



THE INDIAN LAW REPORTS

MADRAS SERIES

CONTAINING

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

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1932

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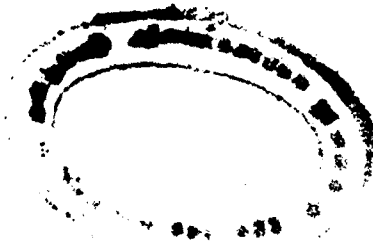
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SEC. 11—Res judicata —Finding declaring joint title of parties to suit and third parties—If operates as <i>res judicata</i> between parties—Adverse finding against a party who could not appeal—If operates as <i>res judicata</i> —Hindu Law—Partition—Complete or partial—Presumption.] There were five brothers A., V., S., R. and another. A filed a suit in 1906 against S. and Z. (a stranger to the family) claiming that a certain sum of money lent on mortgage to Z. by him in 1885 was his exclusive property. In that suit S. who did not represent V. and R. stated that the sum of money belonged to himself and V. and R. and that A. had no right to the same; Z. contended that the suit was bad for non-joinder of proper parties since the sum of money belonged to all the five brothers jointly. Nobody raised the point that there was a partition in 1887 among the brothers. The Court held that, on the date of the transaction of 1885, A. lived separately from his brothers, and that he took the mortgage of 1885 in his name with funds in which his brothers were interested and in which they had a share, and that there was no ground for supposing that when A. lent the money	

he was acting as the managing member of the joint family or was representing any interest but his own and as such the suit was not bad for non-joinder of proper parties. A decree was passed in A.'s favour for the amount claimed. In a later suit by V.'s widow against the other members of the family it was held that in 1887 there was a partition among the five brothers. S. filed a suit in 1924 against A. and several others, claiming a fifth share of the sum of money that was the subject-matter of the suit of 1906, basing his claim on the findings in that suit and also alleging that the sum was not disposed of by the partition of 1887. Held, (1) that where a partition has taken place the presumption is that it was a complete partition and the burden lies upon him who alleges that a certain property was excluded from the partition to show that it was a partial partition; (2) that the finding in the suit of 1906 cannot operate as *res judicata* between A. and S. because the suit, in spite of the finding, was decided in A.'s favour and as a result he had no right to appeal for the purpose of challenging the finding; and (3) that the finding in that suit cannot operate as *res judicata* between A. on the one hand, and V. and R. on the other since the latter were not parties to that suit and it cannot operate as *res judicata* between A. and S. by the mere fact that they were parties to that suit, since the joint title of all the five brothers (including V. and R.) to that sum was found in that suit and not the exclusive title of S, V., and R.

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CIVIL PROCEDURE, CODE OF (ACT V OF 1908), ss. 24, 37, 38, 39 AND 150—Jurisdiction—Final decree in mortgage suit—Transfer of territorial jurisdiction to another Court after—Execution application filed in latter Court without obtaining transmission of decree from former Court—Jurisdiction of the former and latter Courts to execute the decree considered.] After the passing of a final decree in a mortgage suit, the Court which passed the decree ceased to have territorial jurisdiction over any of the mortgaged properties, though the said Court continued to exist, and, in pursuance of a notification which had not to effect to a transfer of business, another Court acquired territorial jurisdiction over the said properties. Held, that the latter Court could not execute the decree without transmission of the same from the former Court which passed the decree. The *obiter dictum* to the contrary in *Seeni Nadan v. Muthuswami Pillai*, (1919) I.L.R. 42 Mad. 821 (F.B.), disapproved. *Subrahmanya Ayyar v. Swaminatha Chettiar*, (1928) 28 L.W. 885, followed. Held further, that the Court which passed the mortgage decree retained jurisdiction to execute the decree even after transfer of territorial jurisdiction. Observations to the contrary in *Sevakandu Raju v. Raja of Jeypore*, (1921) I.L.R. 50 Mad. 882, overruled as being in conflict on this point with *Seeni Nadan v. Muthuswami Pillai*, (1919) I.L.R. 42 Mad. 821 (F.B.).

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SEC. 24 (1) (a)—"Competent to try"—Meaning of—District Munsif's small cause jurisdiction—Suit beyond, and within Subordinate Judge's small cause jurisdiction—Transfer to District Munsif of—Competency of Munsif to try suit—Provincial Small Cause Courts Act (IX of 1887), sec. 16.] A suit, which was within the small cause jurisdiction of the Subordinate Judge of Devakotta and beyond the small cause jurisdiction of the District Munsif of Devakotta was transferred by the District Judge of Ramnagar to the file of the District Munsif of Devakotta. Held, that the District Munsif was "competent to try" the suit within the meaning of section 24 (1) (a) of the Code of Civil Procedure. "Competent to try" in section 24 (1) (a) of the Code must be understood to mean "of jurisdiction competent to try"; and section 24 of the Code must be understood to constitute an enactment saving, in special circumstances, the provision of section 16 of the Provincial Small Cause Courts Act.

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CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 144—Restitution under—Meaning and object of—Execution of decree—Stay by Appellate Court of, pending defendants' appeal therefrom—Amount deposited in Court as a condition of, for withdrawal by the decree-holder on furnishing security—Failure of decree-holder to furnish security and to withdraw amount from Court—Reversal of decree in appeal—Restitution on—Interest on amount deposited in Court—Defendants' right to.] The restitution mentioned in section 144 of the Code of Civil Procedure is the restoration to the injured party of what he has lost, not primarily the deprivation of the other party of what he has wrongfully gained. The section is directed to the benefit of the wronged party and its object is, so far as possible, to put him back into the position in which he would have been but for the wrong decree or order, which is afterwards reversed. Pending an appeal against a decree for money, the defendant-appellant applied for stay of execution of that decree. The plaintiff-respondent opposed that stay application, and eventually an order was made on the stay petition that execution would be stayed if the defendant paid into Court Rs. 3,500, a portion of the decree amount, and gave security for the remainder of the decree, and that, if the Rs. 3,500 was paid into Court in accordance with the order, the plaintiff should be allowed to draw it only on giving security for that amount. The defendant paid that Rs. 3,500 into Court and gave security for the remainder of the decree, and thereupon execution of the decree was stayed pending the appeal against that decree. The plaintiff however did not give security for the Rs. 3,500 and did not withdraw it from Court. The defendant succeeded in his appeal; and after his success he applied to the Court below, in which the Rs. 3,500 had been deposited by him, for restitution. Held, that the defendant was entitled to interest upon the Rs. 3,500 as part of the restitution due to him under section 144 of the Code. Per REDA J.—The payment of the Rs. 3,500 into Court pursuant to the order on the stay petition was not a voluntary payment.	
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CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. V, R. 20—Substituted service—Due service if and when may be.] Neither of the extreme positions (1) that substituted service is necessarily due service which can never be contested by the judgment-debtor at a later date and (2) that it is necessarily not due service is correct. There are circumstances under which substituted service may be treated as due service. Where it appeared that substituted service was ordered and effected because the defendant had deliberately evaded service of summons, held that substituted service was due service. Shariba Beeby v. Abdul Salam, (1927) I.L.R. 51 Mad. 860, and Gyanammal v. Abdul Hussain Sahib, (1931) I.L.R. 55 Mad. 223, considered.	
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Arunachalam v. Veerappa Chettiar (1932) I.L.R. 55 Mad. 17	
CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XI, R. 15—Inspection—Right of party to—Inability on his part to particularise in his allegations—Effect.] The plaintiffs' commission agents for the sale of timber despatched to them by the defendants, sued for the recovery of the balance due to them on accounts, being the excess of advances made over the value of timber received, alleging a settlement of account prior to suit followed by further dealings. The defendants pleaded, <i>inter alia</i>, that the alleged settlement based admittedly wholly upon plaintiffs' accounts even if definite, was vitiated by fraud and that they were therefore entitled to re-open the same; and, in order to obtain material upon an issue framed upon that point, they applied for permission to inspect the plaintiffs' account relating to the pre-settlement period. Held that, the defendants were not disentitled to inspection upon the sole ground that their allegations of fraud and misconduct against the plaintiffs were couched in general terms and that they had adduced no specific instances. The mere inability of a party to particularise in his allegations does not afford a sufficient ground for refusing to grant him inspection. Whyte v. Ahrens (1884) 28 Ch.D. 717; Lesich v. Abbott (1886) 31 Ch.D. 374; and Sachs v. Spielman (1888) 37 Ch.D. 295, followed.	
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CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XI, RR. 16 AND 18—Inspection—Right of—Documents relied upon by plaintiff as evidence in support of his claim—Documents entered in list attached to plaint—Right if extends to—Defence—Inspection before filing of—Right of—Discretion of Court to allow or disallow inspection—Principles regulating exercise of.] The right to inspection conferred by rule 15 of Order XI of the Code of Civil Procedure is not limited to documents sued upon but extends to documents relied upon by the plaintiff as evidence in support of his claim. Documents entered in a list attached to the plaint come within the description in rule 15 of Order XI of documents to which reference is made in the pleadings. The only reasonable way of reading Order VII, rule 14 with Order XI, rule 15, is to hold that the expression "referred to" is equivalent to "entered in the list". For this purpose the list must be deemed to be part of the plaint. Chandmull Goneshmull v. Dhanraj Ganapatray (1919) 24 C.W.N. 302, dissented from. To the extent indicated in the proviso to rule 18 (1) of Order XI the Court has a discretion to withhold inspection; but the onus rests on the party resisting an order for inspection to show that it should not be made in the special circumstances of the	

case. The English rule is ordinarily to allow inspection even though the defence may not have been put in. In India, while the Court has a certain discretion, limited to the terms of the proviso to rule 18 (1) of Order XI, it would not be a proper exercise of that discretion to refuse inspection on the general ground that it was sought before the written statement was filed.

Ramanathan Chettiar v. Raja Sir Annamalai Chettiar. (1932) I.L.R. 55 Mad. 421

CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXI, r. 4—Small Cause suit—Judgment in—Proper judgment if and when is—Fact only—Law—Fact and law—Questions of—Suits involving—Distinction—Provincial Small Cause Courts Act (IX of 1887), sec. 25; Code of Civil Procedure (Act V of 1908), O. I, r. 1—Applicability and effect of.] The test whether rule 4 (1) of Order XX of the Code of Civil Procedure has been used or abused lies in the answer to the question whether the judgment has been made intelligible. If with the aid of the record the judgment, however brief, show that the judge has grasped the questions for decision and has answered them, not arbitrarily, but for reasons which can be readily understood, then he has complied with the provisions which regulate his procedure. On a question of fact it will ordinarily be enough if the Judge gives his actual decision on that question—his answer to it. *Per REILLY J.:*—In a case in which a question of law is raised, if the question is, when the facts are once settled, very simple to answer, the Judge may in a large proportion of cases be able to give quite an intelligible answer, sufficient for all purposes, to the question in a word or two. But, when a more difficult question of law or of mixed law and fact arises, a Small Cause Judge cannot perform his duty of making his judgment intelligible, unless he at least sets out so much of his reasoning as will make clear the road by which he has reached his conclusion. *Per ANANTAKRISHNA AYYAR J.:*—A Small Cause Judge is under a duty to record his finding on a question of law in such a way as will enable the High Court in revision to appreciate the exact finding on the question on the face of the judgment. A judgment recording simply "in the affirmative" or "in the negative"—the finding on such a point—is not ordinarily a proper judgment. How much of discussion is necessary in any particular case regarding any particular point of law will largely depend upon the circumstances of each case and on the nature of the question of law that arises.

Mariyayee Ammal v. Ponnusami Chettiar ... (1932) I.L.R. 55 Mad. 671

CEDURE, CODE OF (ACT V OF 1908), O. XXI, r. 2:—See CIVIL PRO- 720

O. XXI, r. 16—Application by transferee-decree-holder under—Plea of uncertified adjustment of decree by judgment-debtor—If sustainable.] In an application under Order XXI, rule 16, of the Code of Civil Procedure by a transferee-decree-holder, the judgment-debtor cannot plead an uncertified adjustment of the decree as an objection to its execution. *Pamadimarri Gnanamma v. Raja Seetharama Chandra*, (1929) 119 I.C. 480, followed. *Raghunath Govind v. Gangaram Yesu*, (1923) I.L.R. 47 Bom. 643, dissented from. *Ramayya v. Krishnamurti*, (1916) I.L.R. 40 Mad. 296, overruled on this point.

Subramanyam v. Ramaswami ... (1932) I.L.R. 55 Mad. 720

O. XXI, r. 58—Claim made after sale—Jurisdiction of Court to consider—Order rejecting claim in such case—Conclusive against claimant if no suit is brought by him within prescribed year to set it aside.] Under Order XXI, rule 58 of the Code of Civil Procedure, the Court has jurisdiction to consider a claim even when it is made after the sale, and its order rejecting the claim is conclusive against the claimant if he does not bring a suit within the prescribed year to set it aside.

Jagannadham v. Bura Pydayya ... (1932) I.L.R. 55 Mad. 251

CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXI, r. 63—Claimant unsuccessful—Suit by—Onus of proof in.] In a suit by a defeated claimant under rule 63 of Order XXI of the Code of Civil Procedure the onus is on the plaintiff to prove the validity of the alienation under which he claims. *F.E.A.R.M. Firm and another v. Maung Ba Kyin and another*, (1927) I.L.R. 5 Rang. 852 (P.C.), explained.

Appathurai Chettiar v. Vellayan Chettiar ... (1932) I.L.R. 55 Mad. 748

O. XXI, r. 68 (2) (e)—Litigation concerning property sold—Existence of—Intimation to intending buyers of—Propriety of.] Under rule 68 (2) (e) of Order XXI of the Code of Civil Procedure, the Court is directed to specify "every other thing which the Court considers material for a purchaser to know in order to judge the nature and value of the property". Where, therefore, the Court thinks that it is material for intending buyers to know that the property is under litigation, it is entirely justified in directing the *amin* to give them that information. Observations of *SHESHAGIRI AYYAR J.* in *Venkataram v. Ranganayakamma*, (1918) I.L.R. 41 Mad. 985, 997 (F.B.), on the undesirability of issuing such warnings, dissented from.

Venkataramayamma v. Singarayya Setty ... (1932) I.L.R. 55 Mad. 205

O. XXI, r. 89—Application under—Notice of, before sale is set aside under O. XXI, r. 92—Other decree-holders, who have applied for rateable distribution of purchase-money deposited by purchaser not entitled to.] In an application under Order XXI, rule 89 of the Code of Civil Procedure other decree-holders who have applied for rateable distribution of the purchase-money deposited by the purchaser who have no such direct or proximate interest as to make them persons "affected thereby." They are not therefore entitled to notice of the application before the execution sale is set aside under Order XXI, rule 92 of the Code.

Ramnath Chunilal v. Grandhi Sattirozu ... (1932) I.L.R. 55 Mad. 64

O. XXI, r. 92 (2)—Person "affected thereby" within the meaning of:—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXI, r. 89 ... 64

O. XXII—Rules of abatement in—Applicability of:—See LIMITATION ACT (IX OF 1908), ARTS. 177 AND 181 ... 1008

O. XXXIII, RR. 5 AND 9:—See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XLIV, r. 1 ... 982

O. XXII, RR. 3, 4, 8 AND 12; O. XXI, r. 16 AND s. 146—Execution petition—Death of decree-holder pending—Substitution of his legal representative in his place and continuance of petition by him—Permissibility:—See EXECUTION PETITION .. (F.B.) 852

O. XXXIV, r. 6—Court's power to award cost against non-mortgagor defendants at the stage of:—See Costs ... 832

O. XL, r. 4—Receiver—Wilful default or gross negligence of—Loss caused to estate by—Order for payment by receiver of amount of, and directing, on default, realisation of amount by plaintiff from property given by receiver as security—Order made under O. XL, r. 4 is—Appeal from, lies, under O. XLIII, r. 1 (a)—Arrest or imprisonment of receiver—Order for payment of money which can be enforced by—Court cannot pass under O. XL, r. 4—Gross negligence of receiver in not applying for attachment of property of judgment-debtor in execution of decree—Allegation of—Onus of proof as to—Conditional order against receiver directing him to pay amount due from debtor to estate if it is not recovered from him in further proceedings—Validity of.] A suit, in which a receiver was appointed, was compromised, and the receiver's appointment was terminated. After that the plaintiff in the suit made an application

alleging that the receiver had caused loss to the estate by his wilful default or gross negligence. The Court inquired into the matter, found that the receiver had caused loss to the estate to the extent of Rs. 500 and made an order that he should pay the said sum into Court and that, if he failed to do so, the plaintiff should realize the amount from property given by the receiver as security for the performance of his duties. *Held* that the order was one made under rule 4 of Order XL of the Code of Civil Procedure and that an appeal lay against it under rule 1 (s) of Order XLIII of the Code. *Per KELLY J.*—Where a receiver is found to have occasioned loss to the estate by wilful default or gross negligence, the Court cannot under rule 4 of Order XL, make an order against him for the payment of money which can be enforced by arrest or imprisonment. If it makes an order enforcing the recovery of compensation from the receiver by some illegal means, that cannot save its order from appeal. Where, in a case in which a receiver had made several applications for the realization of the amount of a decree by the arrest of the judgment-debtor, it was alleged that he was guilty of gross neglect in not applying for the attachment of the judgment-debtor's property, *held* that the onus was on the party alleging such neglect to show that it would have been profitable to the estate for the receiver to have attached that property and not on the receiver to show that there was no property of the judgment-debtor available for the recovery of the decree-debt. A conditional order directing the receiver to pay an amount due from a debtor to the estate, which it was alleged the receiver should have recovered, if the amount is not recovered in further proceedings from the debtor, is not legal. *Per ANANTAKRISHNA AYYAR J.*—The right of appeal given under Order XLIII, rule 1 (s) is not confined to cases in which the Court directs the property of the receiver to be attached with a view to be sold.

Gurumurthi Ayyar v. Ramaswami Chettiar ... (1932) I.L.R. 55 Mad. 120

CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XLI, R. 21:—*See* CIVIL PROCEDURE, CODE OF (ACT V OF 1908) O. V, R. 20 ... 223

..., O. XLIII, R. 1 (s):—*See* CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XL, R. 4 ... 120

..., O. XLIV, R. 1, *PROVISO*—*Leave to appeal in forma pauperis—Grant of—Respondent's right to be heard at stage of—Notice with respect to inquiry relating to pauperism of appellant—Respondent served with—Appendix G, Form No. 11, of Code—Applicability and effect of—O. XXXIII, rr. 5 and 7, of Code—Inapplicable to pauper appeals—Ex-parte order granting leave to appeal in forma pauperis—Respondent not bound by—Forms appended to code—Meaning of sections and rules in Code not to be extended by.* The respondent may, as a matter of indulgence, be, but is not entitled as of right to be, heard on the question whether the decree of the Court below is "contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust," as provided for in the proviso to rule 1 of order XLIV of the Code of Civil Procedure. Form No. 11 in Appendix G to the Code should not be interpreted in a way which will modify the proviso to rule 1 of Order XLIV. That form refers to cases where notice is given to the respondent with respect to the inquiry relating to the pauperism of the appellant and in such cases the respondent may argue that the appellant is not a pauper. But he has no right to take advantage of that opportunity to argue that the appeal should not be admitted. An *ex-parte* order granting leave to appeal in *forma pauperis* is not binding on the respondent and does not preclude him from arguing at a latter stage that there is no substance in the appeal. Rules 5 and 7 of Order XXXIII of the Code are inapplicable to pauper appeals. *Per RAMESAM J.*—The forms appended to the Code should not be allowed to extend the meaning of the sections and the rules in the Code.

Somasundaram Chettiar v. Arunachalam Chettiar, (1932) I.L.R. 55 Mad. 982

CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XLV, R. 4—*Judgment in—Means judgment appealed against—Consolidation permissible when appellate judgment the same, though judgments in suits separate—Judgment when will be held to be the same within meaning of rule—Sec. 110 of Code of Civil Procedure, subject-matter of appeal—Value of—Court-fee valuation given in plaint—Defendant adopting, as basis of his appeal—Effect—Plea by him subsequently that real value of property is less than court fee valuation given in plaint—Maintainability of.* The word "judgment" in Order XLV, rule 4, of the Code of Civil Procedure means the judgment appealed against, and the provision of that rule applies to a case in which the suits were decided in the High Court by the same judgment, though they were not decided by the same judgment in the lower Court. *Deokinandan Prasad v. Narsing Raut*, (1921) 6 P.L.J. 97, approved. *Per RAMESAM J.*—To determine whether so-called separate judgments are really the same within the meaning of the rule regard must be had to the spirit of the rule and not the letter. *Jivangiri v. Gajanan Narayan*, (1926) I.L.R. 50 Bom. 753, referred to. *Per VENKATASUBBA RAO J.*—In a case to which Order XLV, rule 4, of the Code applies, the Court will, unless sufficient grounds are shown, exercise its discretion in favour of the applicant. *Per RAMESAM J.*—When the defendant adopts the plaintiff's court fee valuation of the suit property for the purpose of choosing the forum for his appeal against the decree in the suit, he is estopped from thereafter contending that the real valuation is lower than the court fee value given in the plaint. *Kristo Indro Saha v. Huromonee Dassee*, (1873) L.R. 1 I.A. 84, followed. *Kumar Basanta Kumar Roy v. The Secretary of State for India in Council*, (1910) 14 C.W.N. 872, referred to. *Per VENKATASUBBA RAO J.*—*Kristo Indro Saha v. Huromonee Dassee*, (1873) L.R. 1 I.A. 84, is not an authority for the position that the defendant is precluded, as a matter of law, from showing that the real value is different from the court-fee value. But, as the court-fee value is hardly, if ever, more than the real value, the previous conduct of the defendant in adopting the court-fee value becomes a strong piece of evidence to which the Court attaches the utmost weight.

Chandra Mouleswara Prasada Bahadur v. Secretary of State for India ... (1932) I.L.R. 55 Mad. 108

..., O. XLV, R. 7, AS AMENDED BY ACT XCVI OF 1920, SEC. 3—*Time for furnishing security—Extension—Power of High Court—Judicial Committee Rules (1920), r. 9—Inability to raise funds—If a ground for extension.* The High Court has no power to extend the time for furnishing security beyond the time set out in Order XLV, rule 7, of the Code of Civil Procedure and no different effect is produced by rule 9 of the Privy Council Rules. *Nilkanth Bahadur v. Vidya Narasinha Bharati*, (1927) I.L.R. 51 Bom. 430 (F.B.), dissented from.

Poornimananthachi v. Gopalaswami Odayar ... (1932) I.L.R. 55 Mad. 835

..., O. XLV, R. 15:—*See* HINDU LAW—INHERITANCE ... 856

..., O. XLVII—*Review—Order granting—Effect of, on original decree or order—Appeal filed against original decree or order before filing of application for review of same—Competency of.* Where, after filing an appeal against a decree or order, an application is filed in the Court below for a review of the same and that Court, after issuing a notice to the other side to show cause why the review should not be granted and after hearing its objections, passes an order rejecting the review application, the result is that the parties are relegated to the old decree or order and this is so even in a case where the hearing of the review application may involve to some extent an investigation into the merits of the case. In such a case the competency of the appeal previously filed against the old decree or order is not affected. The result will, however, be different in a case in which the review application is granted and the case is reheard on the merits and the old decree or order is either

repeated or varied as a result of the rehearing. In such a case, the whole matter having been reopened, there is a fresh decree and the appeal previously filed against the old decree or order is not competent.

Abdurahiman v. Imbichunni ... (1932) I.L.R. 55 Mad. 871

CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. I, R. 1:—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XX, R. 1 ... 671

SCH. II, PARA. 20:—“Subject-matter of award” in meaning of—Court within whose jurisdiction portion only of immovable properties forming subject matter of award is situated—Jurisdiction of, to entertain application to file the award—Application to file award under para 20—Separate order on, for filing of award under para. 21—Necessity for—Absence of—Appeal—Right of, in such a case. The expression “the subject-matter of the award” in paragraph 20 of Schedule II of the Code of Civil Procedure means the whole, and not the whole or a portion, of the subject-matter of the award. A Court within whose jurisdiction a portion of the immovable properties forming the subject-matter of an award is not situated has, therefore, no jurisdiction to entertain an application to file the award made under that paragraph. When an application is made under paragraph 20 of Schedule II of the Code, the Court should first pass a separate order that the award be filed under paragraph 21 of that schedule and then proceed to pronounce judgment according to the award. In a case in which there is no such separate order the Court must be deemed to have passed such an order and the party affected will have the right to appeal from it.

Krishna Iyer v. Subbarama Iyer ... (1932) I.L.R. 55 Mad. 689

COMPANY—Winding up order—Preponderating influence of one shareholder—

Winding up order wrongly made—Appeal to Privy Council—Lapse of time—Solvent company—Duty of liquidator—Indian Companies Act (VII of 1913), ss. 162 (vi), 174, 183.] Under section 162 (vi) of the Indian Companies Act, 1913, which provides that a company may be wound up by the Court if the Court is of opinion that that course is just and equitable, the fact that one shareholder has a preponderating voice in the company's affairs, by reason of owning or controlling a large number of shares, is of itself no reason for a winding up order. *Loch v. John Blackwood, Ltd.* (1924) A.C. 783, distinguished. A winding up order having been made in 1924 by the High Court on appeal, with effect from 1922, the Judicial Committee upon an appeal heard in 1931, although of opinion that the order was not justified when made, advised that it be maintained, save as to costs, having regard to the lapse of time, and the confusion and expense which consequently would result from setting it aside. Where a company ordered to be wound up is solvent, so that the contributories only are interested in the result of the liquidation, the Court, under section 174 of the Act, should have regard to their wishes, ascertained by meetings convened under section 183, sub-section 2. If the order has been made upon the petition of shareholders, an appeal at the instance of other shareholders is properly brought in the name of the company. *In re Diamond Fuel Company* (1879) 13 Ch.D. 400, 405, applied. In such an appeal the Court should not make an order enabling the liquidator actively to oppose the appeal at the expense of the company. The duty of the liquidator is to act with complete impartiality between the contending shareholders.

Ripon Press and Sugar Mill Co. v. Gopal Chetti ... (1932) I.L.R. 55 Mad. (P.C.) 180

COMPANIES ACT (INDIAN) (VII OF 1913), ss. 162 (vi), 174 AND 183:—See COMPANY ... 180

CONFESSION—Circumstance rendering a, inadmissible—Examples of:—See CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), SEC. 190 (1) (c) ... 717

CONTEMPT OF COURT—Pending legal proceedings—Publications in respect of—Test to be applied.] Where legal proceedings are pending before a Court, publications, in respect of those proceedings, which are calculated to produce an atmosphere of prejudice in the midst of which the said proceedings must go on, are contempts of Court even where the legal proceedings pending did not involve trial by jury and where no one would imagine that the mind of the magistrates or judges charged with the case would or could be induced thereby to swerve from the straight course.

Sathappa Chettiar v. Ramachandra Naidu ... (1932) I.L.R. 55 Mad. 282

CONTRACT—Charge created in favour of a third party—Third party's right to sue on same.] By a compromise entered into between the parties to a partition suit certain properties were allotted to certain branches to which also were allotted certain debts. It was stipulated that, until the debts mentioned therein were fully discharged, the properties allotted to the shares of the respective branches should be liable in the first instance, and that, “if any one sharer should fail to discharge the debts mentioned and consequently, either obstruction is caused to the properties of the remaining sharers or the other sharers should be necessitated to discharge such debts, the sharer who has committed default should pay these amounts from and out of his properties as well as the losses sustained thereby together with interest to the sharers who have discharged those debts.” In a suit by a creditor who was not a party to the compromise but whose debt had been directed to be paid as mentioned above, on a plea by him that the above recitals created a charge in his favour on the family properties, held that the above recitals created neither a charge nor a trust in his favour but only a contract of indemnity among the parties to the compromise. Held, further that, even supposing a charge had been created in his favour, he, being a stranger to the agreement, could not sue the parties to the same on foot of the agreement. The headnotes in *Iswaram Pillai v. Sonniavaveru Taragan*, (1913) I.L.R. 38 Mad. 753, and *Subbu Chetti v. Arunachalam Chettiar*, (1929) I.L.R. 53 Mad. 270 (F.B.), in so far as they state that an exception to the rule that a stranger to the contract cannot sue thereon exists in a case where a charge on immovable property is created in his favour by the contract, are misleading.

Suryanarayana Rao v. Basivireddi ... (1932) I.L.R. 55 Mad. 436

CONTRACT ACT (INDIAN) (IX OF 1872), ss. 126 AND 141—Joint debtors—When sureties as amongst themselves.] In the absence of a custom or contract to the contrary between joint-debtors who are jointly and severally liable to a creditor, each is not a surety to the other as defined by section 126 of the Indian Contract Act nor do they occupy a position analogous to that of surety strictly so-called so as to attract the provisions of section 141 of the Indian Contract Act.

Vyavan Chettiar v. Official Assignee, Madras ... (1932) I.L.R. 55 Mad. 949

COSTS—Suit for sale of the mortgaged properties—Preliminary decree silent about costs against a non-mortgagor-defendant—Court's power to award costs of suit even at the stage when the mortgagee applies under O. XXIV, r. 8 of the Code of Civil Procedure.] In a suit by the mortgagee for sale of the mortgaged properties, the Court has power to pass a personal decree for costs of the suit against defendants who had not executed the mortgage, even at the stage when he applies under Order XXIV, rule 6 of the Code of Civil Procedure (Act V of 1906), and though the preliminary decree is silent in respect of the same.

Rajagopalaswami Naicker v. Palaniswami Chettiar ... (1932) I.L.R. 55 Mad. 332

Unexplained delay—Privy Council practice in respect of:—See ARBITRATION ... 93

COURT-FEE—Administration—Creditor's suit for—Preliminary decree in—Claim put in by another creditor of deceased subsequent to—Court-fee payable on—Court-fees Act (VII of 1870), sec. 11—Applicability of—Fiscal statute—Application of, by analogy—Permissibility—Creditor's suit for administration of estate of deceased—Nature of—Other creditors if parties to.] Where, after a preliminary decree has been made for the administration of the estate of a deceased person on a creditor's plaint, another creditor puts in a claim against the estate of the deceased, no *ad valorem* court-fee is payable on such a claim and the court is bound to inquire into the claim without such court-fee. Such a claim cannot be treated as a plaint for the purpose of the Court-fees Act. The provisions of section 11 of the Court-fees Act cannot by analogy be applied to such a case. *Shashi Bhushan Bose v. Manindra Chandra Nandy*, (1946) 1 I.L.R. 41 Cal. 89, considered. The plaintiff-creditor in a suit for the administration of the estate of a deceased person does not effectively represent all the other creditors so as to make his suit a suit for an account on behalf of all. A fiscal statute cannot be applied by analogy.

Ramaswami Ayyar v. Rangaswami Ayyar ... (1932) I.L.R. 55 Mad. 26

Alternative reliefs—Court-fee payable in respect of one of, exceeding that payable in respect of other alternative relief—Higher court-fee payable in case of.] In the case of a plaint praying for alternative reliefs, if the court-fee payable in respect of any of the alternative prayers should exceed the court-fee payable in respect of the other alternative prayer, the plaintiff must pay the higher court-fee. Held, therefore, in a case in which the plaint prayed for a declaration in respect of which a fixed court-fee of a certain amount was payable and in the alternative for another relief in respect of which an *ad valorem* court-fee of a much larger amount would ordinarily be payable, that the plaintiff was bound to pay the *ad valorem* court-fee payable in respect of the latter relief, although the plaintiff's valuation thereof was in fact lower than that of the relief for declaration.

Venugopalayya, In re ... (1932) I.L.R. 55 Mad. 336

Land Acquisition Act (I of 1894) sec. 32—Compensation money awarded to Hindu widow having life-interest only directed to be invested in Bank under—Appeal by another claimant claiming exclusive right to—Court-fee payable on memorandum of—Excess court-fee paid in appeal—Refund of—Order for—Inherent power of High Court to make—Court-fees Act (VII of 1870), ss. 13, 14 and 15—Cases not covered by—Code of Civil Procedure (Act V of 1908), sec. 151.] On a reference under section 18 of the Land Acquisition Act (I of 1894) the District Judge held that one of the claimants, a Hindu widow, was entitled to a life-interest in the compensation money awarded for the melwaram, but, on account of the limited interest held by her, he, under section 32 of the Act, ordered the money to be invested in a Bank, which was accordingly done. In an appeal filed by another claimant claiming that the compensation was payable to him alone, held that, the proper court-fee payable on the memorandum of appeal was not a court-fee *ad valorem* on the amount of the award but a court-fee as for a mere declaration. The compensation money was not payable to the widow in person but was held in trust for her by the Court, and therefore a mere declaration of the appellate Court to the lower Court directing that the money is not any longer to be so held in trust for the widow but is to be handed over to the appellant is sufficient. Even in cases not covered by sections 13, 14 and 15 of the Court-fees Act, the High Court can, under section 151 of the Code of Civil Procedure, order refund of court-fee paid in excess when obvious injustice would be done if it were not repaid.

Thammayya Naidu v. Venkataramanamma ... (1932) I.L.R. 55 Mad. 641

COURT-FEES ACT (V OF 1870), sec. 7 (iv), (f) AND SCH. I, ART. 1—Accounts—Suit for—Final decree in—Appeal from—Court-fee payable on memorandum of—Preliminary decree in same suit—Appeal previously filed by same

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party to same Court from—Court-fee paid on memorandum of—Credit for—Appellant's right to—Conditions.] When a party, who has filed an appeal against a preliminary decree for accounts and paid court-fee on the value as fixed by the plaintiff in his plaint, files along with or pending that appeal an appeal to the same Court against the final decree ascertaining the amount due according to the preliminary decree, he is entitled to get credit in the appeal attacking that amount for the court-fee already paid on the appeal against the preliminary decree. This doctrine ought not, however, to be extended to cases where the appeal against the final decree is filed after the decision in the appeal against the preliminary decree. In such cases the court-fee in appeal would be governed by article 1 of Schedule I to the Court-fees Act.

Suppathayammal, In re ... (1932) I.L.R. 55 Mad. 684

COURT-FEES ACT (VII OF 1870), ss. 13, 14 AND 15:—See COURT-FEE ... 641

COURT OF WARDS REGULATION (V OF 1804), sec. 3—Collector's report under—Admissibility of:—See EVIDENCE ACT (INDIAN) (I OF 1872), ss. 32 (5), 35, 115 ... 40

CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), sec. 162—"Statement made by any person" in—Accused's statements if included in—Statement by accused to police during investigation—Admissibility of—Indian Evidence Act (I of 1872), sec. 8—Confession—Retracted confession—Admissibility of—Confession by co-accused at preliminary enquiry—Use of, at sessions trial against other accused—Sec. 30 of Evidence Act—Criminal trial—Charge of main offence and conviction for abetment thereof—Legal.] Held by the Full Bench.—The expression "statement made by any person" in section 162 of the Code of Criminal Procedure includes a statement made by a person accused of the offence under investigation. *Per WALLER J.* in the Division Bench.—Though statements made by accused persons to the police during the investigation are inadmissible in evidence, evidence of their conduct is admissible under section 8 of the Indian Evidence Act. A retracted confession can be used under section 30 of the Indian Evidence Act where the Court is satisfied that the confession was made voluntarily in the first instance and that it is true. A confession made at the preliminary enquiry by one of several accused persons and filed as part of the prosecution evidence at the sessions trial can be used against the others under section 30 of the Evidence Act. It is not evidence, but it can be used to corroborate the other evidence, against the other accused. *Marudamuthu Padayachi, In re* (1931) I.L.R. 51 Mad. 788, distinguished. An accused person charged with the main offence of murder can be convicted of abetment of murder even though he is not separately charged. *Begu v. The King-Emperor* (1925) I.L.R. 6 Lah. 226 (P.C.), followed. *Per KRISHNAN PANDARAI J.* in the Division Bench.—The rule that a retracted confession ought not to be acted upon without corroboration is not an absolute rule of law but a rule of caution. *Quære*—Whether the general admissibility under section 8 of the Evidence Act of statements accompanying and explaining the conduct of a criminal in relation to his crime is subject to the special prohibition imposed by section 162 of the Code of Criminal Procedure against the admission of all statements made by accused persons to the police during the investigation.

Syamo Maha Patro, In re ... (1932) I.L.R. 55 Mad. (F.B.), 903

CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), sec. 164—Effect of:—See sec. 164 (8)—Caution prescribed by—Omission to administer—Admissibility in evidence of confession in case of—Indian Evidence Act (I of 1872), sec. 29—Effect of—Code of Criminal Procedure (Act V of 1898), ss. 164 (3) and 163 (2)—Inconsistency between provision of.] A confession, otherwise admissible in evidence, is, ... 717

sec. 164 (8)—Caution prescribed by—Omission to administer—Admissibility in evidence of confession in case of—Indian Evidence Act (I of 1872), sec. 29—Effect of—Code of Criminal Procedure (Act V of 1898), ss. 164 (3) and 163 (2)—Inconsistency between provision of.] A confession, otherwise admissible in evidence, is,

by virtue of section 29 of the Indian Evidence Act, admissible even though the caution prescribed by section 164 (3) of the Code of Criminal Procedure has not been administered. Section 164 of the Code of Criminal Procedure does not override section 29 of the Evidence Act, and it is the latter Act that must, as a rule, be looked to when there is a question of the admissibility of a particular piece of evidence. Inconsistency between the provisions of section 164 (3) and section 163 (2) of the Code of Criminal Procedure as regards the necessity or propriety of administering a caution pointed out.

Vellamoonji Goundan, In re ... (1932) I.L.R. 55 Mad. 711

CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), SEC. 160 (1) (c)—*Information by offender himself amounting to a confession—Cognizance of offence on Magistrate entitled to take—Confession—Admissibility in evidence of—Conditions—Indian Evidence Act (I of 1872), ss. 24, 25 and 26—Sec. 164 of Code of Criminal Procedure—Effect of.* A magistrate, duly empowered to take cognizance of any offence under section 190 (1) (c) of the Code of Criminal Procedure, is entitled to record and act on the information furnished by the offender himself even though such information amounts to a confession. Confessions, like admissions, are relevant evidence under the Indian Evidence Act unless they are rendered inadmissible by circumstances which the Act declares to be of an invalidating nature. Examples of such circumstances are to be found in sections 24, 25 and 26 of the Act. Section 164 of the Code of Criminal Procedure does not exclude confessions otherwise admissible. It provides for the manner in which confessions made during a police investigation shall be recorded.

Arunachala Reddi, In re ... (1932) I.L.R. 55 Mad. 717

..., SEC. 195 (1) (b)—*Offences in respect of which sanction necessary under, but not obtained—Complaint of, with other offences in respect of which such sanction not necessary—Jurisdiction to entertain—Conviction in respect of latter offences only—Legality of—Sec. 537 of the Code—Applicability.* Where, on a complaint by a private person alleging the commission of an offence under section 193, Indian Penal Code (XLV of 1860), and of other offences in respect of which a complaint under section 476, Code of Criminal Procedure, is not necessary, the Court took cognizance of every offence alleged in the complaint but actually convicted the accused under sections 467, 109, Indian Penal Code, *Held*, that the Court proceeded upon no legal complaint at all, that the error was much more than an irregularity and could not be cured under section 537, Code of Criminal Procedure, and that the conviction must be set aside as being without jurisdiction *Per OUGENVEN J.*—A Court cannot evade the provisions of section 195, Code of Criminal Procedure, by dealing under sections 467, 109, Indian Penal Code, with what is in effect an offence under section 193, Indian Penal Code. *Perianna Muthirian v. Vengu Ayyar*, (1928) 56 M.L.J. 208, followed.

Ravanappa Reddi, In re ... (1932) I.L.R. 55 Mad. 343

..., SEC. 203—*Dismissal of complaint under—No bar to a magistrate taking cognizance of a subsequent complaint.* When a complaint is dismissed under section 203 of the Code of Criminal Procedure, any magistrate having co-ordinate jurisdiction can take cognizance of a subsequent complaint on the same facts, notwithstanding that the order of dismissal has not been set aside. *Emperor v. Chinna Kaliappa Goundan*, (1905) I.L.R. 29 Mad. 126 (F.B.), followed.

Ponnuswami Goundan, In re ... (1932) I.L.R. 55 Mad. (F.B.), 622

..., SEC. 307—*Reference under—Case triable, as regards some offences, by jury and, as regards others, with aid of assessors—Reference of whole case not proper—Judge must dispose of assessor-charges and then make reference.* Five accused persons were tried by the Assistant Sessions Judge of Salem on charges of rioting, assault and causing hurt and grievous hurt to public servants in the

discharge of their duty (under sections 147, 353, 332 and 333, Indian Penal Code) and also under section 379, Indian Penal Code, for having committed theft of a log of wood from the reserve forest. The jury were asked to give their verdict on the charge of theft and their individual opinion as assessors on the other charges. The jury returned a unanimous verdict that the accused were not guilty of theft; as assessors they were individually of opinion that none of the accused was guilty of any offence. The Assistant Sessions Judge did not agree with the verdict of the jury. He was of opinion that the case of theft against accused 1 to 5 was established and also that the other charges of rioting, assault, hurt and grievous hurt were made out against the various accused. Under section 307 of the Code of Criminal Procedure he referred the whole case to the High Court, being of opinion that, under clause 2 of section 307, when a reference to the High Court is made on any one charge, the Court referring the case cannot record judgment of acquittal or conviction on the other charges. *Held*, that the Court had no jurisdiction to refer the whole case, that it ought to have disposed of the other charges which were triable with the aid of assessors and then, if necessary, referred the jury-charge to the High Court. *Emperor v. Kalidas*, (1898) 8 Bom. L.R. 599, and *Emperor v. Vyankatsing*, (1907) 9 Bom. L.R. 1057, referred to.

Pachaimuthu, In re ... (1932) I.L.R. 55 Mad. 715

CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), SEC. 386—*Hindu joint family—member of—Right, title, and interest in joint family movable property of—Attachment of, under sec. 386—Mode of—Seizure—Mode laid down in O. XXI, r. 47, Civil Procedure Code or—Claim to property so attached by other members of family of convicted person on ground that it is their separate property—Onus of proof in case of.* Under section 386 of the Code of Criminal Procedure the right, title and interest of a convicted person in joint family properties can be attached for the recovery of the fine imposed on him. The proper mode of attachment in such a case is not by way of seizure. The crown has no right to anything more in joint movable property than the delinquent, himself had, and it cannot deprive the co-owners, by seizing property, of their right of possession in it. The correct course is that laid down in rule 47 of Order XXI of the Code of Civil Procedure. If necessary, either a receiver can be appointed to the delinquent's share, or a prohibitory order can be issued against him. His interest in the property can then be brought to sale. Where property is attached under section 386 of the Code of Criminal Procedure on the footing that it is joint family property of the convicted person and of others and a claim is made to the same by the latter on the ground that it is their separate property, the onus of proof lies on them in the same way as it does upon claimants to attached property under the Code of Civil Procedure.

Narasanna, In re ... (1932) I.L.R. 55 Mad. 1041

..., SEC. 403—*Applicability of—Successive convictions under sec. 323, Indian Penal Code, and under sec. 3 (12), Towns Nuisances Act (Madras) (Act III of 1889)—Legality.* Section 403 of the Code of Criminal Procedure is no bar to convictions successively under section 323, Indian Penal Code, and under section 3 (12) of the Madras Towns Nuisances Act in respect of the same conduct of being guilty of disorderly behaviour. Though the act or series of acts constituting the two offences may have been the same, they are capable of being viewed from two different points of view. The offence of hurt is an offence against an individual, while the offence under the Towns Nuisances Act is an offence against the public. Further, the circumstances to be considered in regard to the two cases are not precisely the same. *Emperor v. Ram Sukh*, (1924) I.L.R. 47 All. 284, and *In re Dodhu Kalu*, (1929) 31 Bom. L.R. 922, referred to.

Subbiah Kone v. Kandaswamy Kone ... (1932) I.L.R. 55 Mad. 766

CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), ss. 403, 259, 259—Oral charge in a summary trial by a First-class Bench—Subsequent transfer of the case to a Second-class Magistrate who had no jurisdiction to try it summarily—Complainant not present on the day of hearing—Discharge of accused under sec. 259—Legal—Subsequent complaint—Entertainable.] A First-class Bench of magistrates took up on its file for summary trial a complaint against the accused, and an oral charge under section 328, Indian Penal Code, was framed against them to which they pleaded "not guilty". The case was transferred to the file of a Second-class Magistrate who had no jurisdiction to try the case summarily. The case was called on for hearing on a day to which it had been posted and the complainant not being present, either in person or by pleader, the magistrate discharged the accused under section 259 of the Code of Criminal Procedure. Subsequently another complaint was presented by the same complainant against the same accused on the same facts. Objection was taken that the order of discharge was really an order of acquittal and under section 403 of the Code of Criminal Procedure the second complaint was incompetent. *Held*, that the order of discharge was a valid order under section 259 of the Code of Criminal Procedure and being an order of discharge there was no legal bar to entertaining the subsequent complaint; that the oral charge framed by the First-class Bench Court could not be deemed to be subsisting after the transfer of the case to the Second-class Magistrate; that section 350 of the Code of Criminal Procedure had no application to the trial of the case by the Second-class Magistrate who could only hold a complete *de novo* trial subsequent to the transfer of the case to his file.

Nannier v. Dasalier ... (1932) I.L.R. 55 Mad. 795

... ss. 476 AND 195 (1) (b)—
Meaning of the words "in relation to the proceeding"—Complaint to police against accused and others not charged—Court has no jurisdiction to take action under sec. 476 against complainant, under sec. 211, Indian Penal Code, in respect of persons not charged.] When a charge is made by a complainant to the police against more than one individual, and police, while charging before the Court one or more of such individuals with the offence complained of, do not charge them all, the Court has no jurisdiction to take action, under section 476 of the Code of Criminal Procedure, against the complainant in, under sec. 211, Indian Penal Code, in respect of those not so charged. Where a witness for the prosecution sends a telegram to the District Superintendent of Police that the accused, with other persons not charged, stabbed the deceased the mere fact that the telegram is exhibited and filed in the case does not make the contents of it a matter "in relation to the proceeding" in the Court so as to give the Court jurisdiction to take action under section 476.

The Registrar, High Court, Madras v. Kodangi ... (1932) I.L.R. 55 Mad. (F.B.) 611

... ss. 476 AND 195 (1) (b),
(c)—*Offence committed "in or in relation to, any proceeding in any Court"—Meaning of—Termination of proceeding in which document produced but document remaining in custody of Court—Forgery in respect of such document—Jurisdiction of Court to complain under sec. 476.]* The offence of forgery of an endorsement of payment on a mortgage bond, committed after the termination of the proceeding in which the bond was produced, but while the document was among the Court records, cannot be said to have been committed "in or in relation to the proceeding" within the meaning of section 476 of the Code of Criminal Procedure, and the Court which disposed of the proceeding has no jurisdiction to take action under section 476 in respect of that offence. An offence cannot be said to have been committed in relation to a judicial proceeding unless it has entered as a component into that proceeding, or unless in some manner it has affected that proceeding or been designed to affect it or come to light in the course of it. An offence committed after the close of the proceeding is wholly outside the scope of the provision and the circumstance that the

document was still in the custody of the Court does not make the offence one committed in relation to the proceeding which had previously terminated.

Subbarayudu v. Gopayya ... (1932) I.L.R. 55 Mad. 531

CRIMINAL PROCEDURE, CODE OF (ACT-V OF 1898), sec. 476—Perjury in respect of contradictory statements made before committing Magistrate and in Sessions Court—Action under sec. 476 regarding—Jurisdiction to take.] The Sessions Court has jurisdiction, under section 476 of the Code of Criminal Procedure (Act V of 1898), to file a complaint for perjury against a witness examined before it in respect of contradictory statements made by him before itself and before the committing Magistrate. A statement made by a witness at the preliminary enquiry is one made in relation to the subsequent proceeding in the Sessions Court. *Narayanan Nadan v. Palaniappa Nadan*, (1917) M.W.N. 141, approved. It is neither desirable nor necessary for the committing Magistrate also to file a complaint in such cases. (Observations to the contrary in *In re Ganesh Mull*, (1932) I.L.R. 55 Mad. 178 and in *Res v. Veeraiya Moopan*, (Criminal Appeals Nos. 46 and 47 of 1931), dissented from.

Athi Ambalagaran. In re ... (1932) I.L.R. 55 Mad. 536

... sec. 491—*Habeas Corpus proceedings—Power of the High Court to award costs.]* The High Court has no power to award costs in proceedings under section 491 of the Code of Criminal Procedure. Costs are a creature of statute or statutory rules.

Ramammal v. Vijayaraghavalu ... (1932) I.L.R. 55 Mad. 1049

... sec. 587—*Applicability:—*
See CRIMINAL PROCEDURE, CODE OF, sec. 195 (1) (b) ... 343

DEFAMATION—Slander—Spoken words imputing unchastity to a Hindu woman—Special damage—Maintainability of suit by her on the Original Side of the High Court without proof of—Caste—Wrongful expulsion from—If actionable, apart from slander—"Justice and right" and "Justice, equity, and good conscience"—Meaning of—Law in Presidency-town same as in mofussil—Mayor's Court Charter, 1687, 1726 and 1753; Recorder's Court Charter, 1798; Supreme Court Charter, 1800; Regulation II of 1802; Letters Patent (Madras), 1802 and 1865, cl. 19—Discussed.] A suit for defamation in respect of spoken words imputing unchastity is maintainable by a Hindu woman on the Original Side of the High Court without proof of special damage. A wrongful expulsion from caste gives rise to a cause of action quite apart from the slander, although such slander was the cause of the expulsion, and a suit claiming damages for wrongful expulsion from caste is maintainable. There is no real distinction between the words "justice and right" and "justice, equity and good conscience" and the law as regards slander suits claiming damages is the same in the Presidency-town as in the mofussil.

Narayana Sah v. Kannamma Bai ... (1932) I.L.R. 55 Mad. 727

DISTRICT MUNICIPALITIES ACT (MADRAS) (V OF 1920), sec. 80:—See DISTRICT MUNICIPALITIES ACT (MADRAS) (ACT V OF 1920), SCH. IV, R. 9 ... 207

... sec. 92—"Paid up capital" in—*Meaning of—Benefit society or association—Members of—Subscriptions paid to society or association by, to enable it to carry on its business—Income and not capital.]* The words "paid-up capital" in section 92 of the Madras District Municipalities Act (V of 1920) must be given the technical meaning which is usually given to those words. Paid-up capital means so much of the authorized or stated capital of a company which its shareholders or subscribers have paid up. Subscriptions paid by the members of a benefit society or an association to the society or

association to enable it to carry on its business are its "income" and not "capital".

Municipal Council, Vizagapatam v. Tea Districts Labour Association.
(1932) I.L.R. 55 Mad. 282

DISTRICT MUNICIPALITIES ACT (MADRAS) (V OF 1920), sec. IV, R. 9—

Enhancement of assessment of property—Notification under r. 9 of sch. IV—Necessity—Notice in conformity with requirements of r. 9—What amounts to—Sec. 80 of Act—Publication in District Gazette not condition precedent to validity of levy of tax under—Revised assessment on which tax imposed illegal—Tax-payer liable on old assessment—Code of Civil Procedure (Act V of 1908), sec. 80—Public officer—Municipal Council not a.} Under the Madras District Municipalities (Act V of 1920) an enhancement of assessment of property is illegal in the absence of the notification required by rule 9 of Schedule IV of the Act. A notice that the Municipal Council "proposes to revise the taxes" is not a notice in conformity with the requirements of rule 9 of Schedule IV of the Act; nor is a notice running "Making changes in the property gutha" because the word "gutha" is ambiguous and may mean either assessment or tax. A Municipal Council is not a "public officer" to whom notice under section 80 of the Code of Civil Procedure is necessary. If a revised assessment on which a tax-payer has been required to pay tax is illegal, he is liable to pay tax on the old assessment. There is nothing in the Madras District Municipalities Act (V of 1920) to show that, if for any reason a revision of assessment is not made before the end of five years, the old assessment lapses. Section 80 of the Madras District Municipalities Act (V of 1920) does not make the publication in the District Gazette a vital and pre-requisite necessity so that, if publication does not precede the date on which the tax is to come into force, the levy of tax from that date is illegal. Paragraph 70 of the Municipal Account Code has no statutory force.

Municipal Council, Anantapur v. Vasudeva Rao ... (1932) I.L.R. 55 Mad. 297

... , sch. IV, RR. 56 to 58 AND 61 AND 62—*Extraordinary audit or re-opening of closed audit—Power of—Surcharge made pursuant to—Suit contesting legality of—Maintainability—Appeal to Local Government by party aggrieved and partial success therein—Suit if barred in case of.} The appellant was chairman of a municipality from June 1921 till June 1923. He was succeeded by another whose term of office lasted till 1st July 1923, when the respondent succeeded to the office. During the appellant's term of office the periodical audits provided for by the rules framed under the Madras District Municipalities Act were regularly made. In 1924, a supplemental audit was made of the accounts of the period from 1st April 1921 till 18th January 1924. It was ascertained that, owing to the negligence of successive chairmen, a large sum of money had been misappropriated and the auditor surcharged the appellant, amongst others. The appellant appealed to the Local Government and obtained a reduction. He then filed a suit for an injunction restraining the respondent from recovering from him the sum representing the unremitted surcharge under rule 82 of the rules in Schedule IV of the Act. Held, that there was no jurisdiction to conduct the supplemental audit. Rules 56 to 58 of the rules in Schedule IV of the Act provide for one recurring audit only, as the result of which defaulters can be charged or surcharged. They do not provide for extraordinary audits or the re-opening of audits when once they have been closed. Held further that the audit in pursuance of which the surcharge on the appellant was made not being one contemplated by the rules in Schedule IV of the Act, the appellant's suit was not affected by the remedies provided by those rules. Even if the remedies provided by the rules in Schedule IV of the Act can be held to be substituted for the ordinary remedy by suit in cases governed by the rules, the same result will not hold in a case where the auditor being authorized to issue surcharge notices only on the audit mentioned in the rules conducts an audit outside the rules and in fact the surcharge certificate is not a certificate within the rules at all but *ultra vires* of*

them. Held also that neither the appellant's appeal to the Local Government against the surcharge nor the reduction of the amount of the surcharge by the Local Government in the appeal was a bar to the appellant's suit.

Tulasiram v. Chairman, Municipal Council, Madura ... (1932) I.L.R. 55 Mad. 298

ESTABLISHED USAGE—Meaning of:—See ESTATES LAND ACT (MADRAS) (I OF 1908), sec. 59 ... 189

ESTATES LAND ACT, MADRAS (I OF 1908), ss. 5 AND 128—Charge created by—Right to—Persons entitled to, and circumstances in which they are entitled—Co-sharers—Rent decrees against—Arrest in execution of—Co-sharer paying up decree amount to prevent—Contribution suit by, against other co-sharer—First charge on latter's portion of holding, i.e., priority over encumbrances existing on it on date of payment by reason of which contribution claimed—No right to, either under ss. 5 and 128 of Madras Estates Land Act or under general law or by virtue of ss. 82 and 100 of Transfer of Property Act—Co-sharers like joint pattadars if within intent of sec. 128 of Madras Estates Land Act.) A co-sharer, who, to prevent arrest in execution of a decree obtained by the landlord against himself and another co-sharer for arrears of rent due by both under the Madras Estates Land Act, pays the whole rent and brings a suit for contribution, is not entitled, either by virtue of sections 5 and 128 of that Act or under the general law or by virtue of sections 82 and 100 of the Transfer of Property Act, to a first charge on the other co-sharer's portion of the holding, i.e., to priority over encumbrances existing on that portion on the date of the payment by reason of which contribution is claimed. The first charge created by section 5 of the Madras Estates Land Act is a charge created for the benefit of the landholder and applies to rent only so long as it is due to him in that character. Section 128 of the Madras Estates Land Act is inapplicable to the case, because the charge given by that section is one given to other persons than the landholder for a sum different from the rent and given only in the particular circumstance mentioned, i.e., that a sale by the Revenue Court has been averted after proclamation for sale by that Court. *Semble.*—Co-sharers like joint pattadars are not within the intent of section 128. The claim to contribution being against the co-owner and the charge which springs into existence on the date of payment being against his property it can only avail against that property as it stood on the date of payment and cannot avail retrospectively against prior mortgages and others who have in good faith and without any suspicion that such a charge may come into future existence advanced money on the property.

Vyazaperumal v. Alagappa ... (1932) I.L.R. 55 Mad. 469

... , ss. 52 AND 53—*Valid patta continuing in force by reason of sec. 53—Effect of—Suit under sec. 77 for determination of proper rent—Rent mentioned in previous patta if conclusive in—Landholder's right to show proper rate of rent in—Enhancement of rent suit for—Suit for reverting to former rent when is not.} The view that the effect of section 52 (3) of the Madras Estates Land Act is that, where a patta and a muchilika have been exchanged between a landholder and a ryot, the former cannot in any subsequent year demand rent other than what is mentioned in the patta except after getting a fresh patta and muchilika accepted, exchanged or decreed mentioning the new rent claimed, is incorrect. The consequence of a valid patta continuing in force by reason of section 53 of the Madras Estates Land Act is only that the landholder cannot distrain the ryot's movables or sell his holding except for the amount mentioned in the patta. Nowhere in the Act is stated that in suits for rent under section 77 for the purpose of determining the proper rent the rent mentioned in the previous patta is conclusive and that the only way for demanding a different amount except under certain sections, such as 25, 30, 42 and 43, is to have previously exchanged a fresh patta and muchilika. The only effect of there being a patta which remains in force by virtue of section 52 (3) so far as suits for rent are concerned is that,*

except in special cases falling under sections 25, 30, 42 and 45 which require the order of the Collector for determination of rent, the rent mentioned in the patta will, under sections 27 and 28, be presumed to be the proper rent until the contrary is shown. In other words, except in those excepted cases, it is open to the landholder without tendering or exchanging or getting decreed a fresh patta to show to the Court in which the suit for rent is filed that he is legally entitled to a different amount or rate of rent from that mentioned in the old patta. *Radhakrishna Ayyar v. Sundarasami*, (1922) I.L.R. 45 Mad. 475 (P.C.), explained and distinguished. A suit by the landholder for reverting to what has been proved to be the proper rent of the village, namely, *varam rents*, is not suit for enhancement in the proper sense of the term.

Foulkes v. Kandasami Pillai ... (1932) I.L.R. 55 Mad. 994

SEC. 59—Usage in—Meaning of—
Validity of—Conditions—“Established usage” in section means usage of holding in question and not usage of whole estate.] The word “usage” in section 59 of the Madras Estates Land Act is not synonymous with the word “custom”; a usage, to be valid, need not possess the same degree of antiquity as a custom. “Established usage” mentioned in the section need not be the usage of the whole estate. The words may be rightly construed as meaning the “established usage” of the particular holding with reference to which the question arises.

Rajaram Mehta v. Narayanaswami Naidu ... (1932) I.L.R. 55 Mad. 169

ESTATES LAND ACT (MADRAS) (I OF 1908), SS. 61 AND 187 (2) :—See INCOME-TAX ACT (INDIAN) (XI OF 1922), SEC. 2 (1) (a) ... 830

EVIDENCE ACT (INDIAN) (I OF 1872), SS. 8 AND 30 :—See CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898) ... 903

SS. 24, 25 AND 26—Examples of circumstances rendering confessions inadmissible :—See CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), SEC. 190 (1) (c) ... 717

SEC. 29—Effect of :—See CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), SEC. 164 (3) ... 711

SS. 32 (5), 35 AND 115—Estoppel—Reversionary heir—Declaration by one person that another is a—Latter induced to part with a portion of the property in dispute—Former, if estopped from saying that the latter is not a—Adopted son—One person treated for a long time as such—Another person disputing the fact later—Burden of proof on the latter—Pedigree signed not by a party but by his *vakil* and filed in certain proceedings—Admissibility in evidence to prove relationship—Court of Wards Regulation (V of 1804), sec. 3—Report of Collector under—Admissibility.] If a person executes a document in his personal capacity declaring that T. is the reversionary heir to the estate of V. and induces T. to part with a portion of the said estate in favour of another, he is estopped from saying that T. is not the reversionary heir of V., and it makes no difference that the property given away by T. was not his private property but only part of the estate of V. Though a person is *prima facie* bound to prove, as a fact, that he is an adopted son when it is challenged in proper proceedings, yet, if for a long period of time he acted as such and was treated as such, the burden resting upon the person who disputes such an adoption is of the heaviest order. Under section 32 (5) of the Indian Evidence Act, a pedigree filed in certain proceedings by a *vakil* on behalf of certain members of the family who had not signed it may be received in evidence in order to prove the relationship of the parties, if, from the form and contents of the statements in the said pedigree, it purports to originate with the members for whom the *vakil* signed, and justifies the presumption that it was duly authorized by the said members, and, as such, is in effect a statement put in by them.

Ramakrishna Pillai v. Tirunarayana Pillai ... (1932) I.L.R. 55 Mad. 40

EVIDENCE ACT (INDIAN) (I OF 1872), SS. 40 TO 43—Civil Court judgment—Admissibility of, in criminal proceedings in respect of same matter.] The judgment of a Civil Court dismissing a suit brought by A against B for damages for defamation is not admissible in evidence to prove the innocence of B in a criminal prosecution by A against B on the same facts. Sections 40 to 43 of the Indian Evidence Act deal with the admissibility of a judgment in evidence, and, if a judgment is not admissible under any of these sections, it must be left out of consideration altogether. The judgment of the Civil Court in question does not come under any one of those sections. *Markur, In re*, (1914) I.L.R. 41 Bom. 1, dissented from.

Ramanamma v. Appala Narasayya ... (1932) I.L.R. 55 Mad. 346

SEC. 112—“Access” in—Meaning of—Presumption in favour of legitimacy under the section—Nature of—Limit to.] “Access” in section 112 of the Indian Evidence Act means sexual intercourse and not merely “opportunity of access”. Under section 112 there is a presumption to start with in favour of legitimacy; in other words, that the husband had intercourse with the wife at the time when the child must have been conceived. That presumption is a rebuttable one and may be rebutted by showing non-access; but once access of, or intercourse by, the husband is proved, no evidence will be allowed to show that the child is not the child of the husband. The circumstance that the wife had intercourse with several at that time makes no difference. Observations on the kind of evidence required to rebut the presumption that the husband had intercourse with the wife.

Jagannatha Mudali v. Chinnaaswami Chetti ... (1932) I.L.R. 55 Mad. 243

SEC. 112—Non-access—Burden of proof of—Indian law—Competency of wife to give evidence to prove access or non-access.] Section 112 of the Indian Evidence Act (I of 1872) lays a heavy burden on a person who questions the legitimacy of another on the ground of non-access of proving or showing such non-access. But the proof in such a case is not different from any other species of proof under the Evidence Act, viz., “when after considering the matters before it the Court either believes” that there was non-access, “or considers its existence so probable that a prudent man ought in the circumstances of the particular case to act upon the supposition that it exists.” The section does not require a negative to be proved by positive evidence. In Indian law a wife is a competent witness to prove access or non-access by her husband. *John Howe v. Charlotte Howe*, (1913) 25 M.L.J. 594 (F.B.), and *Rosario v. Ingles*, (1893) I.L.R. 15 Bom. 468, followed.

Mayandi Asuri v. Sami Asari ... (1932) I.L.R. 55 Mad. 292

EXECUTION PETITION—Decree-holder's death pending—Substitution of his legal representatives in his place and continuance of petition by him—Permissibility—Code of Civil Procedure (Act V of 1908), O. XXII, rr. 3, 4, 8 and 12; O. XXI, r. 16 and sec. 146.] Held by the Full Bench that the legal representative of a deceased decree-holder who died during the pendency of an execution petition filed by him could be substituted in his place in the execution petition and be allowed to continue it. *Palaniappa Chettiar v. Valliammai Achi*, (1926) I.L.R. 50 Mad. 1, overruled.

Venkatachalam Chetti v. Ramaswami Servai ... (1932) I.L.R. 55 Mad. (F.B.) 852

EXECUTOR—Will of Hindu—Will to which Hindu Wills Act (XXI of 1870) does not apply—Absence of probate—Vesting of property—Powers of executor—Probate and Administration Act (V of 1881), ss. 4 and 90.] In the case of a Hindu will to which the Hindu Wills Act, 1870, does not apply the estate of the testator vests in the executor, if he accepts office, from the date of the testator's death, and he has the powers of an executor under the Probate and Administration Act, 1881, even though probate has not been obtained. Observations in *Administrator-General of Bengal v. Premial Mullick*, (1895) I.L.R. 22 Calo. 788; I.L.R. 22 I.A. 107, and

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<i>Kurritulain Bahadur v. Nushat-ul-dowla Abbas Hossein Khan</i> , (1903) I.L.R. 33 Cal. 116; L.R. 32 I.A. 244, discussed.	
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GENERAL CLAUSES ACT (MADRAS) (I OF 1891), SEC. 3 (C):—See REVENUE RECOVERY ACT (II OF 1864) ... 453	453
GROSS NEGLIGENCE —Allegation that receiver was guilty of—Burden of proof:— <i>See</i> CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XL, R. (4). 120	120
HEREDITARY VILLAGE-OFFICES ACT (MADRAS) (III OF 1895), SEC. 23 — <i>Second appeal to Board of Revenue under—Hearing of parties in—Not necessary—Rule 16 of Standing Order No. 172 of Board of Revenue (paragraph 11)—Ultra vires of—Sec. 3 of Act—Office specified in—Claim to—Decision of Board of Revenue on—High Court's jurisdiction to revise, excluded by sec. 21 of Act.</i> The Board of Revenue, having jurisdiction to decide a second appeal to it under section 23 of the Madras Hereditary Village-Offices Act, has jurisdiction to decide it without giving the parties an opportunity of being heard. Rule 16 of Standing Order No. 172 of the Board of Revenue (paragraph 11) is not <i>ultra vires</i> . Section 18 of the Madras Hereditary Village-Offices Act by expressly providing for parties or Counsel to be heard in cases of reference makes the procedure not allowing the parties to be heard on second appeals to the Board of Revenue quite consistent with the provisions of the Act. The High Court has no jurisdiction to revise a decision of the Board of Revenue on a claim to one of the offices specified in section 3 of the Madras Hereditary Village-Offices Act. Its jurisdiction to do so is expressly excluded by section 21 of that Act.	
<i>Kumaraswami v. Munirathna Mudali</i> ... (1932) I.L.R. 55 Mad. 942	942
HINDU LAW —Adoption—Agreement between an adoptive and a natural father at time of—Disposition of family property by former pursuant to, contrary to rule in the case of <i>Krishnamurthi Ayyar v. Krishnamurthi Ayyar</i> , (1927) I.L.R. 50 Mad. 508 (P.C.)—Void or voidable—Ratification by adopted son of—Validity of conditions—Dispositions by adoptive father forming part of same arrangement—Ratification by adopted son of one of—Inference of, from ratification by him of the other dispositions—When proper. An arrangement between an adoptive and a natural father disposing of the former's family property in violation of the rule in <i>Krishnamurthi Ayyar v. Krishnamurthi Ayyar</i> , (1927) I.L.R. 50 Mad. 508 (P.C.), is not voidable in the ordinary sense of the term but is void against the adopted son. But such an arrangement is capable of validation by the adopted son by his own ratification after he comes of age. Such a ratification need not necessarily be accompanied by all the ingredients of a valid contract and need not be made between the adopted son and the party benefited by the invalid disposition; <i>Ramaswami Aiyar v. Venkatarama-aiyan</i> , (1879) I.L.R. 2 Mad. 91 (P.C.), followed. An act amounting to an election by the adopted son to hold it good, sufficient according to the doctrine enunciated by the Privy Council in <i>Ranjasami Gounden v. Nachappa Goundan</i> , (1918) I.L.R. 42 Mad. 523 (P.C.), followed and applied in <i>Ramakottayya v. Viraraghavayya</i> , (1928) I.L.R. 52 Mad. 556 (F.B.), is sufficient for that purpose. Whether a ratification by the adopted son is of the whole transaction or arrangement or only of a particular portion of it is essentially a question of fact. In a case in which a Hindu had disposed of by way of bequest portions of his family property in favour of his deceased brother's widow for life with remainder absolutely to her daughter, it was found that that and other disposition of family property were made in pursuance of an arrangement made by the testator with the natural father of the boy whom he wished to adopt in consideration of the adoption and that the adopted son had ratified all the other dispositions forming part of the same arrangement and had not questioned the disposition in favour of the testator's brother's widow and her daughter for a period of more than twenty years after attaining majority. From all this and from the oral evidence of the adopted son	

himself the first appellate Court came to the conclusion that the adopted son in affirming and accepting the arrangements made by his natural father affirmed them in their entirety without leaving any exception in respect of the disposition in favour of the testator's brother's widow and her daughter. Held that it was competent for the first appellate Court to come to that conclusion and that its finding was a finding of fact which was binding in second appeal.

Subramania Chettiar v. Velayudam Chettiar ... (1932) I.L.R. 55 Mad. 408

HINDU LAW—Adoption—Widow's power of—Limit to—Test to be applied.] *B.*, a Hindu, died leaving him surviving his widow and a daughter *R.L.* After the death of the widow, *R.L.* succeeded to his properties. *R.L.* was married to *R.K.* who died without issue as a member of a joint family in or about 1892. Subsequently there was a partition among the other members of the joint family. In 1922, after the said partition, *R.L.* adopted *A.I.*, a distant agnatic relation of her father, with the consent of all her husband's agnates. *B.*'s reversioners questioned the validity of this adoption on the ground that the power of *R.L.* to adopt came to an end with the partition and became incapable of revival with the extinction of her husband's joint family. Held, that the true test of the principle defining the limit of the widow's power of adoption is to be sought, not in the rule of divesting or otherwise of an estate, but in the rule that requires the continuance of a person to perform all the requisite religious services and the limit is reached on the happening of the event mentioned by *CHANDAVARKAR J.*, viz., "where a Hindu dies, leaving a widow and a son, and that son himself dies leaving a natural-born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived", in *Ramkrishna v. Shamrao*, (1902) I.L.R. 26 Bom. 526 (F.B.).

Panyam v. Rama Lakshammamma ... (1932) I.L.R. 55 Mad. 581

Illegitimate son—Status of—Maintenance out of joint family property—Right of:—*See* HINDU LAW ... 1

Inheritance—Father—Self-acquisition of—Succession to—Right of—Divided son—Undivided son—Rights of.] On the death of a Hindu leaving self-acquired property, his undivided sons succeed to such property to the exclusion of a divided son. *Nana Tawker v. Ramchandra Tawker*, (1908) I.L.R. 32 Mad. 377, was rightly decided as regards the order, though not as to the nature, of succession in such a case. *Vairavan Chettiar v. Srinivasachariar*, (1921) I.L.R. 44 Mad. 49 (F.B.), explained.

Narasimham v. Narasimham ... (1932) I.L.R. 55 Mad. 577

Inheritance—Illegitimate son of Sudra—Widow of last male owner—Moiety devolving upon, on death of last male owner—Illegitimate son of last male owner who had succeeded to other moiety—Right of, on death of widow, to moiety which had vested in her, as against daughter's son of last male owner—"Reverter"—Hindu Law doctrine of—Applicability of—Code of Civil Procedure (Act V of 1908), O. XLV, r. 15—Transmission of Order of Privy Council—Order for, made at instance of one of parties—Right of another party to avail himself of—Limitation Act (IX of 1908), art. 183—"Enforce"—Meaning of.] Under the Hindu Law the illegitimate son of a Sudra is entitled only to a moiety of his father's estate, so long as the widow, daughter or daughter's son of the father exists, and the widow, daughter and daughter's son are entitled to take the other moiety one after the other. On the death of a Sudra, the last male owner of an estate, his widow succeeded to a moiety thereof and his illegitimate son to the other moiety. The widow then died leaving behind her a son of the daughter of the last male owner and the illegitimate son abovementioned. Held, that the daughter's son was entitled to the moiety which had vested in the widow and that the illegitimate son was not entitled to any portion thereof. The Hindu Law doctrine of "reverter", that, on the death of a female, who holds only a "woman's estate" in the property inherited by her from the last male owner, the then heir of the last male

owner succeeds to his property, is inapplicable to a case where his property vested on his death not in a female heir only but in a male heir also. Under rule 15 of Order XLV of the Code of Civil Procedure it is not necessary that each party interested in the execution of an order of His Majesty in Council should obtain a separate transmission of the order. An order for transmission made by the High Court at the instance of one of the parties may be taken advantage of by another party. *Baluswami Ayyar v. Venkataswami Naicken*, (1923) 32 M.L.T. 249, followed. *Maharaja Sir Rameshwari Prasad Singh v. Rai Basinath Goenka Bahadur*, (1917) 2 P.L.J. 498, referred to. *Quaere*—whether the word “enforce” in article 183 of the Limitation Act (IX of 1908) means the same as “execute”, or whether its connotation is wider than the connotation of the word “execute”. In *re Barlow v. Order* (1872) 18 W.R. (P.C.) 175, referred to.

Karuppayyee Ammal v. Ramaswami Pandiya Nayakkar ... (1932) I.L.R. 55 Mad. 858

HINDU LAW—Maintenance—Sudra—Illegitimate son—Joint family property—Collaterals—Mistakshara, ch. I, sec. 12.] The illegitimate son of a Sudra by a continuous concubine has the status of a son, and, if his father has died leaving no legitimate son and no separate property, the illegitimate son, though not entitled to a partition, is entitled as a member of the family to maintenance out of joint family property in the hands of the collaterals with whom the father was joint. The Court may award him not only future but also past maintenance, so far as his claim thereto is not barred by limitation, and may direct that it be secured by a charge upon the joint family property. Consideration of the text and decided cases. *Jogendra Bhupati Hurrochundra Mahapatra v. Nityanand Man Singh*, (1890) I.L.R. 18 Cal. 151 (P.C.); L.R. 17 I.A. 128, followed. *Ramalinga Muppan v. Puvudai Goundan*, (1901) I.L.R. 25 Mad. 518, and *Subramania Ayyar v. Rathnavelu Chetty*, (1917) I.L.R. 41 Mad. 44 (P.B.), approved. *Vellaiyappa Chetty v. Natarajan* ... (1932) I.L.R. 55 Mad. (P.C.) 1

—Partition—Complete or partial—Presumption:—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 11 ... 483

—Widow—Property inherited by her—Income out of—Right of disposal over—If bound to pay the principal of binding debts—Sale to discharge a binding debt—Necessity for sale not imminent—Test to be applied—Payment of a small portion of the amount realized by sale for a debt which was not a legal necessity—Effect of, on sale.] A Hindu widow succeeded to properties left by her husband which yielded a considerable income. Her husband had executed two mortgages which were binding on the inheritance. The widow sold one of those properties for an adequate consideration, viz., Rs. 3,200 out of which Rs. 2,550 and 650 were applied in payment of the principal and interest respectively due under the mortgages. The reversioners objected to the sale. Held that, (1) a Hindu widow has absolute power of disposal over the income of the property inherited by her, even though there were binding debts to be paid, and she is not bound to apply the surplus income to the payment of the principal amount of those debts but only bound to pay the interest on the same out of such surplus. (2) the purpose of the sale being the payment of a binding debt, the fact that the necessity for the sale was not imminent should not be allowed to prevail, and the test to be applied in such a case is, “was the sale effected in good faith and in the exercise of proper discretion; in other words, could it be justified as the act of a prudent manager of a joint Hindu family?” (3) though the payment of Rs. 650 out of the sale price towards the interest on the mortgage debts was not a “legal necessity,” the entire sale should be upheld as that sum bears a small ratio to the entire consideration.

Jagannadham v. Vigneswarudu ... (1932) I.L.R. 55 Mad. 218

—Widow—Maintenance—Suit for, after there has been a partition—Right of widow not enforceable against surviving co-parceners who have not taken her husband's share.] When the widow of a co-parcener sues for

maintenance after there has been a partition, she cannot enforce her right against any of the surviving coparceners except those who have taken her husband's share. *Jayanti Subbiah v. Alamelu Mangamma*, (1902) I.L.R. 27 Mad. 45, applied.

Narasimham v. Venkatasubamma ... (1932) I.L.R. 55 Mad. 752

HINDU LAW—Will:—See EXECUTOR ... 443

HINDU RELIGIOUS ENDOWMENTS ACT (MADRAS) (II OF 1927), ss. 7, 9, CLC. (2), 67 AND 81—Non-existent temple—Hindu Religious Endowments Board—Jurisdiction.] The control of the Hindu Religious Endowments Board over the endowments of a temple is dependent on the temple being one to which the Madras Hindu Religious Endowments Act applies and the Board has no jurisdiction over the endowments where the temple is clearly non-existent, not temporarily but permanently, and there is no apparent intention of bringing it into existence again.

H.R.E. Board, Madras v. Rugmini ... (1932) I.L.R. 55 Mad. 686

—Remand and re-hearing of case under—Power of—District Court has no. Section 84 (2) of the Madras Hindu Religious Endowments Act (II of 1927) does not constitute the District Court an appellate authority with all the normal powers of an appellate Court. The District Court has, therefore, no authority under that section to direct a remand and re-hearing of the case.

Punnasseri Nambi v. Commissioners, H.R.E. Board, (1932) I.L.R. 55 Mad. 201

AS AMENDED BY ACT (I OF 1928), SEC. 73 (2)—Wrongful alienation of trust property by trustee—Suit by other trustees to recover property from alienees—Jurisdiction of Civil Courts.] Section 73 (2) of the Madras Hindu Religious Endowments Act II of 1927 (as amended by Act I of 1928) is not a bar to the institution of a suit by a trustee of a temple against strangers to the trust claiming to be alienees of trust property wrongly obtained by them through the maladministration of a trustee. *Vythilinga Pandara Sannadhi v. Temple Committee, Tinnevely Circle*, (1931) I.L.R. 54 Mad. 1011, dismissed. *Burree Das Mukim v. Choons Lall Johurry*, (1908) I.L.R. 33 Cal. 789, followed. *Semle*—There is nothing in section 82 of the Code of Civil Procedure which has not been taken out of that section and placed either in section 3 or other sections of the Madras Hindu Religious Endowments Act and section 73 of the said Act does not embrace any relief which could not formerly have been obtained under the procedure set out in section 92 of the Code.

