to the counter-petitioner and was by his employee. Without that licence the counter-petitioner would not be plying his car at all.

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Prima facie he is responsible in law for whatever plying his car does under cover of his licence. It is the counter-petitioner who has the licence to ply and it is therefore he who plies. It is not open to him to interpose as many persons as he likes between himself and the person who takes the fares or drives the bus and then argue that it is they and not he who plied the car. It is to my mind *prima facie* obvious that it was the counter-petitioner who plied the car without a licence on the road.

The *ratio decidendi* in the case *In re Krishnaswami Iyer*(1), relied on by counter-petitioner does not apply here. The question here is not whether counter-petitioner caused or permitted his car to ply without a licence because it is really he himself who plied it. The principle to be applied is that which is applied in the case of other licence-holders, for example, holders of Abkari licences (see 1 Weir, 647), holders of licence under the City Police Act. See *Velayuda Mudaly* v. *King Emperor*(2). See also *Queen Empress* v. *Tyab Alli*(3), *Emperor* v. *Babu Lal*(4), and *Emperor* v. *Jwala Prasad* (5). The licensees are in law responsible for all that their servants do. The principle is that the act of the servant of a licensee is the act of his master, and that it is the licensee who does everything that is done under cover of the licence. It is he who undertakes to conform to the terms of it and to be responsible that no breach of it takes place. I therefore set aside the acquittal order of the lower Court and direct that the counter-petitioner be re-tried in the light of the above remarks.

B.C.S.

(1) (1919) 10 L.W., 399.
(2) (1920) I.L.R., 43 Mad., 438.
(3) (1900) I.L.R., 24 Bom., 423.
(4) (1912) I.L.R., 34 All., 319.
(5) (1923) I.L.R., 45 All., 642.

APPELLATE CRIMINAL.

Before Mr. Justice Curgenven.

1927. April 21.

K. SRINIVASAMOORTHI (P.W. 5), PETITIONER,

v.

NARASIMHULU NAIDU (P.W. 1), RESPONDENT.*

Seized property—title doubtful—To whom to be returned—Sec. 520, Criminal Procedure Code (Act V of 1898)—"Court of Appeal, confirmation, reference or revision"—meaning of—if specifies nature of application to such Courts—provisions regarding appeals—if applicable.

Where the title to seized property is doubtful, it should be returned to the person from whom it was seized, unless there are special circumstances which would render such a course unjustifiable.

The Collector of Salem, (1873) 7 M.H.C.R., 233; *In re Pandharinath Pundlik Revankar*, (1916) I.L.R., 40 Bom., 186, referred to.

The phrase "Court of appeal, confirmation, reference, or revision" in section 520 of the Code of Criminal Procedure designates only the Courts, which can "modify, alter or annul" an order passed under the preceding sections of the code, and does not specify the nature of the application which has to be made to them. Such an application cannot be treated as an appeal attracting all the provisions regarding appeals.

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 Additional District Magistrate of Tanjore in Criminal Appeal No. 18 of 1926 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Tanjore in C.C. No. 91 of 1926.

The facts are shortly:—

One Vijiaraghavulu, the accused in Criminal Case No. 91 of 1926 committed theft of certain currency

* Criminal Revision Case No. 925 of 1926.

notes, including a thousand rupees note from the respondent (P.W. 1). The accused cashed the thousand rupees note in the Central Co-operative Bank in Mysore and got small notes. The petitioner (P.W. 5) got a thousand rupees note from the bank in exchange for small notes. The note that was given to the petitioner happened to be the self-same note that was handed in by the accused into the bank. In the course of the investigation, the police seized the thousand rupees note in the possession of the petitioner as concerned with the offence of theft. After enquiry, the accused was convicted and the Sub-Magistrate directed the note to be returned to the respondent (P.W. 1). Against this order a petition was presented to the Additional District Magistrate of Tanjore who held that that petition was an appeal and that it was time-barred and dismissed it. Against that order of the Additional District Magistrate the petitioner filed the present Criminal Revision Petition to the High Court.

B. Sitarama Rao for petitioner.

A. Srinivasa Ayyangar for respondent.

JUDGMENT.

The question which arises on the merits of this case is whether a stolen currency note for Rs. 1,000 should be returned to the complainant, who lost it by the theft, or to the innocent third party, from whom it was recovered after passing through a bank. Before however coming to the merits, a question of procedure arises. The Stationary Sub-Magistrate of Tanjore who disposed of the theft case, directed that the note should be returned to the complainant. The subsequent recipient, now the petitioner, appealed against this decision to the District Magistrate, and the case was disposed of by the Additional District Magistrate of Tanjore. He held that an appeal lay, under the

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terms of section 520, Code of Criminal Procedure, to the District Magistrate, but that the petitioner's appeal was time-barred, and no satisfactory explanation had been given of the delay. He therefore dismissed it, holding at the same time that he could not treat the application as a revision petition.

A revision petition is now preferred against this decision to this Court.

It appears to me doubtful whether an application made under section 520 to a "Court of appeal, confirmation, reference, or revision" is in the nature of an appeal. The phrase I have quoted seems only to designate the Courts which can "modify, alter or annul" an order passed under the preceding sections, and not to specify the nature of the application which has to be made to them. For analogous powers possessed by superior Courts reference may be made to section 125, Code of Criminal Procedure, relating to the cancellation of a bond given for good behaviour, and to section 195, Code of Criminal Procedure, relating to sanction to prosecute. It seems to me that in all these cases the Court designated has been given special jurisdiction to pass what orders it thinks fit, and that it is not necessary to read into the section the provisions regarding appeals. I have been unable to obtain any light upon this point from decided cases, since neither in *Kunshi Ram* v. *The Crown*(1) nor in *In re Arunachala Tevan*(2) did the question arise in its present form; in the one the original order was passed by the Appellate Court; and in the other it was found possible to treat the proceeding as part of the criminal appeal. In these circumstances I hold that the application to the Additional District Magistrate was not an appeal and therefore not time-barred. He had jurisdiction to entertain it, and his

(1) (1923) I.L.R., 4 Lah., 49. (2) (1923) I.L.R., 46 Mad., 162.

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refusal to do so, in my view, enables this Court to entertain this Criminal Revision Petition.

On the merits, the principle which I am disposed to adopt, against the adoption of which I have not been shown any authority, is, that where the title to seized property is doubtful, it should be returned to the person from whom it was seized, unless there are special circumstances which would render such a course unjustifiable. In the present case, there is no doubt that the petitioner received the note in all good faith, and the title is not so much doubtful as pretty evidently with him, as property to a currency note passes by mere delivery. That was the principle adopted in an old Madras case, *The Collector of Salem*(1) and *In re Pandharinath Pundlik*(2). The facts of the latter case were in essentials similar to those here. For the complainant it has been suggested that it is not for this Court in revising the Sub-Magistrate's order to interfere with his discretion. This argument receives no support from the terms of section 525, Code of Criminal Procedure, and since revision of the order may save subsequent litigation, I think that there is ample ground for revising it. Accordingly I allow the Criminal Revision Petition, set aside the order of the lower Courts and direct that the Sub-Magistrate recover the currency note from the complainant (P.W. 1) and deliver it to the petitioner here (P.W. 5).

B.C.S.

(1) (1873) 7 M.H.C.R., 233. (2) (1916) I.L.R., 40 Bom., 186.

SPECIAL BENCH.

Before Sir William Phillips, Kt., Officiating Chief Justice, Mr. Justice Ramesam and Mr. Justice Beasley.

1927, September 5.

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

v.

MESSRS. BINNY & Co., ASSESSEE.*

Indian Income-tax Act (XI of 1922), sec. 50—"Recovered," meaning of.

The words "tax was recovered" in section 50 of the Indian Income-tax Act (XI of 1922) mean "tax was received by the Government" and not either "tax was refunded" to the assessee in the United Kingdom under section 27 of the Finance Act, 1920 (10 and 11 Geo. V, Ch. 18), or "tax was recovered by coercive process." Hence any claim for refund of tax claimable under section 49 of the Indian Income-tax Act, should, as provided by section 50 of the Act, be made within one year from the last day of the year in which it was received by or paid to the Government in India.

CASE stated under section 66 (1) of Act XI of 1922 by the Commissioner of Income-tax, Madras, in the matter of Messrs. Binny & Co., Limited (London), by agents Messrs. Binny & Co., Madras.

The facts as stated by the Commissioner of Income-tax in his Reference to the High Court were as follow:—

"The petitioners Messrs. Binny & Co. (London) were assessed to Indian income-tax for the years 1922–23 and 1923–24 and 1924–25. The tax due for 1922–23 was paid finally in April 1923, that for 1923–24 in November 1923 and that for 1924–25 in September 1924. On 17th December 1924, Messrs. Binny & Co. obtained from the United Kingdom Revenue authorities the certificate required by section 49 showing the rate of tax levied in the United Kingdom and the rate of relief obtained

* Referred Case No. 7 of 1926.

there. On 29th August 1925 they applied to the Income-tax Officer, First Circle, Madras, for the double income-tax relief from Indian Revenue for 1922–23 and on 4th September 1925 for the relief for 1923–24. For 1924–25 the application for relief was made on 8th September 1925. It was granted, but relief for 1922–23 and 1923–24 was refused on the ground that the applications, dated 29th August and 4th September, were made more than one year after the last day of the year on which the taxes for 1922–23 and 1923–24 had been paid. In the view of the Income-tax Department the claims for these years should have been made before 31st March 1925. They were thus late about 5 months."

ON THIS REFERENCE—

Vere Mocket for assessee.—The word "recovered" in section 50 of the Income-tax Act refers to the repayment of tax in the United Kingdom referred to in section 49. Hence the word "recovered" means "refunded" to the assessee under section 27 of the Finance Act of 1920. Section 50 has not used the words "received" or "paid." See also section 59 (2) (*b*). The ordinary meaning of "recovered" according to dictionaries is "taking back" what was originally paid. One other meaning for the word "recovered" that can be suggested is "recovered by compulsory process." If either of these meanings is right I am within time.

M. Patanjali Sastri for Referring Officer.—Section 50 covers not only section 49 but also section 48 and we must give such a meaning to the word "recovered" as would be applicable to section 48 also. The meaning suggested by the appellant cannot be applied in the case of section 48. The Income-tax Act uses the words "paid," "received," "collected," "recovered," "levied," "adjusted," as synonymous. See sections 18 (8), 41, 44-A, 8, 68 (*a*) 2nd proviso. All these refer to the initial voluntary payment, receipt or collection, etc., without any coercive process. The assessee had three months after obtaining the certificate in England to apply to the Income-tax authorities here, but he mistook his remedy.

JUDGMENT.

What we are asked to determine is the meaning of the words "tax was recovered" in section 50 of the Indian Income-tax Act. It is contended by the assessee

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that the word "recovered" which ordinarily has the meaning of taking back must refer to the repayment of tax in the United Kingdom referred to in section 49 and that the words "tax was recovered" must be read as meaning "tax was refunded to the assessee under the provisions of section 27 of the Finance Act of 1920." Unfortunately for this contention we see that section 50 is applicable not only to section 49 but also to section 48; and if we are to apply this meaning of the word "recovered" to section 48, it would mean that when a person had obtained a refund under section 48 he is given under section 50 another year within which to apply for that same refund. This certainly makes nonsense of the two sections. The word "recovered" does not necessarily mean the actual taking back of what has been given as is obvious from its use throughout the Income-tax Act. In section 18 (8) which deals with "deduction" of tax in advance it is observed that "the power to levy by deduction under this section shall be without prejudice to any other mode of recovery," implying thereby that deduction is one mode of recovery. Similarly, under section 41 tax is "recoverable" from the Court of Wards, Administrator-General, etc., and there it does not mean "taken back." It is suggested that tax can only be "recovered" by coercive process. The Act does provide for recovery by coercive process but even then there is no taking back of what has been given any more than when the tax is received by voluntary payment. Possibly there is an implication in the word "recover" that the tax is a sum which has to be deducted out of the income as really belonging to Government, and in that sense the word "recovered" would bear the meaning of "taking back." Section 44 (*a*) is also a very strong argument against the assessee's contention as to the meaning of the word

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"recovered." We are therefore satisfied that the words "tax was recovered" mean "tax was received by the Government."

It has been pointed out to us that this interpretation may cause hardship in individual cases where there has been delay on the part of the income-tax authorities in England in making the refund there, such delay not being due to the default of the assessee. We would point out that this hardship can only be obviated by an amendment of section 50 and we are of opinion that this should be done by giving the Income-tax Commissioner power to extend the time in suitable cases.

The petitioner will pay the costs of this application, i.e., Counsel's fee Rs. 250.

Moresby & Co., Attorneys for assessee.

N.R.

SPECIAL BENCH.

Before Sir William Phillips, Kt., *Officiating Chief Justice, Mr. Justice Ramesam and Mr. Justice Beasley.*

1927, September 5.

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

v.

YAGAPPA NADAR, ASSESSEE.*

Indian Income-tax Act (XI of 1922), sec. 2 (1) (b)—Agricultural income—When income derived from toddy is such income.

Income derived from toddy is agricultural income when it is received by the actual cultivator, whether owner or lessee of the land on which the trees grow. If the income is obtained by a person who has not produced the trees from which the toddy is tapped, or has not done any agricultural operation whereby

* Referred Case No. 16 of 1926.

COMMISSIONER OF INCOME-TAX, MADRAS, v. YAGAPPA NADAR.

those trees have been raised, it is not agricultural income within the meaning of the Act.

CASE stated under section 66 (1), Act XI of 1922, by the Commissioner of Income-tax, Madras, referring the following question :—

"Whether toddy extracted from coconut trees situate on lands assessed to Government revenue is or is not agricultural income within the meaning of section 2 (1) and whether the Income-tax Act applies to profits derived from the sale of such toddy?"

The necessary facts are given in the judgment.

K. S. Jayarama Ayyar (with *S. Nagaraja Ayyar*) for assessee.—The income made by drawing and selling toddy even by a contractor who is not the owner or lessee of the land on which the trees stand is "agricultural income" and not "business" income within the meaning of the Income-tax Act. See Maclean's Manual, Vol. III, page 906, as to the process of producing and extracting toddy. Rubber is treated as agricultural product. See Law of Income-tax, page 90, by V. S. Sundaram. Likewise sugarcane and tea after cutting. "Agriculture" is defined in *Panadai Pathan* v. *Ramasami Chetti*(1). If when the owner himself raises toddy it is agricultural product, it is equally so in the hands of a lessee of trees.

[PHILLIPS, OFFG. C.J.—The former is a cultivator within section 2 of the Act and the latter is not. How can a process which eventually destroys the trees be classed as agricultural income?]