Chandukchand v. Vedachala Chettiar ... (193) I.L.R. 55 Mad. 549

INCOME-TAX ACT (INDIAN) (XI OF 1922), SEC. (2) (1) (a)—Agricultural income—Rent arrears and interest due by ryot to landholder—Promissory note taken from ryot by landholder for—Interest accrued due under agricultural income, etc.] Interest due to a zamindar under promissory notes taken by him from his ryots for the amount of rent due by them with interest is not “agricultural income” within the meaning of section 2 (1) (a) of the Indian Income-tax Act of 1922. Sections 81 and 147 (2) of the Madras Estates Land Act only apply if a suit is brought directly on the liability of the ryot to pay rent. They are inapplicable to a case in which by a fresh contract between the zamindar and the ryots the actual character of the liability has been changed into a loan.

Commissioner of Income-tax, Madras v. Zamindar of Kirlampudi ... (1932) I.L.R. 55 Mad. (S.B.) 830

—SS. 3 AND 4 (2)—Hindu joint family carrying on business—Residence of—Test of—Applicability of test in *Commissioner of Income-tax, Madras v. T.S. Firm*, (1927) I.L.R. 50 Mad. 847 (S.B.)] The question as to what is the residence of a joint Hindu family does not depend upon the nature of income it gets. The test of residence cannot be one thing if the family is a trading family and some other thing if it

gets income from securities, property or other sources. A joint Hindu family should be said to reside in all those places where members of the family live. The test in *Commissioner of Income-tax, Madras v. T. S. Firm*, (1927) I.L.R. 50 Mad. 847 (S.B.), cannot apply to what are generally described in decisions as Hindu Law partnership, i.e., partnership which are the creatures of Hindu Law and not of the law of contracts. A joint Hindu family, which consisted of a father and his son and which carried on businesses in several places within and outside British India, had its permanent home in the Pudukottah State, where also it had a money-lending business. The father and manager visited the various places of business periodically for the purpose of supervising the businesses. During such visits he stayed at Madura, one of the places of business, for various periods in the business premises which were provided with a kitchen and other conveniences of a residential house. Held, that the above-mentioned circumstances constituted legal evidence on which the Commissioner could find that the joint family had its residence in Madura within British India.

Commissioner of Income-tax, Madras v. Somasundaram Chettiar ... (1932)
I.L.R. 55 Mad. (S.B.) 885

INCOME-TAX ACT (INDIAN) (XI OF 1922), ss. 10 (1) AND 40—Guardian—Business carried on by—Assessment of, as a single business—Permissibility—Business for benefit of wards alone or partly for benefit of guardian and partly for benefit of wards—Effect of sec. 40—Guardian not carrying on any business but merely receiving income on behalf of wards—Mode of assessment in case of—Sec. 3—Association—Business carried on by association of individuals—Meaning of.] Section 40 and the following sections of the Income-tax Act are enabling sections, i.e., the Income-tax Officer can take steps to assess the trustees or guardians as representing their separate beneficiaries or wards, as the case may be, if he so chooses. But the sections do not compel the Crown to resort to them. The existence of section 40 cannot prevent an assessment under section 10 (1) if it is otherwise justified. In a case where guardians or trustees do not carry on business but merely receive incomes on behalf of wards or beneficiaries and there is no question of any business being carried on by guardians or trustees it may be that section 10 will not be available to the Crown and in such a case the incomes of the various minors or beneficiaries cannot be added and each must be separately assessed whether directly or through the guardians or trustees under section 40 of the Act. But where a guardian or trustee carries on a business, though the persons ultimately deriving the benefit of the business may be some wards or beneficiaries, or, as in the present case, partly the guardian and partly the minors, the business can be regarded as a business carried on by the trustee or guardian and can be assessed as a single business. "Association" in section 3 of the Act merely means a group. When properties of a number of individuals are put together and one business is carried on with the combined resources, it is open to the Income-tax Officer to regard it as one business carried on by an association of individuals within the meaning of section 3 of the Act.

Commissioner of Income-tax, Madras v. Mrs. Saldanha. (1932) I.L.R. 55 Mad. (S.B.) 891

ss. 10 (2) (iii) AND 24—Capital loss—Trading loss or—Dissolution of partnership—Distribution of assets and liabilities on—Interest paid on liabilities—Deduction of, from taxable income—Right to—More businesses than one carried on by an assessee—Loss sustained by him in one or more of—Set off of, against gains and profits of other businesses—Right of—"Profits or gains of any business carried on by him" in section 10 (1)—Meaning of.] The petitioners, who constituted a joint Hindu family, carried on a money-lending business. They had also a share in two firms doing other classes of business. Those two firms were dissolved, an account was taken of their assets and liabilities and those assets and liabilities, when ascertained, were distributed between the petitioners and another partner. Those

liabilities represented capital borrowed entirely for the purpose of the two firms and the said borrowed capital was raised by those firms from third parties and not from any of the petitioners' businesses and was actually utilized in those two partnership businesses. During the year of account the petitioners paid interest on the liabilities of the two firms so taken over by their family. Held, that the amount paid by the petitioners for interest on the liabilities of the two firms taken over by them was not a trading loss within the meaning of section 24 of the Income-tax Act of 1922 and that the petitioners could not claim a deduction of that amount from the profits made by them in their joint family money-lending business. The property of the two businesses was distributed after their dissolution; and it was capital. Where more businesses than one are carried on by an assessee, what has to be ascertained is whether they have resulted in a profit or whether one or some of them have resulted in a profit and others in a loss. If it is discovered, on an account taken in accordance with section 10, that there has been a loss in one or more of them, that loss can be set off under section 24 against the profits and gains of other businesses of whatever description. *Quaere*—Whether the words "profits or gains of any business carried on by him" in section 10 (1) mean "profit or gains of each and every business" carried on by him. *Commissioner of Income-tax, Madras v. Suppan Chettiar*, (1929) I.L.R., 53 Mad. 702 (S.B.), approved *Commissioner of Income-tax v. Arunachalam Chettiar*, (1923) I.L.R. 47 Mad. 660 (S.B.), doubted.

Commissioner of Income-tax, Madras v. Siddha Gowder and Sons (1932)
I.L.R. 55 Mad. (S.B.) 818

INCOME-TAX ACT (INDIAN) (XI OF 1922), sec. 22 (3)—False return deliberately and dishonestly made—Penalty under sec. 28 for—Liability for—Revised correct return made by assessee and treated as revised return for purposes of sec. 22 (3)—Effect.] Section 22 (3) of the Indian Income-tax Act of 1922, which entitles an assessee to furnish a revised return, applies to a case in which he makes a bona fide discovery that he has made a previous incorrect return but not to a case in which the previous return was deliberately and dishonestly made. Where an assessee made a return of his income deliberately and fraudulently omitting therefrom a large sum of money, and, on the point of the Income-tax Officer discovering that omission, the assessee put in a revised return including that sum, held that, although the later return might for the purposes of assessability to income-tax be treated as a revised return under section 22 (3), the income-tax authorities were entitled to look at the previous incorrect return and were under section 28 of the Act entitled to inflict a penalty on the assessee.

Commissioner of Income-tax, Madras v. Arunachalam Chettiar (1932)
I.L.R. 55 Mad. (S.B.) 827

SEC. 26 (2)—"Any business" in—Meaning of—Several businesses owned or controlled by a company—Sale of one of, to another company—Purchaser company "successor" of vendor company within meaning of sec. 26 (2) if—Assessability of purchaser company under sec. 26 (2).] Where a company, which owns or controls several other companies, sells one of them to another company, the purchaser company is the successor of the vendor company within the meaning of, and can be assessed under, section 26 (2) of the Indian Income-tax Act of 1922, even in the absence of proof that the purchaser company succeeded to all the other companies owned or controlled by its vendor. Upon whom the burden is ultimately to fall is a matter of arrangement between the vendor company and the purchaser company. The words "any business" in section 26 (2) do not mean "each and every business" carried on by the former owner of a business. The effect of section 26 (2) is that, where a person who was not the former owner of a company is found to be owning that company in the year of assessment, that person is to be assessed.

Commissioner of Income-tax, Madras v. Best & Co., Madras ... (1932)
I.L.R. 55 Mad. (S.B.) 882

INTEREST —When ceases to run:—See TENDER	Page 458
IRRIGATION CESS ACT (MADRAS) (VII OF 1865), SEC. 1 — <i>Zamindari land bounded by river—Riparian rights—Engagement with Government—"River belonging to the Government"</i> . The property in land bounded by a river, whether tidal and navigable or not, has inherent in it the riparian right to take water from the river for irrigating the land, and on a permanent settlement of the land that right is included, without special mention, in the property in respect of which the zamindar enters into an engagement with the Government to pay the jama the right being a natural right, not an easement, is not lost by non-user. Accordingly, even if the river belongs to the Government within the meaning of the Madras Irrigation Cess Act, 1865, section 1, the proviso exempts the zamindar or a grantee from him of part of the riparian land, from liability to the cess to the extent of his said right. A river is one "belonging to the Government" for the purposes of the section if, at the point at which the water is taken, the bed of the river belongs to the Government, and that is so when the Government is proprietor of the land abutting on the river on both sides, or when the river is tidal and navigable. <i>Prasad Row v. The Secretary of State for India</i> , (1917) I.L.R. 40 Mad. 886 (P.C.); L.R. 44 I.A. 168, applied. <i>Lyon v. Fishmongers Company</i> , (1870) 1 App. Cas. 662, <i>Swindon Waterworks Company v. Uits and Perks Canal Navigation Company</i> , (1875) L.R. 7 H.L. 697, 7-4, and <i>McCartney v. Londonderry and Lough Suilly Railway</i> , [1904] A.C. 301, 307, referred to.	
<i>Secretary of State for India v. Subbarayudu</i> ... (1932) I.L.R. 55 Mad. (P.C.)	288
JUDGMENT —Consolidation:—See CIVIL PROCEDURE CODE , O. XLV, R. 4	106
— in Small Cause Suit—Contents of. See CIVIL PROCEDURE CODE , (ACT V OF 1908), O. XX, R. 4	671
JUDICIAL COMMITTEE RULES (1920), R. 9 :—See CIVIL PROCEDURE CODE OF (ACT V OF 1908), O. XLV, R. 7	835
JURISDICTION :—See CRIMINAL PROCEDURE CODE , ss. 476 AND 195 (b)	611
— See CRIMINAL PROCEDURE CODE , SEC. 476	536
JURY — <i>Verdict not vitiated by mistake or accident—Power of jury and Judge to revise same—Judge not satisfied with same—Procedures to be adopted.</i> When a Sessions Judge thinks that the jury has, by committing an error of law, committed an error of judgment but not that they delivered a verdict which they did not intend to deliver, he cannot address another charge to the jury on the law and request them to reconsider their verdict in the light of the same but should, if he disagreed with the verdict of the jury, submit the case to the High Court under section 307 of the Code of Criminal Procedure.	
<i>Sundaram Ayyar, In re</i> (1932) I.L.R. 55 Mad.	266
LAND ACQUISITION ACT (I OF 1894), ss. 31 (2) AND 49 — <i>Order on reference under—If a decree—Acquisition of a portion of a house—Test to be applied—Madras Town Planning Act (VII of 1908), ss. 12 and 35 (2) (a)—Power of Local Government to extend time fixed under sec. 12—Date to be adopted under sec. 35 (2) (a) when the time is extended.</i> The order of a Court on a reference to it under section 49 of the Land Acquisition Act (I of 1894) is a decree and as such appealable. On such a reference, in coming to the conclusion whether a portion of the house "is reasonably required for the full and unimpaired use of the house," regard should be had to the existence of ample space within the compound in which a similar portion could be built without any particular inconvenience to the use of the house, and if there is such space the whole house need not be acquired. The Local Government have ample power, by notification, to extend the time fixed by them under section 12 of the Town Planning Act. <i>Per RAMESAM OFFG C.J.</i> —If the time is extended, the date of the further notification would be the date to be adopted under section 35 (2) (a) of the Town	

<i>Planning Act. Per CORRISS J.</i> —The extended date for submission of a draft scheme is not to be treated as the date of publication of the notification for the purpose of section 35 (2) (a). <i>Per RAMESAM OFFG C.J.</i> — <i>Semle</i> . In the present condition of the Act all awards are decrees and all orders other than awards on a reference under section 31 (2) are also decrees.	
<i>Secretary of State for India v. Narayanaswamy Chettiar</i> ... (1932) I.L.R. 55 Mad.	391
LAND ACQUISITION ACT (I OF 1894), SEC. 32 :—See COURT-FEE	341
LANDLORD AND TENANT — <i>Decree for possession obtained by third party against both landlord and tenant—Effect of—No termination of tenancy or destruction of landlord's title merely by reason of—Execution of decree allowed by third party to become barred—Subsequent suit by landlord against tenant for possession—Maintainability of—Eviction of tenant by title paramount—What amounts to—Unexecuted decree for possession obtained by third party if amounts to.</i> A suit by a lessor for the recovery of a portion of a house alleged to have been let by him to the defendant was dismissed by the Courts below on the preliminary ground that it was not maintainable by reason of a decree for possession of the suit house obtained in a prior suit by a third party against both the lessor (plaintiff) and the lessee (defendant). Possession of the suit house was decreed to the third party in the prior suit on the ground that he was the owner thereof, that the possession of the house by the lessor (plaintiff) became adverse to the third party only within twelve years of his suit, and that his suit was therefore in time. The third party did not, however, execute the decree in his favour and it had become barred on the date of the lessor's suit. <i>Held</i> , reversing the Courts below, that, in the absence of anything further done or alleged amounting to a new arrangement between the third party and the lessee (defendant) or to an attornment, the decree obtained by the third party had not the effect as between the lessor and the lessee of destroying whatever rights the lessor might have previously had or of automatically putting an end to the tenancy pleaded by the lessor. The finding as to title in the prior suit is not <i>res judicata</i> between the lessor and the lessee who were only co-defendants therein and the unexecuted decree for possession obtained by the third party therein had not the effect of destroying the lessor's title as between him and his tenant. <i>Bala v. Anai</i> , (1909) 11 Bom. L.R. 1093, dissented from on this point. An unexecuted decree for possession obtained by a third party does not operate as an eviction of the tenant by title paramount liberating him from the estoppel against pleading <i>jus tertii</i> . <i>Devalraju v. Mahamed Jaffer Sahab</i> (1911) I.L.R. 36 Mad. 53, followed. <i>Ram v. Pramatha</i> (1921) 35 C.L.J. 140, 154, 155, considered.	
<i>Krishna Rao v. Mungara Sanyasi</i> (1932) I.L.R. 55 Mad.	601
LETTERS PATENT (MADRAS), 1862 AND 1865, CL. 19 :—See DEFAMATION	727
LIEN :—See ADVOCATE	455
LIMITATION ACT (INDIAN) (IX OF 1908), SEC. 4 :—See PRESIDENCY-TOWNS INSOLVENCY ACT (III OF 1909), SEC. 46 (3)	680
—, ss. 4, 6 AND 8— <i>Ex-minor—Suit by—Three years' period allowed by sections 6 and 8 for, expiring on day when Court is closed—Suit filed by him on re-opening day—Not barred by virtue of sec. 4—Effect of that section.</i> Where three years allowed by sections 6 and 8 of the Indian Limitation Act to an ex-minor to institute a suit expire on a day when the Court is closed, a suit filed by him on the re-opening day is, by virtue of section 4 of that Act, in time. Section 4 of the Limitation Act does not extend the period of limitation. But it enables the plaintiff, by excluding the time during which the Court is closed, to institute his suit on the re-opening day and so to have the benefit of the three years' period which the Act gives him for that purpose.	
<i>Mari Naganna v. Krishnamurti</i> (1932) I.L.R. 55 Mad.	286

LIMITATION ACT (INDIAN) (IX OF 1908), SEC. 19 (1)—"Some person through whom he derives title" in—Meaning of—Mortgagor—Acknowledgment of mortgage debt by—Alienee of mortgaged property prior to date of—Binding nature of acknowledgment on.] The words "some person through whom he derives title" in section 19 (1) of the Limitation Act ought not to be read as "some person through whom he derives title subsequently to the acknowledgment." *Per JACKSON J.*—An acknowledgment of a mortgage debt made by a mortgagor after he has alienated the hypotheca affects both the mortgagor and his alienee. *Per KRISHNAN PANDALAI J.*—An acknowledgment of a mortgage debt made by a mortgagor who has sold a portion of the mortgaged property but remains personally or in respect of the unsold portion liable on the mortgage is effective to save limitation as against the property sold. *Quaere*—Whether, after a mortgagor's personal liability had become barred and he had sold all the mortgaged property, any acknowledgment by him of the mortgage debt can save limitation against the purchaser.

Muthu Chettigar v. Muthuswami Ayyangar ... (1932) I.L.R. 55 Mad. 758

Provincial Insolvency Act:—*See* PROVINCIAL INSOLVENCY ACT (V OF 1920), SEC. 9 ... 766

ARTS. 184, 189:—*See* CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. V, R. 20 ... 228

ARTS. 177 AND 181:—Execution proceedings—Order made in—Appeal against—Legal representative of deceased respondent in—Application to bring on record—Limitation—Code of Civil Procedure (Act V of 1908), O. XXII—Rule of abatement in—Applicability of.] The rules of abatement in Order XXII of the Code of Civil Procedure apply to appeals against orders made in execution proceedings as to other appeals. An appeal against an order made in execution proceedings is no itself a proceeding in execution of a decree or order within the meaning of rule 12 of Order XXII of the Code. *Held*, accordingly, that an application to bring on record the legal representative of a deceased respondent in an appeal against an order made in execution proceedings is governed by article 177, not by article 181, of Schedule I of the Limitation Act.

Rajah of Kalahasti v. Jagannadha Ranganiggar ... (1932) I.L.R. 55 Mad. 1006

ART. 188—"Enforce"—Meaning of:—*See* HINDU LAW—INHERITANCE ... 856

LIQUIDATOR—(duties of:—*See* COMPANY ... 180

LIS PENDENS—*See* CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 11 ... 494

LOCAL BOARDS ACT (MADRAS) (XIV OF 1920), SEC. 98—Profession-tax—Person living within area of Union Board and receiving within that area income from business carried on by him outside that area—Profession-tax in respect of such income—Liability for—Person is under, though he had already paid profession-tax thereon in his place of business—Double taxation when not allowed by Act.] Income received by a person living within the area of a Union Board is taxable there under section 98 of the Madras Local Boards Act (XIV of 1920; whether it has been taxed elsewhere or not. The only cases in which double taxation is not allowed by the Act are specified in sub-section 3 of that section. *Held*, accordingly, that a person who, lived within the area of a Union Board and received within that area income from a business carried on by him at places outside that area was, under section 98, liable to pay profession-tax on that income at his place of residence, even though he had already paid the profession-tax thereon in those places.

Manickavasagam Chettiar v. Union Board, Devakotta, (1932) I.L.R. 55 Mad. 868

LOCAL BOARDS ACT (MADRAS) (XIV OF 1920), SEC. 98, PROVISIO 1—"Intermediate landholder" within meaning of—Minor inamdar holding under landholder within meaning of Madras Estates Land Act (I of 1908) and entitled to occupancy right in his holding if an—Land-cess payable to landholder by—Mode of recovery of—Explanation to sec. 89 of Madras Local Boards Act added in 1930—Change of law if effected by.] The test of being an "intermediate landholder" within the meaning of the Madras Local Boards Act (XIV of 1920) is not whether a person is the owner of only the melvaram but whether he holds on an under-tenure created, continued or recognized by the landholder. If he satisfies the latter test he is an "intermediate landholder" though he may be entitled to one or both varams. *Held* that a minor inamdar holding under a landholder within the meaning of the Madras Estates Land Act (I of 1908) was an "intermediate landholder" within the meaning of proviso 1 to section 88 of the Madras Local Boards Act, although he was entitled to an occupancy right in his holding, and that he was, under that proviso, liable to pay the landholder the whole of the land-cess paid by him on the inamdar's holding less one-half of the cess so assessable on the quit-rent. *Held further* that, in respect of the land-cess so recoverable from him, the inamdar could be proceeded against, as if he were a ryot owing rent, under the Madras Estates Land Act. *Per KRISHNAN PANDALAI J.* (WALLER J. inclining to the same view without deciding the point expressly).—The explanation to section 89 of the Madras Local Boards Act (added in 1930), which expressly subjects intermediate landholders to the procedure for realization of rents from ryots under the Madras Estates Land Act, has not altered the law, and section 74 of the Madras Local Boards Act of 1934 and section 89 of the Act of 1920 before the amendment were intended to have the same effect. *Lakshminarasimham Pantulu v. Sree Sree Ramachandra Mardaraja Deo*, (1913) I.L.R. 27 Mad. 319, considered.

Bhupathi Raju v. Subba Rao ... (1932) I.L.R. 55 Mad. 646

SEC. 98—Income accrued to a person outside British India but received by him within the area of a Taluk Board—Taxability by Taluk Board of.] Income accrued to a person outside British India but received by him within the area of a Taluk Board is, under section 98 of the Madras Local Boards Act (XIV of 1920), taxable by that Board. Where part only of the income accruing to him outside British India is received by him within the area of a Taluk Board it can assess him only on that part. The plain meaning of section 93 is that that part of his income is chargeable which he actually receives within the area of the Taluk Board.

Perianan Ochetti v. Taluk Board, Devakotta ... (1932) I.L.R. 55 Mad. 848

AS AMENDED BY ACT XIV OF 1930, SEC. 228, PROVISIO—Using a motor vehicle for hire without licence—Prosecution by District Board—Three months period—Starting point.] Under the proviso to section 228 of the Madras Local Boards Act, read with that section, a person, who does an act for which a licence is required, and fails to obtain a licence, may be prosecuted within three months of the expiry of the period for which the licence, if granted, would have been current. *Arthur v. Apparu Velan*, (1927) 108 I.O. 411, followed.

President, District Board, Tanjore v. Adam Ghanni Routhier ... (1932) I.L.R. 55 Mad. 482

MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT (MADRAS) (I OF 1900)—Applicability of, to building leases (that is, leases of vacant sites for building purposes.) The operation of the Malabar Tenants' Improvements Act (I of 1900) is not confined to agricultural leases. The Act applies to building leases (that is, leases of vacant sites for building purposes) as well. *Chathukutty v. Kunhappu*, (1927) I.L.R. 50 Mad. 812, and *Sabju Sahib v. Malabar District Board*, (1929) I.L.R. 58 Mad. 51, referred to. Law on the point prior to Madras Act I of 1887 and the effect of that Act considered.

Avoru v. Aai Bai ... (1932) I.L.R. 55 Mad. 151

MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT (MADRAS ACT I OF 1900), s.c. 11—Kanam given before 31 January 1885—*renewal of, after that date—Compensation to be given for improvements in case of—Rate of—Rate fixed in original kanam—Enforceability of, up to date of renewal and thereafter.* A kanam of 1900 was given in renewal of a kanam of 1884 one of the terms of which was that compensation for improvements was to be at half their value. That term was repeated in the kanam of 1900. In a suit brought on the kanam of 1900 the question arose as to the rate at which the tenants had to be compensated for their improvements. Held that the rates in the 1884 contract were enforceable only up to the date of the renewal in 1900 and not after it. *Rayarappa Atiotti v. Kelappa Kurup* (1916) I.L.R. 40 Mad. 54 (F.B.), is not an authority for the view that, in the case of renewals, compensation should be given at the rate originally fixed before the Madras Malabar Compensation for Tenants' Improvements Act came into force. *Rayarappa Atiotti v. Kelappa Kurup*, (1916) I.L.R. 40 Mad. 54 (F.B.), explained. *Trivangulath v. Neroliparkam*, (1928) 115 I.C. 349, and Second Appeal No. 545 of 1928, dissented from. Second Appeal No. 216 of 1924 considered. The practice of Courts in the Malabar District of issuing several commissions in succession and arriving at valuations by a process of selection from the reports of each commissioner condemned as being lax and irregular.

Kunjunn Nair v. Achuta Menon ... (1932) I.L.R. 55 Mad. 656

MALABAR LAW—Kanam—Renewal of—Agreement for—Notice of—Melkanamdar when will be held to have—Specific performance—Kanam—Agreement to grant or to renew—Specific performance of—Notice—Constructive notice—Principles of—English decisions as to—Application in India of—Caution as to. In Malabar a person who takes a melkanam, the term of which is to begin after the expiry of a kanam in force in favour of a third party, must be held to have had notice of an agreement for renewal obtained by the kanamdar. The principle that no decree should be made for specific performance of a contract to advance or take a loan is inapplicable to a suit for specific performance of an agreement for the renewal of a kanam. In proper cases there is no difficulty in making a decree for specific performance of an agreement to grant a kanam. *Unniri Kutti v. Narayana*, A.I.R. 1929 Mad. 777, followed. *Per REILLY J.*—Courts should be very careful about applying to this country English decisions in regard to the principle of constructive notice and should do so only when they are quite sure that the circumstances are really similar.

Kalyani v. Krishnan Nambiar ... (1932) I.L.R. 55 Mad. 519

MARRIED WOMEN'S PROPERTY ACT (III OF 1874), s.c. 9—*Life insurance policy—Sum insured payable to the assured or his wife if he predeceases her—Effect of.* A life insurance policy, in the column headed "to whom payable," contained the following words, viz., "the assured or his wife if he predeceases her." Held, that the said words express on the face of the policy that the same is for the benefit of his wife and as such it enures and is deemed to be a trust for the benefit of the wife, within the meaning of section 6 of the Married Women's Property Act (III of 1874).

Abhiramavalli v. Official Trustee, Madras ... (1932) I.L.R. 55 Mad. 171

MORTGAGE—Sub-mortgage—Redemption suit by original mortgagor against original mortgagee—Sub-mortgagee not impleaded in—Right of, where redemption suit ends in redemption—Original mortgagor not having notice of sub-mortgage—Notice of sub-mortgage to mortgagor—Registration of sub-mortgage not of itself—Redemption suit—Preliminary decree in—Payment out of Court made after, and reported to Court by both mortgagor and mortgagee—Validity of—Third party's right to question. A sub-mortgagee (of whose sub-mortgage the original mortgagor had no notice) left out of a redemption suit against his mortgagor, which ends in redemption, cannot claim afterwards to bring either the property originally mortgaged to his mortgagor or what was mortgaged to himself to sale. His right in such a case is only to a personal decree against his mortgagor. A sub-mortgagee has a right to sue for sale of the property mortgaged to him, and, if he is not made a

party to the redemption suit against his mortgagor, his right to bring his own suit is unaffected and can be pursued by him. But the legal effect of the redemption of the original mortgage in accordance with the decree of the Court in the redemption suit is to wipe out the original mortgage. As the sub-mortgagee has only a mortgage right over that mortgage, if that is gone, the whole foundation of a suit by him for sale is gone to. *Muhamad Haji v. Mohidin Kutti* (1926) 80 M.L.T. 21, followed. *Sukhi v. Ghulam Saifdar Khan* (1921) I.L.R. 43 All. 469 (P.C.), distinguished on the ground of its not being a sub-mortgagee's case. The registration of a sub-mortgage is not of itself notice thereof to the mortgagor. The rule that a payment made out of Court after the preliminary decree in a redemption suit will not be recognised by the Court if disputed cannot affect the right of the mortgagor and the mortgagee to settle between themselves out of Court and report the matter to the Court. When they do so the validity of the payment cannot be questioned by a third party not impleaded in the suit. *Singa Raja v. Pethu Raja* (1919) I.L.R. 42 Mad. 61, explained.

Viswanatha Ayyar v. Chimmukutti Amma ... (1932) I.L.R. 55 Mad. 320

NOTICE—Constructive notice—Principles of—English decisions as to—Application in India of—Caution as to:—See MALABAR LAW ... 519

PARTITION—Suit for—Defendant asking for his share to be separated and given in—Power of Court to do so—Indian Stamp Act (II of 1869)—Partition decree stamped as an instrument of partition under—Non-liability of defendant to pay court-fee in such suit. If, in a suit for partition, a defendant asks for his share to be given, the Court can order his share to be separated and given, and the right of the Crown to some revenue on the claim of the defendant is satisfied by the direction in the Indian Stamp Act that the decree as finally drawn up should be stamped as an instrument of partition and except that stamp duty no other duty as court-fee is payable by the defendant in such a suit.

Venkatasubdamma v. Ramanadhayya ... (1932) I.L.R. 55 Mad. 975

PASSING OFF ACTION:—See TRADE NAME ... 965

PENAL CODE (INDIAN) (ACT XLV OF 1860), s.c. 117—*Abetment by more than ten persons of an offence—Madras Salt Act (IV of 1859), sec. 74, if supercedes section 117 of the Indian Penal Code—Punishment for abetment.* The gravamen of a charge under section 117 of the Indian Penal Code is the abetment itself, the instigation to general lawlessness, not the particular offence of which the commission is instigated. Section 74 of the Madras Salt Act refers to the direct abetment of particular acts and does not embrace the offence under section 117 of the Penal Code; and any person instigating more than ten persons to commit an offence under the Madras Salt Act is liable to imprisonment for three years under section 117 of the Indian Penal Code.

Konda Satyavatamma, In re ... (1932) I.L.R. 55 Mad. 90

SEC. 171-G—Offence under—Meaning of "any statement purporting to be a statement of fact"—Mere general imputations not sufficient. By the words "any statement purporting to be a statement of fact" in section 171-G, Indian Penal Code, is intended "any statement which is made as a statement of fact" and to constitute an offence under that section something must be stated as a fact and not as a general imputation or as a matter of opinion. General imputations of misconduct unaccompanied by any charges of particular acts of misconduct cannot properly be described as statements of fact within the meaning of section 171-G, Indian Penal Code.

Radhakrishna Ayyar, In re ... (1932) I.L.R. 55 Mad. 791

SEC. 323—See CRIMINAL PROCEDURE CODE OF (ACT V OF 1898), s.c. 403 ... 789

POWER OF ATTORNEY—Creditor having a, to collect rent.—If, a secured creditor:—See **PRESIDENCY-TOWNS INSOLVENCY ACT (III OF 1909), SEC. 7.** 558

PRACTICE—Full Bench—Question answered by—Division Bench—Binding character on—Procedure to be adopted by Division Bench if it considers answer obiter dictum and doubts its correctness.] Held by the CHIEF JUSTICE:—The answer to a question referred to a Full Bench cannot be treated by a Division Bench as an obiter dictum nor can the matter be referred by a Division Bench to a larger Full Bench if it doubts the correctness of the answer given by the Full Bench. The proper procedure in such cases is to refer the matter to the Chief Justice and it is for him to consider whether the question should be reconsidered by a larger Bench.
Rajah of Mandasa v. Jagannayakulu ... (1932) I.L.R. 55 Mad. (F.B.) 888

PRESIDENCY-TOWNS INSOLVENCY ACT (III OF 1909), SS. 7, 18, AND 36—Insolvency Court—Power to file partition suits in—Pending partition suit—Power of Insolvency Court to stay proceedings in—Hindu father's debts—Binding nature of—Power of Insolvency Courts to summon son for ascertaining—Power of attorney to collect rents—Creditor having a—[If, a secured creditor.] S. and his minor son K. were members of a joint Hindu family. S. had made certain alienations of the family property. He had also borrowed a sum of money from R. and had executed a power of attorney in favour of R. permitting him to collect the rents of certain family houses and to let them to other tenants when necessary. S. had also given a letter to R. by which he undertook not to cancel the power of attorney and not to deal with the houses so long as R.'s debt remained undischarged. On 11th February 1927, K's mother as the next friend of K. filed a suit for partition against S. and certain other creditors of the joint family, *inter alia*, alleging that the debts contracted by S. from them were not binding on K. In March 1927, S. became an insolvent and in September 1927, the Official Assignee was added as a party to this suit. In 1929, R. filed a suit against S. and the Official Assignee for specific performance of an agreement to give a mortgage of the abovementioned houses alleged to have been entered into between him and S. in 1926. R. alternatively contended that he should be treated as a secured creditor in the insolvency of S., in view of the terms of the power of attorney above mentioned. Held that, inasmuch as the power of attorney created an interest in the rents only and not in the property by enabling R. to take possession of the houses, R. was not a secured creditor. *Spooner v. Sandilands*, (1842) 62 E.R. 939, referred to. *Per Ramaswami J.* (1) Section 7 of the Presidency Towns Insolvency Act (III of 1909) does not enable partition suits to be filed in the Insolvency Courts. Observations to the contrary in *Ramachandra Ayyar v. Official Assignee of Madras*, (1930) I.L.R. 54 Mad. 739, discussed. (2) On the Insolvency of a Hindu father, the Insolvency Court has no jurisdiction to summon the son under section 36 of the Presidency Towns Insolvency Act in order to find out the binding nature of the father's debts on the sons, unless the son chooses to appear before the Insolvency Court and raises the question about the binding nature of the debt. In *re Balusami Ayyar*, (1928) I.L.R. 51 Mad. 417 (F.B.), explained. (3) Under section 18 of the Presidency Towns Insolvency Act the Insolvency Court has no power to stay the proceedings in a pending partition suit in which the insolvent is a party.

Krishnamurthy Pillai v. Sundaramurthy Pillai ... (1932) I.L.R. 55 Mad. 558

... SS. 7 AND 36 AND SUB-SS. 4 AND 5—Presidency Towns Insolvency (Amendment) Act (XIX of 1927), sec. 2—[Scope and effect of.] The Official Assignee of Madras examined the father of the insolvent and one of his brothers, under section 36 of the Presidency Towns Insolvency Act (III of 1909), for the purpose of ascertaining whether the status of joint family was subsisting between the insolvent and the other members of his family and whether a business was a joint family business. Later on, he took out an application under section 7 of the Act for, *inter alia*, a declaration that the business was a joint family business and that the deed of partition entered into between the insolvent and the

other members of his family was void against him. Held that the amendment of section 7 of the Act by section 2 of the amending Act (XIX of 1927) refers only to such proceedings under section 36 of the Act (III of 1909) as come under sub-section 4 which deals with simple money claims and sub-section 5 which deals with the examination of persons supposed to be in possession of some property of the insolvent and to no other matters. Sub-section 5 of section 36 does not touch the case of a person who is examined for the purposes mentioned above and as such the application under section 7 of the Act (III of 1909) was a proper one. *Official Assignee of Madras v. Narasimha Mudaltar*, (1929) I.L.R. 52 Mad. 717 (F.B.), distinguished.

Chinnappa Mudalt v. Official Assignee, Madras ... (1932) I.L.R. 55 Mad. 885

PRESIDENCY-TOWNS INSOLVENCY ACT (III OF 1909), SEC. 46 (3)—Barred debt—Right to sue on same subsisting on date of adjudication—Proof of—Indian Limitation Act (IX of 1908), sec. 4.] A barred debt is provable in insolvency, under section 46 (3) of the Presidency Towns Insolvency Act, where the right to sue on the debt subsisted on the date of the order of adjudication, by reason of the provisions of section 4 of the Indian Limitation Act.

Fatma Bi v. Nagoorkhan ... (1932) I.L.R. 55 Mad. (F.B.) 630

PRESIDENCY-TOWNS INSOLVENCY (AMENDMENT) ACT (XIX OF 1927), SEC. 2:—See **PRESIDENCY-TOWNS INSOLVENCY ACT (III OF 1909), SEC. 7** ... 385

PROBATE AND ADMINISTRATION ACT (V OF 1881), SS. 4 AND 90:—See **EXECUTOR** ... 443

PROVINCIAL INSOLVENCY ACT (V OF 1920), SEC. 9—Creditor's petition under—Applicability to, of sec. 5 of Limitation Act (IX of 1908)—Creditor's petition under sec. 9 an application within sec. 78 of Provincial Insolvency Act if it is—"Petition" and "Application"—Distinction in Provincial Insolvency Act between.] A creditor's petition under section 9 of the Provincial Insolvency Act of 1920 praying that a debtor may be adjudged insolvent is not an application within the meaning of section 78 of that Act, and section 5 of the Limitation Act of 1908 is therefore inapplicable to such a petition. Appeal against Order No. 523 of 1925 dissented from. *Vaithinatha Aiyar v. Vaithinatha Aiyar*, (1931) 61 M.L.J. 544, followed. The Provincial Insolvency Act draws a very definite distinction between the words "petition" and "application," the former word being used for an application praying that a debtor may be adjudged insolvent, which thereby institutes insolvency proceedings, and the latter for an application to the Court in the course of insolvency proceedings already instituted.

Gangee Premjee & Co. v. O.L.K.K.N. Firm, Colombo ... (1932) I.L.R. 55 Mad. 766

... SEC. 52—As amended—Interim receiver's right to apply under—Immovable property under attachment by Court—Sec. 52 applies to.] An interim receiver is entitled to apply under section 52 of the Provincial Insolvency Act. Section 52, as now amended, contemplates the presentation of an application, not, as it used to do, after adjudication, but at an earlier stage—that is to say, after an insolvency petition has been admitted. *Subramania Ayyar v. The Official Receiver, Tanjore*, (1925) 50 M.L.J. 665, dissented from. *Maharajah v. Vaibhai*, (1927) 30 Bom. L.R. 455, referred to. Section 52 of the Provincial Insolvency Act applies to immovable property under attachment by a Court. *Harachandra Chakravarti v. Jay Chand*, (1929) I.L.R. 57 Cal. 122, followed.

Sivasami Odayar v. Subramania Aiyar ... (1932) I.L.R. 55 Mad. 316

... SS. 75 AND 83—Application by creditor under sec. 83—Collusive withdrawal and dismissal of—Appeal from order of—Right of—Another creditor not party to application has, when aggrieved by order.] Under section 75, clause 1, of the Provincial Insolvency Act, any aggrieved person may prefer an appeal against an order

passed by the Judge in Insolvency. *Held*, accordingly, in a case in which an application filed by one of the creditors under section 68 of the Provincial Insolvency Act was withdrawn by him collusively and was dismissed, that another creditor who was aggrieved by the order was, though not a party to the application under section 68, competent to appeal against it.

Pulli Goundan v. Kumaraswami Goundan ... (1932) I.L.R. 55 Mad. 818

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SEC. 25:—*See* CIVIL PROCEDURE CODE OF (ACT V OF 1904), O. XX, r. 4 ... 671

"PUBLIC OFFICER":—*See* DISTRICT MUNICIPALITIES ACT (MADRAS) (V OF 1920), SEC. 1, r. 9 ... 207

RECEIVER—Interim—Rights of:—*See* PROVINCIAL INSOLVENCY ACT (V OF 1920), SEC. 62 ... 816

REGISTRATION—If of itself notice:—*See* "MORTGAGE" ... 820

REGISTRATION ACT (INDIAN) (XVI OF 1908), ss. 17 AND 49—*Partnership—Dissolution of—Partnership assets including immovable property—Agreement adjusting rights between partners involving modification of title to immovable property—Necessity of registration—Agreement designed as an indivisible whole—Clause relating to payment of money—Enforcement of—Admissibility of agreement for purpose of.* Where an unregistered instrument of dissolution of partnership affecting or involving modification of title to immovable property is not merely a record of an already completed division of properties but is regarded by the parties as the only repository of their agreement, no other evidence of its terms can be given except the instrument itself, and, that being so, the instrument being unregistered is not receivable as evidence of any transaction affecting immovable property under section 49 of the Indian Registration Act; and where such an instrument, comprising a number of counter balancing terms, some affecting immovable property and some not, is designed as an indivisible whole to effect a fair distribution of the assets, it is inadmissible in evidence even for the purpose of proving the terms not affecting immovable property.

Samuvier v. Ramasubbier ... (1932) I.L.R. 55 Mad. 72

REGULATION II OF 1802:—*See* DEFACTION ... 727

V OF 1804 (SEC. 3):—*See* EVIDENCE ACT (INDIAN) (I OF 1872) ... 40

VII OF 1828:—*See* REVENUE RECOVERY ACT (MADRAS) (II OF 1864) ... 458

RES JUDICATA:—*See* CIVIL PROCEDURE CODE SEC. 11 ... 458, 495, 601

REVENUE RECOVERY ACT (MADRAS) (II OF 1864)—*Auction sale under—Confirmation of sale by Revenue Divisional Officer—District Collector's powers of revision—Madras General Clauses Act (I of 1891), sec. 8 (6)—Definition—Collector—Inapplicability to Madras Regulation VII of 1828 or to Act II of 1864.* G was in arrears of revenue and his land was put up to auction by the revenue authorities and was purchased by O. The Revenue Divisional Officer confirmed the sale in O's favour. On a petition put in by G, the District Collector cancelled the sale in favour of O. *Held*, that confirmation of sales held under the Revenue Recovery Act and the issue of certificates, etc., are to be done by the Collector of the District and the exercise of similar power by the Deputy Collector in charge of a division is subject to the complete control of, and supervision and revision by, the Collector of the District who may "confirm, modify or annul" the order of his subordinate and issue "any further order in the case as he may see fit." *Gnana Sambanda Pandara Sannadhi v. David Nadar*, (1904) 14 M.L.J. 438, followed. *Brahmayya v. Pappasetty*, (1921) I.L.R. 51 Mad. 695, overruled.

Chittayya v. Secretary of State for India ... (1932) I.L.R. 55 Mad. 458

REVENUE RECOVERY ACT (MADRAS) (II OF 1864), ss. 8 AND 25—*Defaulter in the register—Death of—Sale-proceedings under the Act conducted after, and without prescribed notices being given to any living person as defaulter—Sale in case of—Void—Irregularity in publishing and conducting sale—Omission of preliminary steps necessary to give jurisdiction to revenue authorities to conduct sale—Distinction—Sec. 59 of Act—Limitation plea based upon—Available in former class of cases but not in latter.* The fundamental requisite for giving the revenue authorities jurisdiction to conduct a sale under the Madras Revenue Recovery Act (II of 1864) is that there should be a defaulter living who can receive the notices and avoid the sale by payment of the arrears. *Held*, accordingly, that a sale of land for arrears of revenue under Madras Act II of 1864, all the proceedings in which were conducted after the death of the defaulter in the register and without the prescribed notices being given to any living person as defaulter, was void. There is clear distinction between irregularities in publishing and conducting the sale and essential preliminary steps which are necessary to give the revenue authorities jurisdiction to conduct the sale, the omission of which makes the sale null and void. The plea of limitation based upon section 59 of Madras Act II of 1864 will avail in the former class of cases but not in the latter. A notice under section 8 in case of movables and under section 25 in case of immovables is of the latter class. Whether the modes of service of the notice mentioned in section 25 of the Act are dependent or independent, all of them equally contemplate that the defaulter for whose information the notice is intended is alive.

Marukkolandayammal v. The Secretary of State for India (1932) I.L.R. 55 Mad. 876

SEC. 11—*Inamdar—Quit-rent—Arrears due by—Distraint for, of crops raised by occupancy ryot under inamdar—Legality of.* Under the Madras Revenue Recovery Act crops raised by an occupancy ryot under an inamdar are liable to be distrained for arrears of quit-rent due by the inamdar.

Venkatarama Ayyar v. The Collector of Tanjore ... (1932) I.L.R. 55 Mad. 661

RIPARIAN RIGHT:—*See* IRRIGATION CESS ACT (MADRAS) (VII OF 1865) ... 268

SALT ACT (MADRAS) (IV OF 1889), SEC. 74—*If supersedes section 117 of the Indian Penal Code:—See* PENAL CODE (INDIAN) (ACT XLV OF 1860), SEC. 117. 90

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Maddi Sudarsanam, In re ... (1932) I.L.R. 55 Mad. 86

SEC. 84—*Purchaser of salt removing salt purchased from factory on payment of salt duty then sought to be correct—Enhancement of duty prior to removal, enhanced duty, however, not being collected from purchaser—Personal liability for enhanced duty—Purchaser not under.* A purchaser of salt from a salt licensee applied for and obtained permission to remove the salt from the licensee's factory but could not do so until after some time. In the interval the salt-tax had been increased but the enhanced duty was not collected from the purchaser and the salt was taken away by him. *Held*, that the purchaser was not personally liable to pay the enhanced duty and that the same could not be subsequently recovered from him under section 84 of the Madras Salt Act (IV of 1889). City Civil Court Appeal No. 14 of 1918 followed. The addition of the words "to be paid by the applicants" found in rule 81 (2) (i) of the Salt Manual is without any authority whatever.

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VILLAGE COURTS ACT (MADRAS) (I OF 1889), SEC. 8 —Panchayat Court—Member of—Removal of, from membership of that Court—Collector's order directing—Order of Board of Revenue affirming—Judicial orders are, and not merely administrative orders—Writ of certiorari in respect of—Application to High Court for—Maintainability of—Interference in—Conditions—Delegation of jurisdiction vested in Collector under sec. 8—What amounts to—Legality of—Inquiry under sec. 8—Principles of "natural justice" applicable to.] Orders made by the Collector under section 8 of the Madras Village Courts Act, I of 1889, removing a member of a Panchayat Court from the membership of that Court and by the Board of Revenue affirming the Collector's order on appeal are judicial and not merely departmental or administrative orders, and an application to the High Court for relief by way of certiorari is maintainable in respect of such orders. Neither the use of the word "final" in section 8 of the Act nor the circumstance that the Collector deciding matters referred to in that section may not be "Court" (as to which <i>quære</i>) precludes the High Court from entertaining the application if the other conditions are satisfied. But the High Court will not grant relief if it is not satisfied that the principles of natural justice have not been observed by the Collector and by the Board of Revenue. The jurisdiction vested in the Collector by section 8 of the Madras Village Courts Act cannot be delegated by him. A mere direction by the Collector to a subordinate to give notice to the parties interested, to inquire into the matter, to record evidence, and submit the records to him, so that, with those materials, he may use his own discretion in the matter and exercise the jurisdiction specially vested in him by the section is not, however, a case of delegation. There being no specific procedure prescribed by the Madras Village Courts Act in regard to an inquiry under section 8 thereof, the authority concerned will have to act according to the principles of "natural justice". <i>Meniswamy Chetty v. Board of Revenue, Madras</i> (1932) I.L.R. 55 Mad. 137	
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THE
INDIAN LAW REPORTS
(MADRAS SERIES).

PRIVY COUNCIL.

VELLAIYAPPA CHETTY AND OTHERS (DEFENDANTS),
APPELLANTS,

J.C.*
1931,
July 24.

v.

NATARAJAN AND ANOTHER (PLAINTIFFS 1 AND 2),
RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Hindu Law—Maintenance—Sudras—Illegitimate son—Joint family property—Collaterals—Mitakshara, ch. I, sec. 12.

The illegitimate son of a Sudra by a continuous concubine has the status of a son, and, if his father has died leaving no legitimate son and no separate property, the illegitimate son, though not entitled to a partition, is entitled as a member of the family to maintenance out of joint family property in the hands of the collaterals with whom the father was joint. The Court may award him not only future but also past maintenance, so far as his claim thereto is not barred by limitation, and may direct that it be secured by a charge upon the joint family property.

Consideration of the texts and decided cases.

Jogendro Bhupati Hurrochundra Mahapatra v. Nityanand Man Singh, (1890) I.L.R. 18 Cal. 151 (P.C.); L.R. 17 I.A. 128, followed.

Ramalinga Muppan v. Pavadai Goundan, (1901) I.L.R. 25 Mad. 519, and *Subramania Ayyar v. Rathnavelu Chetty*, (1917) I.L.R. 41 Mad. 44 (F.B.), approved.

* Present:—Lord TOMLIN, Lord MACMILLAN and Sir DENHAM MULLA.

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APPEAL (No. 71 of 1928) from a decree of the High Court in its appellate jurisdiction (December 6, 1926) which affirmed, so far as material to the present appeal, a judgment of the Court in its original jurisdiction (January 16, 1925).

The appeal related to the rights of maintenance of the two illegitimate sons of a Sudra by a continuous concubine. The suit was instituted on September 8, 1919, against the father by the mother as next friend of the sons and of a daughter who were minors. Maintenance was claimed from July 15, 1919, it being alleged that the defendant had neglected to provide maintenance from that date. The father died on April 21, 1921, before the trial, leaving no separate property and no legitimate son or grandson; the appellants, collaterals of the father, who had succeeded by survivorship to the joint estate were joined as defendants in his place.

The facts are stated in the present judgment.

The trial judge, KUMARASWAMI SASTRI J., awarded maintenance to each son for his life and to the daughter until she attained eighteen years of age, and by his judgment decreed that the maintenance should be a charge upon the joint family property.

The decision was affirmed by KRISHNAN and ODGERS JJ. as to the sons but reversed as to the daughter. The appeal is reported in (1926) I.L.R. 50 Mad. 340.

There was no appeal to the Privy Council from the rejection of the daughter's claim.

Dunne K.C. and *Narasimham* for appellants.—The text of the Mitakshara, chapter I, section 12, which deals with the rights of an illegitimate son of a Sudra by a female slave relates only to separate property. That view has been uniformly adopted by Courts in India. There is no text supporting a right to maintenance out of joint property. The right is a personal one against the father, and in respect of his separate

property only. It is true that the High Court at Madras in many cases has awarded an illegitimate Sudra maintenance out of the joint property. Those decisions however merely followed one another and are not based upon any text or sound principles. In the present case the appellants are not the legitimate sons but collaterals; they cannot therefore be treated as holding the joint property subject to the duty to discharge the father's obligations. Even if there was any right to maintenance out of the joint estate it ceased upon the plaintiffs attaining majority. Reference was made to *Chuoturya Run Murdun Syn v. Sahub Purhulad Syn*(1), *Muttusawmy Jagavera Yettappa Naicker v. Venkataswara Yettappa*(2), *Krishnayyan v. Muttusami*(3), *Ranoji v. Kandoji*(4), *Parvathi v. Thirumalai*(5), *Ananthaya v. Vishnu*(6), *Gopalasami Chetti v. Arunachellam Chetti*(7), *Subramania Mudaly v. Valu*(8), and *Panchapagesa Odayar v. Kanaka Ammal*(9). In the two cases last mentioned the joint estate was in the hands of collaterals; it is submitted that in any case those decisions were wrong. There is no real analogy between the position of an illegitimate son and a member of the family incapacitated from inheritance.

Wallach for respondents.—Although the text of the Mitakshara relates only to separate property, there has been no case which decides that the rights of an illegitimate son of a Sudra are restricted to those there mentioned. On the contrary there is the series of Madras decisions already referred to in which maintenance has been awarded out of the joint estate, sometimes in the hands of collaterals. Those cases cover a period of fifty years and are mentioned without question in authoritative text-books. In *Muttuswamy Jagavera's* case (2) the Privy Council as early as 1868 held that the illegitimate son of a Sudra was entitled to maintenance after his father's death, and, it is submitted, recognized that it might be payable out of joint estate. The right against the joint estate rests upon the principle that the illegitimate son of a Sudra is a member of the joint family although he cannot obtain a partition; he is therefore entitled to maintenance out of the joint property like other members disqualified from taking a share.

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|--------------------------------|--------------------------------|
| (1) (1887) 7 M.I.A. 18. | (2) (1868) 12 M.I.A. 208. |
| (3) (1888) I.L.R. 7 Mad. 407. | (4) (1885) I.L.R. 8 Mad. 557. |
| (5) (1887) I.L.R. 10 Mad. 334. | (6) (1892) I.L.R. 17 Mad. 160. |
| (7) (1903) I.L.R. 27 Mad. 32. | (8) (1910) I.L.R. 34 Mad. 62. |
| | (9) (1917) 38 M.L.J. 455. |

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That an illegitimate Sudra is a member of the joint family was established by the judgment of the Privy Council in *Jogendro Bhupati Hurrochundra Mahapatra v. Nityanand Man Singh*(1) which affirmed the judgment of the Calcutta High Court in *Jogendro Bhuputi v. Nityanund Man Singh*(2) and approved that of the Bombay High Court in *Sadu v. Baiza*(3). The same view was laid down in *Subramania Ayyar v. Rathnavelu Chetty*(4), in which the position of an illegitimate son of a Sudra was fully considered. The above principle applies in whoever's hands the joint estate may be. The right to maintenance being in lieu of a right to a share by partition the maintenance is for life: *Ananthaya v. Vishnu*(5). In *Panchapagesa Odayar's* case (6) maintenance was awarded during minority, but there was no appeal to the High Court on that point. Reference was made also to Mayne's Hindu Law, 9th Edn., paragraph 450; Trevelyan's, 3rd Edn., page 224; West and Buhler's, 3rd Edn., page 82.

Dunne K.C. replied.

The JUDGMENT of their Lordships was delivered by

Sir
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Sir DINSHAH MULLA.—This appeal arises out of a suit instituted in the High Court of Madras by the illegitimate sons and an illegitimate daughter of P. M. A. Muthiah Chetty, a Sudra by caste, by a continuous concubine, for past and future maintenance against their father. Muthiah Chetty owned no separate property, but he was joint with his uncles and uncles' sons, and the joint family possessed considerable properties. The plaintiffs claimed that the maintenance should be charged on the joint family properties. The suit was filed on the 18th September 1919. Muthiah Chetty died on the 21st April 1921, and after his death the plaint was amended, and the uncles and uncles' sons were brought on the record as defendants Nos. 2 to 5 as his surviving coparceners and legal representatives.

(1) (1890) I.L.R. 18 Calo. 151 (P.C.); L.R. 17 I.A. 128.

(2) (1885) I.L.R. 11 Calo. 702.

(3) (1878) I.L.R. 4 Bom. 37 (F.B.).

(4) (1917) I.L.R. 41 Mad. 44 (F.B.).

(5) (1898) I.L.R. 17 Mad. 160.

(6) (1917) 33 M.L.J. 455.

The learned Judge who tried the case awarded maintenance to each son at the rate of Rs. 100 per month from the date of the institution of the suit for life, and to the daughter at the rate of Rs. 50 per month until she attained the age of eighteen years, and the maintenance was made a charge on certain joint family property. On appeal the High Court confirmed the decree so far as it related to the sons' claim for maintenance, but reversed it as regards the daughter's claim on the ground that an illegitimate daughter was not entitled to maintenance out of joint family property. From that decree of the High Court, defendants Nos. 2 to 5 have brought the present appeal.

Three questions were raised at the hearing of this appeal, viz. :—

(1) Whether the illegitimate son of a Sudra by a continuous concubine is entitled, after the father's death, to maintenance out of properties held by the father jointly with his collaterals as members of an undivided Hindu family, where the father has left no separate property and no legitimate son;

(2) whether, if so, he is entitled to maintenance for his life or during minority only;

(3) whether he is entitled to arrears of maintenance accrued due in his father's lifetime.

These questions were also raised before the High Court and the High Court answered them in favour of the sons. It was conceded on behalf of the appellants that there have been cases in India in direct support of the judgment of the High Court, but it was argued that those decisions were not founded on any text of the Hindu law, and that unless there was a text to support it the sons' claim should be disallowed.

The rights of illegitimate sons are considered in the Mitakshara, chapter I, section 12. The section

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is headed "Rights of a son by a female slave, in the case of a Çúdra's estate," and consists of three verses which are as follows :—

"1. The author next delivers a special rule concerning the partition of a Çúdra's goods. 'Even a son begotten by a Çúdra on a female slave may take a share by the father's choice. But, if the father be dead, the brethren 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.'

2. The son, begotten by a Çúdra on a female slave, obtains a share by the father's choice, or at his pleasure. But, after [the demise of] the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share: that is, let them give him half [as much as is the amount of one brother's] allotment. However, should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife, nor sons of daughters. But, if there be such, the son of the female slave participates for half a share only.

3. From the mention of a Çúdra in this place [it follows that] the son begotten by a man of a regenerate tribe on a female slave, does not obtain a share even by the father's choice, nor the whole estate after his demise. But, if he be docile, he receives a simple maintenance."—(Stokes' Hindu Law Books, page 426.)

It has been held in India that the text of Yajna-
valkya, cited in verse 1, and the commentary on the text refer to the estate of a separated householder. The view so taken has not been contested before their Lordships. See *Ranoji v. Kandoji*(1), *Parvathi v. Thirumalai*(2), *Ramalinga Muppan v. Pavadai Goundan*(3) and *Gopalasami Chetti v. Arunuchellam Chetti*(4).

It is to be observed that verses 1 and 2, which relate to a Sudra son, make no mention of maintenance where the father has left no property to which the son can succeed.

(1) (1885) I.L.R. 8 Mad. 557, 561. (2) (1887) I.L.R. 10 Mad. 334, 343
(3) (1901) I.L.R. 25 Mad. 519, 522, 523.
(4) (1903) I.L.R. 27 Mad. 32, 36.

The father having died undivided in the present case, and the text being silent as to maintenance, the case stands outside the text. But this, in their Lordships' opinion, is not sufficient to cause the rejection of the plaintiffs' claim if it can be sustained on some principle recognized by the Hindu law. The High Court have held that there is such a principle, that principle being that, where under the Hindu law a person is excluded from inheritance to property or from a share on partition of joint family property, he is entitled to maintenance out of that property, and that the present case is such a case. The matter was thus summed up by KRISHNAN J. in his judgment :—

"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."

Their Lordships will, therefore, proceed to examine the authorities.

The first case in order of date is *Ranoji v. Kandoji*(1). In that case the High Court of Madras held that an illegitimate son does not become a coparcener by birth, that he cannot, therefore, demand a partition against his father's brother's sons of property held by the father in coparcenary with them, and that he is entitled to maintenance only. MUTTUSWAMI AYYAR J. said :—

"The illegitimate son, it will be observed, does not by birth become a coparcener. He is ordinarily entitled only to maintenance, and in the case of Sudras this right to maintenance is in certain cases to be satisfied by the allocation not of a share but of a portion of the estate equal to half a share."

It appears from the judgment that in the view of the learned Judge the share of inheritance provided for

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(1) (1885) I.L.R. 8 Mad. 557.

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the illegitimate son was not in recognition of his status as a son or an heir, but that it was merely in lieu of maintenance, the maintenance being represented by the specified share of inheritance.

The next case is *Ananthaya v. Vishnu*(1). The suit was by an adult illegitimate son of a Brahman against the legitimate son of his father for maintenance out of joint family property which had passed to the legitimate son by survivorship. As the plaintiff's father belonged to a twice-born class, his case came within the terms of verse 3, and he could claim maintenance only, but two questions were raised on both of which the verse was silent, namely, whether the plaintiff, being an adult, was entitled to maintenance, and, if so, whether maintenance could be made a charge on the joint family property. Both these questions were answered in the affirmative. On the first question MUTTUSWAMI AYYAR J. said that the maintenance provided for in verse 3 was in lieu of inheritance as in the case of females of the family and disqualified heirs, and that it should, therefore, be awarded for life. On the second question the learned Judge said :

"As the maintenance awarded is the result of exclusion from inheritance, and as the Hindu theory is that family property constitutes assets from which charges in the nature of maintenance, etc., are to be met, the maintenance decreed to an illegitimate son may be secured on the family property as in the case of a female member, by being declared to be a charge."

Pausing here, and reading this and the preceding case together, it would appear that in the opinion of the learned Judges the share allotted to the illegitimate son of a Sudra was in lieu of maintenance, and that the

maintenance provided for the illegitimate son of one who belonged to a regenerate class was in lieu of inheritance.

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After these cases in date comes *Gopalasami Chetti v. Arunachellam Chetti*(1). The suit was by an illegitimate son for his share in his father's estate, or, in the alternative, for maintenance against the father's adopted son and his brother's son with both of whom the father was joint at his death. The claim for a share was disallowed, but maintenance was decreed out of the joint family property. Arrears of maintenance for nine years prior to the suit were also allowed, being presumably arrears accrued due during the father's lifetime. It would appear from the judgment that the son's right of maintenance was not even contested, and that the only questions argued were as to the scale of maintenance and the arrears of maintenance.

The last case on the subject cited to their Lordships was *Panchapagesa Odayar v. Kanaka Ammal*(2). In that case a Sudra died leaving a concubine and an illegitimate son by her. The suit was for maintenance by the concubine and the son against the undivided brother of the deceased out of the joint family property in his hands. The Subordinate Judge awarded maintenance to the son until majority and to the mother for life. An appeal was taken to the High Court, and, as appears from the judgment, the only question argued was whether a concubine was entitled to maintenance out of joint family property, and the judgment of the Subordinate Judge was confirmed. The son's right to maintenance was not called in question. There was no appeal in this case by the son from that part of the decree which limited his maintenance until majority.

(1) (1908) I.L.R. 27 Mad. 32.

(2) (1917) 38 M.L.J. 455.

(1) (1898) I.L.R. 17 Mad. 180.

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It appears from the above cases that, where the father dies undivided and leaves no separate property, the illegitimate son of a Sudra is entitled to maintenance out of the joint property in the hands of the surviving members of the family to which the father belonged. The ground of the decisions would seem to be that the share of inheritance which in the case of a separated householder is allowed to the illegitimate son is in lieu of maintenance, and that, where the father has left no property to which the son could succeed, he is entitled to maintenance out of joint family property because of his exclusion from a share on a partition of that property.

That maintenance in the case of the twice-born classes is in lieu of inheritance is apparent from the terms of verse 3, but there is a divergence of opinion as to whether the share of inheritance allotted to a Sudra son is merely in lieu of maintenance, or whether it is in recognition of his status as a son and a member of the family. The latter view was taken in some cases, where the question, though not one of maintenance, involved a consideration of the status of an illegitimate son, and it seems to have been influenced to a large extent by the position in the Mitakshara of section 12, which deals with the rights of illegitimate sons.

The arrangement of the Mitakshara is this: Chapter I deals with partition of unobstructed heritage. It consists of twelve sections. After expounding the law of partition in general in the earlier sections the author enumerates in section 11 twelve classes of sons common to all the four castes, including the legitimate and adopted sons. Then comes section 12, which deals with the rights of illegitimate sons. This is followed by chapter II. That chapter relates to obstructed heritage, and prescribes the order of succession *on failure of sons*. Verse 1 of section 1 of that chapter is as follows:—

“That sons, principal and secondary, take the heritage, has been shown. The order of succession among all [tribes and classes] *on failure of them*, is next declared.”

Verse 2 is as follows:—

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

Such being the arrangement of the chapters, the question arises whether any inference can be drawn from the place of section 12 as to the status of an illegitimate son, and if so, what?

The first case on the subject is *Sadu v. Baiza*(1). The question there was whether, where a Sudra left two sons, one illegitimate and the other legitimate, and the legitimate son died before partition of the estate with the illegitimate son and without leaving male issue, the illegitimate son was entitled to the whole estate by right of survivorship, or whether the share of the legitimate son passed to his own heirs. The High Court at Bombay held that the two sons succeeded to the property as members of a joint family and that the illegitimate son was entitled to the whole estate by survivorship. It was argued in that case that the illegitimate son could not be a coparcener with the legitimate son, first, because of the inequality of shares, and, secondly, because he was not even an heir as he was not mentioned in the list of heirs in chapter II, section 1, verse 2. As to the first argument, WESTROPP C.J. said that inequality of shares did not prevent coparcenery as under the ancient Hindu law the elder son was entitled to a larger share, and his younger brothers nevertheless were his coparceners.

(1) (1878) I.L.R. 4 Bom. 27 (F.B.).

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As to the second argument the learned Chief Justice said:—

"It has, to a certain extent, been already noticed in *Rahi v. Govinda*(1), though not as clearly expressed as it might be, that the place in which the author of the Mitakshara has in his work dealt with illegitimate sons is important. He does so before he treats of obstructed heritage, i.e., of the rights of succession after the failure of sons, principal and secondary, and he has treated the *dasiputra* as amongst these in the case of Shudras."

In the same case NANABHAI HARIDAS J., after indicating the important points of difference between the position of the legitimate and that of the illegitimate son, observed as follows:—

"While admitting, therefore, that the position of a *dasiputra* in a Shudra family does differ in important particulars from that of an *aurasputra*, I am not prepared to allow that the former is not a member of the family at all, nor that he is not a coparcener, and not, therefore, entitled to succeed with right of survivorship. His legal status as a son is unquestionably recognized, . . . "

The learned Judge refrained from expressing any opinion as to whether an illegitimate son is entitled to inherit from his father's legitimate son or from his collaterals, saying that the question did not arise for decision.

The *ratio decidendi* of the above case is that an illegitimate son in a Sudra family has the status of a son, and that he is a member of the family, though with limited rights as compared with a legitimate son.

Then came the Madras case of *Ranoji v. Kandoji*(2), to which reference has already been made. In that case MUTTUSWAMI AYYAR J. said:—

"No inference can be drawn from the place in which the author of the Mitakshara deals with the rights of an illegitimate son. The passage is introduced as a special rule."

(1) (1875) I.L.R. 1 Bom. 104.

(2) (1885) I.L.R. 8 Mad. 557.

It was in this case that the learned Judge laid down that the share of inheritance given to a Sudra son was in lieu of maintenance, a view which he repeated in *Parvathi v. Thirumalai*(1).

This was followed by a Calcutta case, *Jogendro Bhuputi v. Nityanund Man Singh*(2). The facts of that case were very similar to the Bombay case, and the point for decision was the same. The learned Judges of the High Court, GAETH C.J. and BEVERLEY J., after consulting MITTER J., followed the Bombay decision. In the opinion of the learned Judges inequality of shares in the case of an illegitimate son did not prevent coparcenery any more than in the case of an adopted son.

"This case of an adopted son",

they said,

"appears to us very analogous to that of an illegitimate son. In both cases there is the same sort of imperfect brotherhood to the legitimate son, and in both the superior position of the legitimate son is recognized by his receiving a larger share upon partition."

The Calcutta case was taken on appeal to this Board and the judgment of the High Court was confirmed: see *Jogendro Bhupati Hurrochundra Mahapatra v. Nityanand Man Singh*(3). Their Lordships held that the illegitimate son could not enforce a partition during his father's lifetime, as he could take a share only by "the father's choice," and that he did not acquire at his birth any right to share in the estate in the same way as a legitimate son would do, but that on the father's death he succeeded to the father's estate as a coparcener with the legitimate son, and, on the death of the legitimate son before partition, he became entitled to the whole estate by survivorship. Their Lordships examined at some length the judgments of WESTROPP C.J. and

(1) (1887) I.L.R. 10 Mad. 334, 345. (2) (1885) I.L.R. 11 Cal. 703.
(3) (1890) I.L.R. 18 Cal. 151 (P.O.); L.R. 17 L.A. 126.

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NANABHAI HARIDAS J. in *Sadu v. Baiza*(1) and observed as follows :—

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"Therefore, their Lordships have before them the well-considered judgment of the High Court of Bombay upon this question, as well as that of the High Court of Calcutta, and it appears to them that the learned Judges of those Courts put a right construction upon the law as stated in the *Mitakshara*."

The Madras case of *Ranoji v. Kandoji*(2) was also cited to their Lordships, but no reference was made to it in the judgment.

The above decision of the Board was the first authoritative recognition of the status of the illegitimate son of a Sudra as a son and a member of the family, and it seems to have considerably influenced the course of decisions in India. In *Ramalinga Muppan v. Pavadai Goundan*(3), a Madras case, BHASHYAM AYYANGAR J. expressed the opinion that the illegitimate son of a Sudra was in a position more analogous to that of a legitimate son than to that of other relations whose right of inheritance was liable to obstruction. In a later Madras case, *Subramania Ayyar v. Rathnavelu Chetty*(4), KUMARASWAMI SASTRIYAR J. observed that, so far as the Smriti writers were concerned, the position of the illegitimate son was by no means inferior to that of an adopted son, and he expressed his dissent from the view taken by MUTTUSWAMI AYYAR J. in *Ranoji v. Kandoji*(2) that the share of inheritance given to the illegitimate son was merely in lieu of maintenance. The learned Judge said :—

"With all respect, an examination of the Smritis shows that there is nothing in them to support the view as to the share being given in lieu of maintenance or to suggest that at some period the illegitimate son's rights were enlarged, he being given a share in lieu of maintenance. An examination of the development of Hindu Law as to the various forms of marriages and

(1) (1878) I.L.R. 4 Bom. 37 (F.B.). (2) (1885) I.L.R. 8 Mad. 557.
(3) (1901) I.L.R. 25 Mad. 519. (4) (1917) I.L.R. 41 Mad. 44 (F.B.).

the twelve classes of sons shows that greater importance was being gradually attached to marriage and legitimacy, and that even in the time of Manu and Yajnavalkya distinctions based on these considerations were drawn between the various classes of sons. It is hardly likely that if the Sudra illegitimate son was not in the pale of heirs at any anterior period he would have been given the extensive rights conferred in lieu of a bare right of maintenance."

On a consideration of the texts and the cases on the subject their Lordships are of opinion that the illegitimate son of a Sudra by a continuous concubine has the status of a son, and that he is a member of the family; that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son; that where the father has left no separate property and no legitimate son, but was joint with his collaterals, as in the present case, the illegitimate son is not entitled to demand a partition of the joint family property in their hands, but he is entitled as a member of the family to maintenance out of that property; that his position in this respect is analogous to that of widows and disqualified heirs to whom the law allows maintenance because of their exclusion from inheritance and from a share on partition; and that the Court may, as in their case, award not only future but also past maintenance, so far as it is not barred by the law of limitation, and may direct the same to be secured by a charge on the joint family property. Their Lordships express no opinion as to whether the illegitimate son would have any rights of maintenance out of the joint family property, if the father left separate property or if such property was not sufficient for his maintenance.

For the reasons stated above, their Lordships agree with the conclusion reached by the High Court. The decree, however, cannot stand in its present form.

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Though the judgment of the learned trial Judge says that "the maintenance will be a charge upon the property (242, Police Commissioner's Road)," the decree, as passed by him and confirmed by the High Court, provides for the payment of maintenance and costs out of "the assets of P. M. A. Muthiah Chetty, the first defendant herein since deceased," and similar words are also used in the decree of the High Court which directs payment of the costs of the appeal. It is obvious that the undivided interest of a co-parcener does not, after his death, constitute his assets, and their Lordships think that the decree of the High Court should be amended (a) by adding after the words "in favour of first and second plaintiffs" the words "with this alteration that the words 'the immovable properties mentioned in the schedule hereto' shall be substituted for the words 'the assets of P. M. A. Muthiah Chetty, the first defendant herein since deceased'" in clause 1 of the decree of the first Court, and for similar words also in clauses 4 and 6 thereof, and (b) by substituting in the decree of the High Court the words "the immovable properties mentioned in the schedule hereto" for the words "the assets of P. M. A. Muthiah Chetty, the deceased first defendant, come to their hands as his undivided coparceners and legal representatives."

In the result, their Lordships are of opinion that this appeal fails, and that the decree of the High Court should be confirmed with the amendments indicated above, and their Lordships will humbly advise His Majesty accordingly. The appellants must pay the respondents' costs of this appeal.

Solicitor for appellants: H. S. L. Polak.

Solicitors for respondents: T. L. Wilson & Co.

A.M.T.

APPELLATE CIVIL—FULL BENCH.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Ramesam, Mr. Justice Reilly, Mr. Justice Anantakrishna Ayyar, and Mr. Justice Sundaram Chetti.

ARUNACHALAM, MINOR BY MOTHER AND GUARDIAN
PERIAMMAI (PETITIONER), APPELLANT,

1931,
March 9.

v.

P. K. A. C. T. VEERAPPA CHETTIAR, THROUGH HIS
AUTHORIZED AGENT S. RAMASWAMI AIYAR
(RESPONDENT), RESPONDENT.*

*Code of Civil Procedure (Act V of 1908), Sch. I, O. IX,
r. 13—If applicable to execution proceedings under O. XXI
which fall within sec. 47 of the Code.*

Order IX, rule 13, Schedule I of the Code of Civil Procedure (Act V of 1908) does not apply even to such execution proceedings under Order XXI of the Code as also fall within section 47 of the Code.

APPEAL against the order of the Court of the Temporary Subordinate Judge of Devakottai, dated 6th March 1929, in Execution Application No. 72 of 1929 in Execution Petition No. 117 of 1927 in Original Suit No. 36 of 1923 on the file of the Court of the Additional Subordinate Judge of Sivaganga.

This appeal coming on for hearing, the Court (ANANTAKRISHNA AYYAR and CORNISH JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

The plaintiff obtained a decree for money against the sixth defendant, the father of the appellant before us. The sixth defendant died, and his minor son—the appellant before us—was brought on record as the legal representative of the deceased. The decree-holder applied by Execution Application

* Appeal against Order No. 274 of 1929.

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No. 17 of 1929 on 7th January 1929 for attachment of certain immovable properties; and notice to the appellant, the minor son, was ordered on 8th January 1929, and the hearing of the petition was adjourned to 29th January 1929. The appellant not appearing on 29th January 1929, the learned Subordinate Judge passed orders that day ordering attachment of the immovable properties as prayed for by the decree-holder. Subsequently the appellant applied on 2nd February 1929, under Order IX, rule 13, Schedule I and section 151 of the Code of Civil Procedure, to set aside the order passed on 29th January 1929 after excusing his non-appearance on 29th January 1929, to hear his objections to the attachment of the properties, and to cancel the order of attachment, alleging that his guardian *ad litem* had instructed a Vakil to appear for him on the 29th and to oppose the decree-holder's application, but that his Vakil was late in appearing before the Court by "a minute," and that orders were passed by the learned Subordinate Judge "a minute before the said Vakil came to Court." The decree-holder contended that the petition was not maintainable under any of the provisions of the Code. The learned Subordinate Judge dismissed the application holding that Order IX, Code of Civil Procedure, was inapplicable to execution proceedings, and observed as follows:—"It appears to me that under the law, as it stands, the objections of the respondent must prevail. This petition cannot therefore be granted." On this appeal, preferred against the decision of the learned Subordinate Judge, it was contended by the learned Advocate for the appellant, that the recent decision of a Full Bench of this Court in *Alagasundaram Pillai v. Pichuvier*(1) is authority for the proposition that Order IX, Code of Civil Procedure, applied to such proceedings under Order XXI as fall within section 47 of the Code; and that the proceedings now in question being proceedings under Order XXI falling also within section 47 of the Code, the decision of the Full Bench is directly applicable, and that the appeal must be allowed and the petition remanded to the lower Court for fresh disposal. On the other hand, the learned Advocate for the respondent, decree-holder, contended that the Full Bench had not to decide the general question whether Order IX, Code of Civil Procedure, applies to execution proceedings under Order XXI, Code of

(1) (1929) I.L.R. 52 Mad. 899 (F.B.).

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Civil Procedure, falling within section 47 of the Code of Civil Procedure, and that the questions which the Full Bench had to decide were only the two questions specifically mentioned in the Order of Reference. It was also pointed out that there are several decisions of this Court where learned Judges have held that Order IX, Code of Civil Procedure, does not apply to execution proceedings under Order XXI, Code of Civil Procedure, and that it could not be said that the Full Bench has considered that question and overruled those decisions, more especially as the points referred to the Full Bench did not necessitate the same. On the other hand, the learned Advocate for the appellant drew our attention to the wordings of the answer of the Full Bench to the first question, viz., "Order IX does not apply to such proceedings under Order XXI, rules 97 or 100, Code of Civil Procedure, as do not also fall within section 47 of the Code." We were referred to the decisions in *Subbiah Naicker v. Ramanathan Chettiar*(1), *Chidambaram Chetti v. Theivanai Ammal*(2), *Kali Shettathi v. Shama Rau*(3), *Kajuluri Swami v. Sooryanarayana Rasu*(4), *Kaliakkal v. Palani Koundan*(5), *Narayanan Chettiar v. Muthu Chettiar*(6), and *Vemareddi Ramaraghava Reddi v. Rajah of Venkatagiri*(7), among others. We have not thought it necessary to refer in detail to the various other decisions that were cited to us in support of the contentions raised by the respective parties, as most of them have been referred to, either in *Subbiah Naicker v. Ramanathan Chettiar*(1), or *Kaliakkal v. Palani Koundan*(5). The question relates to a matter of practice of frequent occurrence, and, as there should not be any doubt on such an important matter, we think that the following question should be referred to the decision of a Full Bench:—"Whether Order IX, rule 13, Schedule I, Code of Civil Procedure, applies to such execution proceedings under Order XXI as also fall within section 47 of the Code."

ON THIS REFERENCE.—

T. M. Krishnaswami Ayyar (with him S. Subrahmaniam Ayyar) for appellant.

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| (1) (1914) I.L.R. 37 Mad. 462. | (2) (1923) I.L.R. 46 Mad. 768 (F.B.). |
| (3) (1916) 5 L.W. 124. | (4) (1924) 47 M.L.J. 269. |
| (5) (1925) 50 M.L.J. 200. | (6) (1926) 51 M.L.J. 219. |
| | (7) (1926) 52 M.L.J. 123. |

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Order IX of the Code of Civil Procedure consists of two parts. Rules 1 to 12 deal with the appearance of parties and the consequences of their non-appearance. If the plaintiff appears and the defendant does not appear after service of summons on him, an *ex parte* decree can be passed. Order IX, rule 13 begins with the words "in any case" and not with the words "in any suit." Section 115 of the Code also uses the word "case." The Privy Council in *Balakrishna Udayar v. Vasudeva Ayyar*(1) construe the word "case". If the Court finds that there is a decree and that it was passed *ex parte*, jurisdiction of the Court can be invoked under Order IX, rule 13.

[REILLY J.—Does the word "defendant" in Order IX, rule 13 include "judgment-debtor" ?]

The appellant is the legal representative of a defendant and as such possesses his characteristics.

[RAMESAM J.—Your client was added as a legal representative after the decree was passed. Can he become a defendant simply because a creditor chose to add your client as a defendant instead of as a judgment-debtor ?]

According to section 146 of the Code the appellant steps into the shoes of the defendant whose legal representative he is.

[SUNDARAM CHETTI J.—We have to consider the cumulative effect of the following words in Order IX, rule 13, viz., "defendant", "summons", and "suit." You have got to go so far as to say that "defendant" includes "judgment-debtor", "summons" includes "notice", and "suit" includes "execution proceedings."]

Execution proceedings are proceedings in the suit. Order IX, rule 13 uses the words "in any case." Section 141 of the Code enables the appellant to proceed under Order IX, rule 13; see *Subbiah Naicker v. Ramanathan Chettiar*(2) and *Krishna Chandra Pal v. Protap Chandra Pal*(3). In *Kaliakkal v. Palani Koundan*(4) pointed attention has not been drawn to the distinction between "decrees" and "orders", and the distinction between rule 13 and the other rules of Order IX of the Code. *Narayana Chettiar v. Muthu Chettiar*(5) and *Kali Shettathi v. Shama Rau*(6) are cases of dismissal for default.

(1) (1917) I.L.R. 40 Mad. 798 (P.C.). (2) (1914) I.L.R. 37 Mad. 462.
(3) (1906) 3 C.L.J. 278, 279. (4) (1925) 50 M.L.J. 200.
(5) (1926) I.L.R. 50 Mad. 67. (6) (1916) 5 L.W. 124.

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[ANANTAKRISHNA AYYAR J.—Except relying on certain words in rule 9 and rule 13, can you point out any principle by which cases under rule 13 can be made to stand on a different footing to cases under rule 9 ?]