Both are agriculturists. See V. S. Sundaram's Law of Income-tax, page 82. All the facts of this case are not fully given by the Commissioner. I am not only the owner of some land on which some of the trees stand but I am also the lessee of some trees of another and I water both classes of trees for producing juice. There cannot be double taxation for the same income—*Chief Commissioner of Income-tax* v. *Zamindar of Singampatti*(2). In this case there is a tax on the land; there is also a tax on the trees, and I am now sought to be taxed with income-tax in respect of the income derived by selling the juice of the trees. Tree tax is said to be revenue in the Abkari Act. Mere exposure to air in order to make the juice ferment

(1) (1922) I.L.R., 45 Mad., 710. (2) (1922) I.L.R., 45 Mad., 518.

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is not any industrial operation. If there is no lease of the land in my favour there is at least a lease of the trees which are movables. I am not a mere licensee to be taxed.

M. Patanjali Sastri for Referring Officer.—The onus is on the assessee. His income is not an agricultural income. He does nothing by way of agriculture to get the juice. It is the landlord that does it. In his hands it may be agricultural income. The assessee is not even the lessee of the land; he is only a licensee and his income from juice is taxable; *W. Donald* v. *A. Thomson*(1). For the difference between a lease and a licence, see *Secretary of State for India* v. *Karuna Kanta Chowdhry*(2); if at all the assessee waters the trees it must be due to some arrangement by him with the owner; *Hornsby* v. *Maynard*(3).

JUDGMENT.

The question referred by the Income-tax Commissioner is

"Whether toddy extracted from coconut trees situate on lands assessed to Government revenue is or is not agricultural income within the meaning of section 2 (1) and whether the Income-tax Act applies to profits derived from the sale of such toddy?"

It is contended for the petitioner that he as lessee of the trees is entitled to treat the income derived from the toddy which is produced from these trees as agricultural income. The juice which by contact with air in time becomes toddy is a product of these coconut trees and it is contended that as such it is an agricultural product. That undoubtedly is so, and the income derived therefrom by the person who has produced that product by agricultural operations would be agricultural income, but it does not at all follow that if he sells the juice to another person and that person makes an income by again selling that product that the latter income is agricultural income. Ordinarily, it would certainly not

(1) (1922) 8 Tax. Cas., 272. (2) (1908) I.L.R., 35 Calc., 82 (F.B.) at 98. (3) [1925] 1 K.B., 514 at 523.

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be agricultural income unless it could be shown that the second seller had obtained his income by agriculture, that is to say, he must show that he has either as owner or as lessee done some agricultural operation by reason of which he becomes possessed of the toddy and therefore is entitled to treat the proceeds as income from agriculture. It is contended here that the petitioner is the lessee of the trees, but admittedly not of the land on which they stand. It is very doubtful whether it is possible to have a lease of the trees without the land on which they stand. Under the Transfer of Property Act leases are only in respect of immovable property and no instance of a lease of movable property has been suggested to us. No interest in the land has been transferred here and it would appear that what the petitioner has obtained is a mere licence to tap the trees and draw the juice. If that is so, the mere fact that he has to water the trees (and this is not proved to be the case) shows only that the watering is one of the conditions of his licence and not an act whereby the agricultural produce had been raised, for that was raised before he obtained his licence. As the facts of the case have not been put before us by the Commissioner, we must give a general answer as follows :—

"Income derived from toddy is agricultural income when it is received by the actual cultivator, whether owner or lessee of the land on which the trees grow. If the income is obtained by a person who has not produced the trees from which the toddy is tapped, or has not done any agricultural operation whereby those trees have been rasied, it is not agricultural income within the meaning of the Act."

Counsel's fee Rs. 250 will be paid according to the result of the disposal of the petition.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir William Phillips, Kt., Officiating Chief Justice, Mr. Justice Beasley and Mr. Justice Anantakrishna Ayyar.

1927, September 12.

GANSHAMDOSS NARAYANDOSS (PLAINTIFF), APPELLANT,

v.

GULAB BI BAI (LEGAL REPRESENTATIVE OF 1ST DEFENDANT), RESPONDENT.*

Sec. 187, *Indian Succession Act* (X *of* 1865), *corresponding to sec.* 213 *of Act XXXIX of* 1925—*Suit by heir-at-law for possession—Resistance by defendant relying on unprobated will in his favour—Bar by section.*

A defendant resisting a claim made by the plaintiff as heir-at-law cannot rely in defence on a will executed in his favour at Madras in respect of property situate in Madras, when the will is not probated and no letters of administration with the will annexed have been granted. Section 187 of the Indian Succession Act (X of 1865) corresponding to section 213 of Act XXXIX of 1925 is a bar to every one *claiming* under such a will, whether plaintiff or defendant; *Lakshmamma* v. *Ratnamma*, (1915) I.L.R., 38 Mad., 474, approved. *Caralapathi Chunna Cunniah* v. *Cota Nammalwariah*, (1910) I.L.R., 33 Mad., 91, overruled. The section is no bar to proving the will for other purposes.

APPEAL from the judgment of the Hon'ble Mr. Justice KUMARASWAMI SASTRI, dated 29th October 1924, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 755 of 1920.

The facts are given in the Referring Order of CURGENVEN, J.

This Appeal coming on for hearing, the Court (COUTTS-TROTTER, C.J., and CURGENVEN, J.) made the following

* Original Side Appeal No. 16 of 1925.

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ORDER OF REFERENCE TO A FULL BENCH:—

COUTTS-TROTTER, C.J.—The plaintiff in this case is one Ganshamdoss Narayandoss, and he sued for the recovery of a house No. 2/100, Perumal Mudali Street, impleading originally one Saraswathi Bai, who is now dead, and subsequently putting on the record Gulab Bi Bai, her legal representative. The property belonged to one Kaveri Bai, and it may be taken for the purposes of this reference that in the absence of a will, the plaintiff, Ganshamdoss Narayandoss, would be entitled to succeed to Kaveri Bai in preference either to Saraswathi Bai or Gulab Bi Bai. The claim is resisted on the ground that Kaveri Bai left a will in favour of Saraswathi Bai. That will was not probated, and the question is whether it can be used to defeat the plaintiff's claim.

The plaintiff by paragraph 5 of his plaint alleges that Kaveri Bai died intestate on the 16th of October 1908. In my opinion that was an unnecessary allegation. But it resulted in the first issue in the suit being framed as follows: "Did Kaveri Bai die intestate as alleged in paragraph 5 of the plaint or after making her last will and testament as alleged in paragraph 3 of the written statement?" The learned Judge obviously attached importance to the form of the pleading and the issue, because he says this: "In the present case the plaintiff comes to Court saying that Kaveri Bai died intestate and that he is the heir under Hindu law claiming by intestate succession." In my opinion that burden was not one which lay upon him and the allegation in the pleading was an unnecessary averment. I think that all he had to do was to prove that he was the next of kin of the last owner of the property, Kaveri Bai, and thereupon the burden of proof would be cast upon the defence to show that the defendant had a better title. It would be to my mind wholly wrong in this country to allow the burden of proof to be shifted by a redundant averment in the pleading or by an incautious acceptance of an issue framed upon that averment. I am therefore of opinion that it would be wrong in determining where the burden of proof lies in this case to rest it upon the form of pleading and the issue and that we ought to consider where the burden lies in law.

The learned Judge held that an unprobated will could be used to defeat the plaintiff's claim and reiterated the view which

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he had expressed on the subject in *Shadagopa Naidu* v. *Thirumalaswami Naidu*(1). The doctrine is alleged to be derived from the case of *Janaki* v. *Dhanu Lall*(2). I do not wish to embarrass the Full Bench by comments on the cases which will be discussed before them. But I think it is very doubtful whether *Janaki* v. *Dhanu Lall*(2) really supports the proposition contended for, though it was taken to establish that proposition in *Caralapathi Chunna Cunniah* v. *Cota Nammalwariah*(3). I confess myself unable to ascertain what exactly was laid down in *Parthasarathi Iyer* v. *Subbaraya Gramani*(4). On the other hand, the observations in *Lakshmamma* v. *Ratnamma*(5) seem clearly to tend in the opposite direction. My own view would be not merely that an unprobated will could not be used to establish title which is clearly forbidden by section 187 of the Succession Act but that it could not be used as a weapon of defence when the onus was clearly thrown upon the defence. But I realize the difficulty created by section 25 of the Succession Act which defines intestacy in the following words:—

"A man is considered to die intestate in respect of property of which he has not made testamentary disposition which is capable of taking effect."

Where the evidence establishes a valid execution of a will, it is difficult to say that an unprobated will is not capable of taking effect, because it is obvious that as soon as probate is obtained it can take effect. The position would then be that the burden would be thrown upon the plaintiff by law, and not by the accident of the way in which he framed his pleading, of proving that the testatrix died intestate and that applying the definition of section 25 this testatrix did not die intestate. The practical inconvenience of putting an executor in the position of being able to refuse to take out probate and keep the presumptive heir-at-law at arm's length by an unprobated will requires no comment. In my opinion the matter had better be settled by a reference to a Full Bench and the question referred will be as follows:—

"Can a defendant resisting a claim made by the plaintiff as heir-at-law rely in defence on a will executed in his favour at Madras in respect of property situate in Madras when the

(1) (1915) 18 M.L.T., 129.
(2) (1891) I.L.R., 14 Mad., 454.
(3) (1910) I.L.R., 33 Mad., 91.
(4) (1923) 45 M.L.J., 175.
(5) (1915) I.L.R., 38 Mad., 474.

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will is not probated and no letters of administration with the will annexed have been granted?"

CURGENVEN, J.—This is an appeal against the judgment of Mr. Justice KUMARASWAMI SASTRI in C.S. No. 755 of 1920 on the file of this Court. The property in suit consists of a house and site in Georgetown, Madras, valued in the plaint at Rs. 12,700. It belonged to one Kaveri Bai, sister of the plaintiff's father, and the plaintiff claimed to recover possession of it as her heir. The claim was resisted by a half-sister of Kaveri Bai's, named Saraswathi Bai, who obtained possession upon Kaveri Bai's death in 1908 and who set up a will of Kaveri Bai's as the foundation of her title. Saraswathi died during suit, and her sister, Gulab Bi Bai, was brought on the record as her legal representative. The learned Judge has found in favour of the will and dismissed the suit, and the plaintiff appeals.

The will was attacked on the grounds (*a*) that it was not genuine, (*b*) that it was not executed in accordance with law and (*c*) that being unprobated the defendant could not rest any claim upon it. Point (*a*) was given up in appeal. Points (*b*) and (*c*) remain for consideration.

The document purports to bear the mark of Kaveri Bai, to which is subscribed a declaration that it was "signed by the testatrix and acknowledged by her to be her last will and testament in the presence of us present at the same time who at her request and in our presence and in the presence of each other have subscribed our names as witnesses." There follow four signatures, the first in order being that of Mr. Seshacharlu, the Vakil who, as the evidence shows, prepared the will. Mr. Seshacharlu died not long afterwards, and although the genuineness of his signature is fully proved by his clerk, it cannot, I think, be presumed that it amounted to a valid attestation. Neither of the two reputed attestors who have been examined speaks to his presence at the execution of the document, and one would have expected that, had he been present, the words "Mark of Kaveri Bai" would have been in his hand. It is not improbable that he signed as the author of the document. Of the other three persons whose signatures appear, two, Rangildoss and Poolji Vias, deposed respectively as defendants' 1st and 2nd witnesses. The learned Judge has alluded to the circumstance of Gulab Bi Bai's conversion to Muhammadanism as a reason

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for suspecting that any bias which these witnesses may have would be against her, so that, if evidence of valid attestation of the will can be derived from their statements, it may be accepted with little hesitation. Rangildoss stated that he saw Kaveri Bai put her mark, that he was asked to sign below and that he did so. That constitutes a valid attestation under section 50 of the Succession Act. The account given by the other witness, Poolji Vias, is this: He was called to the house by the executor named in the will, Rancholedoss; Kaveri Bai was lying in bed ill. Rancholedoss told him that "it was the will of Kaveri Bai," and asked him to attest it. Kaveri Bai also said that he should sign, and he signed. He does not remember whether the testator's mark was already there, but it may be inferred from an answer which he gives to another question that Rangildoss's signature was already on the document, and there is Rangildoss's evidence that Kaveri Bai put the mark in his presence. Thus it is to be gathered from what Poolji Vias says that Kaveri Bai had already executed the will, that a statement was made to him in her presence that the will was hers, and that both she and her executor asked the witness to attest it and he attested it. It remains for consideration whether this satisfies the requirement of section 50 that an attesting witness, where he has not actually seen the testator, either by himself or by another under his direction, sign or affix his mark, must have received from the testator a personal acknowledgment of his signature or mark. A "personal acknowledgment" of execution need not necessarily, I think, be restricted to an express statement to that effect, but may include words or conduct, or both, on the part of the testator which may be construed unequivocally as such an acknowledgment. Here we have not only a statement made in Kaveri Bai's presence that the will was hers, and a request to attest it—which evoked no disclaimer from her—but also her own request to the witness to sign. It appears to me that she thus conveyed to the witness an impression that she avowed execution no less certain than if she had made the avowal in terms. It was thus, by implication, an acknowledgment. It was a personal acknowledgment because the impression was created directly by her own words and conduct. I conclude, therefore, in agreement with the learned Judge, that this witness also validly attested the will, which has thus, so far execution and attestation are concerned, been established.

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The question now remains whether Saraswathi or her legal representative (she died pending suit) can resist the plaintiff's claim without obtaining probate of the will. The plaint alleged that Kaveri Bai had died intestate, and it appears to me that such an allegation was necessary, because under Parts IV and V of the Succession Act an heir-at-law can only succeed in the event of an intestacy. But since there is a presumption that a person dies intestate unless a will be established, it lay upon the defendant to disprove the fact of intestacy by establishing the existence of a will. That, I think, was the course followed in this suit. The defendant proved that Kaveri Bai had executed a will, but that proof was adduced otherwise than by producing probate, and the question is whether, by such proof, the plaintiff's claim is defeated.

By section 25 of the Succession Act, a man is considered to die intestate in respect of property "of which he has not made a testamentary disposition which is capable of taking effect." Did Kaveri Bai make such a disposition? The answer, I think, is clearly "yes." She made a valid will, and even though that will be still unprobated, it was, and indeed still is, capable of giving effect to her intentions. That proposition has not been disputed. Thus she did not die intestate, and it appears to me to follow that any claim by an heir who would succeed upon an intestacy must necessarily fail.

So far as I can see, the only way in which the plaintiff could surmount this difficulty would be by showing that the will could not be established against him, in which case the Court would have to infer an intestacy. Recourse for this purpose has been had to section 187. This section provides that "No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction (in British India) shall have granted probate of the will under which the right is claimed." Clearly this does not amount to saying that a will may not be proved for any purpose otherwise than by producing probate, but only for the purpose of establishing a right as executor or legatee. But it is argued for the plaintiff that title to the property must vest in some one, that *prima facie* it vests in him, that only by proof of a superior title can his title be displaced, and that this section renders such proof inadmissible. His title must therefore prevail.