If execution proceedings are dismissed for default, the decree-holder can file another execution petition. It is merely an order and not a decree adjudging rights as under Order IX, rule 13. The observations in *Alagasundaram Pillai v. Pichuvier*(1) support the above submissions.

[Reference was made to cases referred to in *Subbiah Naicker v. Ramanathan Chettiar*(2).]

N. Srinivasa Ayyangar for respondent.—A suit has got a definite meaning in the Code. The three words, i.e., "suit", "defendant", and "summons" exclude execution proceedings. A suit begins with a plaint and any proceeding which is not begun by the filing of a plaint is not a suit. "Execution proceedings" may be proceedings in "suits" but they cannot become "suits." Section 144 of the Code clearly draws a distinction between "suits" and "applications." Order XXI, rule 11 of the Code shows what the nature of an execution application is. The definition of a decree is given in section 2 of the Code.

[BEASLEY C.J.—We do not want to hear you further.]

Our. adv. vult.

OPINION.

BEASLEY C.J.—The plaintiff obtained a decree for money against the sixth defendant. The sixth defendant died and his minor son was brought on record as his legal representative as eighth defendant. The decree-holder applied by Execution Application No. 17 of 1929 for attachment of certain immovable properties in the hands of the eighth defendant and notice was ordered on him. When the petition came on for hearing on the 29th January 1929, in the absence of the eighth defendant who did not appear, the learned Subordinate Judge ordered attachment of the immovable properties as prayed for by the decree-holder.

(1) (1929) I.L.R. 52 Mad. 899 (F.B.). (2) (1914) I.L.R. 37 Mad. 462.

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Subsequently the eighth defendant applied on the 2nd February 1929 under Order IX, rule 13 of the Code of Civil Procedure to set aside that order on the ground that his non-appearance on the 29th January was due to the late appearance of his Vakil. He alleged that his Vakil had only been a minute late in appearing before the Court and that orders were passed by the learned Subordinate Judge a minute before the said Vakil came to Court. The decree-holder contended that the petition was not maintainable under any of the provisions of the Code. The learned Subordinate Judge dismissed the eighth defendant's application holding that Order IX of the Code was inapplicable to execution proceedings. From that order of the learned Subordinate Judge an appeal was preferred to the High Court. That appeal was considered by a Bench and the following question has been referred by that Bench to the decision of this Full Bench, namely, "Whether Order IX, rule 13, schedule I, Code of Civil Procedure, applies to such execution proceedings under Order XXI as also fall within section 47 of the Code." In the order of reference certain cases have been referred to, the most important of which are *Subbiah Naicker v. Ramanathan Chettiar*(1) and *Kaliakkal v. Palani Koundan*(2). These two decisions are directly in conflict. In the former case it was held that Order IX, rule 13, Code of Civil Procedure, applies to *ex parte* orders in execution and unless they are set aside by application under Order IX, rule 13, or by appeal, they cannot be questioned in the further stages of execution proceedings. On page 475 it is stated as follows:—

"It is contended by the appellant's learned Vakil, Mr. L. A. Govindaraghava Ayyar, that Order IX, rule 13, Civil

(1) (1914) I.L.R. 37 Mad. 462.

(2) (1925) 50 M.L.J. 200.

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Procedure Code, does not apply to *ex parte* orders passed in execution but only to *ex parte* decrees in suits. We think that that argument cannot be accepted. Orders in execution which come under section 47, Civil Procedure Code, are decrees as defined in section 2 of the Code and hence *ex parte* orders passed in execution are *ex parte* decrees and Order IX, rule 13, provides generally for the setting aside of *ex parte* decrees and not only for the setting aside of those classes of *ex parte* decrees which are not also orders passed under section 47 in execution proceedings. We are fortified in this view by the decision in *Krishna Chandra Pal v. Protap Chandra Pal*(1)."

The last-mentioned decision is the only decision upon this point which is in agreement with the decision in *Subbiah Naicker v. Ramanathan Chettiar*(2). In *Kaliakkal v. Palani Koundan*(3) DEVADOSS and WALLER JJ. took the opposite view. Before us it was contended that the *ex parte* order passed against the eighth defendant attaching his property was a decree within the provisions of section 47 of the Code, and that, since it is a decree, and since Order IX provides for the setting aside of *ex parte* decrees, the eighth defendant's petition was maintainable. We are invited to interpret Order IX, rule 13, as applying to all *ex parte* decrees whether in suits or in execution proceedings. On the other side it is contended that Order IX does not apply to execution proceedings at all and that the whole scheme of the Order is to provide for procedure in suits. In the rules of that Order the words "summons", "defendant", and "suit" are used, all of which are inappropriate to execution proceedings, and in *Vemareddi Ramaraghava Reddi v. Rajah of Venkatagiri*(4) it was held that cases of dismissal for default of an execution petition are not within Order IX at all. It is quite true that in a Full Bench decision of this Court, namely, *Alagasundaram*

(1) (1906) 3 C.L.J. 276.

(2) (1914) I.L.R. 37 Mad. 462.

(3) (1925) 50 M.L.J. 200.

(4) (1926) 53 M.L.J. 123.

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Pillai v. Pichuvier(1), in which was raised the question of the power of this Court to set aside an order of dismissal for default, it is stated on page 909:

" . . . it is not contested that Order IX does not apply to proceedings in execution except such as involve the determination of any question under section 47, in which case the orders thereon would amount to decrees . . . "

and further on,

"the orders passed in the proceedings would be decrees and Order IX would apply."

It may be observed that these observations are *obiter* and unnecessary for the decision of the questions referred; and it is quite clear that this question was not at all argued before that Full Bench although such a position may have been stated by way of an example. It is beyond dispute that such an *ex parte* order as was passed in these execution proceedings is a decree within the provisions of section 47, but it does not follow that the provisions of Order IX, rule 13 apply to such a decree. If Order IX, rule 13 applies only to suits, then the fact that such an *ex parte* order is a decree within the provisions of section 47 is of no real assistance to the defendant. Sub-section 2 of that section enables the Court to treat a proceeding under the section as a suit or a suit as a proceeding. The use of the word "treat" is an indication to us that the proceedings under that section are not suits. Moreover when section 2 (2) of the Code which defines "decree" is referred to, it will be seen that it shall be "deemed" to include the determination of any question within section 47. Here again the use of the word "deemed" is inconsistent with something that is actual or real. It is quite clear to us that Order IX does not apply to anything but suits and has no application to execution

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proceedings, and that such an *ex parte* order whilst it is a decree is not a decree in a suit. That the provisions of Order IX were not meant to apply even to appeals is evident from the fact that the Legislature has made similar rules for governing cases of non-appearance of parties in appeals, viz., rules 11, 17, 18, 19 and 21 of Order XLI. It follows therefore that the answer to the question referred to us must be in the negative. Although the facts of this case do not disclose that the eighth defendant has suffered any real hardship, we are of the opinion that many cases may occur in execution proceedings where to prevent a judgment-debtor or a decree-holder having an application or petition restored under Order IX, rule 13 may be a great hardship and immediate steps will be taken to frame a new rule making Order IX applicable to such proceedings in execution.

RAMESAM J.—I have no alteration or addition to make.

REILLY J.—I agree.

ANANTAKRISHNA AYYAR J.—I agree.

SUNDARAM CHETTI J.—I agree.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

1931,
March 31.

T. S. RAMASWAMI AYYAR (PETITIONER), PETITIONER,

v.

M. A. RANGASWAMI AYYAR (RESPONDENT),
RESPONDENT.*

Court-fee—Administration—Creditor's suit for—Preliminary decree in—Claim put in by another creditor of deceased subsequent to—Court-fee payable on—Court-Fees Act (VII of 1870), sec. 11—Applicability of—Fiscal statute—Application of, by analogy—Permissibility—Creditor's suit for administration of estate of deceased—Nature of—Other creditors if parties to.

Where, after a preliminary decree has been made for the administration of the estate of a deceased person on a creditor's plaint, another creditor puts in a claim against the estate of the deceased, no *ad valorem* court-fee is payable on such a claim and the Court is bound to inquire into the claim without such court-fee.

Such a claim cannot be treated as a plaint for the purpose of the Court-Fees Act. The provisions of section 11 of the Court-Fees Act cannot by analogy be applied to such a case.

Shashi Bhushan Bose v. Manindra Chandra Nandy, (1916) I.L.R. 44 Cal. 890, considered.

The plaintiff-creditor in a suit for the administration of the estate of a deceased person does not effectively represent all the other creditors so as to make his suit a suit for an account on behalf of all.

A fiscal statute cannot be applied by analogy.

PETITIONS under section 115 of the Code of Civil Procedure (Act V of 1908) praying the High Court to revise the orders of the Court of the District Munsif of Calicut, dated the 9th day of March 1927 and made in Miscellaneous Petition No. 500 of 1927 and Civil

* Civil Revision Petitions Nos. 1897 and 1618 of 1927.

Miscellaneous Petition No. 670 of 1927 in Original Suit No. 519 of 1925.

P. S. Narayanaswami Ayyar for petitioner.

T. S. Anantanarayana Ayyar and C. V. Harihara Ayyar for respondent.

Government Pleader (P. Venkataramana Rao) for the Crown.

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JUDGMENT.

REILLY J.—These petitions relate to a suit in which the District Munsif of Calicut made a preliminary decree for the administration of the estate of one Rama Pattar on a creditor's plaint. After that preliminary decree was made, two other creditors put in claims against Rama Pattar's estate. The District Munsif has ordered that on these claims they must pay *ad valorem* court-fee as if they were plaints. These revision petitions are against those orders.

REILLY J.

It will be noticed that we are not concerned here with the question what court-fee should be paid by a creditor who institutes an administration suit. The question is what court-fee, if any, should be paid by another creditor, who comes in with a claim after a preliminary decree for administration has been made in such a suit. The learned Government Pleader has admitted that there is no explicit provision in the Court-Fees Act requiring any court-fee to be paid on such a claim. But he has suggested that we should treat such claims as plaints for the purpose of the Court-Fees Act. Except throwing out that suggestion he has not shown us in my opinion any good reason why we should extend the definition of the word "plaint" in that way. But his more serious argument is that such a creditor's suit for administration is really a suit for an account, the plaintiff-creditor representing in it all the other creditors,

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who, being so represented, are in effect parties to the suit from the outset. His view of the suit is that the plaintiff-creditor may fix his own valuation and court-fee in the first instance, but that, before any further amount than that on which he has paid the court-fee can be recovered by any creditor, additional court-fee must be paid—in some such way as it is required to be paid in other suits for accounts by section 11 of the Court-Fees Act. In a sense a creditor's suit for administration is a suit for an account; but the analogy between it and an ordinary suit for an account will not in my opinion carry us far enough. First, it must be noticed that in an ordinary suit for an account, if a larger amount is found due to the plaintiff when the account is taken than that on which he has paid court-fee, section 11 of the Court-Fees Act provides that he cannot execute his decree for the larger amount without paying additional court-fee on it. That is not exactly what the learned Government Pleader is contending for in this instance. Here it is contended that the creditors other than the plaintiff-creditor must pay additional court-fees at an earlier stage, not when they are executing any decree or order which they may eventually obtain in the suit, but when they put in their claims. And does a plaintiff-creditor in such an administration suit really represent all the other creditors? In one sense his suit is a suit for the benefit of all the creditors of the estate. But I think it is clear that the other creditors cannot be held to be represented by him in the sense that they are in effect parties to the suit from the outset. It is clear I think that, if during the pendency of the suit, before a preliminary decree for administration is made, a claim of one of the other creditors becomes barred by time, it is gone; it cannot be enforced in the administration suit. That could not be if the other creditor

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had been represented by the plaintiff-creditor and was in effect a party to the suit from the start. On that subject it is useful to compare *In re Greaves, Deceased. Bray v. Tofield*(1) which explains the English Law on the subject; and I see no reason to suppose that the position in this country is different in that respect. Then it must be noticed that, before the preliminary decree for administration is made, if the person who represents the estate of the deceased pays off the plaintiff-creditor's claim, the suit will be dismissed, although none of the other creditors has been satisfied at all. That too shows that the plaintiff-creditor does not effectively represent all the other creditors so as to make his suit a suit for an account on behalf of all, which is really what the learned Government Pleader contends for. We must also remember that in an administration suit the Court takes control of the estate and distributes it among the creditors, and it is no part of the duty of the Court to do that in an ordinary suit for an account. When we examine the matter in that way, it will be seen what a short distance the analogy of a suit for an account takes us in this matter. But, even if it went much further, could analogy help us? The learned District Munsif has relied on some remarks in *Shashi Bhushan Bose v. Manindra Chandra Nandy*(2) on the subject. In that case the learned Judges said :—

“After the preliminary decree has been made and creditors have been invited to establish their claims, if any, against the debtor, each creditor, who puts forward a claim not already transformed into a judgment-debt, may well be required to pay court-fees *ad valorem* on his application, as if it were a plaint in a suit for the recovery of the sum he claims. Such a procedure can be sustained on the analogy of section 11 of the Court-Fees Act.”

(1) (1881) 18 Ch.D. 551.

(2) (1916) I.L.R. 44 Cal. 690.

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In regard to that it must first be noticed that what the learned Judges said was only *obiter dictum* and in no way necessary for the decision of the case before them. And apart from that with very great respect I may say that I do not understand how any fiscal statute can be applied by analogy. When the State requires the subject to pay a tax of any kind, that must be done by definite enactment strictly interpreted; and that is a principle which we are bound always to defend. In my opinion, there being no enactment requiring court-fee to be paid on such claims as these, the learned District Munsif was wrong in his order; these petitions should be allowed and the claims inquired into without court-fee; if the petitioners have now paid court-fees, they should be refunded.

It may well be that creditors should not on principle be allowed to urge their claims in such suits without paying some court-fee on them. But that is a matter for legislation, in connection with which it would be necessary to consider such questions as what should be done in cases where the deceased's estate was insolvent and what should be done where some of the creditors had already obtained decrees against the deceased or his estate, on which they had already paid court-fee. Those questions no doubt would have to be taken into consideration if legislation in the matter was undertaken; but it is unnecessary for us to consider them now.

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ANANTAKRISHNA AYYAR J.—I should like to add a few words of my own, as the case involves the decision of a question of law of some importance. The question for decision is as to the amount of court-fee payable on a claim sought to be filed by an alleged creditor to the estate of a deceased person, in respect of whose estate a preliminary decree for administration had been

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made. One of the creditors filed a suit, purporting to be instituted on behalf of himself and the other creditors of the deceased debtor. A preliminary decree for administration was passed. Public notice was given of the preliminary decree for administration of the estate of the deceased person having been passed, and claims from creditors of the estate were invited to be filed within a particular time. The petitioners in the revision petitions before us accordingly filed their claims. The learned District Munsif directed that, before their claims could be inquired into, they should pay *ad valorem* court-fee on the amounts of their respective claims. The present civil revision petitions have been filed by these claimants against that order of the learned District Munsif.

The suit that was instituted by the creditor—Original Suit No. 519 of 1925—has at present ended in this preliminary decree for administration. We are not now concerned with the question as to the exact amount of court-fee payable in respect of such a plaint. Both the Bombay and the Calcutta High Courts had to consider the question of court-fee payable in respect of such a plaint. For purposes of court-fee, both the High Courts have held that such a plaint should be treated as a plaint in a suit for an account; see *Shashi Bhushan Bose v. Manindra Ohandra Nandy*(1) and *Khatija v. Shekh Adam Husenally*(2). The necessary court-fee having been paid by the plaintiff in the suit, and the suit having, as I said, for the present ended in a preliminary decree for administration, the question with which we are now directly concerned is not whether the plaintiff in the suit had to pay any, and if so what, additional court-fee, but whether the new claimants who, in obedience to the advertisement caused to be published

(1) (1916) I.L.R. 44 Calo. 860.

(2) (1915) I.L.R. 40 Bom. 544.

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in pursuance of the preliminary decree for administration passed in the suit, filed their claims, have to pay *ad valorem* court-fee on the amounts of their claims. It was argued by the learned Government Pleader that such a plaint as the one in Original Suit No. 519 of 1925, though filed by a single creditor, should be taken to be filed not in the individual capacity of that creditor of the estate but as filed by him as representing both himself and the other creditors of the estate. But this argument would be correct only in a very limited sense. If the suit should be taken to have been filed not only on his own behalf but on behalf of the other creditors also, then no question of any court-fee payable by the other creditors only would arise, since the other creditors would, on that hypothesis, being parties to the suit and the decree, not have to pay court-fee at the time they filed their claims. If, however, all claimants other than the plaintiff on record have to pay court-fee when filing their claims in pursuance of the preliminary decree for administration, then, even creditors who have obtained independent decrees for moneys due to them from the estate would have to pay court-fees afresh on the amount of their decrees, which is of course very unjust. There is no provision of law to which our attention was called which directs the payment of *ad valorem* court-fees in such circumstances by the claimants against the estate, whether their claims have ripened into decrees or not. Again, it has been decided that a plaintiff in such a suit can have his suit dismissed, compromised, withdrawn or otherwise settled out of Court by any arrangement with those representing the estate, without in any way caring for the interests of the other creditors of the estate. There is a direct observation to this effect by WHITE C.J. and OLDFIELD J. in *Athalur Malakondiah v. Lakshminarasimhalu*

Chetty(1). There is also English authority to support such a position. At page 1631 of Volume II of Williams on Executors and Administrators, it is mentioned as follows :—

“ After the usual administration judgment or order, every creditor has an interest in the suit, and is in a sense deemed to be before the Court; yet, until such order, the plaintiff is *dominus litis*, so that he may deal with the action as he pleases; and he may settle the matter with the executor, by the latter paying the debt and costs of the action, and compromise the action and relinquish proceedings. And indeed the Court will compel the creditor to accept payment of his debt, when the executor offers to pay it with the costs of the action.”

In paragraph 392, at page 190, of Halsbury's Laws of England, Vol. XIX, it is observed :

“ If administration proceedings under the present practice are commenced by an executor who is also a creditor of the testator, and a claim is brought in by a creditor for a simple contract debt, which was more than six years old at the time of the judgment but not at the time of the commencement of the action, the claim is barred by the Statute.”

Again in paragraph 807, at page 341, of Halsbury's Laws of England, Vol. XIV, it is stated as follows :—

“ A judgment for administration prevents time from running against the claims of all creditors coming in under the judgment, but the mere institution of administration proceedings is not sufficient to effect this.”

Again, at page 338, paragraph 798, it is stated :

“ The Court may also, where necessary to prevent proceedings by other creditors or by persons beneficially interested, make the usual order for administration, with a proviso that no proceedings are to be taken under the order without leave of the judge in person. Nothing short of an order for administration will prevent a creditor from suing the representative, or the representative from preferring creditors.”

The law in India is also stated to be the same by the learned Judges in the case of *Shashi Bhushan Bose v.*

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(1) (1914) 26 M.L.J. 312, 313.

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Manindra Chandra Nandy(1). At page 895, the learned Judges observed :

"The suit is in essence for an account and application of the estate of the debtor for the satisfaction of the dues of all the creditors; the whole administration and settlement of the estate are assumed by the Court, the assets are marshalled, and the decree is made for the benefit of all the creditors. Creditors other than the plaintiff may come in under the decree and prove their debts and obtain satisfaction of their demands, equally with the plaintiff in the suit, and under such circumstances, they are treated as parties to the suit . . . But although such is the nature of the suit, it is well settled that where one creditor sues on behalf of himself and the others for administration of the estate of the debtor, the defendant may, at any time before judgment, have the action dismissed on payment of the plaintiff's debt and all the costs of the action."

Their Lordships follow the observations to the same effect in *Athalur Malakondiah v. Lakshminarasimhalu Chetty*(2) where it was held by a Bench of this Court :

"It seems clear that under the English practice, where one creditor sues on behalf of others for the administration of the estate of a deceased person, the defendant may at any time before judgment have the action dismissed on payment of the plaintiff's debts and all the costs of the action. See Daniel's Chancery Practice, edition 7, Vol. I, page 195 and the cases there cited."

If such a suit be treated strictly and in all respects as a suit brought by the other creditors also, then it would not be open to them to file independent suits of their own in addition to such a suit when it was pending. On the other hand Courts have held that it is not only open to the other creditors to file suits to enforce their own claims, but that, if their claims should become time-barred before the preliminary order for administration is passed, they could not successfully prosecute their claims against the estate. It has also been held that it is open to persons representing the

(1) (1916) I.L.R. 44 Calo. 890.

(2) (1914) 26 M.L.J. 312.

estate to pay off any of the other creditors of the estate even when such a suit is pending, and that when they render an account in respect of the assets that have come into their hands they are entitled to be given full credit in respect of such payments. It has been clearly laid down by JESSEL M.R. in *In re Greaves, Deceased. Bray v. Tofield*(1) that, if the rights of the other creditors is barred by limitation when the preliminary order for administration is passed, then such creditors could not take advantage of the order for administration.

There is an early English case, *Sterndale v. Hankinson* (2), where HART V.C., while discussing the exact nature of suits like the one before us, laid emphasis on the fact that all creditors of the estate are also interested in such a suit; and the learned Vice-Chancellor went to the extent of observing that, if the rights of the other creditors be not barred by limitation on the date of the plaint in such a suit, their rights would not be barred at all. That would seem to be the law in Ireland, as seen from the decision in *Harpur v. Buchanan*(3). JESSEL M.R. in *In re Greaves, Deceased. Bray v. Tofield*(1) had to consider how far that view of the learned Vice-Chancellor was sustainable after the Judicature Acts were passed in England. The learned Master of the Rolls remarked that, in early days, Equity Courts viewed questions of limitation only as matter of laches and delay and as such would only be a guide to Equity Courts in the matter of exercising their equitable jurisdiction. It is clear that, after the Judicature Acts were passed, pleas of limitation apply to all actions whether tried in the Chancery Division or Common Law Division. It was further observed that the remarks of

(1) (1881) 18 Ch.D. 551.

(2) (1827) 57 B.R. 625.

(3) (1919) 1 Ir. Rep. 1.

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the learned Vice-Chancellor in *Sterndale v. Hankinson*(1) should not be taken as authority on the point. In fact, the learned Master of the Rolls specifically stated as follows :—

“Creditors had better not rely upon that decision of the Vice-Chancellor.”

[It may be noted that the Vice-Chancellor's name is given in *In re Greaves, Deceased. Bray v. Tofield*(2) as Sir JOHN LEACH, whereas it is given as Sir ANTHONY HART in *Sterndale v. Hankinson*(1) at page 627]. In *Harpur v. Buchanan*(3) O'CONNOR M.R. observed with reference to *Sterndale v. Hankinson*(1) as follows :—

“The principle (of that case) is that a creditor's administration suit is one on behalf of all creditors, and that each creditor is entitled to the benefit of it just as if he instituted the suit himself. This may not now be the law in England, but it has always been followed in Ireland.”

We also find that text-writers have adopted the view of JESSEL M.R. In the circumstances, it must be taken to be settled law in England that the mere filing of such a plaint does not stop the period of limitation running against the other creditors of the estate.

I think the above observations are enough to show that it is not strictly correct to say that Suit No. 519 of 1925 was a suit to which all the other creditors should be taken to have been parties in the ordinary sense of the term.

Further, when once a decree has been passed, the only provision of the Court-Fees Act by virtue of which additional court-fee is payable is that provided for by section 11 of the Court-Fees Act. Under the terms of section 11, the petitioners could not be called

(1) (1827) 57 E.R. 625.

(2) (1881) 18 Ch.D. 551.

(3) (1919) 1 Ir. Rep. 1, 3.

upon to pay *ad valorem* court-fees when they filed their claims.

As I said the question of the court-fee payable in respect of the plaint in Original Suit No. 519 of 1925 is not before us at present; the only question which we have now to decide is what, if any, is the court-fee payable on the claims preferred by the other creditors of the estate after an order for administration had been passed. If I understood the learned Government Pleader aright, there does not seem to be any specific provision in the Court-Fees Act which exactly covers a case like the present. In fact the difficulty seems to have been felt by the Senior Government Pleader of Calcutta, who argued the case of *Shashi Bhushan Bose v. Manindra Chandra Nandy*(1), and he represented to the Court on that occasion that the court-fees due to Government would be largely lost if such claimants are let off without being compelled to pay *ad valorem* court-fees on the value of their claims. It was in that connection that the learned Judges, MOOKERJEE and CUMMING JJ., made the remarks that were read to us at page 897 of the report. I must say that the learned Judges had not to decide the present question in that case. The only question before the Court was as to the amount of court-fee payable in respect of the plaint in such a case. The observations therefore at page 897, relied on by the learned Government Pleader before us, were therefore only *obiter*. Further, the learned Judges, after observing that the case was not specifically covered by any provision of the Court-Fees Act, only threw out an observation, with reference to the remark made by the Senior Government Pleader of Calcutta, that by way of analogy the

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(1) (1916) I.L.R. 44 Cal. 590.

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provisions of section 11 of the Court-Fees Act might be applied. It is possible that the learned Judges' observations were meant to be no more than a suggestion that that would be the way in which such cases could be dealt with in any attempt to collect court-fee from such claimants. If the learned Judges purported to go further and meant to decide that, as the Court-Fees Act now stands, such claimants come within section 11 of the Court-Fees Act, and that they have to pay *ad valorem* court-fee on the amount of their claims when filing their claims, then, with all deference to the learned Judges, I am not able to agree with them. The Court-Fees Act being a fiscal enactment has to be construed according to well-known rules of interpretation. The Courts are not entitled to strain the words of the Court-Fees Act with a view to tax the subject. It may be that the present is a case of omission. If that is so, it is not a matter for the Courts but one for the Legislature. Again, if argument by way of analogy be permissible, we find that under the provisions of section 28 of the Provincial Insolvency Act, on the making of an order for adjudication, the estate of the insolvent vests in the Court or in the Official Receiver. There is a specific provision made in that section that, after that event, the money creditors of the insolvent are not entitled to commence an action to enforce their dues, but that, whatever reliefs they are entitled to, they should seek only in the insolvency proceedings. As far as I am aware, no *ad valorem* court-fee is levied from creditors who prove their claims in insolvency. If the intention was that, in respect of administration also, *ad valorem* court-fees should not be levied from the creditors who seek to file their claims in pursuance of the order of administration passed by a Court, then, we have got a consistent procedure covering these classes of cases. It was

brought to our notice by the learned Advocate for the petitioners that Order XX, rule 13 of the Code of Civil Procedure refers to the procedure to be followed with reference to insolvency; but, as I read the rule, it only goes to the extent of providing for the way in which the assets should be distributed among the secured and unsecured creditors, and refers to the Insolvency Act only to that extent and for that purpose; and the rule cannot, as its wordings now stand, be taken to expressly cover the question of court-fee also. It is enough to say for the present that, if there is an omission in the Court-Fees Act, the litigant is entitled to take advantage of the same.

Finally, I take it that, when a preliminary order for administration is passed, a receiver is at once appointed. It is a settled rule of practice that no suit can be instituted against a receiver appointed by a Court without the permission of the Court. When the Court has invited claims with a view to have them adjudicated and to have the estate before the Court administered among the creditors, etc., the Court is not ordinarily likely to refer a claimant to a separate suit. I am not here concerned with a case where, for any special reason, the Court may consider that in the circumstances a separate suit should be filed to have the claim properly adjudicated, and may grant permission for the filing of such a suit against the estate in the hands of the receiver. In any event, the present is not alleged to be such a case, and that is not the reason given by the learned District Munsif. I have accordingly come to the conclusion that, as the law now stands, Courts are not entitled to demand from claimants like those before us *ad valorem* court-fee before their claims are entertained by the Court administering the estate of the deceased debtor.

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I agree with my learned brother that the orders of the lower Court in these petitions should be reversed and the *ad valorem* court-fee, if paid, directed to be refunded. We make no order as to costs in the revision petitions in the High Court in the circumstances.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Cargenven and Mr. Justice Cornish.

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S. RAMAKRISHNA PILLAI (PLAINTIFF), APPELLANT,

v.

TIRUNARAYANA PILLAI AND NINE OTHERS (DEFENDANTS AND
LEGAL REPRESENTATIVES OF THIRD DEFENDANT), RESPONDENTS.*

Indian Evidence Act (I of 1872), ss. 32 (5), 35 and 115—Estoppel—Reversionary heir—Declaration by one person that another is a—Latter induced to part with a portion of the property in dispute—Former, if estopped from saying that the latter is not a—Adopted son—One person treated for a long time as such—Another person disputing the fact later—Burden of proof on the latter—Pedigree signed not by a party but by his vakil and filed in certain proceedings—Admissibility in evidence to prove relationship—Court of Wards Regulation (V of 1804), sec. 3—Report of Collector under—Admissibility.

If a person executes a document in his personal capacity declaring that *T* is the reversionary heir to the estate of *V* and induces *T* to part with a portion of the said estate in favour of another, he is estopped from saying that *T* is not the reversionary heir of *V*, and it makes no difference that the property given away by *T* was not his private property but only part of the estate of *V*.

* Appeal No. 268 of 1925.

Though a person is *prima facie* bound to prove, as a fact, that he is an adopted son when it is challenged in proper proceedings, yet, if for a long period of time he acted as such and was treated as such, the burden resting upon the person who disputes such an adoption is of the heaviest order.

Under section 32 (5) of the Indian Evidence Act, a pedigree filed in certain proceedings by a vakil on behalf of certain members of the family who had not signed it may be received in evidence in order to prove the relationship of the parties, if, from the form and contents of the statements in the said pedigree, it purports to originate with the members for whom the vakil signed, and justifies the presumption that it was duly authorized by the said members, and, as such, is in effect a statement put in by them.

APPEAL against the decree of the Court of the Subordinate Judge of Mayavaram in Original Suit No. 8 of 1917.

T. R. Venkatarama Sastri (with him *T. S. Ramaswami Ayyar*, *M. S. Vaidyanadha Ayyar* and *V. Sundaram Ayyar*) for appellant.—Alamelu Achi succeeded to the properties that are the subject-matter of this appeal as the mother of Venkatakrishna. On her death on 7th April 1905 the succession to these properties opened. Disputes arose and Exhibits A and I came into existence in May 1905. In Exhibit I the plaintiff acted as the guardian of his son Krishnamoorthy and also as trustee of some of the properties. He did not act in his individual capacity. One of the questions to be considered in this appeal is whether the conduct of the plaintiff in signing Exhibit I precludes him from setting up his own title later on. Strictly he is no party to the deed. There is no estoppel in this case; see *Chandra Kunwar v. Chaudhri Narpat Singh* (1). In the case of *Sarat Chunder Dey v. Gopal Chunder Laha* (2) there was a representation by the son that his mother was the owner of the properties and that she had a right to mortgage the same which had to be made good by him. There was no representation in the present case, and even if there was any it was not in his individual capacity, and as such he has not got to make good the same. Further, the representation under section 115 of the Evidence Act has got to be by one who knows the facts to one who does not know them. The representation in this case is, if any, by first defendant, who knew

(1) (1906) I.L.R. 29 All. 184 (P.O.). (2) (1898) I.L.R. 20 Cal. 896 (P.O.).

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the facts, to the plaintiff, that he (first defendant) was the nearest reversioner. The charge against the plaintiff is that he assented to such a representation. This circumstance will not avail the first defendant; see *Mohori Bibee v. Dharmodas Ghose*(1).

[CURGENVEN J.—A representation may be by declaration, act, or omission. Will it make any difference if the representation originally proceeds from first defendant? Is it not enough if the plaintiff accepts or admits that position?]

At the worst it will amount to an admission which he can disprove. It will not amount to an estoppel. In any event, if the plaintiff's case, viz. that he is the owner of the properties and not the first defendant, is true, then first defendant lost nothing by plaintiff's representation, if any. On the other hand he got properties to which he was not entitled. There is no damage to the first defendant. The person who will not be entitled to any portion of the properties in dispute, if the true facts are known, cannot say that the giving up a portion of the same was a damage sustained by him. In *Sarat Chunder Dey v. Gopal Chunder Laha*(2) the mortgagee parted with a portion of his moneys on the representation of the son. The next point is *res judicata*. Any decision between first defendant and Gopalswami, each claiming to be the heir of Venkatakrishna, in which first defendant's adoption was upheld cannot be *res judicata* between first defendant and plaintiff because the latter was not a party to that litigation and both first defendant and plaintiff claim as heirs to the same person here; see *Asghar Raza Khan v. Mahomed Mehdi Hossein Khan*(3), *Vythilinga v. Vijayathammal*(4) and *Spencer v. Williams*(5). The evidence clearly establishes that first defendant was not in fact adopted by Venkatachella and was not a 'dayadi' of Venkatakrishna.

S. Srinivasa Ayyangar (with him *A. C. Sampath Ayyangar* and *N. Somasundaram*) for first and second respondents.

Exhibits A and I should be construed together as a compromise of disputed claims based on the fact that first defendant is the nearest reversioner of Venkatakrishna. There is an implied representation that the plaintiff in his individual capacity would not dispute that basis. The case of *Sarat Chunder Dey v. Gopal Chunder Laha*(2) exactly covers the present case.

(1) (1908) I.L.R. 80 Calo. 589 (P.O.). (2) (1892) I.L.R. 20 Calo. 296 (P.O.).
(3) (1903) I.L.R. 30 Calo. 556 (P.O.). (4) (1882) I.L.R. 6 Mad. 43.
(5) (1871) L.R. 2 P. & D. 230.

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Admissions can amount to estoppels under section 115 of the Evidence Act. There would never have been any compromise or any parting of the disputed property if this reservation in his mind that he would in his individual capacity challenge the basis of the compromise at a future date was manifested then. By this double dealing he cannot gain any advantage. It is not necessary first defendant should have spent anything out of his pocket without the aid of the disputed property; see *Raja of Deo v. Abdullah*(1). It does not matter if the property parted with is a portion of the disputed property; *Helan Dasi v. Durga Das Mundal*(2). As between first defendant and Gopalswami the issue of adoption of first defendant has become *res judicata*. As between the representatives in interest of these persons that issue will be *res judicata* to the extent of the interest taken by them. Plaintiff being representative in interest of Gopalswami cannot dispute the adoption of first defendant to the extent of Gopalswami's properties that have become the subject-matter of this litigation, the same having been inherited by Venkatakrishna on the death of Gopalswami. See *Pittapur Raja v. Buchi Sitayya*(3). The evidence clearly establishes that first defendant was adopted by Venkatachella who was a *dayadi* of Venkatakrishna. In the circumstances of the case, the plaintiff has to show that there was no adoption in fact; see *Rajendra Nath Holdar v. Joyendro Nath Banerjee*(4) and *Kanchumarthi Venkata Seetharama Chandra Row v. Kanchumarthi Raju*(5). The pedigree put in by the vakil, Exhibit XXIV, is admissible in evidence; see *Chandreshwar Prasad Narain Singh v. Bisheshwar Pratap Narain Singh*(6) and *Jagannadham v. Venkatasubba Rao*(7). The statements proving relationship by deceased relatives, servants, etc., who had special means of knowledge, are admissible in evidence in India; see *Garuradhwaja Prasad v. Superundhwaja Prasad*(8). A report of the Collector under section 3 of the Court of Wards Regulation (V of 1804) is admissible in evidence.

M. Krishna Bharati for fourth to tenth respondents.

T. R. Venkatarama Sastri in reply.—The case that Exhibits A and I were settlements of family disputes was not put forward at any stage. The plaintiff never put forward his claim to be

(1) (1918) I.L.R. 45 Calo. 909 (P.O.). (2) (1906) 4 C.L.J. 323.
(3) (1884) I.L.R. 8 Mad. 219 (P.O.). (4) (1871) 14 M.I.A. 67.
(5) (1925) 53 M.L.J. 858 (P.O.). (6) (1926) I.L.R. 5 Pat. 777.
(7) (1927) I.L.R. 50 Mad. 877. (8) (1900) I.L.R. 28 All. 27 (P.O.).

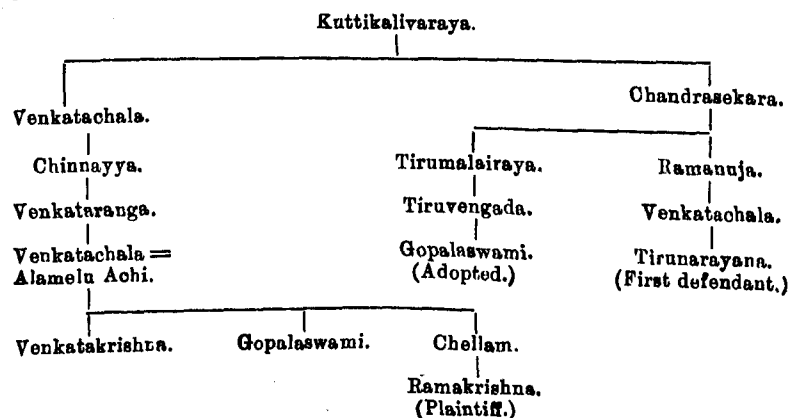
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settled. Exhibit XXIV cannot be admitted in evidence; see *Sangram Singh v. Rajam Bahi*(1) and *Jagatpal Singh v. Jageshar Bahsh Singh*(2).

Our. adv. vult.

JUDGMENT.

CURGENVEN J. CURGENVEN J.—The main question which this appeal raises is whether the plaintiff or the first defendant is the nearest reversionary heir to the estate of one Venkatakrishna Pillai who died on the 24th October 1899 leaving considerable property in the Tanjore District. The following genealogical table illustrates the rival claims:—



It will be seen that the plaintiff, Ramakrishna Pillai, is the son of Venkatakrishna's sister, Chellam, while the first defendant claims to be the adopted son of one Venkatachala Pillai shown as an agnate belonging to another branch of the family. The left and right hand branches are referred to in the evidence as the Kannan-kulam and Koppayam branches respectively. The fact of this adoption is disputed, and it is further disputed that the adoptive father was related to the last male holder in the manner shown in the table. The learned

Subordinate Judge has upheld the first defendant's claim upon each of these points and the plaintiff appeals.

On Venkatakrishna's death without issue the estate devolved for her life upon his mother, Alamelu Achi, who died on the 7th April 1905. Thereupon the first defendant took possession of the property claiming as the next reversionary heir. At the time, the plaintiff set up, not his own right, but a claim that his son Krishnaswami had been adopted by Alamelu Achi just prior to her death. This claim he succeeded in compounding with the first defendant by means of a deed of indenture under which the plaintiff's son received a certain amount of the property in exchange for the withdrawal of this claim. This document was executed in May 1905, and it was not until 1917 that the plaintiff instituted the present suit. The issue with regard to first defendant's reversionary right is attended by two preliminary objections to the plaintiff's right to raise it; it is contended, in the first place, that he is precluded by reason of his subscription to the indenture referred to, and secondly, it is said to be barred by *res judicata*.

The question of estoppel arises out of the following facts. In January 1905 Alamelu Achi addressed a letter, Exhibit X, to the first defendant expressing a strong desire to adopt and inviting him to come and discuss the matter. It is clear that his consent was sought in the belief that he had a reversionary interest in the estate, a belief which, as the evidence will show, had been widely recognized by members of the family for a long period. The first defendant wrote back discouraging the idea but professing himself willing to discuss it. It is deserving of note that on getting this reply Alamelu Achi got the plaintiff, who was largely responsible for the management of her affairs, to consult Sir V. Bhashyam Ayyangar, their legal adviser (Exhibits

(1) (1885) I.L.R. 12 Cal. 219 (P.O.). (2) (1902) I.L.R. 25 All. 143 (P.O.).

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XXXVI and XXXVI-a). A further letter was then sent to the first defendant, Alamelu Achi explaining that she was desirous of consulting him as he was the most influential among the relatives. In reply, the first defendant attributed her reference to him to his being the nearest *dayadi*, and therefore, of course, the first person whose consent should be obtained, and in Alamelu Achi's next letter, Exhibit XI-a, she acknowledges that she wanted to obtain his permission as a *gnati*. With this letter dated the 10th March 1905 the correspondence ends. As has been said, Alamelu Achi died on the 7th April and on that very day the plaintiff telegraphed to the first defendant alleging that she had executed a will, and adopted his son Krishnaswami. He also sent telegrams to the same purport to two other persons as remoter *dayadis*. The next day, the first defendant wired back repudiating the will and the adoption as false and invalid, and the other two reversioners replied in the same sense. Then on the 12th April the first defendant, alluding to the circumstances of this claim, filed a petition in the District Court of Tanjore applying that a curator should be appointed to take charge of all the immovable and movable properties of the estate. Next day, however, an agreement was come to between the plaintiff and the first defendant and embodied in a document, Exhibit A. It recites the rival claims, deprecates resort to litigation, and declares that the parties have entered into a compromise according to which, the minor Krishnaswami was to get certain of the lands and movables and the first defendant the remainder. This was signed by the plaintiff, as guardian of the son, and by the first defendant. It was agreed at the same time that the necessary documents should be executed within a month, and pursuant to this the deed of indenture, Exhibit I, was signed on

the 11th May 1905. This deed was executed by the first defendant, described as the adopted son of Venkatachala Pillai, of the first part, by the plaintiff acting as father and guardian of the minor Krishnaswami, of the second part, and by the plaintiff in his personal capacity, of the third part. After alluding to Alamelu Achi's succession and death it declares that the first defendant became entitled to the estate and had taken possession of it as reversionary heir of Venkatakrishna. It then refers to the contention raised by the plaintiff, as guardian, that Alamelu Achi had adopted his son, following this by an admission made by the plaintiff in both capacities that no authority had been given by the first defendant or by the remoter reversioners for this adoption, with the consequence that the first defendant was alone entitled to all the properties of the deceased. Out of regard and affection for the minor, however, and his close relationship to the deceased Alamelu Achi, the first defendant conveyed to him the properties specified in schedule I to the indenture absolutely, but subject to the condition that, if the claim of adoption were again set up, the deed should stand revoked. Now it is claimed that this document operates against the plaintiff in three separate ways, by estoppel, as a composition, and as an admission. It will be seen that it is primarily a settlement of the competing claims of the first defendant and of the minor Krishnaswami as alleged adopted son of Alamelu Achi. It has been argued that, viewed in this light, the plaintiff is not personally bound by its terms as he subscribed to them, not in his personal capacity but as guardian of his son; and that the only object of the document was to put an end to the son's claim as Alamelu Achi's adopted son, so that no renunciation of any claim which the plaintiff may himself have had as reversioner is either expressly or impliedly made.

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That the document was not executed by the plaintiff purely in a representative capacity is clear from the circumstance that besides being a party as guardian he was made a party of the third part, in his personal capacity. This cannot have been done simply because he became a trustee of a certain charitable endowment, because the other trustee, K. Chithambaranatha Mudaliyar, was not made a party, and only signed the document as a witness. It seems clear therefore that he was added in his personal capacity in order that the recitals in the document should in that capacity bind him. The arrangement was in fact for the plaintiff's own benefit, as deposed by Chithambaranatha Mudaliyar himself, a very respectable witness. Those recitals include an unqualified statement that the first defendant had become entitled to Venkatakrishna's property as reversionary heir, and, since it was open to the plaintiff at that time to set up his own competing title and he not only did not do so but made this declaration, the conclusion must be, I think, that he thereby admitted that the first defendant's title as reversioner was superior to his own. I think that this declaration can only be taken as an assurance to the first defendant that, if Krishnaswami's claim was out of the way, there was, so far as the signatories to the document were concerned, no other competing claim to his,—that he was Venkatakrishna's reversionary heir. Whether or not such an admission would amount to an estoppel must depend upon the view taken of the course which the first defendant was led to adopt in consideration of it. The learned Subordinate Judge finds an analogy in the circumstances of the case reported as *Sarat Chunder Dey v. Gopal Chunder Laha*(1), but there is this difference, that the mortgagee in that case was induced by

(1) (1892) I.L.B. 20 Cal. 296 (P.O.).

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the representations made to advance money which formed no portion of the property in dispute; whereas here it was a portion of the disputed property that the first defendant conveyed to the minor. If, however, he so conveyed it on the understanding that so far as the plaintiff and his son were concerned his title would henceforward be undisputed, I am not clear that the plaintiff is any the less estopped by this circumstance. It is pretty evident, I think, that if the plaintiff had endeavoured to put this transaction through, while expressly reserving his own right to dispute the first defendant's position as the nearest reversioner and to advance his own claim as sister's son, the first defendant would never have parted with the property. If that be granted, then I think the plaintiff is clearly estopped from setting up his claim. No case has been cited to us directly in point and I only refer to the Privy Council case, *Raja of Deo v. Abdullah*(1), where it was held that a party may be caused to change his position even by being the recipient of a gift which carried with it the ordinary liabilities of immovable property in order to show how far the doctrine extends. I consider that the plaintiff's conduct in entering into this agreement did estop him from raising this claim and that *a fortiori* it constituted a clear and unqualified admission on his own behalf of the first defendant's title. As to the remaining aspect, I do not think that Exhibit I can be construed as a composition of the claim.

To understand the plea of *res judicata*, certain facts, which will be of use in dealing later with the merits of the claim, require to be known. The table given above shows one Thiruvengkata as first cousin to Venkatachala,

(1) (1918) I.L.B. 45 Cal. 809 (P.O.).

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the first defendant's alleged adoptive father. Gopalaswami, Venkatakrisna's natural brother, appears also as Thiruvenkata's adopted son. The litigation which gives rise to this plea is between this Gopalaswami and the first defendant, each questioning the other's adoption. On the 1st November 1873 Thiruvenkata executed a will. On the 29th July 1879 he died. The will made certain dispositions in favour of both Gopalaswami and the first defendant, and it will become necessary later on to consider its terms in some detail. As soon as the testator died, the question of the revenue registry of his properties arose, and the records relating to these proceedings show that the claims of the rival candidates were sometimes asserted and sometimes denied. The first civil litigation took the form of an interpleader suit filed against the rival claimant by a mortgagor to Thiruvenkata anxious to redeem his property. In this it was found that the adoption of each was true and valid. Shortly after this came to an end, Thiruvenkata's widow died, and Gopalaswami, on the 29th May 1884, filed a suit against the first defendant and others (Original Suit No. 30 of 1884, Subordinate Judge's Court, Kumbakonam), which, it is claimed, renders the question of the first defendant's adoption *res judicata* as between the present parties. The Subordinate Judge found that neither adoption was true, but both these findings were reversed on appeal. As regards the first defendant's claim the High Court observed that the plaintiff, that is, Gopalaswami had withdrawn his contest, and both adoptions were declared well proved, and the case was then remanded for the trial of the other issues, and when the suit went back to the trial Court both parties filed a statement, Exhibit XXXII-g, admitting the validity of Thiruvenkata's will and agreeing to take the properties in accordance with its

terms, and a decree was passed in conformity with this compromise. In August 1893 Gopalaswami died, and Venkatakrisna, the last male holder in the present case, inherited his property under his will, dated the 7th August 1893. It is this property with some others not derived from Gopalaswami, that is the subject-matter of the present dispute. So far as the latter property is concerned the doctrine of *res judicata* can have no application, and it is therefore necessary, however that matter may be decided, to go into the merits of the first defendant's claim as nearest reversioner. For this reason, and also because we propose to uphold that claim upon its merits, it is not essential for the due disposal of this suit that a finding should be recorded upon this question of *res judicata*. I will however briefly set down my reasons for the conclusion that no such defence arises in the circumstances of the present case.

The argument in support of the plea depends primarily upon the circumstance that the property in dispute derives from Gopalaswami, so that it is said that, while the first defendant is a party common both to the earlier and the later suit, the plaintiff claims under the other party within the meaning of section 11 of the Code of Civil Procedure. Of course the first defendant, equally with the plaintiff, claims under him as reversioner, but in view of his own participation in the previous suit this circumstance, it is said, may be disregarded, and does not bring the case into line with such decisions as *Vythilinga v. Vijayathammal*(1) and *Asghar Reza Khan v. Mahomed Mehdi Hossein Khan*(2). It appears to me that this is an extremely doubtful proposition, and if the question depends, as it must do,

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(1) (1882) I.L.R. 6 Mad. 43.

(2) (1908) I.L.R. 30 Calo. 556 (P.C.).

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upon the devolution of Gopalaswami's property, I think that the principle of those decisions does apply, and that it is as a claimant to Venkatakrishna's property that the first defendant's position must be regarded. Then it is no doubt true that, as between Gopalaswami and the first defendant, the effect of the adjudication in Original Suit No. 30 of 1884 was to set at rest the question, irrespective of the property involved in the dispute. There is authority for this in *Pittapur Raja v. Buchi Sitayya*(1) and *Abdul Gani v. Nabendrakishore Ray*(2). The matter in issue between them, the fact of adoption, had been tried and finally decided. The further question, how far Gopalaswami's disability attaches to the holder of or claimant to property traceable to him, is of far greater obscurity. Mr. Srinivasa Ayyangar would ask us to hold that the plaintiff is thus barred by virtue of the source of the property to which he lays claim, but the case which he cites, *Pittapur Raja v. Buchi Sitayya*(1), is certainly no authority for so wide a proposition. In that case the son stood in the shoes of his father in a manner to which the relation between Gopalaswami and the plaintiff furnishes no parallel. The proposition may be reduced to an absurdity by supposing that Gopalaswami had disposed of his property by a number of gifts and bequests,—would each recipient be *ipso facto* debarred from questioning the first defendant's adoption? It appears to me that the circumstance that some of the property in dispute belonged to Gopalaswami is a wholly irrelevant consideration. His title to that property involved the question not of the first defendant's adoption but of his own. I think, further, that it is merely fortuitous that some of the property to which, as reversioner to

(1) (1884) I.L.R. 8 Mad. 219 (P.C.). (2) (1929) I.L.R. 57 Cal. 258.

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Venkatakrishna, the plaintiff lays claim should have descended from Gopalaswami. I can only add that no principle or line of reasoning intelligible to me has been advanced which would lead me to hold that the earlier adjudication now bars the trial of the fact of adoption.

The learned Subordinate Judge has summarised in paragraph 49 of his judgment the various heads of proof that the adoption was made. They consist of (a) the terms of Thiruvengkata's will, (b) evidence, direct and indirect, that the ceremony of adoption was performed, and (c) evidence that subsequently the first defendant behaved and was accepted by members of the family as the adopted son.

[His Lordship discussed the terms of the will and held that they afforded strong support to the other evidence that the adoption was in fact made, and proceeded as follows:—]

The oral evidence relating to the performance of the ceremony of adoption consists in the testimony of three witnesses examined at the trial, and of the depositions of a number of other witnesses, not now available, who were examined in the interpleader suit and in Original Suit No. 30 of 1884. It cannot be said that the first defendant is now in a position to call witnesses qualified to give any very convincing evidence upon this point. The three witnesses whom he examines are himself (D.W. 1), one Muthiah Pillai (D.W. 4) and his Karyasthan Appuswami Ayyar (D.W. 13). To show the handicap under which the first defendant labours in producing oral evidence at this distance of time, it may be observed that the ages of the two witnesses other than himself are given respectively as 73 and 69 years. The learned Subordinate Judge has given some grounds in paragraph 63 of his judgment for not attaching very much weight to this evidence, and

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I do not therefore wish to base my decision in any material degree upon it, although there are a great many other considerations to suggest that it is true. The learned Subordinate Judge has admitted in evidence the depositions of as many as 24 other witnesses, three of whom at least he thinks are fully deserving of credit, considered even on their own merits, and apart from such corroboration as is furnished by the will and other circumstances. It is for consideration whether these statements are admissible. They were made in suits in which the question of adoption was directly in issue and cannot therefore be admitted under sub-section (5) of section 32 of the Evidence Act as they were not made before the question in dispute was raised. It is claimed that they are relevant under section 33 of the Act, as evidence given in a prior judicial proceeding. That section contains three provisos, the first of which is that the proceeding is between the same parties or their representatives in interest. The first defendant having been common to the two suits, the question is whether the plaintiff here is a representative in interest of Gopalaswami in the two former suits. It may be true, as Mr. Srinivasa Ayyangar contends, that the phrase "representative in interest" is not for all purposes synonymous with the expression "person claiming under" in section 11 of the Code of Civil Procedure,—for instance, cases may be cited in which the former expression has been deemed to apply to the several members of a class. But I think that here, unless the plaintiff can be said to be claiming under Gopalaswami within the meaning of section 11 of the Code of Civil Procedure, in no other way can he be said to be his representative in interest. We must therefore apply the same tests as were appropriate in deciding the question of *res judicata*, and, as I have said in dealing

with that question, I am unable to see by what line of reasoning the plaintiff can be held to be Gopalaswami's representative so far as the issue of the first defendant's adoption is concerned. I must hold accordingly that these statements are inadmissible.

[His Lordship further discussed the oral evidence with regard to the adoption and held that it was very powerfully corroborated by documentary proof that on many occasions and for a long term of years the first defendant's status as an adopted son was recognized, and proceeded as follows:—]

Enough has I think been set down to show that on many occasions and over a long period of time the first defendant's adoption has been admitted by members of the family some at least of whom were interested to deny it. I cannot interpret Thiruvengada's own treatment of the boy as otherwise than an acknowledgment of the fact. Even his widow, Alamelu, although she disputed her own husband's adoption of Gopalaswami, and might have been expected to get rid of the first defendant's claims in the same manner, stopped short of this. Gopalaswami himself seems only to have challenged the adoption because his own was challenged, and admitted it readily enough when his own was established. Then in turn we find Venkatakrishna and his widow making the same admission. Lastly, but very notably, there is the conduct of the plaintiff himself. From the time of Venkatakrishna's death he appears to have cast covetous eyes upon the property, becoming a party to the proposal that the widow should renounce her rights, and, when that broke down owing, according to the first defendant, to his excessive demands, setting up the palpably false claim of his own son's adoption. When this too failed, and after a delay not satisfactorily accounted for, he files the present suit. The main issue in that suit is the

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truth of an occurrence said to have taken place in 1873, more than fifty years before it was instituted. The first defendant, now in his seventieth year, was then a child of eleven. It is sought to make much of certain early doubts cast upon his status. I have referred, as some explanation of these, to the motives which are likely to have actuated Thiruvenkata in wording his will as he did, and to the dispute with Gopalaswami. Since that dispute ended a long period elapsed, and no further challenge was forthcoming, although some occasions arose for it, until the plaintiff's very belated action. In view of all that has taken place, it may almost be said that it lies upon the plaintiff himself to disprove the adoption, even were we to disregard such oral evidence as still remains available. To hold otherwise would lead to the anomaly that the older the adoption set up the more vulnerable becomes the occupant's position. This view is well enough supported by authority. In *Rajendra Nath Holdar v. Jogendro Nath Banerjee*(1) the Judicial Committee had to deal with the validity of a will under which an adoption was made and acquiesced in by the family for twenty-seven years, when a suit was brought by one of the testator's heirs claiming the estate on the ground that the adoption was invalid. Their Lordships held that, although the defendant was bound to prove his title as adopted son, every allowance for the absence of evidence to prove such fact was to be favourably entertained, and that the case was analogous to that in which the legitimacy of a person in possession had been acquiesced in for a considerable time, and afterwards impeached by a party who had the right to question the legitimacy, where the defendant, in order to defend his status, is allowed to invoke against the

(1) (1871) 14 M.I.A. 67.

claimant every presumption which arises from long recognition of his legitimacy by members of his family, and that the case of a Hindu, long recognized as an adopted son, raised even a stronger presumption in favour of the validity of his adoption, arising from the possibility of the loss of his rights in his own family by being adopted in another family. In another case before the Privy Council, *Kanchumarthi Venkata Seetharama Chandra Row v. Kanchumarthi Raju*(1), the authority of a widow to make an adoption which was in fact made forty-two years before suit was questioned by a reversionary heir, and their Lordships, after referring to a variety of considerations,—the transfer of the adopted son from his natural to his adopted home, his recognition after inquiry by the local authorities, proceedings in which the plaintiff had acknowledged the right, the dilatoriness of the plaintiff in preferring his claim—expressed the view that the burden resting upon a litigant who disputes such a claim is indeed of the heaviest order. Two cases dealt with by the High Court of Allahabad on the same lines are *Prem Devi v. Shambhu Nath*(2) and *Chhote Lal v. Chandra Bhan*(3). In the present case, together with a little direct evidence still available, it has been shown that in numerous transactions and over a long period of time the first defendant acted and was treated as an adopted son, his position not even being challenged by the plaintiff himself until all other means of securing some of the property had been tried. I find it very hard to believe that the plaintiff can have any faith in the truth of his own claim. I find on this issue against him.

The question next arising is whether the Kannakulam and the Koppayam branches of the family are agnatically

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(1) (1925) 53 M.L.J. 858 (P.C.). (2) (1920) I.L.R. 42 All. 382.

(3) (1922) I.L.R. 45 All. 59.

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related as shown in the tree. The evidence consists of (i) proof that members of each branch have been described and treated as *dayadis* by members of the other, and (ii) proof of the relationship actually alleged.

The expression "*dayadi*" is in Ghose's Hindu Law explained as being equivalent to "agnatic heir" and in this sense it has been construed in the Privy Council judgment in *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo*(1). That members of the two branches shown in the tree are so related has been affirmed so frequently by one or the other of them as to leave the matter in no doubt whatever.

[His Lordship discussed the evidence and held that the case set up by the plaintiff that the first defendant is not agnatically related to Venkatakrishna was false, and that the evidence very materially helped to corroborate the more specific evidence referred to later on and proceeded as follows:—]

The record comprises three pedigrees all showing the same relationship and, except for one possible inaccuracy, agreeing as to the names of the connecting links. The first of these is contained in Exhibit XXIV, a statement put in during the inam enquiry of 1865 by (i) Venkatachala Pillai, the father of Venkatakrishna, (ii) Thiruvēkata Pillai, and (iii) Venkatachalam Pillai, the adoptive father of the first defendant. This statement is not signed by these persons or by any of them, but by a Vakil on their behalf under a certificate that the matters set out in the statement and the genealogical tree are true. It is contended that, because it is not signed by the persons whose statements it purports to be, it is not admissible under section 32 (5) of the Evidence Act. Two cases have been cited before us as

(1) (1876) I.L.R. 1 Mad. 69 (P.C.).

authority for this position. The case in *Sangram Singh v. Rajam Bahi*(1) related to the deposition given in Court by a muktyar, and that being so it was only the personal knowledge of the deponent which could render his statement admissible, since the statement must be that of a person having "special means of knowledge." Their Lordships make this clear when they say:

"It appears to their Lordships, therefore, on the two grounds first, that he was not shown to have special knowledge, and secondly, that he did not pretend to speak from his knowledge at all, that this deposition was not admissible."

The statement could not be taken to be that of his clients, since no client can authorize a representative to depose in Court as from his own lips. The second case, *Jagutpal Singh v. Jageshar Bakhsh Singh*(2), related to a genealogical table filed on behalf of the client in some prior claim. The admissibility of this evidence was found to be open to the fatal objection that it was in no way brought home to the client except as being an exhibit binding on him for the purpose of that suit:

"His relation to the document is therefore something entirely different from the personal knowledge and belief which must be found or presumed in any statement of a deceased person which is admissible in evidence. For aught that appears, the genealogical table in question might never have been seen or heard of by Gurdatt personally, but have been entirely the work of his pleader."

I do not think that the circumstances of that case also conform to those of the present. There can be no doubt from the form and contents of the statement before us that it purports to originate with the members for whom the Vakil signed, as a statement in an inam enquiry by the holders of the inams. It is attested by two karnams, was received by an officer whose duty it was to ensure that information was correctly obtained

(1) (1885) I.L.R. 12 Cal. 219 (P.C.). (2) (1902) I.L.R. 25 All. 143 (P.C.).

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from the proper parties, and it appears to me that the circumstances in which it originated justify the presumption that it was duly authorized and is in effect, as it is entitled, a statement put in by the three persons named. In *Rani Srimati v. Khagendra Narayan Singh*(1) the question arose whether a statement in a petition for the appointment of a guardian was admissible in evidence, the argument (on page 880) being that no proof that the statement was authorized by those in whose name the petition was presented had been furnished. Their Lordships, however, held that the statements in the petition must be regarded as the statements of the petitioners if the document was worth anything. Another instance of a petition filed on behalf of a party but not bearing his signature is furnished by *Chandreshwar Prasad Narain Singh v. Bisheshwar Pratap Narain Singh*(2), and evidence contained in it was deemed admissible under section 32 of the Evidence Act. I do not think that either of the two cases relied upon for the appellant is authority for the rejection of a statement such as the one under consideration. It is further objected that from the genealogical table the name of the common ancestor is missing, but inasmuch as the two brothers, Venkatachala Pillai and Chandrasekhara Pillai, from whom the two branches are derived are shown as brothers, I follow *Jagannadham v. Venkatasubba Rao*(3) in holding this to be no objection in law to accepting the pedigree as proof of the relationship.

On the death of Thiruvengkata in 1879 the Collector submitted a report to the Board of Revenue on the question whether the estate should be taken over by the Court of Wards, and illustrated his statement of the

(1) (1904) I.L.R. 31 Calo. 871 (P.C.). (2) (1926) I.L.R. 5 Pat. 777.
(3) (1927) I.L.R. 50 Mad. 877.

facts by a genealogical table (Exhibit XXIX-a). The provision of law then in force was Regulation V of 1804, section 3 of which requires Collectors to report each case of property devolving to incapacitated heirs. In so doing they are to describe all the circumstances of each particular case. It seems clear to me that the information contained in the Collector's report, including this table, was submitted in accordance with that direction. We have not been furnished with information whether any more specific rules for the guidance of Collectors were in existence under that Regulation, but it is perhaps worthy of note that a rule framed under the Court of Wards Act of 1902 now requires that the report shall include the names, ages, and relations of the proprietor and of rival claimants, if any, to the estate, and the validity of their respective claims, and also the names, ages, and relation of all other members of the family. According to the first defendant, the Tahsildar made an enquiry upon which this report was no doubt based, and I think that the statements in the report and, in particular, the family tree, are relevant under section 35 of the Evidence Act. It must always be a question of drawing a line between records and correspondence which do, and those which do not, fall within the scope of that section. But where there is a statutory duty laid upon public officers to investigate and report facts, I cannot doubt that a report of the facts elicited by their investigation is an official record within the meaning of the section. As to the value of this tree, it is not suggested that on the occasion of its preparation the first defendant's adoption was in dispute, and the only specific reason for showing the Kannankulam branch seems to have been to exhibit the natural, as well as the adoptive, position of Gopalaswami in the

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family. I think therefore that a good deal of weight may be attached to this record.

The third table, Exhibit IX-a, was compiled in another enquiry under the Court of Wards Act. On the death of Venkatakrishna the first defendant asked for Government management on the ground that Alamelu Achi was not equal to the task. Here again there was no suggestion that the first defendant was other than a reversionary heir by reason of his adopted status, the only difference of opinion revealed by the records was as to whether the Government should take over the management. In view of this I think that besides being admissible under section 35, this table may be viewed in another aspect, as a statement relevant under section 32 (5) of the Act. It has been signed by three persons other than the first defendant himself, Rangaswami Pillai, Sambasiva Pillai, and another Rangaswami. The first of these was related to the family in a number of ways, being among other things the husband of Alamelumangathayi and also the plaintiff's paternal uncle. Similarly, Sambasiva Pillai was the brother of Alamelu Achi and therefore Venkatakrishna's maternal uncle, and the father-in-law of Venkataranga Pillai, Venkatakrishna's elder brother. The third signatory was a Karyasthan; and we need not trouble about his opportunities of knowledge, but it appears to me that the statements by the two former persons are qualified for admission under section 32 (5). In this country the rule governing such cases is wider than in England where it applies only to blood relations and their consorts; (XIII Hals. Laws of Eng. 470). It has been stated by the Judicial Committee in *Garuradhwaja Prasad v. Superundhwaja Prasad*(1) that for the purpose

of proving relationship statements of deceased relatives, servants, and dependents of the family are admissible and in every instance, it must be a question of fact as to whether the person who made the statement had special means of knowledge. I think that upon this footing also this statement is admissible.

My conclusion is therefore that the three pedigrees discussed above are admissible in evidence. I can find no reasons to doubt the correctness of the relationship which they represent. The other evidence places beyond question the fact that the first defendant was recognized by members of the Kannankulam branch as a *dayadi* or agnatic heir. It is *a priori* probable therefore that the precise manner in which he, as adopted son, was related to that branch was known. These pedigrees originated in circumstances giving no ground for the suspicion that they were drawn up for the purpose of asserting his claim. I agree with the learned Subordinate Judge that they afford proof of it.

These findings are sufficient to dispose of the plaintiff's suit which in my view has been rightly dismissed. As my learned brother concurs, the appeal is dismissed with costs of first and second respondents. (Advocate's fee Rs. 2,500).

CORNISH J.—I concur.

G.R.

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APPELLATE CIVIL.

*Before Mr. Justice Krishnan Pandalai.*1931,
February 3.

RAMNATH CHUNILAL (PETITIONER), PETITIONER,

v.

GRANDHI SATTIRAZU AND FOUR OTHERS (RESPONDENTS),
RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XXI, r. 89—
Application under—Notice of, before sale is set aside under
O. XXI, r. 92—Other decree-holders who have applied
for rateable distribution of purchase-money deposited by
purchaser not entitled to.*

In an application under Order XXI, rule 89 of the Code of Civil Procedure other decree-holders who have applied for rateable distribution of the purchase-money deposited by the purchaser have no such direct or proximate interest as to make them persons "affected thereby." They are not therefore entitled to notice of the application before the execution sale is set aside under Order XXI, rule 92 of the Code.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908) and section 107 of the Government of India Act praying the High Court to revise the order of the District Court of East Gōdāvari at Rajahmundry, dated 2nd May 1927, and made in Execution Application No. 525 of 1926 in Original Suit No. 38 of 1920.

*B Sitarama Rao (P. Kameswara Rao with him)
for petitioner.*

*G. Lakshmanna, P. Somasundaram, T. Ramachandra
Rao and O. Rama Rao for respondents.*

Our. adv. vult.

* Civil Revision Petition No. 1416 of 1927.

JUDGMENT.

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Two questions arise in this petition :—1. Before an execution sale is set aside under Order XXI, rule 92, on an application under Order XXI, rule 89, of the Code of Civil Procedure, is notice of the application necessary to other decree-holders who have applied for rateable distribution of the purchase-money deposited by the purchaser?

2. If such notice is necessary, and has been given to some but not to all such decree-holders, can the purchaser whose sale has been set aside enforce repayment of the purchase-money under Order XXI, rule 93 of the Code against these decree-holders who have not received notice but have received their share of the purchase-money?

The facts are as follows:—In execution of the decree in Original Suit No. 38 of 1920 in the District Court of East Godavari immovable properties belonging to the debtors were sold on or about 5th January 1925 and purchased in different lots, of which one lot was purchased by the petitioner, a stranger to the decree, for Rs. 4,000 and he deposited the purchase-money in the usual course. There were a number of other decrees against the same judgment-debtors, the holders of which, including the respondents 2 to 4 and the petitioner himself who held one of them, had applied under section 73 of the Code for rateable distribution of the assets when realized. The sale was never confirmed because on 4th February 1925, i.e., within thirty days of the sale, the fifth respondent, who had obtained a mortgage from the judgment-debtors of the property prior to the sale but after its attachment, deposited the amount of the decree in Original Suit No. 38 of 1920 for payment to that decree-holder together with five per cent of the purchase-money for payment to the purchasers, and applied, under Order XXI, rule 89

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and rule 92 (2) of the Code, for the sales being set aside. To that petition the decree-holders in Original Suit No. 38 of 1920, the judgment-debtors and the auction-purchasers, including the present petitioner, were added as respondents. Of the holders of other decrees two had notice of the petition. The present petitioner who was impleaded was himself the holder of another decree. The third respondent, another decree-holder, intervened with a petition, objecting to the sale being set aside as he had attached the money paid by the mortgagee to set aside the sale. The petition was dismissed by the District Judge on the ground that the fifth respondent had no right to apply as his mortgage, though before the sale, was subsequent to the attachment of the property sold. But this Court in appeal on 25th February 1926 set aside that decision and held that the fifth respondent had a right to apply and set aside the sale; see *Viranna v. Sattiraju*(1). In the appeal the same persons were impleaded as in the first Court and, though the third respondent was not formally impleaded, it is impossible to believe that he, being a local pleader of position and having intervened in the lower Court, was not aware of the proceedings in appeal. After the decision in appeal, the petitioner on 16th August 1926 applied to the District Court under rule 93 for repayment of the purchase-money and for payment of the five per cent on it to which he was entitled, and, as in the meanwhile the respondents 2 to 4 had received their rateable shares, they were impleaded. The learned Judge has held that the respondents 2 to 4 having received rateable distribution out of the purchase-money are persons affected under the proviso to rule 92 (2) to whom notice of the application to set aside the sale should have been given, that they had no such notice,

(1) (1926) 52 M.L.J. 157.

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and that therefore they are not bound by the order in the appeal or liable to repay what they received under rule 93.

The learned Judge's order results, as he himself says, in the obvious injustice that the purchaser by court-sale, whose sale has been set aside by the Court not at his own instance as in applications under rule 91 but at the instance of the judgment-debtor's alienee, and who, according to the law applicable both to private and court-sales, has the right to get back his money if the sale falls through without his default, is deprived both of the property and his money. The only decision referred to by the learned Judge is *Komandur Krishnamacharlu v. Danoji*(1). That was a case of an application under rule 91 by the purchaser himself on the ground that the judgment-debtors had no saleable interest in the property sold. He succeeded in his application, but did not make parties to the proceeding certain other decree-holders who had obtained orders for rateable distribution of the sale-proceeds before the application was made to set aside the sale. The District Munsif held on an application by the purchaser under rule 93 that those decree-holders were not bound by the order setting aside the sale and therefore were not bound to repay the money they had received. ABDUR RAHIM J., in upholding this order, did so on the ground that, even if the District Munsif had erred in law, he was not disposed to interfere in revision. He, however, made the observation :—

"If it were necessary to express my view on this point I should be inclined to hold that persons who had obtained orders for rateable distribution are persons affected by an application to set aside the sale within the meaning of rule 92, and an order made behind their backs cannot bind them for the purpose of rule 93."

(1) (1918) 35 M.L.J. 604.

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This is not a decision. Giving every weight to the observation of so learned a Judge, it was made in a case in which the facts were different from those in this case. In the first place, the present is a case of an application under rule 89 by the judgment-debtor's alienee, whereas that was an application by the purchaser himself under rule 91. Assuming for the moment that persons who have got orders for rateable distribution are "persons affected" within the meaning of rule 92 in applications both under rule 89 and rule 91, with which I will deal presently, still, the consequences of a failure to make such a person party need not be the same when the failure was by the judgment-debtor or his alienee as where it is by the purchaser himself. Secondly, there is nothing to show that, before the application was made on 4th February 1925, any of the respondents had obtained orders for rateable distribution. It is impossible that any such order could have been made because thirty days had not then elapsed after the sale, and I cannot imagine how any order for rateable distribution can be made before the sale is confirmed and the title passes. These orders were in all probability passed after the District Judge dismissed the petition. If, therefore, only those who have obtained orders, as distinguished from those who have merely applied for rateable distribution before the date of the application, had to be impleaded in the present application, none of the respondents come within that class. Lastly, so far at least as the third respondent is concerned, he intervened on his own petition in the present matter before the District Judge and was heard, and, as I have stated, must have had notice of the proceedings in appeal.

But it seems to me that, in applications under rule 89, at any rate, persons (decree-holders), who have applied for rateable distribution of the sale proceeds, have no such direct or proximate interest as to

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make them persons "affected thereby", and are therefore not entitled to notice under rule 92. No doubt, if the sale is upheld, they have a chance of getting a share of the sale-proceeds, and, if it is set aside, they lose that chance. But that chance they derive not because they are purchasers of the property for whose loss of bargain a solatium is provided by rule 89 or the decree-holders who have brought it to sale for whose satisfaction (and not that of other decree-holders) that rule specially provides or the judgment-debtors for whose benefit that rule provides a period of grace of thirty days for paying the particular decree-debt (and not the debts of other decree-holders) and avoiding the sale. In short, the chance for other decree-holders of getting rateable distribution is entirely contingent on the sale being confirmed, which itself is contingent on the judgment-debtor or his alienee not paying up the particular decree-debt plus five per cent within thirty days of the sale. The provision thus being one intended to relieve the judgment-debtor and for that purpose of satisfying only the particular creditor who has taken the trouble to execute his decree and to bring the debtor's property to sale and the purchaser who has advanced cash for the price, those are the three classes of persons affected by a petition under rule 89. The other decree-holders have only a contingent interest in the sale, contingent on its not being set aside by payment of the particular decree-debt. As observed by the Privy Council in a case under the Code of 1882, which equally applies to the present Code,

"to bring section 295 (present section 73) into play, certain conditions are necessary and one of them is that there should be assets held by the Court."

Mina Kumari Bibi v. Bijoy Singh Dudhuria(1); see also *Annamalai Chettiar v. Palamalai Pillai*(2). It is difficult

(1) (1916) I.L.R. 44 Cal. 668 (P.C.). (2) (1917) I.L.R. 41 Mad. 265 (F.B.).

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to see how other decree-holders, if they were given notice under rule 89, are in any position to affect the decision of a petition under that rule, by which, read with rule 92 (2), as soon as the steps necessary are taken [as to which see *Narayana Sahu v. Pentamma*(1)], the Court is bound to set aside the sale. In the case just cited it was held that it is not essential for an order under rules 89 and 92 (2) that the auction-purchaser should be included in the petition if it is filed in time or that the notice to him should be taken out or served within the thirty days so long as he is served before the order. No more do I see any necessity for complicating proceedings under rule 89 by requiring that other decree-holders who have but a contingent interest in the matter should be notified.

In this view, it becomes unnecessary to decide whether, if the respondents 2 to 4 were entitled to notice in proceedings under rule 89, the absence of notice to some of the decree-holders, like respondents 2 and 4, though others had notice, invalidates the order setting aside the sale as against those who had no notice. In this case, I asked the learned Advocates for the respondents to say in what way the absence of notice had prejudiced them, in other words, how they could have avoided the sale being set aside, if the fifth respondent, being held to be entitled to apply, had paid the necessary sums and made the application in proper time. They replied that they were entitled to rely on the statutory requirement of notice, and that, in the absence of such notice, the order passed behind their back cannot bind them. I find it difficult to reconcile myself to the position that a sale conducted by the Court could be declared invalid so far as the judgment-debtor and decree-holder and purchaser are concerned, and yet be

(1) (1939) I.L.R. 53 Mad. 861.

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valid as against another creditor because a notice which should have been sent to him was not sent. In such a case I should say that the omission was a mere irregularity which did not affect the validity of the order [*Umesh Chandra v. Mt. Safiyatannessa*(1)]; and, in any case, there would be no difficulty in view of section 151 of the Code of Civil Procedure to regularize the matter by treating the original petition to set aside the sale as still pending, so far as the respondents who had no notice are concerned, and in disposing of the matter in their presence. Seeing that the respondents have absolutely no merits but have to rely solely on what is at best an omission, the result would be the same and the sale would again be set aside. It is however unnecessary to pursue the matter.

It may be unnecessary, but perhaps as well, to say that I say nothing about the "persons affected" in petitions under rules 90 and 91.

In the result, the order of the learned Judge is set aside, and the petitioner is declared entitled to recover from the respondents 2 to 4 such sums as they may have received by way of rateable distribution out of the purchase-money deposited by him, together with interest at five per cent from the date of receipt to date of payment. The petitioner is also entitled to five per cent of his purchase-money out of the amount deposited by the fifth respondent. The lower Court will ascertain the amounts payable by each respondent and make orders accordingly. The petitioner and fifth respondent will have their costs in the lower Court and here from the respondents 2 to 4 in proportion to their respective liabilities.

A.S.V.

(1) A.I.R. 1928 Cal. 267.

APPELLATE CIVIL.

Before Mr. Justice Curgenvven and Mr. Justice Cornish.

1931,
January 8.

R. N. SAMUVIER AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

R. N. RAMASUBBIER (DEFENDANT), RESPONDENT.*

Indian Registration Act (XVI of 1908), ss. 17 and 49—Partnership—Dissolution of—Partnership assets including immovable property—Agreement adjusting rights between partners involving modification of title to immovable property—Necessity of registration—Agreement designed as an indivisible whole—Clause relating to payment of money—Enforcement of—Admissibility of agreement for purpose of.

Where an unregistered instrument of dissolution of partnership affecting or involving modification of title to immovable property is not merely a record of an already completed division of properties but is regarded by the parties as the only repository of their agreement, no other evidence of its terms can be given except the instrument itself, and, that being so, the instrument being unregistered is not receivable as evidence of any transaction affecting immovable property under section 49 of the Indian Registration Act; and where such an instrument, comprising a number of counterbalancing terms, some affecting immovable property and some not, is designed as an indivisible whole to effect a fair distribution of the assets, it is inadmissible in evidence even for the purpose of proving the terms not affecting immovable property.

APPEAL against the decree of the Court of the Subordinate Judge of Tinnevely in Original Suit No. 28 of 1925.

S. Varadachari and P. R. Srinivasan for appellants.

T. M. Krishnaswami Ayyar, T. M. Ramaswami Ayyar and K. Venkateswaran for respondent.

Cur. adv. vult.

* Appeal No. 21 of 1929.

JUDGMENT.

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CURGENVEN J.—The plaintiff, who appeals, brought this suit against his brother for a sum of Rs. 18,800-3-1. The learned Subordinate Judge has narrated in full the circumstances leading up to the claim. To understand how it arose, it is only necessary to explain that there were two firms in which both parties were partners. One of these firms worked under the vilasam V.S.R.S., and in it one Sankaranarayana Ayyar had a half-share while the two brothers had the other half-share. It was a money-lending business, and it also ran a chit fund. The other firm was known as the R.S. firm, it was also engaged in money-lending, and the plaintiff and defendant were the partners. The two firms had dealings each with the other. In 1923 disagreements arose between the brothers, and they decided to dis sever their interests. By an agreement, Exhibit K, dated the 4th June of that year, the plaintiff purported to take over all the defendant's interests in the V.S.R.S. firm while those of the plaintiff in the R.S. firm were assigned to the defendants. The latter at the same time accepted liability for a sum of Rs. 13,000 odd due by the R.S. to the V.S.R.S. firm. Later, in February 1925, Sankaranarayana Ayyar and the plaintiff dissolved their partnership in the V.S.R.S. firm and it was arranged that the debt due from the R.S. firm, which by that time amounted to Rs. 18,340-6-1, should be taken over by the plaintiff. It is this sum that formed the subject-matter of the suit.