I would meet this agrument by saying that for the defendant to prove title in himself is not indispensable. He may

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plead, "I may not be able to prove my own title, but it will do if I show that title cannot vest in you, and to do this I have simply to establish the will." I cannot see that the plaintiff has any answer to this form of defence, if, as I am disposed to hold, his claim fails upon an adjudication against him upon the issue of intestacy. Once the intestacy has been found against, the plaintiff has no better claim than anyone else to oust the defendant, however infirm or incapable of proof may be her title, and upon this view it would be immaterial whether the defendant was (or represented) an executor or legatee, or was a mere third party or trespasser.

To hold that the intestacy could not be disproved by establishing the unprobated will would be to give section 187 an effect similar to that of section 49 of the Registration Act, according to which a document required to be registered, and which is unregistered, cannot be received in evidence. If that had been intended, I do not see why it was not expressed. It may then be said that the construction which I put upon the statute would lead to very inconvenient results. The argument, of course, cannot avail if, as I am compelled to find, the statute is clear. No doubt there may be cases in which an executor who fails to obtain probate causes loss and trouble to others. There being no period of limitation, it is possible for him to postpone indefinitely the settlement of claims upon the estate. On the other hand, the position would hardly be more satisfactory if, as in a case like the present, the testator's wishes could be rendered ineffectual by a mere omission to probate a perfectly good will.

I have not thought it necessary to discuss the case law, as the learned Judge has already done so, and as we have decided to refer the question to a Full Bench, I agree to the terms of the reference proposed.

ON THIS REFERENCE—

K. S. Krishnaswami Ayyangar (with *K. Bashyam* and *R. Purushotham Ayyangar*) for appellant.—Plaintiff as heir-at-law is entitled to succeed unless the defendant proves a better title either in himself or in third person and if the defendant can prove this only by claiming through a will to which the Indian Succession Act applies, he cannot do this unless he has obtained a probate of the will or letters of administration with the will annexed. See section 187

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of the Indian Succession Act (X of 1865) corresponding to section 213 of Act XXXIX of 1925. Merely showing that the deceased did not die intestate will not displace the plaintiff's *prima facie* title as heir-at-law. The defendant must also *establish* that under the will pleaded by him some one other than the plaintiff is entitled to the property. Section 187 enacts a rule of public policy just like section 49 of the Registration Act. The section is general in its wording and applies to anyone whether plaintiff or defendant if he has to make out his claim through such a will. It has been held in *Lakshmamma* v. *Ratnamma*(1), *Alamelammall* v. *Suryaprakasaroya Mudaliar*(2), *Venkatanarayana Pillai* v. *Subbammal*(3), C.S. No. 521 of 1919, *Parthasarathy Aiyar* v. *Subbaroya Gramany*(4), that the section bars even a defendant in such cases. See also *Achyutananda* v. *Jagannath*(5). *Caralapathy Chunna Cunniah* v. *Cota Nammalwariah*(6), which holds that a defendant is not barred is not good law as it is based on *Janaki* v. *Dhanu Lall*(7), which does not lay down any such proposition. *Manuel Louis Kunha* v. *Jnana Coelho*(8) and *Prosunno Chunder Bhuttacharjee* v. *Kristochytunno Pal*(9), do not lend any support to the defendant's contention and they are distinguishable on their facts and if at all they lay down the opposite view they are wrong.

C. Venkatasubbaramayya for respondent.—Section 187 bars only a *plaintiff* as he alone can be said to seek to *establish* his right as an executor or a legatee. This is the view taken of the section in *Caralapathy Chunna Cunniah* v. *Cota Nammalwariah*(6), and in the cases distinguished by the appellant. The section cannot apply to a defendant who wants to and can non-suit a plaintiff on the grounds that there is a valid will and that the plaintiff whose title as heir-at-law rests only on intestacy cannot therefore succeed. The cases already cited show that a will can be proved and acted upon even when no probate is produced, and that the defendant can show that under a will so proved, either himself or a third party has title to the property in suit.

(1) (1915) I.L.R., 38 Mad., 474. (2) (1915) I.L.R., 38 Mad., 988.
(3) (1909) 6 M.L.T., 116. (4) (1923) 45 M.L.J., 175.
(5) (1915) 21 C.L.J., 96. (6) (1910) I.L.R., 33 Mad., 91.
(7) (1891) I.L.R., 14 Mad., 454. (8) (1908) I.L.R., 31 Mad., 187.
(9) (1879) I.L.R., 4 Calc., 342.

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PHILLIPS, OFFG. C.J.

OPINION.

PHILLIPS, OFFG. C.J.—The question referred to us is: "Can a defendant resisting a claim made by the plaintiff as heir-at-law rely in defence on a will executed in his favour at Madras in respect of property situate in Madras when the will is not probated and no letters of administration with the will annexed have been granted?"

This question deals with the provisions of section 187 of the Indian Succession Act, X of 1865, which is to the effect that no right as legatee can be proved by a will of which probate has not been taken. It has been held by this Court in *Caralapathi Chunna Cunniah* v. *Cota Nammalwariah*(1) that this objection to proving title by an unprobated will applies only to a plaintiff and it was held

"that a defendant is not precluded by that section from relying upon a will as he is not seeking to establish a right as executor or legatee."

Janaki v. *Dhanu Lall*(2) was cited as authority for that proposition. On a reference to *Janaki* v. *Dhanu Lall*(2), with all respect, it seems very doubtful whether any such proposition is there put forward. In that case the first defendant had obtained a decree against the personal representatives of the deceased man who was said to have left a will, and subsequently the deceased's mother, who would have been his representative in the absence of a will, brought a suit to set aside that decree. It was then held that,

"though the executors can establish no right without taking probate, the existence of the will cannot be ignored for all purposes whatsoever."

It was also observed

"that the decision in *Prosunno Chunder Bhuttacharjee* v. *Kristochytunno Pal*(3) is applicable, and that the persons,

(1) (1910) I.L.R., 33 Mad., 91. (2) (1891) I.L.R., 14 Mad., 454.
(3) (1879) I.L.R., 4 Calc., 342.

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who took possession of Ghulab's estate upon his death, were liable to be treated by the creditor (first defendant) as his representatives even though themselves liable to be dispossessed by the executors on taking out probate."

It was, therefore, held that the first defendant's decree was not a nullity and it was open to him to prove that Ghulab left a will and, therefore, the plaintiff was not a person who could claim to set that decree aside. It was clearly in the minds of the Judges that the executors could establish no right without taking probate, and yet the existence of the will was in the circumstances allowed to be proved. That is not authority for the proposition that a defendant is not precluded from establishing a right under an unprobated will, as was held in *Caralapathi Chunna Cunniah* v. *Cota Nammalwariah*(1). I am strengthened in this view by the fact that *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal*(2) was relied upon by the learned Judges in *Janaki* v. *Dhanu Lall*(3). In that case no question was decided under section 187 of the Succession Act. It was merely held that a decree having been obtained against the *de facto* manager of the deceased's estate, the decree was not a nullity and, even if it cannot be executed against the estate in the hands of the executor when he has taken out probate, it is at any rate sufficient to enable the plaintiff to bring a suit against the executor in order to have the decree satisfied. In fact, the executor had actually obtained probate.

There is nothing in section 187 which would in terms make it applicable only to the case of plaintiffs and not to the case of defendants, and this view has been taken in several cases, in opposition to *Caralapathi Chunna Cunniah* v. *Cota Nammalwariah*(1). The first of

(1) (1910) I.L.R., 33 Mad., 91. (2) (1879) I.L.R., 4 Calc., 342.
(3) (1891) I.L.R., 14 Mad., 454.

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these is *Lakshmamma* v. *Ratnamma*(1), where, however, *Caralapathi Chunna Cunniah* v. *Cota Nammalwariah*(2), does not appear to have been cited. Again in *Parthasarathi Aiyar* v. *Subbaroya Gramany*(3), *Kumar Chandra Kishore Roy* v. *Prasanna Kumar Dasi*(4) and *Basunta Kumar Chuckerbutty* v. *Gopal Chunder Das*(5), no distinction is drawn between a plaintiff and a defendant. There is, however, a remark of SCHWABE, C.J., in *Parthasarathi Aiyar* v. *Subbaroya Gramany*(3), who after stating

> "that a person who in Court has to prove title and has to deduce that title from a will, whether that person is plaintiff or defendant, cannot do so without producing probate,"

goes on to remark,

> "This would not prevent a defendant resisting a claim by an heir-at-law by producing and proving a will of which probate had not been granted."

This observation must clearly be read as being limited to cases in which the claim could be resisted without establishing a title under the will. This view has been taken consistently throughout and it is evident that there can be no objection to an unprobated will being proved for certain limited purposes, provided that it is not sought to prove by the will a right thereunder; for this is prohibited by section 187.

The answer, therefore, to the question referred to us must be that a defendant can rely on an unprobated will, provided that he does not do so in order to establish a right under the will.

As this answer will in no wise dispose definitely of the case before the referring Judges, I think I may add a few words on the facts of the case. The plaintiff is suing as heir-at-law, but he was resisted by the defendants who claim under a will of which no probate has

(1) (1915) I.L.R., 38 Mad., 474. (2) (1910) I.L.R., 33 Mad., 91.
(3) (1923) 45 M.L.J., 175. (4) (1911) 21 M.L.J., 116.
(5) (1914) 18 C.W.N., 1136.

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been taken. It is argued that it is a sufficient answer to the plaintiff's case to allege and prove the existence of a will; for in that case the plaintiff, who would be the heir in case of intestacy, would no longer have any right. This rather ignores one point which, I think, is important, namely, that the plaintiff being the heir under intestacy, which must be presumed until a will is proved, is entitled to succeed to the property, unless it can be shown that his title has been displaced. If the defendant merely proves that a will is in existence and does not prove the terms of that will, that is not necessarily inconsistent with the plaintiff's title. In the first place, the will may not be a valid will and, in the second place, the plaintiff may be a legatee under the will. The mere existence, therefore, of a will does not necessarily displace the plaintiff's title. It is necessary for the defendant to go further and to prove that some one other than the plaintiff has title under the will. This he cannot do by virtue of the provisions of section 187. In the circumstances of the present case, I would therefore hold that the defendant cannot use an unprobated will as a defence.

BEASLEY, J.

BEASLEY, J.—I agree.

ANANTAKRISHNA AYYAR, J.

ANANTAKRISHNA AYYAR, J.—I agree. An argument based on the principle of the plea of *jus tertii* was advanced on behalf of the respondent on which I should like to say a few words. I find the principle of *jus tertii* referred to in Odgers' book on Principles of Pleading and Practice, Chapter VIII, page 139, Ninth Edition:

> "If the plaintiff is in possession of any land or goods or can otherwise make out a *prima facie* title to them, it is not enough for the defendant to show a better title in some third person; he must also show that he acted as agent for such third person at the time he did the act complained of."

Thus where a plaintiff makes out a *prima facie* title in himself to the property in dispute, the defendant

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has to show a better title either in himself or in some third person. If what is stated above be the correct principle of pleading applicable to such cases, it follows that when the plaintiff in the present case shows a *prima facie* title in himself to the property in dispute—as the admitted heir-at-law of the last owner—the defendant has "to show a *better* title" either in himself or in some third person (in the words of the learned author quoted above) or "establish a right as legatee" (in the language of section 213 of the Indian Succession Act, XXXIX of 1925) in himself or in some third person. It seems to me therefore that where the plaintiff's *prima facie* title to the property is established, the defendant in order to nonsuit the plaintiff should establish the title of the legatee. The general law would seem to be that the defendant's plea of *jus tertii* cannot be entertained when he does not state in whom the right resides. The defendant must trace the title to a third party other than plaintiff. A mere suggestion that there may be a third party with better title is nothing: *Chandra Kanta Pathak* v. *Bhagjur Bepari*(1). It has been held by the Privy Council that

> "possession is a good title against all the world except the person who can show a better title."

See *Sundar* v. *Parbati*(2) and *Narayana Row* v. *Dharmachar*(3). Similarly a *prima facie* title made out by the plaintiff to the property in suit is, I think, a good title against all the world except against the person who can show a better title. This *prima facie* title of the plaintiff has no doubt to be proved by him if it be not admitted by the defendant; but when once plaintiff's *prima facie* title is admitted or proved, I think it follows that he must succeed unless the defendant is able to

(1) (1909) 1 I.C., 525. (2) (1890) I.L.R., 12 All., 51 at 56 (P.C.).
(3) (1903) I.L.R., 26 Mad., 514 at 517.

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displace the plaintiff's *prima facie* title and prove a better title in some person other than the plaintiff. If such person's right should happen to be as legatee under a will, since the defendant has to prove such person's right as legatee, he comes within the scope of section 213 of the Succession Act, XXXIX of 1925 (section 187 of the old Act X of the 1865) under which

"No right as legatee can be established in any Court of justice, unless a Court of competent jurisdiction has granted probate of the will under which the right is claimed."

We are not here concerned with that class of cases where no direct title to property is claimed under a will,—the will being relied on only to prove an authority to adopt or as containing an admission of the status of some other person—*Achyutananda* v. *Jagannath*(1), *Manuel Louis Kunha* v. *Jnana Coelho*(2), *Basunta Kumar Chuckerbutty* v. *Gopal Chunder Das*(3).

My Lord, the learned Officiating CHIEF JUSTICE, has in his judgment discussed the trend of decisions in this Court on the construction of the section. I think that the respondent in the present case has to establish the right of the deceased Saraswathi Bai as legatee of the suit property to displace the *prima facie* title of the appellant and under section 213 of the present Act (section 187 of old Act) she is not entitled to do so unless a Court of competent jurisdiction has granted probate of the will under which the right is claimed. I would accordingly answer the question referred to us in the negative, and hold that the defendant in the present case cannot use the unprobated will as a defence to the suit.

N.R.

(1) (1915) 21 C.L.J., 96. (2) (1908) I.L.R., 31 Mad., 187. (3) (1914) 18 C.W.N., 1136.

APPELLATE CIVIL.

Before Sir William Phillips, Kt., Officiating Chief Justice, and Mr. Justice Reilly.

NAMMALWAR CHETTY AND ANOTHER (DEFENDANTS 1 AND 2), APPELLANTS,

1927, September 1.

v.

PERUNDEVI THAYARAMMAL (PLAINTIFF), RESPONDENT.*

Hindu Law—Right of husband in distress to take his wife's stridhanam—Text, meaning of.

The word "take" in the text of Yagnavalkya, that "a husband is not liable to make good the property of his wife *taken* by him in a famine or for the performance of a duty or during illness or while under restraint" does not mean "physical taking" but means "taking and using." Hence if the husband taking his wife's property in such circumstances does not actually use it, the wife still remains its owner.

APPEAL from the judgment of Mr. Justice V. V. SRINIVASA AYYANGAR in C.S. No. 329 of 1924 in the exercise of the Ordinary Original Civil Jurisdiction of the High Court.

The facts are given in the judgment of the Officiating Chief Justice.

K. Krishnaswami Ayyangar (with *T. S. Narasinga Rao* for *K. G. Ramaswami Ayyar*) for appellants.—The husband can according to the text in Yagnavalkya in Chapter II, placitum 148, take his wife's property in case of distress. This means physical taking. If he chooses to take it, it becomes his own; see also Mitakshara ii, Chapter 11, placita 31 and 32.

C. S. Venkatachari for the respondent.—The text does not mean that physical taking alone constitutes the husband the owner. Unless he *uses* them for any of the purposes mentioned, the wife's ownership does not cease. Using is necessary; see Smrithi Chandrika IX, section 21, placita 19 and 20. Other commentaries such as Dayabhaga,

* Original Side Appeal No. 107 of 1926.

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Dayakrama Sangraha, Vyavahara Mayukha understand the word "take" only as "use."

T. S. Narasinga Rao in reply.—Mere physical taking is sufficient. Even if using were necessary, there has been a user of the wife's jewels in this case by the husband, in that he placed them in the hands of a mediator and that was the means of his obtaining relief from arrest.

PHILLIPS, OFFG. C.J.

PHILLIPS, OFFG. C.J.—In this case the plaintiff respondent sues to recover certain jewels which, she alleges, are her stridhanam. Her husband was ordered to pay a sum of Rs. 12,000 into Court by the 7th April 1924. The order was passed on the 24th March. The payment was to be made in a suit in which the present appellants were the plaintiffs. After the date fixed for payment it appears that the plaintiff's husband arranged to sell the jewels now claimed by the plaintiff to the respondents in part-satisfaction of the claim of Rs. 12,300 under the Order. In accordance with this arrangement the plaintiff's husband put in an application to the Court to sanction this arrangement as there was a minor concerned and the arrangement amounted to a compromise between the parties in respect of this claim of Rs. 12,300. The appellants signified their agreement to this application when it was put into Court. The application was for leave to be granted to the first plaintiff to receive these jewels on behalf of her minor son in respect of this order of Rs. 12,300. An affidavit was filed at the same time which said that

"it had been agreed that in lieu of the said sum of Rs. 12,300 the undermentioned jewels should be handed over by the first defendant to the first plaintiff. All the eight items have now been deposited with the mediator pending the order of this Honourable Court granting leave to the first plaintiff to receive them."

Before the leave of the Court was obtained the present plaintiff claimed these jewels as hers and they

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were also attached by a creditor. Accordingly orders were postponed and finally the application was withdrawn and dismissed on 24th July 1924, with the plaintiffs', the present appellants', costs, by which date, the second appellant had attained majority. The appellants have relied at the trial on a provision of Hindu Law, that in times of necessity a husband is entitled to take his wife's property to relieve that necessity. It has been found by the learned Judge that that necessity did not exist but he has also found in his judgment—he does not base his decision on it—that the husband had not disposed of these jewels and, as he died before the disposal, the creditors cannot seize the jewels which belonged to the plaintiff to pay his debts. This finding was not in accordance with the pleadings and apparently the attention of the parties had not been directed to it, but it having found a place in the judgment, it was undoubtedly the duty of the appellants to meet this aspect of the case. They were not prepared to do so at the first hearing but were granted time and have now argued the case. In the first place they contend that the finding that the jewels were the stridhana of plaintiff is wrong. There is the evidence of the plaintiff and her relations coupled with entries in her husband's account book which go strongly to support the plaintiff's case. There is no evidence contra and I must therefore accept the learned Judge's finding that the jewels were plaintiff's.

The next question is whether the husband had disposed of these jewels before he died. He had deposited them with a mediator who was to hold them pending sanction of the Court being obtained. His possession therefore was clearly the possession of the person who would be entitled to these jewels subject to the Court's order. If sanction had been given, his possession would

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have been that of the appellants. But in this case no sanction was given and therefore the property in the jewels did not pass to the appellants. There was an agreement by the deceased to sell the jewels but payment had not been made and the goods had not been delivered and the property in them had not passed. It was then contended for appellants that this is not necessary but that according to the text the husband has a right to take his wife's Stridhana, and need not dispose of them. The text runs as follows:—

"A husband is not liable to make good the property of his wife taken by him in a famine or for the performance of a duty or during illness or while under restraint."

It is contended that the word "taken" means only physical taking and not necessarily the use or disposal of the property. The same text is explained in several passages in the Smriti Chandrika which clearly show that the word "take" has the meaning of use or disposal and it is difficult to hold that it merely means physical taking. If that were the meaning, the husband in illness or in a famine could take his wife's Stridhana and not use it for his benefit but he might recover or obtain relief by other means and would apparently be entitled to retain possession of his wife's property which was still in his hands. This is a very strange interpretation to put upon the text which clearly refers to the husband being entitled in case of necessity to make use of his wife's property as well as his own in order to obtain relief. In that view the only way in which he could be said to take the property would be when he takes it and disposes of it for his own benefit. This contention therefore cannot be accepted.

The further contention that by placing the jewels in the hands of a mediator, the husband did obtain relief

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and that the jewels themselves were the cause of his relief and that therefore he is not liable to make them good is clearly a fallacy. It is not the jewels themselves that gave the relief but the agreement by the deceased to sell them to the appellants. As a consequence of that agreement which was never completed we may assume that they did refrain from taking active steps against him, but the deceased unfortunately died before the jewels had passed to the appellants and it has been consistently held that his right to take his wife's jewels does not extend to a creditor or any other person whatever. As he had not exercised that right during his lifetime, the jewels remained the property of the plaintiff.

The appeal is accordingly dismissed with costs. As regards the costs which have been ordered to be paid to the third defendant's legal representative's guardian it can only be observed that the mediator was a necessary party to the suit and as he is not himself liable for costs he must be paid by the losing party.

REILLY, J.

REILLY, J.—I agree that we certainly cannot interfere in this case with the finding of the learned trial Judge that the jewels in question were the *Stridhana* property of the plaintiff, on which point the evidence at the trial was all one way.

In the argument in this appeal, so far as it has been necessary to go, it has been assumed that the exceptional circumstances, which will justify a husband in taking his wife's *Stridhanam* and dealing with it to relieve his own distress have been fulfilled. But it has been disputed whether his right is only to use that property for the relief of his distress or he is entitled to take it from his wife for the purpose of relieving his distress but, if he does not use it for that purpose, to keep it nevertheless for himself. The text upon which the

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special power of the husband to take his wife's *Stridhanam* is founded is that of Yagnavalkya :—

"A husband is not liable to make good the property of his wife taken by him in a famine or for the performance of a duty or during illness or while under restraint."

Speaking for myself I should have thought it obvious that "taken" in that verse means "taken and used." But no very great discussion on that point is really necessary because the Smriti Chandrika, undoubtedly an authority in this Presidency, explains the verse as meaning that the husband is entitled to use his wife's property in those circumstances; and the quotation which has been read to us from the Mitakshara, in which the verse is slightly enlarged, certainly is not against that interpretation of it.

Then the question in this case is, did the husband actually use these jewels to relieve his necessity? What it appears he did was to enter into a contract of sale in regard to them. The jewels were to be sold to defendants 1 and 2 for Rs. 9,500, part of a sum which the plaintiff's husband had been directed to pay into Court for the benefit of the second defendant. But the agreement of sale had a term in it that the plaintiff was to obtain the sanction of the Court for this adjustment. If the agreement between the parties had been that the plaintiff's husband was to have something done to the jewels, to have them cleaned or mended or reset or anything of that sort, it is perfectly clear and indeed unquestionable that the property in the jewels would not have passed from him to the second defendant until that work had been done. And I think the same principle applies where the seller undertakes to do something in respect of the goods. In this case the plaintiff's husband undertook to get the sanction of the Court and, so far as we can see, honestly undertook that. He applied for

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the sanction of the Court; but, before the sanction was obtained, he died. Then had the property passed at the date of his death? I think the answer to that clearly must be "no." If the property had not passed, then he had not made use of the jewels to relieve his necessity, and, as the right to use them was peculiar to himself, it ended with his death. If the jewels had been in his house or in his possession at the date of his death, I think there can be no doubt that the plaintiff could have recovered them. In this particular case it happens that the jewels, pending the sanction of the Court, were handed over to a third party, a "mediator." But that does not really affect the legal position at all, the mediator being like a stake-holder trustee for whichever party might eventually be entitled to the jewels.

What appeared to me to be the most effective argument for the second defendant was raised by Mr. Narasinga Rao in his reply, namely that the plaintiff's husband got a benefit out of his dealings with the jewels. He was by the order of the Court to pay the Rs. 12,300 by the 7th April; but by the arrangement which the second defendant entered into and the petition for sanction, the proceedings were prolonged until after the plaintiff's husband died on the 20th April. It is urged therefore that from the 7th April to the 20th April the plaintiff's husband obtained a benefit out of his dealings with the jewels. But, as my Lord has explained, that benefit was obtained, not by the use of the jewels or any transfer of property in them, but by the agreement to sell them in certain circumstances which were never fulfilled.

I agree that this appeal must be dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Sir William Phillips, Kt., Officiating Chief Justice, and Mr. Justice Anantakrishna Ayyar.

1927, August 29.

THE OFFICIAL ASSIGNEE OF MADRAS, APPELLANT,

v.

S. M. SHEIK MOIDEEN ROWTHER, RESPONDENT.*

Presidency Towns Insolvency Act (III of 1909)—ss. 55 and 56—Insolvent transferring all his property to a simple creditor without providing for other creditors—Knowledge of transferee—Good faith and consideration—Onus.

If a person in insolvent circumstances transfers all his properties to one of his creditors solely for a past debt, without providing for his other creditors to whom he was heavily indebted, by means of an antedated deed of transfer, and the transferee, a relation of the transferor, takes the transfer knowing all the circumstances, he is not a transferee in good faith within the meaning of section 55 of the Presidency-Towns Insolvency Act (III of 1909) and his transfer is liable to be cancelled under the section if the transferor is adjudged insolvent within two years of the transfer. The onus of proving that a particular transfer effected by the insolvent is void as against the Official Assignee under section 56 of the Act is on the Official Assignee, whereas the onus of proving good faith and valuable consideration in a case coming under section 55 is on the transferee.

APPEAL from the judgment of the Hon'ble Mr. Justice BEASLEY in the exercise of the Ordinary Original Insolvency Jurisdiction of the High Court in I.P. No. 110 of 1924 in Application No. 423 of 1924.

The facts are given in the judgment.

O. Thanikachelam Chettiar for appellant.

K. Krishnaswamy Ayyangar for respondent.

* Original Side Appeal No. 106 of 1926.

JUDGMENT.

S. M. Mohamed Rowther was adjudicated insolvent on 31st March 1924 on a petition filed on 17th March 1924 by a creditor Chengalvaraya Chettiar. The Official Assignee of Madras applied to have a sale deed, dated 27th October 1923 and a deed of transfer of mortgage, dated 11th November 1923 executed by the insolvent in favour of the garnishee (S. M. Sheik Mohidin Rowther) declared void under section 55, or in the alternative under section 56 of the Presidency-Towns Insolvency Act. The learned Judge having dismissed the application, the Official Assignee has preferred this appeal.

The insolvent was carrying on business as a commission agent at Madras. He had a branch shop in Tinnevelly. In 1923 the insolvent was largely indebted. He was indebted to the garnishee to the extent of about Rs. 20,000 in May 1923, and he had executed in favour of Chengalvaraya Chettiar a promissory note on 1st October 1923 for Rs. 30,000 the amount having been advanced to the insolvent between 25th June and 30th September 1923. The garnishee is the paternal uncle of the insolvent and the sale deed Exhibit IV executed by the insolvent in favour of the garnishee comprised all the immovable properties of the insolvent. It was also alleged that the properties comprised in the sale deed were worth very much more than Rs. 10,000, the consideration mentioned in the sale deed. Under Exhibit V, dated 11th November 1923, the insolvent transferred for Rs. 775 to the garnishee the mortgage rights of the insolvent in certain immovable properties in Tinnevelly, the principal amount of the mortgage being Rs. 500. It was also alleged that Exhibit IV was not executed on the date it bears (27th October 1923) but that it was executed only about the 20th December 1923, the date of registration; finally it was

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alleged that the garnishee was aware of insolvent's indebtedness to Chengalvaraya Chettiar and others and that Exhibit IV was taken with full knowledge of the fact that it comprised all the properties of the insolvent and that the same was a fraudulent transaction and void as against the Official Assignee. The learned Judge in dismissing the application concluded his judgment as follows:—

"The Official Assignee has not in my view discharged the burden on him of showing that the sale was not *bona fide*; it clearly was in my view for valuable consideration and the only way in which the *bona fides* of the transaction might have been impeached was by showing that for some reason or other the execution of the sale deed was not on the date it bears. That as I have said the Official Assignee has failed to prove. The Official Assignee having failed to show that the sale was not for valuable consideration and that it was not *bona fide* this application must be dismissed with costs."

On behalf of the appellant the following main contentions were raised by his learned counsel:—

1. That the deed of sale was not executed at Pettai, a suburb of Tinnevelly, on 27th October 1923, the date mentioned in the document, but that it was antedated and executed only about the time of its registration at Tinnevelly on 20th December 1923.

2. The consideration mentioned in the document Rs. 10,000 is grossly inadequate, the properties being really worth about Rs. 20,000.

3. The amount due to the garnishee at the time was only about Rs. 7,000 and the recital in the document that more than Rs. 10,000 was due to the garnishee from the insolvent at the time is false and fraudulent.

4. That the document Exhibit IV could not be said to have been executed in good faith and consequently the transaction is void as against the Official Assignee, under section 55 of the Presidency Towns Insolvency Act.

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5. That the case is also one of fraudulent preference coming within section 56 of the Act and consequently the transfer is void as against the Official Assignee.

Before discussing the questions raised by the appellant it would be convenient to state that the *onus* of proving that a particular transfer effected by the insolvent is void against the Official Assignee under section 56 of the Act is on the Official Assignee, whereas the *onus* of proving good faith and valuable consideration in a case coming under section 55 would be on the garnishee. This was admitted before us by the learned Counsel on either side appearing in the case, and we think the decisions of this Court in *The Official Assignee of Madras* v. *Sambanda Mudaliar*(1), and of the Calcutta High Court in *Nripendra Nath Sahu* v. *Ashutosh Ghose*(2) and *Nilmoni Choudhuri* v. *Bashanta Kumar Banerji*(3) and *The Official Assignee of Bengal* v. *The Yokohama Specie Bank, Ltd.* (4) fully support the position.