The defendants raised a number of legal objections to the claim, and it is with these that we are concerned. The first part of the argument is based upon the circumstance that the agreement, Exhibit K, between the parties was not registered. It purported, as we have seen, to dissolve two partnerships, and since each

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partnership involved immovable property, title to which necessarily, it is contended, underwent modification, the whole document is subject to the disqualifications imposed by section 49 of the Registration Act, it can neither affect the property nor be received as evidence of any transaction affecting it. Several replies have been attempted to this objection. In the first place the actual transaction is assigned to an anterior date, when the document would be no more than a record of an earlier oral agreement, and not itself the embodiment and sole repository of the contract. But, supposing this contention to fail, it is urged that the objection with regard to registration does not apply where a partnership involving immovable property is dissolved; or if, again, this position is not maintainable, some parts of the transaction, and in particular that part which gives rise to the present claim, are not affected. A further line of defence resorted to by the defendant is that the plaintiff has not acquired the right to sue by a valid assignment of the actionable claim.

There can be no doubt, in my view, that the agreement of 4th June 1923 was, and was intended by the parties to be, the instrument of dissolution. It was not the less so merely because the operations thereby involved could not all be executed upon the day upon which the document was signed, but some came into force earlier and some were left to be done later. Thus it may be, as the plaintiff recites, that from some day in May the parties began to open separate accounts, but the document itself recognizes the necessity for registered conveyances, and provides that they should be subsequently executed. The document is formal in design, and opens with the words "agreement entered into on 4th June 1923". The plaintiff (paragraph 4) gives its date as the date up to which the parties carried on their transactions as

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joint partners. In paragraph 11 it is referred to as having been "confirmed and brought into force", and other similar expressions occur elsewhere. Allusion to earlier dates on which certain changes involved in the two dissolutions were introduced does not, in my view, go far to show that what was clearly drafted as a written agreement should be discarded in favour of a prior oral one. There are indications in the evidence that it was not until trouble was apprehended from this source that such a theory took shape. Thus the plaintiff, when examined on 11th February 1928, said that when division was effected on 24th May 1923, "it was decided that an agreement should be drawn up and executed in duplicate and each should keep one as a voucher to evidence the arrangements come to". On the 16th February he made the incompatible assertion that "at the time of the division of the assets there was no intention to reduce to writing the arrangements come to", and went on to say that Exhibit K was drawn up merely as a record of an already completed division. Another contradiction of this construction is to be found in his lawyer's notice to the defendant, Exhibit VI. I have no doubt that the written agreement was, in the words of COUGH C.J., quoted by their Lordships of the Privy Council in *Subramonian v. Lutchman*(1), "what the parties considered to be the only repository and appropriate evidence of their agreement", and, under section 91 of the Evidence Act, can alone be looked at for the terms of it.

The next point is whether the document could effect its purpose without registration. As has been said, it sets out to dissolve two partnerships, making various dispositions, which need not be given here in

(1) (1922) F.L.R. 50 Cal. 232 (P.O.).

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CURGENVEN J. detail, with regard to the movable and immovable property until then held by each firm. I would here record my view, in reply to an argument addressed to us, that the terms of this deed can only be construed as actually assigning rights in the immovable property, and not, as is provided for by section 17 (2) (v) of the Registration Act, "merely creating a right to obtain another document which will, when executed, create," etc., rights in the property; so that, as has been laid down by the Privy Council in *James Skinner v. R. H. Skinner*(1), it cannot escape the provisions of the Act merely because paragraphs 15 and 16 of it may contemplate the execution and registration of other documents. In *Venkataratnam v. Subba Rao*(2) PHILLIPS and MADHAVAN NAIR JJ. have held that a document of the nature of Exhibit K does not require registration, but with all respect I am unable to adopt the reasoning upon which that decision is based. The theory underlying it is that both before and after a partner releases his rights the property is and still remains the property of "the partnership," meaning by that phrase, I think the learned Judges would have conceded, a legal entity which does not itself undergo change. But this is surely to lose sight of the fact that "if from any cause whatsoever any member of a partnership ceases to be so, the partnership is dissolved as between all the other members" [Indian Contract Act, section 253 (7)]. Accordingly where, to take the case of the V.S.R.S. firm as an example, there is a partnership of three persons, and one goes out, the whole partnership is dissolved. If the remaining two persons resume business as partners, it can only be by the formation, tacit or express, of a partnership. If the original partnership of three held

immovable property, and it afterwards vests in the new partnership of two, it can surely only be by a transfer of interest from the one to the other. The analogy drawn between partners in a firm and shareholders in a joint stock company does not seem to be a true one, because, whereas a company is a juridical person, and its identity is unaffected by the transfer of its shares, a partnership is, legally speaking, only an aggregate of individuals and changes with every change of *personnel*. Some discussion of this point by the Court of Appeal will be found in *Ashworth v. Munn*(1), one of the *Mortmain* cases referred to in the next stage of the argument. It is worth remark that section 17 of the Registration Act excludes from its provisions any instrument relating to shares in a joint stock company, notwithstanding that the assets of such company consist in whole or in part of immovable property, which may perhaps justify the inference that, in similar circumstances, the exclusion of instruments relating to partnership was not contemplated by the framers of the Act, and certainly shows an intention to distinguish between such companies and ordinary partnerships.

Assuming then that a partner in a firm possessing immovable property holds an interest in that property, it would seem to follow that upon a dissolution a transfer of that interest takes place. The question whether he does hold such an interest has been elaborately discussed by JARDINE and TELANG JJ. in *Joharmal v. Tejram Jagrup*(2), where the English case law dealing with the subject has been considered at length. The former learned Judge admitted that the tendency of decisions in England had been to bring partnership agreements conveying interests in land among other

(1) (1880) 15 Ch.D. 322.

(2) (1892) I.L.R. 17 Bom. 225.

(1) (1929) I.L.R. 51 All. 771 (P.C.).

(2) (1926) I.L.R. 49 Mad. 738.

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CURGENVEN J. assets within section 4 of the Statute of Frauds, as had been done under the Statute of Mortmain, and, although he seems to have inclined towards the general proposition that in India a document transferring a share in the assets, including immovable property, of a firm does not require registration, I do not find that he expressly committed himself to that view. TELANG J. gave reasons for adopting the contrary position, in which I would respectfully express my concurrence. To go no further than to the provisions of the Contract Act, under section 253 all partners, in the absence of a contract to the contrary, are joint-owners of the partnership property; and although certain restrictions are imposed upon them, *quā* partners, in dealing with their shares in that property, that does not make them the less joint-owners, and, if joint-owners they be, it is difficult to see how they can be said not to possess an interest in the property. The same considerations apply of course even more plainly where, as here with the R.S. firm, a partnership of two undergoes dissolution. Each ex-partner acquires certain sole interests in immovable property by the conversion of rights previously held jointly. I conclude then that the agreement Exhibit K cannot operate to affect the immovable property of which it treats, and, in so far at least as it evidences a transaction affecting immovable property, it is inadmissible in evidence.

The appellant next contends that we may take the terms of the agreement piecemeal, and enforce any not directly affecting immovable property, among these latter being the suit claim. The question first arising here is, does it even operate to dissolve the two partnerships? Analogy sought in the severance of joint status among the members of a Hindu family is, I think, likely to be fallacious. We are here dealing not with status

but with contract. In *Gray v. Smith*(1) KEKEWICH J. SAMUIER v. RAMASUBBIAH. held that an agreement by one of the partners to retire and to assign his share in the partnership assets, including immovable property, is an agreement to assign an interest in land, and falls within the Statute of Frauds, a decision which, although not argued, was approved by the Court of Appeal. But it does not seem necessary here to settle this point, because, I think, that the authorities are clear that, where a contract comprises a number of counterbalancing terms, some affecting immovable property and some not, designed as an indivisible whole to effect a fair distribution of assets, you cannot pick out such of those terms as do not relate to immovable property and enforce them regardless of the consequences of such a course. The decision in *Lakshamma v. Kameswara*(2) has been criticized as giving weight to prior cases decided under the Registration law as it stood before 1877, when the document could not be received in evidence for any purpose. It was a partition case, and the learned judges held that the transaction was one and indivisible, so that the partition of the movable property could not be separated from the partition of the rest. In *Thandavan v. Valli-amma*(3), a partition of movables effected by an unregistered instrument which dealt also with the immovable property was held to be valid, but it will be found that the one-third share claimed in the movables was quite separable from and independent of the share in the immovable property. The Court has, it is said, to ascertain whether "the part which is void be in its own nature separable and divisible." Another case, dealing with separable movable property and citing the case last referred to with approval, is *Hanmant v. Ramabai*(4). So

(1) (1889) 43 Ch.D. 208.

(2) (1889) I.L.R. 13 Mad. 281.

(3) (1892) I.L.R. 15 Mad. 336.

(4) (1919) 21 Bom. L.R. 716.

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too where there is a lien or charge upon property, partly movable and partly immovable, effected by an unregistered document, the charge may be enforced upon the movable property, see *Pasupati Venkatapathiraju Garu v. Vatsavaya Venkata Subhadrayamma*(1). These cases are merely illustrations of contracts with separable terms. In *Vyравun Chetti v. Subramanian Chetti*(2), which related to an agreement to divide equally the proceeds of a first and second mortgage, all that their Lordships of the Privy Council decided was that, for the purpose of a claim to half the proceeds, the document, although unregistered, could be given in evidence. No question of the inherent divisibility or indivisibility of a transaction into its component parts really arose. An instance of a document effecting partition of movables and immovables, which was considered not to be enforceable as regards movables only, is afforded by a Full Bench case of this Court, *Pothi Naicker v. Naganna Naicker*(3). The principle accepted was that

"when there is an entire contract and part of it cannot be enforced, the whole goes, whereas it is otherwise when an instrument contains two or more distinct contracts, in which case they are severable."

This case was referred to as the law upon the point in *Perumal Ammal v. Perumal Naicker*(4), although the kind of transaction dealt with there, being a gift of movable and immovable property, stands upon a different footing, and no question of upsetting the balance of a bilateral contract arises. Where a party relinquished his claim to property, comprising movables and immovables, in consideration of a sum of Rs. 1,000, it was held in *Bisheshar Lal v. Musst. Bhuri*(5) that, as this consideration could not be apportioned

(1) (1918) 47 I.O. 568.

(2) (1920) I.L.R. 48 Mad. 680 (P.O.).

(3) (1915) 30 M.L.J. 82 (F.B.).

(4) (1920) I.L.R. 44 Mad. 196.

(5) (1920) I.L.R. 1 Lah. 436.

between the real and personal estate, the document could not be admitted for any purpose whatever.

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The conclusion to be derived from these cases is that no hard and fast rule can be drawn as to the divisibility, and therefore the enforceability, of some terms in a contract apart from the remainder. If justice can be done between the parties by a partial enforcement, the Court will enforce, and not otherwise. Turning now to the document before us, I think I am right in saying that Mr. Varadachari for the appellants has not attempted to show that, on this principle, the suit amount can be separated from the other property dealt with. In the first place, the plaintiff takes over the defendant's interest in the V.S.R.S. firm, and the defendant the plaintiff's interest in the R.S. firm with an indemnity clause in each case. Then the brothers owned an extent of wet land, of which the plaintiff was to receive 70 acres 60 cents, and the defendant the remainder (area not stated, but said to be considerably less). The plaintiff was to have all the outstandings, and to meet the liabilities of another business, known as the Mun-nirpallam business, hitherto jointly owned. There were several other assignments of property, some of it immovable, which I need not particularize. It is evident, therefore, that if, on the footing of this agreement, the defendant is held solely liable for the suit item, as a liability of the R.S. firm assumed by him under it, it must be in entire disregard of the consideration which led him to assume that liability. In the case of such a contract as this, the terms of which are inextricably united, the only course, in my view, is to regard it as a single transaction affecting immovable property, within the meaning of section 49 of the Registration Act, and to decline to receive the document as evidence of any of its terms.

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The final ground taken by the appellants upon the question of registration is that there was no occasion to adduce evidence of the terms of the contract, as they had been admitted by the defendant. It is true that the defendant admitted that he had executed Exhibit K, but he set up a further agreement, copy of which he filed as Exhibit XXV, which would have had the effect of very substantially modifying the terms of Exhibit K. It cannot be said, therefore, that the parties were *ad idem* as to the terms of the contract between them.

Since the inadmissibility of Exhibit K is fatal to the plaintiff's claim, the question of the validity of the assignment of the debt to him by the V.S.R.S. firm does not arise. The appeal is dismissed with costs.

CORNISH J.—I have come to the same conclusion, and will briefly state my reasons.

The plaintiff's evidence is that Exhibit K was intended to embody the agreement between him and the defendant. He says:—"Even when the division was effected on 11th Vykasi 1098 (corresponding to 24th May 1923), it was decided that an agreement should be drawn up and executed in duplicate, and each should keep one as a voucher to evidence the arrangements come to." He adds that a draft of an agreement was prepared a few days later; that two fair copies were prepared from the draft, each being executed by plaintiff and defendant; and that Exhibit K is the agreement executed by both and kept by the plaintiff. Further, Exhibit K is in form an agreement, and does not purport to be a memorandum of an agreement previously made by the parties. It begins,—“Agreement entered into on 4th June 1923 by both of us.” In these circumstances, it appears to me that Exhibit K constitutes the contract between the parties; and consequently, under section 91, Evidence Act, no other

evidence of its terms can be given except the document itself; see *Subramonian v. Latchman*(1).

It is plain from a perusal of Exhibit K, clauses 2, 5, 15 and 16, that immovable properties exceeding Rs. 100 in value were being assigned; and it will follow by reason of sections 17 and 49, Registration Act, that the document would require registration if that which was being assigned on the dissolution of the partnership was an interest in immovable property. I think it is clear upon the authorities that it was an interest in immovable property. The plaintiff and defendant as partners were joint-owners of the partnership assets, movable and immovable; see section 253, Indian Contract Act. A partner, however, has no right to any specific items of the partnership property as representing his share. But he has, in respect of the amount which falls due to him when an account is taken upon a dissolution of partnership, a charge upon the immovable property of the *quondam* partnership, when the assets comprise such property, and this charge is an interest in land; see *Ashworth v. Munn*(2). There it was held that a gift to charity by a testator, a partner in a mercantile firm, of the proceeds of the sale of his share in certain land held as partnership property, was a gift of an interest in land, and therefore void under the Mortmain Act. So, too, in *Gray v. Smith*(3) it was held by KEKEWICH J., and the Court of Appeal expressed approval, that an agreement by one of the partners to retire from the partnership and to assign his interest in the partnership assets, which comprised land, was an agreement to assign an interest in land which required a memorandum in writing in pursuance of the Statute of Frauds. The ruling in *Venkataratnam v. Subba Rao*(4)

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(1) (1922) I.L.R. 50 Cal. 333 (P.C.).

(3) (1889) 43 Ch.D. 208.

(2) (1880) 15 Ch.D. 353.

(4) (1926) I.L.R. 49 Mad. 738.

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is inconsistent with these authorities and I respectfully dissent from it. It appears that the learned Judges, in the case of *Venkataratnam v. Subba Rao*(1), treated an ordinary partnership as standing on the same footing as a joint stock company with regard to the transfer of a partner's share; whereas, as is shown by the judgments of the Court of Appeal in *Ashworth v. Munn*(2) (supra), there is a great distinction between the two. Thus at page 372 BRETT L.J. observed:

"There are joint stock companies where by the agreement of the partners, that is to say, by the constitution of the company to which they have agreed, there are to be shares in the company, and there are to be shareholders, and by the agreed constitution of the company those shares may be transferred, and the company still continued. Now, in such a case if the company is the owner of land, in one sense, it may be said that that land does not belong to a corporation but does belong to the shareholder; but by the agreement of the parties that matter is to be dealt with precisely as if there was a corporation, that is to say, the shares are to be allowed to be transferred, so that the new shareholders may come into the partnership without the partnership ceasing at all, . . . But when you come to the case of an ordinary partnership not so constituted, which holds land, one partner cannot dispose of his interest without the consent of the others, and supposing he dies, the partnership is at an end, and it may not be possible to ascertain his interest in the partnership without dealing with the land which is the property of the partnership, in which, therefore, he has an interest."

In view of these authorities, the interest in the partnership assets which the parties to Exhibit K purported to assign was, in my judgment, an interest in immovable property; and that being so, the document being unregistered is not receivable as evidence of any transaction affecting that property; see *James Skinner v. R. H. Skinner*(3).

(1) (1926) I.L.R. 49 Mad. 788.

(2) (1880) 15 Ch.D. 863.

(3) (1929) I.L.R. 51 All. 771 (P.C.).

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Nor can I discover in Exhibit K an agreement to pay the money claimed by the plaintiff which is severable from the agreement transferring the immovable property. If there were two distinct provisions, the one relating to rights to the immovable property, and the other to the realization and payment of money, proof of the latter provision could be given without the document requiring registration; see *Vyrvan Chetti v. Subramanian Chetti*(1) and the judgment of WALLIS C.J. in *Pothi Naickan v. Naganna Naicker*(2). In my opinion, it is impossible to say that the part of the agreement upon which the plaintiff founds his claim to the Rs. 18,000 is independent of the agreement relating to the transfer of the immovable property. It is part and parcel of the same transaction and indivisible from it.

It has also been contended for the plaintiff that he is entitled to invoke the doctrine of part-performance in aid of his claim. In *Arsecularatne v. Perera*(3) it was held that this doctrine had no application to the stringent provisions of a Ceylon Ordinance which rendered "of no force or avail in law" any agreement as to land not duly attested by a notary and two witnesses. It seems to me that the doctrine must be equally unavailing against the not less stringent provision of section 49, Indian Registration Act. Reference, however, has been made to section 53-A of the amended Transfer of Property Act. But the conditions which make that provision applicable have not been fulfilled in this case.

Upon these grounds, I think, the plaintiff's suit fails and his appeal must be dismissed with costs.

G.R.

(1) (1920) I.L.R. 48 Mad. 660 (P.C.).

(2) (1915) 30 M.L.J. 63 (F.B.).

(3) [1928] A.C. 178.

APPELLATE CRIMINAL.

*Before Mr. Justice Jackson.*1932,
February 10.

IN RE MADDI SUDARSANAM (ACCUSED), PETITIONER.*

*Madras Salt Act (IV of 1889), sec. 74 (d)—Charge sheet—
Power of the police to put in.*

The police have power to put in a charge sheet in respect of offences under the Madras Salt Act (IV of 1889) as there is nothing in the Act restricting the normal duty of the police to report to the magistracy or indicating that the sections taken as a whole compose a self-contained code of procedure.

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 Stationary Sub-Magistrate of Guntur, dated 16th October 1930, in Calendar Case No. 468 of 1930.

K. S. Jayarama Ayyar and G. Krishna Arya for petitioner.

Advocate-General (A. Krishnaswami Ayyar) and Public Prosecutor (L. H. Bewes) for the Crown.

Cur. adv. vult.

JUDGMENT.

This is a petition by an under-trial prisoner in the Court of the Sub-Magistrate, Guntur, seeking to set aside his order that, under section 190 (b), he had lawfully taken cognizance of the offence.

This Court has already had occasion to remark upon the mischievous habits of trial courts passing interlocutory orders for which there is no provision in the Code of Criminal Procedure. If the accused wishes to raise a point of law by way of defence, he should raise it when called on for his defence, and the Court should deal with it in its judgment.

* Criminal Revision Case No. 786 of 1930.

This petition therefore is misconceived, and might be dismissed upon that short ground. However, since the point of law has been raised it may be answered.

The petitioner was charge-sheeted by the police under section 74 (d) of the Madras Salt Act, and his plea is that for offences under that Act the police have no power to put in a charge sheet. This plea depends upon the contention that the Salt Act entirely regulates the manner of investigating offences under that Act, and its regulation does not admit of a police report to a Magistrate under section 190 (b), Code of Criminal Procedure. Chapter VI of the Salt Act deals with the powers of public officers for the detection and punishment of offences against the Salt Law.

It will be convenient to survey its sections as bearing upon police powers in concise form.

Section 46.—Magistrate to issue search warrant on information. Informant not specified; presumably any one.

Section 47.—Police Officer duly empowered may search, and arrest. Person arrested must be bailed for appearance before Salt Inspector.

Section 48.—Headman to report to nearest salt factory or police station.

Sections 49 and 50.—Police may arrest without warrant.

Section 52.—To report such arrest to immediate official superior.

Section 53.—Person arrested to be forwarded to Salt Inspector or to nearest police station.

Section 54.—Bail by police to appear before Salt Inspector.

Section 64.—Salt Inspector must send report to the Magistrate who acts as though it were a police report under section 190 (b).

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Section 67.—Police to take charge of property in crime.

Section 68.—The police must assist other departments in carrying out provisions of the Act.

Section 69.—Police must report breaches of the Act to Salt Inspectors, and shall be bound to take all reasonable measures in their power to prevent the commission of such breaches.

Section 70.—Land owners to report offences to the police.

I cannot find anything in these sections restricting the normal duty of the police to report to the magistracy, nor any indication that the sections taken as a whole compose a self-contained code of procedure. Section 64 seems to contemplate that the Magistrate will be familiar with police reports, and does not say "in like manner as if report had been made to him in respect of other offences under section 190 (b)." And if section 69 imposes upon the police the duty of taking all measures in their power, one would expect some clause making that power clear, if it is a restricted power, and not the normal power of the police. In the Indian Salt Act (XII of 1882), this clause finds place. Section 11.—A charge of an offence under section 9 shall not be entertained except on the complaint of a salt revenue officer. That the Madras Act contains no similar provision seems conclusive upon the point. Chapter VI is mainly concerned with providing special provisions in regard to arrest and bail; but as regards a mere report it is silent. *Yerlagadda Venkanna, In re*(1) is very much to the same effect as the above observations, although that ruling is concerned with the Madras Abkari Act. With all respect I would transfer the argument to this case, only I

(1) (1924) 48 M.L.J. 805.

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should not use the phrase "serious lacuna" when reaching the point that for cases where there is no arrest the Acts make no special provision. Because a lacuna suggests some gap or oversight in a regular scheme, and I do not think that the Acts intend a scheme of procedure, or intend anything more than a few special additions to the normal procedure of the Code of Criminal Procedure.

In *In re Kuppuswami Naidu*(1), which is also upon the Abkari Act, it is found that the submission of a charge sheet by the police instead of by the abkari officers placed a considerable disability on the accused. But as observed in *Yerlagadda Venkanna, In re*(2) it is not clear that this does not refer to an arrest in which the special provisions in the Abkari Act were not observed.

In *Fernando v. Amirtham Fernando*(3) the learned Judge in the chapter entitled "Powers and Duties of Officers" finds no mention of private persons, which is not surprising. It seems at least questionable whether, if the Abkari Act was intended to restrict the normal function of private persons, it would not have done so in terms.

I do not find therefore that the Magistrate wrongfully took cognizance of this offence, and dismiss the petition.

K.N.G.

(1) (1922) 44 M.L.J. 231.

(2) (1924) 48 M.L.J. 805.

(3) (1928) I.L.R. 52 Mad. 613.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson.

1931,
February 10.

IN RE KONDA SATYAVATAMMA (ACCUSED), PETITIONER.*

Indian Penal Code (Act XLV of 1860), sec. 117—Abetment by more than ten persons of an offence—Madras Salt Act (IV of 1889), sec. 74, if supersedes section 117 of the Indian Penal Code—Punishment for abetment.

The gravamen of a charge under section 117 of the Indian Penal Code is the abetment itself, the instigation to general lawlessness, not the particular offence of which the commission is instigated.

Section 74 of the Madras Salt Act refers to the direct abetment of particular acts and does not embrace the offence under section 117 of the Penal Code; and any person instigating more than ten persons to commit an offence under the Madras Salt Act is liable to imprisonment for three years under section 117 of the Indian Penal Code.

PETITIONS 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 judgment of the Court of Sub-divisional Magistrate of Guntur, dated 23rd September 1930, in Criminal Appeal No. 23 of 1930.

K. S. Jayarama Ayyar and B. T. M. Raghavachari for petitioner.

Advocate-General (A. Krishnaswami Ayyar) and Public Prosecutor (L. H. Bewes) for the Crown.

Cur. adv. vult.

JUDGMENT.

The petitioner was sentenced to six months' rigorous imprisonment and Rs. 50 fine under section 117, Indian Penal Code.

* Criminal Revision Case No. 730 of 1930.

In the trial Court she did not cross-examine the prosecution witness before the charge, and after framing it the Court omitted to give her further opportunity, hence the case has been remanded for a retrial. She now raises a point that was not taken at the trial. In such circumstances it is doubtful if this Court should interfere in revision. To allow parties in petty magisterial cases to reserve their defence till they can bring it up to the High Court upon revision would be to turn topsyturvy the judicial system of this Presidency, and, apart from other considerations, this Court is not so fully abreast of its ordinary work as to afford the time for trying the cases of second-class magistrates.

However the case has been admitted and argued and therefore I will not dismiss it on this short but cogent point.

It is argued on behalf of the petitioner that section 117, Indian Penal Code, has been superseded by section 74 of the Madras Salt Act, and any person instigating more than ten persons to commit an offence under the Salt Act is not liable for three years' imprisonment under section 117 but only to six months under section 74. The argument proceeds, as I think it is bound to proceed, to the length of saying that the Local Legislature deliberately reduced the sentence in the case of abetment of offences against the Salt Act, in the view that such abetment was less criminal than abetment of other offences. It seems to be a fantastical notion. The gravamen of a charge under section 117 is the abetment itself, the instigation to general lawlessness, not the particular offence of which the commission is instigated. The illustration to the section is an example of what those who consider themselves entitled to discriminate between offences would call a minor offence, the attack by the adherents

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of one religious sect upon those of another, for which of course, all the time-honoured excuses for law breaking and anarchy—conscience, pure motive, and disinterested zeal—can be requisitioned. Nevertheless the section makes the public instigation to such an attack punishable by three years' imprisonment, and it is impossible to believe that any Government ever thought that the public instigation to offences against the Salt Law should be punishable with less. Section 74 of the Madras Salt Act no doubt runs, "Any person who within the meaning of the Indian Penal Code abets the commission of offences under the Act," but that obviously refers to the direct abetment of particular acts; and to try and make it embrace the offence under section 117, Indian Penal Code, is merely a legal quibble. Section 117, Indian Penal Code, was never contemplated by the Local Government when it enacted the Salt Act. *Emperor v. Ganesh*(1) is to the same effect.

The petition is dismissed.

K.N.G.

(1) (1980) 88 Bom. L.R. 56.

PRIVY COUNCIL.

LOUIS DREYFUS AND COMPANY, APPELLANTS,

v.

ARUNACHALA AYYA, RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Arbitration—Award—Misconduct—Taking legal advice—Privy Council practice—Costs—Unexplained delay—Indian Arbitration Act (IX of 1899), sec. 14.

J.C.*
1931,
July 23.

An arbitration took place under a submission in a contract of April 25, 1918, upon a claim for damages by the buyers of goods against the seller. The arbitrators having disagreed, the matter was referred to an umpire under the arbitration clause. The seller contended, *inter alia*, that the contract of April 25, 1918, had been superseded by one of November 3, 1918, which contained no arbitration clause. The umpire awarded the buyers damages. He prefaced his award with the words: "After taking independent legal opinion, having decided that the alleged agreement, dated November 3, 1918, at no time constituted a concluded contract and did not therefore override the agreement of April 25, 1918." The seller moved to set aside the award on the grounds that the umpire had refused to state a special case, and had taken legal advice without notice to the seller. Upon the latter point the award itself was the only evidence.

Held, that the award was valid, as its language indicated merely that the umpire took advice upon the general rules of law bearing upon the case, and did not mean that he had left to an outsider the burden of deciding any issue instead of exercising his own judgment thereon; the fact that the umpire, in the exercise of his discretion, had refused to state a case did not strengthen the contention that there had been misconduct.

Where there has been unexplained delay in proceedings, a successful appellant to the Privy Council may be refused costs.

APPEAL (No. 65 of 1930) from a decree of the High Court in its appellate jurisdiction (September 12, 1927)

* PRESENT:—Lord TOMLIN, Lord RUSSELL of Killowen, and Sir GEORGE LOWNDEN.

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reversing a decree of the Court in its original jurisdiction (May 6, 1926) and setting aside the award of an umpire, dated February 19, 1923, in an arbitration between the parties.

The facts giving rise to the appeal appear from the judgment of the Judicial Committee.

The High Court (RAMESAM and CORNISH JJ.), reversing the decision of WALLER J., had set aside the award in question upon the grounds (1) that there was not a valid agreement between the parties to submit the disputes between them to arbitration, (2) that the umpire had misconducted himself, within the meaning of the Indian Arbitration Act, 1899, section 14, in that before making his award he had taken legal advice without the consent or knowledge of the parties.

Sir Thomas Inskip K.C. and *Van den Berg* for appellants.—The fact that the umpire took legal advice as to the principles of law applicable was not in itself misconduct. It does not appear that he subordinated his mind to the advice received, so as to delegate the duty of deciding between the parties; that being so, there was no misconduct justifying setting aside the award: *Rolland v. Cassidy*(1), *Eads v. Williams*(2), *Emery v. Wase*(3), *Anderson v. Wallace*(4), *Ellison v. Bray*(5). The case first mentioned was followed by the Board in *Buta v. Lahore Municipal Committee*(6). The appellate Court relied upon *Dobson v. Groves*(7), but in the light of the above cases the language there used must be read in reference to the facts of the case, not in its widest sense. Even where there has been technical misconduct an award in a commercial arbitration should not be set aside unless it appears that injustice has been done; that is not here the case: *Olympia Oil & Cake Co., In re*(8). Having regard to the previous decision of the High Court, and its affirmance by the Privy Council, that there was a valid submission to arbitration was

(1) (1888) 13 App. Cas. 770, 776.

(3) (1801) 5 Ves. 846.

(5) (1864) 9 L.T. 730.

(7) (1844) 6 Q.B. 637, 647.

(2) (1854) 4 De. G.M. & G. 674.

(4) (1835) 3 C. & F. 28, 41, 43 (H.L.).

(6) (1902) I.L.R. 29 Calc. 854;
L.R. 29 I.A. 168.

(8) [1918] 2 K.B. 771, 778.

res judicata. The award now in question was to the same effect as that which was so affirmed. Further, the contracts themselves embodied the arbitration clause by reference.

Dunne K.C. and *Horace Douglas* for respondent.—The question whether the submission to arbitration applied to the dispute was a vital one. The umpire was asked to refer that question of law to the Court and had power to do so under section 10 of the Act. It was misconduct to refuse to do so and then take legal advice upon the question. The High Court rightly applied the judgment of Lord DENMAN in *Dobson v. Groves*(1), and set aside the award. In the circumstances of the case there was no *res judicata* affecting the respondent.

Sir Thomas Inskip K.C. replied.

The JUDGMENT of their Lordships was delivered by Lord TOMLIN. Lord TOMLIN.—The question in dispute in this appeal is whether the award of an umpire, dated February 19, 1923, should be set aside or not.

WALLER J. sitting on the Original Side of the High Court of Judicature at Madras on May 6, 1926, dismissed an application of the present respondent to set it aside. By a decree, dated September 12, 1927, of the High Court (Appellate Jurisdiction) the decision of WALLER J. was reversed and the award was set aside. The appellants thereupon appealed to His Majesty in Council to have the judgment of WALLER J. restored.

The appellants are seed and grain merchants carrying on business in Karachi.

On April 25, 1918, an agreement in writing was entered into between the appellants of the first part and R. K. Rajagopala Ayyar (since deceased) and the respondent of the second part. At that time Rajagopala and the respondent were carrying on business together in partnership as Messrs. R. K. Rajagopala Ayyar and Brother, and Rajagopala was managing the affairs of the firm.

(1) (1844) 6 Q.B. 637.

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The agreement provided for the parties of the second part acting as *dubashes* to the appellants. It contained, *inter alia*, the following clauses:—

1. The merchants shall be at liberty to make offers for the purchase from the *dubashes* of groundnuts, castor-seed and any other article required by them for export from Madras, Pondicherry, Cuddalore and Negapatam (hereinafter referred to as "the said merchandise"), and the *dubashes* shall be at liberty to accept such offers, provided that at the time of any such acceptance the quantity of the said merchandise required by the merchants shall be under offer to the *dubashes*, as to which the *dubashes* shall furnish, if required, evidence satisfactory to the merchants. Failure to furnish such evidence on demand shall entitle the merchants to cancel the contract with the *dubashes* for the purchase of the said merchandise.

2. Every contract resulting from an acceptance by the *dubashes* of an offer made by the merchants under clause 1 hereof shall be a contract for the delivery by the *dubashes* of the said merchandise free on board at Madras or Pondicherry or Cuddalore or Negapatam, as specified at the time by the merchants, and shall be reduced into writing, and signed by the *dubashes*, and shall provide that the analysis and quality of the said merchandise, the subject of the said contract, shall correspond to the analysis and quality required and stipulated by the merchants. Failure by the *dubashes* to sign on demand such written contract as aforesaid shall entitle the merchants to cancel the contract.

Clause 12 of the agreement provided for a deposit of Rs. 20,000 being made by the *dubashes* with the appellants, and under clause 14 the agreement was to remain in force for one year from April 25, 1918, unless previously determined under a power thereby conferred on the appellants.

The agreement also contained an arbitration clause in the following terms:—

15. If any question or difference shall arise between the parties hereto touching these presents or the constructions thereof or the rights, duties or obligations of any person hereunder, or as to any other matter in anywise arising out of or connected

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with the subject-matter of these presents, the same shall be referred to two arbitrators, being European merchants, and members of the Madras Chamber of Commerce, one to be nominated by each party to the reference. If either party shall refuse or neglect to appoint an arbitrator within seven days after the one party shall have appointed an arbitrator and served a written notice upon the other party requiring him to appoint an arbitrator, then upon such failure the party making the request and having himself appointed an arbitrator, may appoint another arbitrator to act on behalf of the party so failing to appoint, and the arbitrator so appointed may proceed and act in all respects as if he had been appointed by the person failing to make such appointment. The arbitrators shall, within three days after their appointment and before entering upon the business of the said reference, appoint an umpire, in writing, to whom the matters in dispute shall be referred if the arbitrators disagree, and if they fail to appoint an umpire within the said period, then the Chairman or the Acting Chairman for the time being of the Madras Chamber of Commerce shall appoint the said umpire. The arbitrators and umpire acting under these presents shall have all the powers conferred by the Indian Arbitration Act, 1899, or any statutory modification thereof for the time being in force, and these presents shall be deemed to be a submission to arbitration within the provisions of the said Act.

The deposit of rupees twenty thousand referred to in clause 12 of the agreement was duly paid, and under the terms of the agreement a number of contracts were made between the appellants and the *dubashes*, including four contracts in August, 1918, for the sale by the *dubashes* to the appellants of goods for delivery at various dates between September, 1918, and February, 1919. Each of these four contracts contained the words "Conditions as per agreement with you" (i.e., the appellants) "dated the 25th April, 1918."

In their Lordships' judgment, the combined effect of the agreement of April 25, 1918, and the four contracts was to import into each of the four contracts a provision for arbitration in the terms of clause 15 of the agreement of April 25, 1918.

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Shortly after the contracts of August had been made, differences arose between the respondent and his partner Rajagopala, and the firm found itself unable to deliver punctually the goods agreed to be sold under the several contracts entered into between the firm and the appellants.

Accordingly on September 25, 1918, the respondent wrote a letter to the appellants, suggesting modifications of the subsisting arrangements, with the result that on November 3, 1918, a document was signed by the appellants, the respondent, and certain sureties and one Sundaresa. This document was not signed by Rajagopala Ayyar, who was ill and died a day or two later.

This document was in the following terms :—

1. The difference in price due to the firm for September contracts as per their two bills to Messrs. R.K.R., Rs. 20 to be paid in cash.
2. All contracts outstanding to be extended up to February, 1919.
3. Messrs. C. K. Narayana Ayyar & Sons and S. Kuppuswami Ayyar stand sureties for the due fulfilment of all outstanding contracts, each agreeing to deliver one-half of the above at the respective contracted rates at the aforesaid time.
4. The contract for 500 tons at Rs. 38 due October to be cancelled by the firm.
5. The *dubashy* to go in future under the name of "Arunachala Ayya Sundaresa Ayyar".
6. All sales made to the firm to be confirmed especially by Mr. Sundaresa Ayyar.

An amount of Rs. 50,000 to be deposited with the firm by the aforesaid *dubashes* as per the new agreement.

In their Lordships' opinion, the effect of this document is plain and may be stated as follows :—

Certain moneys due to the appellants under subsisting contracts were to be paid in cash. One outstanding contract, not being one of the four August contracts,

was to be cancelled. Time for delivery under all outstanding contracts, including the four August contracts, was to be extended to February 1919. Two sureties were to guarantee the performance of all outstanding contracts. Sundaresa Ayyar was to take Rajagopala's place as one of the *dubashes* in respect of future contracts, and the deposit was to be increased to Rs. 50,000. There was nothing in this agreement to free the firm of R. K. Rajagopala Ayyar and Brother or the respondent from the submissions to arbitration contained in the four August contracts. These contracts remained unaffected except that the time for delivery was extended.

The deliveries under the four August contracts were not in fact made within the extended time, and on March 8, 1919, the appellants wrote to the *dubashes* firm and to the respondent calling attention to the default, claiming damages, and asking to have the matter settled by arbitration.

The respondent in his answer on November 14, 1919, did not repudiate the August contracts or suggest that there was no submission to arbitration, but took the line that there had been no default.

Apparently the appellants did nothing further until June 14, 1920, when they again wrote to Messrs. R. K. Rajagopala Ayyar and Brother and the respondent a letter claiming Rs. 1,34,053-9-6 by way of damages in respect of the four August contracts, and stating that, failing a settlement, they should refer the matter to arbitration under clause 15 of the agreement of April 25, 1918.

On September 18, 1920, no arbitrator having been nominated on the respondent's side, the appellants appointed two arbitrators.

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On January 26, 1921, the arbitrators affected to enlarge the time for making their award until February 28, 1921.

This extension was undoubtedly made too late, as the original time for making the award had already expired.

The arbitrators disagreed and appointed Mr. Chettle to be umpire.

Mr. Chettle made his award on February 21, 1921, and awarded that the respondent and his firm should pay the appellants Rs. 1,34,053-9-6, with interest at six per cent. from February 28, 1919, and costs.

Neither the respondent nor his firm was represented in the arbitration or took any part in the proceedings.

On August 10, 1921, a motion was launched by the respondent to have the award of Mr. Chettle set aside. In his affidavit in support of the motion the respondent alleged, among other reasons for setting the award aside, that the effect of the document of November 3, 1918, which he said was a concluded agreement, was to override the agreement of April 25, 1918, and thus to eliminate the submission to arbitration contained in that document. He did not repudiate the agreement of April 25, 1918, or contend that he was not bound by the August contracts.

On September 6, 1921, PHILLIPS J. set the award aside. The learned Judge held that the award was bad because the affected extension of time for making the award was ineffectual, and because the umpire did not send the respondent any notice of his proceedings. While expressing his inclination to the view that the document of November 3, 1918, did not wholly supersede the agreement of April 25, 1918, he held that it was not necessary for him to decide this point.

The appellants appealed, and on July 20, 1922, SCHWABE C.J. and WALLACE J. made an order setting aside the award, but remitting the matter back to the umpire.

The learned appellate Judges held that the award was bad on the grounds on which PHILLIPS J. had based himself, but they also held that the document of November 3, 1918, had not wholly superseded the agreement of April 25, 1918. It is plain that they remitted the matter upon the basis of a determination that there was in existence a submission to arbitration binding upon the respondent.

Subsequently the respondent appealed to His Majesty in Council against the order of July 20, 1922, but this appeal was on December 8, 1924, dismissed because the respondent did not appear to support it.

In the meantime the respondent, by way of counterblast to the arbitration, launched a suit against the appellants for damages under the document of November 3, 1918, in respect of transactions subsequent to that agreement. This suit was dismissed on April 12, 1923. The trial Judge, COURTS TROTTER J. in the course of his judgment expressed the view that the document of November 3, 1918, superseded the agreement of April 25, 1918. The respondent appealed but without success.

After the order of July 20, 1922, had been made, it was found that Mr. Chettle was no longer available to act as umpire, and ultimately by an order of the Court Mr. Rae was appointed umpire in his place.

The proceedings under the remit pursuant to the order of July 20, 1922, were therefore held before Mr. Rae and the respondent was represented thereat.

On February 19, 1923, Mr. Rae awarded that Messrs. R. K. Rajagopala Ayyar and Brother (of which

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firm the respondent was the sole surviving partner) should pay to the appellants the sum of Rs. 1,34,053-9-6, with interest thereon at six per cent. from February 28, 1919, to payment, and also certain costs.

The award was therefore identical in effect with that made by Mr. Chettle.

Mr. Rae prefaced his award by stating that it was made

“after taking independent legal opinion having decided that the alleged agreement, dated 3rd November, 1918, at no time constituted a concluded contract and did not therefore override the agreement of the 25th April, 1918.”

As will hereafter appear, this preface formed the basis for an attack subsequently made upon the validity of Mr. Rae's award.

On February 23, 1923, the respondent gave notice of motion for an order that Mr. Rae's award be declared *ultra vires*, illegal, and not binding upon him, and that the award be set aside. This is the application which has led to the present appeal before their Lordships' Board.

In his affidavit in support of his motion the respondent for the first time set up, amongst other grounds for attacking the award, that the agreement of April 25, 1918, was made by his partner without his authority and that he was not bound by it. He also contended that the award was bad because the umpire had refused to state a special case and had taken legal advice without notice to him.

On April 30, 1925, over two years later, the motion to set aside Mr. Rae's award was heard by WALLER J. who gave his final judgment on May 6, 1926.

The learned Judge dismissed the motion with costs, holding, amongst other things, that the agreement of April 25, 1918, was operative and was binding on the

respondent, that the umpire had a discretion as to stating a special case, and that he did not do wrong in taking independent legal advice.

On July 19, 1926, the respondent gave notice of appeal. On September 12, 1927, the appellate side of the High Court allowed the appeal and set aside the award.

The Court held, *inter alia*, (1) that the decision of SCHWABE C.J. and WALLACE J. did not determine the question whether there was an agreement to submit to arbitration binding on the respondent; (2) that there was in fact no agreement to submit to arbitration binding on the respondent either because he was not bound by the agreement of April 25, 1918, or because, if he was so bound, such agreement was superseded by the document of November 3, 1918, which contained no arbitration clause; (3) that the umpire was not guilty of misconduct in refusing a special case; and (4) that he had been guilty of misconduct by taking independent legal advice.

The appellants now appeal to His Majesty in Council against the decision of September 12, 1927, contending, *inter alia*, that the question of the umpire's jurisdiction was *res judicata* between the parties having regard to the decision of SCHWABE C.J. and WALLACE J. of July 20, 1922, and the subsequent dismissal of the appeal from that decision to His Majesty in Council, and that the umpire was not guilty of misconduct.

The respondent on his part contends that he was not bound by the submission in the agreement of April 25, 1918, and that, if he was, that agreement was superseded by the document of November 3, 1918, that there is no *res judicata*, and that anyhow the award is bad because the umpire took independent advice after refusing to state a special case.

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It is remarkable that throughout this lengthy litigation no Court has in terms called attention to the fact that each of the four August contracts by direct reference to the agreement of April 25, 1918, embodied the arbitration clause and that the respondent never repudiated such contracts or suggested that he was not bound by them.

Their Lordships are of opinion that the respondent was in respect of each of the four August contracts bound by a submission to arbitration in the terms of clause 15 of the agreement of April 25, 1918, whether or not Rajagopala had originally authority to enter into that agreement so as to bind his partner.

In any case, their Lordships are of opinion that the question of the umpire's jurisdiction is *res judicata* between the parties. Under the order of July 20, 1922, the appeal from which to His Majesty in Council was dismissed, the matter was remitted to the umpire. This could have been done only upon the footing that the respondent was bound by a submission to arbitration. In their Lordships' judgment, the Court did in fact determine that the respondent was so bound, whatever may have been the reasons upon which that determination was based.

The award must therefore stand unless it can be shown that the umpire was guilty of misconduct.

The precise length to which an arbitrator may go in seeking outside advice upon matters of law may be difficult to prescribe in general terms. It is less difficult in a particular case to determine whether or not an arbitrator has gone further than is justifiable. Here, unless the language of the award is itself sufficient to fix the umpire with misconduct, the charge against him must fail.

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In their Lordships' judgment, the language of the award does no more than indicate that the umpire took advice upon the general rules of law bearing upon the case and does not mean that he left to an outsider the burden of deciding any issue in the case instead of exercising his own judgment thereon. The case against the umpire in this respect is not, in their Lordships' view, strengthened because the umpire in the exercise of his discretion refused to state a special case.

Their Lordships are therefore of opinion that the award is good and ought to stand.

Their Lordships cannot, however, part with this case without calling attention to the remarkable and unexplained delay which has occurred at various stages of its course. Lord BUCKMASTER, in delivering the judgment of their Lordships' Board in *Banga Chandra Dhur Biswas v. Jagat Kishore Chowdhuri*(1), indicated that in cases of unexplained delay costs might be refused.

Although in the present case their Lordships do not think fit to refuse costs to the appellants, they desire to re-affirm the views expressed by Lord BUCKMASTER in order that the penalty liable to be incurred by unexplained delay may be fully understood.

For the reasons which have been indicated their Lordships will humbly advise His Majesty that the appeal should be allowed and that the decree of the appellate side of the High Court of September 12, 1927, should be set aside and that the order of May 6, 1926, should be restored.

The appellants' costs here and on the appellate side of the High Court must be borne by the respondent.

Solicitors for appellants: *Burton, Yeates & Hart.*

Solicitor for respondent: *H. S. L. Polak.*

A.M.T.

(1) (1916) I.L.R. 44 Calc. 186, 200; L.R. 43 I.A. 249, 256.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice
Venkatasubba Rao.

1931,
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WARA PRASADA BAHADUR ZAMINDAR GARU
(FIRST RESPONDENT), PETITIONER,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,
REPRESENTED BY THE COLLECTOR OF KISTNA AT MASULI-
PATAM AND ANOTHER (APPELLANT AND SECOND RESPONDENT),
RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XLV, r. 4—Judgment in—Means judgment appealed against—Consolidation permissible when appellate judgment the same, though judgments in suits separate—Judgment when will be held to be the same within meaning of rule—Sec. 110 of Code of Civil Procedure—Subject-matter of appeal—Value of—Court-fee valuation given in plaint—Defendant adopting, as basis of his appeal—Effect—Plea by him subsequently that real value of property is less than court-fee valuation given in plaint—Maintainability of.

The word "judgment" in Order XLV, rule 4 of the Code of Civil Procedure means the judgment appealed against, and the provision of that rule applies to a case in which the suits were decided in the High Court by the same judgment, though they were not decided by the same judgment in the lower Court. *Deokinandan Prasad v. Narsing Raut*, (1921) 6 Pat. L.J. 97, approved.

Per RAMESAM J.—To determine whether so-called separate judgments are really the same within the meaning of the rule regard must be had to the spirit of the rule and not the letter. *Jivangiri v. Gajanan Narayan*, (1926) I.L.R. 50 Bom. 753, referred to.

Per VENKATASUBBA RAO J.—In a case to which Order XLV, rule 4 of the Code applies, the Court will, unless sufficient

grounds are shown, exercise its discretion in favour of the applicant.

Per RAMESAM J.—When the defendant adopts the plaintiff's court-fee valuation of the suit property for the purpose of choosing the forum for his appeal against the decree in the suit, he is estopped from thereafter contending that the real valuation is lower than the court-fee value given in the plaint. *Kristo Indro Saha v. Huromonee Dassee*, (1873) L.R. 1 I.A. 84, followed. *Kumar Basanta Kumar Roy v. The Secretary of State for India in Council*, (1910) 14 C.W.N. 872, referred to.

Per VENKATASUBBA RAO J.—*Kristo Indro Saha v. Huromonee Dassee* is not an authority for the position that the defendant is precluded, as a matter of law, from showing that the real value is different from the court-fee value. But, as the court-fee value is hardly, if ever, more than the real value, the previous conduct of the defendant in adopting the court-fee value becomes a strong piece of evidence to which the court attaches the utmost weight.

PETITIONS (Nos. 1338 and 1339 of 1929) praying that in the circumstances stated in the affidavit filed therewith the High Court may be pleased to grant leave to the petitioner therein to appeal to His Majesty in Council against the judgment and decrees of the High Court in Appeal Suits Nos. 244 and 245 of 1922 preferred against the decree of the Court of the Subordinate Judge of Bezwada in Original Suits Nos. 26 and 27 of 1920 respectively.—Civil Miscellaneous Petition No. 1340 of 1929.—Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to consolidate the aforesaid Civil Miscellaneous Petitions Nos. 1338 and 1339 of 1929 for purposes of pecuniary valuation and for purposes of hearing before His Majesty in Council.

When Civil Miscellaneous Petitions Nos. 1338 and 1339 of 1929 originally came on for hearing, the Court made an order calling for a report from the Subordinate Judge of Bezwada on the market-value of the lands forming the subject-matter of the suits, then, and at the

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time of the filing of the said suits in the said lower Court. The Subordinate Judge submitted a report to the effect that the then value of all the lands was Rs. 9,772-15-3 and that their value on the date of suit was Rs. 7,263-2-5. The petitions came on for final hearing after the return of the above report.

Advocate-General (A. Krishnaswami Ayyar) and P. Satyanarayana Rao for petitioner.—The Government accepted the plaintiff's valuation and appealed to the High Court on that basis. They are therefore estopped from questioning the same; see *Kristo Indro Saha v. Huromonee Dassee*(1), referred to and distinguished in *Mallapudi Venkatarayudu v. Mallina Venkanna*(2). For purposes of appeal to the Privy Council the suits will be consolidated; see Order XLV, rule 4 of the Code of Civil Procedure. The question in the two suits is one and the same and the judgment in them is a common judgment. The decree also involves indirectly interests of larger value than Rs. 10,000 within the meaning of section 110 of the Code. The main question in the suits is the construction of the permanent settlement between the zamindar and the Government. Other suits concerning the resumption of service inam lands in the plaintiff's zamindari are now pending in the High Court in 19 second appeals and the value of those cases, if added to the present, undoubtedly makes the subject-matter of the dispute much more than Rs. 10,000. The effect of the judgment in the present suits will be *res judicata* between the zamindar and the Government as regards the construction of the permanent settlement; see *Secretary of State v. Raja of Venkatagiri*(3) on appeal from *The Secretary of State for India v. Maharajah of Venkatagiri*(4), and *Radhakrishna Ayyar v. Sundaraswami*(5). As to the meaning of the word "indirectly" in section 110 of the Code, see *Mt. Dulhin Shyam Sunder Kuer v. Mt. Bibi Qasiman*(6) and *Subramania Ayyar v. Sellammal*(7).

The case would be different if the question arose between the zamindar and an inamdar claiming under the Government.

(1) (1878) L.R. 1 I.A. 84, 88.

(2) (1927) 104 I.C. 577; A.I.R. 1927 Mad. 862.

(3) (1921) I.L.R. 44 Mad. 864, 874 (P.C.).

(4) (1918) 81 M.L.J. 97, 116.

(5) (1922) I.L.R. 45 Mad. 475, 481 (P.C.).

(6) A.I.R. 1928 Pat. 191.

(7) (1915) I.L.R. 39 Mad. 843, 849.

Secretary of State for India in Council v. Subbarayudu(1) does not touch the present question. The matter is also one of public importance under section 109 (c) of the Code with regard to the nature of lakhiraj lands.

Government Pleader (P. Venkataramana Rao) and D. Venkataratnam for respondent.—Under section 110 of the Code, the value of the subject-matter of the suit and of the subject-matter in dispute on appeal to the Privy Council must both be Rs. 10,000 or upwards. Under Order XLV, rule 4, the suits must be disposed of by the same judgment.

[*P. Satyanarayana Rao* referred to *Deokinandan Prasad v. Narsing Raut*(2) for the position that "judgment" in Order XLV, rule 4, means only judgment in the appeal, and to *Jivangiri v. Gajanan Narayan*(3) for the position that a judgment may be the "same judgment" within the meaning of Order XLV, rule 4, though written separately.]

Consolidation under Order XLV, rule 4, is discretionary, and the party who asks for consolidation must show special circumstances. As to the argument of estoppel based on *Kristo Indro Saha v. Huromonee Dassee*(4), market-value is the thing to be considered. Court-fee value is not necessarily market-value. Hence, Government's acceptance of court-fee value does not preclude them from urging that the market-value is different; see *Mohun Lall Sookul v. Bebee Doss*(5) and *Mallapudi Venkatarayudu v. Mallina Venkanna*(6). As regards the word "indirectly" in section 110 of the Code, there can be no question of *res judicata*, because the parties will be different. Further, the questions decided in the present suits are (1) whether, according to the true construction of section 4 of the Permanent Settlement Regulation, inams such as the suit ones are excluded from the Permanent Settlement and (2) whether apart from that section those inams are excluded. No question of the construction of any sanad is decided.

Advocate-General in reply.—[Court-fee value is not market-value. Therefore the rule of estoppel in *Kristo Indro Saha v. Huromonee Dassee*(4) will not apply—VENKATASUBBA RAO J.]

(1) (1929) 57 M.L.J. 477.

(2) (1921) 6 Pat. L.J. 97.

(3) (1926) I.L.R. 50 Bom. 753.

(4) (1878) L.R. 1 I.A. 84, 88.

(5) (1860) 7 M.I.A. 428.

(6) (1927) 104 I.C. 577; A.I.R. 1927 Mad. 862.

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Fifteen times the cost is not a mere notional value. The Order of the Judicial Committee then regulating appeals to the Judicial Committee is set out in *Sreemutty Rane Surnomoyee v. Maharajah Sutteeschunder Roy*(1). The expression in that Order is "the value of the matter in dispute in the appeal". Section 110 of the present Code does not use the word "market-value". *Prima facie* the value of a thing is its market-value. Fifteen times the profits is *prima facie* market-value. The enactment which the Privy Council considered in *Kristo Indro Saha v. Huromonee Dassee*(2) employed the same language as that to be found in section 110 of the present Code. The Court-Fees Act was in force then and its language was the same. The expression used in *Mohun Lall Sookul v. Bebee Doss*(3) is "actual value of property sued for". The distinction between the court-fee valuation and the valuation for purposes of appeal to the Privy Council was not presented to the Privy Council; see *Kristo Indro Saha v. Huromonee Dassee* (2). MARKBY J., in the High Court, drew a distinction between institution fee and valuation for purposes of appeal. A party is not precluded by the court-fee valuation from showing the real value; see *Baboo Lekraj Roy v. Kanhya Singh*(4) following *Mohun Lall Sookul v. Bebee Doss*(3). *Kumar Basanta Kumar Roy v. The Secretary of State for India in Council*(5) considers the effect of the two cases in L.R. 1 Indian Appeals. The effect is stated to be that, while the market-value may be shown to be more than the court-fee valuation, it cannot be shown to be less. The plaintiff may show that the market-value is more than the court-fee valuation, but the defendant, who has adopted the court-fee valuation for purposes of getting a right of appeal, cannot show it to be less than the court-fee valuation; see *Kumar Basanta Kumar Roy v. The Secretary of State for India in Council*(5) at page 873. Neither *Rattayya v. Brahmayya*(6) nor *Mallapudi Venkatarayudu v. Mallina Venkanna*(7), which explains the principle of the decision in *Kristo Indro Saha v. Huromonee Dassee*(2), says that the court-fee valuation can never be the real value of the property. *Kristo Indro Saha v. Huromonee Dassee* (2) is a decision not on the market-value clause in the Court-Fees Act but on the fifteen times the profits clause. The idea of the Court-Fees Act is to get at the value of the land. All

(1) (1860) 8 M.I.A. 165.

(3) (1860) 7 M.I.A. 428.

(5) (1910) 14 C.W.N. 872.

(7) (1927) 104 I.C. 577; A.I.R. 1927 Mad. 862.

(2) (1873) L.R. 1 I.A. 84.

(4) (1874) L.R. 1 I.A. 317, 319.

(6) (1925) 49 M.L.J. 309.

the provisions of the Act purport to fix court-fee with reference to the value of the matter in dispute. The method adopted is to get at what may be called a minimum value for fiscal purposes. When that is not found to be satisfactory, the real value is stated to be the market-value. The principle of the decision in *Kristo Indro Saha v. Huromonee Dassee*(1) is that, when the plaintiff has given the minimum value and the defendant has adopted it for purposes of his appeal, it is not open to him to show that the minimum value is less, though the plaintiff may show that the real value is more than the minimum value.

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JUDGMENT.

RAMESAM J.—Of the above petitions Civil Miscellaneous Petitions Nos. 1338 and 1339 of 1929 are applications for leave to appeal to the Privy Council against our judgments and decrees in Appeal Suits Nos. 244 and 245 of 1922 respectively. Civil Miscellaneous Petition No. 1340 of 1929 is an application under Order XLV, rule 4 of the Code of Civil Procedure for a consolidation of the other petitions for purposes of pecuniary valuation and hearing. It is convenient to take up the third petition in the first instance, as the disposal of the other two petitions depends upon the disposal of this to a certain extent. Under Order XLV, rule 4 of the Code of Civil Procedure, we have power to consolidate the two suits for purposes of valuation, if they are decided by the same judgment. In the High Court they are undoubtedly decided by the same judgment, but it is objected by the learned Government Pleader that they were not decided by the same judgment in the lower Court and therefore, Order XLV, rule 4, does not apply. But in the first place I think the word "judgment" in Order XLV, rule 4 means the judgment appealed against and has nothing to do with the judgments of the Courts below; vide *Deokinandan Prasad v. Narsing Raut*(2).

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(1) (1873) L.R. 1 I.A. 84.

(2) (1921) 6 Pat. L.J. 97.

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It is true that, if this condition is satisfied, we consolidate not merely the appeals before us but all the proceedings in the suits. Moreover a comparison of the so-called separate judgments of the first Court shows that the second judgment in Appeal Suit No. 245 is practically a copy of the first Court's judgment rewritten omitting a few sentences or paragraphs. Except that two sentences in the third sub-paragraph of paragraph 2 are omitted and paragraph 4 (the summary of the third defendant's written statement which is unnecessary for the other case) is also omitted, the judgment is identical up to paragraph 22. Paragraph 23 in the first case is not reproduced in the second case as it refers to a point which does not arise in the second case. The rest of the judgment is again identical. In a matter of this kind we think we should look to the spirit of the rule and not the letter. This is the view taken by the learned Judges of the Bombay High Court in *Jivangiri v. Gajanan Narayan*(1). I think that the judgments of the lower Court must be regarded as the same judgment and therefore the objection of the learned Government Pleader is disallowed. We are prepared to consolidate the value of the suits if it is of any use to the petitioner.

This leads us to the next question whether, even after the consolidation, the value of the two suits together exceeds Rs. 10,000. When these petitions came on for disposal before us last time, we called for a report from the Subordinate Judge of Bezwada as to the value of the lands now and at the time of the suits. In the view I now take, probably it would have been unnecessary to call for such a report as to the valuation of the lands at the time of the suits if an order

(1) (1926) I.L.R. 50 Bom. 752.

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was passed on the petition for consolidation. But, at that time, we passed no orders on the petition for consolidation. We simply said we would call for a report and dispose of the petition after the report was received. The report of the Subordinate Judge now is that the value of the lands in the first suit is Rs. 3,954 and in the second suit Rs. 5,868—omitting annas and pies. These values together with the value of the mesne profits claimed by the plaintiff prior to the plaint will certainly make the value Rs. 10,000. But the value of the two suits at the time of the suit does not amount to Rs. 10,000 according to his present report. In the first case he found the value to be Rs. 3,217 and in the second case he found it to be Rs. 4,085. These two values with the amount of mesne profits claimed do not bring the value up to Rs. 10,000. It is claimed by the learned Advocate-General appearing for the petitioner that it is not open to the respondent to go below the value given to these suits in the plaint, because he adopted those values for the purpose of choosing the forum for his appeal when he filed the appeals from the decision of the Subordinate Judge to the High Court. If the valuation of the two suits were less than Rs. 5,000, the Government's appeals would lie in the District Court of Kistna and not in the High Court. It is only because the value of each of the two suits was more than Rs. 5,000 that the appeals lay to the High Court. The Government did not object to the valuation of the plaint in the written statement; and adopting the value of the suits as valued by the plaint they filed appeals to the High Court. It is therefore contended by the learned Advocate-General that it is not open to them to say that the values were less. He relies on the decision of the Privy Council in *Kristo Indro Saha v. Huromonee*

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Dassee(1). The learned Government Pleader seeks to distinguish this case on the ground that the principle mentioned therein, namely, that the opposite party when adopting the plaintiff's valuation cannot reprobate it afterwards, applies only where the valuation of the plaint was a valuation based on the market-value and not under the rules mentioned in the Court-Fees Act. The decision in *Kristo Indro Saha v. Huromonee Dassee*(1) was followed by us in *Rattayya v. Brahmayya*(2) and also in *Mallapudi Venkata-rayudu v. Mallina Venkanna*(3). But these decisions do not help us to decide the distinction now drawn by the learned Government Pleader. This principle was applied by Sir LAWRENCE JENKINS C.J. in *Kumar Basanta Kumar Roy v. The Secretary of State for India in Council*(4). The learned Advocate-General points out in reply to the Government Pleader that in *Kristo Indro Saha v. Huromonee Dassee*(1) the valuation made by the plaintiff which the defendant had adopted for his appeal and which afterwards was opposed by very strong affidavits was itself a court-fee valuation, fifteen times the profits of the land, and the Court-Fees Act then in force is the same as the Court-Fees Act in force now. But this aspect of the question was not discussed or dealt with by the learned Judges who disposed of the petition. But we cannot assume that the aspect was not present in the minds of their Lordships. About the same time the same Lordships of the Privy Council disposed of another case on a similar question in *Baboo Lekraj Roy v. Kanhya Singh*(5). The interval between the two judgments is five months. In the second case it was held that a party is not precluded from showing

(1) (1878) L.R. 1 I.A. 84.

(2) (1925) 49 M.L.J. 309.

(3) (1927) 104 I.C. 577; A.I.B. 1927 Mad. 862.

(4) (1910) 14 C.W.N. 872.

(5) (1874) L.R. 1 I.A. 817.

that the market-value is higher than the court-fee valuation which he adopts for purposes of stamp duty. These two cases together were discussed by JENKINS C.J. in the Calcutta case already referred to, *Kumar Basanta Kumar Roy v. The Secretary of State for India in Council*(1). At page 873 his Lordship observes:

"But this involves no conflict of opinion: indeed it may be pointed out that in both the cases I have mentioned the judgment was delivered by Sir JAMES COLVILLE and the members of the Board were the same. And the distinction is obvious for in the earlier case the endeavour was to lower the value of the subject-matter and this was made by one who had adopted it for the purpose of the previous appeal preferred by him so that the principle that a party cannot approbate and reprobate governed. In the other cases, which are collected in *Hari Mohan Misser v. Surendra Narain Singh*(2), the endeavour was to raise the value and this was made in circumstances where that principle could not be invoked. I therefore hold that we must take the value of the property as that laid in the plaint and adopted by the respondents for the purposes of the appeal to this Court."

As I understand his Lordship's judgment, the defendant who adopted the plaintiff's value cannot prevent the appellant from showing that the market-value is higher than the court-fee value, but, where the plaintiff wants to appeal and is content with the court-fee value, the defendant who adopted it for his own purposes cannot say the real valuation is lower than the court-fee value. The real reason behind this seems to be this, that the methods of valuation adopted in the Court-Fees Act of 1870 really represent the modes of estimating the minimum value of the lands. It is not that the valuation of the subject-matter as mentioned in section 7, clause 5, does not represent anything connected with the value of the land. After the lapse of 30 or 40 years the value of the lands has considerably increased. Now

(1) (1910) 14 C.W.N. 872.

(2) (1903) I.L.R. 31 Cal. 301.

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the lands are worth far more than the value adopted on the principles of the Court-Fees Act. That being the case, it is inconceivable in these days to get a case where the court-fee value should be more than the market-value. The court-fee value generally is far below the market-value. The Court-Fees Act is intended to give the benefit of a lower valuation for the purpose of court-fees. But where definite rules are not available the residuary clause refers the party to market-value. Seeing it is not human nature to value the subject-matter of a suit at a value higher than its real value, it is not easy to imagine that the plaintiff has over-valued the lands in this case solely by anticipating the difficulty which has now arisen. The presumption therefore in all such cases is that the court-fee value at least represents the minimum value. The presumption becomes very strong where the other party adopts it and uses it, because both parties would then have acquiesced in that value. It is said it is not open to one party afterwards to argue that the real value of the land is less than the court-fee value given by one and adopted by the other. If this is really the reason underlying the decision from *Kristo Indro Saha v. Huromonee Dassee*(1) onwards, it seems to me that we ought to adopt that the value of the suit lands is at least the court-fee value given in the plaints for purposes of court-fee. By so saying I do not mean that the market-value is not to be looked to. The rule laid down in such a manner only means this, that the court-fee value is the least possible market-value and it is safe to adopt it for our purposes. In this view it is unnecessary to go into the reasons given by the Subordinate Judge for his valuation of the lands at the time of the suit.

(1) (1878) L.B. 1 I.A. 84.

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It is also contended by the learned Advocate-General appearing for the petitioner that indirectly the question at issue involves the interests of larger value than Rs. 10,000. The substantial question of law in this case is what are the lands excluded from a zamindari at the time of the permanent settlement by reason of the terms in the Sudarwari Istimirari the terms of which are also embodied in the Permanent Regulation, section 4. The affidavit of the petitioner discloses that there are other suits concerning the resumption of service inam lands in the plaintiff's zamindari which are now pending in the High Court in nineteen second appeals and the value of these cases undoubtedly if added to the present makes the subject-matter of the dispute much more than Rs. 10,000. We explained the meaning of the word "indirectly" in section 110 in *Secretary of State for India in Council v. Subbarayudu*(1). Myself and KUMARASWAMI SASTRI J. also adopted that view in Civil Miscellaneous Petition No. 793 of 1929 cited in *Secretary of State for India in Council v. Subbarayudu*(1). There we said that the mere possibility of similar litigation in this Presidency will not entitle the petitioner in the case to add to the value unless the other litigation will be affected by the doctrine of *res judicata* in which case it helps. Adopting that test we think that this is another reason why the value of these petitions must be held to be more than Rs. 10,000. For all these reasons I would grant leave. Consolidation of the appeals is ordered.

VENKATASUBBA RAO J.—The first question is, can the suits be consolidated? That depends upon the meaning of the expression "the same judgment" in Order XLV, rule 4 of the Code of Civil Procedure. That order deals with appeals to the King in Council. The judgment referred to in that order must, therefore, be the

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(1) (1929) 57 M.L.J. 477.

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judgment of the High Court—that being the one appealed against. In this case the High Court disposed of the suits by a single judgment. The provision therefore applies.

Next, once an order is made under that rule, it relates back to the suits from their very start. What is contemplated is the consolidating of the suits and not of the appeals. The test is, after such consolidation, is the subject-matter of the suits and similarly the subject-matter in dispute on appeal of the requisite value under section 110 of the Code of Civil Procedure? The contention that Order XLV, rule 4, does not apply, therefore, fails.

Now that we hold that the provision applies, is there any ground for our refusing to make the order? The intention of the rule is to save time and expense. Unless sufficient grounds are shown, the Court would exercise its discretion in favour of the applicant.

The second question that is raised is one of valuation. According to the report of the lower Court, the value of the subject-matter of the suits is less than Rs. 10,000. But it is argued that the defendant having adopted the valuation given in the plaint, he cannot now be permitted to show that it is wrong. For this position, the applicant relies upon *Kristo Indro Saha v. Huromonee Dassee*(1). That case applies the doctrine of approbate and reprobate. But what is it then that the defendant cannot be allowed to show? That the plaint valuation is wrong; for that alone he can be deemed to have adopted by his conduct. But the value fixed in the plaint is not synonymous with the market-value. Under section 110, what we are concerned with is the market or real, as distinguished from the court-fee,

(1) (1878) L.R. 1 I.A. 84.

value; see *Baboo Lekraj Roy v. Kanhya Singh*(1) and *Mohun Lall Sookul v. Bebee Doss*(2). In *Kristo Indro Saha v. Huromonee Dassee*(3), the case above quoted, it was assumed, the point not having been taken, that the two values were identical. In my opinion, that case, therefore, is not an authority for the position that the defendant is precluded, as a matter of law, from showing that the real value is different from the court-fee value.

But I agree with my learned brother that the court-fee value is hardly, if ever, more than the real value. In that sense, the previous conduct of the defendant becomes relevant. In this case, the court-fee value (i.e., the value fixed in the plaint) is upwards of Rs. 10,000. I am therefore prepared to assume that the subject-matter of the suits is of the appealable market-value. This and nothing more is, in my opinion, the effect of *Kristo Indro Saha v. Huromonee Dassee*(3). The conduct of the defendant thus becomes a strong piece of evidence to which the Court attaches the utmost weight. The first part of section 110 accordingly applies.

As regards the second part of that section, I have nothing to add to what my learned brother has stated.

In the result, I agree in the order proposed by him.

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(1) (1874) L.R. 1 I.A. 317.

(2) (1860) 7 M.I.A. 428.

(3) (1878) L.R. 1 I.A. 84.

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APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

G. GURUMURTHI AYYAR (RECEIVER-RESPONDENT),
APPELLANT,

v.

RAMASWAMI CHETTIAR (FIRST PLAINTIFF-PETITIONER),
RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. XL, r. 4—Receiver—Wilful default or gross negligence of—Loss caused to estate by—Order for payment by receiver of amount of, and directing, on default, realization of amount by plaintiff from property given by receiver as security—Order made under O. XL, r. 4 is—Appeal from, lies, under O. XLIII, r. 1 (s)—Arrest or imprisonment of receiver—Order for payment of money which can be enforced by—Court cannot pass under O. XL, r. 4—Gross negligence of receiver in not applying for attachment of property of judgment-debtor in execution of decree—Allegation of—Onus of proof as to—Conditional order against receiver directing him to pay amount due from debtor to estate if it is not recovered from him in further proceedings—Validity of.

A suit, in which a receiver was appointed, was compromised, and the receiver's appointment was terminated. After that the plaintiff in the suit made an application alleging that the receiver had caused loss to the estate by his wilful default or gross negligence. The Court inquired into the matter, found that the receiver had caused loss to the estate to the extent of Rs. 500 and made an order that he should pay the said sum into Court and that, if he failed to do so, the plaintiff should realize the amount from property given by the receiver as security for the performance of his duties.

Held that the order was one made under rule 4 of Order XL of the Code of Civil Procedure and that an appeal lay against it under rule 1 (s) of Order XLIII of the Code.

* Appeal against Order No. 227 of 1930.

Per REILLY J.—Where a receiver is found to have occasioned loss to the estate by wilful default or gross negligence, the Court cannot, under rule 4 of Order XL, make an order against him for the payment of money which can be enforced by arrest or imprisonment. If it makes an order enforcing the recovery of compensation from the receiver by some illegal means, that cannot save its order from appeal.

Where, in a case in which a receiver had made several applications for the realization of the amount of a decree by the arrest of the judgment-debtor, it was alleged that he was guilty of gross neglect in not applying for the attachment of the judgment-debtor's property, held that the onus was on the party alleging such neglect to show that it would have been profitable to the estate for the receiver to have attached that property and not on the receiver to show that there was no property of the judgment-debtor available for the recovery of the decree-debt.

A conditional order directing the receiver to pay an amount due from a debtor to the estate, which it was alleged the receiver should have recovered, if the amount is not recovered in further proceedings from the debtor, is not legal.

Per ANANTAKRISHNA AYYAR J.—The right of appeal given under Order XLIII, rule 1 (s) is not confined to cases in which the Court directs the property of the receiver to be attached with a view to be sold.

APPEAL against the order of the Court of Subordinate Judge of Dindigul, dated 24th February 1930 and made in Interlocutory Application No. 149 of 1929 in Original Suit No. 10 of 1926.

T. M. Krishnaswami Ayyar and O. K. Viswanatha Ayyar for appellant.

K. Rajah Ayyar for respondent.

JUDGMENT.

REILLY J.—This appeal relates to the receivership of the property of one Nagappa Chetty, who died in February 1926. On his death one of his two widows adopted the first plaintiff in the suit and then with the first plaintiff instituted a suit against the other widow and

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the other widow's daughters for a declaration that the adoption of the first plaintiff was valid and alternatively for a partition of Nagappa Chetty's properties between her and the other widow. Pending that suit, a receiver of all Nagappa Chetty's estate was appointed. Eventually the suit was compromised in October 1928, and the receiver's appointment was terminated in April 1929. After that the first plaintiff made an application to the Subordinate Judge, alleging that the receiver was responsible for great loss to the estate. The Subordinate Judge held an inquiry into the matter and found that the receiver had caused loss to the estate to the extent of Rs. 500 by failing to execute in a proper way a decree for money, which Nagappa Chetty had obtained. On that he made an order that the receiver should pay into Court Rs. 500 on account of the loss which he had caused to the estate and that, if he failed to do so, the first plaintiff should realize the amount from property given by the receiver as security for the performance of his duties. Against that order the receiver appeals.

A preliminary objection has been raised that no appeal lies in this case. Under the Code of Civil Procedure as now framed an appeal is allowed against an order made under rule 4 of Order XL. But it is contended for the first plaintiff, the respondent here, that this order, made by the learned Subordinate Judge, was not one under that rule. Under that rule an order can be made that a receiver's property be attached and sold to recover compensation for loss caused by him; but in this case, as I have mentioned, the order was not for attachment of the receiver's property. It is therefore contended for the first plaintiff that this was not an order under rule 4 and so not an order against which any appeal is provided in the Code. In support of that contention three cases have been quoted; but before

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discussing them I think it will be better to set out the rules with which we are concerned. Rule 1 of Order XL provides for the appointment of receivers. Rule 2 provides for the fixing of their remuneration. Rule 3 prescribes their duties or some of their duties and lays down that every receiver shall furnish security to the extent the Court thinks fit, shall submit his accounts at such periods and in such form as the Court directs, shall pay the amount due from him as the Court directs and shall be responsible for any loss occasioned to the property by his wilful default or gross neglect. The provisions of that rule make it clear that a receiver has certain duties and that he is responsible to the Court for those duties. He cannot say that he is appointed to look after the interests of the parties and is responsible only to the parties. Then we come to rule 4, which provides for the enforcement of the receiver's duties and for making good any loss caused by his wilful default or gross negligence. There is an appeal provided against orders made under rule 4, but there is no appeal provided against any order made under rule 3, the explanation of that being that rule 3 does not provide for any order being made, as it is concerned with prescribing the receiver's duties. Now part of the ordinary duties of a receiver is to pay into Court or to some one else, as the Court may direct, amounts which he has in his hands or has collected. That would include periodical payments which he is directed to make or amounts which on investigation of his accounts he is directed to pay. Amounts which he is directed to pay in connection with his accounts may include amounts which those accounts show he has in his hands, amounts which those accounts show should have been in his hands and amounts which his accounts, if properly kept, would have shown he ought to have in

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his hands. The payment of those amounts into Court or into a bank or otherwise, as the Court directs, is all part of the ordinary duties of the receiver as laid down in rule 3, and he has to pay those amounts under the ordinary control of the Court, which can direct the general conduct and administration of the estate. The Code has provided no appeal against any of the ordinary directions which a Judge may give a receiver in the course of his administration and no appeal against an order that such amounts as he has or are found due from him on investigation of his accounts should be paid into Court or elsewhere. That is the stage, I think, to which the cases referred to by Mr. Rajah Ayyar in support of his preliminary objection really relate.

The Madras case he quoted is *Palaniappa Chetty v. Palaniappa Chetty*(1). In that case there had been, it appears, some investigation of the receiver's account by the Subordinate Judge; but the inquiry into the accounts had not been completed and the accounts had not been settled. But at that intermediate stage the Subordinate Judge found that in any case Rs. 31,000 was due from the receiver, and he said "Pay it into Court". The receiver, who was one of the parties to the suit, tried to appeal to this Court; but the learned Judges before whom the appeal came said that it was incompetent, that he had no right to appeal against such an order. That decision, if I may say so with respect, appears to me to be quite correct, and it also appears to me to be of no avail to the first plaintiff in this case. In another of the cases quoted, *Ganesh Lal v. Kumar Satya Narayan Singh*(2), a receiver's accounts were investigated, and the result was that he

(1) (1921) M.W.N. 806.

(2) (1919) 4 Pat. L.J. 636.

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was found liable to pay a certain amount to the estate. He was directed apparently to pay that amount into Court. The learned Judges held that there was no appeal against such an order, which they said did not amount to an order under rule 4 of Order XL. The other case quoted was *L. A. R. Arunachellam Chettiar v. U. Po Lu*(1). There a receiver was ordered to pay Rs. 4,760 after inquiry into his accounts. One of the parties to the suit appealed to the High Court, urging that the receiver ought to be ordered to pay a larger amount. The decision was that no appeal lay against that order. The learned Judges say that there was no order made "under the operative part of the section", by which I understand them to mean that no order was made under rule 4 enforcing the direction to the receiver. All those cases appear to me to relate only to the stage when in the ordinary course of administration or at the close of administration the Court in the exercise of its control over the receiver directs him to pay into Court or to somebody else an amount which it is found he has or ought to have in his hands. But a receiver may not obey that order either because he is dissatisfied with it or for some other reason. Then rule 4 provides that, if he does not do so, the order may be enforced by attaching his property and selling it if necessary. Against such an order of attachment the Code provides an appeal; and, if the receiver appealed against the order of attachment, no doubt he could then dispute the grounds upon which the order was made. But rule 4 also provides for quite a different case, the case with which we are concerned, where there is no money found due from the receiver on investigation of any accounts, but it is found that

(1) (1925) I.L.R. 3 Rang. 318.

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he has caused loss to the estate by wilful default or gross negligence. If the Court finds that, it is obvious from the rule that the amount of the loss must be estimated and fixed by the Court, and then the rule provides that that amount may be recovered by the attachment and sale of the receiver's property. Against that the Code provides an appeal. The cases quoted by Mr. Rajah Ayyar have no application to such orders as that; and it is not necessary for the appellant in this case to dispute the correctness of those decisions, which do not apply to him.