[Their Lordships then discussed the evidence and held as follows:—]

On the whole, we have come to the conclusion that Exhibit IV was not executed on 27th of October 1923 but that it was antedated by the parties thereto.

As regards the second and third points namely the value of the properties covered by Exhibit IV and repayment of Rs. 15,000 to the garnishee by the insolvent, we are not satisfied that the appellant has proved his contentions on these heads . . . In the face of the statement made by Kadir Mohidin Rowther that the documents Exhibits IV and V were executed on the 11th of November 1923, we hold that the Official Assignee is not entitled to relief under section 56 of the

(1) (1920) I.L.R., 43 Mad., 739.
(2) (1914) 19 C.W.N., 157.
(3) (1914) 19 C.W.N., 865.
(4) (1924) 29 C.W.N., 374.

Act, but we hold that he is entitled to the relief that he seeks under section 55.

[After discussing the evidence their Lordships proceeded as follows :—]

We hold that the garnishee knew when he took Exhibit IV that the insolvent was indebted to Chengalvaraya Chettiar to the extent of Rs. 30,000 and also to some others and that he (insolvent) had no other properties. Knowing all this the garnishee took an assignment of all the insolvent's properties and antedated the sale-deed, knowing full well that what was being done was in fraud of the insolvency law. He cannot be said to have acted in good faith in the circumstances of the case.

The learned counsel for the respondent argued that the present case does not come under section 55 of the Presidency Towns Insolvency Act. Under that section any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration shall if the transferor is adjudged insolvent within two years after the date of the transfer be void against the Official Assignee. It will be noticed that it is only in favour of purchasers and encumbrancers in good faith and for valuable consideration that the exception is made. In the present case the respondent has proved valuable consideration, but he has to prove good faith also. The respondent's counsel argues that the expression "good faith" in the section means only that the transaction should not be a sham one or one in which there is a resulting trust in favour of the insolvent, and he contends that as neither of those two objections could be urged in the present case, the transaction is binding on the Official Assignee. We are unable to accept that contention. Absence of good

faith could be proved by showing that the transaction was a sham one, or that there was a resultant trust in favour of the insolvent, but the same could be proved by other circumstances also. If an insolvent transfers in favour of one of his creditors who happens to be his relation all his properties knowing that he is in insolvent circumstances and unable to pay his other creditors to whom he owes much more than the debt due to the transferee and the transferee also being fully aware of all the above circumstances, and in concert with the insolvent, brings into existence such a transfer deed, and antedates the same, and takes such sale deed for a debt due to him without any contemporaneous advance or other promise to help the insolvent to carry on his business, then we have no doubt that the transaction could not be said to have been entered into in good faith, and the same should be held to be void against the Official Assignee under section 55 of the Act. The cases referred to by the respondent, *Hakim Lal* v. *Mooshahar Sahu*(1) and *Musahar Sahu* v. *Lala Hakim Lal*(2) are cases that were decided under section 53 of the Transfer of Property Act and not under the Insolvency Act. In fact at page 1015 of 34 Calcutta, it is observed as follows :—

"It is well settled that in the absence of a bankruptcy act, a debtor may make preference amongst his creditors even to the extent of transferring all his property to one creditor to the exclusion of the others."

Note the words "*in the absence of a bankruptcy act.*" The Privy Council also in *Musahar Sahu* v. *Lala Hakim Lal*(2) at page 524 makes a similar observation. At page 524 it is said :

"As matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy

(1) (1907) I.L.R., 34 Calc., 999. (2) (1916) I.L.R., 43 Calc., 521.

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applies, there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts."

In fact we have cases arising under the Insolvency Act where it has been held that under similar circumstances the transfer would be void as against the Official Assignee. In *The Official Assignee of Bengal* v. *Yokohama Specie Bank, Ltd.*(1), SANDERSON, C.J., and BUCKLAND, J., held that an assignment executed in favour of one of the creditors of the insolvent of all the properties of the insolvent without any contemporaneous advance, was void against the Official Assignee when the transferor was adjudicated insolvent within two years after the date of the transfer. Finding that the transferee had knowledge of the state of affairs of the assignor at the time of the assignment, the Court held that the transfer was not in *good faith* within the meaning of section 55 of the Act. Mr. Justice BUCKLAND was of opinion that in considering the effect of transactions of such a nature the facts must be considered in the light of the law of bankruptcy, the object of which is to ensure rateable distribution of an insolvent's property among his creditors, and that a transaction which may in other circumstances be free from all taint would become an offence when it is established that it contravenes the law of bankruptcy. BUCKLAND, J., further remarked that

"though the bank (transferees) may have acted honestly in the popular sense they cannot be deemed to have acted in good faith within the law of insolvency, however honestly they may have endeavoured and thought they were justified in endeavouring to secure the property of the insolvent as security for their own debt."

We may also refer in this connexion to a passage in the Privy Council decision reported in *Khoo Kwat*

(1) (1924) 29 C.W.N., 374.

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Siew v. *Wooi Taik Hwat*(1) at page 231, where Lord HOBHOUSE observed as follows:—

"The well-known rule of law is that if a trader assigns all his property, except on some substantial contemporaneous payment, or some substantial undertaking to make payment *in futuro*, that is an act of bankruptcy and is void against the creditors and the assignee, simply because nothing is left with which to carry on his business, whereas, if he receives substantial assistance, something is left to carry on the business."

In *Jukes, In re, Official Receiver, ex parte*(2), WRIGHT, J., remarks as follows:—

"I think it is quite clear that the debtor committed an act of bankruptcy in parting with the whole of his property to one of his creditors to satisfy a past debt . . . I cannot help thinking that if a creditor of a debtor takes the whole, or substantially the whole, of the property of his debtor in payment of a past debt, and knowing that there are other creditors, he cannot be said to be acting in good faith."

See also *The Official Assignee of Bombay* v. *Sundarachari*(3).

The onus of proving good faith, it has been held, is on the transferee. *The Official Assignee of Madras* v. *Sambanda Mudaliar*(4) and *The Official Assignee of Bengal* v. *Yokohama Specie Bank, Ltd.*(5). It will depend on the circumstance of each case whether good faith has been proved or not. Having regard to the facts found by us in this case, we are of opinion that the transactions impugned in this case were not executed in good faith and we accordingly allow the appeal and declare that the deed of sale, dated 27th October 1923 (Exhibit IV), and the deed of transfer, dated 11th November 1923 (Exhibit V), are void against the Official Assignee. The garnishee would be entitled to prove, as a simple creditor, in respect of the amount

(1) (1892) I.L.R., 19 Calc., 223 (P.C.). (2) [1902] 2 K.B., 58 at 60.
(3) (1927) I.L.R., 50 Mad., 776. (4) (1920) I.L.R., 43 Mad., 739.
(5) (1924) 29 C.W.N., 374.

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that he may be found entitled to get from the insolvent. The garnishee should pay the taxed costs on the Original Side scale of the Official Assignee both in the appeal and before the learned Judge (including the costs of the commission).

R. Ramachandra Chetti, Attorney for appellant.

V. Varadaraja Mudaliyar, Attorney for respondent.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

1927, August 2.

DHANABAKKIYAMMAL (PETITIONER), APPELLANT,

v.

THANGAVELU MUDALIAR AND OTHERS (RESPONDENT AND OTHERS—EXECUTORS), RESPONDENTS.*

Indian Succession Act (XXXIX of 1925), sec. 301—Administrator-General's Act (V of 1902)—Judicial Trustees' Act (59 and 60 Vic., Ch. 35)—Application under sec. 301 for removal of executor—Duty of Court to inquire—Remedy of petitioner—Suit for removal, whether necessary and competent—Sec. 301, construction of the word "may" in—Remedy by suit or application.

Where an application is made to the High Court, under section 301 of the Indian Succession Act (XXXIX of 1925) for the removal of an executor, the Court ought to enquire into the allegations made by the petitioner and ought not to dismiss the petition without any kind of enquiry on the ground that the matter required the taking of a considerable quantity of evidence and that another remedy by way of suit was open to the petitioner.

Section 301 of the Indian Succession Act, 1925, reproduces section 4 of the Administrator-General's Act (V of 1902), which

* Original Side Appeal No. 124 of 1926.

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itself reproduces the Judicial Trustees' Act of England (59 and 60 Vic., Chap. 35); and until the said Acts were passed, the Courts had really no power to remove an executor as distinguished from a trustee, though a limited power existed in the Court of imposing restraints on his powers by appointing a receiver: See *Ratcliff, In re.* [1898] 2 Ch., 352, and *Amerchand Madhowji, Ex parte* (1905) I.L.R., 29 Bom., 188.

But after the above Acts were passed in India, if the removal of an executor is sought, the only remedy that is open is by way of a petition under section 301 of the Indian Succession Act.

The use of the word "may" in section 301 of the Act shows merely that a proper case must be made out, and that the Court shall act only if a proper case is made out; to that extent the power is discretionary, but the discretion is not arbitrary but a judicial discretion.

APPEAL from the judgment of SRINIVASA AYYANGAR, J., dated 5th October 1926, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court and made in Original Petition No. 117 of 1926.

The material facts appear from the judgment.

K. S. Krishnaswami Ayyangar and *M. S. Venkataramа Ayyar* for appellant.

S. Doraiswami Ayyar and *J. A. Pinto* for first respondent.

JUDGMENT.

This is an appeal against an order of our brother SRINIVASA AYYANGAR, J., dismissing an application under section 301 of the Indian Succession Act XXXIX of 1925 to remove the executor Thangavelu Mudaliyar appointed under the will of Vaidyalinga Mudaliyar, dated 21st October 1925. An interim order appointing a receiver was made by our brother BEASLEY, J. When the matter came on for final disposal before SRINIVASA AYYANGAR, J. he held that the matters which had to be determined required a considerable quantity of evidence and the

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determination of various facts and issues some of which were really complicated. He was also of opinion that the petitioners have got another remedy for the removal of the executor by way of a regular suit and that the object of this section was merely to provide a summary remedy for such removal in addition to that by suit. No evidence was taken by the learned Judge in respect of the allegations made by the petitioner. On the view he has taken he dismissed the petition. He also expressed a suspicion that the petition was not made in good faith but was actuated by some other motives. Now section 301 of the Succession Act enacts section 4 of the Administrator-General's Act, V of 1902. That Act itself reproduces the provisions of the Judicial Trustees' Act of England, 59 and 60 Vic., Ch. 35. Until the Judicial Trustees' Act of 1896 was passed in England and the Administrator-General's Act (V of 1902), was passed in India, the Courts had really no power to remove an executor. If the character of executor has ceased and he becomes merely a trustee he might be removed from his position as a trustee, but if he continued to be executor he could not be removed from his position as executor. This is the view of KEKEWICH, J., in *Ratcliff, In re*(1). At page 356, he says

"That is to say, the Court can under this Act do what it could not do before—remove an executor."

The same view was taken in India by TYABJI, J., in *Amerchand Madhowji, Ex parte*(2). At page 190, he quotes Lewin on Trusts which says :

"An executor is regarded in some sense as a trustee, but he cannot, like a trustee, be discharged, even by the Court from his *executorship*. When the funeral and testamentary expenses, debts, and legacies have been satisfied, and the surplus has been

(1) [1898] 2 Ch., 352. (2) (1905) I.L.R., 29 Bom., 188.

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invested upon the trusts of the will, the executor then drops that character and *becomes a trustee* in the proper sense, and may then be discharged from the office like any other trustee."

Mr. Doraswami Ayyar appearing for the respondent argues that even prior to the Judicial Trustees Act of 1896 there was certainly some jurisdiction in the Court of Chancery by which the estate can be protected. He concedes that an executor cannot be removed, but in the case of a bankrupt executor or in case of waste or improper disposition of the property by the executor, the Court of Chancery can appoint a receiver. But the Court will not interefere merely because an executor is poor. See William's on Executors, 10th Edition, page 1615 and Ingpen on Executors, 2nd Edition, page 51. But this seems to be a remedy of a very limited kind and it is of a very indirect character when the Court restrains an executor from acting merely by the appointment of a receiver. Now, much wider powers are conferred upon Courts both in India and in England for the removal of an executor. Mr. Doraswami Ayyar does not contend that a regular suit for the removal of an executor lies apart from section 301. It is, therefore, clear that, if the removal of an executor is sought and not an indirect restraint on him by merely getting the appointment of a receiver, the only remedy that is open is under section 301. The use of the word 'may' in this section shows merely that a proper case must be made out and the Court shall act only if a proper case is made out. To that extent no doubt, the power vested in a Court under this section is discretionary, but the discretion is not arbitrary but it is a Judicial discretion. It may be that the section does not try to exhaust the kinds of charges that may be brought against an executor or other circumstances that ought to be made out before his removal can be obtained. The fact that

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BEASLEY, J., thought that a receiver ought to be appointed shows that in his opinion there was good reason for the appointment of a receiver. The learned Judge (SRINIVASA AYYANGAR, J.) does not say that the allegations made by the petitioner in this case do not make out a *prima facie* case, even if proved. That being so, we think the Court ought to enquire into the allegations made by the petitioner; and, if the facts proved do not make out a proper case, it is another matter. But it may not be open for a Court to dismiss the petition without any kind of enquiry into the allegations made. As to the apprehension that the Original side may be flooded by applications of this kind, all that I can at present say is I do not know how far the apprehension is justified. In many cases the allegations themselves may be *prima facie* frivolous and in such cases petitions may fail without even an enquiry. But assuming that there may be a large number of such applications that is no ground for refusing an obvious remedy now conferred upon the parties by the Legislature. I do not think it is necessary to pursue this kind of argument any further. The result is, the order of the learned Judge will be set aside and the case will go back to the Original side for enquiry into the petition.

We are informed that the receiver appointed by BEASLEY, J., has been discharged as a result of the dismissal of the petition. Now that the order dismissing the petition is set aside, we think it is safe in the interests of the estate and in the interests of all parties that the receiver should continue. We do not mean to express any opinion as to the allegations and counter-allegations made by the parties against each other at this stage. Seeing that there has been a receiver up to the dismissal of the petition and his discharge was really a result of the dismissal of the petition, we think it is

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proper that he should continue, now that the Order dismissing the petition is set aside.

The receiver will act under the directions of the Court.

Costs up to this stage will abide the result.

Stamp paid on appeal will be refunded.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Ramesam.

SANNIDHIRAJU SUBBARAYUDU AND OTHERS (PLAINTIFF'S LEGAL REPRESENTATIVES), APPELLANTS,

1927, April 19.

v.

THE SECRETARY OF STATE FOR INDIA (DEFENDANT), RESPONDENT.*

Madras Irrigation Cess Act (VII of 1865)—River, when "navigable"—Riparian proprietor using water of non-navigable river, whether liable to pay irrigation cess.