But it has been contended by Mr. Rajah Ayyar that, although, if it is found by the Court that a receiver has caused loss through wilful default or gross negligence and an order of attachment is made in consequence against him, he can appeal, yet, if it is found that he has caused loss in the same way but some other order is made against him, then he cannot appeal. But, when we examine the rule, can any other order be made against a receiver when it is found that he has occasioned loss to the estate by wilful default or gross negligence except an order of attachment? Mr. Rajah Ayyar contends that an order can be made like a decree in a money-suit that he is to pay a certain amount and that can be executed by arrest, by attachment or by sale exactly as a money-decree can be executed; and he suggests that that is the kind of order which the learned Subordinate Judge has made in this case, an order which he maintains he is entitled to enforce by arresting the receiver. I do not think it can be disputed that the rules imply not only that a receiver can be required to give security for the performance of his duties but that, if he occasions loss to the estate, the amount of compensation due from him can be recovered by proceeding against the security though

that is not explicitly provided for. But apart from proceeding against the security the only provision for taking action against him under the rules is that his property can be attached. We must not only notice that that is the only provision made; but we must notice that that provision is specifically inserted in the rules. Now, if, as Mr. Rajah Ayyar contends, such an order against a receiver could be executed like a money-decree by arrest and by attachment, what is the point, what is the use, of specifically providing that it can be executed by attachment? Surely this is a case where we must apply the ordinary rule of interpretation that the expression of one thing excludes others. The fact that the rule provides for the enforcement of such an order by attachment implies that that is the only way it is to be enforced, that arrest and imprisonment are not to be the methods of enforcement; and I have no doubt that that is the historical explanation of the rule having been made in the form in which it is. But Mr. Rajah Ayyar, as I understand him, went further and contended that, although, if the learned Judge had ordered the receiver's property to be attached in this case, there would have been an appeal, as he has not done so and has chosen to make some other order, then, whether that order is a legal order or not, there is no appeal against it. That appears to me, if I may say so, quite an unreasonable contention. Could it be contended that, if a Magistrate who had power to convict a man of theft and to sentence him to imprisonment, which conviction and sentence would be subject to appeal, chose instead of sentencing the man to imprisonment to sentence him to death, there would be no appeal against that sentence? If a Court acting within its jurisdiction in an appealable case makes a decision but embodies it in a decree or

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order which is illegal, is the case no longer subject to appeal? If that were so, many wrong decrees and orders would be saved from appeal merely because they were wrong. In the present case, if the learned Subordinate Judge has proceeded, as I think it is clear he must have proceeded, under rule 4 to decide that the receiver in this case has caused loss to the estate by gross negligence and then instead of ordering attachment, which he could legally do in such circumstances, has made an order enforcing the recovery of compensation from the receiver by some illegal means, that cannot save his order from appeal. I doubt myself whether the learned Subordinate Judge ever intended to make the order which Mr. Rajah Ayyar represents that he made, an order such as a money-decree which plaintiff could execute by arrest. The learned Subordinate Judge, as I understand his order, has found that the receiver ought to pay a certain amount of compensation for the result of his gross negligence, has given him an opportunity of paying it into Court, has ordered that, if he does not do so, the first plaintiff may proceed against the security and has kept his power to attach the receiver's property in reserve for use later if necessary. But, whether that was what the learned Subordinate Judge really intended or not, the fact that he has not made an explicit order for attachment in this case, but has worded his order differently cannot in my opinion make it immune from appeal. In my opinion the learned Judge's order is one under rule 4 of Order XL of the Code, and the preliminary objection that no appeal lies should be overruled.

I may add that, though I feel no doubt about the application of rule 4 of Order XL to this case, in my opinion the wording of the rule might well be improved by amendment in order to make clear exactly what

orders it covers and what orders are therefore subject to appeal under rule 1 (s) of Order XLIII.

The neglect of which the Subordinate Judge has found the receiver guilty in this case is that he has not recovered by execution Rs. 500 or thereabouts on a money-decree obtained by Nagappa Chetty in 1915 but still unsatisfied when he died in 1926. The debtor in that case was one Muthuswami Chetty. I cannot see in the learned Subordinate Judge's judgment any express finding that the estate has suffered loss to the extent of Rs. 500 through failure to execute that decree; but we must take it, I think, that that is implied in the judgment. The learned Subordinate Judge appears to accept the view that the debtor, Muthuswami Chetty, had land, which the receiver might have attached in order to obtain the balance due under that decree. The receiver's explanation is that from his inquiries he learnt that the land was so much encumbered that it was not worth while spending money on attaching it in execution of the decree. The learned Subordinate Judge appears to be of opinion that there was sufficient property of Muthuswami Chetty unencumbered which could have been attached for the recovery of what was due on the decree. But there again there is no explicit finding in his judgment. His view appears to me to be that the receiver has not shown that there was no property of Muthuswami Chetty available for the recovery of the decree-debt. This is not a case in which the receiver did nothing. The decree was nearly eleven years old when he was appointed. Before the twelve years rule could come into force he applied for execution and in all made seven applications for the arrest of the judgment-debtor. The charge against him is, not that he overlooked the decree or did nothing in regard to it at all, but that he failed to attach the judgment-debtor's

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property. If he is to be found guilty of gross neglect in that, in my opinion it should first be shown that it would have been profitable to the estate for him to have attached that property. But the learned Subordinate Judge appears to have looked at the matter the other way round and to have held that, unless the receiver could prove definitely that there was no property of Muthuswami Chetty available for the satisfaction of this decree, then he must be regarded as grossly negligent because he only applied for Muthuswami Chetty's arrest and not for the attachment of his property.

[His Lordship considered the evidence and came to the conclusion that the charge of gross negligence was not made out against the receiver, and that the order of the Subordinate Judge was wrong and proceeded:—]

I may mention that there is one other subsidiary matter in the appeal. It was alleged against the receiver that he should have recovered Rs. 93 from a certain lessee. The learned Subordinate Judge said that there was still time to sue that lessee and the first plaintiff could do it himself. But he made a conditional order that, if the first plaintiff did not recover that amount from the lessee, then the receiver should pay it. It has not yet been found that there has been any loss to the estate in connection with that amount. No one yet knows whether there is going to be any loss. If there were any loss, it would still have to be determined whether that loss was due to any neglect on the part of the receiver. The learned Subordinate Judge in my opinion was clearly not justified in making a hypothetical and conditional order that, if the amount was not recovered in further proceedings from the lessee, the receiver should pay it.

In my opinion this appeal should be allowed with costs in this Court and the order of the learned

Subordinate Judge, so far as it is against the receiver, should be set aside.

ANANTAKRISHNA AYYAR J.—I agree. On the merits I agree with my learned brother and have nothing to add.

On the preliminary objection taken by the learned Advocate for the respondent that no appeal lies in this case, I should like to add a few words of my own, having regard to the importance of the question. I think that the learned Advocate for the respondent is correct in his contention that no appeal should be taken to lie as a matter of course and that the appellant has to show in every case that a right of appeal has been expressly given to him by statute; see *Minakshi v. Subramanya*(1) and *Rangoon Botatoung Company, Ltd. v. The Collector, Rangoon*(2). The question then is whether Order XL, rule 4 read with Order XLIII, rule 1 (s), gives a right of appeal in a case like the present. Now, the learned Advocate for the respondent argued that it is only in cases where the Court directs the property of the receiver to be attached with a view to be sold, that a right of appeal is given under XLIII, rule 1 (s). I am unable to agree. The wording of Order XLIII, rule 1(s) is to this effect:—“An appeal shall lie from an order under rule 1 or rule 4 of Order XL.” If, therefore, the order in question is an order passed under Order XL, rule 4, then it follows that an appeal lies under the express provisions of Order XLIII, rule 1 (s) of the Code of Civil Procedure. The learned Advocate for the respondent argued that the present case comes under Order XL, rule 3. I am again unable to agree. Order XL, rule 3, only declares the duties of a receiver appointed by Court. A receiver in one sense would be

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a similar provision repeated in sub-section (4) of section 56 of the Provincial Insolvency Act of 1920. Of course, our decision should rest on the wordings of the section applicable to the case on hand; but, to understand and properly appreciate the meaning and effect of the words, it will be useful to remember the history of the matter. If we remember this aspect of the question, then, the last portion of rule 4 does not, in my view, give any trouble at all in considering the question of appeal. Otherwise, it is surely curious that the Legislature should provide for appeals only when the property of the receiver is attached to realize the amount found due by the receiver (when, it is not disputed, the question of liability, and the amount found due, could also be agitated), without providing for direct appeal from orders fixing such amounts. I am of opinion that one is not driven to such a conclusion, as I read the provisions of the Code.

Turning to the cases cited by the learned Advocate for the respondent, the first case that should receive our careful consideration is *Palaniappa Chetty v. Palaniappa Chetty*(1). But, on reading the judgment as a whole, I find that the learned Judges state there that the amount due from the receiver had not been finally fixed by the Court. In fact, I find that a lump sum of Rs. 36,100 is directed to be paid by the receiver into Court. It therefore seems to me that, reading the judgment as a whole, it is only a case of the Court issuing directions to the receiver—its officer—as to how the money in his hands should for the time being be safeguarded or disposed of. I do not understand that to be a case where the Court after going into the question determined the amount for which the receiver

(1) (1921) M.W.N. 806.

is liable. I receive support in my so understanding this judgment by what happened later on in the very case that was the subject of discussion in *Palaniappa Chetty v. Palaniappa Chetty*(1). That matter at a later stage came again before this Court in *Palaniappa Chetti v. Palaniappa Chetti*(2) and the learned Judges—KRISHNAN and VENKATASUBBA RAO JJ.—specifically state that they are not able to understand how the amount of Rs. 36,100 which the Court directed the receiver to pay into Court was arrived at (Counsel in that case were also unable to state how the amount was arrived at), evidently because the accounts of the receiver had not been duly investigated and the amount due by him had not been determined by the Court in accordance with Order XL, rule 4. As I read the judgment in *Palaniappa Chetty v. Palaniappa Chetty*(1) it is not a decision on this point. As regards *Ganesh Lal v. Kumar Satya Narayan Singh*(3) and *L. A. R. Arunachellam Chettiar v. U. Po Lu*(4), in both these cases the learned Judges seem to suggest that a right of suit would be available in such cases, and that the matter is not one for appeal, and that appeal is limited only to cases where consequential orders attaching property of the receiver are passed under Order XL, rule 4. I may state that, as remarked by the learned Judges who decided *Palaniappa Chetti v. Palaniappa Chetti*(2), the proper procedure to be followed in such cases is this. If, after asking parties interested to state the points in dispute and after giving them liberty to surcharge and falsify the accounts filed by the receiver, the Court comes to the conclusion that the matter involved is not intricate and that justice to the parties and the receiver could be meted out by having the questions decided in

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(1) (1921) M.W.N. 806.

(2) (1919) 4 Pat. L.J. 636.

(3) (1922) M.W.N. 741.

(4) (1925) I.L.R. 9 Rang. 318.

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those very proceedings, then the Court should appoint a commissioner to go into the matter after taking evidence and itself dispose of the disputes raised. Of course, evidence is taken and the questions are ultimately decided by the Court. To say that, after all this is done, a right of suit is still available to any aggrieved party or receiver seems to be really not in accordance with what the learned Judges have observed in *Palaniappa Chetti v. Palaniappa Chetti*(1). Further, a suit against a receiver requires the sanction of the Court. If the Court, after examination and investigation into the matter after all the evidence available has been let in, should come to definite conclusions on points in dispute, then—ordinarily—I cannot understand the Court giving leave to file a fresh suit relating to the same matter. The learned Judges in these cases, *Ganesh Lal v. Kumar Satya Narayan Singh*(2) and *L. A. R. Arunachellam Chettiar v. U. Po Lu*(3), were evidently dealing with cases where only directions were given to the receiver in the matter of the management of the estate, and not with cases where the Court had to decide the amount due from the receiver in respect of wilful default or gross negligence; and, in that view, no objection could be taken to the remarks of the learned Judges in those cases.

HEATON J. in *Shriniwas v. M. O. Waz*(4), observed, at page 103, that Order XL is “somewhat imperfectly framed”. With respect, I agree with that remark, and, as the matter is one which is likely to be of frequent occurrence, it is right that there should be no doubt on such matters. It is a question for consideration whether Order XL, rule 4 may not be amended by the addition of a clause providing that

(1) (1922) M.W.N. 741.

(3) (1925) I.L.R. 3 Rang. 318.

(2) (1919) 4 Pat. L.J. 636.

(4) (1920) I.L.R. 45 Bom. 99.

the Court may, after inquiry, pass orders determining the amount due from the receiver on examination of his accounts, and also similarly determine the amount of loss caused to the estate by the wilful default or gross negligence of the receiver.

I therefore hold that an appeal lies in this case, and accordingly overrule the preliminary objection.

I agree with my learned brother on the merits of the case, and also in the order as to costs which he proposes to pass in this case.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Anantakrishna Ayyar and
Mr. Justice Sundaram Chetti.

MADDUR MUNISWAMI CHETTY, PETITIONER,

v.

THE BOARD OF REVENUE, LAND REVENUE AND
SETTLEMENT, MADRAS, AND ANOTHER, RESPONDENTS.*

Madras Village Courts Act (I of 1889), sec. 8—Panchayat Court—Member of—Removal of, from membership of that Court—Collector's order directing—Order of Board of Revenue affirming—Judicial orders and not merely administrative orders—Writ of certiorari in respect of—Application to High Court for—Maintainability of—Interference in—Conditions—Delegation of jurisdiction vested in Collector under sec. 8—What amounts to—Legality of—Inquiry under sec. 8—Principles of “natural justice” applicable to.

Orders made by the Collector under section 8 of the Madras Village Courts Act, I of 1889, removing a member of a Panchayat Court from the membership of that Court and by the Board of Revenue affirming the Collector's order on appeal are judicial

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and not merely departmental or administrative orders, and an application to the High Court for relief by way of *certiorari* is maintainable in respect of such orders. Neither the use of the word "final" in section 8 of the Act nor the circumstance that the Collector deciding matters referred to in that section may not be "a Court" (as to which *quære*) precludes the High Court from entertaining the application if the other conditions are satisfied. But the High Court will not grant relief if it is not satisfied that the principles of natural justice have not been observed by the Collector and by the Board of Revenue.

The jurisdiction vested in the Collector by section 8 of the Madras Village Courts Act cannot be delegated by him. A mere direction by the Collector to a subordinate to give notice to the parties interested, to inquire into the matter, to record evidence, and submit the records to him, so that, with those materials, he may use his own discretion in the matter and exercise the jurisdiction specially vested in him by the section is not, however, a case of delegation.

There being no specific procedure prescribed by the Madras Village Courts Act in regard to an inquiry under section 8 thereof, the authority concerned will have to act according to the principles of "natural justice".

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* and remove the proceedings of the lower Courts to the High Court by calling for the entire records of the proceedings in Rt. No. 1081, dated 12th February 1930 of the Board of Revenue, Land Revenue and Settlement, Madras, and proceedings of the District Collector, Chittoor, D. Dis. No. 8595/29, dated 8th October 1929 and quash the same.

T. K. Srinivasathatha Chariar for petitioner.

Government Pleader (P. Venkataramana Rao) for respondents.

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The JUDGMENT of the Court was delivered by ANANTAKRISHNA AYYAR J.—This is an application filed by Maddur Muniswami Chetty praying that the High Court may be pleased to issue a writ of *certiorari* to the

Board of Revenue, Land Revenue and Settlement, Madras (1st respondent), and the Collector of Chittoor (2nd respondent), and to call for the entire records in connection with the proceedings taken against the petitioner which resulted in the removal of the petitioner from his position as a member of a Panchayat Court, and to quash the proceedings.

The petitioner was one of the members of the Panchayat Court of Tirupathi. The president of the Board sent up a complaint against the petitioner alleging that the petitioner was guilty of certain specific misconduct and that he was not a fit person to continue as a member of the Panchayat Court. The petitioner in his turn sent up a petition against the president of the said Court charging him with irregularity in the conduct of the proceedings, and other specific acts mentioned in that petition. The Collector of Chittoor directed the Tahsildar of Chandragiri Taluk to enquire into the matter of both the petitions after giving due notice to the petitioners. The Tahsildar, it is alleged, gave notice to the petitioner as well as the president in respect of both the above petitions, and after taking the depositions of several witnesses sent up the records to the Collector. The Collector passed orders on the 8th October 1929 to the following effect:—

"M.R.Ry. Maddur Muniswami Chetty Garu is a member of the Village Panchayat Court at Tirupathi. He is found to be quarrelsome within the Court during the conduct of its business. His membership of the Court is clearly prejudicial to its efficiency and reputation. He is therefore removed under section 8 of the Madras Village Courts Act, 1889, from the membership of the Court, with effect from the date of this Order."

The petitioner thereupon appealed to the Board of Revenue. The Board of Revenue dismissed the appeal by its resolution, dated 12th February 1930. The Board

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remarked that "it has perused the appeal petition and the connected records", and that it "considers that the appellant is unsuitable to be a member of the Panchayat Court." The appeal was accordingly dismissed. Muni-sami Chetty filed the present application to the High Court, and in the affidavit that he filed in support of his application he made allegations to the effect that no notice was given to him of the enquiry by the Tahsildar, that the enquiry was conducted in his absence, and that at one stage when he was present he was directed to stand outside the building while the Tahsildar was examining certain witnesses. In effect he complained that the enquiry by the Tahsildar did not comply with the principles of natural justice. The affidavit also went further and specifically stated that no formal charges were framed either by the Tahsildar or by the Collector, and that he had no opportunity of either explaining the evidence against him or to adduce evidence in his favour which he wanted to adduce. He also complained that his Counsel was not given an opportunity to argue his appeal before the Board. Having regard to the serious nature of the allegations made in the affidavit, we issued notice to both the respondents, namely—the Board of Revenue and the Collector. When this matter came before us on a former occasion, we had before us only the affidavit of the petitioner and also the affidavit filed by the Collector in answer to the allegations contained in the petitioner's affidavit. We thought that it would be more satisfactory if an affidavit from the Tahsildar who conducted the enquiries in this case under the orders of the District Collector could be filed, if available. Now we have got an affidavit sworn to by the Tahsildar, and the petitioner has filed his reply affidavit with reference to the Tahsildar's affidavit.

Before we go further into the merits of the controversy, we think it proper to consider one or two points of a preliminary nature raised in the affidavit filed by the Collector.

In paragraph 4 it is stated:—

"Neither the Collector nor the Board of Revenue when exercising the powers conferred on them by Madras Act I of 1889 are subordinate to the jurisdiction of this Honourable Court."

In paragraph 7 it is alleged as follows:—

"The action of the Collector in removing the petitioner from office, and of the Board of Revenue in affirming the said action, are departmental and administrative, in respect of which a writ of *certiorari* does not lie."

If the said orders are in essence departmental or administrative orders, it is clear that remedy by way of *certiorari* would not ordinarily be available to the petitioner. In this connection it is desirable to refer to the provisions of section 8 of the Madras Village Courts Act. Under that section,

"the Collector of the District may suspend or remove a village munsif or a member of the village court for incapacity, neglect of duty, misconduct, or other just and sufficient cause, and shall do so on a requisition passed by the District Judge for like cause appearing in the judicial proceedings of a village munsif."

The second paragraph of that section is also important. From every order of suspension or removal, an appeal may be made within three months to the Board of Revenue, if the order was passed by the Collector without orders from the District Judge, or to the High Court if passed upon such orders. The decision of the Board of Revenue or High Court as the case may be on all such appeals shall be final. Reading the provisions of section 8, it is clear that the order complained of in the present case could not be said to be a mere departmental or administrative order. A member of the

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Panchayat Court is not as such a departmental subordinate of the Collector. The right, which such member has, concerns his status and is a valuable legal right, and any order which has the effect of, in any way, impairing or taking away such right should *prima facie* be taken to be more of a judicial character rather than that of a mere departmental or administrative character. This view derives strength by reason of the fact that the second paragraph of the section allows an appeal to the High Court against such orders in certain cases, as, for example, when the initiative was taken by the District Judge by making a requisition to the Collector to proceed under section 8 of the Act. It cannot be said that one and the same order, if it was initiated in one way, is of a departmental or administrative character, but that, if it was initiated in another way, is of a judicial character, more especially when the result of the order would be to take away from a person his status as a member of the Panchayat Court. It could not be contended that a right of appeal is given to the High Court in respect of a mere departmental or administrative order passed by the Collector.

As observed by Lord PARMOOR in *Local Government Board v. Arlidge*(1):—

“Whether the order of the Local Government Board is to be regarded as of an administrative or of a quasi-judicial character appears to me not to be of much importance, since, if the order is one which affects the rights and property of the respondent, the respondent is entitled to have the matter determined in a judicial spirit, in accordance with the principles of substantial justice.”

It is clear that the essence of the proceedings before the Collector in this case was one relating to the legal rights possessed by the petitioner as a member of the

(1) [1915] A.C. 120, 142.

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Panchayat Court, and the decision being one relating to a judicial matter, we think that the preliminary points mentioned in the Collector's affidavit about the want of jurisdiction in this Court to deal with this matter should be decided against the Collector.

Then it was argued by the learned Government Pleader that, having regard to the last sentence in section 8 of the Act, namely, that the decision of the Board of Revenue or the High Court as the case may be on all such appeals shall be “final”, the petitioner has no further remedy. It could not be contended at this time of the day that, because the word “final” is used, therefore the remedy by way of *certiorari* is not available, if in other respects a party would be entitled to the same. The word “final” used in the section really means that the said decision is not open to any further appeal. The question as to what is the meaning of the word “final” had to be considered in *Fahamidan-nissa Begum v. The Secretary of State for India in Council*(1) and *Muthuvaian v. Periasami Iyen*(2). It is however not necessary to go into those cases just now, because the Privy Council had to consider the effect of the insertion of such words in enactments in relation to the remedy by way of *certiorari*. In *Rex v. Nat Bell Liquors, Ltd.*(3) their Lordships of the Privy Council consider this question. Their Lordships remark that the insertion of the words “final” and “without appeal” in statutes does not restrict or take away the right of the superior Court to bring the proceedings before itself by *certiorari*, if the other conditions be satisfied. Even after the insertion of such words in several statutes, and even after the decisions of the Courts that the insertion

(1) (1886) I.L.R. 14 Calo. 67 (F.B.). (2) (1903) 13 M.L.J. 467.

(3) [1922] 3 A.C. 128, 159, 160.

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of such words does not take away the remedy by way of *certiorari* in proper cases, the Legislature has not thought proper to make any amendments. The Privy Council further remarked that the Legislature by continuing to use the same language in subsequent enactments should be taken to have accepted this interpretation put upon these words by Courts. Those remarks substantially apply to the present case also.

As remarked in Halsbury's Laws of England, Vol. X, page 175, paragraph 345:—

"*Certiorari* can only be taken away by express negative words. It is not taken away by words which direct that certain matters shall be 'finally determined' in the inferior Court, nor by a proviso that 'no other Court shall intermeddle' with regard to certain matters as to which jurisdiction is conferred on the inferior Court."

Again in paragraph 346, it is stated:—

"Clauses by which *certiorari* is taken away are strictly construed."

In Wharton's Law Lexicon, page 150, it is stated as follows:—

"An appeal does not lie unless it is expressly given by statute, but *certiorari* always lies unless it is expressly taken away by statute."

It therefore seems to us that the insertion of the word "final" in section 8 does not, of itself, preclude the High Court from entertaining an application for relief by way of *certiorari*, if the other conditions be satisfied. With these remarks, we proceed to deal with the application on its merits.

The chief allegations made by the petitioner are, as has been mentioned already, that he had no notice of the enquiry made by the Collector, and that no charges were framed against him. It is also mentioned that the Collector has no jurisdiction to delegate his functions in this matter to any other officer. The answer to the

latter contention is clear. The Collector is the officer to whom this power is given by the Act, and it is not open to him to delegate to any other person that particular jurisdiction, that is, the right to decide questions which are confided to him for decision under the terms of the Act. But, in this case, the Collector has not done anything like that. He has not delegated to any other person his right to decide the matter. What has been done is to direct a subordinate of the Collector, namely, the Tahsildar of Chandragiri, to give notice to the parties interested, to inquire into the matter, to record evidence, and submit the records to him, so that, with those materials before him, the Collector may use his own discretion in the matter and exercise the jurisdiction specially vested in him by section 8 of the Act. The present case not being a case of *delegation*, the cases quoted by the learned Advocate for the petitioner do not call for any special notice in this connection.

The action of the Tahsildar has been severely criticised on behalf of the petitioner. But, after reading the affidavit filed by the Tahsildar, we feel no doubt that of the two versions, the Tahsildar's version is clearly the one that we should act upon. We have got the admitted fact that on the 11th August 1929 the petitioner gave a statement before the Tahsildar. The petitioner is no doubt right in complaining that no "formal charges" were framed in this matter. It would have been more satisfactory if that had been done, and such a procedure would have rendered unavailable to the petitioner the main argument which he has been urging to get rid of the order against him. But we find, from the statement of the petitioner referred to above, that the acts complained of against him were specifically put to him. In fact the very first sentence

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of that statement makes it clear that he was apprised of the real matters of complaint made against him, and asked to give his own explanation. The Tahsildar also states that he explained the contents of both the petitions to the petitioner as well as to the president. He also states that the petitioner was present when the enquiry was being conducted,—except at a later stage when owing to the petitioner's own default he was not present though the date to which the enquiry was adjourned was communicated to him. On the 30th August 1929, the petitioner again went to the Tahsildar and gave a list of certain witnesses. The Tahsildar states that, of the witnesses mentioned in the list, such of those as the petitioner wanted to be examined were examined. The Tahsildar swears that the petitioner was never asked to go out of the building when the evidence was being recorded. Having regard to the statements made by the Tahsildar, and seeing that the Tahsildar's statements are supported by other records in the case, we think that the complaint made by the petitioner under the several heads mentioned above has not been made out.

But it was argued that the petitioner was not given an opportunity to argue before the Collector. It does not appear that the petitioner expressed any desire to be given an opportunity to do so. Ordinarily, the Collector is bound to give notice of the date on which he is going to take up a case like this for inquiry and decision. But, having regard to the course taken in the present case, one can easily see that the petitioner was satisfied with making his representations in writing to the Tahsildar and leaving the Collector to go through the records and to pass such orders as he thought proper. We do not think that, in the circumstances of the present case, the Collector's failure to give further

notice to the petitioner should be taken to have really prejudiced the petitioner.

Then it was argued that before the Board of Revenue also the petitioner's Counsel was declined an opportunity to argue his case. The appeal to the Board was prepared by his learned Advocate, and he stated in that petition of appeal that, " 'if necessary' he might be heard ". Having regard to the context, the reasonable interpretation of the appeal memorandum is that the petitioner was satisfied with putting his points in writing, and left it to the Board whether it would, in the circumstances, hear Counsel. Having left the matter to the Board to decide whether Counsel should be heard or not, it is not open to the petitioner now to complain that his Counsel was not heard. If we were not able to place that interpretation on the appeal petition, and if it were clear to us that the Advocate who presented that petition to the Board expressed a specific desire therein to be allowed to be heard orally before final orders were passed, and if the Board, in spite of the same, passed orders against the petitioner without giving a proper opportunity for hearing the petitioner's Counsel as requested, then the question will arise whether the Board in disposing of an appeal under the Madras Village Courts Act is bound to hear the appellant or his Counsel orally, and whether the decision of the Board arrived at otherwise would be legal, and whether it would have to be vacated and the appeal remitted to the Board for fresh disposal after giving a proper opportunity to the petitioner's Counsel to argue the appeal. In the circumstances of the present case, we need not go into that question.

In the present case, we need not consider whether the Collector deciding matters referred to in section 8 of the Village Courts Act is a Court or not. The learned Government Pleader drew our attention to

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Chinnayya Gounder, In re(1), and to the provisions of the Madras Act III of 1895, and argued that the Collector could not be said to be "a Court," and that the High Court has no jurisdiction over him, either under section 115 of the Code of Civil Procedure or under section 107 of the Government of India Act. It is not necessary for us to express any opinion on that point, because it has been held that the High Court's power to issue writs of *certiorari* is not confined to "Courts" subordinate to the High Court. In *Mrs. Besant v. Emperor*(2) by this Court, and by the Privy Council on appeal in *Besant v. Advocate-General of Madras*(3), it has been remarked that the power of *certiorari* is a power which the High Court possesses in addition to its powers of supervision and revision under section 115 of the Code of Civil Procedure and section 107 of the Government of India Act. In respect of persons or bodies exercising judicial functions and adjudicating on legal rights of parties, it has been held that such a writ of *certiorari* would lie. In Halsbury's Laws of England, Volume X, page 161, paragraph 320, it is remarked :

"*Certiorari* also lies to remove, for the purpose of quashing, the determinations of persons or bodies who are by statute or charter intrusted with judicial functions out of the ordinary course of legal procedure . . . though "the determinations of such authorities are not judgments in the sense required to admit of a writ of error being brought in respect of them."

See also page 160, paragraph 320, of the same Volume X of Halsbury's Laws of England—where it is stated :

"*Certiorari* lies at common law to remove the proceedings of inferior courts or judicial bodies for the purpose of quashing such proceedings where the writ of error did not lie."

(1) (1921) 41 M.L.J. 577.

(2) (1916) 1 L.R. 39 Mad. 1085.

(3) (1919) 1 L.R. 43 Mad. 146, 159 to 161 (P.C.).

Similarly in *Local Government Board v. Arlidge*(1), decided by the House of Lords, Lord HALDANE L.C. observed at page 133 :—

"If the Local Government Board failed in this duty, its order might be the subject of *certiorari*, and it must itself be the subject of *mandamus*."

Lord PARMOOR referred to this point at page 140 :—

"The power of obtaining a writ of *certiorari* is not limited to judicial acts or orders in a strict sense, that is to say, acts or orders of a Court of law sitting in a judicial capacity. It extends to the acts and orders of a competent authority which has power to impose a liability or to give a decision which determines the rights or property of the affected persons."

On the subject of *certiorari* generally, we may refer to a very recent decision of VENKATASUBBA RAO and MADHAVAN NAIR JJ. in *Venkataratnam v. Secretary of State for India*(2), where the law relating to *certiorari* is exhaustively considered, and the conclusion is reached that, in the absence of express statutory prohibition, this High Court possesses the same jurisdiction in *certiorari* as the Court of King's Bench in England.

It is therefore clear that the circumstance that the Collector is not a Court presents no insuperable obstacle to our entertaining this application by way of *certiorari*, if the other conditions be satisfied, having regard to the nature of the adjudication in question.

It should be observed by way of a general answer to most of the contentions raised by the learned Advocate for the petitioner that the Madras Village Courts Act does not prescribe in detail the procedure to be adopted in such matters. In the absence of any specific procedure prescribed by the Act, the authority concerned will have to act according to the rules of "nature justice". What these rules are had to be considered by the House of Lords in the case of *Local*

(1) [1915] A.C. 120.

(2) (1929) 1 L.R. 53 Mad. 979.

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Government Board v. Arlidge(1) already referred to. The essentials of natural justice applicable to such cases have been examined by the several learned Lords who took part in that decision. At page 132, Viscount HALDANE L.C. stated as follows:—

“When the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice.”

At page 140, Lord PARMOOR observed as follows:—

“In determining whether the principles of substantial justice have been complied with in matters of procedure, regard must necessarily be had to the nature of the issue to be determined and the constitution of the tribunal.”

At page 138, it was remarked by Lord SHAW:

“If a statute prescribes the means, it must employ them. If it is left without express guidance, it must still act honestly and by honest means. In regard to these certain ways and methods of judicial procedure may very likely be imitated; and lawyer-like methods may find especial favour from lawyers. But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are *ex necessitate* those of Courts of justice is wholly unfounded.”

Finally, to quote the observations of Lord PARMOOR at page 140:

“Where, however, the question of the propriety of procedure is raised in a hearing before some tribunal other than a Court of law there is no obligation to adopt the regular forms of legal procedure. It is sufficient that the case has been heard in a judicial spirit and in accordance with the principles of substantial justice.”

Having regard to the above observations made by the noble and learned Lords as to what course should be followed in cases not specifically provided for by any

(1) [1915] A.C. 120.

particular statute, and after examining the records in the present case, we are not satisfied that the principles of natural justice have not been applied to the case of the petitioner. That being so, we dismiss the application with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Madhavan Nair.

AVARU, SON OF KALI MATATHIL VEERAN KUTTY.
(FIRST DEFENDANT), APPELLANT,

1931,
April 27.

v.

ASI BAI AND TWO OTHERS (PLAINTIFFS 3, 7 AND 8),
RESPONDENTS.*

Madras Malabar Compensation for Tenants' Improvements Act (I of 1900)—Applicability of, to building leases (that is, leases of vacant sites for building purposes).

The operation of the Malabar Tenants' Improvements Act (I of 1900) is not confined to agricultural leases. The Act applies to building leases (that is, leases of vacant sites for building purposes) as well. *Chathukutty v. Kunhappu*, (1927) I.L.R. 50 Mad. 813, and *Sabju Sahib v. Malabar District Board*, (1929) I.L.R. 53 Mad. 54, referred to.

Law on the point prior to Madras Act (I of 1887) and the effect of that Act considered.

SECOND APPEAL against the decree of the District Court of South Malabar in Appeal Suit No. 86 of 1924 preferred against the decree of the Court of the Subordinate Judge of Cochin in Original Suit No. 4 of 1921.

P. Govinda Menon for appellant.

B. Sitarama Rao and *O. V. Harihara Ayyar* for respondents.

Our. adv. vult.

* Second Appeal No. 1532 of 1925.

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The JUDGMENT of the Court was delivered by WALLACE J.—The first defendant is the appellant. This second appeal arises out of a suit instituted by the plaintiff to recover possession of the suit property after the removal of the house standing on it. The appellant obtained the property, which was a vacant site, on lease for erecting a house for residential purposes. Under the lease deed (Exhibit H) he agreed to remove the house at his own expense whenever required by the owner. He now claims that before he is ejected he is entitled to be paid the value of the house under the Malabar Tenants' Improvements Act (I of 1900). It is conceded that the house falls within the meaning of the term "improvement" as defined in the Act and that, if the Act applies, the undertaking to remove it cannot be enforced as it offends against the provisions of section 19 of the Act. The learned District Judge disallowed the compensation for the house on the ground that the lease, being not an agricultural one, is governed by the Transfer of Property Act and not by the Malabar Tenants' Improvements Act.

The question we have to decide is whether the Malabar Tenants' Improvements Act applies only to agricultural leases and not to building leases (i.e., leases of vacant sites for building purposes) as well. On one side, it is argued that there is a statement in Mr. Logan's Malabar Manual, Vol. II, App. XIII etc that under the customary law of Malabar only agricultural tenants were entitled to improvements, that such a statement was made as to the effect of Act I of 1887 in the Legislative Council, that an unreported decision of this Court, Second Appeal No. 1445 of 1889 (under Act I of 1887), held that that was the law, that there is no reason to imagine that the Legislature in passing Act I of

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1900 departed from this rule and that the unreported decision has been followed very recently by ANANTAKRISHNA AYYAR J. in *Sabju Sahib v. Malabar District Board*(1) which, we may say, was decided during the time this second appeal remained part-heard. On the other side, it is urged that, having regard to the provisions of the present Act (I of 1900), which are clear, the statements made in Logan's Malabar Manual and in the Legislative Council should be disregarded, that the Act clearly applies to building leases and that it was recently held by JACKSON J. in *Chathukutty v. Kunhappu*(2) that

"it has invariably been held in Malabar that the Act applies to agricultural holdings and also to what are known as Kudiyiruppu, i.e., vacant sites available for buildings . . ."

and that ANANTAKRISHNA AYYAR J. does not dissent from the decision in *Chathukutty v. Kunhappu*(2).

We shall first refer to the provisions of the two Acts to which our attention was drawn. The first Act that was passed by the Madras Legislative Council to secure to tenants in Malabar compensation for the value of improvements was Act I of 1887. Section 2, clause 1 of this Act defines "tenant" as follows:—

"In this Act, unless there is something repugnant to the context or subject, 'tenant' means a person who holds land under another person and is, or, but for a special contract or custom, would be liable to pay rent for that land to that person." Section 3, clause 1 defines "improvement" as meaning

"any work which adds to the value of the holding which is suitable to the holding and consistent with the purpose for which it was let."

Clause 2 of this section in enumerating what are deemed to be improvements states amongst others that

"until the contrary is shown, the following shall be presumed to be improvements within the meaning of this Act:—

(a) the erection of dwelling-houses, buildings appurtenant thereto, and farm buildings;

(1) (1929) I.L.R. 53 Mad. 54.

(2) (1927) I.L.R. 50 Mad. 813.

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(b) the construction of tanks, wells, channels, dams and other works for the storage or supply of water for agricultural or domestic purposes.”

Section 4 states that

“every tenant who is ejected from his holding shall, notwithstanding any custom to the contrary, be entitled to be compensated for improvements made by him”

As Act I of 1887 failed to achieve its purpose fully, the Legislature amended the law by repealing it and enacting the present Act I of 1900. By this Act the definition of the term “tenant” was thoroughly recast and its scope was enlarged to include the claim of a “squatter” for compensation which it was thought did not fall within the definition under the repealed Act. The definition of the term “improvement” was also modified by adding “the product of a work” to the definition under the old Act. By section 3, clause 1 of this Act the term “tenant” is defined as follows:—

“‘Tenant’, with its grammatical variations and cognate expressions, includes a person who as lessee, sub-lessee, mortgagee or sub-mortgagee or in good faith believing himself to be lessee, sub-lessee, mortgagee or sub-mortgagee of land is in possession thereof, or who, with the *bona fide* intention of attorning and paying the customary rent to the person entitled to cultivate or let waste-land, but without the permission of such person, brings such land under cultivation and is in occupation thereof as cultivator.”

Sub-clause 3 of the same section defines “improvement” to mean

“any work or product of a work which adds to the value of the holding, is suitable to it, and consistent with the purpose for which the holding was let, mortgaged or occupied.”

Section 4 deals with what are deemed to be “improvements” and states amongst other things that the erection of dwelling-houses as under the old Act shall be presumed to be an improvement and section 5 states that every tenant shall be entitled to compensation on

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ejection. It is nowhere stated in the Act that its operation is limited to agricultural tenancies; on the other hand, such indications as we have of the intention of the Act show that it would be difficult to restrict its operation to such tenancies. The title and the preamble of the Act show that it applies generally to all tenants in the Malabar District and, if it had been the intention of the Legislature to restrict its operation to agricultural tenancies only, nothing was easier than to add the qualifying words “agricultural” before the word “tenants”. The first part of the definition of “tenant” ending with the word “thereof” is wide enough to include a person to whom land has been let for building purposes. We cannot accept the plea that the scope of this part of the definition which stands apart from the rest of the clause should be limited to agricultural tenancies, because when referring to quite a different class of people as tenants in the same clause (*viz.*, “squatters”) the words “cultivation and cultivator” are used; on the other hand, it may well be argued that the absence of such words in the first part of the definition shows that the Legislature deliberately intended to include non-agricultural tenants, such as lessees holding land for building purposes within its scope. The plea urged before us was rejected by ANANTAKRISHNA AYYAR J. when it was urged before him in *Sabju Sahib v. Malabar District Board*(1). Another indication as regards the intention of the Legislature may be found in section 4 of the Act which in clause (a) refers to the erection of dwelling-houses as a work which shall be presumed, until the contrary is shown, to be an improvement for the purposes of the Act. Clause (b) of this section refers to certain other works

(1) (1929) I.L.R. 53 Mad. 54.

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for agricultural purposes. The absence of such a qualification in clause (a) lends support to the suggestion that "dwelling-houses" shall always be deemed to be improvements until the contrary is shown irrespective of the purpose for which the land on which these stand may have been leased. The fact that "dwelling-houses" are grouped together with "farm buildings" in the same clause cannot in our opinion be relied on to show that these, to be deemed improvements, should be appurtenant to a holding for agricultural purposes. If that was the intention of the Legislature, appropriate words might have been used to express that intention as has been done in the subsequent clause which refers to tanks, wells, channels, etc. Agricultural tenancies of land as distinguished from other forms of tenancies are well known to law and, if the intention of the Legislature was to restrict the operation of the Act to agricultural tenancies alone, nothing was easier for the Legislature than to state it in the preamble or in the sections of the Act, as was done for example in the corresponding Act in the North-Western Provinces (Act XII of 1881 as amended by Act XIV of 1886) which enacted:

"Nothing herein contained applies to land for the time being occupied by dwelling-houses or manufactories, or appurtenant thereto, so long as such land is not let to agricultural tenants."

In this connection the observations of SUNDARA AYYAR J. in his book on Malabar Law edited by Mr. Sitarama Rao (see pages 296-7) as regards the scope of the two Acts may be referred to with advantage:

"The Act applies not only to the kanomdar but also to all classes of lessees, sub-lessees, mortgagees, sub-mortgagees, in possession and also to persons who are *bona fide* in possession with the intention of paying rent to the person entitled to let the waste land but without the permission of that person. The last is the case of a pure squatter that used to be introduced by

the Government to whom reference has already been made. In Mr. Logan's Manual, Vol. II, App. XIII etc there is a statement that under the customary law, only agricultural tenants are entitled to improvements. A similar statement was made as to the effect of Act I of 1887 by Mr. Subrahmanya Ayyar, as he then was, in the Legislative Council. *It is doubtful if this is correct; at any rate, it would seem to be difficult to so restrict the later Act.*" (The italics are mine.)

In this connection see also page 345. In our opinion Act I of 1900 applies to non-agricultural tenants, such as lessees of vacant sites leased for building purposes.

If the sections of the present Act clearly indicate that its operation is not limited to agricultural tenancies alone, it is needless to inquire what the customary law that prevailed prior to the legislation was, and whether the repealed Act I of 1887 applied only to agricultural tenancies; for we should be guided only by the plain words of the statute. However, as the point was argued, we shall briefly deal with it. Assuming that under the customary law of Malabar only agricultural tenants were entitled to the value of the improvements, it is not quite clear whether the Courts in actually administering the law before the Act I of 1887 was passed ever gave effect to the customary law with strictness, for we find in a well-known book of Malabar Law entitled "A Manual of Malabar Law as administered by the Courts" by Cuddalore Ramachandra Ayyar, Subordinate Judge of South Malabar, Calicut, published in July 1883, reference to a decision of this Court, Second Appeal No. 361 of 1880, to the effect that a lessee of vacant land let out for building purposes was entitled before ejectment to get compensation for the dwelling-house he had erected on it. In section 301 of the book under the heading, illustration (b), the facts of the case are thus summarized:

"Where a house worth Rs. 3,000 had been erected on a waste Paramba given by the Karnavan of a Tarwad to his own

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wife, the High Court refused to allow the tenant to be disturbed without receiving compensation, though the plaintiff sought to set aside the alienation of the site as prejudicial to the interests of the Tarwad (Second Appeal No. 361 of 1880)."

On examining the record we find that the plaintiff claimed compensation for a house built on a vacant site in a crowded locality of residential houses in Kollengode village. The District Munsif granted compensation. The District Judge thought that the claim was not justified under the customary law, but the High Court maintained the Munsif's decree on the ground that

"it would be contrary to the rule of good conscience that the plaintiff should recover without compensating the fourth and the fifth defendants"

This case shows that a claimant to compensation for improvements in Malabar, even though his title to the holding fails, that is, even though he is in the position of a squatter, is not disentitled to claim the value of the dwelling-house which he has erected on the vacant site leased to him. It would thus appear that prior to the Act I of 1887 it was usual to give compensation in cases like the present whether the grant was justified by customary law or not. We may mention that the right to compensation in the above-mentioned case is referred to in Mr. Ramachandra Ayyar's book as based on custom. In our view, this right to claim compensation for dwelling-houses erected on vacant sites was recognized by Act I of 1887. Section 4 of the Act already quoted states that until the contrary is shown the erection of dwelling-houses shall be presumed to be improvements for the purposes of the Act. In the commentaries of Act I of 1887 reference is made to section 301 of Mr. Ramachandra Ayyar's book. It follows therefore that prior to this Act dwelling-houses were always considered to be improvements and this has been so subsequent to the Act also. We may here

refer to Second Appeal No. 1445 of 1889, the unreported decision relied on by the respondents. It, no doubt, held that the provisions of the Act I of 1887, the repealed Act, do not apply to building leases. This conclusion is based on the following reasoning :—

"Dwelling-houses described in section 3, clause 2 of the Act are grouped together with farm-houses, and the term 'improvement' itself is defined in the Act as a work which adds to the value of the holding."

In their ordinary sense the words appear to us to refer to dwelling-houses appurtenant to a holding for agricultural purposes and not to dwelling-houses within the limits of a town for purposes of residence only. The learned Judges state also that

"dwelling-houses for which compensation was claimed in this suit form admittedly no part of an agricultural holding."

We may observe that they do not refer in their judgment to the definition of the term "tenant" which is very wide and that the word "holding" does not necessarily mean that the land held is agricultural land. The term is not defined although it is used in several places in the Act. According to the Oxford Dictionary it means "tenure" or "occupation of land," and, in the absence of a definition, it may be taken that the word is used in this sense. If the Legislature intended that the word should mean "agricultural holding," then it would have used "agricultural" before the word "holding". Legislatures are not unfamiliar with the expression "agricultural holding" (see for example the English Agricultural Holdings Act, 1883). We may also observe that the grouping of "dwelling-houses" along with farm-buildings in enumerating what shall be deemed to be "improvement" under the Act either by itself or by combination with "holding" is, as we have already shown, not a sufficient justification to show that dwelling-houses in clause (a) of section 3

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mean dwelling-houses appurtenant to a holding for agricultural purposes. The construction adopted by the learned Judges is opposed to the plain words of the section in enacting which the Legislature simply gave sanction to the practice followed in Malabar of treating "dwelling-houses" as improvements for which compensation may be claimed. It is open to considerable doubt whether the decision in Second Appeal No. 1445 of 1889, being unreported and presumably unknown, was ever used in Malabar in preference to the ruling in Second Appeal No. 361 of 1880 which must have been familiar to those who had to deal with questions of the kind raised in that case. For these reasons we are of opinion that in spite of the decision in Second Appeal No. 1445 of 1889 compensation was always given to lessees who built dwelling-houses on vacant sites—leased to them for erecting houses for residential purposes whether such houses were erected in villages or towns and that Act I of 1887 was never understood to stand in the way of awarding compensation in such cases.

The argument that the old Act (I of 1887) was intended only to apply to agricultural tenancies and there is no reason why a different intention should be imputed to the Legislature when it passed Act I of 1900 does not present to us any difficulty. It may be that it was intended that the Act of 1887 should apply only to agricultural tenancies as at the time, that is, 1887, the local Legislature under the Indian Councils Act of 1861 could not pass legislation affecting the operation of the Transfer of Property Act—an Imperial Act which applied to all tenancies other than agricultural. But the intention, as we have shown, does not seem to have been carried out effectively in actual practice. As pointed out in Mr. Justice SUNDARA AYYAR's book, it is doubtful if the statement that the

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repealed Act applied only to agricultural tenancies is correct. But, however that may be, this disability of the local Legislature to pass Acts affecting the operation of the Imperial Acts was removed by the Statute of 1892, so that in 1900, when the Improvements Act I of 1900 was passed, it had power with the sanction of the Governor-General in Council to pass legislation regarding tenancies other than agricultural. The new Act is not a mere repetition of the old Act. Its scope was enlarged and it was modified in various respects. If the old Act was intended to apply only to agricultural tenancies, there is nothing to show that the intention of the new Act is the same, having regard to its sections which, as we have already shown, do not restrict its operation to agricultural tenancies. When the statute is clear, it cannot be qualified or neutralized by indications of intention gathered from previous legislation on the same subject; see *Administrator-General of Bengal v. Premal Mullick*(1).

We shall now consider the decisions of this Court under the Act (I of 1900) having a bearing on this point. There are only two decisions directly bearing on the question, these two being a decision of JACKSON J. in *Chathukutty v. Kunhappu*(2) and a recent decision by ANANTAKRISHNA AYYAR J. in *Sabju Sahib v. Malabar District Board*(3). Before we discuss these cases attention may be drawn to two other decisions of this Court, viz., *Kallingal Moosa Kutti v. The Secretary of State*(4), and *Ullattuthodi Choyi v. Secretary of State for India*(5), which, though not useful as direct decisions on the point, are yet, in our opinion, very helpful as an inference may be drawn from them regarding the view

(1) (1895) I.L.R. 22 Cal. 788 (P.C.).
(2) (1927) I.L.R. 50 Mad. 813. (3) (1929) I.L.R. 53 Mad. 54.
(4) (1919) I.L.R. 48 Mad. 65. (5) (1931) 14 L.W. 386.

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generally held as regards the scope of Act I of 1900. The facts of the cases, so far as they are relevant to the point under consideration, are very similar to the facts of the present case, the only important difference being that in both the cases the lessor was the Secretary of State for India in Council. In both the cases the leases were of parambas and in one there was a clear undertaking on the part of the lessee to pull down and remove all the buildings at the time of surrender without demanding compensation. The lessees claimed compensation for the value of the dwelling-houses erected by them when they were called upon to surrender the lands and it was held that the provisions of the Malabar Tenants' Improvements Act as to eviction of tenants on payment of compensation to them for improvements does not apply to Crown grants which do not provide accordingly; see *Ullattuthodi Choyi v. Secretary of State for India*(1), following *Kallingal Moosa Kutti v. The Secretary of State*(2). No attempt was made in either of those cases to justify the disallowance of compensation on the ground that the Malabar Tenants' Improvements Act applied only to agricultural tenancies and not to building leases. The judgments would rather show that it was assumed that the Malabar Tenants' Improvements Act would apply but for the provisions of the Crown Grants Act. In this connection attention may be drawn to the following extract from the judgment in *Kallingal Moosa Kutti v. The Secretary of State*(2):

"On the second point, we feel no doubt that the wide language of section 3 of the Crown Grants Act is conclusive. The Government have specially armed themselves with powers which they have withheld from private parties, presumably on the ground that they are not likely to misuse them. It is clear

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to us that these contracts are not within the mischief of section 19 of the Malabar Compensation for Tenants' Improvements Act."

This would show by implication that the learned Judges were prepared to apply the Tenants' Improvements Act but would not do so on account of section 3 of the Crown Grants Act. In *Ullattuthodi Choyi v. Secretary of State for India*(1) the following observations occur:—

"It is now said that he cannot be evicted until he has received compensation under the provisions of the Malabar Compensation for Tenants' Improvements Act. To allow such a provision of that Act to take effect would prevent the crown grant in question from taking effect according to its tenor. We entirely agree with the decision on this point in *Kallingal Moosa Kutti v. The Secretary of State*(2)."

In this case, *Ullattuthodi Choyi v. Secretary of State for India*(1), perhaps it may have been possible to say that the lease was an agricultural one; but the proceedings in the case show that it was throughout treated as a lease of a paramba. Attention may be drawn to the following observations of the District Munsif as they refer to the practice followed in Malabar in such cases and also show that the argument put forward was that the lease being a non-agricultural one the tenant cannot plead section 19 of the Act:

"The more important question is about the buildings in the paramba. One or two of them are useful as dwelling-houses . . . it has been the usual practice to allow their value in favour of the tenant. There is hardly any lease in Malabar given for the purpose of building shops or dwelling-houses. Yet it has been the rule to allow the tenant the value of shops and dwelling-houses when none of them is inconsistent with the holding. I do not think that Government who are most solicitous about the welfare of the tenant ought to ask the Court to construe the provisions of the Act against the interests of the tenant."

(1) (1921) 14 L.W. 386.

(2) (1919) I.L.R. 43 Mad. 65.

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WALLACE J. The District Munsif overruled this argument and allowed compensation. The learned District Judge treated the lease as a crown grant and set aside the order of the District Munsif. The High Court also, as may be seen from the extract quoted above, proceeded on the same line.

Coming now to the decisions under Act I of 1900 which have a direct bearing on the question, we shall first deal with *Chathukutty v. Kunhappu*(1). The facts in that case were as follows:—

"The plaintiff let to the defendant a shop in a town in Malabar for five years, the tenant agreeing to remove a bakery oven erected by him thereon, when surrendering the shop at the end of five years. At the end of five 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."

In support of the plea that the tenant was not entitled to compensation, two arguments were pressed before the learned District Judge (Mr. V. P. Rao) these being (1) that the tenant of a house is not a lessee of land within the meaning of the Act and (2) that the Act applied only to agricultural tenancies.

The first was disallowed on the ground that the point was taken for the first time in appeal and on the second the learned District Judge expressed the opinion that the Act (I of 1900) was not confined to agricultural tenancies. On this point he stated:

"The Act has been hitherto applied in practice to Kudiyiruppu tenants, i.e., tenants of land for building houses for themselves and they have been awarded compensation for such houses without any question all these years."

In the result, compensation under the Act was awarded to the tenant. In second appeal it was held by JACKSON J. that the defendant was not entitled to

(1) (1927) I.L.R. 50 Mad. 813.

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WALLACE J. compensation as the tenant of a house or a shop is not a lessee within the meaning of the Malabar Tenants' Improvements Act. On the second point which is the one we are concerned with in this case he agreed with the District Judge and stated thus:

"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 . . . "

The present case, as it relates to a claim for compensation for a house built on a vacant land leased out for erecting buildings, comes literally within the latter part of this rule and therefore the tenant should be held entitled to claim compensation for the house. This case, i.e., *Chathukutty v. Kunhappu*(1), is referred to in *Pathuma Umma v. Aliyammakkanath Moideen*(2) decided by SRINIVASA AYYANGAR and REILLY JJ. A perusal of the judgment of REILLY J. leaves the impression that he was inclined to hold, if necessary, that even the lessee of a house in Malabar comes within the purview of this Act: but it was not necessary for him to express any opinion on the point as he found that the house in that case was not an improvement within the meaning of the Act. In the present case the questions whether the tenant of a house leased to him comes within the Act or not and whether the scope of the Act is restricted to agricultural lands and vacant sites do not arise for consideration and we express no opinion on them. On the point we are called upon to decide, that is, whether a lessee of a vacant site is entitled to compensation under the Act for the house erected by him, both the learned Judges agree with the judgment of JACKSON J. in *Chathukutty v. Kunhappu*(1).

The next case having a somewhat direct bearing on the point is the decision of ANANTAKRISHNA AYYAR J. in

(1) (1927) I.L.R. 50 Mad. 813.

(2) (1927) 110 I.O. 752.

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Sabju Sahib v. Malabar District Board(1). In that case the President of the District Board, Malabar, leased to the defendant a roadside poramboke. When he was called upon to surrender the site he claimed compensation under the Act for a house which he had built on it though he had undertaken in the lease deed not to claim compensation for the improvement that he might make on the property. His claim was disallowed in all the Courts. The judgment in the second appeal is relied on to show that Act I of 1900 applies only to agricultural tenancies. The learned Judge no doubt refers amongst other things to the unreported decision, Second Appeal No. 1445 of 1889, and also to Act I of 1887 and the speech in the Legislative Council, when that Act was introduced, considerations which might lead one to think that in his opinion the present Act applies only to agricultural tenancies; but on a careful perusal of the judgment we can find nowhere in it any such decisive statement. On the other hand, he agrees with the decision in *Chathukutty v. Kunhappu*(2) and distinctly says that he does not think it requires any reconsideration. In his view that decision did not apply to the case before him because he understood the finding in the case to be that the suit land is a roadside poramboke; in other words, it is neither an agricultural holding nor a building site available for building purposes. He also held that in the circumstances of the case the house in question was not an improvement within the meaning of the Act. In our view the decision in *Sabju Sahib v. Malabar District Board*(1) does not lend any substantial support to the argument of the respondents. However, if the decision is to be understood as an authority for the position that the Malabar Tenants'

(1) (1929) I.L.R. 53 Mad. 54.

(2) (1927) I.L.R. 50 Mad. 813.

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Improvements Act of 1900 applies only to agricultural tenancies, then with all deference to the learned Judge we cannot agree with his view. In passing, we may observe that, though the facts in Second Appeal No. 1445 of 1889 are similar to those in *Chathukutty v. Kunhappu*(1), having regard to the reasoning in the judgment in that case and the principle on which the judgment was rested, it appears to us that the question which JACKSON J. had to decide in *Chathukutty v. Kunhappu*(1) was *res integra*. We may also say that the decision in Second Appeal No. 1445 of 1889 was used before us solely for showing that the operation of Act I of 1887 was restricted to agricultural tenancies and we do not understand the case to have been used for any other purpose in *Sabju Sahib v. Malabar District Board*(2).

For the above reasons, we are of opinion that the operation of Act I of 1900 is not restricted to agricultural tenancies, that it applies to building leases as well, that in this view it is unnecessary to consider what the law was prior to 1900 and that, even if it is necessary to refer to the prior law on the ground that the words of the statute are not very clear, the law administered in Courts without any question for over a century has always been to the effect that in Malabar the tenant of a vacant site is always entitled to claim compensation for dwelling-houses that he may have erected on the site. We think it is now too late to reconsider the law on the strength of an unreported decision of this Court as old as 1889 and on the policy of the Act of 1887 which itself is not very clear.

We would therefore allow this second appeal and grant the appellant compensation for the value of the

(1) (1927) I.L.R. 50 Mad. 813.

(2) (1929) I.L.R. 53 Mad. 54.

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house erected on the plaint site. But, as the lower Courts have not recorded a finding on this point, before we allow the second appeal, we would ask the District Judge to submit a finding as regards its value; the District Judge is at liberty to send the case to the Sub-Court for the finding. Fresh evidence on this point may be taken. Two months for the finding and ten days for objections.

[In compliance with the order contained in the above judgment, the Subordinate Judge of Cochin submitted a finding to the effect that the value of the house in the plaint site was Rs. 899-6-2 and that the defendant was entitled to that amount only. On the appeal coming on for hearing after the return of the said finding, the Court delivered a judgment accepting the finding and modifying the decree of the trial Court by decreeing that after the word "shall" the words "remove . . . and" should be struck out and the words "on payment by plaintiff to defendant of Rs. 899-6-2" should be inserted. The defendant was allowed to get his costs of the second appeal from the plaintiff.]

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APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

T. RAJARAM MEHTA AND ANOTHER (PLAINTIFFS),
APPELLANTS,

v.

NARAYANASWAMI NAIDU AND FORTY-THREE OTHERS
(DEFENDANTS), RESPONDENTS.*

*Madras Estates Land Act (I of 1908), sec. 59—Usage in—
Meaning of—Validity of—Conditions—"Established usage"
in section means usage of holding in question and not usage
of whole estate.*

The word "usage" in section 59 of the Madras Estates Land Act is not synonymous with the word "custom"; a usage, to be valid, need not possess the same degree of antiquity as a custom.

"Established usage" mentioned in the section need not be the usage of the whole estate. The words may be rightly construed as meaning the "established usage" of the particular holding with reference to which the question arises.

APPEAL against the decrees of the District Court of Chingleput in Appeal Suits Nos. 117 to 154 of 1927 preferred respectively against the decrees of the Court of the Sub-Collector of Chingleput in Summary Suits Nos. 64 to 66, 68 to 70, 72 to 86, 88, 89, 91 to 93, 95 to 98, 101 to 103 and 105 to 109 of 1926.

M. Subbaraya Ayyar for appellants.

T. V. Muthukrishna Ayyar, T. K. Ramaswami Ayyangar and K. S. Krishnaswami Ayyangar for respondents.

JUDGMENT.

The decision in this case turns on the question, what is the meaning of the expression "established usage"

* Second Appeal No. 943 of 1928.

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in section 59 of the Madras Estates Land Act? It runs thus :

“ Rent shall be payable in instalments according to agreement or in the absence of agreement according to established usage.”

If the rent claimed was payable, as alleged by the plaintiff, on the last day of the fasli, the suit is within time; if, on the other hand it was payable on the kistbhundi dates, as alleged by the defence, the suit is barred. In the lower Court, it was argued that, as in the case of a valid custom, so in the case of usage, it is essential that it should be ancient. I cannot agree that the two words are synonymous; a usage need not possess the same degree of antiquity as a custom.

It is then contended, that the word “ usage ” must be understood as referring to the entire estate and the appellant relies for this position upon *Hira Lal Das v. Mothura Mohun Roy Chowdhry*(1), a case dealing with section 53 of the Bengal Tenancy Act. I am unable to agree with that decision. I fail to see why, when the section refers to rent, which, of course, must mean the rent of a particular holding, it must be assumed that “ established usage ” mentioned must be the usage of the whole estate. In this case, there is a finding, which cannot be attacked in second appeal, that, according to the usage of the *village*, the rent is payable not at the end of the fasli, but on the four kistbhundi dates. But even that finding is, in my opinion, unnecessary, for the words “ established usage ” may be rightly construed as meaning that of the particular holding with reference to which the question arises.

The second appeal is dismissed with costs (one set). I have been asked to fix the Counsel's fee, owing to

(1) (1888) I.L.B. 15 Cal. 714.

the fact that numerous appeals have been consolidated, and I accordingly fix it at Rs. 150.

The appellant's Counsel asks me to leave it open to him to enforce his right, if any, against the first defendant, on the ground that the rent properly belonging to him was wrongly received by the latter. I wish to make it clear that my judgment is not intended to affect any such right.

A.S.V.

ORIGINAL CIVIL.

Before Mr. Justice Madhavan Nair.

IN THE MATTER OF THE MARRIED WOMEN'S PROPERTY
ACT (III OF 1874).

ABHIRAMAVALLI AMMAL, PETITIONER,

v.

THE OFFICIAL TRUSTEE OF MADRAS AND OTHERS,
RESPONDENTS.*

Married Women's Property Act (III of 1874), sec. 6—Life insurance policy—Sum insured payable to the assured or his wife if he predeceases her—Effect of.

A life insurance policy, in the column headed “ to whom payable ”, contained the following words, viz., “ the assured or his wife if he predeceases her ”.

Held that the said words express on the face of the policy that the same is for the benefit of his wife and as such it enures and is deemed to be a trust for the benefit of the wife, within the meaning of section 6 of the Married Women's Property Act (III of 1874).

JUDGE's summons under section 25 of the Official Trustees Act (II of 1913) to show cause why the

* Application No. 861 of 1931.

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Official Trustee, Madras, be not directed as trustee of the petitioner, Abhiramavalli Ammal, to recover on her behalf the amount due under the life insurance policy of R. Srinivasa Ayyar, deceased, effected with the United India Life Insurance Company, Limited, and why the Official Trustee, Madras, be not directed to pay the same to the petitioner.

S. Jagadesa Ayyar and T. V. Ramiah for petitioner.

Official Trustee (S. Rangaswami Ayyangar) first respondent in person.

S. Duraiswami Ayyar for *V. Sundararajan* for second and third respondents.

Our. adv. vult.

JUDGMENT.

This is an application to show cause why the Official Trustee of Madras be not directed as trustee of the petitioner herein to recover on her behalf the amount due under Policy No. 6033 of R. Srinivasa Ayyar, deceased, effected with the United India Life Insurance Company, and to pay the same to the petitioner. The petitioner, Abhiramavalli Ammal, is the widow of R. Srinivasa Ayyar who was the Headmaster of St. Antony's Secondary School, Negapatam. The petition is opposed by his two brothers. The late Mr. Srinivasa Ayyar insured his life for a sum of Rs. 1,000 with the United India Life Assurance Company, Madras. The policy so far as is material is as follows:—

"This policy . . . witnesseth that in consideration of the payment already made to the Company . . . as stated in the sub-joined schedule . . . the Company doth hereby agree that, upon proof satisfactory to the Directors of the happening of the event or events on which the sum assured is to become payable as described in the said schedule and of the title of the person or persons who may be entitled to receive the same, it will pay the sum stated in such schedule as the sum assured, to such person or persons."

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The schedule to the policy stated, *inter alia*, the following particulars under the following headings:—

Name, address and calling of the assured—R. Srinivasan Esq., Headmaster.

Sum assured—Rupees one thousand only.

Amount to whom payable—The assured or his wife, Abhiramavalli, if he pre-deceases her.

The petitioner's right to recover the amount is based on section 6 of the Married Women's Property Act of 1874 which runs as follows:—

"A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate."

This language is in material particulars identical with the language of section 10 of the English Married Women's Property Act of 1870. In England the Act of 1870 was repealed by the Married Women's Property Act of 1882. Section 11 of that Act corresponding to section 10 of the previous Act and section 6 of our Act is as follows:—

"A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts."

It will be observed that in two particulars the terms of section 11 of the Act of 1882 differ from the terms of section 10 of the Act of 1870. The words "on the face of it" appearing in section 10 are omitted in section 11 of the later Act, and for the words "shall

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. . . be deemed to be a trust" appearing in section 10 of the Act of 1870 we have the words "shall create a trust in favour of the objects therein named, etc.", in section 11 of the Act of 1882.

Relying on section 6 of the Married Women's Property Act of 1874 it is argued on behalf of the petitioner that, by using the words that the sum is payable to "the assured or his wife, Abhiramavalli, if he pre-deceases her," it is expressed on the face of the policy that it is for the benefit of the wife of Srinivasa Ayyar if he pre-deceases her, and so, the policy "shall enure" and "be deemed to be a trust for the benefit" of the petitioner within the meaning of that section. On the other hand, the argument of the respondents is that the words used in the policy are not specific enough to show that it is expressed on the face of it that it is for the benefit of his wife and that the policy shall enure and be deemed to be a trust for her benefit within the meaning of the section. According to this argument, in order that a policy may be deemed to be a trust in favour of the wife within the meaning of section 6 of the Act, it must appear on the face of the document in express words that the insurance was intended by the deceased for the benefit of his wife. I do not think that the language of section 6 warrants the contention urged on behalf of the respondents. That section states that the policy shall on the face of it express that it is to be for the benefit of the wife, and if it is so expressed, then it says the policy shall be deemed to be a trust for the benefit of the wife. There is nothing in the language of the section to show that the words "for the benefit of his wife" or other words corresponding to these should appear in the policy to enable us to infer a statutory trust in favour of the wife within the meaning of the section. If on reading the words used in the policy it appears that the assured has intended, in the event of

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his death, that the policy should enure to the benefit of his wife, then I think the policy may be deemed to be a trust for her benefit. I shall now consider how far the authorities brought to my notice support the respective contentions.

The only Indian decision bearing on the point is *Srinivasachariar v. Ranganayaki Ammal*(1). In that case *R* insured his life in *S* Company and died in 1914. Under the terms of the policy the amount assured was payable to *R* or to his wife in case of his death earlier. It was held that the sum insured did not form part of the deceased's estate but that the widow was the beneficiary who became entitled to the beneficial interest in that sum on her husband's death. The exact terms of the policy making the amount payable to the wife in the case of the husband's death do not appear in the judgment, but from the facts stated by the reporter it would appear that the terms were as general as the terms used in the present policy. This decision supports the petitioner. Another decision which supports the argument of the petitioner may be found in *Fleetwood's Policy, In re*(2), a decision under the English Act of 1882. In that case a husband took out an insurance policy for £500 on his life, and by the terms of the policy the insurance company agreed to pay that sum to the insured's wife, if she were living at his death, or in the event of her prior death to pay it to the insured's executors, administrators, and assigns. It was held that the policy came within section 11 of the Married Women's Property Act, 1882, and created a trust in favour of the wife in certain events. Though the words "for the benefit of his wife" did not appear in the terms of the policy, the learned Judge pointed out that "the policy is, in the

(1) (1915) 3 L.W. 466.

(2) [1926] 1 Ch. 48.

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terms of the section, a policy of assurance effected by a man on his own life, and expressed to be for the benefit of his wife." Using similar language, I think we may say in this case that the language used in the policy, "to the assured or his wife, Abhiramavalli, if he pre-deceases her", shows that it is a policy of assurance expressed to be for the benefit of his wife though the express words "for the benefit of his wife" do not appear in the terms of the policy. Mr. Duraiswami Ayyar for the respondents drew my attention to a series of cases under the English Act of 1870, the language of section 10 of which, as I have already stated, is identical with that of section 6 of the present Act. These cases are *In re Mellor's Policy Trusts*(1), *In re Adam's Policy Trusts*(2), *In re Seyton, Seyton v. Satterthwaite*(3) and *In re Griffiths' Policy*(4). In all these cases the terms of the policy contained the words "for the benefit of his wife". On the strength of these decisions it is contended that, unless these words appear on the face of the policy, the policy cannot be deemed to be a trust within the meaning of section 6 of the Act. I do not think this conclusion necessarily follows from these decisions. Of course, if these words appear on the face of the policy, then there can be no difficulty at all with regard to the solution of the question whether a statutory trust in favour of the wife has been created or not; but these cases do not say that, unless these words are used, no statutory trust within the meaning of the section can be inferred. It is well known that in England documents are drawn up with greater precision than in this country. It is clear that, in the cases referred to, the draftsmen, to avoid all difficulties of construction, have obviously introduced

(1) (1877) 6 Ch.D. 127; 7 Ch.D. 200.

(2) (1883) 23 Ch.D. 525.

(3) (1887) 34 Ch.D. 511.

(4) [1908] 1 Ch. 789.

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the very words of the statute in the documents themselves. If a similar procedure is adopted in India also by insurance companies in drawing up the terms of the policy in cases where the assured intends to create a trust in favour of his wife in the event of his death, there will be no scope for arguments like the one now urged on behalf of the respondents. In *Griffiths v. Fleming*(1), a case strongly relied on by Mr. Duraiswami Ayyar, a husband and his wife effected with an insurance association a policy whereby, in consideration of a premium of which each paid a part, a sum of money was made payable upon the death of whichever of them should die first to the survivor. The wife having died, the husband brought an action upon the policy to recover the policy money. Under the heading "The amount . . . to whom payable" in the policy it was stated "£500 to the survivor of the grantees." It was argued against the contentions of the husband's counsel by Sir John Simon K.C. that to come within section 11 of the Married Women's Property Act of 1882 "the insurance must comply strictly with its terms, and must be expressly for the benefit of one or more of the objects therein named". This argument found favour with VAUGHAN WILLIAMS L.J. But KENNEDY L.J., with whom FARWELL L.J. concurred, did not accept it. This case is more an authority for the petitioner than one for the respondents. In this connection I may state that, having regard to the second point of difference between the language of section 11 of the English Act of 1882 and the language of section 10 of the Act of 1870 which I have already pointed out, the argument advanced in the English case is somewhat plausible; but the language of the Indian Act is identical with the language of the English Act

(1) [1909] 1 K.B. 805.

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of 1870 which in my opinion does not lend any support to the respondents' arguments.

For the above reasons I hold that the terms of the insurance policy in the present case fall within the language of section 6 of the Married Women's Property Act of 1874, and so a statutory trust in favour of the petitioner has been created under the Act. She is therefore entitled to claim the money. Her prayer in the petition is granted with costs which I fix at Rs. 75.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson.

1931,
April 23.

IN RE MARWADI GANESH MULL (ACCUSED), PETITIONER.*

Alternative charges—Statement in the committing Court contradicted in the Sessions Court—Statement in Sessions Court true—Sessions Judge, if competent to complain that one or the other of the statements must be false—Practice.

When a person makes a statement in the Committing Court and contradicts it in the Sessions Court, the Sessions Judge can complain in the alternative that one or other of the statements must be false, even though the statement in the Sessions Court is true, since the false statement at the committal stage which eventuates in a trial is "in relation to the trial".

By way of superabundant caution, in these alternative cases, it is well to have complaints from both the Courts.

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 Anantapur Division in Criminal Appeal No. 45 of 1930 preferred against the judgment of the Court of the Joint Magistrate, Hospet, in Calendar Case No. 51 of 1930.

* Criminal Revision Case No. 61 of 1931.

V. V. Srinivasa Ayyangar and S. Ramanujachari
for petitioner.

Public Prosecutor (L. H. Bewes) for the Crown.

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JUDGMENT.

This Court would not have called up this case except that it involves an interesting point of law; because the petitioner confined his appeal below to a plea *ad misericordiam*, and a party must obviously work out all his remedies in the properly constituted Courts below before he comes up for revision.

The point of law is whether, when a person makes one statement in the committing Court and contradicts it in the Sessions Court, the Sessions Judge can complain in the alternative that one or other of the statements must be false. If the statement in the Sessions Court is true, can the Sessions Judge complain of the statement in the committing Court? He can only do so if the latter statement has been committed in relation to the Sessions trial. It has been held in Calcutta in *Nazir Ahmed v. Emperor*(1) that if a person makes a false charge in a police station which eventuates in a trial, the false charge is in relation to the trial. In the same way the false statement at the committal stage which eventuates in a trial is in relation to the trial. The learned Judges in *Bami Reddi v. Public Prosecutor of Kurnool*(2) were considering subordination and not the phrase "in relation to".

In these circumstances it cannot be said that the lower Courts erred in law. But by way of superabundant caution in these alternative cases it is well to have complaints from both Courts. On the merits there is no reason to interfere. The petition is dismissed.

L.N.S.

(1) (1924) 100 I.C. 708.

(2) (1914) 27 M.L.J. 522.

PRIVY COUNCIL.

J.C.*
1931,
July 28.

RIPON PRESS AND SUGAR MILL COMPANY,
LIMITED, APPELLANTS,

v.

GOPAL CHETTI AND OTHERS, RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Company—Winding up order—Preponderating influence of one shareholder—Winding up order wrongly made—Appeal to Privy Council—Lapse of time—Solvent company—Duty of liquidator—Indian Companies Act (VII of 1913), ss. 162 (vi), 174, 183.

Under section 162 (vi) of the Indian Companies Act, 1913, which provides that a company may be wound up by the Court if the Court is of opinion that that course is just and equitable, the fact that one shareholder has a preponderating voice in the company's affairs, by reason of owning or controlling a large number of shares, is of itself no reason for a winding up order.

Loch v. John Blackwood, Ltd., [1924] A.C. 783, distinguished.

A winding up order having been made in 1924 by the High Court on appeal, with effect from 1922, the Judicial Committee upon an appeal heard in 1931, although of opinion that the order was not justified when made, advised that it be maintained, save as to costs, having regard to the lapse of time, and the confusion and expense which consequently would result from setting it aside.

Where a company ordered to be wound up is solvent, so that the contributories only are interested in the result of the liquidation, the Court, under section 174 of the Act, should have regard to their wishes, ascertained by meetings convened under section 183, sub-section 2.

If the order has been made upon the petition of shareholders, an appeal at the instance of other shareholders is properly brought in the name of the company.

In re Diamond Fuel Company, (1879) 13 Ch. D. 400, 405, applied.

* Present : Lord BLANESBURGH, Lord ATKIN and Sir LANGFLOZ SANDERSON.

In such an appeal the Court should not make an order enabling the liquidator actively to oppose the appeal at the expense of the company. The duty of the liquidator is to act with complete impartiality between the contending shareholders.

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APPEAL (No. 95 of 1928) by special leave from a decree of the High Court in its appellate jurisdiction (November 13, 1924) reversing an order of the Court in its ordinary jurisdiction (November 3, 1922).

The appeal arose out of a petition by the first four respondents and two others, who between them held 32 out of the 200 shares issued by the appellant company, for an order under section 162 of the Indian Companies Act, 1913, that the company be wound up by the Court.

The petition was heard by KUMARASWAMI SASTRI J. and dismissed on November 3, 1922. An appeal heard by SPENCER and DEVADOSS JJ. on November 13, 1924, was allowed and an order winding up the company was made.

Special leave to appeal to His Majesty in Council was granted on December 2, 1926.

The material facts appear from the judgment of the Judicial Committee.

K. V. L. Narasimham for appellants.

Upjohn K. C. and *K. J. Rustomji* for sixth respondent, the official liquidator.

The other respondents did not appear.

The JUDGMENT of their Lordships was delivered by Lord BLANESBURGH.—This is an appeal from a judgment and decree of the High Court of Judicature at Madras, dated the 13th November, 1924, reversing a judgment and order dated the 3rd November, 1922, of a single Judge of the same High Court in its ordinary original civil jurisdiction. These orders were

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—
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made in the matter of a petition presented to the Court on the 1st May, 1922, for the compulsory winding up of the appellant company. By the order of the 3rd November, 1922, KUMARASWAMI SASTRI J. dismissed the petition with costs. On appeal his order was discharged by that of the 13th November, 1924, and the compulsory winding up of the company was thereby decreed. This appeal from that order reached the Board for hearing more than six years after it had been made. Its discharge accordingly involved the supersession of all proceedings in a liquidation which as a result of it had then been in operation for more than eight years. To this fact are attributable the grave difficulties which have confronted the Board in disposing of the appeal.

The company was constituted in 1882 for the purpose (1) of erecting a cotton-pressing factory at Raichur in Hyderabad and (2) of erecting a sugar factory at Hospet in the Madras Presidency of British India. It was registered in Madras solely because part of its business was to be carried on in British India. But for the Hospet project it would have been registered in the Nizam's Dominions. And the Hospet factory did not materialize. It was definitely abandoned as a project in 1909. The company has never done any business in British India. Its sole activities have been centred at Raichur in connection with the factory which in due course was erected there. The fact that the fixed property of the company and its business have thus been in one jurisdiction and its place of incorporation and statutory obligations in another has always been a source of difficulty. It hampered the company in its competition with local rivals: it exposed it to the risk of double taxation: its accounts were necessarily kept at Raichur in the local vernacular, and the compilation of the annual statements at Bellary

from these materials in a form to meet the requirements of the statute law of British India must always have been difficult and never quite satisfactory. It is unfortunate that in the liquidation no allowance appears so far to have been made for, or consideration given to, these difficulties inherent in the situation.

The company was not a private company, but its shareholders were never numerous. Its articles of association were those of Table A of the Act of 1882, with modifications introduced which did not affect its status as a public company. It had a nominal capital of Rs. 1,25,000, divided into 250 shares of Rs. 500 each. Of these, 200 shares were issued at the time of its formation, Rs. 250 being then called up on every share. This paid-up capital sufficed for the establishment of the Raichur factory. The 200 shares with Rs. 250 paid up were in May, 1922, in the hands of 24 holders or sets of holders.

The original articles of the company, clauses 7 and 8, provided for the appointment of named persons, as secretaries and treasurers at an allowance of five per cent. on net profits, and as agents in charge of the factories at a like allowance. Between 1905 and 1909 K. Venkata Rao, of whom much will be heard in the sequel—it is around him that the whole controversy has raged—had become one of the two agents.

In 1909 and 1910 the original offices of secretary and treasurer and agent were abolished, and by special resolutions of the company, passed and confirmed unanimously on the 7th and 28th of May, 1910, clauses 7 and 8 of the company's articles of association were cancelled, and it was resolved that, in lieu thereof, the firm of K. U. S. Ramachander & Co. should be appointed treasurers of the company on condition of their retaining the company's moneys without interest, and

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lending moneys to the company without interest when-
ever required.

In view of the allegations of the petition with reference to this arrangement—operative, as it was, for so many years—it is convenient to note, in passing, the deliberation with which it was made—the special resolution of May superseding with a technical amendment an earlier special resolution adopted with similar unanimity in April, 1910. It is material also to note that under the arrangement the firm was called upon to discharge the duties which had theretofore devolved upon the secretary, treasurer and agent combined, and that in any advantage that might accrue to it from the fact that, like a banker, it was not required to pay interest on the company's balances, was to be found the only counterpart for the 10 per cent. on profits which, under the superseded arrangement, had to be found by the company.

The firm, K. U. S. Ramachander & Co., was the family firm of Venkata Rao. From 1910 and earlier he had been at its head. In 1922 he was 73 years of age. It is impossible to read the record without seeing that, even at a later date, he remained a man of outstanding ability and strong personality. From 1910 his was undoubtedly the predominant influence in the firm, although he was only one of nine members, as also in the directorate of the company, although the evidence is clear to show that no duly qualified shareholder who desired a seat on the Board was ever excluded therefrom. His influence, real, and, for anything that appears, thoroughly well deserved, was not, at all events, unwelcome. Everything points to the conclusion that the shareholders, for benefits resulting to them therefrom, were well content to leave the management of the company's affairs in Venkata Rao's hands.

At all relevant times a large number of shares in the company stood registered in his own name, and in the names of his firm and of different individual members of his family, some of them members of the firm. But the number which at any time he really controlled is left in complete uncertainty. His own personal holding was never large. He complains in his evidence that members of his family had become, prior to the date of the petition, at variance with him. The petitioners have put in the minutes of a meeting of the 23rd June, 1917 (Record Part II, page 7), at which K. Ramachander, his eldest son, is found voting against him in favour of a larger dividend. Indeed, their Lordships can find nothing in the record to show that, if at any time any disagreement with Venkata Rao's action or policy had existed amongst the shareholders, it would not have found effective expression as, for the moment at all events, it did, at the meeting of the 21st August, 1921, to which reference will presently be made. The proceedings of the shareholders up to that date do not indicate that, as the petition suggests, they were there merely to register Venkata Rao's decrees. They do show that up to 1921 there was never any serious disagreement amongst them.

The first trace of conflict originates with a resolution proposed by Venkata Rao as an extraordinary resolution at a general meeting of the company held on the 6th August of that year. The resolution, in effect, was that, in view of the complete abandonment of the Hospet venture and of difficulties resulting from its British Indian incorporation, the registration of the company should be transferred to Hyderabad. The proposal, as might, perhaps, have been expected from what has been already said, was accepted unanimously at that meeting. But Subhupati Rao, a shareholder, a

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vakil of thirty years of age, who now becomes as prominent in the drama as Venkata Rao himself, although the holder of a single share only, and with, therefore, it might perhaps have been supposed, no very extensive interest in dividends, detected in the resolution or thought or said that he detected a subtle device on the part of Venkata Rao to make the recovery of dividends more difficult. Accordingly, at the meeting held on the 27th August, 1921, to confirm the resolution, he proposed an amendment to the effect that the company should be wound up voluntarily. And his amendment was carried by a bare majority of the members present, and Venkata Rao's original resolution was therefore lost, although the amendment was not, of course, affirmatively effective.

From this incident must be dated the movement, such as it was, headed by Subhupati Rao, culminating in the petition and ultimately in the winding up order which is now under review.

The petition, as has been said, was presented on the 1st May, 1922. There were six petitioners. Subhupati Rao is one; his brother, Lakshmikanta Rao, holding two shares, is another; a third has since died; and a fourth, Sidabasappa, sold his 21 shares in the company on the 2nd November, 1924, before the winding up order was made. The whole six petitioners between them held no more than 32 shares out of the total of 200. Only one other shareholder, the respondent, Madam Venkayya, supported them. The company, in its opposition to the petition, represented the views of a preponderant majority. It was amply solvent. Creditors were in no way interested, if they existed at all.

The petition is an attack upon Venkata Rao from every angle. That that attack was inspired throughout by Subhupati Rao has never been questioned, while

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Venkata Rao has reiterated in evidence that it is from some unexplained enmity to himself on the part of Subhupati Rao and from that alone that everything has resulted—the winding up petition, the appeal from the order dismissing it, and the whole course of the supervening liquidation so marked in its hostility to himself. Their Lordships are not prepared to treat these assertions lightly. They have never been contradicted by Subhupati Rao, although he has given evidence on two occasions and has made many affidavits in the course of the liquidation. No petitioner, except himself, has ever taken any part in the proceedings. The petition, for the terms of which Subhupati Rao is clearly, primarily, and not improbably exclusively responsible, is inexcusable in the recklessness and misleading character of its most serious allegations, and their Lordships have been compelled to note that throughout the recorded proceedings in the subsequent liquidation the activities of Subhupati Rao have been exclusive, constant, persistent, and officious, not to be explained by his insignificant material interest in the liquidation or its results. It is necessary to approach the consideration of the case with these most disturbing facts in mind. The learned trial Judge was able to dismiss the petition on what may be called its own demerits. Their Lordships will anticipate so far as to say that it is almost inconceivable that the High Court could have wound up the company as and when it did or have justified its order by the reasons assigned had these matters been even remotely present to the minds of the learned Judges there.

[Their Lordships' judgment pointed out inconsistencies appearing in the petition, and upon an examination of the evidence agreed with the view of the trial judge that the charges against Venkata Rao contained in the

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petition were not established. The judgment continued as follows :—]

In the result the learned Judge, as has been already noted, found that the charges made by the petition had not been proved in any particular. It had been conceded, he said, that unless the case could be brought within clause 6 of section 162 of the Indian Companies Act no order could be made: no misconduct had been proved against Venkata Rao or the other directors. The fact that Venkata Rao had a preponderating voice in the company by reason of his owning or controlling a large number of shares was of itself no reason for winding up the company; the allegation that dividends had not been paid regularly was no ground for winding up, but the trouble had only arisen in transmission cases. The petitioners had had inspection of all the accounts, and in no instance had these been shown to be wrong. As regarded the sum proposed to be spent on machinery, it was hardly likely that Venkata Rao, with his preponderating interest, would ruin the company for the pleasure of annoying the other shareholders.

Their Lordships subscribe to that judgment. The order dismissing the petition with costs was in their judgment, on the evidence before the Court, the only possible order. They think it both fair and right to add that, on a careful consideration of all the evidence, they can find no justification worthy of the name for the suggestion that, during Venkata Rao's long tenure of office, his management of the company's affairs had in view any other object than the welfare of the company in which as a shareholder he was, directly and indirectly so largely interested. Nor have they in the evidence found any proof that moneys retained by the firm were normally in excess of reasonably possible prospective

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needs or that there was any impropriety on the part of the treasurers in retaining the moneys they did retain or on the part of the directors in recommending their retention. The balances were, in fact, the working capital of the company, even although some portion of them might without illegality or even inconvenience have been distributed as dividend had the shareholders so insisted.

The petitioners appealed to the High Court by notice dated the 17th November, 1922. For some unexplained reason the appeal was not disposed of until the 13th November, 1924—nearly two years later. There were no new materials placed before the appellate Court to account for this loss of time, which would not have been possible in England, where winding up appeals are placed in an interlocutory list in order to be beyond any such risk. Their Lordships hope that this case is, in this, as in so many other respects, exceptional. But this delay ought to have weighed with the learned Judges in reaching a decision. The difficulties created by a winding up order in November, 1924, with effect from the 22nd May, 1922, which so soon became manifest in the liquidation, might have given them pause. It does not appear that these difficulties were even present to their minds.

Nor is it easy either to discover or to state the actual reasons of the appellate Judges for making a winding up order when they did or at all. They were apparently led to do so partly by the case of *Loch v. John Blackwood, Ltd.*(1), which, as they noted, had not been available for the trial Judge's consideration, but which, so far as their Lordships can see, bears no resemblance either in principle or detail to the facts as proved in this case.

(1) [1924] A.C. 782.

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For the rest, while the learned Judges do not in terms reject the trial Judge's findings of fact, they ignore them altogether. They seem to treat allegations in the petition as true merely because they are placed there. They find neither in its contradictions nor in its charges any room even for criticism. This omission in relation to the alleged threats by Venkata Rao to call up the unpaid share capital of the company is particularly unfortunate. The learned Judges appear, without examination, to accept these charges as proved, while, from their statement of the first of them, it is apparent that the nature of the charge made was quite misunderstood. Perhaps their conclusions on the whole matter may, however, best be taken from their own closing words:—

“It is evident that the affairs of this company are carried on in such a way that the members of one family are able to exercise a predominating influence over the management of the company and to secure certain benefits for themselves. The minority are unable to protest effectively against the actions of the directors because the majority of shares are in the hands of one family and the directors themselves are able to hold over the shareholders the fear of having to pay up the unpaid portion of their shares. This causes a lack of confidence in the management of the directors which there is no hope of improving so long as the present directorate continues and the funds are in the hands of the present treasurers. Under these circumstances, we think the only course we can take to secure the just rights of the shareholders is to direct the winding up of the company.”

Venkata Rao has sworn, and it has not been denied, that, before the appeal was heard, two of the petitioners had notified to him their actual, although apparently not their formal, withdrawal from the proceedings. One had died; a fourth, Sidabasappa, as has been stated, had, before this judgment of the High Court, sold his shares. In active support of the petition, therefore, if

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Venkata Rao has sworn truly, there remained, at the date of the winding up order, only Subhapati Rao and his brother, holding three shares between them, and Madam Venkayya, who had never even verified its allegations. A striking comment on the observations of the High Court when read in the light of the history already set forth.

But, presumably, these petitioning casualties were not—at least, all of them—known to the learned Judges, and Venkata's statement of them may have been exaggerated. Even so, the conclusions of the appellate Court cannot, in their Lordships' judgment, be supported. Their own examination of the petition leads them, on the evidence, to the inevitable conclusion that its allegations, so far as these were offensive, were entirely unproved. Its proper fate was the dismissal which it met with at the hand of the trial Judge. The winding up order on the materials before the High Court ought not to have been made. So far the present appeal is entirely justified.

But many further considerations emerging in subsequent events have to be weighed before it can be properly disposed of. To the statement and consideration of these, their Lordships now proceed.

At the instance of the directors, immediate steps were taken to have the order set aside. An application for leave to use the company's name as appellant was first made. This was strenuously opposed by Subhapati Rao, who, in an affidavit, challenged Venkata Rao to ascertain the contributories' views on the subject. At a meeting, in answer, held on the 2nd April, 1925, sixteen contributories holding 168 shares out of 200 declared themselves for an appeal in the company's name or, if that were not possible, for one in their own. Notwithstanding this declaration of their wishes (see section

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174 of the Act), the learned Judge in charge of the liquidation on the 19th November, 1925, refused the leave asked for, on the ground that Venkata Rao was then in default under an order made against him in the liquidation, and, on appeal to the Court, this refusal was, on the 18th December, 1925, upheld, on the expressed ground, the basis of which their Lordships are quite unable even to conjecture, that there was no reason to suppose that those who purported to be the company in the application "represented the wishes of the majority of the shareholders." This new misunderstanding of the position at another critical moment in the history is responsible for the further misfortune that an appeal against a winding up order, so unusual in its occasion and circumstances, only became possible through the special leave granted by His Majesty on the recommendation of this Board two years later, on the 2nd December, 1926. Four further years elapsed before the appeal was brought to a hearing—the greater part of that long interval having been apparently consumed in the preparation and printing of the supplemental appendices included in the record at the instance of the official liquidator.

The appeal, quite rightly, is in the company's name. The objection taken to its competence long persisted in was quite unfounded. In that respect it is in accord with a well-established practice, devised to meet the necessities of just such a situation as here arose. But this is all mere form or style. The appeal is really that of the contributories who are behind it. They may be truly regarded as the appellants; see *In re Diamond Fuel Company*(1). Of the respondents, the official liquidator alone has appeared to oppose. He has taken

(1) (1879) 13 Ch.D. 400, 405.

it upon himself to contest the appellants' case *ab initio*—the remaining respondents, with Madam Venkayya, their unpledged supporter, being all who remain of the original petitioners. They have kept themselves in the background throughout, doubtless by arrangement. The official liquidator in his printed case and at the Bar has said for them all that they could have said for themselves. Moreover, he has had printed and included in the record 364 pages of the proceedings in the winding up, including a verbatim transcript of the depositions that have been taken in the course of it. What has really been attempted by this procedure is that the opposition to the appeal—the petitioners' business—shall be conducted even if it fails at the charge of the assets of the company.

Such unusual partisan activity on the part of an official liquidator in relation to such an appeal clearly called for some justification, and this was sought to be supplied by referring to an order of the 14th November, 1928, by the Judge in winding up, which directed the liquidator to oppose the appeal and do all the above things. Their Lordships have noted that the order referred to is really an affirmative answer by the learned Judge to questions asked by the liquidator on an *ex parte* summons, while the order made has been so liberally interpreted by the liquidator that in the second appendix he has had printed 124 pages of depositions, all taken after the date of the order and, save for a few lines here and there, entirely irrelevant, as their Lordships think, to any issue arising on the appeal.

Their Lordships are gravely concerned that such an order should ever have been asked for. They are even more concerned that it should have been acted upon with so little discrimination. The order, in principle,

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was sought to be justified by the representation doubtless made by the official liquidator to the learned Judge, and as a contention maintained before the Board, that in these appendices facts are disclosed which, had they been known to the Court when the petition came before it, would have made a winding up order inevitable. It is merely an aggravation of the position that, in their Lordships' judgment, as will appear presently, no such facts are there disclosed. For, even if they had been, these were facts to be brought forward, if so advised, by the petitioner-respondents at their own risk, and not by the liquidator at the charge of the assets. Their existence would have been no justification for his becoming partisan in a dispute between two sets of contributories concerning the propriety of an order from which his authority alone proceeded. His only duty on an appeal against such an order was from a position of complete impartiality, and in the interests of the whole body of his constituent contributories to be ready to inform the Board of any facts and circumstances in relation to the company's affairs about which he might be asked or which in his judgment the Board ought to know.

In the present case the liquidator's attitude is peculiarly invidious. It appears from the depositions that he was put forward by the petitioners for his office on the resignation of the official first appointed, and that his appointment was opposed by the Venkata Rao party for that very reason. He, too, was an "enemy". From him, therefore, on appointment, an attitude of unqualified detachment was specially to be desiderated. His conception of detachment in relation to this appeal has been to ask for and to obtain *ex parte* and to interpret with an excess of liberality an order which has enabled him free of expense to the petitioners, in

relief of their responsibilities, and already at a cost far in excess of any possible interest of theirs in assets, to fight their battle, with, as will be seen, no success and at what, except as to a trifling amount, must be the inordinate expense of their opponents. It is to be hoped that orders like that of the 14th November, 1928, will not in future be lightly made in the course of an Indian winding up. The only results of the order in the present instance have been excessive delay and utterly useless expenditure, both of which will, like the delay already referred to, be found to have been operative to the prejudice of the appellants, in absence of whom the order was made.

[After dealing with the contents of the appendices the judgment continued as follows :—]

Accordingly, their Lordships have reached the conclusion that the proceedings in the liquidation, the details of which—at such great expense—the official liquidator has introduced into the appeal, do not, in any way, help the case he has sought to make. On the contrary, they operate further to imperil it. For, what, in their Lordships' judgment, these proceedings do show is that, owing to the mistaken principles upon which the liquidation has been conducted, doubtful orders have been made in the past and that, unless the methods hitherto adopted are for the future discarded, nothing can result from the further progress of the liquidation but the dissipation of the company's entire assets in expenses. In other words, the liquidator's appendices, properly appreciated, point to the discharge of the winding up order being called for rather than to the continuance of the liquidation being beneficial. And the proper choice between these two alternatives becomes thus ever more difficult.

This statement requires some expansion.

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The outstanding fact in relation to this winding up which seems so far to have been entirely missed is that the contributories are alone interested in its results. The company had no creditors. From this it followed that the liquidation was peculiarly one in which the Court, as to all matters affecting the contributories as a class, would have regard to their wishes as proved by any sufficient evidence (Indian Companies Act of 1913, section 174) and one, also, in which the official liquidator [section 183(2)], would lose no opportunity of summoning meetings of contributories for the purpose of ascertaining their wishes in respect of similar matters. Now, it is hardly too much to say that with consequences—serious in many other respects than excessive cost—these vital considerations have been consistently forgotten or ignored throughout the liquidation.

[The judgment pointed out two “typical examples” of the above and referred with disapproval to certain orders made in the winding up. The judgment then continued as follows:—]

Their Lordships have now detailed with much particularity the salient incidents in this long history. They have done so, laboriously they fear, but not finding it possible otherwise to make clear within the confines of a self-sufficient judgment the difficulty of the problem disclosed. What they find themselves faced with at the end of the day is a winding up order, made two years after its presentation upon a petition which ought never to have been presented, for, even if not merely vindictive and malicious, the petition was entirely without proved merits. They find also that the winding up order has in the liquidation been succeeded by a series of orders, off-hand in form and on the face of them, at all events, made without full consideration of

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all relevant circumstances. Lastly, their Lordships find a liquidation in being which, if carried on as it has been begun, can, as they forecast it, end in nothing for the contributories but a call of all the unpaid capital to provide for payment of the costs and expenses. And for these disasters, one and all—with the exception only of the expense and trouble due to the recalcitrancy of Venkata Rao, the costs of which have already and rightly fallen upon him—the petitioners are mainly, if not indeed entirely, responsible. There is, therefore, so far, and even at this distance of time, everything to be said for the discharge of the winding up order appealed against.

But what would now be the consequences of discharging that order? The business of the company has ceased for years: its undertaking has been broken up: its reconstitution except under new auspices is now probably quite impracticable: and the task of adjusting liability for the mischief which has resulted from the liquidation presents a prospect of far-reaching and ruinous litigation. Nor could these consequences be mitigated, nor could any bounds be set by their Lordships to the range and extent of future trouble if the winding up order were now to be set aside. A direction to that effect would, their Lordships cannot doubt, be a calamity to all concerned. They cannot give it.

On the other hand, it seems to the Board by no means hopeless that, if the liquidation be left operative, it may, by a change of method, be possible to avoid at least total disaster.

Their Lordships are, of course, well aware that it is not for them to dictate the future course of the liquidation. That is a matter for the learned Judge in winding up. The judicial discretion in such matters is, at all

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events in the first instance, with him alone, and he may not divest himself or be divested of full responsibility for its exercise. The observations accordingly which immediately follow are made merely for his assistance. They are in no way directory. It is enough that they will have his attentive consideration. In their Lordships' view, then, it is essential, if complete disaster is to be avoided, that for the future this liquidation shall be conducted in a spirit of complete impartiality, as between different sets of contributories, and with due regard to the wishes of the contributories (section 174). It will be for the learned Judge to consider whether this end can be attained under the present liquidator, who has identified himself so completely and, so far, so unfortunately, with the petitioners in their unworthy conflict with the main body of contributories, or whether it will not be necessary to place in the position of liquidator a man of no less high standing than the present official liquidator, but who has not hitherto been associated professionally or otherwise with either set of contributories, and who would be advised by a vakil, equally dissociated from either side, whose appointment would be authorized under section 181 of the Act. It will further deserve most careful consideration at the hand of the learned Judge whether, in the future course of the liquidation, by whomsoever it is conducted, the audited accounts up to 1923 should not remain undisturbed for reasons similar to those which have led their Lordships to leave the winding up order in being, and whether the accounts of the company for 1924 should not be taken on the best available materials and audited in order that on these accounts, as so taken, the actual amounts with which the treasurers are to be charged may appear as accurately as is now possible. Particularly, however, will it be for the

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learned Judge to determine if the liquidator should not be directed to consider, as a protection from all further litigation, whether the liquidation cannot be brought to an end by some scheme under which the whole remaining assets of the company would be taken over by the majority contributories on the terms of their providing for the authorized costs and expenses of the liquidation and a sum equivalent to the then existing value of the shares in the company of the remaining contributories; and whether, failing that, the liquidator should not be directed in relation to the dividend declared on the 22nd December, 1924, and, notwithstanding the orders on that subject previously made, either to complete its distribution out of the assets in his hands or enforce repayment from each recipient of the dividend paid to him. In their Lordships' judgment, the preferable course, if funds permit, is, with the sanction of the Court, to complete the distribution. All these observations, however, as their Lordships have explained, express their own views only. They form no part of the order following.

The actual order now to be made should, their Lordships think, be as follows: That the winding up order of the 13th November, 1924, although not justified when made, be, by reason of the lapse of time and intervening events, maintained except as to costs. As to these, the order will be discharged.

Their Lordships will humbly advise His Majesty accordingly.

As to costs, as the winding up is allowed to continue, the petitioners cannot be ordered to pay the company's costs either of the petition or of the appeal to the High Court, proper though such an order would be. But they must not have costs in either Court, and if these costs have been paid by the official liquidator they

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must be repaid. The official liquidator must pay out of the assets the costs of the company—that is, the majority contributories—of the petition, of the appeal to the High Court and of this appeal. There will be no costs of this appeal to the petitioner-respondents or Madam Venkayya. The Registrar will tax the costs of this appeal of the official liquidator, who will have liberty to apply in the liquidation for payment, out of the assets, of these costs or of such part of them as the Judge, in winding up, may, in view of this judgment, allow; the official liquidator having further liberty reserved to apply to the learned Judge for payment otherwise than by the majority contributories of such of his taxed costs as may be disallowed out of assets.

It will be the duty of the official liquidator when applying for his costs to bring this judgment of their Lordships to the notice of the learned Judge.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for sixth respondent: *Watkins & Hunter.*

A.M.T.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Madhavan Nair.

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PURAMASSERI NARAYANA *alias* PUNNASSERI
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v.

THE BOARD OF COMMISSIONERS FOR HINDU
RELIGIOUS ENDOWMENTS CONSTITUTED UNDER
ACT I OF 1925 (RESPONDENT), RESPONDENT.*

*Madras Hindu Religious Endowments Act (II of 1927), sec.
84 (2)—Remand and re-hearing of case under—Power of—
District Court has no.*

Section 84 (2) of the Madras Hindu Religious Endowments Act (II of 1927) does not constitute the District Court an appellate authority with all the normal powers of an appellate Court. The District Court has, therefore, no authority under that section to direct a remand and re-hearing of the case.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908) and section 107 of the Government of India Act praying the High Court to revise the order of the District Court of South Malabar, dated the 30th September 1927, and made in Original Petition No. 117 of 1926.

P. Govinda Menon for petitioners.

P. Venkataramana Rao for respondent.

The JUDGMENT of the Court was delivered by
WALLACE J.—In our view the District Court had no authority under section 84 (2) of the Madras Hindu Religious Endowments Act to direct a remand and re-hearing of the case. The powers conferred on the Court by that section are only to modify or set aside the

* Civil Revision Petition No. 1746 of 1927.

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decision of the Board and, of course, to dismiss the application. If the section had meant that the Court was an appellate authority with all the normal powers of an appellate Court, we should expect that to have been stated. The District Court's order is therefore without jurisdiction and we must set it aside and direct that it pass a proper order in accordance with its powers under the section. Each party will bear his own costs.

A.S.V.

APPELLATE CIVIL.

*Before Sir V. Ramesam, Kt., Officiating Chief Justice
and Mr. Justice Cornish.*

GORANTLA PARVATAMMA (THIRD DEFENDANT),
APPELLANT,

v.

VEERAGANDHAM SUBBAYYA AND FOUR OTHERS
(PLAINTIFF AND FIRST, SECOND AND FOURTH DEFENDANTS AND
NIL), RESPONDENTS*

Benami purchase—Plaintiff putting forward a case of—Failure of plaintiff to discharge burden—Defendant's case—Unnecessary to examine.

If a plaintiff, who puts forward a case that a land standing in the name of a female member of a family was really purchased *benami* in her name for some ulterior purpose, does not discharge the burden that is cast upon him, it is unnecessary to examine the defendant's case.

Pratap v. Sarat, (1920) 33 C.L.J. 201, followed.

APPEAL against the decree of the Court of the Subordinate Judge of Bapatla in Original Suit No. 96 of 1923.

T. V. Ramanatha Ayyar for appellant.

B. Somayya for first respondent.

* Appeal No. 458 of 1925.

The JUDGMENT of the Court was delivered by
RAMESAM OFFG. C.J.—This appeal by the third defendant arises out of a suit for partition filed on behalf of the plaintiff, a minor at the time of the suit, by his next friend, his maternal uncle, against the first defendant, his uncle, the second defendant, his father, and the third defendant, daughter of the first defendant. After the suit was filed, the fourth defendant was born, with the result that the plaintiff's share was reduced from one-fourth to one-sixth. The plaintiff got a decree in the Court below. The third defendant files this appeal in respect of two items of immovable property, (1) two and half cents in item 40 of schedule A, and (2) two acres of dry land in item 51 of schedule A; and an item of debt. The third defendant claimed in her written statement that the two former items did not belong to the joint family but belonged to herself. The Subordinate Judge found this point against her and gave a decree for the plaintiff in respect of these two items also. Hence she appeals.

[His Lordship discussed the evidence as regards the first item, held that the plaintiff had not proved his case as regards the same and proceeded as follows:—]

Coming to the second item, the consideration for this item is as much as Rs. 500. Third defendant's case is that her husband got it from the lands which he obtained on division with his brothers. In a case of this sort the burden of proof is upon the plaintiff and we are not to scrutinize and examine the defendant's case in the first instance; vide *Pratap v. Sarat* (1). The plaintiff must prove that a land standing in the name of a female member of the family was really purchased *benami* in her name for some ulterior purpose such as depriving him of his rights, and if that burden is not

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(1) (1920) 33 C.L.J. 201.

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discharged it is unnecessary to examine the defendant's case.

RAMESAN
OFFG. C.J.

[His Lordship discussed the evidence as regards the second item and proceeded as follows:—]

We think the plaintiff has not made out a *prima facie* case in respect of this item and it is unnecessary to examine the evidence adduced by the defendant as to the source of the purchase-money.

There is a third item claimed by the third defendant in this appeal. That is a debt due to the family in respect of which the plaintiff claimed a share. This item is No. 6 of schedule III, part II (b). The debt was due from P.W. 6. P.W. 6 himself says that the note was executed in favour of the first defendant. The first defendant in his evidence says that the note was transferred to somebody because he was in need of money. But all this evidence does not help the third defendant. It does not show that she is entitled to item 7 of schedule III, part II (b). If there is any other debt due by this debtor to the third defendant, this judgment will not affect her in respect of it, but certainly her claim to item 6 must be disallowed, because she has established no right to it. This portion of the appeal fails, but the appeal in respect of the other two items succeeds. The plaintiff's suit in respect of the two items of immovable property will be dismissed. As the parties have succeeded equally and lost equally, there will be no order as to costs between the plaintiff and the third defendant.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

YANATI VENKATARAGHAVAMMA (PETITIONER—FIRST
DEFENDANT), APPELLANT,

1981,
July 81.

v.

BYRISETTY SINGARAYYA SETTY AND THREE OTHERS
(PLAINTIFFS NOS. 1 AND 2 AND AUCTION-PURCHASERS),
RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXI, r. 66 (2) (e)
—*Litigation concerning property sold—Existence of—Inti-*
mation to intending buyers of—Propriety of.

Under rule 66 (2) (e) of Order XXI of the Code of Civil Procedure, the Court is directed to specify "every other thing which the Court considers material for a purchaser to know in order to judge the nature and value of the property". Where, therefore, the Court thinks that it is material for intending buyers to know that the property is under litigation, it is entirely justified in directing the amin to give them that information.

Observations of SESHAGIRI AYYAR J. in *Venkataratnam v. Ranganayakamma*, (1918) I.L.R. 41 Mad. 985, 997 (F.B.), on the undesirability of issuing such warnings, dissented from.

APPEAL against the order of the District Court of Nellore, dated 15th September 1927, and made in Execution Application No. 191 of 1927 in Original Suit No. 56 of 1925 on the file of the Court of the Subordinate Judge of Nellore.

P. Venkataramana Rao for appellant.

M. Ramachandra Rao for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by
WALLER J.—This is an appeal against an order refus- WALLER J.
ing to set aside a sale in execution. Only two of the

* Appeal against Order No. 364 of 1927.

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WALLER J.

grounds urged before the lower Court are pressed here. The first is that bidders were scared away by a notification issued at the sale itself, warning them that the appellant's daughter's claim to the property had been dismissed and that she had filed a suit. Reliance is placed on some observations by SESHAGIRI AYYAR J. in *Venkataratnam v. Ranganayakamma* (1) on the undesirability of issuing such warnings. With great respect we must express our dissent. Rule 66 (2) (c) of Order XXI of the Code of Civil Procedure directs the Court to specify

"every other thing which the Court considers material for a purchaser to know in order to judge the nature and value of the property."

In this instance, the Court thought that it was material for intending buyers to know that the property was under litigation and directed the amin to give them that information and we think that it was entirely justified in doing so. Nor does the complaint come very well from the appellant, for it seems tolerably obvious that it is she that is responsible for her daughter's effort to defeat or delay the decree and the sale under it.

The next complaint is that the sale was illegal as it was adjourned for over seven days. What happened was that the sale went on from day to day continuously from 18th to 29th April which was neither illegal nor irregular. It was not adjourned in the proper sense of the word. The Judge was, no doubt, absent for three days, while the sale was going on, but it appears that he had issued a general order that all sales were to continue till his return.

We find on both points against the appellant. Assuming that there had been irregularities, it is for

(1) (1918) I.L.R. 41 Mad. 985, 997 (F.B.).

her to show that they caused her substantial injury. She complains that land worth Rs. 40,000 was sold for Rs. 6,000-odd. [His Lordship discussed the evidence and concluded that the land fetched much less than its value owing to the fault of the appellant herself and dismissed the appeal with costs.]

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APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

THE MUNICIPAL COUNCIL, ANANTAPUR REPRESENTED
BY ITS CHAIRMAN (SECOND DEFENDANT—RESPONDENT),
APPELLANT,

1931,
July 20.

v.

SANGALI VASUDEVA RAO (PLAINTIFF—APPELLANT),
RESPONDENT.*

Madras District Municipalities Act (V of 1920), sch. IV, r. 9—Enhancement of assessment of property—Notification under r. 9 of sch. IV—Necessity—Notice in conformity with requirements of r. 9—What amounts to—sec. 80 of Act—Publication in District Gazette not condition precedent to validity of levy of tax under—Revised assessment on which tax imposed illegal—Tax-payer liable on old assessment—Code of Civil Procedure (Act V of 1908), sec. 80—Public officer—Municipal Council not a.

Under the Madras District Municipalities Act (V of 1920) an enhancement of assessment of property is illegal in the absence of the notification required by rule 9 of Schedule IV of the Act.

A notice that the Municipal Council "proposes to revise the taxes" is not a notice in conformity with the requirements of

* Letters Patent Appeals Nos. 93 and 108 of 1930.

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rule 9 of Schedule IV of the Act; nor is a notice running "Making changes in the property gutha", because the word "gutha" is ambiguous and may mean either assessment or tax.

A Municipal Council is not a "public officer" to whom notice under section 80 of the Code of Civil Procedure is necessary.

If a revised assessment on which a tax-payer has been required to pay tax is illegal, he is liable to pay tax on the old assessment. There is nothing in the Madras District Municipalities Act (V of 1920) to show that, if for any reason a revision of assessment is not made before the end of five years, the old assessment lapses.

Section 80 of the Madras District Municipalities Act (V of 1920) does not make the publication in the District Gazette a vital and pre-requisite necessity so that, if publication does not precede the date on which the tax is to come into force, the levy of tax from that date is illegal.

Paragraph 70 of the Municipal Account Code has no statutory force.

APPEALS under clause 15 of the Letters Patent against the judgment of MADHAVAN NAIR J. in Second Appeal No. 266 of 1929 preferred against the decree of the District Court of Anantapur in Appeal Suit No. 110 of 1928 preferred against the decree of the Court of the District Munsif of Anantapur in Original Suit No. 508 of 1928.

Kasturi Seshagiri Rao for appellant,

B. Sitarama Rao for respondent.

JUDGMENT.

REILLY J.

REILLY J.—In this case the plaintiff, who is the owner of three houses within the Municipality of Anantapur, sued the Chairman of the Anantapur Municipal Council, the first defendant, and the Municipal Council, the second defendant, for a declaration that the house-tax levied by the Municipal Council on his three houses for the year 1928-29 was illegal and that he was not liable to pay it and for a permanent injunction restraining the defendants from collecting the tax from him. It

happened that in respect of the tax to which he objected not only had the rate of the tax been increased by the Municipal Council but the assessment of his property on which the rate was calculated had also been increased in the course of a periodical revision of assessment under the Madras District Municipalities Act. The District Munsif dismissed the suit as against the Chairman, the first defendant, but made the declaration and injunction prayed for against the second defendant. The Municipal Council then appealed to the District Court, and the District Judge dismissed the suit so far as the house-tax was concerned. Then the plaintiff came to this Court on second appeal. MADHAVAN NAIR J. found that the increased rate of house-tax was valid but that the enhancement of the assessment of the property was illegal; and he made a declaration that the Municipal Council was entitled to collect the house-tax at the new enhanced rate but only on the old assessment as it stood before the revision and also made an injunction in accordance with that declaration. I may mention that the suit originally covered questions about water-tax and education-tax as well as house-tax, but that by the time it reached this Court it was concerned only with house-tax. Against the decision of MADHAVAN NAIR J. the Municipal Council has preferred Letters Patent Appeal No. 93 of 1930.

Under the Madras District Municipalities Act provision is made for a revision of the assessment of land and buildings for the purpose of house-tax once in five years. Rule 7 of Schedule IV of the Act provides that the Chairman shall enter the annual value of all lands and buildings determined by him and the tax payable thereon in assessment books to be kept for the purpose at the Municipal office, and those books are to contain particulars in respect of each item of property entered.

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Rule 8 provides that the assessment books shall be completely revised by the Chairman once in five years. Rule 9 provides that, when the assessment books have been prepared for the first time and whenever a general revision of such books has been completed, the Chairman shall give public notice stating that revision petitions will be considered if they reach the Municipality within a period of thirty days in the case of ordinary assesses: that notice shall be affixed to the notice-board of the Municipal office and on the same day shall be published in the Municipality by beat of drum.

The process of revising the assesment in Anantapur Municipality was going on towards the close of 1927 and the beginning of 1928. MADHAVAN NAIR J. has found that there were certain serious irregularities in the proceedings of the Chairman, which made the levy of house-tax of which the plaintiff has complained on an enhanced assessment illegal. He has arrived at that conclusion partly because the provisions of paragraph 70 of the Municipal Account Code were not followed out properly. With great respect I may point out that that paragraph of the Municipal Account Code appears to have no statutory force. It is not, as the learned Judge appears to have thought, a statutory rule made under the Act. So far as I can gather, he was led into that misapprehension by the learned Advocate who argued the case for the Municipal Council before him appealing to the provisions of that paragraph. But without going into that matter any further or into any of the other points in the learned Judge's judgment in my opinion it is sufficient to deal with this case on the ground of defects in the notification published by the Chairman in regard to the revision of the assessment or rather on the ground that no proper notification was

issued by him as required by rule 9 of Schedule IV of the Act.

Exhibit D is a copy of an English notification, dated the 22nd December 1927 and published in *Anantapur District Gazette* of the 5th January 1928, on this subject. It notifies, not, as required by the rule, that the Chairman has completed the general revision of the books, but that the Municipal Council proposes

"to revise the taxes on the properties situated within the Municipality with effect from 1st April 1928."

It calls for objections to be submitted by the 6th February 1928 and states that

"the revision lists of the four wards will be available for verification of the public from 11 a.m. to 5 p.m. daily in the Municipal Office."

Now I have mentioned that at that time there was not only a revision of assessment of property going on but there was an enhancement of the rate of tax under consideration, the enhancement to which the plaintiff objects in this case. This notification to which I have referred is not a notification that a revision of assessment has been carried out and that tax-payers have an opportunity of objecting to the revision of the assessment. It is a notification that the Council proposes "to revise the taxes", which people might well understand to refer to the proposal to increase the rate of tax. It is urged for the Municipal Council that the notification ought not to be read in that way because it is stated that the revision lists of the four wards will be available for verification by the public in the Municipal office. That reference to revision lists is certainly not enough to make it clear to the public that the revision of taxes mentioned at the beginning of the notification is not an enhancement of the rate of tax but a revision of assessment. And the reference to revision lists does not state that the lists have already been completed. It merely

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states that they will be available at some indefinite date. It is clearly the duty of the Chairman under the rules to issue a notification when he has completed his revision of the assessment books, which will give the tax-payers due notice that they have an opportunity of disputing his revised assessment. To give a vague notice that the Council "proposes to increase the taxes" is certainly not to give a notice that he has revised the assessment of their property and that they may come in and dispute it. So much for Exhibit D. But it is urged that at the same time another notification in Telugu was published. That notification was, I think, clearly better from the Chairman's point of view than the English notification. It was generally in the same terms as the English notification. But it ended with a paragraph that every day between 11 a.m. and 5 p.m. the lists for the four wards in respect of which changes had been made would be publicly exhibited. That at least shows that something had already been done, that it was not merely in the stage of a proposal. But the first paragraph of the notification is almost as bad as the English one. Literally translated it runs:

"Making changes in the property gutha the Municipal Council proposes to bring the changes into effect from the 1st April 1928."

Now it is admitted that "gutha" may mean either assessment or tax. So by that notification also the tax-payers were left in doubt as to what it was that was being done, whether it was the assessment of their property that was being revised or a higher rate of tax which was being calculated on the assessment fixed. To my mind there is no doubt that neither the English notification, Exhibit D, nor the Telugu notification, Exhibit E, has complied properly with the requirements of rule 9 of Schedule IV of the Act.

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It has been suggested before us for the Municipal Council that, even if these notifications were not such as should have been issued, section 354 (1) of the Act makes the defects in them not such as to take away the validity of the taxes imposed. The effect of section 354 (1) appears to me to be far too narrow to have that result. It provides that clerical errors or mistakes in respect of the name, residence, place of business or occupation of any person or in the description of any property or thing or in respect of the amount assessed, demanded or charged shall not be enough for impeaching any assessment or demand for taxes. But here we have something very much more serious than a mere clerical error or mistake such as is referred to in that section. The tax-payers were not, as required by the rules, informed that a revision of the assessment of their property had been completed and that they had an opportunity of coming forward and disputing it as it affected them. The tax imposed without a compliance with the Act in that respect appears to me clearly illegal; and without going into the other questions discussed by MADHAVAN NAIR J. in my opinion his decision that the tax based upon the new assessment, which is subject to this important defect, is illegal must be supported.

It has been urged for the appellant here, as it was urged from the beginning, that the plaintiff's suit must fail because he did not give notice to the Municipal Council such as is required by section 80 of the Code of Civil Procedure. It is contended for the Municipal Council that the Council is not only a "person"—which is not denied—but is a "public officer" within the meaning of section 80 of the Code. I entirely agree with MADHAVAN NAIR J.'s rejection of that contention. I may add to what he has said on that subject that, if

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a Municipal Council was a "public officer" to whom notice under section 80 of the Code was necessary, then the provisions in section 350 (1) of the Madras District Municipalities Act would be superfluous.

In my opinion therefore Letters Patent Appeal No. 93 of 1930 should be dismissed with costs.

Letters Patent Appeal No. 108 of 1930 is an appeal in respect of the same suit by the plaintiff against MADHAVAN NAIR J.'s decision. It is contended for the plaintiff that, if the revised assessment, on which he was required to pay the tax for 1928-29, had not been made legally, then he was not liable to pay any house-tax at all. But, although the Act requires that the assessment of property for the purpose of house-tax should be revised every five years, there is nothing in the Act to show that, if for any reason a revision of assessment is not made before the end of five years, no house-tax can be collected but that the old assessment lapses. I see no reason to suppose that MADHAVAN NAIR J.'s view that the tax should be collected on the old assessment is wrong. It is also contended for the plaintiff in this appeal that the enhanced rate of tax at seven and a half per cent instead of six and a quarter per cent could not legally be enforced against him because all the formalities for enhancing the tax had not been carried out. It is admitted that the Municipal Council passed a resolution in January 1928 that the rate of tax should be raised to seven and a half per cent from the 1st April 1928 and that a notification to that effect was published in the District Gazette on the 5th February inviting objections, that no objections were received and that the Municipal Council confirmed its resolution to levy the enhanced tax on the 17th March 1928. All that was in accordance with the prescribed procedure. But there was one further step

to be taken by the Municipal Council in such cases. Section 80 of the Act, as it stood at that time, provided that

"when a Municipal Council shall have determined subject to the provisions of sections 78 and 79 to levy any tax or toll for the first time or at a new rate, the Chairman shall forthwith publish a notification in the District Gazette and by beat of drum specifying the rate at which the tax or toll will be levied from a date to be specified in the notification."

Mr. Sitarama Rao for the plaintiff urges that the intention of that section is that the notification should be published before the tax comes into force. It happens that the Chairman sent a notification in accordance with those provisions to the District Gazette on the 19th March 1928, but that it was not published in the District Gazette until the 5th April 1928. Mr. Sitarama Rao therefore contends that the notification published in the Gazette on the 5th April 1928 stating that the tax at the enhanced rate would be levied from the 1st April 1928 was not a proper compliance with the requirements of the section and was equivalent to retrospective taxation. No doubt it is desirable that the notification that such a tax is to be levied or enhanced should be published before the date from which the levy or enhancement comes into force; but I do not think that we can read section 80 of the Act, as it stood then, as making the publication in the District Gazette a vital and pre-requisite necessity so that, if publication does not precede the date on which the tax is to come into force, the levy of tax from that date is illegal. There is nothing in the section to show that the tax is to become legally enforceable only after the notification is published. The section lays the duty on the Chairman to publish the notification "forthwith", and that duty was fulfilled by the Chairman in this case. It is true, as Mr. Sitarama Rao has contended,

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that the whole scheme under the Act is that house-tax should be assessed and collected for the financial year; but I cannot agree with him that the fact that this notification happened to be published in the District Gazette five days after the commencement of the financial year makes the levy of the tax at the enhanced rate from the beginning of that year illegal.

In my opinion this appeal also should be dismissed with costs.

ANANTAKRISHNA AYYAR J.—I agree.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Cargenven.

1931,
July 24.

NANDULA JAGANNADHAM (THIRD DEFENDANT),
APPELLANT,

v.

GOTETI VIGNESWARUDU AND FOURTEEN OTHERS
(PLAINTIFFS TWO TO NINE AND DEFENDANTS ONE
AND TWO AND NIL), RESPONDENTS.*

Hindu Law—Widow—Property inherited by her—Income out of—Right of disposal over—If bound to pay the principal of binding debts—Sale to discharge a binding debt—Necessity for sale not imminent—Test to be applied—Payment of a small portion of the amount realized by sale for a debt which was not a legal necessity—Effect of on sale.

A Hindu widow succeeded to properties left by her husband which yielded a considerable income. Her husband had executed two mortgages which were binding on the inheritance. The widow sold one of those properties for an adequate consideration, viz., Rs. 3,200, out of which Rs. 2,550 and 650 were

* Appeal No. 181 of 1926.

applied in payment of the principal and interest respectively due under the mortgages. The reversioners objected to the sale.

Held that, (1) a Hindu widow has absolute power of disposal over the income of the property inherited by her, even though there were binding debts to be paid, and she is not bound to apply the surplus income to the payment of the principal amount of those debts but only bound to pay the interest on the same out of such surplus.

(2) the purpose of the sale being the payment of a binding debt, the fact that the necessity for the sale was not imminent should not be allowed to prevail, and the test to be applied in such a case is, "was the sale effected in good faith and in the exercise of proper discretion; in other words, could it be justified as the act of a prudent manager of a joint Hindu family?"

(3) though the payment of Rs. 650 out of the sale price towards the interest on the mortgage debts was not a "legal necessity," the entire sale should be upheld as that sum bears a small ratio to the entire consideration.

APPEAL against the decree of the Court of the Subordinate Judge of Narasapur in Original Suit No. 113 of 1922.

A. Satyanarayana for appellant.

B. T. M. Raghavachari for fourth and eleventh to fourteenth respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by

VENKATASUBBA RAO J.—In this appeal we have to decide whether a certain alienation made by a Hindu widow is binding on the reversioner. One Manikya Rao died on the 4th of January 1919 leaving the first defendant, then a minor, his widow. On the 26th of September 1920, her father, the second defendant, agreed on her behalf to sell the suit house to the third defendant for Rs. 3,200. This agreement was made subject to the widow's confirmation on her attaining majority. After she became a major, in pursuance of that contract, she

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—
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executed on the 16th of February 1922 a conveyance of the property in favour of the third defendant. The price mentioned in the sale deed is Rs. 3,770-5-0, which, ignoring a certain small item, represents the sum mentioned in the contract, (namely, Rs. 3,200), together with the interest thereon to the date of the sale. The fact was that the vendee was put in possession of the property on the date of the agreement and he was, on that account, required, in lieu of the profits received by him, to pay interest on the amount originally fixed as the price. For deciding the question raised, the price must therefore be taken to have been Rs. 3,200.

The lower Court has set aside the sale, but has declared in favour of the third defendant a charge over the property in question for Rs. 3,200, the price paid. From this decree he appeals. His case was that the sale was made for purposes of necessity. Rs. 3,000 out of the consideration went in full discharge of a mortgage of 1916 and the balance of Rs. 200 in part-payment of another mortgage of 1918. Both these mortgages were those executed by the first defendant's husband, and that the debts were accordingly binding on the inheritance is not disputed. The plaintiff attacks the sale by saying that the debts could have been paid off with the income from the estate. He contends that the rents for 1918, which accrued due during Manikya Rao's life-time, must have been received subsequent to his death. It is unnecessary to decide whether his contention is correct that a Hindu widow has no absolute power of disposal over the income which accrues due during her husband's life-time. For, it has not been shown that in point of fact such income was available to the first defendant. The learned Judge does not find that she was in possession of the income for 1918. He merely observes that she

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must have been in possession of such income. Nor is it sufficient to suggest that she received the rents; what must be shown is, that, after allowing for the expenses of the previous year, there was a balance left in her hands, available for the payment of the debts. On the contrary, it appears clearly that Manikya Rao was borrowing money for household expenses even some time prior to his death. It is likely that for the expenses incurred during his lifetime the widow had to make payments. We are not, therefore, prepared to assume that she had at her disposal any unexpended rents of the year 1918 and was thus in a position to pay off any part of the debts with such rents.

It is next contended that by the date of the sale the widow came into possession of some considerable income; and that, it being incumbent upon her to pay off her husband's debts with such income, she was not competent to sell any part of the estate. The question raised is, whether a Hindu widow is bound to pay the debts of her husband out of the income. It is settled law that a widow or other limited heir has absolute power of disposal over the income of the property inherited by her. She is not bound to make any savings and may spend the whole income just as she likes. But it is argued for the respondents, that this rule is subject to the qualification, namely, that legal necessity, which alone justifies an alienation, disappears when the limited owner is shown to be in possession of a sufficient surplus, after meeting the necessary expenses. This proposition involves that, where there are binding debts to pay, the so-called absolute power over the income becomes illusory. The contention is not only illogical, but is opposed to authority. The following passage from the judgment of MUTTUSWAMI AYYAR J.

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in *Ramasami Chetti v. Mangaikarasu Nachiar*(1) states the law very tersely:—

“It is next contended that she was bound to apply the income of her husband's estate first in discharge of his debts instead of executing the mortgage. The net income is, under Hindu law as administered in this Presidency, her own exclusive property as widow, and she is not bound either to save or apply it for the benefit of the reversioners. She is no doubt bound to pay her husband's debts from it, because she had taken charge of the whole property left by him whilst her right of inheritance extends only to the property as diminished or affected by his debts. As between her and the reversioners she is entitled to say, ‘I will pay my husband's debt by the sale of his property and take the residue, and I desire to keep the net income derived from it and to spend or invest it as I please.’”

The point is more fully dealt with in *Boddu Jaggayya v. Goli Appala Raju*(2). That case points out that it is not over the gross but net income that a widow has absolute power of disposal. She takes the estate subject to payment of debts. The interest on those debts is an expense properly debitable to the income. A limited owner is thus bound to pay off the interest on the debt where there is a sufficient surplus, but it is equally clear that it is not incumbent on her to apply any part of the income to the payment of the corpus. So stated, the rule is consistent and logical and we must, therefore, reject the view of the lower Court, which is opposed both to reason and authority. The last-mentioned case was followed in Appeal No. 214 of 1929 to which one of us was a party.

The cases relied on by the respondents' Counsel, such as, *Cavalry Vencata Narrainapah v. The Collector of Masulipatam*(3) and *Mahomed Shumsool v. Shewukram*(4), are not really helpful. The point to decide is, whether a limited owner is bound to apply the surplus revenues

(1) (1894) I.L.R. 18 Mad. 118.

(3) (1867) 11 M.I.A. 619.

(2) (1913) M.W.N. 275.

(4) (1874) I.L.R. 2 I.A. 7.

to the payment of binding debts. Apart from the point not having been considered or decided in these cases, there are not even dicta in them on which the respondents can rely. From a bare reference to the surplus revenue in the statement of facts, no inference can be drawn either for or against the position taken up by the respondents. As regards the cases referred to in the lower Court's judgment, they scarcely merit any consideration, as they are irrelevant and have no bearing on the question. To the authorities that actually decide the point the learned Judge has failed to refer.

The sale is next attacked on the ground that it was made for an inadequate price. The learned Judge has rightly attached no weight to the evidence on the plaintiffs' side, but he makes a conjecture that the house might have been worth Rs. 5,000 on the date of the sale. He records a halting finding to this effect. It is contended by the respondents that the late owner spent nearly Rs. 7,000 on the construction of the house. This has not been satisfactorily proved. Apart from that, a house cannot be expected to fetch at a sale the amount which its owner spends in building it to suit his own fancy or needs. According to the learned Judge, there is no reason to suspect collusion on the part of the widow or her father with the purchaser. In the circumstances, we fail to see why, in the absence of evidence to that effect, it should be held that the price got was inadequate.

The sale is next impeached on the ground that it has not been shown that there were circumstances of actual pressure. According to this contention, where money is raised for paying off a binding debt, an alienation can be justified only if actual pressure is shown in the sense of some pressure from without. For instance

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it must be shown that legal proceedings were threatened or a forced sale of the mortgaged property was imminent. In our opinion, this is not the correct test of justifying necessity, for, a restraint of this kind, far from benefiting or preserving the estate, would lead to the very opposite result. Why should a widow, for instance, be compelled to allow a mortgage-debt to grow and swallow up the property mortgaged, when the early paying off of that debt would be beneficial to the estate and tend to its preservation? If the alienation was made in the exercise of a reasonable discretion and could be justified as the act of a prudent manager, the objection that there was no compulsion from without and that the necessity was not imminent should not be allowed to prevail. The question then reduces itself to this: the purpose of the sale being the payment of a binding debt, was it effected in good faith and in the exercise of proper discretion; in other words, could it be justified as the act of a prudent manager? Judged by this test, we are satisfied that this sale must be upheld. The husband died in debt. There were two mortgages outstanding. Some part of the debt had been incurred for building this very house. He died while still it was being built. To complete its construction, it would be necessary for the widow to raise further money. We fail to see why, in such circumstances, any limited owner should be compelled to retain against her consent such a property, while she deems it prudent in the exercise of a sound discretion to dispose of it and pay off a binding debt.

There is one further matter to be dealt with. The sale price was Rs. 3,200 out of which only Rs. 2,550 was applied in payment of the corpus of the principal of the debts. The balance of Rs. 650 went in discharge of the interest due on those debts. According to our

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judgment, the widow was bound to pay the interest from the surplus revenue in her hands. In these circumstances, is the sale to be upheld in its entirety or not? Following *Sri Krishan Das v. Nathu Ram*(1) and *Suraj Bhan Singh v. Sah Chain Sukh*(2), we hold that the portion of the price not taken for legal necessity bears such a small ratio to the entire consideration that it might be left out of account. Accordingly the sale is upheld and the appeal is allowed and the suit is dismissed with costs of the third defendant throughout. In this view, it is unnecessary to decide the question whether the plaintiffs are the next reversioners of Manikya Rao or not.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

GYANAMMAL (PETITIONER—PLAINTIFF), APPELLANT,

v.

ABDUL HUSSAIN SAHIB (COUNTER-PETITIONER—
SECOND DEFENDANT), RESPONDENT.*

1931,
April 28.

*Code of Civil Procedure (Act V of 1908), O. V, r. 20—
Substituted service effected with due formality—Due
service necessarily if, within meaning of arts. 164 and
169 of the Indian Limitation Act (IX of 1908) and
Orders IX and XLI of the Code of Civil Procedure.*

Substituted service, when it has been effected with due formality, is not necessarily due service within the meaning of articles 164 and 169 of the Limitation Act or rule 13 of Order IX or rule 21 of Order XLI of the Code of Civil Procedure.

(1) (1926) I.L.R. 49 All. 149 (P.C.); L.R. 54 I.A. 79.

(2) (1927) 53 M.L.J. 300 (P.C.).

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There is nothing in the rules to prevent a defendant against whom an *ex parte* decree has been made from showing, if he can, that he has not been duly served in the sense that knowledge of his opponent's claim has been brought home to him, even though the formalities of substituted service have been carried through. Due service within the meaning of articles 164 and 169 of the Limitation Act and Orders IX and XLI of the Code is not service which is technically and formally correct as a basis for proceeding *ex parte*, but service which has really been effective, which has achieved the object of service by bringing the claim against him to the knowledge of the defendant or respondent.

Shariba Beeby v. Abdul Salam, (1927) I.L.R. 51 Mad. 860, and *Narasimha Chettiar v. Balakrishna Chetty*, (1926) 52 M.L.J. 512, dissented from.

APPEAL against the order of the District Court of Chingleput dated 8th day of April 1927 and made in Civil Miscellaneous Petition No. 697 of 1926 in Appeal Suit No. 114 of 1925.

A. Dorai Raj for appellant.

K. P. Ramakrishna Ayyar for respondent.

JUDGMENT.

REILLY J.

REILLY J.—The appellant in this case obtained a preliminary decree for sale on a mortgage, the first defendant in the suit being the mortgagor and the second defendant a purchaser of the equity of redemption. The second defendant appealed to the District Judge of Chingleput. That appeal was heard *ex parte* without any appearance having been put in for the plaintiff, and the decree obtained by the plaintiff in the original Court was set aside. Subsequently the plaintiff made an application to the District Judge under rule 21 of Order XLI of the Code of Civil Procedure praying that the *ex parte* decree against her made in the appeal might be set aside. Before the appeal was heard several attempts were made to serve the plaintiff, and, as they were unsuccessful,

eventually an order was made for substituted service on her. That substituted service appears to have been held sufficient, as the learned District Judge disposed of the appeal against the mortgage decree. But, when the plaintiff came forward with her application under rule 21 of Order XLI, she alleged that she had never heard anything about the appeal and wished to give evidence to establish that. The learned District Judge however, finding that the formalities for substituted service had been properly carried out and, as his order shows, that there was no allegation before him that they had not been properly carried out in due form, refused to give the plaintiff an opportunity of showing that the appeal had never come to her knowledge. He therefore dismissed her application, and the present appeal before us is against that order of dismissal.

We are not now concerned with the evidence which the plaintiff may be able to produce to show that she did not hear of the appeal against her mortgage decree. But it may be noted in passing that *prima facie* her allegation that she did not know of the appeal does not appear to be a frivolous one. Having obtained a preliminary decree on her mortgage it is not *prima facie* probable that she would not have contested the appeal, if she had known of it; and it may be also mentioned that, while the appeal against her decree was pending and after it, she was prosecuting the proceedings in the original Court with the object of obtaining a final decree in her suit. However, I do not wish to go any further into that side of the matter than to say that *prima facie* her allegation that she did not know of the appeal does not appear to be frivolous. Nevertheless the learned District Judge was of opinion that, because substituted service had been ordered and had been effected, he could not allow the plaintiff an opportunity of proving that

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she did not know of the appeal. And for the respondent here, the second defendant in the suit, it is urged that that view of the learned District Judge is correct and that, as substituted service had been effected, the plaintiff cannot now say that she was not duly served: if she was duly served within the letter of the law, then she cannot come under rule 21 of Order XLI and ask for the decree made in the appeal against her be set aside.

The question what is the exact effect of substituted service in such a case is an important one. Substituted service is a legal method of serving a defendant or respondent, the rules for service on defendants applying also to respondents. The question is whether, when it has been effected with due formality, it is necessarily due service within the meaning of rule 21 of Order XLI, which corresponds to rule 13 of Order IX in respect of suits. I think the task of answering the question before us will be simplified if we remember that all the rules in the Code of Civil Procedure relating to service of defendants and respondents are intended to carry out the cardinal principle of our administration of civil justice that no decree shall be made against a party behind his back. There are several methods of service provided. The first and best method of service is personal service on the defendant himself; and in the class of personal service we may include service on the defendant's agent or the manager of his business or a male member of his family residing with him. All that comes within the class of personal service because it may reasonably be inferred, and it is inferrable under the rules, that, if a summons is served upon a defendant's agent or the manager of his business or a male member of his family living with him, it comes to the defendant's knowledge. Obviously the best method of service is upon the defendant himself. But, even if the

summons is returned to the Court as having been served on the defendant himself, and he does not appear at the trial of the suit, he is not necessarily concluded. We cannot in all cases say that, because the return is that the summons has been served personally, it has been duly served and so he cannot get an *ex parte* decree against him set aside. It is open to a defendant in such circumstances to show that the summons in the suit was not really served upon him but upon somebody else, or that what was served upon him was not the summons in the suit, or that it did not give the correct date or some other essential information about the suit, or that it was not accompanied by a copy of the plaint in the suit concerned, so that, although in a sense he was personally served, he was not provided with the knowledge of the claim against him, which is the object of the service. All these and similar allegations are open to him, even if there is a record that he has been personally served. If after due diligence the process-server is not able to serve a defendant personally, either on himself or his agent or his manager or a member of his family, the rules provide that he may affix the summons to the door of the house in which the defendant ordinarily resides or carries on business; and, when that is done and a return to that effect is made, the Court after taking an affidavit from the process-server may hold that that is due service and proceed with the case. There it will be seen there is a reasonable inference which the Court may draw that the defendant really had knowledge of the suit derived from the notice which was fixed on his door. But in that case the rule is that the Court before proceeding with the case must specifically hold that such service is due service. Obviously the reason of that is that, if the Court is not satisfied that such

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affixture has been made effectively, a fresh attempt at service must be made. But, although the Court uses in its finding in such cases the words "duly served" according to the rule, that does not prevent the defendant from coming in afterwards and showing that the summons was not duly served by affixture because that affixture really did not bring home to him the knowledge of the claim against him. The order made by the Judge that the service by affixture has been due service, which enables the suit to go on, is an *ex parte* order, and it cannot be suggested that the defendant in those circumstances cannot come in and show that he never had knowledge of the claim against him, that the inference that it was brought to his knowledge by the affixture is for some reason not a sound inference.

But it is not always possible to serve a defendant by affixture to the house where he ordinarily resides or works. Therefore a third method of service is provided, namely, substituted service. That may be adopted when the Court is satisfied that the defendant is keeping out of the way for the purpose of evading service or for any other reason summons cannot be served in the ordinary ways. That method of service is by affixing a copy of the summons to the notice-board of the Court and to some conspicuous part of the house in which the defendant is known to have last resided or carried on business. That is obviously the least satisfactory of all methods of service, only to be used by the Court as a last resort when other means are unavailable. And it is the practice of the Courts to give a long period before the hearing of a case after substituted service has been effected in that way. Inferior as that method of service is to the other methods of service, it will be seen it too provides some slight basis for an inference that the summons really comes to the knowledge of the

defendant before the case is heard. If substituted service is ordered because the Court is satisfied that the defendant is keeping out of the way for the purpose of evading service, then the inference that he knows of the case is easily drawn. In other cases the basis of the inference is that the summons is affixed to the house where he last lived or carried on business and to the notice-board in the Court-house, a public place, and therefore it may have come to his notice. The inference is often not at all a strong one. But plaintiffs cannot be kept waiting for their relief indefinitely because the defendants cannot be found, and therefore some such method as substituted service must be provided as a last resort to be used by the Court when other means of service are unavailable. Rule 20 (2) of Order V of the Code provides that substituted service by order of the Court shall be as effectual as if it had been made on the defendant personally. That means, as I understand it, that the proceedings can go on after the date fixed in the summons so served. But does it mean, as Mr. Ramakrishna Ayyar for the second defendant would have us say, that it is necessarily due service, which can never be contested by the defendant at any later date? There is nothing in the rule about it being due service. The word "due" does not appear in rule 20 at all. Such service is said to be as effectual as if it had been made on the defendant personally, not more effectual. As I have mentioned, even if the defendant is served personally, it is open to him to come to the Court and show that that was not really due service because it did not really give him knowledge of the claim against him. If a defendant who is served personally can do that, how can we say that a defendant who is served only by inference through substituted service is shut out for ever from showing that he had no

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knowledge of the claim against him? I can find nothing in Order V, which deals with summonses on defendants and respondents, to indicate that that is the intention of the rules.

But it has been urged by Mr. Ramakrishna Ayyar that there are certain decisions which support the position which he has taken up. He referred to a decision of WALLACE J., *Doraiswami Aiyar v. Balasundaram Aiyar*(1). The only part of that decision which is of interest to us in this matter is, I think, the learned Judge's statement that "duly served" is not equivalent to "personally served"; and that is a statement with which none of us I think would care to quarrel. A more important decision in Mr. Ramakrishna Ayyar's favour is that of MADHAVAN NAIR J. in *Narasimha Chettiar v. Balakrishna Chetty*(2), where he made the statement that substituted service is due service for the purpose of the Limitation Act, even though it does not in fact come to the defendant's knowledge. With great respect I may point out that that statement of opinion was made *obiter* or was at least unnecessary, as in that case the defendant, before substituted service was ordered, had refused to receive a summons sent to him by registered post under order of the Court and was found to have been evading summons in the suit, of which he must have had knowledge. The learned Judge quoted as an authority for his opinion a statement made by SHADI LAL C.J. in *Dittu Ram v. Nawab*(3). It is true that the learned Chief Justice made a similar statement; but in that case too it was made *obiter*. On the other hand in *Vitta Venkatachalam v. Sivapuram Subbaya*(4) SRINIVASA AYYANGAR J. said that substituted service was not due

service for the purpose of the Limitation Act, that is for the purpose of article 164, which provides the period of limitation for applications to set aside *ex parte* decrees in original suits. That as a general statement may go too far. But SRINIVASA AYYANGAR J. drew attention to an important point, namely that under article 164 the thirty days period runs from the date of the decree or, where summons was not duly served, from the date when the applicant has knowledge of the decree; and he suggested with great force, I think, that the provision that, when the summons is not duly served, the period runs from the date when the applicant had knowledge of the decree implies that due service within the meaning of that article is service which brings the claim to the knowledge of the defendant. However there is a decision of a Bench, to which Mr. Ramakrishna Ayyar drew our attention, *Shariba Beeby v. Abdul Salam*(1). In that case PHILLIPS and MADHAVAN NAIR JJ. held that substituted service effected under Order V of the Code is as effectual as if it had been made personally and must be deemed to be due service within the meaning of article 164 of the Limitation Act. Now that substituted service is as effectual as if it had been made on the defendant personally cannot be disputed as it is so provided by the rule itself. But there is nothing in the rule, if I may say so with respect, which declares that it must be deemed to be due service within the meaning of the Limitation Act or in any other sense. The learned Judges in that case stated that they differed from SRINIVASA AYYANGAR J.'s view in the case which I have quoted; but they did not deal with his argument drawn from the reference to "knowledge" in article 164 of

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(1) (1926) 52 M.L.J. 477.

(3) (1925) 7 Lah. L.J. 448.

(2) (1926) 52 M.L.J. 512.

(4) (1927) 54 M.L.J. 448.

(1) (1927) I.L.B. 51 Mad. 860.

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the Limitation Act. And, if I may say so with very great respect, the matter was not fully discussed by them. With great respect I venture to differ from their view that substituted service must always be deemed to be due service within the meaning of articles 164 and 169 of the Limitation Act or rule 13 of Order IX or rule 21 of Order XLI of the Code. I see nothing in the rules to prevent a defendant against whom an *ex parte* decree has been made from showing, if he can, that he has not been duly served in the sense that knowledge of his opponent's claim has been brought home to him, even though the formalities of substituted service have been carried through. As I understand the matter, due service within the meaning of articles 164 and 169 of the Limitation Act and Orders IX and XLI of the Code is not service which is technically and formally correct as a basis for proceeding *ex parte*, but service which has really been effective, which has achieved the object of service by bringing the claim against him to the knowledge of the defendant or respondent. Substituted service may be such service; but we know that often it is not so. Nevertheless we are asked to say that, when substituted service is carried out in the prescribed form, it must invariably be held to be due service. It would be a very extraordinary thing if the most unsatisfactory of all methods of service, substituted service, where the inference that the defendant has knowledge of the claim against him is seldom strong and often almost entirely absent, should somehow be turned into the most effective of all services, a service which the defendant can never dispute, which must bind him for all time, although in fact and in truth he has never had any knowledge whatever of the proceedings against him. I venture to think that the

decision in *Shariba Beeby v. Abdul Salam*(1) goes too far and would lead to very great difficulties and injustice. The rules about service should I think be interpreted as a whole and must be read in the light of the fundamental principle that we should never make a decree against a man behind his back, a principle which, so far as I can see, they are intended to carry into effect, not in any way to supersede or abrogate.

In my opinion therefore the plaintiff in this case was entitled, when she came before the District Judge under rule 21 of Order XLI alleging that the second defendant's appeal had never come to her knowledge, to prove her statement, if she could, in spite of the fact that substituted service on her had been ordered and, as the learned District Judge found, had been effected with all due formality. In my opinion this appeal should be allowed and the plaintiff's application should be remanded to the District Judge for fresh disposal after allowing her an opportunity to produce such evidence as she may have. The second defendant of course should also be allowed to offer such evidence as he may wish and to raise any legal objection regarding limitation or otherwise. Costs of this appeal will abide and follow the result and be provided for in the revised order of the District Court.

ANANTAKRISHNA AYYAR J.—The appellant in this appeal was respondent in Appeal No. 114 of 1925 on the file of the District Court, Chingleput. Substituted service of notice of that appeal was effected so far as the present appellant was concerned. That appeal was heard *ex parte* in her absence, and was allowed, with the result that the preliminary mortgage decree which she had obtained in her favour in the trial Court in

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Original Suit No. 201 of 1922 on the file of the Tiruvallur Munsif's Court was reversed by the decree in Appeal No. 114 of 1925 and her suit was dismissed. On the allegation that she was not served with any notice in that appeal, and that she became aware of the decree passed in that appeal only within a few days prior to her application, she applied under Order XLI, rule 21, of the Code of Civil Procedure for the re-hearing of the appeal. Her application was dismissed by the learned District Judge of Chingleput, and against that decision she has preferred the present civil miscellaneous appeal.

On behalf of the appellant great stress was laid on the fact that she had obtained a preliminary decree in the suit for money due on a mortgage executed by the first defendant, that the purchaser of the equity of redemption—the second defendant—had appealed against that preliminary decree, and that there was no reason to suppose that she would have omitted to defend the appeal in case she had notice of the same in the circumstances. But, in my view, the question for our decision now is not whether she had a good case on the merits of the appeal then pending, but whether she has complied with the conditions imposed by law in respect of her present application to re-hear the appeal. Under Order XLI, rule 21 of the Code of Civil Procedure she must satisfy the Court that the notice of appeal was not duly served on her or that she was prevented by sufficient cause from appearing when the appeal was called on for hearing. Her allegation in effect is that the notice of appeal was not duly served on her. Under article 169 of the Limitation Act, the period of limitation for an application for the re-hearing of an appeal heard *ex parte* is thirty days from the date of the decree in appeal, or, where notice of the appeal was not duly

served, when the applicant has knowledge of the decree.

In considering the question whether notice of appeal was “duly” served on her or not, we have to be guided by the provisions of Order V of the Code of Civil Procedure. Personal service (Order V, rule 12), and, in cases where the defendant cannot be found and has no agent empowered to accept service of the summons, service on any adult male member of his family residing with him (Order V, rule 15), and, where the defendant or his agent or such other person as aforesaid refuses to sign or where the serving officer cannot after using all due and reasonable diligence find the defendant and there is no agent or other person on whom service could be made, service by affixing a copy of the summons on the outer-door or some other conspicuous part of the house in which the defendant ordinarily resides . . . (Order V, rule 17),—these are the principal, primary and ordinary modes of service prescribed by the Code; and, under Order V, rule 19, the Court is empowered in case of returns under Order V, rule 17, to declare that the summons has been duly served. When those methods fail, then under Order V, rule 20, where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any other reason summons cannot be served in the ordinary way, the Court is empowered to order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided, or in such other manner as the Court thinks fit. This is what is called “substituted service of the summons”, and, under sub-clause 2 of rule 20, “service substituted by order of the Court shall be as

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effectual as if it had been made on the defendant personally."

The learned District Judge did not dispose of the application for re-hearing filed before him on the merits; but has, as I understand his judgment, dismissed it on the ground that the formalities prescribed for substituted service having been followed, her application has necessarily to be dismissed. To use the learned Judge's own words:—

"The petitioner contends that she heard nothing about the appeal until the appellant began to execute his decree. I am unable to accept this as a sufficient reason for ordering a re-hearing of the appeal. The petition contains no allegation of fraud and no allegation that the formalities prescribed for substituted service were not strictly followed, nor does it in fact appear that there was any irregularity. In the circumstances, I decline to grant the petitioner's request for an adjournment to produce evidence that she was in fact ignorant of the proceedings."

In paragraph 4 of the petitioner's affidavit in support of her application for re-hearing, she stated that she was not served with any notice in the appeal, that she was therefore not able to appear at the hearing of the appeal, and that she came to know of the decree in the appeal only within a few days of her application. It seems to me that the Court has first to consider whether notice of the appeal had been duly served on her within the meaning of Order XLI, rule 21, read with Order V, of the Code having regard to her allegations.

Exigencies of litigation in Court require that, in order to bring proceedings pending in a Court to a termination within a reasonable time, the rules regarding service of notice on the respondent or the defendant should include not only those forms of service, viz., personal service, service on an agent or other adult male member living with him, or affixing notice on the house

in which he resides at the time, from which knowledge could be reasonably imputed to the defendant of the proceedings in question, but also other forms of service which, though less efficacious for the purpose of imputing such knowledge to the defendant, have, owing to the necessities of the case, to be resorted to in order to bring the proceedings to a termination. These latter modes will fail in their object, unless they be declared to be as effectual as if the same had been made on the defendant personally for the purpose of going on with the proceedings in Court; and that is what is enacted by Order V, rule 20, sub-clause 2. It is significant that the Legislature has not expressly declared that "substituted service" is "due service". The words "duly served" occurring in Order V, rule 19, are not used in rule 20, clause 2. Does the statement in sub-clause 2 of rule 20 that "substituted service shall be as effectual as if it had been made on the defendant personally" make such service "due service" in all cases and necessarily? In my view, the same does not necessarily follow. In cases where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, and therefore the Court orders substituted service, then there is no difficulty in treating substituted service in such circumstances as due service. *Ex hypothesi* the defendant is aware of the proceedings in such cases, and is keeping out of the way for the purpose of avoiding service; and no injustice would be done to him in the circumstances, and he has only to thank himself for any inconvenient results that might follow. But substituted service could be ordered in various other cases also. The plaintiff might act *bona fide*. There might be no fault to be found with the defendant's conduct either in the circumstances. Yet

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serious injustice would result if one were to accept the view that if the formalities are gone through then substituted service should be held to be due service in all such cases and for all purposes. Even in the case of personal service, one can imagine various circumstances which might not make it due service. To give substituted service the effect contended for is in effect to give it greater efficacy than even personal service. Orders are passed in the absence (necessarily) of the defendant in such cases, and the materials before the Court are often very scanty; and the plaintiff himself could not often personally vouch for the accuracy of the allegations. In these circumstances, I think it was open to the petitioner (the appellant before us) to prove, if she could, that the notice of the appeal was not duly served and that she had no knowledge of the appeal at the time.

We were pressed by the learned Advocate for the respondent with three decisions of this Court, *Doraiswami Aiyar v. Balasundaram Aiyar*(1), *Narasimha Chettiar v. Balakrishna Chetty*(2) and *Shariba Beeby v. Abdul Salam*(3). There is nothing really in the first of these cases necessarily against the view I am suggesting; the observations in the second of the cases are only *obiter*; the third case requires more respectful consideration. The judgment of the learned Judges does not contain any real discussion of the question. The arguments in *Vitta Venkatachalam v. Sivapuram Subbayya*(4) were met only by a reference to sub-clause 2 of Order V, rule 20, and the implications that follow from the last clause of article 164 (also article 169) of the Limitation Act have not been duly

(1) (1926) 52 M.L.J. 477.
(3) (1927) I.L.R. 51 Mad. 860.

(2) (1926) 52 M.L.J. 512.
(4) (1927) 54 M.L.J. 448.

considered. The view taken by the learned Judges would lead to the conclusion that "whenever a defendant is served according to any of the rules of the Procedure Code, it could never be held that there was no due service". This view would, in my opinion, lead to injustice to defendants in many cases, where they could not be said to be in default in the ordinary acceptation of the term. It should further be noticed that the learned Judges finally remanded the case before them for the trial of the question whether substituted service was duly effected in that case or not. In the present case also, the appellant in the argument before us complained that the substituted service was not duly effected and that she was residing at St. Thomas' Mount, and not in Georgetown as was represented by the second defendant—appellant in the main appeal—in connection with the substituted service of notice of that appeal in the appellate Court.

In the circumstances of this case, I think that the learned District Judge ought to have given an opportunity to the petitioner—appellant before us—to substantiate her contention that there was no due service of the notice, and that she had no knowledge of the appeal except a few days prior to the date of her present application to the District Court.

I therefore agree that this appeal must be allowed, and Civil Miscellaneous Petition No. 697 of 1926 remanded to the District Court for fresh disposal. It would be open to both parties to let in evidence in support of any pleas available to them. Of course I express no opinion at all on the merits of the petition.

Costs of this appeal will abide and follow the result and be provided for in the revised order of the District Court.

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APPELLATE CIVIL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

1931,
July 31.

P. V. M. MUHAIDIN KADER MEERA SAHIB
MARAKKAYAR (PETITIONER—FIRST DEFENDANT), APPELLANT,

v.

P. L. S. LAKSHMANAN CHETTIAR AND TWO OTHERS
(RESPONDENTS—PLAINTIFFS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. V, r. 20—Substituted service—Due service if and when may be.

Neither of the extreme positions (1) that substituted service is necessarily due service which can never be contested by the judgment-debtor at a later date and (2) that it is necessarily not due service is correct. There are circumstances under which substituted service may be treated as due service.

Where it appeared that substituted service was ordered and effected because the defendant had deliberately evaded service of summons, held that substituted service was due service.

Shariba Beeby v. Abdul Salam, (1927) I.L.R. 51 Mad. 860, and *Gyanammal v. Abdul Hussain Sahib*, (1931) I.L.R. 55 Mad. 223, considered.

APPEAL against the order of the Court of the Subordinate Judge of Tuticorin in Interlocutory Application No. 423 of 1925 in Original Suit No. 14 of 1924.

K. V. Krishnaswami Ayyar and *I. M. Ibrahim* for appellant.

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

Cur. adv. vult.

WALLER J. WALLER J.—The JUDGMENT of the Court was delivered by
The appellant in this case applied to have an *ex parte* decree against him set aside. His

* Appeal against Order No. 144 of 1926.

application was put in more than a year after the date of the decree. Several ineffective attempts had been made to serve him with summons and ultimately substituted service was ordered and effected. He did not appear and a decree was passed against him *ex parte*. The Subordinate Judge dismissed his application as time-barred under article 164 of the Limitation Act. We have been asked in appeal to refer the question at issue, that is to say whether substituted service is due service, to a Full Bench, on the ground of a supposed difference of opinion between two Benches of this Court. The decision of one is to be found in *Shariba Beeby v. Abdul Salam*(1), the other in *Gyanammal v. Abdul Hussain Sahib*(2). In the first case an *ex parte* decree passed after substituted service on the defendant was set aside. In revision the High Court reversed the order of the lower Court and remanded the matter for a decision on the allegation by the respondent that substituted service had not been properly effected. In the second case, the appellant had been served by substitution as the respondent in an appeal and the appeal was allowed *ex parte*. She applied to have the decree set aside, but her application was dismissed. The High Court reversed the order of the lower Court and gave the appellant an opportunity of proving that substituted service had not been properly effected. The circumstances of the two cases are different, no doubt, but the result in both was the same—the aggrieved party was given an opportunity of proving that substituted service had not been properly effected, that, in other words, there had been no due service.

The truth appears to be that what the Judges were dissenting from in *Gyanammal v. Abdul Hussain Sahib*(2)

(1) (1927) I.L.R. 51 Mad. 860.

(2) (1931) I.L.R. 55 Mad. 223.

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was a very extreme argument put forward by Mr. K. P. Ramakrishna Ayyar, which, he contended, was justified by the decision in *Shariba Beeby v. Abdul Salam*(1). It was that substituted service necessarily is due service which can never be contested by the judgment-debtor at a later date. *Shariba Beeby v. Abdul Salam*(1) is, of course, no authority for such a contention, for, in it, the judgment-debtor was given an opportunity of proving that he had not been duly served. In the case we are now dealing with, the opposite extreme is being put forward and the decision in *Gyanammal v. Abdul Hussain Sahib*(2) is cited in support of it. It is that substituted service is necessarily not due service. *Gyanammal v. Abdul Hussain Sahib*(2) lends no support to such an argument. ANANTAKRISHNA AYYAR J. pointed out that there are circumstances under which there is no difficulty in treating substituted service as due service.

This being so, we see no reason to make a reference to a Full Bench. The first case does not decide that substituted service is necessarily due service nor does the second decide that it is necessarily not due service. Each was remanded in order to give the party an opportunity of proving that there had not been due service. On the merits of this particular appeal, we think it clear that all the defendants, including the appellant, deliberately evaded service of summons and that substituted service was properly asked for, granted and effected, in other words, that there was due service. The appellant should therefore have applied within thirty days of the decree and his appeal is dismissed with costs.