A river is not "navigable" unless it is navigable *throughout* the year for *steamers and big boats.*

Where only one side of a non-navigable river belongs to the Government and the other side belongs to a private owner, (e.g. a Zamindar with a permanent Sannad or, as in this case, an inamdar from him) the latter has the right *as a riparian owner* to take a reasonable quantity of water for irrigation purposes without any liability to pay any cess under the Madras Irrigation Cess Act (VII of 1865), the extent of the right being determined by the configuration of channels and sluices and the width of the river.

SECOND APPEAL against the decree of K. APPAJI RAO, Subordinate Judge of Rajahmundry, in Appeal Suit

* Second Appeal No. 1216 of 1924.

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No. 104 of 1923 (Appeal Suit No. 7 of 1923 on the file of the District Court, Gōdāvari) preferred against the decree of N. NARASIMHAM, District Munsif of Amalapur, in Original Suit No. 833 of 1918.

The facts and arguments are fully given in the judgment.

N. Rama Row and *P. Panini Row* for appellant.

Government Pleader (*C. V. Anantakrishna Ayyar*) for respondent.

The JUDGMENT of the Court was delivered by

RAMESAM, J.

RAMESAM, J.—This Second Appeal arises out of a suit to recover from the defendant, who is the Secretary of State for India in Council, Rs. 8-13-2 being the water tax collected from the plaintiff by the defendant's officers and paid under protest and now alleged by the plaintiff to be illegally collected. The plaintiff is the pujari of a certain temple which owns a darmila inam, 12 acres and odd in extent. The inam was included in the assets of the zamindari of Guttenadivi at the time of the permanent settlement and was granted to the temple subsequent to it. Hence the word "darmila" inam (that is, subsequent inam) as opposed to inams granted prior to the settlement and excluded from the assets of a permanently settled estate and afterwards enfranchised by the inam rules in 1861 to 1864. Thus, the suit land is not an enfranchized inam and is part of the zamindari lands of Guttenadivi. The Zamindari of Guttenadivi is a small zamindari paying a peshkash of Rs. 651 in Amalapur taluk (vide Maclean's Manual, Glossary, Vol. III, under Amalapuram). The river Gōdāvari is cross-bunded by an anicut below the town of Rajahmundry at the village of Dowlaishweram and below it, it splits up into two branches forming the Gōdāvari delta. The northern branch is known as the Gautami branch and the

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southern is known as the Vasistha branch. Between the two branches are the taluks of Amalapur and Razole and the Zamindari of Guttenadivi is in the former taluk. The Gautami branch in the course of its progress towards the sea which it joins near Koringa splits up into innumerable branches which separate and join again forming islands; so that, it is sometimes difficult to say which is the main stream of the Gōdāvari. The suit lands abut on a branch known as the Addarapu kalava or Chilapa kalava. The plaintiff alleged that on both sides of the branch are Guttenadivi lands, but the Courts below have found this against the plaintiff. They found that while on the one side there are Guttenadivi lands there are on the other side the Government lands of the Yedurlanka village. The plaintiff (appellant) has questioned the correctness of this finding. For the present, the case will be discussed on the footing that the finding is correct. Both the lower Courts dismissed the suit. The District Munsif found (vide paragraph 48 of the Judgment) that the Government as owner of one of the bunds is also the owner of the northern half of the bed of the stream. He therefore held that the Government is entitled to levy water-cess. On appeal, the Subordinate Judge held that the stream was navigable and therefore belongs to Government. With reference to a contention that the plaintiff is entitled to exercise rights of a riparian owner free of water-cess both the lower Courts observed that long user has not been made out in the suit. The plaintiff files the Second Appeal.

Before us in Second Appeal two points have been elaborately argued. First, whether the stream is a navigable stream at the place where the suit lands abut on it, and secondly, in any event, that the plaintiff is entitled to the exercise of riparian rights free of water-cess.

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On the first question whether the river is navigable, the District Munsif recorded his finding thus (paragraph 48 of the Judgment):

"One of the branches of the Gōdāvari bifurcates into Vrudhagautami and Uppuganti kalva each a mile wide; that Addarapu kalva takes off from Uppuganti kalva; that it is four or five miles long, that on the side of it at the point where plaintiff takes out his water there are Government lands and on the other zamindari lands; that it is navigable in the ordinary sense of the term for big boats for about six or seven months and only for fishing boats later to a distance of 20 yards in the remaining period of the year. It is admittedly subject to tidal action. As owner of one of the bunds half of the stream belongs to Government. On this ground I find that Government is entitled to levy water-cess."

It is clear that the District Munsif thought that the river cannot be regarded as a navigable river, for if it could be regarded as navigable, the Government would have been the owner of the whole of the bed, but he held that the Government owned half of the stream. Earlier in paragraph 35, he observed

"The water is fresh only for four months in the year and that it is brackish during the remaining eight months, that fairly big boats pass over it from July to January, and thereafter only small navas, and that Chilapa kalava is navigable for six months for fairly big boats."

The Subordinate Judge said

"The learned District Munsif having fully examined the evidence came to the conclusion that the stream is navigable for big boats for about six or seven months in the year for boats of a load of 15 tons and for the rest of the year for small fishing craft. In this finding of fact also I wholly concur and the result of it is to make it out that the stream is navigable all through the year."

I think the Subordinate Judge has misunderstood the District Munsif's finding. The District Munsif did not hold that the stream is navigable all through the year. In his opinion the fact that only small fishing craft passed through the stream after January is not

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enough to make it navigable, whereas in the view of Subordinate Judge it is enough. The question therefore arises, whether, on the facts found, namely, that the stream is navigable for big boats for about six or seven months but for the rest of the year for small fishing craft only, the river can be held to be navigable throughout the year; and secondly, whether navigability throughout the year is necessary to make a river navigable for the application of the rule that a river which is tidal and navigable belongs to Government. Taking up the latter question first, the point was fully discussed in the judgment in *The Secretary of State for India* v. *Venkatanarasimha Nayudu*(1). Both the learned Judges held that for a river to be properly described as navigable it must be navigable throughout the year. BURN, J., observed at page 222:

"'Navigable' has always been interpreted to mean navigable throughout the year. *J. G. Bagram* v. *The Collector of Bhulloa*(2), *Chunder Jaleah* v. *Ramchurn Mookerjee*(3), *Mohinee Mohun Doss* v. *Khajah Assanoollah*(4) and *Secretary of State for India* v. *Bijoy Chand Mahatap*(5)."

With reference to an argument of the Government Pleader in that case that the Calcutta decisions were based on the wording of the Regulation of 1825, he observed:

"Assuming this to be so, there seems to me to be no reason to suppose that the public rights in river beds are greater in Madras than in Bengal, at any rate where the banks form portion of permanently settled estates. No Madras authority has been cited which supports the claim now put forward."

SADASIVA AYYAR, J., also refers to the cases in *Chunder Jaleah* v. *Ramchurn Mookerjee*(3) and *Secretary of State for India* v. *Bijoy Chand Mahatap*(6). In the

(1) (1920) M.W.N., 209.
(2) (1864) Gap. Vol. W.R., 243.
(3) (1871) 15 W.R., 212.
(4) (1872) 17 W.R., 73.
(5) (1919) I.L.R., 46 Calc., 390.
(6) (1919) I.L.R., 46 Calc., 390.

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decision in *Secretary of State for India* v. *Bijoy Chand Mahatap*(1), FLETCHER, J., relies on the earlier decision in *Chunder Jaleah* v. *Ramthurn Mookerjee*(2). The case went up on appeal to the Privy Council and was affirmed in *The Secretary of State for India* v. *Maharajah of Burdwan*(3). At page 110, VISCOUNT CAVE observes:

"From Gurchumbook up to Ampta, that is to say, for a distance of about fourteen miles the river is navigable at all seasons of the year; but beyond the last mentioned point it is navigable at certain seasons only, and for present purposes may be treated as non-navigable."

At page 111 it was pointed out that the Subordinate Judge came to the conclusion:

"that the whole bed of the river where it ran through the Zamindari lands, and the bed *ad medium filum aquae* where it bounded those lands on one side only, was the property of the Zamindar, and accordingly that the churs formed on these parts of the river bed belonged to the Zamindari."

At page 112 it was said,

"In dealing with this appeal their Lordships accept the concurrent findings of the Courts as to the ownership of the bed of the river and of the churs formed upon it since the date of the settlement."

It is clear from the above quotations, that the Privy Council accepted FLETCHER, J.'s view in *Secretary of State for India* v. *Bijoy Chand Mahatap*(1). The decision in *Secretary of State for India* v. *Venkatanarasimha Nayudu*(4), was followed and the decision in *The Secretary of State for India* v. *Maharajah of Burdwan*(3) applied by DEVADOSS, J., in *The Secretary of State for India in Council* v. *Bala Venkatarama Chetty*(5), but we are informed that the decision is the subject of a Letters Patent Appeal and I do not wish to rely on that case. But I cannot get over the reasoning of the Privy Council

(1) (1919) I.L.R., 46 Calc., 390. (2) (1871) 15 W.R., 212.
(3) (1922) I.L.R., 49 Calc., 103 (P.C.). (4) (1920) M.W.N., 209.
(5) (1927) 52 M.L.J., 15.

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in *The Secretary of State for India* v. *Maharajah of Burdwan*(1) and I have come to the conclusion that a river must be navigable throughout the year if it is to be regarded as a navigable river. The learned Government Pleader relied on *Orr Ewing* v. *Colquhoun*(2). It is true that Lord BLACKBURN observed at page 847 that:

"There is ample evidence that there had been at least as long as living memory extended, a user by the public of navigation in the river, during the period of the year when the water was high enough."

And that he does not entertain any doubt

"that the interlocutor, so far as it finds that the *Leven* is a navigable river free to the public and that the defenders have no right to execute works which obstruct the navigation, is right."

But on a closer examination of the case it shows that distinction was drawn between ownership of the bed of the river and the right to navigate, that though the river was navigable in the sense that the public have a right to navigate it, he applied the rule of *ad medium filum aquae* to ascertain the ownership of the bed (vide page 854) and allowed the appeal on the ground that the appellant did not obstruct the public rights of navigation, by the pier he has erected and for the purpose of the ownership he regarded the river as a non-navigable river (see page 856). This case does not therefore support the Government Pleader's contention. It is true that in America it has been held that it is not necessary that the river should be navigable throughout the year (see Farnham on Waters, Vol. 1, pages 100–102, Pomeroy on Water Rights, by Black, page 463, section 218, and Angell on Water Courses, page 696, section 537.) But having regard to the observations of

(1) (1922) I.L.R., 49 Calc., 103 (P.C.). (2) (1877) 2 App. Cas., 839 a 847.

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the Privy Council in *Srinath Roy* v. *Dinabandhu Sen*(1), at pages 529 to 531 referring to the observations of Chief Justice TILGHMAN in *Carson* v. *Blayer*(2) and President PORTER in *Zimmerman* v. *Union Canal Company*(3), applied by SADASIVA AYYAR and BURN, JJ., in *Secretary of State for India* v. *Venkataranarasimha Nayudu*(4), it is unsafe to rely upon the American decisions and apply them to Indian conditions which are sometimes different. The branch of the Gōdāvari near the suit lands is known as Addarapu Kalva. The Telugu word "Kalva" generally means an artificial channel as opposed to a natural stream. It is clear that at the spot in question there must have been so many changes in the configuration of the branches of the river that the people have ceased to regard this branch as a natural stream. The width of the stream at the place as accepted by the Courts below is not more than 100 links or 22 yards (see D.W. 1, quoted by the District Munsif in paragraph 28), "At the time of the tide, there is no water in it." D.W. 2, also says that at low tide the bed will be quite dry leaving a small quantity of water, knee-deep and mud. The above statements are taken from the depositions of defendant's witnesses who will be naturally more inclined to support the defendant. The conditions of this branch seem to be far worse from the point of view of the navigability than those of the river Kistna discussed by SADASIVA AYYAR, J., in (1920) M.W.N., at pages 210 and 211. The Government Pleader also attempted to argue that the river was as a matter of fact navigable throughout the year, because small fishing craft are able to navigate it from January to July. But that small fishing craft may float over the water is not enough; small fishing craft are very often mere logs of wood on

(1) (1915) I.L.R., 42 Calc., 489.
(2) (1810) 2 Binney, 477.
(3) (1858) 1 Watts Ser., 351.
(4) (1920) M.W.N., 209.

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which fishermen sit while fishing and cannot be said to be useful for commercial purposes. In Farnham, Vol. 1, page 100, section 23 it is observed:

"The term includes all waters which a period long enough to be of commercial value are of sufficient capacity to float water craft for the purposes of commerce or float to market the products of the country through which the water extends, so as to be useful to the population along its banks. This is alike the rule of the Civil, English Common, and American Law."

The rule is not satisfied by the mere fact that fishermen take fish from the stream for their own sustenance. The evidence does not show that there is any trade in the fish, that fish from the river are cured and exported to other places along the waterway. If there is any doubt about the evidence I would certainly call for a fresh finding allowing further evidence if necessary; but I have already extracted sentences from defendant's witnesses. They are far from showing that the river is navigable throughout the year even for small fishing craft. But assuming it is, it is not for commercial purposes. I have therefore come to the conclusion on the findings of the Lower Appellate Court and on the materials before us that the river is not navigable throughout the year and therefore cannot be regarded as a navigable river and that no further finding need be called for on the matter. In view of my conclusion on the second point I am about to discuss, it is all the more unnecessary to call for a finding.

I now proceed to discuss the second point in the case, namely, whether, by reason of the riparian rights of the plaintiff, he is entitled to use the water free of the water-cess. On this matter the history of the case law in this Presidency may be stated as follows: In *The Secretary of State for India* v. *Swami Narathes-warar*(1), it was held that where water flowing from a

(1) (1911) I.L.R., 34 Mad., 21.

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Government source flowed through a sheet of water in an inam and then overflowed the inam, the inam was liable to pay water-cess. One might concede that where water from the Government source directly irrigates the inam, the inam is certainly liable to pay water-cess, but where the water from the Government source naturally flows into a tank or stream within the inam and then the water is used for irrigation it is only natural rights that are being enjoyed and therefore the inam is not liable for water-cess. But, however, this view did not then prevail. This case was followed in *The Secretary of State for India* v. *Ambalavana Pandara Sannadhi*(1). In that case, where water from two hills, one belonging to Government and the other to a private party, combined and flowed in a channel between Government and private lands and the water was used for irrigation by a private party, it was held he was using Government water but to the extent that the accustomed flow at the time of the grant was utilized for irrigation, it was held the inamdar was not liable to water-cess. But where more water is used than the accustomed flow at the time of the grant it was held that he was liable to water-cess. In this decision, the decision of the High Court in the Urlam case *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India*(2) was followed. But the Urlam case itself and this decision both went up to the Privy Council and I will refer to their effect later on. Meanwhile, before the Privy Council decisions were passed, there was some change in the trend of the decisions in the High Court itself. In *The Secretary of State for India* v. *Janakiramayya*(3) (a Letters Patent Appeal) it was held by SADASIVA AYYAR, J., that the presumption of ownership in flowing water is rebutted

(1) (1911) I.L.R., 34 Mad., 366. (2) (1911) I.L.R., 34 Mad., 295
(3) (1914) I.L.R., 37 Mad., 322.