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(1) (1927) I.L.R. 51 Mad. 860.

(2) (1931) I.L.R. 55 Mad. 223.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

JAGANNATHA MUDALI AND THREE OTHERS
(DEFENDANTS 3 TO 6), APPELLANTS,1931,
April 21.

v.

P. T. CHINNASWAMI CHETTI AND EIGHT OTHERS
(PLAINTIFF AND DEFENDANTS 1, 2, 8, NIL AND LEGAL
REPRESENTATIVES OF PLAINTIFF), RESPONDENTS.*

*Indian Evidence Act (I of 1872), sec. 112—"Access" in—
Meaning of—Presumption in favour of legitimacy under the
section—Nature of—Limit to.*

"Access" in section 112 of the Indian Evidence Act means sexual intercourse and not merely "opportunity of access".

Under section 112 there is a presumption to start with in favour of legitimacy; in other words, that the husband had intercourse with the wife at the time when the child must have been conceived. That presumption is a rebuttable one and may be rebutted by showing non-access; but once access of, or intercourse by, the husband is proved, no evidence will be allowed to show that the child is not the child of the husband. The circumstance that the wife had intercourse with several at that time makes no difference.

Observations on the kind of evidence required to rebut the presumption that the husband had intercourse with the wife.

APPEAL against the decree of the Court of the Subordinate Judge of Vellore in Appeal Suit No. 36 of 1926 (Appeal Suit No. 146 of 1925 on the file of the District Court, North Arcot) preferred against the decree of the Court of the District Mansif of Vellore in Original Suit No. 962 of 1921.

B. C. Seshachala Ayyar for appellants.

S. Varadachari (with him *A. S. Sivakaminathan* and *C. Rajagopalan*) for respondents.

Cur. adv. vult.

* Second Appeal No. 368 of 1928.

JUDGMENT.

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This appeal raises a question regarding the construction of section 112 of the Indian Evidence Act.

The eighth defendant is the wife of one Kuppathai Mudali and the third and fourth defendants are her sons. The plaintiff disputes their legitimacy alleging that the eighth defendant was living in adultery. The point to be decided is, whether the third and fourth defendants are the legitimate sons of Kuppathai. The findings of fact, which, this being a second appeal, I must accept, are that Kuppathai married the eighth defendant about 1876, but discarded her in 1881 owing to some suspicion about her chastity; that he then married a second wife and lived at a place called Govindanpadi, whereas the eighth defendant left for Kilachur, a village within two miles of that place. There she was residing, and the Subordinate Judge thinks that she was having immoral relations with some person. The third defendant was born in 1891 and the fourth in 1898. It is not found that Kuppathai did not have opportunities of access to his first wife; on the contrary, the evidence seems to indicate that he had them. In regard to the period to which reference must be had, the evidence no doubt is very vague; but Kuppathai in 1902 purchased for her some property and in 1905 executed a document settling some lands on her and on her children. In this, Kuppathai describes the boys as the sons of the eighth defendant. I may remark in passing that the learned Subordinate Judge thinks that these words strongly support the contention that the children are illegitimate. There are other passages on which the Judge relies, to which I need not refer. Later in the same year and again in 1906, Kuppathai bought for her some more property. The evidence also shows that he allowed the boys to visit him and took some kind of interest in them, though what precisely its

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nature was, it is difficult to say. In 1909, he executed a writing repudiating the children as illegitimate. That was attested by several persons, including one Rasappa, a brother of the eighth defendant. This man has not been cited as a witness, although the eighth defendant admits that they have been on friendly terms. What led to this repudiation the evidence does not clearly show; but it is suggested that it was some members of his caste that induced Kuppathai to take this step. This was followed in 1915 by a deed which he executed revoking the settlement of 1905. Then there was an open quarrel which led to various proceedings in Courts—where the legitimacy of the boys was asserted by the one side and disputed by the other. I have forgotten to mention that in 1909, about the time when Kuppathai repudiated the boys, he married a third wife. He having died in 1918, his second and third wives sold a part of his estate to the plaintiff, who thereupon has brought the suit. It is in this way that the question of the legitimacy of the third and fourth defendants has been raised. The Subordinate Judge, differing from the trial Court, has decided the point against them.

Their Counsel has not succeeded in showing that his findings, so far as they are questions of fact, can be attacked in second appeal. I have referred in this judgment to those facts alone which bear on the question whether Kuppathai had opportunities of access to his wife or not. That being the important point with which I have to deal, as I shall show presently, I do not propose to refer to the other facts on which the Subordinate Judge relies. The question, as I have said, is, what is the effect of section 112 of the Evidence Act?

According to that section, the fact that a child was born in lawful wedlock is "conclusive proof" that it

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is the legitimate son of its mother's husband. If the section had stopped there, the presumption would be an irrebuttable one, what is termed *presumptiones juris et de jure*. But the section does not end there, for then follows a clause beginning with the word "unless" which reads thus:—

"Unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

The effect of the section taken with that clause, therefore, is that the presumption is not an irrebuttable one, though the words "conclusive proof" (defined in section 4) are used. The section itself enacts how that presumption can be rebutted. It can yield only to positive proof of want of access, whatever the word "access" may mean. If that access is proved, nothing further remains, the presumption rebuttable in the first instance becomes at once irrebuttable. This is the effect of section 112. That there are two distinct presumptions, differing in kind from each other, is sometimes lost sight of, and that has led to some confusion. With these remarks, let me now turn to the meaning of the word "access". If that means "opportunity of access", the plaintiff must fail, for Kuppathai, I have said, had such opportunity. If, on the other hand, it means sexual intercourse, I am afraid I cannot disturb the Subordinate Judge's finding in second appeal. In my opinion, there can be no possible doubt on the authorities that the word means sexual intercourse. That was declared after great deliberation to be the law in the *Banbury Peerage Case*(1). It was there pointedly stated that access in this connection means sexual intercourse and nothing short of it. Now the learned Judges go so far as to use the word "access" in the sense of

(1) (1811) 1 Sim. & Stu. 153; 57 E.R. 62.

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sexual intercourse to distinguish it from non-access or non-generating access. The expression "opportunities of access" is also found used by the Judges as something different from actual intercourse. The effect of the *Banbury Peerage Case*(1) may be thus summed up: The presumption of legitimacy arises from the birth of a child during wedlock; but that presumption may be rebutted by evidence that such access did not take place between the husband and the wife as by the laws of nature is necessary, for the man to be, in fact, the father of the child. It is not the opportunity of access that matters, but sexual intercourse. The presumption in favour of legitimacy is also thus expressed:

"Where a child is born in lawful wedlock . . . sexual intercourse is presumed to have taken place between the husband and the wife, . . ."

This presumption, in whatever way it may be stated, is, as pointed out, a rebuttable presumption, a presumption that may be rebutted by counter-evidence, showing non-access.

Then comes the question, where does the other presumption to which I have referred *presumptiones juris et de jure* come in? Now let us turn to the next leading case on the point, *Morris v. Davies*(2). The Lord Chancellor (in the House of Lords), after stating that the presumption that in the case of husband and wife sexual intercourse took place can be rebutted, goes on to observe:

"If sexual intercourse be proved, that is, if the Jury or the Judge trying the question of fact be satisfied that sexual intercourse took place between the husband and the wife at the time of the child being conceived, the law will not permit an inquiry whether the husband or some other man was more likely to be the father of the child."

(1) (1811) 1 Sim. & Stu. 153; 57 E.R. 62.

(2) (1887) 5 Cl. & Fin. 168; 7 E.R. 365, 396.

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This is the point of distinction. If access or sexual intercourse is proved, the presumption to be drawn becomes an irrebuttable one. The point is brought out very clearly in the following passage from the judgment of SWIFT J. :—

“ Any woman may, and some do, have sexual intercourse with more than one man in the course of a few hours; and if a woman has within the period during which conception must have taken place had connection with more than one man * * * the law presumes that if one of those men is her husband, the child is his. * * * However many men she has had connection with nothing can bastardize the child unless non-access of or non-intercourse by the husband can be proved.”

Warren v. Warren(1). In the words of ALDERSON B. in *Cope v. Cope*(2), the law will not, under such circumstances, allow the balance of the evidence as to who is most likely to have been the father. In short, there is a presumption to start with in favour of legitimacy; in other words, that the husband had intercourse with the wife at the time when the child must have been conceived. That presumption is a rebuttable one and may be rebutted by showing non-access; but once access of, or intercourse by, the husband is proved, no evidence will be allowed to show that the child is not the child of the husband. The circumstance that the wife had intercourse with several at that time makes no difference. It is confounding these two presumptions, when the law is being stated, that leads to difficulty; but as regards what the law on the point is, there can be, as I have said, no doubt.

Then the further question arises, what is the kind of evidence that is required to rebut the presumption of legitimacy, in other words, the presumption that the husband had intercourse with the wife, which should

have made him the father of the child? That presumption is a very strong one, but the strength of it would vary with the circumstances of each case. *The Aylesford Peerage*(1) furnishes a striking instance, where it was held that the presumption of legitimacy was rebutted. The facts are, the lady eloped in 1876 and a deed of separation was executed in 1877. From the time of the elopement till the birth of the child in 1881, the mother lived in a state of adultery with Lord Blanford. The husband and the wife, no doubt, were at the same time, during the critical period when the child might have been conceived, at different houses in London. In those circumstances, the question was raised whether the presumption was rebutted. It was answered in the affirmative. Lord BLACKBURN goes so far as to say that, although the marriage tie remained undissolved, the facts stated having been found, *no presumption can arise* that the husband had cohabited with his wife. But it seems to me, having regard to section 112 of the Evidence Act, it is unnecessary to go so far. The presumption must be drawn under that section, though, on the facts proved, it may become attenuated. In *Hetherington v. Hetherington*(2), where an order was made under section 4 of the Matrimonial Causes Act, 1878, authorizing a wife to refuse to cohabit with her husband, it was held that from the time of such an order “all the presumption which exists in the case of married persons as to access and the legitimacy of children *is reversed*”. Again, I may point out that it is not necessary for us to go so far. The case shows that, while normally the presumption is strong, in certain cases it is not quite so strong. The last-mentioned case is approved in *Andrews*

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(1) (1885) 11 App. Cas. 1.

(2) (1887) 12 P.D. 112.

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v. *Andrews and Chalmers*(1). In the case to which I have referred, *Morris v. Davies*(2), the husband and wife agreed to separate and afterwards lived apart, but within such distance as afforded them opportunities of sexual intercourse. On the facts, it was held that the presumption of law in favour of the legitimacy of a child begotten and born of the wife during the separation was rebutted. It is unnecessary to multiply cases. The short question is, has the learned Judge correctly applied these principles? He is wrong in stating that there was judicial separation between Kuppathai and his wife. Such a conception is foreign to the Hindu Law. The statement that, in the case of children born after such separation, there is no presumption that they are legitimate is, as I have said, also open to exception. But have these errors vitiated his judgment? In the weighing of the evidence, he has not been influenced by his somewhat inaccurate statement of the rule of presumption. Indeed, the case was a difficult one to try, but all the facts were considered by the Judge. It may be, on the evidence, another Judge may come to a different conclusion, but that is no reason why I should disturb the finding in second appeal.

The appeal as well as the cross-appeal is dismissed with costs.

A.S.V.

(1) [1924] P. 255.

(2) (1837) 5 Cl. & Fin. 163; 7 E.R. 865.

APPELLATE CIVIL.

Before Mr. Justice Jackson.

CHITTURU JAGANNADHAM (PLAINTIFF), APPELLANT,

v.

BURA PYDAYYA AND EIGHTEEN OTHERS (DEFENDANTS
1 TO 8 AND 10 TO 20), RESPONDENTS.*

1931,
April 21.

Code of Civil Procedure (Act V of 1908), O. XXI, r. 58—Claim made after sale—Jurisdiction of Court to consider—Order rejecting claim in such case—Conclusive against claimant if no suit is brought by him within prescribed year to set it aside.

Under Order XXI, rule 58 of the Code of Civil Procedure the Court has jurisdiction to consider a claim even when it is made after the sale, and its order rejecting the claim is conclusive against the claimant if he does not bring a suit within the prescribed year to set it aside.

APPEAL against the decree of the Court of the Subordinate Judge of Vizagapatam in Appeal Suit No. 187 of 1926 (Appeal Suit No. 365 of 1925, District Court's file) preferred against the decree of the Court of the District Munsif of Vizagapatam in Original Suit No. 301 of 1923.

Y. Suryanarayana for appellant.

S. Subramania Sastri for third to twelfth respondents.

Cur. adv. vult.

JUDGMENT.

This is a suit for recovery of possession of property described in two schedules A and B.

The appeal is only concerned with the B schedule property, identified as plots B-2 and B-3 by the District

* Second Appeal No. 2103 of 1927.

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Munsif, an identification which the Subordinate Judge may be taken to accept.

On the findings of fact the plaintiff must fail as regards these two plots, unless he can show that defendants 5 and 9 and their legal representatives 3, 6 to 12 are estopped from defending the suit, because in a previous proceeding they put in a claim under Order XXI, rule 58 of the Code of Civil Procedure and upon its rejection did not bring a suit within the prescribed year. Both the lower Courts have held that there can be no estoppel because the order rejecting the claim was passed after the property had been knocked down in Court auction, and at that point for disposing of claims under Order XXI, rule 58, the Court was *functus officio*.

The order runs:—

"The properties attached are sold to-day. This petition is put in too late, and unnecessarily delayed. Hence rejected." *Abdul Kadir Sahib v. Somasundaram Chettiar*(1) cited by the Subordinate Judge has no application because there the lower Court had refused jurisdiction and had not acted under Order XXI, rule 58. But in *Gopal Chandra Mukerji v. Notabar Kundu*(2) the Calcutta High Court has held it to be incompetent to an execution Court to proceed with an application under Order XXI, rule 58, after the sale has actually taken place. The reasoning is not easy to follow. Rule 60 provides for the Court releasing property from attachment after investigating a claim and "it is thus plain that an order under rule 60 must be made before the sale has taken place" which would seem to assume that after the sale has taken place the property is *ipso facto* released from attachment, and therefore any investigation after the sale and consequent release is on the face of it absurd. But there is no warrant for this

(1) (1922) 43 M.L.J. 467.

(2) (1912) 15 I.O. 58.

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assumption. The Code is quite clear on the point when an attachment is released, and sets forth under Order XXI, rule 55, the three occasions when the attachment shall be deemed to be withdrawn. In the circumstances of the present case the attachment would normally cease on satisfaction being made through the Court after the full payment of the purchase-money. Until that point of time the attachment undoubtedly subsists and while it so subsists it would be a strange state of the law if a Court is to be precluded from hearing the complaint of the lawful claimant. At any rate there is nothing in the Code that precludes it. The judgment continues:

"This is also made clear by sub-rule (2) of rule 58 which provides for the adjournment of a sale pending the investigation of the claim"

No doubt if sub-rule 2 enjoined that pending a claim the sale must be adjourned, it would look as though no investigation after sale was ever contemplated; but sub-rule 2 leaves the adjournment to the Court's discretion—it is *may* not *must*. It is quite conceivable that during a sale a claim may be made, so seemingly ridiculous that the Court declines to inconvenience the bidders by adjournment, and disallows the claim subsequently under rule 61. Or, as in the present case, a claim may be put in after the sale, and may be considered and rejected. If on the other hand the claim is accepted the claimant will have his remedy even though the hearing has been after the sale, under Order XXI, rules 99 and 100, as the Calcutta case points out; and it cannot be said that the investigation of the claim is infructuous.

In another Calcutta Case, *Kali Charan v. Sarajini Debi*(1), a single Judge has held that, if the Court admit

(1) A.I.R. 1926 Cal. 468.

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the application under Order XXI, rule 58, before the sale, and then complete the sale, it precludes itself from considering the application; a ruling which affords a good example of the danger of holding that a Court while still fully competent to maintain an attachment is incompetent to hear a protest against that attachment. Surely, to put the point figuratively, if a Court has hands to seize it should also have ears to hear.

Gopal Chandra Mukerji v. Notobar Kundu(1) is followed in *Puhupdei v. Ramcharitar*(2) where again the claim was duly presented before the sale, but was only taken up after the sale was completed. Here it is held to be obvious that after the sale the attachment was *ipso facto* determined. But surely if that were so a sale would be one of the circumstances marshalled in rule 55 as justifying the assumption that the attachment is withdrawn.

Finally these cases are approved in *Maung Po Pe v. Maung Kwa*(3) where it is observed that no case warranting the assumption is to be found in the official reports, possibly because it was too obvious to be reported. But with the greatest respect, when an assumption is found to be unsupported by any provision of the Code of Civil Procedure, I think it unsafe to say that it is too obvious to be reported. An assumption so naked that it can claim authority neither from the Code nor from the authorised reports cannot be said to be beyond suspicion.

I would here observe that Subordinate Courts gravely misdirect themselves when, instead of applying their minds to the binding authority of the statutes and authorised reports, they pursue the *ignis fatuus* of the unreported cases. Here the learned District Munsif

(1) (1912) 15 I.O. 53.

(2) A.I.R. 1924 Pat. 76.

(3) A.I.R. 1928 Rang. 80.

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seems to have apprehended the correct law at the end of his judgment (18th paragraph), but states that he is bound to follow the decisions which he cites, not a single one of which is binding upon him.

There can be no doubt that the rejection of the claim was by a Court in the proper exercise of its jurisdiction, and defendants five and nine are estopped from raising their defence. But whether any other party in the suit is bound by their estoppel is a question which the lower appellate Court has not determined, though the trial Court has held (paragraph 13) that they were neither managers nor members of a joint family.

In any case the thirteenth defendant is admittedly unaffected. As regards him the appeal fails and is dismissed with costs. As regards the rest I must call for a finding from the lower appellate Court upon existing evidence whether defendants (excepting the thirteenth defendant) other than defendants five and nine are estopped by virtue of the claim petition of 1917 and subsequent failure to bring a suit.

Time for submission of finding six weeks and ten days for objections.

[The Subordinate Judge of Vizagapatam submitted a finding to the effect that the third, fourth and ninth to thirteenth defendants were not estopped by the order on the claim petition and that the sixth to the eighth defendants were estopped by that order. On the appeal coming on for final hearing after the return of the finding, the Court delivered a judgment accepting the finding and passing consequential orders.]

A.S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

1931,
July 21.

IN RE. SUNDARAM AYYAR (FIRST ACCUSED), APPELLANT.*

Jury—Verdict not vitiated by mistake or accident—Power of jury and Judge to revise same—Judge not satisfied with same—Procedure to be adopted.

When a Sessions Judge thinks that the jury had, by committing an error of law, committed an error of judgment but not that they delivered a verdict which they did not intend to deliver, he cannot address another charge to the jury on the law and request them to re-consider their verdict in the light of the same but should, if he disagreed with the verdict of the jury, submit the case to the High Court under section 307 of the Code of Criminal Procedure.

APPEAL against the order of the Court of Session of the Tinnevely Division in Case No. 97 of the Calendar for 1930.

K. S. Jayarama Ayyar and G. Gopalaswami for appellant.

Public Prosecutor (L. H. Bewes) for the Crown.

Our. adv. vult.

The JUDGMENT of the Court was delivered by

KRISHNAN
PANDALAI J.

KRISHNAN PANDALAI J.—This is an appeal by the first accused in a case tried by the learned Sessions Judge of Tinnevely with a jury for an offence under section 395, Indian Penal Code, in which the appellant and seven others were convicted and sentenced to various terms of imprisonment. The sentence on the appellant is six months and a fine of Rs. 200 and six months more in default. The facts alleged were as follows: The appellant is the accountant of the Isanam Mutt to which the Murappanad village belongs. The

other accused in the lower Court were mostly pallars residing in the paracheri in that village. The Mutt had engaged the pallars to repair a breach in a channel. On the 11th August 1930 the pallars quarrelled about the distribution of wages between the second accused in the lower Court and the father of the prosecution first witness. The dispute was referred to the appellant who asked that Rs. 10 should be deposited by both parties as caution money to abide by his decision by 3 p.m. on the 12th. The father of P.W. 1 did not turn up at the time nor did he pay. The son (P.W. 1) said that his father had gone to fetch the money. The appellant thought that it was a falsehood and that the father of the prosecution witness was trying to back out of the proposed settlement. It is alleged that at 5 p.m. that day (12th August 1930) the appellant and his co-accused pallars went to the hut where P.W. 1 was cooking. The appellant stood on the bund of the channel and asked for P.W. 1's father and was told that he had not come back. Thereupon the appellant is said to have lost his temper and told his pallar followers, the other accused, to pull off the roof of P.W. 1's house and to loot the contents of the house. They are alleged to have done so after binding P.W. 1's hands with his own cloth. After the looting, P.W. 1 is alleged to have been kept bound at the same place by two of the pallars and not allowed to go away until midday on the 13th.

The conviction of the appellant is said to be based on a unanimous verdict of the jury. If so, it cannot be disturbed unless there was material misdirection or other material irregularity at the trial which would vitiate the verdict and judgment.

Counsel for the appellant has urged that the charge to the jury is vitiated by misdirections (1) as to the

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* Criminal Appeal No. 136 of 1931.

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explanation of the offence of dacoity, (2) by reason of mis-statements of the prosecution evidence in material particulars and (3) on account of general unfairness which did not leave the jury any real choice to exercise an independent judgment on the facts. He also complains that the sentence is vitiated by the fact that the verdict of the jury first given was one of acquittal of the appellant and that the subsequent verdict of guilty was given in circumstances in which the jury had no power to vary their first verdict and the Judge was not entitled to accept any variation.

In the view we take on this last point it is not necessary to consider the objections as to misdirection. The objection as to the verdict seems to us to be well-founded. From the judgment it appears that what happened was that after the learned Judge had charged the jury on the law and on the facts the jury returned the following unanimous verdict:—"Accused 7 and 9 are not guilty; accused 11 and 12 are not guilty. The first accused did this only to intimidate, and the others are guilty of dacoity. The first accused should be let off because he did not intend to cause wrongful gain to himself, only to show that he was all powerful." The judgment proceeds to show that upon this verdict being given the Judge again explained the definitions of "dishonestly" in the Code and sent back the jury to reconsider their verdict in the light of the legal definition. On their return after a long deliberation the foreman stated: "We are unanimous. First accused also is guilty of dacoity." In a note it is stated that this verdict was delivered by the foreman after a very long pause and with obvious emotion. The objection is that the jury, in the first instance, although for a reason which they were not bound to state and which may have been wrong, found the appellant not guilty as they state

expressly that he should be let off, and this verdict not being vitiated by any mistake or accident, neither the jury nor the Judge had the power to bring about its reversal and convert it into one of guilty. In a similar case in *Emperor v. Kondiba*(1), it was held that section 304 of the Code of Criminal Procedure contemplates cases where the verdict delivered is not in accordance with what was really intended by the jury and that it has no application where there is no accident or mistake in the delivery of the verdict and the mistake lies in the misunderstanding of the law by the jury. If such a mistake results in an erroneous verdict, it can be corrected only by the Judge disagreeing with the jury and referring the case under section 307 of the Code to the High Court. It has also been held by this Court that there is no provision in the Code of Criminal Procedure which empowers the Judge to question the jury as to their reasons for a unanimous verdict when there is nothing ambiguous in the verdict itself and no lurking uncertainty in the minds of the jury themselves regarding it and that section 303 of the Code limits the power of the Judge to question to cases in which it is necessary to ascertain what the verdict of the jury is; see *In re Rama Naicker*(2). In this case we can find nothing in the first verdict to show that it was delivered by accident or by mistake, in other words, that that verdict did not express the jury's real meaning. The jury themselves did not say that they had made any mistake or intended anything else but what they said.

Their meaning was quite clear that the appellant should be left off, in other words, that he was not guilty. They no doubt added as a ground for that opinion that he was not actuated by any intention to cause wrongful

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(1) (1904) I.L.R. 28 Bom. 413.

(2) (1912) 22 M.L.J. 355.

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gain to himself but only to intimidate P.W. 1. That may not be right as an application of the law as to dishonesty in the Penal Code. All that it showed was that the jury had, by committing an error of law, committed an error of judgment but not that they delivered a verdict which they did not intend to deliver. This was not a case under section 303 because the learned Judge put no questions to the jury as obviously no questions were necessary to be put to them to ascertain what their verdict was. They had stated their verdict clearly enough as also their reason for it which they were not bound to do. The case was one in which the learned Judge might have thought that the jury's verdict of not guilty against the appellant was based upon an error of law, and on that ground he might have thought fit to disagree with the verdict, and if so, he ought to have submitted the case to this Court under section 307. In fact, however, the course he adopted was to address another charge to the jury on the law as to "dishonestly" and to request them to re-consider their verdict in the light of the legal definition. On the re-consideration, the jury, apparently with great reluctance, returned a verdict of guilty and as the record shows they did so with obvious emotion. For this procedure there is no warrant in the Code of Criminal Procedure and the amended verdict of the jury was therefore illegally obtained and the conviction and sentence following thereupon cannot be sustained. The decision in *King-Emperor v. Nga Tin Gyi*(1), which was referred to by both sides during the argument, was not a case like the present but one in which the verdict of the jury did not make it plain under which part of section 304 they found the prisoner guilty. Thereupon the learned

Judge questioned the jury, as he was entitled to do, under section 303 to ascertain what their verdict was. From the answers given it appeared that the jury wanted some further elucidation of a decision which had been referred to in the summing up. The learned Judge explained the decision further to the jury who retired again and afterwards returned a verdict of guilty under section 303. It was held that this second verdict could be accepted. Whether in the particular circumstances of that case the opinion that the second verdict could be accepted or not and whether the decision was right it is not necessary for us to say. But the case itself is an illustration of the rule that only where the verdict is ambiguous or defective and it become necessary to ascertain what the verdict is, can the Judge question the jury under section 303. That was not this case nor indeed did the learned Judge, as already stated, question the jury under that section. We therefore set aside the conviction and sentence and order that the appellant be set at liberty. In the circumstances of the case we do not think it necessary to order a retrial. The appellant will be discharged.

K.N.G.

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(1) (1926) I.L.R. 4 Rang. 488 (F.B.).

APPELLATE CRIMINAL.

Before Sir Owen Beasley, Kt., Chief Justice and
Mr. Justice Cornish.

SATHAPPA CHETTIAR, PETITIONER,

v.

C. RAMACHANDRA NAIDU (EDITOR AND PUBLISHER,
"TAMIL NADU"), RESPONDENT*.

*Contempt of Court—Pending legal proceedings—Publications
in respect of—Test to be applied.*

Where legal proceedings are pending before a Court, publications, in respect of those proceedings, which are calculated to produce an atmosphere of prejudice in the midst of which the said proceedings must go on, are contempts of Court even where the legal proceedings pending did not involve trial by jury and where no one would imagine that the mind of the magistrates or judges charged with the case would or could be induced thereby to swerve from the straight course.

PETITION praying the High Court to commit the respondent for contempt of Court and otherwise deal with him according to law for his having published in his paper "Tamil Nadu", *in extenso*, the complaint in Calendar Case No. 124 of 1931 on the file of the Court of the Sub-divisional Magistrate of Coimbatore with head lines and comments thereon as alleged in the affidavit filed therewith.

Nugent Grant (with him K. S. Krishnaswami Ayyangar and T. M. Kasturi) for petitioner.—The criminal case that is pending in Coimbatore is for alleged criminal breach of trust. The posters state that there was misappropriation by petitioner of several thousands of rupees. The test to be applied in this case is: "Is it likely to produce an atmosphere of prejudice in the

place where the enquiry has to be conducted?" ; see *Rex v. Tibbits*(1).

N. Rajagopalan for respondent.—The posters were intended to convey that several thousands are "alleged" to be missing. The compositor left out a single Tamil letter "ma". If that had been inserted, it would convey the idea of the word "alleged". This is not a trial by jury and a conscientious magistrate is not likely to be influenced by these posters. Very possibly he might not know of the same. The test to be applied is, "Does the article substantially interfere with the course of justice?" ; see *Hunt v. Clarke*(2) and *Ananta Lal Singh v. Alfred Henry Watson*(3).

The JUDGMENT of the Court was delivered by

BEASLEY C.J.—The respondent here is the Editor and Publisher of the "Tamil Nadu" newspaper whose place of business is in Broadway, Madras; and he is here to-day to show cause why he should not be committed for contempt of Court or otherwise dealt with.

The facts of the case can be stated quite briefly and they are as follows: One Sathappa Chettiar at whose instance these proceedings have been put before the Court is an accused person. He stands charged in the Court of the Sub-divisional Magistrate of Coimbatore with the offence of criminal breach of trust. He is the Secretary and Banker of the Kaleswara Mills, Ltd., and amongst other things he has two mills, viz., the Sree Krishna Ginning Factory and the Soma Vilas Ginning Factory under his management. A complaint was presented against him charging him with criminal breach of trust on the 1st September in the Court before-mentioned. There were three heads of charges—so we gather from the opening of Mr. Nugent Grant—and they were, that a certain sum which had been set apart for the payment of bonuses was received wrongly by

(1) [1902] 1 K.B. 77, 88.

(2) (1889) 61 L.T. 343.

(3) (1930) 131 I.C. 287.

* Criminal Miscellaneous Petition No. 638 of 1931.

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Sathappa Chettiar, that out of a sum of money which lay in suspense account he set apart Rs. 75,000 in order to misappropriate that sum at some future date, and that he was guilty of receiving secret commissions from vendors of cotton. Immediately after this complaint had been presented in the Sub-divisional Magistrate's Court of Coimbatore a search warrant was moved for and obtained, and certain mills were searched by the police. Two of them were the Sree Krishna Ginning Factory and the Soma Vilas Ginning Factory which, as before stated, were under his management. On the 4th September, in the issue of that date of the respondent's newspaper, there appeared a report of the criminal charges against Sathappa Chettiar in the Sub-divisional Magistrate's Court of Coimbatore. We understand that the report contained an accurate statement of the complaint which was set out *in extenso*. Had the matter ended there, no proceedings for contempt of Court could have been taken against the respondent and Mr. Nugent Grant does not here rely upon what appeared with regard to that complaint in the respondent's newspaper. He however complains of something which was done by the newspaper on the same date. In the poster or "Contents Bill" relating to this issue and in the head lines, the matter was dealt with in Tamil in four lines, the official translation of which is as follows: "Sathappa Chettiar in trouble; police search at Tiruppur; thousands of rupees missing; cotton mills in danger." Mr. Rajagopalan who appears for the respondent argues that the correct rendering of that passage is as follows: "Sathappa Chettiar put to trouble; police search at Tiruppur; thousands of rupees missing; cotton mills plight", and argues that read in that way the conduct of the respondent does not amount to contempt of Court in so far as what he

has done is not likely in any way to prejudice the fair trial of Sathappa Chettiar. With regard to the first line, in our view, there is not much difference between the official translation and the interpretation put upon it by the respondent. It called the attention of the public who were invited to read the newspaper to the fact that some trouble or worry had fallen upon Sathappa Chettiar. That by itself, of course, would not amount to anything, but it is linked up with the next line which, in our opinion, clearly shows what those words were intended in the first line to convey to the public. As a result of this criminal complaint Sathappa Chettiar was certainly in trouble and of course those people who read the "Contents Bill" but had not then read the newspaper would find some indication of the sort of trouble that had been put upon him by the words "Police search at Tiruppur". Tiruppur was the place where these two factories which were under the management of Sathappa Chettiar were, and there was a search, and as a result of the search—that is the conclusion to be drawn from the third line—thousands of rupees were found to be missing. As a result of that you get the fourth line that cotton mills were either in danger or in trouble or in a plight, it does not matter which construction is put upon the Tamil words. Taking these four lines together, we are of the opinion that readers of the poster and the head lines would gather that Sathappa Chettiar was in trouble, that the police were connected with the trouble, that the trouble he was in occasioned a search of the mills under his management at Tiruppur, and that as a result of that search thousands of rupees were found to be missing which was a disastrous matter for the cotton mills. It is argued here that, in the third line which after all is the most important one, one Tamil letter "ma" meaning "alleged" was accidentally omitted by

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the compositor and that the line should read "thousands of rupees alleged to be missing." Had the word "alleged" been there, then this matter probably would never have come up before this Court. It is an important omission and we are not going to assume that it was an accidental omission. Even if it were an accidental omission, we have got to ask ourselves whether that omission, accidental or otherwise, does not convey to the public that as a fact thousands of rupees were missing as a result of the police search at Tiruppur, and that Sathappa Chettiar was in trouble with regard to it and in consequence of it. That being so, we have got to consider whether the conduct of the respondent in publishing those lines so worded constitutes a contempt of Court, and we can do no better than to refer to the observations of Lord ALVERSTONE C.J. in the case of *Rea v. Tibbits*(1), where he says as follows:—

"It would, indeed, be far-fetched to infer that the articles would in fact have any effect upon the mind of either magistrate or judge,"—

We may pause here and say that it is not in the least likely that the words complained of would have any effect on the Sub-divisional Magistrate of Coimbatore and indeed it is extremely doubtful whether he would ever have seen these words at all—

"but the essence of the offence is conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on. Publications of that character have been punished over and over again as contempts of Court, where the legal proceedings pending did not involve trial by jury and where no one would imagine that the mind of the magistrates or judges charged with the case would or could be induced thereby to swerve from the straight course."

(1) [1902] 1 K.B. 77, 88.

It seems to us that these words are singularly appropriate to this case and it is impossible to say that the conduct complained of is not calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on. That being so, the respondent is guilty of contempt of Court and the only other matter to be considered is, how is he to be dealt with by us? Whilst we think that it is a serious thing to have omitted the word "alleged" thereby stating it as a fact, when it possibly is not, that thousands of rupees were missing in the factories, it is a case which does not amount to serious contempt of Court. We think that under the circumstances justice will be done by ordering the respondent to pay the petitioner's costs which we fix at Rs. 250.

K.N.G.

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PRIVY COUNCIL.

J.O. *
1931,
November
27.

SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT), APPELLANT,

v.

SANNIDHIRAJU SUBBARAYUDU AND OTHERS (LEGAL
REPRESENTATIVES OF DECEASED PLAINTIFF), RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

*Madras Irrigation Cess Act (VII of 1865), sec. 1—Zamindari
land bounded by river—Riparian rights—Engagement
with Government—"River belonging to the Government".*

The property in land bounded by a river, whether tidal and navigable or not, has inherent in it the riparian right to take water from the river for irrigating the land, and on a permanent settlement of the land that right is included, without special mention, in the property in respect of which the zamindar enters into an engagement with the Government to pay the jama; the right being a natural right, not an easement, is not lost by non-user. Accordingly, even if the river belongs to the Government within the meaning of the Madras Irrigation Cess Act, 1865, section 1, the proviso exempts the zamindar, or a grantee from him of part of the riparian land, from liability to the cess to the extent of his said right.

A river is one "belonging to the Government" for the purposes of the section if, at the point at which the water is taken, the bed of the river belongs to the Government, and that is so when the Government is proprietor of the land abutting on the river on both sides, or when the river is tidal and navigable.

Prasad Row v. The Secretary of State for India, (1917) I.L.R. 40 Mad. 886 (P.C.); L.R. 44 I.A. 166, applied.

Lyon v. Fishmongers' Company, (1876) 1 App. Cas. 662, *Swindon Waterworks Company v. Wilts and Berks Canal Navigation Company*, (1875) L.R. 7 H.L. 697, 704, and *McCartney v. Londonderry and Lough Swilly Railway*, [1904] A.C. 301, 307, referred to.

* Present: Viscount DUNEDIN, Lord BLANESBURGH and Sir JOHN WALLIS.

APPEAL (No. 34 of 1931) by special leave from a decree of the High Court (April 19, 1927) reversing a decree of the Subordinate Judge of Rajahmundry (February 24, 1924) which affirmed a decree of the District Munsif.

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The respondents were the legal representatives of the deceased plaintiff who, as pujari of a temple, owned about twelve acres of land within the zamindari of Guttenadivi under a darmilla inam, i.e., an inam granted by the zamindar after the permanent settlement of the estate. The land was bounded by a tidal channel, known as Chilapa Kalava, which connected with one of the branches by which the river Godavari reached the sea; upon the other side of the Chilapa Kalava was a Government village.

In fasli 1327 (1917-18) the plaintiff took water from the Chilapa Kalava for irrigating the inam land, and the Government thereupon imposed upon him a water-cess of Rs. 8-5-8 under the Madras Irrigation Cess Act (VII of 1865), as amended by Madras Acts (V of 1900), (II of 1913) and (VIII of 1914). The relevant provisions of the Act appear from the judgment of the Judicial Committee.

The plaintiff, having paid the cess under protest, filed the present suit, alleging by his plaint that he had a riparian right to take water from the Chilapa Kalava for cultivating his land without payment of cess, and claiming a refund. By an amendment he alleged an immemorial right in his predecessors to take the water, but that allegation was negatived by the first two Courts and was not argued in the High Court.

The District Munsif dismissed the suit, and his decision was affirmed on appeal to the Subordinate Judge. An appeal to the High Court (KUMARASWAMI SASTRI and RAMESAM JJ.) was allowed by a judgment

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delivered by the latter learned Judge and reported as *Subbarayudu v. Secretary of State for India*(1). The grounds of the decisions of the three Courts are stated in the present judgment.

The Judicial Committee granted special leave to appeal upon the terms that in any event the appellant should pay the respondents' costs as between solicitor and client.

Dunne K.C. and *Dube K.C.* for appellant.—The Subordinate Judge (affirming the Munsif) found that the Chilapa Kalava was navigable for big boats during six or seven months of the year and for fishing boats during the rest of the year. The facts so found were binding upon the High Court under sections 100 and 101 of the Code of Civil Procedure, and they constituted the Chilapa Kalava a navigable stream. That it was tidal was not disputed. The Chilapa Kalava being both tidal and navigable its bed was the property of the Government: *Naresh Narayan Roy v. Secretary of State for India*(2); and it was therefore a "river belonging to the Government" whatever the exact meaning of that expression may be. That being so, and the taking of the water admitted, the plaintiff was liable to the cess, unless he brought himself within the proviso by showing that he was entitled to irrigation free of cess by virtue of an engagement with the Government. The High Court in the present case, following its decision in *Lakshminarasu Avadhanulu v. Secretary of State for India*(3), decided that question against the Government mainly upon a consideration of the judgment delivered by Lord PARKER of Waddington in *Prasad Row v. The Secretary of State for India*(4), conveniently referred to as the *Urlam* case. That case, however, is distinguishable as it related to water taken from artificial channels existing at the time of the permanent settlement, and the circumstances gave rise to an easement to use the water for irrigation. In the present case it was not shown that the Chilapa Kalava was a source of irrigation of the lands at the settlement, or that a wet mamul allowance was

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made. The facts do not give rise to the implication held to arise in the *Urlam* case(1). *Secretary of State for India in Council v. Maharajah of Bobbili*(2) was a case of easement binding upon the Government's predecessors, and is also inapplicable. The Board has never decided that the mere fact that zamindari lands are contiguous to a Government river establishes an engagement within the proviso. If that had been the intention, the section and proviso would have been differently worded, as in practically every case in which zamindari lands are irrigated from a river they are riparian. The High Court misunderstood the observations in the judgment in the *Urlam* case (1), with regard to Madras Act III of 1905, which does not really affect this case.

De Gruyther K.C. and *Narasimham* for respondents.—The Chilapa Kalava, even if tidal and navigable, was not a river belonging to Government for the purpose of the Act as the riparian rights in private persons prevented the water from being under the control of the Government. [Reference was made to *Chinnappan Chetty v. The Secretary of State for India*(3), *Secretary of State v. Janakiramayya*(4) and *Secretary of State for India v. Ambalavana Pandara Sannadhi*(5).] But even if the river belonged to Government the plaintiff, as a grantee from the zamindar, was exempt by the proviso. It is well settled (see the Full Bench decision above referred to) that in India, as in England, a riparian owner has the natural right to use the water for irrigating his land, subject only to the rights of lower riparian owners. That right exists even if the river is tidal and navigable. A zamindar is in effect owner of his settled land, and whether he cultivates it wet or dry, or brings waste land into cultivation, the Regulation prevents any increase in the jama. Although the facts in the *Urlam* case (1) differ from those here, the judgment covers this case. The judgment stated that the permanent settlement was an "engagement" within the proviso, and that the Government could not impose a cess for the use of water, the right to use which (though not mentioned) was appurtenant to the land, without a breach of the obligation undertaken at the settlement. The proviso

(1) (1927) I.L.R. 50 Mad. 961.

(2) (1923) I.L.R. 50 Cal. 446, 457 (P.C.); L.R. 50 I.A. 121, 126.

(3) (1917) 84 M.L.J. 228.

(4) (1917) I.L.R. 40 Mad. 886 (P.C.); L.R. 44 I.A. 166.

(1) (1917) I.L.R. 40 Mad. 886 (P.C.); L.R. 44 I.A. 166.

(2) (1919) I.L.R. 48 Mad. 529 (P.C.); L.R. 46 I.A. 302.

(3) (1918) I.L.R. 42 Mad. 239 (F.B.). (4) (1918) I.L.R. 37 Mad. 322.

(5) (1910) I.L.R. 34 Mad. 368.

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cannot be construed as intending that breach of obligation. The judgment in *Secretary of State for India in Council v. Maharajah of Bobbili* (1) cited and applied the passage referred to.

[Their Lordships stated that in their present view it was not necessary to discuss whether upon the evidence the Kalava was navigable.]

Dunne K.C. replied.

VISCOUNT
DUNEDIN.

The JUDGMENT of their Lordships was delivered by Viscount DUNEDIN.—The original plaintiff in this suit is dead and the suit is continued by his legal representatives. The plaintiff owned land abutting on a branch of the Godavari called the Chilapa Kalava. From that in exercise of what he considered his riparian rights he took water. The Government, through the Collector of Godavari, charged a water-cess of Rs. 8-5-8 for his use of the water. He paid under protest and then raised the present suit against the Government to recover the money so paid.

The sole question, therefore, is whether the water-cess was legally levied. The cess bore to be levied in virtue of the provisions of the Madras Irrigation Cess Act (VII of 1865). The preamble of the Act is in these terms :—

“Whereas, in several districts of the Madras Presidency, large expenditure out of Government funds has been, and is still being, incurred in the construction and improvement of works of irrigation and drainage, to the great advantage of the country and of proprietors and tenants of land : and whereas it is right and proper that a fit return should, in all cases alike, be made to Government on account of the increased profits derivable from lands irrigated by such works : ”

Then follow the words of the Act which, so far as material to the present case, are to be found in the first section.

(1) (1919) I.L.R. 48 Mad. 529, 539 (P.O.); L.R. 46 I.A. 302, 312.

“1. (a) Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank, or work belonging to, or constructed by, Government,

* * * *

it shall be lawful for the Government before the end of the revenue year succeeding that in which the irrigation takes place to levy at pleasure on the land so irrigated a separate cess for such water, and the Government may prescribe the rules under which, and the rates at which, such water-cess as aforesaid shall be levied : and alter or amend the same from time to time :

Provided that where a zamindar or inamdar or any other description of landholder not holding under ryotwari settlement is by virtue of engagements with the Government entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of this right and no more : ”

Now the facts which have not been a matter of dispute may be thus stated :—

- (1) The plaintiff's land is bounded by the river.
- (2) At the place where he has taken the water there are Government lands on the opposite side of the stream.
- (3) He only uses the water he takes for the purpose of the irrigation of his own property.
- (4) The river at this place is tidal.

There are also two disputed facts :—

First, the plaintiff originally averred that he had taken the water at this place from time immemorial. The Government said he had only taken the water recently. The latter was found to be the case both by the Judges of the inferior Court and the Court of appeal, and consequently it cannot be and has not been argued to the contrary by the respondents in this appeal. Secondly, the Government aver that the river at the place where the water is taken being tidal is also navigable. The District Munsif before whom the case depended found that the river was navigable by big

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boats for six or seven months and by fishing boats for the remainder of the year. He therefore found that it was navigable as well as tidal. Upon that ground and the ground that the Government owned land on the other side of the river, he held that the river belonged to the Government. Riparian rights to be good against the Government, he decided, must be customary immemorial rights, and as he had found the fact of long user against the plaintiff, he decided that the cess was duly levied and dismissed the suit. On appeal to the Subordinate Judge he confirmed the judgment of the Munsif on substantially the same grounds. Appeal being taken to the High Court in Madras, they reversed the judgment and decreed the suit.

As to the river being navigable, they were not satisfied that the evidence tendered was sufficient. They considered that navigability must extend during all the year and, as the character of the fishing boats had been left dubious, they would have been prepared to remit the case for further evidence on the point had it been necessary for them to do so, but, in their opinion, the case could be disposed of upon the assumption that the river did in terms of the section "belong" to the Government, and they accordingly proceeded on that assumption. The judgment of the Court was delivered by RAMESAM J., and the deciding passage may be found expressed as follows:—

"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 Addarapū Kalava in exercise of his rights as 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."

There have been in the Madras Courts a considerable number of cases dealing with the Act of 1865. The judgments pronounced in them, and still more the dicta contained in the judgments, are exceedingly contradictory. In their Lordships' view, it would serve no good purpose to go through the cases and pick out the different dicta with which they do or do not agree. They prefer, therefore, to lay down quite shortly the various propositions in law which suffice for the determination of the present case.

The first question that presents itself is obviously whether the river in the phraseology of the Act "belongs" to the Government. Now the word "belongs", easily applicable to works, etc., is obviously ill-suited to be applied to a river. Running water at common law, though many people may have the right to take and use it, belongs in a river to no one. It passes on and successive people have rights in regard to it. So that literally no "river" could belong to the Government unless it was a river which from the source to the sea was within Government lands, or tidal and navigable so that it was always Government property. But clearly the word "belongs" cannot be so restricted. The idea, therefore, must be that the river belongs to such person or persons as have the ownership of the water for the time being at the place at which it is taken. Belonging points to exclusive belonging. It therefore seems to follow that within the expanded meaning a river only belongs to the Government when the solum of the stream belongs to the Government. This will happen either when the Government is

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proprietor of the lands abutting on the river on both sides or when the river is tidal and navigable. So much for the expression as it was used in 1865. But then there is the Act of 1905. That Act with its general and sweeping enactments has certainly the effect that in future, when there is a contest as to the right of water the opponent of the Government will be put to prove his title. He will not be able, as he otherwise would have been when attacked by the Government, to put them to prove their title. But Counsel for the Government did not argue that the Act of 1905 made the river belong to the Government, and as the natural rights of persons are expressly excepted, it can have no effect on the riparian rights of the parties in the present case.

The result is that in this case the river only belongs to the Government if the river is both tidal and navigable. Their Lordships, without deciding, will assume, as the High Court did, it is so; for, if it is not, the right to levy cess is gone. They will therefore assume that it is. Now come the following considerations:—

1. A riparian owner is a person who owns land abutting on a stream and who as such has a certain right to take water from the stream. In ordinary cases the fact that his land abuts on the stream makes him the proprietor of the bed of the stream *usque ad medium filum*. But he may not be. He may be ousted by an actual grant to the person on the other side, or he may be and often is ousted by the Crown when the stream is tidal and navigable, because where the stream is tidal and navigable the solum of the bed belongs to the Crown. Yet in neither of these cases are his rights as a riparian owner to take water affected. He would have no right in the two cases put to erect an *opus manufactum* in the bed of the stream even if from the point of view of navigation or diversion of the

direction of the flow it was unobjectionable, for the land is not his, but his right to take water remains. In *Lyon v. Fishmongers' Company*(1), in the judgments of Lord Chancellor CAIRNS, Lord CHELMSFORD and Lord SELBORNE will be found clearly laid down these two propositions:—

(a) A riparian owner has the same rights in a tidal and navigable river as he has in a river which is not tidal and navigable.

(b) The right of a riparian owner to the use of the stream does not depend upon the ownership of the soil of the stream.

2. The right of a riparian owner to take water is, first of all, for domestic use, and then for other uses connected with the land, of which irrigation of the lands which form the property is one.

But there is a difference in degree between these primary and secondary rights. The whole matter was carefully explained by Lord CAIRNS in *Swindon Waterworks Company v. Wills and Berks Canal Navigation Company*(2) who says:—

“Undoubtedly the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water, that is quite consistent with the right of the upper owner also to use the water for all ordinary purposes, namely, as has been said, *ad lavandum et ad potandum*, whatever portion of the water may be thereby exhausted and may cease to come down by reason of that use. But farther, there are uses, no doubt, to which the water may be put by the upper owner, namely, uses connected with the tenement of that upper owner. Under certain circumstances, and provided no material injury is done, the water may be used and may be diverted for a time by the upper owner for the purpose of irrigation. That may well be done; the exhaustion of the water which may thereby take place may be so inconsiderable as not to form a subject of complaint by the lower

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(1) (1876) 1 App. Cas. 682.

(2) (1875) L.R. 7 H.L. 697, 704.

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owner, and the water may be restored after the object of irrigation is answered, in a volume substantially equal to that in which it passed before."

The same views were expressed by Lord MACNAGHTEN in the more recent case of *McCartney v. Londonderry and Lough Swilly Railway*(1); he says:—

"In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether. No lower proprietor can complain of that. In the exercise of rights extraordinary but permissible, the limit of which has never been accurately defined and probably is incapable of accurate definition, a riparian owner is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character."

Now, in speaking of the returning of the water it must be remembered that both Lord CAIRNS and Lord MACNAGHTEN were speaking of a diversion of the whole stream. When only a part of the stream is taken, and that for purposes of irrigation, the only limitation is that the amount taken shall not be so much as to hurt the right of the inferior owner to have the stream passed on to him practically undiminished.

3. Further, the right is a natural right and not in the strict sense of the word an easement, though in many cases it has been called an easement. In particular, it is not capable of being lost *non utendo* and the maxim *tantum prescriptum quantum possessum* has no application. It is not the only right of this class—analogue to an easement and yet not strictly an easement. The right of support, that is to say the natural right of support as distinguished from the

(1) [1904] A.O. 301, 307.

easement of enhanced support, is another example. It is probably a confusion as to this that led the lower Courts in this case astray.

Applying these principles, it follows that the plaintiff had absolute right to take the water and use it for irrigation of his property, for there is no complaint at the instance of a lower proprietor that too much has been taken, and he uses it for his own property alone. But then comes the Act, and although the plaintiff is within his rights in taking, yet, on the hypothesis that the water comes from a river belonging to the Government, he is liable in cess unless he can have resort to the proviso. In *Prasad Row v. The Secretary of State for India*(1), the *Utlam* case, which has been so often cited and so often commented on, Lord PARKER puts the point quite clearly:—

"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."

The case that Lord PARKER is here putting is where there is no more than the naked fact that the taker of the water takes it in respect of either a natural or of an easement right. Lord PARKER did not go on to decide in terms the question he had raised. He did not do so because there was something more to be considered in the case before him, viz., the effect of the sanad arranged at the time of the permanent settlement. Nor does the *Utlam* case(1) actually decide the present case, because

(1) (1917) I.L.R. 40 Mad. 886, 894 (P.O.); L.R. 44 I.A. 166, 172.

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the rights of the zamindar in question were easement rights. The actual decision necessarily shows this, because the enjoyment was limited by the size of the channels and cuts which brought the water.

Nevertheless in the present case their Lordships think that what was clearly laid down in that case decided the point. It was obviously possible to argue that by engagement was meant an engagement which specially dealt with the supply claimed, but this argument was rejected. Lord PARKER says :—

“ Their Lordships cannot accept the contention that the proviso applies only where there is an express contract that the supply to which the person claiming the protection of the proviso is entitled shall be free from anything in the nature of a future tax.”

And then the judgment goes on, after a review of history as to the permanent settlement and an argument which need not be quoted, to find in terms that the Government sanad permanently fixing the jama for the property (which, it may be added, was accompanied by the zamindar's kabuliyat or counterpart engaging with Government for the payment of the permanently settled jama) may be such an engagement, though it makes no mention of water rights. In other words, if the water rights claimed are within the property which was, so to speak, enfranchised by the jama fixed at the permanent settlement, then the sanad which fixed the jama is an engagement within the meaning of the Act. Of course, the permanent settlement was dealing with the Government right to a payment which represented and replaced the melvaram of more ancient times, but the test is the same as the test which would be applied to a conveyance. In a conveyance you ask what passed. In the case of the permanent settlement you ask what was the extent of the property that was settled. In

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the *Urlam* case(1) the water rights in question passed because they were existing water rights enjoyed by way of easement at the time of the settlement. Here what passed was the property, and the property, being riparian, had inherent in it without special mention the riparian rights. While it must be understood that their Lordships must not be held to concur in each and all of the expressions used in the judgment of the High Court, they are of opinion that the result arrived at by them was right.

An observation is not out of place that, although it is well settled that an enactment cannot be cut down in its meaning by the preamble, yet it is at least satisfactory to feel that the present judgment is in accordance with the express intention of the preamble when a judgment to the opposite effect would have been a flagrant overstepping of it.

Their Lordships will humbly advise His Majesty to dismiss the appeal, with costs as between solicitor and client, in accordance with the terms upon which the Government obtained special leave to appeal in this case.

Solicitor for appellant: *Solicitor, India Office.*

Solicitor for respondents: *H. S. L. Polak.*

A.M.T.

(1) (1917) I.L.B. 40 Mad. 886, 894 (P.O.); L.R. 44 I.A. 166.

APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Cornish.

1931,
September
17.

THE MUNICIPAL COUNCIL OF VIZAGAPATAM BY
ITS CHAIRMAN (DEFENDANT), APPELLANT,

v.

THE TEA DISTRICTS LABOUR ASSOCIATION BY
AGENT MR. LESLIE S. DRIVER (PLAINTIFF), RESPONDENT.*

Madras District Municipalities Act (V of 1920), sec. 92—"Paid-up capital" in—Meaning of—Benefit society or association—Members of—Subscriptions paid to society or association by, to enable it to carry on its business—Income and not capital.

The words "paid-up capital" in section 92 of the Madras District Municipalities Act (V of 1920) must be given the technical meaning which is usually given to those words. Paid-up capital means so much of the authorized or stated capital of a company which its shareholders or subscribers have paid up. Subscriptions paid by the members of a benefit society or an association to the society or association to enable it to carry on its business are its "income" and not "capital".

APPEAL from the judgment and decree of WALLER J. dated 1st October 1929 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 721 of 1928.

B. Satyanarayana for appellant.

C. Krishnaswami Ayyar for respondent.

The JUDGMENT of the Court was delivered by
BEASLEY C.J. BEASLEY C.J.—This is an appeal from a judgment of WALLER J. The facts of the case are as follows:—The respondent association, namely, the Tea Districts Labour (supply) Association, is an association of persons

* Original Side Appeal No. 108 of 1929.

formed for certain purposes, the main purpose being to gather recruits for tea estates for various parts of India and one of the gathering grounds being in or close to the appellant municipality. The objects of the association are fully set out in the memorandum of the association and its articles. The association is contributed to by its members who pay a subscription on a fixed scale and a capitation fee of Rs. 5 for each recruiter and Rs. 12 for each recruit. Each estate which is represented in the association makes an advance of Rs. 75 to cover the expenses of the recruiters. For the moment, we prefer to call these payments by the members of the association their contributions. The association has a branch in the appellant municipality and under section 92 of the Madras District Municipalities Act (V of 1920) the appellant municipality assessed the respondent association to companies' tax for the half-years ending 30th September 1925, 31st March 1926 and 30th September 1926 and served upon the respondent association notices demanding payments of the sums of Rs. 125 for each of the half-years already mentioned making a total sum of Rs. 500. The respondent association paid the amount demanded under protest and stating that they would file a suit in due course for the recovery of the amount paid by them under protest. The amount is a small one, but, as the respondent association had been similarly assessed by other municipalities, this suit and the other suits were, by order of the High Court, transferred here for a decision. WALLER J. allowed the respondents' suit because he held that the respondents were not assessable under section 92 of the Madras District Municipalities Act by reason of the fact that they had no paid-up capital. Upon all other points he appears to have been in favour of the appellant.

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The only point argued before us here to-day was whether the respondent association had a paid-up capital upon which it could be assessed. It is important to observe that the words used in section 92 are "paid-up capital". Admittedly this is not a company but a mere benefit society; and it is not necessary—and so WALLER J. has held—that before a benefit society can be assessed under this Act it should carry on business within the municipality for profit. What we have to deal with here is the question as to whether or not the respondent association has any paid-up capital upon which it can be assessed. Mr. B. Satyanarayana in his very able argument contends that the contributions by the members to which we have already referred constitute the paid-up capital of it. He argues that it is quite clear that the association carries on business within the limits of the appellant municipality. He further argues that no association or company can carry on business without capital so to do and that any money it derives from its own members or from outside must necessarily be the capital of the company with which to transact business. He argues that it is not right, as our learned brother WALLER J. in the Court below did, to give a strict interpretation to the words appearing in the section, namely, "paid-up capital", and invites us to give to those words a liberal construction and hold that any money received by a company, a benefit society, or an association which enables it to carry on its business must necessarily be capital. We are of the opinion that WALLER J. was quite right in applying to those words the technical meaning which usually is applied to those words. We find them in the section in question used in relation to a company and we decline to apply any other meaning to those words "paid-up capital" than that which is usually applied to them.

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Paid-up capital means so much of the authorized or stated capital of a company which its share holders or subscribers have paid-up. In this case it appears to us that the contributions of the members of the association were in no sense capital. They were the subscriptions of the members of the association to the association and as such were the "income" and not the "capital" of the association. There is a distinct difference between "income" and "capital" and in our view this was the income of the association which enables it to carry on its business within the limits of the appellant municipality. The Legislature has chosen to say that where a company or a benefit society carries on business within a municipality it is to be assessed on its paid-up capital. But if the company or the benefit society has no paid-up capital, it follows that it cannot be assessed. Under these circumstances, in our view, the judgment of WALLER J. in the Court below was quite correct. This appeal must, therefore, be dismissed with costs.

Solicitors for respondent: *King & Partridge.*

A.S.V.

APPELLATE CIVIL.

Before Sir V. Ramesam, Kt., Officiating Chief Justice, and
Mr. Justice Cornish.

1931,
August 17.

MARI NAGANNA, MINOR, AND ANOTHER (DEFENDANTS 2 AND 3),
APPELLANTS,

v.

PERURI KRISHNAMURTHI (PLAINTIFF), RESPONDENT.*

Indian Limitation Act (IX of 1908), ss. 4, 6 and 8—Ex-minor—Suit by—Three years period allowed by ss. 6 and 8 for, expiring on day when Court is closed—Suit filed by him on re-opening day—Not barred by virtue of sec. 4—Effect of that section.

Where the three years allowed by sections 6 and 8 of the Indian Limitation Act to an ex-minor to institute a suit expire on a day when the Court is closed, a suit filed by him on the re-opening day is, by virtue of section 4 of that Act, in time.

Section 4 of the Limitation Act does not extend the period of limitation. But it enables the plaintiff, by excluding the time during which the Court is closed, to institute his suit on the re-opening day and so to have the benefit of the three years period which the Act gives him for that purpose.

APPEAL under clause 15 of the Letters Patent against the judgment of REILLY J., dated the 6th August 1928, in Second Appeal No. 824 of 1925 on the file of the High Court preferred against the decree of the Court of the Subordinate Judge of Cocanada in Appeal No. 142 of 1924 (Appeal Suit No. 45 of 1924, Additional Sub-Court, Cocanada) preferred against the decree of the Court of the District Munsif of Peddapur in Original Suit No. 141 of 1923.

C. Rama Rao for appellants.

P. Somasundaram for respondent.

*Letters Patent Appeal No. 86 of 1928.

JUDGMENT.

RAMESAM Offg. C.J.—The facts out of which this letters patent appeal arises are as follows:—

The suit was filed on an unregistered bond dated 26th February 1915. The bond was taken in favour of a minor by his guardian. The minor attained majority on 12th May 1920 and computing three years provided under section 6 of the Limitation Act the suit ought to have been filed on or within the 12th May 1923. But on that date the District Munsif's Court of Peddapur was closed and so the suit was filed on the re-opening day, i.e., 4th June 1923. The Subordinate Judge held that the suit was in time and on second appeal our brother REILLY J. agreed with the Subordinate Judge's view. This letters patent appeal is filed against the judgment of REILLY J. The question is whether section 4 of the Limitation Act can be utilized after getting an extension by reason of the provisions of section 6 of the Limitation Act.

I may at once observe that there is no direct decision on the point. The learned Advocates have referred us to decisions with reference to section 4 and other sections which have a possible bearing. First we have got a decision in *Narasimha Deo Garu v. Krishnachendra Deo Garu*(1). In that case two brothers—members of a joint family—filed a suit to recover their share of a zamindari. It was found that the first plaintiff attained majority more than three years and two months prior to suit and that the suit was barred by reason of the two plaintiffs being members of a joint family on the application of section 7 of the Limitation Act. But apart from this ground, there was a further ground on which the learned Judges, ABDUR RAHIM and SPENCER JJ., held that the second plaintiff's claim was barred, viz., that

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(1) (1919) 37 M.L.J. 256; 10 L.W. 156.

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the period of two months which is the period of notice of suit given under section 49 of the Court of Wards Act cannot be deducted under section 15(2), while the plaintiffs had the benefit of the three years allowed under sections 6 and 8. That decision is distinguishable, for section 15 and sections 12 to 14 and 16 deal with computing periods of limitation and provide for the exclusion of certain periods in such computation. I also entertain some doubts about the correctness of the second ground of the decision. Nor has section 4 anything to do with computation of the period of limitation. After making all the necessary computations, if the period expires on a day when the Court is closed section 4 permits the suit to be filed on the re-opening day. The indulgence given by section 4 does not depend upon any computation. Therefore the decisions under the sections which deal with the computation of the period of limitation ought not to be used in connection with section 4.

Another case relied on is a decision in *Shevdas Daulatram v. Narayen*(1). The question there was whether section 4 of the Limitation Act can be utilized in cases where the party gets the benefit of section 31 and it was held that it could not be so utilized. But this decision has been dissented from in *Murugesu Mudali v. Ramasami Chettiar*(2) and *Somisetti Seshayya Ohetty v. Rolla Subbadu*(3), where all the decisions are collected, and it appears that other High Courts also have dissented from it. We are inclined to agree with all these decisions in dissenting from the case in *Shevdas Daulatram v. Narayen*(1).

The next case referred to is a decision in *Subbarayan v. Natarajan*(4). In that case at page 795, after putting

(1) (1911) I.L.R. 36 Bom. 268.
(3) (1930) 32 L.W. 502.

(2) (1913) 26 M.L.J. 23.
(4) (1922) I.L.R. 45 Mad. 785.

the question "what is meant by a period of limitation?", I observed:

"In the first place it probably does not include mere periods of extension, such as the period of two years under section 31 of the Limitation Act [quoting here *Dayaram v. Lawman*(1)] and the period of three years referred to in section 8 of the Limitation Act"

[quoting the case in *Narasimha Deo Garu v. Krishnachendra Deo Garu*(2), as the only authority]. The decision in *Dayaram v. Lawman*(1) was followed in *Shevdas Daulatram v. Narayen*(3), which, as I have said, has been dissented from repeatedly.

The other decision is the same as that of *Narasimha Deo Garu v. Krishnachendra Deo Garu* (2), as to which I have already expressed my doubts.

The observation in *Subbarayan v. Natarajan*(4) must have been made by me because the decisions were there; and, because it was not clear that I should agree with them, I used the word "probably". It seems to me that that judgment would stand better if that sentence is expunged. My final conclusion in that judgment was that a period of limitation need not be necessarily a period of limitation under the Limitation Act but it may be contained anywhere provided it is a strict period of limitation, and I held that the period in section 48 of the Code of Civil Procedure was not a period of limitation in the stricter sense. My reasons differed somewhat from those of my learned brother SPENCER J.

It will be convenient now to refer to the other cases which relate to the combined use of section 4 with the other sections of the Act. One is *Bai Hemkore v. Masamalli*(5). There it was held that section 4 of the Act

(1) (1911) 18 Bom. L.R. 284. (2) (1919) 37 M.L.J. 256; 10 L.W. 156.
(3) (1911) I.L.R. 36 Bom. 268. (4) (1922) I.L.R. 45 Mad. 785.
(5) (1902) I.L.R. 26 Bom. 782.

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cannot be utilized when its application precedes the benefit to be derived under section 19 of the Limitation Act.

In *Ummathu v. Pathumma*(1) a similar question arose whether the benefit of section 4 can be utilized when it precedes the application of section 14 of the Limitation Act and myself and SPENCER J. held that it could not be so utilized. At page 823 I referred to *Bai Hemkore v. Masamalli*(2), observing that it was held there "that section 4 cannot be tacked on prior to the period of extension given by section 19."

These two decisions do not help the appellants in the present case. Here the respondent wants to use section 4 as the last step for his suit. Having utilized all other exclusions in computation permitted by the Limitation Act, whatever they are, as the period of limitation expired on a day when the Court is closed, he wishes to file the suit on the re-opening day. Section 4 comes in as the last step to help the plaintiff. This was not the case in the two decisions just mentioned. In my opinion the phrase "the period of limitation prescribed for any suit, etc.," in section 4 is wide enough to include a period of time contained in the first Schedule of the Limitation Act but computed with the aid of one or more of the sections 12 to 16 of the Limitation Act or starting from the date of attaining majority under section 6 of the Act. In the present case the period of limitation is three years from 12th May 1920 when the plaintiff attained majority according to the first Schedule taken with section 6 of the Act. Such period expired on a day when the Court was closed and the suit could therefore be filed on the reopening day.

In my opinion the decision of REILLY J. is right and the appeal ought to be dismissed with costs.

(1) (1921) I.L.R. 44 Mad. 817.

(2) (1902) I.L.R. 26 Bom. 782.

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CORNISH J.—The short question for decision appears to me to be whether there is anything in sections 6 and 8 of the Limitation Act to prevent a suitor who comes within those sections from having the benefit of section 4. In my opinion there is not. Section 4 provides an exception to the general rule laid down in section 3. Section 6 enables a person, who was a minor at the time from which the period of limitation is to be reckoned, to institute a suit within the same period after he attains majority as would otherwise have been allowed from the time prescribed therefor in the third column of the first Schedule. This concession is cut down by section 8 which says that

"nothing in section 6 shall be deemed to extend for more than three years from the cessation of the disability the period within which any suit must be instituted."

The illustrations to section 8 make it quite clear that what is meant is that, when time has begun to run against a person during his minority, in no case is the period in which he can institute a suit to be extended for more than three years after the cessation of the disability. In other words, by the operation of sections 6 and 8 the prescribed period within which an ex-minor can institute a suit is limited to three years from the date when he reached majority. If the three years so prescribed expire on a day when the Court is closed, the position seems to me to be precisely within the terms of section 4. Section 4 does not extend the period of limitation beyond the prescribed period. But it enables the plaintiff, by excluding the time during which the Court is closed, to institute his suit on the re-opening day and so to have the benefit of the three years period which the Act gives him for that purpose.

I agree that the appeal should be dismissed with costs.

A.S.V.

APPELLATE CIVIL.

*Before Mr. Justice Wallace and Mr. Justice Stone.*1931,
April 2.MAYANDI ASARI AND TEN OTHERS (DEFENDANTS 1 TO 10
AND LEGAL REPRESENTATIVE OF FIRST DEFENDANT), APPELLANTS,

v.

SAMI ASARI AND ANOTHER (PLAINTIFF AND ELEVENTH
DEFENDANT), RESPONDENTS.**Indian Evidence Act (I of 1872), sec. 112—Non-access—Burden
of proof of—Indian law—Competency of wife to give
evidence to prove access or non-access.*

Section 112 of the Indian Evidence Act (I of 1872) lays a heavy burden on a person who questions the legitimacy of another on the ground of non-access of proving or showing such non-access. But the proof in such a case is not different from any other species of proof under the Evidence Act, viz. "when after considering the matters before it the Court either believes" that there was non-access, "or considers its existence so probable that a prudent man ought in the circumstances of the particular case to act upon the supposition that it exists." The section does not require a negative to be proved by positive evidence.

In Indian law a wife is a competent witness to prove access or non-access by her husband.

John Howe v. Charlotte Howe, (1913) 25 M.L.J. 594 (F.B.), and *Rosario v. Ingles*, (1898) I.L.R. 18 Bom. 468, followed.

APPEAL against the decree of the Court of the First Additional Subordinate Judge of Madura in Civil Suit No. 20 of 1923.

K. V. Krishnaswami Ayyar for appellants.

K. Rajah Ayyar for first respondent.

Second respondent was unrepresented.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by WALLACE J.—This appeal is against the decision of the First Additional Subordinate Judge of Madura in a suit for declaration of title and recovery of possession of property. The plaintiff sued for the property of one Karuppannan Asari, deceased, whose son he claimed to be. The contesting defendants denied his paternity, and the main issue in the case was that question. The lower Court held that the plaintiff's mother, eleventh defendant, had been living apart from Karuppannan, her husband, for some years before his death and for some years before the plaintiff's birth, that she was unfaithful to her husband, but that, as the plaintiff was born during the period of continuance of the valid marriage between his mother and Karuppannan Asari, and as the defendants had not succeeded in proving non-access at or about the time when the plaintiff might have been conceived, the plaintiff was entitled under section 112 of the Evidence Act to be declared the son of Karuppannan. It therefore gave him a decree. First to tenth defendants appeal.

In appeal it is contended that the lower Court has so interpreted section 112 as to place an unfair burden on the appellants which it is practically impossible for them to discharge. The lower Court found that the eleventh defendant had been long living apart from her husband, that in fact she was living with some paramour at Melur, but held that, as Melur is only nine miles from Karuppannan's village, Poruspatti, and as Karuppannan used occasionally to go to Melur to buy cattle in the market, it cannot be said that he had no opportunity of access to her at the time of the plaintiff's conception. It is plain that section 112 lays a heavy burden on the contesting defendants, the burden of proving or "showing" non-access, but such proof is not different from any other species of proof under the Evidence

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Act, namely, "when after considering the matters before it the Court either believes" that there was non-access, "or considers its existence so probable that a prudent man ought in the circumstances of the particular case to act upon the supposition that it exists;" (section 3 of the Evidence Act). It is not necessary, in fact it is not possible in most cases, for a party to prove a negative by positive evidence, and the test laid down by the lower Court comes very nearly to insisting on positive proof of a negative. Putting the most reasonable interpretation on the lower Court's proposition, it amounts to this; that non-access cannot be proved so long as the parties are within reasonable distance of each other, unless there is the evidence of a witness available who can account for every minute of the parties' time, which is of course practically impossible. It is the more necessary not to interpret section 112 in such an unreasonable fashion in this country, because here among the majority of Hindus a valid marriage once contracted cannot be dissolved and therefore "continues" until the death of one party to it. In the circumstances of this case we have no hesitation in holding that the lower Court's view that the legal burden on the appellants has not been discharged is wrong.

The suggestion that Karuppannan and the eleventh defendant might have met at Melur is no part of the plaintiff's case. His case is that eleventh defendant never left her husband's house. Karuppannan's habit of visiting Melur cattle market was put forward so casually in the cross-examination of one or two witnesses for the contesting defendants that no suggestion was even put to any of them that Karuppannan ever was in the village at the same time as the eleventh defendant or ever met her there. The eleventh defendant herself of course never suggested that, since it is

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not her case. The possibility of access in Melur, accepted by the lower Court as a fact, therefore, was one not put forward by either side. The appellants had succeeded in proving that the eleventh defendant had been driven out of her husband's house and had been living apart from him for years, that he had married again, that his visits to Melur were for the purpose of buying cattle, and the plaintiff had not suggested that he ever met the eleventh defendant at Melur. In these circumstances we think that the appellants had discharged the onus of proving non-access sufficient to throw on the plaintiff the onus of proving access. It is claimed for the plaintiff here, as part of his answer to the appellants' claim, that the evidence adduced is enough to prove access; but there are many points which go to establish rather the truth of the appellants' contention. The strongest point to our mind is the admission of the eleventh defendant herself on two occasions that the father of the plaintiff was not Karuppannan but one Muttuswami Asari of Melur. In a guardianship proceeding, after Karuppannan's death, by one Ganapathi Asari, the husband of Karuppannan's sister, asking that he be appointed guardian of the minor plaintiff, the eleventh defendant filed a written statement, Exhibit IV, dated 31st July 1922, stating in categorical terms, what is the present case of the appellants; that she had left Karuppannan eight years before, had lived in concubinage first with one Sivan Asari of Madura and then with Muttuswami Asari of Melur, and that the plaintiff was the son of the latter. She repeated this statement in an affidavit, Exhibit VII-a, dated 22nd August 1922. Later on in those proceedings she attempted to withdraw Exhibit IV (see Exhibit VIII), but the District Judge would not allow her (see Exhibit IX). Her present explanation of these statements is that she was induced by her brothers to sign blank papers and that she does not

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know what they put on them. Such an explanation cannot be accepted. Exhibit IV is countersigned by her vakil in the guardianship proceedings, and it is ridiculous to suggest that it was not read over to her or that she did not know the contents. No sort of reasonable explanation is now advanced why she should falsely swear away her own chastity, and we cannot believe that she would have made such statements unless they were true or unless some severe physical coercion were used to her, which is not pleaded. It is urged, and is no doubt the case, that prior to the guardianship proceedings she had applied for a transfer of Karuppannan's patta in the name of the plaintiff. In the end that was refused. It is pointed out that in the patta transfer proceedings two village officers supported her claim (see Exhibit C). That may have been so then, but the plaintiff has not chosen to examine these village officers in this case. If they really knew the facts to be as he says, they would be excellent witnesses.

Other facts point the same way. For example, that, as his mother admits, the plaintiff was born neither in the family house nor in her parents' house, that she must have been pregnant with the plaintiff at the very time when Karuppannan was marrying a third wife, that Karuppannan himself in a deed of settlement, Exhibit D, dated 11th March 1920, on his third wife ignores the eleventh defendant and mentions only a senior wife who had died, that neither eleventh defendant nor plaintiff was present as a member of the family in a family photograph, for which omission illness and absence from the family house are her only excuse, and finally her omission to send any reply to an accusation of ex-communication and evil living, to very much the same effect as her own previous statements, contained in a reply notice of the appellants, Exhibit XIII, dated

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25th February 1922. It is a circumstance worth comment that when the plaintiff put his mother into the witness-box he did not elicit from her any answer as to who was his father. The only document relied on by the plaintiff is the birth register, Exhibit E, which only proves that some informant then gave the name of Karuppannan Asari as the father of the boy registered there. Such evidence is of little value towards proving who was the father, since the plaintiff did not examine the informant in the lower Court.

With all these undeniable facts in support of the appellants' case that Karuppannan Asari was not the father of the plaintiff, the oral evidence adduced by the plaintiff to prove that his mother never left the family protection cannot be accepted, and we endorse the lower Court's rejection of that. Incidentally we may point out that there is nothing contrary to law, in the mother herself giving evidence on a point of this kind, since it is not the law in this country that a wife is not a competent witness as to access or non-access by her husband; see *John Howe v. Charlotte Howe*(1) and *Rozario v. Ingles*(2). There was therefore no legal objection to the admissibility of her evidence or of her previous statement.

The weight of evidence is decidedly in favour of the view that the defendants have proved, so far as they reasonably can, non-access; and the lower Court's application of section 112 is in our view not reasonable. We hold that the plaintiff is not the son of Karuppannan Asari. We reverse the decree of the lower Court and dismiss the plaintiff's suit with costs in both Courts. Plaintiff will pay the court-fee due to Government.

G.B.

(1) (1913) 25 M.L.J. 594 (F.B.).

(2) (1893) 1 L.R. 18 Bom. 468.

APPELLATE CIVIL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

K. TULASIRAM (PLAINTIFF), APPELLANT,

v.

THE CHAIRMAN, MUNICIPAL COUNCIL, MADURA,
R. S. NAIDU (DEFENDANT), RESPONDENT.*

Madras District Municipalities Act (V of 1920), Sch. IV, rr. 56 to 58 and 61 and 62—Extraordinary audit or re-opening of closed audit—Power of—Surcharge made pursuant to—Suit contesting legality of—Maintainability—Appeal to Local Government by party aggrieved and partial success therein—Suit if barred in case of.

The appellant was chairman of a municipality from June 1921 till June 1923. He was succeeded by another whose term of office lasted till 1st July 1923, when the respondent succeeded to the office. During the appellant's term of office the periodical audits provided for by the rules framed under the Madras District Municipalities Act were regularly made. In 1924, a supplemental audit was made of the accounts of the period from 1st April 1921 till 18th January 1924. It was ascertained that, owing to the negligence of successive chairmen, a large sum of money had been misappropriated and the auditor surcharged the appellant, amongst others. The appellant appealed to the Local Government and obtained a reduction. He then filed a suit for an injunction restraining the respondent from recovering from him the sum representing the unremitted surcharge under rule 62 of the rules in Schedule IV of the Act.

Held that there was no jurisdiction to conduct the supplemental audit.

Rules 56 to 58 of the rules in Schedule IV of the Act provide for one recurring audit only, as the result of which defaulters can be charged or surcharged. They do not provide for extraordinary audits or the re-opening of audits when once they have been closed.

* Second Appeal No. 213 of 1929.

Held further that the audit in pursuance of which the surcharge on the appellant was made not being one contemplated by the rules in Schedule IV of the Act, the appellant's suit was not affected by the remedies provided by those rules.

Even if the remedies provided by the rules in Schedule IV of the Act can be held to be substituted for the ordinary remedy by suit in cases governed by the rules, the same result will not hold in a case where the auditor being authorized to issue surcharge notices only on the audit mentioned in the rules conducts an audit outside the rules and in fact the surcharge certificate is not a certificate within the rules at all but *ultra vires* of them.

Held also that neither the appellant's appeal to the Local Government against the surcharge nor the reduction of the amount of the surcharge by the Local Government in the appeal was a bar to the appellant's suit.

SECOND APPEAL against the decree of the District Court of Madura in Appeal Suit No. 80 of 1928 preferred against the decree of the Court of the Principal Subordinate Judge of Madura in Original Suit No. 150 of 1926.

F. S. Vaz for appellant.—The Madras District Municipalities Act is a complete code so far as powers of audit are concerned. Rules 56 to 58 in Schedule IV of the Act relate to audit. By those rules an auditor is given full powers to require the production of all documents relevant to the inquiry and the report submitted by him is final; see rule 58 (d). Once an audit is completed and a report is made it is final; and neither the Government nor an auditor subsequently appointed by it has power to re-open that audit. The rules in question have been copied from section 247 of the Public Health Act of 1875 in England, and it has been held on the construction of that section that there is no power of a second audit; see *Reg v. Inhabitants of Chiddinstone*(1); Glenn on the Law of Public Health, 13th Ed., Vol. I, pages 800-1; Lumley's Public Health, Vol. II, page 2288; and Encyclopædia of Local Government Law, pages 84, 85, 95 and 96. In 1922 a special Act was passed conferring upon the Government the power of re-opening an audit under the Public Health Act. There is nothing in the present case to show

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(1) (1862) 26 J.P. 248.