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by showing that the bed of the stream over which water flows does not wholly belong to Government. Where half the bed belongs to a private owner, Madras Act III of 1905 cannot be held to abrogate the ordinary juristic principles regarding flowing waters or to create a new kind of ownership in the Government in respect of them which entitles them to impose assessment. His view was that if there are riparian rights and where the irrigation is limited to the exercise of such rights, there is no right to levy water-cess. But his view that half only of the bed belonged to Government did not prevail and the other two judges held in the opposite way. In *Sri Rajah Simhadri Raju* v. *The Secretary of State for India*(1) it was held by SANKARAN NAYAR and SPENCER, JJ., that where a right to take water is proved and established in a previous litigation, an engagement to give it free of water-cess should be implied, and Government could not levy water-cess. *The Secretary of State for India* v. *Janakiramayya*(2) was distinguished on the ground that it turned upon the question of the right to the bed; whereas in the case before them there was no riparian right, but the mokhasadars were enjoying the right as a matter of easement. It is somewhat difficult to follow the distinction. If in *The Secretary of State for India* v. *Janakiramayya*(2) the inamdar had a riparian right and if in *Sri Rajah Simhadri Raju* v. *The Secretary of State for India*(1) the inamdar had a right to easement, one would think that the latter case is not stronger than the former. In *Prasad Row* v. *The Secretary of State for India*(3), the Urlam case decided by the High Court in *Kandukuri Mahalakshmamma* v. *The Secretary of State for India*(4) came up before the Privy

(1) (1916) I.L.R., 39 Mad., 67. (2) (1914) I.L.R., 37 Mad., 332.
(3) (1917) I.L.R., 40 Mad., 886 (P.C.). (4) (1911) I.L.R., 34 Mad., 295.

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Council. At page 894, in discussing the Irrigation Cess Act, Lord PARKER observed :

"If for example, a riparian owner irrigates his land with water derived from a river or stream of which it can be truly said that it is a river or stream belonging to the Government, a cess would appear to be leviable even though the Government had never spent a single rupee in improving the source of supply. If, in order to avoid this result, reliance were placed on the first proviso, the question would arise whether it were possible to imply some engagement with the Government arising out of the natural or prescriptive right of the riparian owner."

Here I wish to note that these sentences refer only to a case where the river or stream belongs wholly only to Government and it is only in such a case that the cess is *prima facie* leviable by Government and exemption could be claimed, if at all, only on the ground of an engagement within the meaning of the proviso. But where the river or stream cannot be said to belong wholly to Government, the observations that cess is *prima facie* leviable and therefore it is necessary to get exemption by reliance on the engagement are not applicable. Where the river or stream does not wholly belong to Government but only a half or no part of it, as where the owners of both sides are private owners and water from a Government source higher up flows into the river, it looks as if in the view of Lord PARKER cess is not *prima facie* leviable. At page 896, His Lordship then discussed the object of the proviso and his conclusion was that the object was to safeguard the obligation not to increase the jumma. At page 897 he discusses the question whether the right to irrigate free of water-cess is limited to the mamul enjoyment at the time of the grant. Then after describing the various channels in the case, His Lordship observes at page 904,

"Obviously some right or easement of taking water from the river must pass. The only question is as to the measure of this right."

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He then comes to the conclusion that the measure of the right is not the mamul of enjoyment at the time of the grant, but the capacity of the easement granted as shown by the configuration of channels and sluices and such other features. At the bottom of page 905 he observes :

"Assuming on the other hand, that the river Vamsadhara does not belong to the Government, the right of taking water from it into each of the four channels could not depend on any easement created by virtue of the permanent settlement. It would depend in part on prescriptive rights existing at the date of, and passing under, the sanads, or acquired since the sanads were granted."

Then His Lordship observes :

"The construction of the sanads in the way their Lordships construe them has the advantage of being in ample accord with the known policy and objects of the permanent settlement. . . . The policy was to encourage such progress"

Then he says at page 907, that the conclusions of the lower Courts were fallacious. The actual case was one of easement and not of riparian rights ; but the way in which His Lordship discussed the construction of the sanads and the policy of the Government at the time of the settlement and used it for the purpose of determining the measure of the easement shows that exactly the same principles would apply to determine the effect of the grant even if it were not a case of easement but a case of riparian right. In fact the riparian right and the prescriptive right were put together in the paragraph immediately preceding the discussion of the construction of the sanad. It is true at an earlier page (page 895) His Lordship observed :

"It is a nice problem whether a riparian owner, who is exercising his natural or prescriptive right of taking water from a natural stream for purposes of irrigation, is taking water from

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a stream belonging to the Government within the meaning of the Cess Act."

But that nice problem was only in respect of a stream wholly belonging to the Government. Where the stream does not wholly belong to the Government, but on the other hand partly belongs to the riparian owner or does not belong to the Government at all, it is not a nice problem. But assuming it is a nice problem in all the cases, there does not seem to be any doubt as to what the answer would have been from the manner in which the question is discussed at page 906, though the matter had not to be decided in that case. But in the case immediately following it, namely, *Ambalavana Pandara Sannadhi* v. *The Secretary of State for India*(1), which was on appeal from *Secretary of State for India* v. *Ambalavana Pandara Sannadhi*(2), it was conceded by both the parties that the decision of the Privy Council in the Urlam case applied to that case also When we remember that the case in *Secretary of State for India* v. *Ambalavana Pandara Sannadhi*(2), was the case of a channel in which water from a Government hill and a private hill combined and flowed and the channel flowed through the private owner's land it is clear that the Urlam decision was held to extend to the case of riparian owners by the decision in *Ambalavana Pandara Sannadhi* v. *The Secretary of State for India*(1). In my opinion the effect of the decision of the Privy Council in *Prasad Row* v. *The Secretary of State for India*(3), and *Ambalavana Pandara Sannadhi* v. *The Secretary of State for India*(1), was not only to reverse the decisions in *Kandukuri Mahalakshmamma* v. *Secretary of State*(4) and *Secretary of State for India* v. *Ambalavana Pandara*

(1) (1917) I.L.R., 40 Mad., 909. (2) (1911) I.L.R., 34 Mad., 366.
(3) (1917) I.L.R., 40 Mad., 886. (4) (1911) I.L.R., 34 Mad., 295.

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Sannadhi(1), from which they arose in appeal but also to reverse the decision of the majority in *Secretary of State* v. *Janakiramayya*(2). In *Lakshminarasu Avadhanulu* v. *The Secretary of State for India in Council*(3), it was held that in the case of enjoyment of riparian rights the inamdar is not liable to water-cess. SADASIVA AYYAR, J., followed his own view in *Secretary of State* v. *Janakiramayya*(2), for though he was then in a minority he now found he was at liberty to follow that view on account of the Privy Council decision in *Prasad Row* v. *The Secretary of State for India*(4). I entirely agree with the view taken in *Lakshminarasu Avadhanulu* v. *The Secretary of State for India in Council* (3), as to the effect of the Privy Council decision. This view is further supported by the fact that the basis of the decision of the majority in *Secretary of State* v. *Janakiramayya*(2), namely, that the whole bed belonged to the Government, a view with which SADASIVA AYYAR, J., did not agree and by reason of which that case was distinguished in *Sri Rajah Simhadri Raju* v. *The Secretary of State for India*(5) was itself overruled in the Full Bench decision in *Venkata Lakshminarasamma* v. *The Secretary of State for India*(6). So that, this is another reason why the decision in *Secretary of State* v. *Janakiramayya*(2) ceases to be of any authority. And if the whole bed does not belong to Government, that decision does not apply, there is no nice problem to decide and the principles of Urlam case apply. In *The Secretary of State for India in Council* v. *Maharaja of Bobbili*(7), a decision of the Privy Council, Lord SHAW after quoting the sentence of Lord PARKER at page 896 I have already quoted

(1) (1911) I.L.R., 34 Mad., 366. (2) (1914) I.L.R., 37 Mad., 322.
(3) (1918) 34 M.L.J., 223. (4) (1917) I.L.R., 40 Mad., 886.
(5) (1916) I.L.R., 39 Mad., 67. (6) (1918) I.L.R., 41 Mad., 840 (F.B.).
(7) (1920) I.L.R., 43 Mad., 529 (P.C.).

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referring to the natural or prescriptive right of the riparian owner, says at page 539:

"That question so reserved is the point now in issue. In their Lordships' opinion such an engagement should be implied in the circumstances already set out. The predecessors of the respondent were using the water as of right when the servient Zamindari was forfeited to the Crown in 1833; with the owners of that Zamindari they had, to use the general term employed in the statute, a good 'engagement': in taking the servient estate, this engagement accompanied the transaction, and the engagement was thereafter with the Crown."

In that case the riparian owner abutting on the channel had a right by prescription to take the water of a river through the channel over the lands of the Zamindar of Palkonda which were since forfeited to Government. It was held there was an engagement not to levy water-cess. Whether it is a natural right or a prescriptive right of the riparian owner I do not see what difference it makes. The method of reasoning in *Prasad Row* v. *The Secretary of State for India*(1), the way in which it was conceded that it applies in *Ambalavana Pandara Sannadhi* v. *The Secretary of State for India*(2), the decision in *Lakshminarasu Avadhanulu* v. *The Secretary of State for India*(3) and finally the decision in *Secretary of State for India* v. *Maharajah of Bobbili*(4), all show that at this day no distinction can be made between the effect of a grant on the measure of irrigation rights granted, whether the enjoyment at the time of the grant was by an easement or as a riparian owner with natural or prescriptive rights. In the present case, the lower Courts observe that the immemorial use of riparian rights by the plaintiff is not proved. In this observation, the lower Courts are, in my opinion, guilty of a

(1) (1917) I.L.R., 40 Mad., 886. (2) (1917) I.L.R., 40 Mad., 909.
(3) (1918) 34 M.L.J., 223. (4) (1920) I.L.R., 43 Mad., 529 (P.C.).

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misconception of law. A riparian right is a natural right and is not acquired by immemorial user. It exists by law, it may be lost by the adverse enjoyment of another, but it has not got to be enjoyed to be kept up. Whatever the enjoyment at the date of the grant may be, the measure of the right that passes is determined only by the configuration and the width of the river or stream. I therefore think in this case the plaintiff is entitled to draw water from the Addarapu Kalava in exercise of his rights as a riparian owner and so long as he does not exceed those rights he is not liable to water cess. That in India rights of the riparian owner include also the right to take reasonable quantity of water for purposes of irrigation scarcely admits of any doubt.

In the result, I would allow the appeal and decree the suit with costs throughout, but only with interest at six per cent instead of twelve per cent claimed.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Wallace

ALAMELU AMMAL (PLAINTIFF), PETITIONER,

1927, April 18.

v.

T. S. VENKATARAMA IYER (DEFENDANT) RESPONDENT.*

Provincial Insolvency Act (V of 1920), ss. 28 and 42—Refusal to order final discharge, whether a termination of insolvency proceedings—No annulment of adjudication.

On an order of adjudication, the property of the insolvent vests in the Official Receiver under section 28 of the Provincial Insolvency Act and it continues to be so until the insolvency proceedings terminate in any of the ways indicated by the Act,

* Civil Revision Petition No. 1283 of 1925.

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such as, annulment of the adjudication. An order refusing under section 42 of the Act the final discharge of the insolvent does not terminate the insolvency proceedings and does not, therefore, enable a decree-holder to apply for execution against the insolvent, without the leave of the Court.

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 order of K. S. VENKATACHALA AYYAR, Small Cause Judge of Kumbakonam, in E. P. No. 2145 of 1925 in S.C.S. No. 1947 of 1920.

The facts are given in the judgment.

S. Subrahmanya Ayyar for petitioner.

K. S. Desikan for respondent.

JUDGMENT.

This Civil Revision Petition is against the order of the lower Court in a matter of execution. The petitioner put in an execution petition praying for the arrest of his judgment-debtor (respondent). The respondent urged that he is still an insolvent and that the proceedings in insolvency are still pending, that the petitioner has not got permission of the insolvency Court to open execution proceedings against him and that, therefore, the petition is not maintainable. The respondent was adjudicated insolvent on 6th January 1921. The petitioner, however, claims that the insolvency proceedings have come to an end since the respondent applied for and was refused a final discharge on 30th October 1923. The petitioner put in a petition for review of that order which was dismissed on 15th March 1924. The present execution petition was put in on 30th April 1925. It is admitted that the respondent's adjudication has not been annulled.

The question for decision is, does the refusal, under section 42 of the Provincial Insolvency Act, of a final

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discharge *ipso facto* determine the insolvency proceedings? The lower Court has held that it does not, and I agree. It is the order of adjudication which vests the property of the insolvent in the Court or in the Official Receiver (see section 28). It would follow that until and unless that order is annulled the property continues to vest in Court, and so long as that vesting remains, the insolvency proceedings cannot have come to an end. It would be absurd to hold that it was open to an execution creditor without the permission of the insolvency Court to arrest his judgment-debtor for not satisfying his decree-debt, when the assets of the judgment-debtor are not vested in him or under his control, and when the Official Receiver is still holding them for the benefit of the judgment-debtor's general body of creditors. Further, an order of refusal of a final discharge is not in itself necessarily final. There are cases in which it may not be final. For example, the final order of discharge may be refused, because the insolvent's assets are less than eight annas in the rupee, but the insolvent may subsequently come into property which would enable a dividend of more than eight annas to be paid and the Court might on that finally grant him an absolute order of discharge. Obviously, the insolvency proceedings must in such a case be pending after the first refusal to grant an absolute order of discharge. It is true that Act V of 1920 does not provide that the pendency of an insolvency proceedings shall be terminated in every case by annulment of adjudication. Such annulment is provided for by sections 35, 36, 39 and 43. But these sections do not cover every possible case. It is clear from the scope of the Act that if a Court intends to bring the insolvency proceedings to an end and restore the *status quo ante*

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the insolvency it must annul the adjudication. In every case where an order under section 42 has been passed the Court might *suo motu* or on the motion of a creditor annul the adjudication, but until it is annulled the insolvency proceedings are still pending.

Another indication that this is the correct view is, that while under section 37 the order annulling an adjudication must be published, there is no section which says that the order of refusal to discharge must be published. The purpose of publication is obviously to notify to the public that the insolvency has come to an end. If it came to an end by an order of refusal to discharge, then it would be equally necessary to direct the publication of that order. That the insolvency Court in the present case did not close the proceedings is clear from the fact that the petitioner himself received a dividend from the Official Receiver on 26th November 1924, five months before his execution petition and eleven months after the order refusing absolute discharge. It is now suggested that the payment might have been sanctioned long before the order of refusal, but there is nothing on the record to warrant that suggestion.

There is a surprising lack of authorized reported rulings on this point of law. A case in Rangoon has been cited to the contrary. The ruling is by a single judge reported in *Maung Po Toko* v. *Maung Po Gyi*(1). Another learned Judge of the same Court has ruled to the contrary effect in *Rowe & Co.* v. *Tan Thean Taik*(2), and I find myself in agreement with the latter's view.

It is not necessary to go into the further question as to whether the execution petition is barred by limitation. The lower Court has made no error of law in holding

(1) (1925) I.L.R., 3 Rang., 492. (2) (1924) I.L.R., 2 Rang., 643.

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that the insolvency proceedings were pending at the time of the execution petition and that section 28 barred the application, as no permission of the Insolvency Court was obtained. I therefore refuse to interfere and I dismiss the Civil Revision Petition with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Venkatasubba Rao.

NAGASUBRAHMANIA MUDALIAR (RESPONDENT), APPELLANT,

1927, April 25.

v.

N. KRISHNAMACHARIAR (PETITIONER), RESPONDENT.*

Provincial Insolvency Act (V of 1920), sec. 2 (a) (d)—Decree against son for debt of father—Liability of son to adjudication under the Act.

Until there is a personal decree under section 52, Civil Procedure Code, a decree against a person as the legal representative of another (such as in this case a decree against a son for the debt of his deceased father to the extent of the assets in his hands) does not make him liable to adjudication under the Provincial Insolvency Act. *The Official Assignee of Madras* v. *Palaniappa Chetty*, (1918) I.L.R., 41 Mad., 824, followed. *Muthuveerappa Chettyar* v. *Sivagurunatha Pillai*, (1926) I.L.R., 49 Mad., 217, considered.

APPEAL against the order of the District Court of North Arcot at Vellore in I.P. No. 22 of 1923.

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

A. Visvanatha Ayyar for appellants.

V. C. Rajagopala Achariyar for respondent.

* Civil Miscellaneous Appeal No. 382 of 1924.

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JUDGMENT.

ODGERS, J.—After a long delay of two years this Civil Miscellaneous Appeal comes before us again. We partially heard the appeal in April 1925 and we then adjourned the hearing till a decision of the Lower Court had been reached as to whether the decree should be amended or not. That has now been done and a Civil Revision Petition against that decision has also been disposed of by us just now. This is an appeal against the decision of the learned District Judge of North Arcot adjudicating the petitioner insolvent. The father of the petitioner before us had incurred certain liabilities to the Commercial Bank and died and the petitioner as his son succeeded to the assets of his father. The learned District Judge held that the petitioning creditor having obtained a decree against the son as representing his father was entitled to have him adjudicated an insolvent. The matter seems to me to be very plain and can be dealt with shortly. It has been strenuously urged on us that the son is personally liable for the father's debt and therefore fulfils the definitions of a "debt" and "debtor" within the meaning of sections 2(*a*) and (*d*) of the Provincial Insolvency Act and the decision in *Muthuveerappa Chettiar* v. *Sivagurunatha Pillai* (1), is pointed to. In that case, one may say that the authorities do not seem to have been discussed and the learned Judges say that each case depends upon its own circumstance and if the petitioner makes the necessary allegation and proves them, then the Court would be justified in adjudicating the members of a joint Hindu family insolvents. That no doubt is perfectly true. But on the other hand, in *The Official Assignee of Madras* v. *Palaniappa Chetty*(2), which was a case decided by

(1) (1926) I.L.R., 49 Mad., 217. (2) (1918) I.L.R., 41 Mad., 824.

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three Judges of this Court after a difference of opinion between ABDUR RAHIM, Officiating C.J., and PHILLIPS, J., the question was whether a minor partner in a Hindu trading family was liable to be adjudicated in respect of debts incurred for the purpose of the business during his minority or after he attained majority. The majority of the Court held that the members of a joint Hindu trading family on attaining majority do not necessarily become personally liable for and liable to adjudication in respect of debts contracted in the joint family business during their minority. Sir JOHN WALLIS, C.J., in his judgment says that on the law he is not prepared to extend the operation of section 248 of the Contract Act beyond the cases that directly fall within it so as to impose for the first time apparently on the members of the Hindu family a personal obligation for debts contracted in the family business during their minority, and with him SPENCER, J., agreed. See also the observation in *Sanyasi Charan Mandal* v. *Asutosh Ghose*(1). It may also be noted that the petitioner is amenable to the Court in respect of the assets of his father which have come into his hands under section 52 (3), Civil Procedure Code. It has been attempted to be contended that because the Provincial Insolvency and the Presidency Towns Insolvency Acts differ in some respects as to the proceedings in insolvency and also in the procedure to be followed by the Courts, there is a radical difference between them in this respect, for it is admitted that under the Presidency Towns Insolvency Act a petition of this sort would be instantaneously dismissed. There is no ground to my mind for holding that a distinction exists between the provisions of the two Acts of a radical character of this sort and I am therefore prepared to hold that the

(1) (1915) I.L.R., 42 Calc., 225 at 232.

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adjudication by the learned District Judge of North Arcot was unwarranted and must be reversed. The Civil Miscellaneous Appeal must be allowed with costs.

VENKATASUBBA RAO, J.—I entirely agree. The question that has to be decided is: when a debt is due from a person in his representative character, is he liable to be adjudicated an insolvent under the Provincial Insolvency Act? An amount became due to the respondent from the appellant's father. The latter died and the respondent filed a suit against the appellant and obtained a decree against the assets of the family. It is alleged that the appellant without satisfying the decree alienated the joint family properties. On this ground the respondent sought to adjudicate the appellant an insolvent. The decree as originally passed was general in its terms, but the appellant applied for the amendment of that decree and it has now been amended. We have just held in the connected Civil Revision Petition that it was within the power of Court to make the amendment under section 152, Civil Procedure Code. There is thus no doubt that the decree as it now stands excludes altogether the personal liability of the appellant. In these circumstances, can the appellant be adjudicated an insolvent: The proposition that any person who happens to be a debtor in his representative capacity is liable to be adjudicated an insolvent, cannot be seriously argued, for in that case any executor or administrator may be so adjudicated by reason of his occupying that limited capacity. This, of course, would be absurd; but it is said that in the case of a co-parcener of a Hindu joint family, the position is different. I am not prepared to accept this contention. I regard *The Official Assignee of Madras* v. *Palaniappa Chetty*(1) as throwing very

(1) (1918) I.L.R., 41 Mad., 824.

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valuable light upon this point. In that case a Hindu father carried on a trade and his son took an active part in the business both while he was a minor and after he became a major. The question arose, was the son liable to be adjudicated an insolvent in respect of the debts incurred in the course of the trade while he was a minor? Six learned Judges took part in this case at various stages, but throughout, the test applied was, was the son personally liable? It was taken for granted, that if he was personally liable he could be adjudicated an insolvent; if he was not, it was equally clear that he could not be. Three of the Judges, BAKEWELL, PHILLIPS, and SADASIVA AYYAR, JJ., took the view that the son was personally liable for such debts and that in consequence he could be adjudicated an insolvent. The other three Judges, Sir JOHN WALLIS, C.J., ABDUR RAHIM, and SPENCER, JJ., were of the opinion that the debts were not personally enforceable against the son and therefore he could not be adjudicated an insolvent in respect of them. It will be seen that on whatever other matter there was a difference of opinion, all the Judges were agreed in this, if the debts could not be personally enforced, the debtor could not be adjudicated an insolvent.

I regard this case as correctly indicating the true rule of law and as the debt in question is not personally enforceable against the appellant, my conclusion is that he cannot be adjudicated an insolvent. It has been said for the respondent that this view of the law would create a hardship. There is no substance in this contention, for section 50 (2) and section 52 (2), Civil Procedure Code, provide necessary safeguards.

The respondent urges that *Muthuveerappa Chettiar* v. *Sivagurunatha Pillai*(1) supports his contention. I do

(1) (1926) I.L.R., 49 Mad., 217.

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not think that the learned Judges intended to lay down the general rule that a co-parcener as such is liable to be adjudicated an insolvent in respect of the debts incurred by the manager and binding on the family. The learned Judges say

"each case depends upon its own circumstances."

This decision thus enunciates no principle of law. A case may be readily put of a member of a trading joint family becoming personally liable by reason of his taking an active part in the business. In such a case he can be adjudicated an insolvent and the observations in 49 Mad., 217, would be correct if applied to a case of this kind. This is exactly what was held in *The Official Assignee of Madras* v. *Palaniappa Chetty*(1) which I have cited. I am not therefore prepared to treat 49 Mad., 217, as an authority for the general proposition which has been pressed upon us.

The respondent's learned vakil contends that under the Provincial Insolvency Act the law is different in this respect from what obtains in England and from what is enacted in the Presidency Towns Insolvency Act. There is no substance in this contention. Section 7 of the Provincial Act corresponds word for word to section 10 of the Presidency Act and it is impossible to suggest that such a radical change was intended in the absence of an express and clear provision to that effect.

I agree that the appeal succeeds and should be allowed with costs.

N.R.

(1) (1918) I.L.R., 41 Mad., 824.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Curgenven.

THE MUNICIPAL COUNCIL, CUDDALORE (SECOND DEFENDANT), PETITIONER,

1927, July 21.

v.

M. C. KRISHNAN NAMBIAR AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

Ss. 93 (3) *and* 354 (2) *and rule* 28, *Sch. IV of the Madras District Municipalities Act* (*V of* 1920)—*Levy of profession-tax in two municipalities for the same half-year, legality of —Right of suit, for refund, when.*

If a person who becomes successively liable in a single half year to pay profession-tax in two municipalities pays it in one, although it be the second, he acquires exemption, under section 93 (3) of the Madras District Municipalities Act, from liability to pay it again in the first.

Rule 28 of Schedule IV of the Act bars a suit for refund of tax paid, only if the municipality is empowered to make the demand and not otherwise.

PETITION under sections 25 of Act IX of 1887 and 107 of the Government of India Act praying the High Court to revise the decree of T. R. MALAYAPPA AYYAR, District Munsif of Chidambaram, in S.C.S. No. 333 of 1925. Section 93 (3) of the Madras District Municipalities Act is given in the judgment.

Section 354 (2) and rule 28, Schedule IV of the Madras District Municipalities Act are as follow:—

Section 354 (2)—

"No suit shall be brought in any Court to recover any sum of money collected under authority of this Act or to recover damages on account of any assessment, or collection of money made under the said authority; provided that the provisions of this Act have been, in substance and effect, complied with."

* Civil Revision Petition No. 1156 of 1925.

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Rule 28 *of Schedule IV*—

"The assessment or demand of any tax, when no appeal is made, as hereinbefore provided, and the adjudication of an appeal by the council, shall be final."

The facts are given in the judgment.

T. S. Nataraja Pillai for petitioner.

S. R. Dikshit and *V. P. Karunakara Nambiyar* for respondents.

The JUDGMENT of the Court was delivered by

CURGENVEN, J.

CURGENVEN, J.—This is a Civil Revision Petition presented by the Cuddalore Municipal Council against the judgment of the District Munsif of Chidambaram in S.C.S. No. 333 of 1925 on his file. The plaintiff in that suit, Mr. M. C. Krishnan Nambiyar, is a District Munsif, and during the first half of the year 1923-24 he successively resided and held appointments for more than sixty days within two municipalities those of Cuddalore and Chidambaram. Although he had thus rendered himself liable to pay profession-tax to the Cuddalore Municipality, no demand was made upon him until several months after he had left, and after a similar demand had been made upon him in Chidambaram. Eventually he paid the tax demanded of him by the latter municipality, and later again the Cuddalore Municipality compelled him to satisfy its own demand. He thus paid profession-tax twice over. In the suit, in which he made both municipalities defendants, the lower Court has decreed the refund to him by the Cuddalore Municipality of Rs. 13-2-0 being equal to the amount of the payment made to the Chidambaram Municipality. The full tax payable to the Cuddalore Municipality was a little more Rs. 15-5-0 and he was found liable for the difference.

The point for decision thus is whether if a person who becomes successively liable in a single half year to pay

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profession-tax in two municipalities pays it in the second he acquires exemption from liability to pay it in the first. The answer depends upon the construction of sub-section (3) of section 93 of the Madras District Municipalities Act V of 1920 which runs as follows :—

"No person who shall prove that he has paid the sum due on account of the profession-tax levied under this Act, or under the Madras City Municipal Act, 1919, or any tax of the nature of a profession-tax imposed under the Indian Cantonments Act, 1910, for the same half year in any other Municipality or Cantonment in the Madras Presidency shall be liable by reason merely of change of business, appointment, residence, or place of business to pay to any Municipal Council more than the difference between such sum and the amount to which he is otherwise liable for the profession-tax for the half year under this Act."

This provision is followed by three illustrations, the first two of which refer to the ordinary case where a person having paid tax in the first municipality, is exempt up to the sum so paid from paying again in a second. The third illustration is upon a different point. But although the more common application of the sub-section may be to cases of this nature, we are in agreement with the learned District Munsif that its terms are wide enough to cover the converse case illustrated by the facts now under consideration. Applied to those facts, what the sub-section says is that no person who shall prove that he has paid the sum due on account of profession-tax for the same half year in the Chidambaram Municipality shall be liable by reason merely of change of business, appointment, residence, etc., to pay to the Cuddalore Municipality more than the difference if any, between the Cuddalore tax and the Chidambaram tax and it makes no difference, in our view, whether the assessee resided and held his appointment first in the one municipality or first in the other. The phrase "by reason merely of change of business, appointment, residence a place of business" applies equally to either case.

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Had the intention been, as contended by the petitioner, to restrict exemption from payment of the tax payable in the second municipality by virtue of payment made in the first, there would have been no difficulty in so wording the provision. The intention seems rather to be that in no circumstances where a transfer of residence and occupation has taken place shall a person have to pay the tax twice over. We are not concerned with the propriety of this rule, once it is clear that it is correct law. But it has at least the merits of encouraging promptitude and vigilance on the part of a municipal collecting agency and of protecting an assessee against delayed claims.

An attempt has been made to base a further point that a suit of this nature does not lie upon the terms of rule 28 of Schedule IV of the Act. That rule, which says that the assessment or demand of any tax, when no appeal is made, as hereinbefore provided, and the adjudication of an appeal by the council shall be final, clearly has reference to an assessment or demand which the municipality was empowered by the Act to make.

Under sub-section (2) of section 354, a suit against a municipality to recover money is only barred, if the provisions of the Act have been in substance and effect complied with; and this condition was not fulfilled in the present case. We accordingly dismiss the Civil Revision Petition with costs (one set).