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that the Government authorized the auditor to re-open the prior audit. Even if the auditor had power to re-open the prior audit, his act was a judicial act, and he ought to have given the appellant notice and heard him before condemning him. As to what is a judicial act, see *Everett v. Griffiths*(1), per Lord ATKINSON. Lastly, the suit is one instituted under the general law and is maintainable. It is not one instituted under rule 61 of Schedule IV of the Act. Rule 61 applies only when the auditor acts within his powers and is inapplicable to a case of an extraordinary audit such as there has been in the present case. Where a special tribunal is established by a statute, the right of suit in the ordinary civil Court is barred only if the special tribunal operates under the statute; see *Ganesh Mahadev v. The Secretary of State for India*(2) and *Leman v. Damodarayya* (3).

P. Venkataramana Rao (Government Pleader), with him *J. R. Alwar Nayudu*, for respondent.—Section 122 is the main section of the Act relating to audit, and it does not limit the period during which the audit can be made. Rule 56 in Schedule IV does not do so either. Rule 57 gives complete power to the auditor to call for any accounts he wants. Rule 58 does not also restrict the period. Clause (d) of the rule refers to the “final statement of the audit”, and these words may include audit for a prior period.

[The words are “the audit”, that is, only one audit. No other audit is referred to—WALLER J.]

The audit is not confined to the particular period. An audit may be a partial audit, that is, an audit relating to particular matters only. Information in regard to other matters may not be available to the auditor and he may not be in a position to audit those matters. In that case his audit will be a partial audit and his report a partial report, and an auditor appointed subsequently will not be debarred from investigating into those matters which were left uninvestigated by the previous auditor. As regards the maintainability of the suit, when a statute confers powers on individuals or bodies and third parties are aggrieved by the exercise of such powers by them, they must pursue the remedies given by the statute. Rule 61 in Schedule IV of the Act gives a remedy to a person aggrieved by a surcharge. He must pursue that remedy and cannot

(1) [1921] 1 A.C. 681, 682.

(2) (1918) I.L.R. 48 Bom. 221.

(3) (1876) I.L.R. 1 Mad. 188.

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have recourse to the right of suit under the common law. Again, when a person has two remedies open to him, a remedy provided by statute and a common law remedy, he must pursue one of them and cannot have recourse to both; see Halsbury, Vol. XXVII, pages 188–189, section 370, and *Ramachandra v. The Secretary of State*(1). The appellant has availed himself of the remedy by appeal and cannot therefore have recourse to civil Courts.

[Rule 61 does not deprive the appellant of a right of suit—WALLER J.]

[On the assumption that the act of the auditor was one entirely without jurisdiction the appellant need not have gone to the Local Government at all. Does the fact that he did so bar his right of suit?—KRISHNAN PANDALAI J.]

The appellant can, under rule 61, apply to the civil Court to set aside the order even where the auditor acted without jurisdiction.

[“Setting aside” referred to in that rule is on the merits and not on the ground of total absence of jurisdiction in the auditor—WALLER J.]

The following cases were referred to: *Wake v. Mayor, etc., of Sheffield*(2), *Iswarananda Bharathi Swami v. Commissioners, H.R.E. Board*(3), *Wolverhampton Waterworks Co. v. Hawkesford*(4), *Mahammad Raza Saheb Belgami v. Sadasiva Rao*(5), *Dewa Singh v. Fazal Dad*(6) and *Pita Ram v. Jujhar Singh*(7). *Ganesh Mahadev v. The Secretary of State for India*(8) is distinguishable on the ground that there the right of appeal conferred by the statute was not resorted to.

F. S. Vaz in reply.—In *Ganesh Mahadev v. The Secretary of State for India*(8) the right of appeal conferred by the statute was resorted to; see page 225. *Secretary of State for India v. Major Hughes*(9) is a direct authority on the question that the filing of an appeal is no bar to the right to file a suit; see page 305. See also *Baijnath Sahai v. Ramgut Singh*(10). Appellant has the option of filing a suit or of applying under

(1) (1888) I.L.R. 12 Mad. 105.

(2) (1931) I.L.R. 54 Mad. 928.

(3) (1925) I.L.R. 49 Mad. 49.

(4) (1916) 15 A.L.J. 661, 663.

(5) (1918) I.L.R. 88 Bom. 293.

(6) (1883) 12 Q.B.D. 142, 146.

(7) (1859) 141 E.R. 486, 484.

(8) (1928) I.L.R. 10 Lah. 333.

(9) (1918) I.L.R. 43 Bom. 221.

(10) (1896) I.L.R. 23 Cal. 776 (P.C.)

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rule 61. The cases cited for the respondent are distinguishable.

Cur. adv. vult.

JUDGMENT.

WALLER J.

WALLER J.—The appellant in this case was Chairman of the Madura Municipality from 11th June 1921 till 25th June 1923. He was succeeded by Hajee B. Syed Shamsuddin Bahadur, whose term of office lasted till 1st July 1923, when he, in his turn, was succeeded by the defendant in the suit, Mr. R. S. Naidu. The rules framed under the Madras District Municipalities Act provide for periodical auditing of municipal accounts and the Government have prescribed that there shall be an audit every half-year. During the appellant's term of office such audits were regularly made. In 1924, when Mr. R. S. Naidu was Chairman, it was discovered that extensive frauds had been going on in the street-lighting department of the municipality and a supplemental audit was made of the accounts of the period from 1st April 1921 till 18th January 1924. It was ascertained that, owing to the negligence of successive chairmen, a large sum of money had been misappropriated and the auditor surcharged the appellant, his immediate predecessor and his two successors. In the case of the appellant and of Mr. R. S. Naidu the surcharges were large, Rs. 7,000 odd and Rs. 6,000 odd, respectively. The rules in Schedule IV of the Act allow to persons surcharged in this way either of two remedies. They may apply to the District Court to set aside the surcharges or "in lieu of such application" may appeal to the Local Government. All four of the aggrieved persons chose the latter course. Three of them succeeded in getting their surcharges remitted completely. The appellant did not; all that he obtained was a reduction to Rs. 2,500. He then filed

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a suit in order to get an injunction restraining Mr. R. S. Naidu from recovering this sum from him under rule 62. The two main questions raised by it were these—whether the auditor had jurisdiction to re-open audits already closed and whether the plaintiff had any right to sue. The Sub-Judge found on the first issue in favour of the appellant. The District Judge, though with some hesitation, dissented from his finding and held that there was nothing in the rules that prevented an audit being re-opened. That was not quite the right method of approaching the problem. The question was rather whether there was anything in the rules that allowed the re-opening of a closed audit. If the rules prescribe a half-yearly audit and nothing more, whence is derived the power to re-open that audit, to conduct an extraordinary or supplemental audit and, as a result, to make surcharges? Certainly not from anything in the rules themselves. On the second issue, the Sub-Judge and the District Judge again disagreed. The former considered that the appellant had a right of suit. The latter was of a different opinion. Both seem to have thought (and there was nothing in the plaint to disabuse them of that idea) that the suit was brought under rule 61. If that had been so, the Sub-Judge was quite wrong in holding that the remedies allowed by the rule were not mutually exclusive. It is quite plain that, if an aggrieved person has resorted to one, he cannot have the benefit of the other as well. Mr. Vaz now points out that this is a regular suit and not an application under section 61, which is not a suit at all and would have had to be presented to the District Court. His case is that all that was done was without any legal foundation and that his client has therefore a right to sue. He concedes, of course, that, had there been any jurisdiction to conduct an extraordinary audit, his right

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to sue would have been barred by the special remedies provided by the statute.

We will now deal with the first question—whether there was any jurisdiction to conduct a supplementary audit. The relevant rules are rules 56 to 58 in Schedule IV of the Madras District Municipalities Act. Rule 56 directs the chairman to submit to the auditor such accounts as he needs. Rule 57 empowers the auditor to summon documents and persons and to question such persons. Rule 58 (a) requires the auditor to report irregularities in expenditure or collection of money to the Council. Under sub-rule (b) he must keep the Council informed of the progress of the audit. By sub-rule (c) he is instructed to report to the Council any loss or waste of money, caused by neglect or misconduct, with the names of the persons directly or indirectly responsible. Sub-rule (d) runs: (The auditor shall)

“submit to the council a final statement of the audit and a duplicate copy thereof to the Local Government within a period of three months from the end of the financial year or within such period as the Local Government may notify.”

And the Local Government have notified that the audit is to be made half-yearly. The District Judge thought that, as sub-rule (c) contained no time-limit, the auditor was under an obligation to report financial irregularities to the Council, whenever he discovered them. We do not agree that sub-rule (c) can be isolated in this manner from the rest of the rule. It must be that the report referred to is one arising out of and based on the audit prescribed by sub-rule (d). Similarly rules 56 and 57 appear to be designed for the purpose of that audit and no other. By rule 58 (a) the auditor must report what he has observed, obviously, what he has observed in the course of that audit. Sub-rule (b) also must refer to that audit and to no other. The rules

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then, in our judgment, provide for one recurring audit only, as the result of which defaulters can be charged or surcharged. They do not provide for extraordinary audits or the re-opening of audits when once they have been closed.

As the rules are obviously framed on English precedents, it may be noted that, at one time and, in the case of one statute, up till a quite recent date, the position was the same. The statutes provided for periodical audits, but said nothing about any other. And it was held that there was no jurisdiction to re-open audits that had been completed. There is a case under the Poor Law Act that dates back to 1862—*Reg v. Inhabitants of Chiddingstone*(1). An attempt was made to force a Poor Law auditor to re-open the audits of the six previous years. He refused on the ground that he was *functus officio* in respect of those audits and had no power to re-open accounts that had been examined, audited and closed. A writ of *certiorari* was issued, but the Court held that his refusal was legally correct. Four years later, in 1866, the Poor Law Amendment Act empowered the Poor Law Board to require an auditor to hold an extraordinary audit, which was to be deemed to be an audit “within the meaning of the several Acts relating to the audit of the accounts of the poor rate.” Section 247 of the Public Health Act of 1875 prescribed—in its original form—an annual audit of the accounts of certain authorities. It is divided into ten sub-sections, which, in many respects, resemble and may well have served as a model for the relevant rules in Schedule IV of the Madras District Municipalities Act. The commentators on the Act point out that there is no provision in the section—as in the Poor Law Amendment

(1) (1862) 26 J.P. 246.

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Act of 1866—for holding an extraordinary audit and state that the Local Government Board consistently refused to allow such an audit. This state of affairs lasted till 1922, when an Act was passed giving the Minister of Health the power of ordering an extraordinary audit to be held. The view therefore in England has always been that if an Act, which prescribes the holding of periodical audits, omits to give power to direct the holding of an extraordinary audit, an account which has been audited and closed at one of the periodical audits cannot be re-opened. In this view, we cannot avoid the conclusion that in this case, there being no power reserved by the rules in Schedule IV to re-open audited accounts, the extraordinary audit and the surcharge certificate were without any legal validity whatever. Even apart from the English precedents, the matter seems plain enough. On the face of them, the rules provide for one audit only, the periodical one, and it is quite impossible to read into them a power to hold any other kind of audit or to re-open a closed account. The appellant therefore succeeds on the first point.

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KRISHNAN PANDALAI J.—On the second point the respondent contends that the suit is incompetent (1) because the ordinary remedy by suit must be deemed to have been taken away by the substitution of the special remedies provided by rule 61 of Schedule IV and (2) because the plaintiff, having elected to appeal to Government against the surcharge as if it came within rule 61 and partially succeeded thereby, cannot now repudiate that election and sue to have the decision obtained by himself set aside.

To succeed on the first branch of this contention it must be shown not merely that on a proper construction the provisions in Schedule IV as to surcharge and

the remedies open to those aggrieved by a surcharge by an auditor acting within the rules are, so to say, a code in themselves intended to exclude the ordinary mode of redress by suit, but also that the same result holds in a case like the present where the auditor, being authorized to issue surcharge notices only on the audit mentioned in the rules, conducts an audit outside the rules, and in fact the surcharge certificate is not a certificate within the rules at all but *ultra vires* of them. The decisions in *Secretary of State for India v. Major Hughes*(1), *Bajinath Sahai v. Ramgut Singh*(2) and *Ganesh Mahadev v. The Secretary of State for India*(3) are illustrations of the distinction between the two classes of cases. In the first case the Cantonment Magistrate of Poona acting under rules made by Government under the Cantonment Act, which enabled him to assess lands and buildings in the cantonment to a tax based on their annual value from which assessment an appeal lay to the Cantonment Committee whose decision was final, assessed the lands and buildings held by the Western India Turf Club not on the annual value of the properties but on the total gross income of the club, which resulted in the assessment being enhanced from Rs. 200 to about Rs. 9,400 per year. An appeal to the Cantonment Committee was unsuccessful, and so, that assessment became final under the rules. When the suit was brought for recovery of the excess sums wrongly levied on the ground that the Magistrate was not acting within the rules, it was never questioned that if the Magistrate's action were *ultra vires* any objection to the suit could be raised, and the only point suggested was that applying a wrong basis for assessment is not acting *ultra vires*. But the contrary was held. The High

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(1) (1918) I.L.R. 38 Bom. 293. (2) (1896) I.L.R. 23 Calo. 775 (P.O.).
(3) (1918) I.L.R. 43 Bom. 221.

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Court observed that the Regulations had not been in substance or effect complied with, that the money had been claimed and received without a shadow of a right and that according to an earlier decision, *Kasandas v. Ankleshvar Municipality*(1), the case was one in which the jurisdiction of the Court was not ousted. In the case of *Kasandas v. Ankleshvar Municipality*(1), in which the plaintiff failed, JENKINS C.J. said :

"Had the appellant (plaintiff) been able to make out that which is the basis of his argument, that the prescribed rules for arriving at a valuation had not been observed, then I agree he would have successfully distinguished this case (24 Bom. 607)."

The decision of the Privy Council in *Baijnath Sahai v. Ramgut Singh*(2) turned on the effect of not observing the essential procedure laid down for enforcement of a demand under the Public Demands Recovery Act. The Collector had sold the defaulter's property without there being in existence a certificate which was declared by the Act to have the force of a decree and which alone would have authorized the sale. The attempt was made in argument to show that the omission was immaterial and had been condoned. The High Court said (page 779) that the Act was framed with the intention as far as possible to exclude proceedings duly taken under it from being reviewed in Courts of Justice.

"The safeguards provided by the Act for the exercise of those powers may or may not be sufficient to prevent those powers being sometimes used harshly and improperly; but, such as they are, they must be strictly enforced, and the form of procedure laid down in the Act must be strictly followed."

Their Lordships of the Privy Council endorsed this by remarking that the provision that a certificate is to have the force and effect of a decree is a very stringent

(1) (1901) I.L.R. 26 Bom. 294.

(2) (1896) I.L.R. 23 Cal. 775 (P.O.).

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provision and that it is unnecessary for them to point out the necessity there is when power is given to a public officer to sell the property of any of His Majesty's subjects that the forms required by the Act which are matters of substance should be complied with. In *Ganesh Mahadev v. The Secretary of State for India*(1) a suit to recover silver seized and a penalty imposed by the Customs Collector was held maintainable notwithstanding section 188 of the Sea Customs Act which declares adjudication by the Customs authorities final. The ground of decision was that there had been in fact no adjudication by the Collector after himself hearing the evidence and giving the plaintiff an opportunity of being heard. In the present case the auditor's surcharge certificate if validly given under the rules can be enforced as a decree and it is idle to suggest that that force and effect is to be given to a so-called certificate given on an audit unauthorized by the rules and further to suggest that the aggrieved party has no other remedy against this illegal demand being enforced against him under the summary procedure of certification except that provided by the rules which were framed for an entirely different purpose.

The cases cited by the learned Government Pleader for the respondent were all cases of public authorities or officers acting within their powers though irregularly and there was no question of *ultra vires* in them. Indeed in *Wake v. Mayor, etc., of Sheffield*(2) the Master of the Rolls pointed out the difference and founded his decision on it. The case of *Ramachandra v. The Secretary of State*(3) was one in which the Forest Officer decided that a certain area of forest land was not part

(1) (1918) I.L.R. 43 Bom. 221.

(2) (1888) 12 Q.B.D. 142.

(3) (1888) I.L.R. 12 Mad. 105.

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of the plaintiff's property and the plaintiff after appealing unsuccessfully to the District Judge under the Forest Act brought a separate suit to set aside that decision. It was held that the suit did not lie. Similarly in *Mahammad Raza Saheb Belgami v. Sadasiva Rao*(1) the Examiner of Local Fund Accounts acting as auditor under the rules now in question surcharged the chairman of the Guntur Municipality for making payments out of the municipal fund which were illegal, because they were made in contravention of a Government Order made under rule 37 of Schedule IV. The chairman having applied unsuccessfully under rule 61 to the District Judge to remit the surcharge, a revision petition to the High Court was dismissed, the Court upholding the decision of the District Judge on the merits. An application to the Court for a writ of *certiorari* was in those circumstances also dismissed, both learned Judges observing that a substituted remedy was provided by the Act and that, even if the general power of issuing the writ in those circumstances were held not to be taken away, the writ would not issue where other and equally efficacious remedies exist for redress of the grievance complained of. It is clear that the Court was not dealing with a case of surcharge *ultra vires* of the Madras District Municipalities Act.

The case of *Dewa Singh v. Fazal Dad*(2) was of an absconding accused against whom proceedings under sections 87 and 88 of the Code of Criminal Procedure were taken and his property was sold and purchased by a stranger. After his arrest and trial in which he was acquitted he applied to the criminal Courts for restoration of the property and it was held on the

(1) (1925) I.L.R. 49 Mad. 49.

(2) (1928) I.L.R. 10 Lah. 333.

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criminal side up to the High Court that under section 89 only the net sale proceeds could be restored but not the property. The absconder then brought a civil suit against the purchaser and it was held that the suit did not lie. It was not denied for the plaintiff that the Magistrate had jurisdiction to take proceedings under sections 87 and 88 and that the civil Court would have no jurisdiction to entertain a suit of the kind if the sale had been properly carried out. But it was urged that there were irregularities in the proclamation fixing a date for the absconder's appearance and that no warrant of attachment had been issued. These irregularities notwithstanding, the suit was held not maintainable. Here again there was no question of *ultra vires* and the authority concerned was a Court from whose acts the Code of Criminal Procedure prescribes resort to higher tribunals for redress. In the case in *Pita Ram v. Jujhar Singh*(1) a claimant to property seized by a Receiver in insolvency proceedings, having urged his claim in the Insolvency Court and failed, instituted a civil suit urging the same claim. That was a case which could have been decided on the ground of *res judicata* without going into the several matters urged before the Court and discussed in the judgment. Statutory provisions giving jurisdiction to inferior Courts, to Government departments, or to bodies created *ad hoc* must be strictly construed and the procedure prescribed must be exactly followed. Where public officers acting under colour of statutory authority either decline to exercise or act beyond the authority given, it will not be held in the absence of clear language that the Legislature intended to destroy the ordinary right of His Majesty's subjects to seek

(1) (1910) 15 A.L.J. 661.

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remedy in the Courts and to place them at the mercy of irresponsible tribunals or irresponsible state departments; see *Rea v. Board of Education*(1) affirmed in *Board of Education v. Rice*(2), and cases cited in Halsbury's Laws of England, Vol. XXVII, page 190, foot-note (g). The result is that the audit in pursuance of which the surcharge on plaintiff was made not being one contemplated by the rules in Schedule IV, the plaintiff's suit is not affected by the remedies provided by those rules, even if those remedies be held to be substituted for the ordinary remedy by suit in cases governed by the rules.

The second branch of the respondent's contention is equally fallacious for the reasons already indicated. The plaintiff's assumption that he was entitled to appeal to the Local Government against the surcharge in this case cannot bind him as by an election to submit to an illegality. Nor can the fact that the Government were pleased to reduce the amount of this surcharge estop him from seeking justice in the Courts to the extent to which the surcharge was confirmed.

In the result the decree of the lower appellate Court must be reversed and that of the Subordinate Judge restored with costs in this and the lower appellate Court.

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(1) [1910] 2 K.B. 185.

(2) [1911] A.O. 179.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

PULLI GOUNDAN (SECOND RESPONDENT), PETITIONER,

v.

KUMARASAMI GOUNDAN AND THREE OTHERS
(NIL. PETITIONER AND RESPONDENTS 1 AND 3), RESPONDENTS.*

1931,
September 3.

Provincial Insolvency Act (V of 1920), ss. 75 and 68—Application by creditor under sec. 68—Collusive withdrawal and dismissal of—Appeal from order of—Right of—Another creditor not party to application has, when aggrieved by order.

Under section 75, clause 1, of the Provincial Insolvency Act, any aggrieved person may prefer an appeal against an order passed by the Judge in Insolvency.

Held, accordingly, in a case in which an application filed by one of the creditors under section 68 of the Provincial Insolvency Act was withdrawn by him collusively and was dismissed, that another creditor who was aggrieved by the order was, though not a party to the application under section 68, competent to appeal against it.

PETITION under section 75 (1) of the Provincial Insolvency Act V of 1920, praying the High Court to revise the order of the District Court, Coimbatore, dated 1st November 1929 and made in Civil Miscellaneous Appeal No. 33 of 1929 preferred against the order of the Court of the First Additional Subordinate Judge, Coimbatore, dated 10th January 1929, and made in Interlocutory Application No. 208 of 1928 in Insolvency Petition No. 31 of 1924.

A. C. Sampath Ayyangar and T. R. Srinivasa Ayyar for petitioner.

B. Sitarama Rao for M. Krishna Bharati for first respondent.

* Civil Revision Petition No. 334 of 1930.

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The JUDGMENT of the Court was delivered by
MADHAVAN NAIR J.—The purchaser of the properties from the Official Receiver of one Karuppa Goundan's estate is the petitioner before us. In Interlocutory Application No. 208 of 1928 one of the creditors filed an application before the Subordinate Judge of Coimbatore under section 68 of the Provincial Insolvency Act to set aside the sale. This application was not pressed and was dismissed. Another creditor took this order in appeal before the learned District Judge under section 75, clause 1, of the Act and the District Judge ordered that the application should be restored to file and enquired into by the Subordinate Judge. This Court directed the District Judge himself to go into the merits of the application and submit findings on two questions, viz., (1) whether or no the withdrawal of the petition under section 68 was collusive and (2) whether the appeal under section 75 of the Act to the District Court was *bona fide* and not merely in the insolvent's interest. The District Judge has now submitted his findings that the withdrawal was collusive and that the appeal under section 75 was a *bona fide* appeal. The correctness of these findings has not been challenged before us.

What is argued on behalf of the petitioner is that the appeal to the lower appellate Court by the creditor who filed the appeal was incompetent, inasmuch as he was not a party to the application under section 68 filed before the Subordinate Judge and that since he was a stranger to that application he was not competent to prefer the appeal under section 75. This argument was pressed before the learned District Judge also. He overruled the argument. The question has to be decided with reference to the terms of section 75,

clause 1, of the Provincial Insolvency Act which are as follows:—

“The debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court may appeal to the District Court, and the order of the District Court upon such appeal shall be final.”

The terms of the section are very wide. Under this section any aggrieved person may prefer an appeal against an order passed by the Judge in Insolvency. It is not contended that the creditor who preferred the appeal before the District Judge, having regard to the facts and the findings, is not an “aggrieved person” within the meaning of the term, the only contention being, as we have said, that he was a stranger to the proceedings. In our opinion, though the creditor who preferred the appeal was not a party to the proceedings, still, having regard to the fact that he is aggrieved by the order appealed against, he would come within the terms of section 75 and would be entitled to prefer the appeal.

Section 8, clause 2, of the Presidency Towns Insolvency Act gives a right to any person aggrieved to prefer an appeal against an order passed by the Judge in Insolvency. In this respect the language of that section is similar to the language used in section 75 of the Provincial Insolvency Act. In a case in which that section had to be considered it was pointed out by the learned Judges of the Calcutta High Court in *Sarat Kumar Ray v. Nabin Chandra Ram Chandra Shaha*(1) that the permission given to a person who is not a party to an order to prefer an appeal on the ground that he is an aggrieved person is a peculiarity of the Insolvency Act, inasmuch as proceedings in

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(1) (1928) I.L.R. 56 Cal. 687, 679 (F.B.).

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Bankruptcy will affect not only parties thereto but also other people; see also the observations in *Chowdappa Gounder v. Kathaperumal Pillai*(1).

We have no doubt that under section 75, clause 1, of the Provincial Insolvency Act the first respondent in the present case was competent to prefer the appeal to the lower appellate Court. In these circumstances we dismiss the revision petition with costs.

A.S.V.

APPELLATE CIVIL.

Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

1931,
August 18.

SIVASAMI ODAYAR (DEPENDANT), APPELLANT,

v.

C. R. SUBRAMANIA AIYAR (PLAINTIFF), RESPONDENT.*

*Provincial Insolvency Act (V of 1920), sec. 52, as amended—
Interim receiver's right to apply under—Immovable property
under attachment by Court—Sec. 52 applies to.*

An interim receiver is entitled to apply under section 52 of the Provincial Insolvency Act. Section 52, as now amended, contemplates the presentation of an application, not, as it used to do, after adjudication, but at an earlier stage—that is to say, after an insolvency petition has been admitted.

Subramania Aiyar v. The Official Receiver, Tanjore, (1925) 50 M.L.J. 665, dissented from.

Mahasukh v. Valibhai, (1927) 30 Bom. L.R. 455, referred to. Section 52 of the Provincial Insolvency Act applies to immovable property under attachment by a Court.

Haranchandra Chakravarti v. Jay Chand, (1929) I.L.R. 57 Calo. 122, followed.

(1) (1926) I.L.R. 49 Mad. 794.
* Second Appeal No. 334 of 1927.

APPEAL against the decree of the Court of the Subordinate Judge of Kumbakonam in Appeal Suits Nos. 47 and 55 of 1926 preferred against the decree of the Court of the District Munsif of Kumbakonam in Original Suit No. 373 of 1922.

T. M. Krishnaswami Ayyar (with him *C. A. Seshagiri Sastri*) for appellant.

B. Sitarama Rao (with him *K. R. Rangaswami Ayyangar* and *S. Rangaraja Ayyangar*) for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by WALLER J.—The appellant in this case is a person who took a lease of an insolvent's land from an Official Receiver. The respondent purchased the land in execution of a decree passed against the insolvent and his sons and he sued to recover the value of the crops removed from it by the appellant. The facts and dates are these. The land was attached in execution and proclaimed for sale, the sale being fixed for 30th September 1920. On 23rd the insolvent applied to be adjudicated and on 28th the Official Receiver was appointed interim receiver. Two days later he moved the Court under section 52 of the Provincial Insolvency Act to adjourn the sale. He did not, in terms, ask for possession of the land to be delivered to him, but, as he wanted the sale to be adjourned so that he himself might sell, such a request on his part may be implied. The Court refused the adjournment and the sale was conducted. On 23rd October the Receiver asked the Court not to confirm the sale, but his prayer was again refused. On 15th December the insolvent was adjudicated and the Official Receiver proceeded to lease his land to the appellant, after which the respondent obtained symbolical delivery from the Court. The Official Receiver subsequently applied

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to have the sale set aside. His application was rejected by the executing Court, but was allowed by the District Judge, whose order was, however, set aside by the High Court in a decision which is reported as *Subramania Aiyar v. The Official Receiver, Tanjore*(1). The Court held that the receiver referred to in section 52 of the Provincial Insolvency Act was the receiver appointed after adjudication and that no application under that section on the part of an interim receiver would lie. With great respect, we must express our dissent from this view. Section 52, as now amended, contemplates the presentation of an application, not, as it used to do, after adjudication, but at an earlier stage, that is to say, after an insolvency petition has been admitted. At that stage, the only receiver that can be in existence for the purpose of applying is an interim receiver. In *Mahasukh v. Valibhai*(2) an application had been presented under section 52 by an interim receiver and no one seems even to have argued that it was not maintainable for the reason that no interim receiver could apply. The truth is that section 52, in its present form, is entirely out of place under the heading "Effect of insolvency (in other words of adjudication) on antecedent transactions". Before amendment, it came properly under that heading. Now it is concerned with applications presented at an earlier stage. Mr. Sitarama Rao seeks to support the High Court's order on another ground that section 52 does not apply to immovable property, which cannot be said to be "in the possession of the Court". Were the matter *res integra*, we should be inclined to accept his argument. In India land is attached not by seizure, but by means of a prohibitory order and it is difficult to understand how,

(1) (1925) 50 M.L.J. 635.

(2) (1927) 30 Bom. L.R. 455.

while it remains in the physical possession of the judgment-debtor or of a third party, it can be said also to be in the possession of the Court. There is, however, plenty of authority, for example, *Haranchandra Chakravarti v. Jay Chand*(1), for the view that the section applies to all kinds of property under attachment by a Court, and we do not propose to dissent from it. The result, then, is that, on the application of the interim receiver, the executing Court should at once have stayed the sale and directed delivery of possession to him, the section being peremptory in its terms. The sale, has, however, been confirmed by a Bench of this Court and, even if it could be set aside, no one is asking for it to be set aside. But it is important to define the true legal position, which has some bearing on the appellant's plea of *bona fides*. It is not disputed that he paid rent to the Official Receiver or that he deposited part of it in Court under Order XXI, rule 46, Civil Procedure Code. Under the circumstances, we do not consider that he should be asked to pay twice over. His payments to the Official Receiver seem to have been made *bona fide* and to be valid under section 50 of the Transfer of Property Act. The Official Receiver was quite justified in declining to recognize the title of the auction-purchaser under a sale that should not have taken place or been confirmed by a Court, which was required peremptorily by the statute to stay its hand and to transfer the attached property to the Receiver. As regards the deposit under Order XXI, rule 46, of the Code of Civil Procedure, the law allowed it and it can hardly be described as *mala fide*. The final argument is that the Receiver was not entitled to possession of the sons' shares and that

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(1) (1929) I.L.R. 57, Cal. 122.

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the plea of *bona fides* could not be sustained in regard to them. As to that, the law at that time was not settled and there was some doubt whether the sons' shares also did not vest in the Receiver. Apart from that, it is clear that the auction-purchaser himself was not entitled to anything but symbolical possession. If he has a legal grievance at all, it is against the Official Receiver, who has received payment from his lessee.

We allow the second appeal and dismiss the suit with costs throughout.

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APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

1931,
July 24.

VISWANATHA AYYAR (APPELLANT), APPELLANT,

v.

CHIMMUKUTTI AMMA AND FOUR OTHERS
(RESPONDENTS 1 to 4 AND 6), RESPONDENTS.*

Mortgage—Sub-mortgage—Redemption suit by original mortgagor against original mortgagee—Sub-mortgagee not impleaded in—Right of, where redemption suit ends in redemption—Original mortgagor not having notice of sub-mortgage—Notice of sub-mortgage to mortgagor—Registration of sub-mortgage not of itself—Redemption suit—Preliminary decree in—Payment out of Court made after, and reported to Court by both mortgagor and mortgagee—Validity of—Third party's right to question.

A sub-mortgagee (of whose sub-mortgage the original mortgagor had no notice) left out of a redemption suit against his mortgagor, which ends in redemption, cannot claim afterwards to bring either the property originally mortgaged to his mortgagor or what was mortgaged to himself to sale. His

* Letters Patent Appeal No. 135 of 1926.

right in such a case is only to a personal decree against his mortgagor.

A sub-mortgagee has a right to sue for sale of the property mortgaged to him, and, if he is not made a party to the redemption suit against his mortgagor, his right to bring his own suit is unaffected and can be pursued by him. But the legal effect of the redemption of the original mortgage in accordance with the decree of the Court in the redemption suit is to wipe out the original mortgage. As the sub-mortgagee has only a mortgage right over that mortgage, if that is gone, the whole foundation of a suit by him for sale is gone too.

Muhammad Haji v. Mohidin Kutti, (1920) 30 M.L.T. 21, followed.

Sukhi v. Ghulam Safdar Khan, (1921) I.L.R. 43 All. 469 (P.C.), distinguished on the ground of its not being a sub-mortgagee's case.

The registration of a sub-mortgage is not of itself notice thereof to the mortgagor.

The rule that a payment made out of Court after the preliminary decree in a redemption suit will not be recognised by the Court if disputed cannot affect the right of the mortgagor and the mortgagee to settle between themselves out of Court and report the matter to the Court. When they do so the validity of the payment cannot be questioned by a third party not impleaded in the suit.

Singa Raja v. Pethu Raja, (1919) I.L.R. 42 Mad. 61, explained.

APPEAL under clause 15 of the Letters Patent against the decision of SPENCER J. in Second Appeal No. 892 of 1923 preferred to the High Court against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in Appeal Suit No. 141 of 1922—Appeal Suit No. 343 of 1922, on the file of the District Court of South Malabar—(Original Suit No. 234 of 1921 on the file of the Court of the Additional District Munsif of Calicut).

K. P. Ramakrishna Ayyar for appellant.

K. P. Krishna Menon for respondents.

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JUDGMENT.

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REILLY J.—The predecessor of the fifth defendant in this case, the janmi of the land concerned, granted a kanam to the first and second defendants. They granted a sub-mortgage of that kanam to the third and fourth defendants, who assigned their right to the plaintiff. After that, on the expiry of the term of the kanam, the fifth defendant sued for redemption without making the plaintiff or his assignors, the third and fourth defendants, parties to the suit, obtained a preliminary decree for redemption and settled with the kanamdars, the first and second defendants, by payment out of Court. The plaintiff has brought this suit to enforce his sub-mortgage by sale of the kanam right, which had been mortgaged to his assignors. The District Munsif gave him a personal decree against his mortgagors and a decree for the sale of their possessory right in the land concerned, whatever that might be. The plaintiff appealed to the Subordinate Judge claiming a decree for sale of the kanam; but his appeal was dismissed. He then appealed to this Court, and the second appeal was dismissed by SPENCER J. The present appeal is against SPENCER J.'s decision.

I have mentioned that the fifth defendant paid the first and second defendants the amount fixed in his redemption decree. It has been suggested before us in the course of the arguments by Mr. Ramakrishna Ayyar for the plaintiff that the evidence of that payment is unsatisfactory. But the payment was found by the District Munsif to have been made; the Subordinate Judge's judgment obviously proceeds on the ground that that finding is correct; SPENCER J. accepted it as correct; and I do not see how we can allow that finding of fact to be questioned at this stage. The District Munsif found that neither the fifth defendant

nor his predecessor ever had actual notice of the plaintiff's sub-mortgage, and that finding is not now contested. It cannot be disputed that on the authorities, if a mortgagor without notice of any sub-mortgage pays off his mortgagee out of Court, the sub-mortgagee cannot after that redemption bring the right mortgaged to him to sale. For that we have *Narayana Mudali v. Raghavammal*(1), *Chinnaswamy v. Venkataramakrishnayya*(2), *Sahadev Ravji v. Shekh Papa Miya*(3) and *Mauung Shan Hpyu v. U Po Thaw*(4). Those were all cases in which the redemption proceeded out of Court. In this case, as I have mentioned, the fifth defendant brought his suit for redemption, and it was in the course of that suit that he made his payment. Mr. Ramakrishna Ayyar has contended that that makes a vital difference in the matter. Under rule 1 of Order XXXIV of the Code of Civil Procedure, the plaintiff, a sub-mortgagee, as a person interested in the mortgage-security should have been made a party to the fifth defendant's suit. Mr. Ramakrishna Ayyar contends that, as he was not made a party, the payment in his absence did not discharge the mortgage to the first and second defendants, which is still available to the plaintiff. He has relied upon certain expressions in the judgment of their Lordships of the Privy Council in *Sukhi v. Ghulam Safdar Khan*(5). Their Lordships there quote with approval as a correct statement the following sentences from the judgment of the High Court in that case:

"The plaintiff is a puisne mortgagee seeking to enforce her mortgage, the prior mortgagee in his suit having failed to make her a party. It is the duty of the Court to give the

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(1) (1907) 18 M.L.J. 462.

(2) (1917) M.W.N. 111.

(3) (1904) I.L.R. 29 Bom. 199.

(4) (1927) I.L.R. 5 Rang. 749.

(5) (1921) I.L.R. 43 All. 469 (P.O.).

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plaintiff the opportunity of occupying the position which she would have occupied if she had been made a party to the former suit."

Mr. Ramakrishna Ayyar would have us interpret that as meaning that we must put the plaintiff in this case into the position in which he would have been if he had been made a party to the fifth defendant's redemption suit and that he must now get what he would have got in that suit. But I do not think that their Lordships, in quoting those expressions, meant to lay down that, when one of the proper parties to a mortgage suit was not impleaded, the suit should be treated as if it had never been or as if the decision between the parties to the suit as it stood could be wiped out or that the hands of the clock should be put back or that necessarily the omitted party must get all that he would have got in that suit. It has been decided that, if a proper party in a mortgage suit is omitted, then his rights are not affected by that suit in the sense that he can still pursue his own remedy. That is so on general principles and is made clear in *Mulla Vittil Seethi v. Achuthan Nair*(1) and *Chinnu Pillai v. Venkatasamy Chettiar*(2). In this case the plaintiff, as the sub-mortgagee, had a right to sue for sale of the property mortgaged to him. If he was not made a party to the fifth defendant's suit, his right to bring his own suit was unaffected and could be pursued by him. But, if he brought such a suit, what would he get? All he could get would be a decree for sale of the mortgage right which was mortgaged to him and, if necessary and available, in due course a personal decree against his mortgagors. It happens that in consequence of the redemption of the land mortgaged it is of no use to the plaintiff to bring that mortgage to sale. It is

(1) (1911) 21 M.L.J. 213.

(2) (1915) I.L.R. 40 Mad. 77.

gone; and therefore all that remains to him is a personal decree against his mortgagors, to which the District Munsif has added a decree for sale of their possessory right, if any.

But Mr. Ramakrishna Ayyar has also contended that *Sukhi v. Ghulam Sajdar Khan*(1) is a direct decision that a simple sub-mortgagee left out of a mortgage suit to which his mortgagor is a party can in all cases afterwards enforce his mortgage by sale. I think it is clearly a mistake to suppose that *Sukhi v. Ghulam Sajdar Khan*(1) was a case dealing with a sub-mortgagee. In that case the first mortgagee brought a suit for sale of his mortgage without impleading the second mortgagee, got a decree, brought the property to sale and bought it himself. He died, bequeathing what he got by that purchase to his widow, and she gave it to her nephews, taking from them a mortgage over it to secure certain annual payments to her for maintenance. After that the second mortgagee brought a suit for foreclosure against the nephews omitting to make the widow a party. He got a decree for foreclosure and paid the nephews about Rs. 3,000 claimed by them under the first mortgage, which they put forward as a shield against the second mortgagee. The second mortgagee then got possession of the property. In the suit which came before the Privy Council the widow sued for sale, and she eventually got a decree for sale for the realization of the amount of Rs. 3,000, which had been paid by the second mortgagee on the first mortgage, on the ground that the nephews had derogated from the right mortgaged to her to that extent. But it was also provided that, if she wanted a decree to recover by sale any further amount on her mortgage, she must pay off

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(1) (1921) I.L.R. 43 All. 469 (P.C.).

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the second mortgagee. On these facts I think it is quite clear that the widow was not, as Mr. Ramakrishna Ayyar suggested, a sub-mortgagee. What was mortgaged to her was what her husband, the first mortgagee, had got in his sale, i.e. the whole interest in the property to the extent of the equity of redemption and his own mortgage but excluding the interest represented by the second mortgage. Their Lordships, while quoting from the judgment of the High Court a statement which they say is correct, quote her description as a puisne mortgagee; and it is quite clear that she must have been a puisne mortgagee, as otherwise she would not have been postponed to the second mortgage. The case is therefore no authority for the proposition that a sub-mortgagee left out of a redemption suit against his mortgagor, which ends in redemption, can claim afterwards to bring either the property originally mortgaged to his mortgagor or what was mortgaged to himself to sale. It is a fact, as mentioned by SPENCER J. in his judgment, that MADHAVAN NAIR J. in Second Appeal No. 668 of 1921 relied upon this judgment of the Privy Council in deciding in favour of a sub-mortgagee in those circumstances. I think it is quite clear that MADHAVAN NAIR J. realised that the case, with which the Privy Council were dealing in *Sukhi v. Ghulam Safdar Khan*(1), was a puisne mortgagee's case, not a sub-mortgagee's case, as has been suggested. But he regarded it as applicable to a sub-mortgagee's case. With respect I may perhaps point out that on a reference to the papers it appears that the case before MADHAVAN NAIR J. himself was not merely a sub-mortgagee's case; it was a case of a puisne mortgagee also, and therefore there is no doubt that the Allahabad case was applicable to it. But that case in my opinion is no authority for giving a sub-mortgagee

(1) (1921) J.L.R. 48, All. 469 (P.C.).

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the right which is claimed for him in this case. In *Muhammad Haji v. Mohidin Kutti*(1) a Bench of this Court decided that a sub-mortgagee left out of a redemption suit against his mortgagor after redemption had been effected could not enforce his sub-mortgage. And I think it is quite easy to see that on principle there is a distinction between the position of a puisne mortgagee and a sub-mortgagee in that respect. A puisne mortgagee obtains an interest in the property originally mortgaged; and every puisne mortgagee in his turn has a right to have his claim satisfied out of the property originally mortgaged until it is exhausted. A sub-mortgagee has no direct interest in the property originally mortgaged by his mortgagor's mortgagor. He has only an interest in the mortgage right obtained by his mortgagor—a right which he knows is terminable—and, when that right has been legally terminated, his security so far is gone. A mortgagor cannot be allowed by redeeming some of his mortgagees to defeat others; but, when a mortgagor wishes to exercise his legal right to redeem a mortgage created by him, he cannot be obstructed or delayed by the existence of a sub-mortgage of which he has never had knowledge or notice. We are certainly not at liberty to allow new obstacles to be invented in the way of redemption.

So far I have been dealing with the case as if the fifth defendant had no knowledge nor notice of the plaintiff's sub-mortgage. Mr. Ramakrishna Ayyar has raised a contention that, though the fifth defendant had no actual knowledge of the sub-mortgage, he had constructive notice of it. It is not suggested that the plaintiff was in possession of the property or that he had the kanam deed in his possession when the fifth

(1) (1920) 80 M.L.T. 21.

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defendant came to pay off the mortgage. Constructive notice is not suggested in either of those ways. But it is contended that, when the fifth defendant brought his suit for redemption, it was his duty under rule 1 of Order XXXIV of the Code of Civil Procedure to bring before the Court all the parties interested in the mortgage-security, and in order to perform that duty he ought to have searched the records of the Registration Department, and, if he had done so, he would have discovered the plaintiff's sub-mortgage. It cannot be contended in a case like this that the registration of the sub-mortgage itself was notice. That is not the law as it was at the time of the fifth defendant's suit, nor is it even the law as altered by the recent amendment of the Transfer of Property Act. And the cases I have quoted, *Narayana Mudali v. Raghavammal*(1), *Chinnaswamy v. Venkataramakrishnayya*(2), *Sahadev Ravji v. Shekh Papa Miya*(3) and *Maung Shan Hpyu v. U Po Thaw*(4), would all have been wrong if registration of the sub-mortgage was itself notice. But the contention is that the fifth defendant, if he was to perform his duty to the Court, would have been bound to search the records of the Registration Department in order to find out who were the parties interested in the mortgage-security so as to make the array of defendants in his suit complete. As Mr. Ramakrishna Ayyar has urged, in *Tilakdhari Lal v. Khedan Lal*(5) their Lordships of the Privy Council in discussing the duty of a plaintiff under section 85 of the Transfer of Property Act, before the present Code of Civil Procedure came into force, to bring before the Court in a mortgage suit all the parties interested in the property say :

(1) (1907) 18 M.L.J. 462.

(2) (1917) M.W.N. 111.

(3) (1924) I.L.R. 29 Bom. 199.

(4) (1927) I.L.R. 5 Rang. 749.

(5) (1920) I.L.R. 48 Calo. 1 (P.C.).

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"In order to discharge that duty the plaintiff was bound to search the register, and his omission to do so would be presumed to have been a wilful abstention from the search or gross negligence ; and in either case he would be deemed to have had notice of the fact that he would have discovered if the search had been made."

Those remarks appear to be equally applicable to the duty of a plaintiff in a mortgage suit under rule 1 of Order XXXIV of the Code ; and in that sense I do not see how we can escape the result that the fifth defendant, when he brought his suit, must have had constructive notice of the plaintiff's sub-mortgage. But what is the result of that ? The fifth defendant did not perform the duty to the Court which should have been performed. He might have been penalised in various ways for that. Anything that was done in the suit in the absence of the plaintiff would not prevent the plaintiff from pursuing his own remedy as he might be advised. But can that affect the legal result of the fifth defendant's redemption suit between the parties to it ? The suit was not altogether ineffective because the plaintiff was not made a party to it. We cannot wipe out that suit ; we cannot pretend that it was never heard and decided ; we must respect its legal effect ; and as between the fifth defendant and his mortgagees, the first and second defendants, the legal effect of what happened in that suit is that their kanam was redeemed and, so far as they are concerned, is gone for ever. The plaintiff had only a mortgage right over that kanam, and, if the kanam is gone, then the whole foundation of his suit, so far as it is for sale, is gone too. In spite of the fact that in accordance with a very long course of decisions payment out of Court in redemption by a mortgagor to his mortgagee with the knowledge that there is a sub-mortgagee who is not satisfied cannot affect the sub-mortgagee's right, as in this case the mortgage has been redeemed

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in accordance with the decree of the Court, we cannot turn the clock back and pretend for the benefit of the plaintiff or any one else that that has not happened. That is in effect the way in which the question was dealt with in *Muhammad Haji v. Mohidin Kutti*(1), and with respect I think that that is the way to look at it.

There was one other contention raised by Mr. Ramakrishna Ayyar on the ground that the payment in this case was admittedly made by the fifth defendant to the first and second defendants after the preliminary decree in the redemption suit but not into Court. The payment was made out of Court and was reported to the Court. He contends that, after a preliminary mortgage decree is made directing payment of an amount into Court, such and such results follow, but no payment out of Court has any valid effect. For that he relies upon *Singa Raja v. Pethu Raja*(2). What was decided in that case was that, if after a preliminary decree the mortgagor alleges that he has paid the amount due from him out of Court and the mortgagee disputes it, the Court will not recognize a payment not made in accordance with the directions of the decree into Court. But that can in no way affect the right of the mortgagor and the mortgagee to settle between themselves out of Court and report the matter to the Court. If they are in agreement and bring the payment to the notice of the Court, it is surely absurd for the Court to take up the position that the preliminary decree still stands and can be pursued, although the parties do not wish it to be done. Certainly that cannot be done at the instance of a third party not impleaded in the suit.

I may add in conclusion that this case has been argued before us as one of a mortgage and a sub-mortgage. The mortgage is a kanam, and a kanam is

(1) (1920) 30 M.L.T. 21.

(2) (1918) I.L.R. 42 Mad. 61.

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not a mortgage only: it is also a lease. But through- out these proceedings in all the Courts the case appears to have been treated as one of mortgage, and in that way I have dealt with it. If it were treated as a case, not of a sub-mortgage of a mortgage right, but of a mortgage of a leasehold right, still more if it were treated as a case of a mortgage of a kanam tenure under the new Malabar Tenancy Act, other considerations might arise. But I do not think that we ought to go into those aspects of the matter on the present occasion in view of the way in which the case has been treated in all the Courts.

In my opinion all the appellant's contentions fail, and this appeal should be dismissed with costs.

ANANTAKRISHNA AYYAR J.—I agree.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Pakenham Walsh.

1931,
August 3.

RAJAGOPALASWAMI NAICKER AND TWO OTHERS
(DEFENDANTS 2 TO 4), APPELLANTS,

v.

PALANISWAMI CHETTIAR AND THREE OTHERS
(PLAINTIFFS 1 AND 3 TO 5), RESPONDENTS.*

Costs—Suit for sale of the mortgaged properties—Preliminary decree silent about costs against a non-mortgagor-defendant—Court's power to award costs of suit even at the stage when the mortgagee applies under O. XXXIV, r. 6 of the Code of Civil Procedure.

In a suit by the mortgagee for sale of the mortgaged properties, the Court has power to pass a personal decree for costs of the suit against defendants who had not executed the mortgage, even at the stage when he applies under Order XXXIV, rule 6 of the Code of Civil Procedure (Act V of 1908), and though the preliminary decree is silent in respect of the same.

APPEAL against the order of the Court of the First Additional Subordinate Judge of Coimbatore, dated 5th March 1930 in Interlocutory Application No. 760 of 1929 in Original Suit No. 11 of 1924.

K. S. Venkatarama Ayyar for appellants.

T. M. Krishnaswami Ayyar and *T. B. Balagopal* for first respondent.

C. V. Mahadeva Ayyar for second and third respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by
JACKSON J. JACKSON J.—This is a suit for sale brought by the mortgagee against the mortgagor, first defendant, and his three sons, second, third, and fourth defendants. The

* Appeal No. 464 of 1930.

lower Court decreed the suit, and, after the hypotheca had been sold under the decree, the plaintiff applied for a personal decree against the first defendant for the balance still due under the mortgage and costs, and against defendants two and three for the amount due for costs. The lower Court has granted a personal decree against defendants two, three, and four and hence the appeal. The point taken is that once the amount due under the mortgage, the subsequent interest, and costs, have been amalgamated into one sum, and the hypotheca has been sold, it is not open to the plaintiff to assume that costs are part of the remaining balance, or to ask for a personal decree for costs as though they were still legally recoverable from the defendants as provided by Order XXXIV, rule 6. It is not contended that in no case can defendants who are not personal parties to the mortgage be held personally liable for costs. That, under section 35 of the Code of Civil Procedure, would be within the Court's discretion; compare *Ramakrishna Ayyar v. Raghunatha Ayyar*(1). But it is contended that, unless in its preliminary decree the Court exercises its discretion, it is too late for the plaintiff to apply after the amalgamation of the amounts due by way of mortgage, interest, and costs, and the subsequent sale.

The same point is taken in *Venugopalachariar v. Padmanabha Row*(2) where the non-mortgagor second defendant concedes that costs are legally recoverable from him under the decree but contends that there is no admissible assumption that the portion of the decree amount unsatisfied by the sale represents costs and not the mortgage money. While admitting (page 121) that in England this assumption is warranted, this Bench felt constrained by Indian Statute Law to

(1) (1929) 33 L.W. 284.

(2) (1915) 29 M.L.J. 120.

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take a contrary view. It was impressed by the circumstance that in Appendix D, under Order XXXIV, rule 6, a form of decree against a mortgagor personally is provided; but this would almost assume that Appendix D is exhaustive. Can it be said that no decree can be passed for which Appendix D provides no form, or that the decretal rules in the Code are restricted to such decrees as may be found in Appendix D? Two Allahabad cases are cited by this Bench in support of its ruling. *Ram Lal v. Sil Chand*(1) contemplates (page 441) a decree for costs being given against a non-mortgagor personally. No doubt it interprets the obsolete section 90, Transfer of Property Act, as referring only to a mortgagor: "The whole tenor and wording of section 90 abundantly show . . . that the persons affected by it are the mortgagee who has brought the property to sale, and the mortgagor . . ." (page 440). But that is of little assistance in interpreting Order XXXIV, rule 6, because the wording has changed; "amount due for the time being on the mortgage" giving place to "amount due to the plaintiff", which may well include costs from a non-mortgagor. In that case (page 441) no order had been made in the preliminary decree to the effect that the non-mortgagor should be personally liable in costs; and again in *Mata Amber v. Sri Dhar*(2) it is pointed out that the preliminary decree contained nothing justifying the application for a personal decree. Apparently that decree was in some form resembling Form 5 of Appendix D of the Code of Civil Procedure before its amendment in 1929; for it was a suit for redemption governed by section 92, Transfer of Property Act, or Order XXXIV, rule 7, Civil Procedure Code. In that Form there is no clause such as is found

(1) (1901) I.L.B. 23 All. 439.

(2) (1904) I.L.R. 26 All. 507.

in Form 4, the form of our decree, "that if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree."

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Where a Court decrees "if the proceeds are insufficient to pay costs", it must contemplate costs remaining unpaid if there is any balance owing after the sale. In the present suit the mortgage amount with interest comes to over 76,000 rupees and the costs are about Rs. 3,000. It is an ingenious fiction but one to which a Court can hardly lend colour that the mortgage amount, interest and costs are as it were piled into one heap, with the costs at the top, and then the moment that some bidder at the sale has offered Rs. 3,000, the costs are cleared off, and only the mortgage amount and interest at the bottom remain to be defrayed. The heap as a matter of fact consists of "what is declared due to the plaintiffs" (paragraph 2 of decree), and if a portion of the heap remains not cleared off after the sale it is still "what is declared due to the plaintiffs", and if costs are declared due to the plaintiffs, they are justified in treating this residue as costs and in applying under paragraph 3 for their personal decree. Any other interpretation would seem to make paragraph 3 of Form 4 a dead letter as regards non-mortgagor-defendants.

This was evidently the opinion of another Bench of this Court in *Komandur Kamalammal v. Komandur Narasimhacharlu*(1), and if this be read with *Venugopalachariar v. Padmanabha Row*(2) it cannot be said that there is any binding authority upon this question to be found in the rulings.

In this view of the law we see no reason to interfere with the lower Court's judgment. The plaintiffs did not

(1) (1912) 12 M.L.T. 312.

(2) (1915) 29 M.L.J. 120.

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ask for a personal decree against fourth defendant and apparently do not want one, but it follows logically upon the argument that makes defendants two and three personally liable, and it must stand. Only the fourth defendant will not be liable to arrest. The appeal is dismissed with costs.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Anantakrishna Ayyar.

1931,
September
17.

IN RE PATURU VENUGOPALAYYA (PLAINTIFF),
PETITIONER.*

Court-fee—Alternative reliefs—Court-fee payable in respect of one of, exceeding that payable in respect of other alternative relief—Higher court-fee payable in case of.

In the case of a plaint praying for alternative reliefs, if the court-fee payable in respect of any of the alternative prayers should exceed the court-fee payable in respect of the other alternative prayer, the plaintiff must pay the higher court-fee.

Held, therefore, in a case in which the plaint prayed for a declaration in respect of which a fixed court-fee of a certain amount was payable and in the alternative for another relief in respect of which an *ad valorem* court-fee of a much larger amount would ordinarily be payable, that the plaintiff was bound to pay the *ad valorem* court-fee payable in respect of the latter relief, although the plaintiff's valuation thereof was in fact lower than that of the relief for declaration.

PETITION under sections 115 of the Code of Civil Procedure (Act V of 1908) and 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Nellore, dated 20th August 1931, and made in Original Suit No. 22 of 1931.

Oh. Raghava Rao for petitioner.

* Civil Revision Petition No. 1181 of 1931.

JUDGMENT.

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This civil revision petition has been filed by the plaintiff in an original suit pending on the file of the Additional Subordinate Judge of Nellore. Objection was taken by the defendants as regards the sufficiency of the court-fee paid by the plaintiff, having regard to the prayers contained in the plaint. The plaint was once amended and some of the reliefs originally claimed were deleted. As regards the prayers contained even in the amended plaint the defendants contended that proper court-fee had not been paid by the plaintiff. That preliminary question had to be decided by the learned Subordinate Judge, and after hearing parties he came to the conclusion that the court-fee paid by the plaintiff was not sufficient, and gave the plaintiff some time to pay the deficient court-fee. On the allegation that the court-fee already paid was sufficient, and that the learned Subordinate Judge's order was erroneous in so far as it directed the plaintiff to pay additional court-fee, the plaintiff has filed the present civil revision petition. There is also an application for stay of further proceedings in the suit in the lower Court.

To appreciate the arguments urged on behalf of the petitioner it is necessary to understand what exactly are the prayers contained in the plaint as amended. The plaintiff asks for two reliefs, the first relief being the main relief prayed for, and the second relief being an alternative relief claimed in case the Court should hold that the plaintiff is not entitled to the first relief. The reliefs claimed in the plaint are—

(1) Declaring the plaintiff's right after setting aside the sale in favour of the fifth and seventh defendants to the half-share of the properties in schedules A to E; or, in the alternative, (2) to the entirety of the properties in schedules A, B and C, with a right to account from

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the first defendant for the income thereof and collections thereunder from 1918, together with interest thereon, and for plaintiff's share of the movables in schedule E, to be ascertained on an accounting by the first defendant.

The first relief was valued at Rs. 49,986, and the fixed court-fee of Rs. 100 payable for a declaration was paid.

The second relief was valued at Rs. 47,022-0-9, but no court-fee was paid in respect of the same, though *ad valorem* court-fee has ordinarily to be calculated on that amount.

The plaintiff's contention is that as the valuation of the first relief is more than the valuation of the second relief, he is bound to pay only the court-fee of Rs. 100 payable in respect of the higher valued relief.

The defendants argued that the plaintiff should pay separate court-fee in respect of each of the reliefs. The learned Subordinate Judge overruled the defendants' contention, and he held that the case before him was one where alternative reliefs only were claimed, and that court-fee need be paid only in respect of the relief which appears to be of the higher value. In deciding the amount of court-fee to be paid he held that *ad valorem* court-fee should be paid on the valuation of the second of the reliefs claimed, and, as the court-fee payable in respect of that relief would be more than the court-fee paid in respect of the first relief, he directed, as I understand his order, the plaintiff to pay the difference.

Before me it was argued by the learned Advocate for the plaintiff (petitioner) that the value put on the first relief is higher than the value put in respect of the second relief, and that the fixed court-fee of Rs. 100 payable in respect of the first relief should be held to be the proper court-fee payable on the plaint.

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The lower Court has held that the present is not a case coming under section 17 of the Court-fees Act. The lower Court has also held that the present is a case of *alternative reliefs* in respect of the *same cause of action*. The plaintiff should have no cause for complaint so far. The real question then is, how the court-fee is to be calculated in the case of alternative reliefs. My attention was drawn to the cases of *Kashinath Narayan v. Govinda Bin Piraji*(1), *Motigavri v. Pranjivandas*(2), *Mukhlal Gir v. Ramdheyan Bai*(3), *Dasarate Meshy v. Jay Chand Sutradhar*(4) and *Raja v. Muttalli*(5).

MELVILL J. remarked in *Motigavri v. Pranjivandas*(2) as follows:—

"As regards the alternative relief sought, the larger of the two reliefs sought must determine the amount of the stamp."

The learned Advocate for the petitioner argued that the valuation of the first relief is larger than the valuation of the second, and as the plaintiff has paid proper court-fee in respect of the first prayer he contended that, under the ruling of MELVILL J. that "the larger of the two reliefs sought must determine the amount of the stamp", the court-fee already paid is correct. I have read the rulings referred to by the learned Advocate, but I am not satisfied that the contention raised on behalf of the petitioner is correct. If the plaintiff in the present suit had asked for the second relief only, then it is clear (and this was admitted by the learned Advocate for the petitioner) that the plaintiff will have to pay *ad valorem* court-fee on the valuation of that relief. Merely because the plaintiff has asked in the plaint another alternative relief also (in the present case the first relief) in respect of which the

(1) (1890) I.L.R. 15 Bom. 82.

(2) (1882) I.L.R. 6 Bom. 302.

(3) (1917) 44 I.C. 143.

(4) (1924) 78 I.C. 530; A.I.R. 1925 Pat. 193.

(5) (1926) 96 I.C. 823.

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court-fee payable is less, I fail to see how the plaintiff gets exemption from paying the court-fee payable in respect of the former relief for which he has to pay a higher court-fee. If section 17 of the Court-fees Act should apply, then the plaintiff will have to pay the aggregate amount of the fees chargeable in respect of each of the subjects which the suit embraces; but where section 17 does not apply, the plaintiff need not pay separate court-fee in respect of each of the reliefs claimed in the plaint, if the reliefs claimed are only in the alternative; so long as any relief is claimed, whether solely or in the alternative, the plaintiff will have to value the same; that is, he will have to value each of the reliefs to decide the court-fee due in respect of each; but, as he does not get all the reliefs claimed, he has to pay only the highest amount of court-fee chargeable in respect of any of the alternative reliefs. If the court-fee payable in respect of one prayer is x Rs. while that payable in respect of another prayer is $2x$ Rs., the plaintiff will have to pay a court-fee of only $2x$ Rs. He is not bound to pay x Rs. plus $2x$ Rs. or $3x$ Rs.; and it would not be sufficient if he pays a court-fee of only x Rs. so long as another alternative prayer in respect of which a court-fee of $2x$ Rs. is payable is contained in the plaint.

Ordinarily the court-fee payable in respect of the larger of the two reliefs would exceed the court-fee payable in respect of the smaller of the two reliefs; and that was all that was presumably meant by the learned Judge in *Motigavri v. Pranjivandas*(1).

In *Raja v. Muttalli*(2) the learned Judges held that, where a plaint prays for one of the two reliefs in the alternative based on one cause of action, the larger of the two reliefs determines the value of the claim.

(1) (1882) I.L.R. 6 Bom. 302.

(2) (1926) 96 I.C. 926.

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In *Dasarate Meshy v. Jay Chand Sutradhar*(1) the Court held that, where two reliefs are identical in actual money value but different in respect of the court-fee leviable on each, then the amount of court-fee payable is to be determined on the relief carrying the higher court-fee.

The difficulty arises because, in respect of some reliefs, only a fixed court-fee is payable whatever might be the valuation, whereas, in respect of other reliefs, court-fee is payable *ad valorem*. Calculating court-fee according to the provisions of the Court-fees Act, we have to see what is the court-fee payable in respect of each of the alternative reliefs claimed in the plaint. The plaintiff need not pay the total (aggregate) of these court-fees as the prayers are only alternative. If the court-fee due in respect of each prayer be the same, he will have to pay only one set of court-fee; but, if the court-fee payable in respect of any of these alternative prayers should exceed the court-fee payable in respect of the other alternative prayer, then the plaintiff will have to pay the higher fee.

One can imagine a case where a declaration is prayed for in a suit in the Munsif's Court (the court-fee for which would be Rs. 15), and also an alternative relief for payment of Rs. 60 (for which the court-fee would be only Rs. 6-11-0). In such a case, if the petitioner's contention be upheld, the plaintiff need not pay court-fee as for the declaration but need pay a court-fee of Rs. 6-11-0 only.

The principle applicable in such cases would seem to be that the greater should be taken to include the less, and, when the higher court-fee payable in respect of any of the reliefs prayed for in the plaint has been

(1) (1924) 78 I.C. 530; A.I.R. 1925 Pat. 193.

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paid, the lower court-fee ordinarily payable in respect of the other relief need not be also paid, if the reliefs are prayed for only in the alternative.

I do not consider that in arriving at this conclusion the principle that taxing statutes should be strictly construed, and, in cases of doubt, in favour of the subject and against the Government, is contravened; for in the present case where only alternative reliefs have been asked, the plaintiff is not asked to pay court-fee on each of the prayers, but is only asked to pay the court-fee due on one of the reliefs, and he is excused from paying any court-fee on the other on the ground that, as he has paid the larger court-fee, he need not pay any further court-fee.

In this view, as I understand the order of the lower Court, the plaintiff should have no grievance, and the order directing payment by the plaintiff of the excess court-fee is in my opinion right. I accordingly decline to interfere with the lower Court's order and dismiss the revision petition.

A.S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson and Mr. Justice Curgenvven.

IN RE RAVANAPPA REDDI (FIRST ACCUSED), APPELLANT.* 1931,
November 10.

*Code of Criminal Procedure (V of 1898), sec. 195 (1) (b)—
Offences in respect of which sanction necessary under, but
not obtained—Complaint of, with other offences in respect
of which such sanction not necessary—Jurisdiction to enter-
tain—Conviction in respect of latter offences only—Legality
of—Sec. 537 of the Code—Applicability.*

Where, on a complaint by a private person alleging the commission of an offence under section 193, Indian Penal Code (Act XLV of 1860), and of other offences in respect of which a complaint under section 476, Code of Criminal Procedure, is not necessary, the Court took cognizance of every offence alleged in the complaint but actually convicted the accused under sections 467, 109, Indian Penal Code,

Held, that the Court proceeded upon no legal complaint at all, that the error was much more than an irregularity and could not be cured under section 537, Code of Criminal Procedure, and that the conviction must be set aside as being without jurisdiction.

Per CURGENVEN J.—A Court cannot evade the provisions of section 195, Code of Criminal Procedure, by dealing under sections 467, 109, Indian Penal Code, with what is in effect an offence under section 193, Indian Penal Code.

Perianna Muthirian v. Vengu Ayyar, (1928) 56 M.L.J. 208, followed.

APPEAL against the order of the Court of Session of the North Arcot Division at Vellore in Case No. 6 of the Calendar for 1931.

A. S. Sivakaminathan for appellant.

K. N. Ganpati for Public Prosecutor (*L. H. Bewes*) for the Crown.

Cur. adv. vult.

* Criminal Appeal No. 442 of 1931.

JUDGMENT.

RAVANAPPA
REDDI,
In re.
JACKSON J.

JACKSON J.—The appellant has been sentenced to three years' rigorous imprisonment for abetting the forging of a promissory note.

On the facts there seems to be no doubt that the appellant is guilty under sections 467, 109, Indian Penal Code. The evidence of the Christian school-master, prosecution witness 9, proves that the accused asked him to write the draft of the promissory note, Exhibit C, after the death of its alleged maker Krishna Reddi, obviously for the purpose of a fraudulent execution.

Section 467 has no necessary connection with any Court proceeding, and when the committal order came before me upon an application to have it cancelled, I declined to interfere as there was sufficient evidence to establish a *prima facie* case against the accused. But now that the whole record is before us, the matter is not quite so simple. In the complaint, Exhibit J, it is alleged that the accused fabricated a pro-note and induced one Vatta Goundan to file a suit against Krishna Reddi in the Panchayat Court, and obtained a fraudulent decree. The complainant was ignorant of all this until the execution of the decree was begun in the District Munsif's Court . . . "The object of bringing about these forged and fabricated transactions is to get the house of the late Krishna Reddi."

This is clearly the offence under section 193, Indian Penal Code, of intentionally fabricating false evidence for the purpose of being used in a stage of a judicial proceeding.

The Court may think the forgery a clearer count than the fabrication of evidence because on the facts of this case it is doubtful if there was any proceeding before the panchayat at all, but nevertheless the

allegation is plainly stated in the complaint, and it is the allegation which attracts the mischief of section 195 (1) (b), Code of Criminal Procedure.

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A Court confronted with a complaint like Exhibit J by a private person and not preferred under section 476, Code of Criminal Procedure, must refuse to take cognizance. It cannot even examine the complainant upon oath and then note that it is only taking cognizance of the offences not referred to in section 195, Code of Criminal Procedure; because the examination of the complainant on oath under section 200 is after cognizance has been taken. But nothing of that sort was attempted in this case. The Court recorded a short sworn statement, and evidently took cognizance of every offence alleged in the written complaint.

The effect of this is that the Court proceeded upon no legal complaint at all; which is much more than a mere irregularity in the complaint. Therefore the error cannot be corrected under section 537, Code of Criminal Procedure. Nor has section 532 any relevancy to the matter; for that only validates commitments legal in themselves but made by a Magistrate not empowered to commit.

In these circumstances the conviction must be set aside as being without jurisdiction. The bail is released.

CURGENVEN J.—Section 195 (1) (b) of the Code forbids a Court to take cognizance of an offence under section 193, Indian Penal Code, when it is alleged to have been committed in, or in relation to, any proceeding in any Court, except upon the complaint of that Court. Such an offence, so committed, is undoubtedly alleged in the complaint in the present case, and indeed the section of the Penal Code is quoted. The Court was precluded from taking cognizance of that offence, the complaint

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GURUNYEN J. being a private one. The conviction was actually of abetment of forgery of a valuable security, under sections 467, 109, Indian Penal Code, but in *Perianna Muthirian v. Vengu Aiyar*(1) I have already given my reasons for holding that, this being only another way of dealing with what was in effect the same offence, fabricating false evidence, it is not open to a Court to permit the provisions of section 195, Code of Criminal Procedure, to be evaded in this manner. I agree therefore that upon this ground the conviction must be set aside, the proceedings being without jurisdiction.

K.N.G.

APPELLATE CRIMINAL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

1931,
November 20. PADMANABHANI RAMANAMMA alias BULLEMMMA
(COMPLAINANT), PETITIONER,

v.

GOLUSU APPALANARASAYYA (FIRST ACCUSED),
RESPONDENT.*

Indian Evidence Act. (I of 1872), ss. 40 to 43—Civil Court judgment—Admissibility of, in criminal proceeding in respect of same matter.

The judgment of a Civil Court dismissing a suit brought by A against B for damages for defamation is not admissible in evidence to prove the innocence of B in a criminal prosecution by A against B on the same facts. Sections 40 to 43 of the Indian Evidence Act deal with the admissibility of a judgment in evidence, and, if a judgment is not admissible under any of

(1) (1928) 56 M.L.J. 208.

* Criminal Revision Case No. 329 of 1931.

these sections, it must be left out of consideration altogether. The judgment of the Civil Court in question does not come under any one of those sections.

Markur, In re (1914) I.L.R. 41 Bom. 1, dissented from.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of acquittal, in Criminal Appeal No. 2 of 1931 on the file of the Court of Session of the Vizagapatam Division preferred against the order of the Court of the Huzur Sheristadar First-class Magistrate of Vizagapatam in Calendar Case No. 1 of 1930.

V. Krishnamachari for petitioner.

Public Prosecutor (L. H. Bewes) for the Crown.

No one appeared for the respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by

WALLER J.—This case has had a somewhat remarkable history. The petitioner charged the respondent, his wife and others with the offences of robbery and defamation. Ultimately the respondent alone was convicted of the latter offence and his conviction was upheld by the Sessions Judge in appeal. The petitioner then filed a suit for damages for defamation against the respondent and another person. A copy of the judgment confirming the conviction was produced, but the District Munsif held, quite rightly, that he was not bound to follow it and that he had to arrive at a decision independently on the evidence before him. In the result, he dismissed the suit. The next thing that happened was that this Court, in revision, set aside the conviction and ordered a re-trial. The case was re-tried and ended again in the conviction of the respondent. The latter tried to get admitted in evidence a copy of the judgment of the Civil Court, but the Magistrate

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rejected it, being of opinion that it was irrelevant for the purpose of the trial. An appeal was again preferred, which was on this occasion successful. The Sessions Judge set aside the conviction, holding that the Munsif's judgment was not merely relevant, but also conclusive proof of the respondent's innocence. To the material sections of the Evidence Act, which lay down the law as to the admissibility of judgments, he made no reference. It would be interesting to know how he would have dealt with the matter, if the judgment had been one awarding damages against the respondent. We venture to doubt whether he would have gone so far as to hold that it was conclusive proof of the respondent's guilt and that the Magistrate should at once have convicted him on it, without any further evidence. And yet, if a judgment one way might be conclusive proof of the respondent's innocence, it is not apparent why a judgment the other way should not be conclusive proof of his guilt.

What the Sessions Judge relied on was a judgment of the Bombay High Court, in *In re Markur*(1). Markur was prosecuted for breach of trust in regard to certain sums of money. He had already been sued civilly for the recovery of those sums, but the suit had been dismissed. A copy of the Civil Court's judgment was produced before the Magistrate, who declined to admit it in evidence, holding, with reference to sections 40 to 43 of the Evidence Act, that it was irrelevant and inadmissible. The matter was taken up to the High Court, which decided, without any reference to those sections, that the judgment should have been admitted. The Judges did not actually say, in so many words, that it was conclusive proof of Markur's innocence; indeed,

(1) (1914) I.L.R. 41 Bom. 1.

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HEATON J. conceded, that it could not be used to prove or disprove the facts in dispute in the case. But it is impossible not to agree in the Sessions Judge's observation that the whole tenor of their argument indicates that, in their opinion, it ought to have been treated as conclusive proof and that, on it, Markur should, at once, have been discharged by the Magistrate. If, however, it was not to be used to prove or disprove the charge, it is difficult to see on what ground the Magistrate could have acted on it, as if it were conclusive. With great respect, we cannot follow this decision. The matter, it seems to us, is governed by sections 40 to 43 of the Evidence Act and, if a judgment is not admissible under any of those sections, it must be left out of consideration altogether. The judgment in question was not one to which section 40 applied; for it was not a bar to the prosecution. Nor was it a judgment *in rem* under section 41. It did not relate to a matter of a public nature as required by section 42. Nor was its existence a fact in issue in the prosecution or relevant under any other section of the Act—section 43. HEATON J. puts his decision on a quite different ground—the ground of public policy. “We cannot” he said “have Criminal Courts trying over again matters which have been thoroughly dealt with and finally decided by a Civil Court of competent jurisdiction.” It is not easy to see how such a rule is to be enforced, unless the judgment of the Civil Court is, in law, a bar to or conclusive against the prosecution. And what of cases in which the Criminal Court has decided the controversy first and convicted? Can we not have the Civil Court trying over again a matter which has been decided by a Court of competent jurisdiction and coming to a different conclusion? The truth is that, although the civil suit and the prosecution may be

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based on exactly the same cause of action, the parties are, strictly speaking, not the same, the burden of proof is differently placed and different considerations may come in. The result may therefore be a conflict in decision. For instance, A is tried for murdering B but acquitted, because a confessional statement by him is, in a criminal trial, inadmissible in evidence. O, B's widow, sues him for damages for the murder and gets a decree, the confessional statement being admissible in a civil suit. In the matter of defamation, again, there is a good deal of difference between a suit for damages and a criminal prosecution. The prosecution is governed by the provisions of the Indian Penal Code, the suit by the English law of slander and libel. A defence which is open to the accused in the prosecution is not open to him as the defendant in the suit. The question of special damage may arise in the suit, but cannot arise in the prosecution.

It has often been said in this Court, that, where a civil suit and a criminal complaint have been filed, which raise the same issues between the same parties, the hearing of the complaint should be stayed until the suit has been decided. And this has been put on the ground that it will avoid a possible conflict in decision. Our brother JACKSON has pointed out in a judgment, in which we entirely concur, *Gnanasigamani Nadar v. Vedamuthu Nadar*(1), that the risk of such a conflict is one that is inherent in the division of causes into criminal and civil. The judgment of neither Court is binding on the other and each must decide the cause on the evidence before it. If they arrive at different conclusions it is regrettable but unavoidable. The ruling in *In re Markur*(2), was relied on in another case

(1) (1929) 52 M.L.J. 80.

(2) (1914) I.L.R. 41 Bom. 1.

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in this Court, *In re Velayutham Chetty*(1). The head-note states that the Bombay ruling was followed. The fact, however, remains that KRISHNAN J. disposed of the criminal revision petition on the merits and not on the decision in the civil proceeding. What he said was that, if he accepted the civil judgment as the basis of his judgment in the criminal case, he would have to find that the conviction was wrong. What he refrained from saying was that it could be accepted as the basis of his judgment. The head note therefore seems to be inaccurate. If he had been satisfied that the Bombay ruling was unimpeachably correct he could and would have allowed the revision petition without considering the evidence in the criminal case.

It is not, we think, necessary to refer to any other rulings. We are satisfied that the judgment relied on by the Sessions Judge was not admissible in evidence under any of the relevant sections of the Evidence Act. It is a judgment *in personam* and not *in rem* and is not conclusive proof, in the subsequent judicial proceeding, of anything material. The order of the Sessions Judge must be set aside. He will dispose of the criminal appeal on its merits.

K.N.G.

(1) (1922) 72 I.C. 172.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Madhavan Nair, Mr. Justice Jackson and
Mr. Justice Curgenven.

VENKATACHALAM CHETTI (PETITIONER), PETITIONER,

v.

RAMASWAMY SERVAI AND THREE OTHERS (RESPONDENT
AND NIL), RESPONDENTS.*

1931,
September
18.

Execution petition—Decree-holder's death pending—Substitution of his legal representative in his place and continuance of petition by him—Permissibility—Code of Civil Procedure (Act V of 1908), O. XXII, rr. 3, 4, 8 and 12; O. XXI, r. 16; and sec. 146.

Held by the Full Bench that the legal representative of a deceased decree-holder who died during the pendency of an execution petition filed by him could be substituted in his place in the execution petition and be allowed to continue it.

Palaniappa Chettiar v. Valliammai Achi, (1926) I.L.R. 50 Mad. 1, overruled.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the order of the Court of the District Munsif of Devakotta, dated 28th June 1927 and made in Execution Application No. 165 of 1927 in Execution Petition No. 380 of 1927 in Small Cause Suit No. 266 of 1914 on the file of the Court of the Subordinate Judge of Sivaganga.

The revision petition came on for hearing in the first instance before JACKSON J. on 17th April 1931 when his Lordship directed it to be posted before a Bench. The petition then came on for hearing on 20th August 1931 before MADHAVAN NAIR and JACKSON JJ. when their Lordships directed the matter to be placed before His Lordship the Chief Justice for being posted before a Full Bench. Pursuant to the orders of the Chief Justice,

* Civil Revision Petition No. 1712 of 1927.

the petition came on for hearing before the Full Bench constituted as above.

K. Balasubramania Ayyar for petitioner.—On the right construction of rules 1, 3, 4 and 12 of Order XXII of the Code the only conclusion possible is that an execution petition does not abate on the death of the decree-holder. Rule 1 provides that there shall be no abatement if the right survives. Rules 3 and 4 which provide for abatement in certain events are inapplicable to execution proceedings by reason of the provisions of rule 12. The only question then is whether the representative must file a fresh execution petition or can obtain leave to continue the proceeding already begun by the deceased. If a fresh petition by the representative is held to be necessary, what is to become of the old one which has admittedly not abated? Further if the representative is not allowed to come on record in the pending execution petition, the practical result is to hold that it abates. Rule 3 of Order XXII does not give the right to the representative to come on record but only provides the procedure applicable to a case in which he does apply. The representative can come in under rule 16 of Order XXI of the Code, and, so long as that rule does not prohibit his coming in, he can come in under the provisions of section 146 of the Code. Section 146 applies as much to a case of a continuation of a proceeding by the representative as to a case of an institution of a proceeding by him. The words "save as otherwise provided in the Code" in that section mean that the provisions of that section ought to be applied in the absence of any rules in the Code prohibiting their applicability; see *Muthiah Chettiar v. Govinddoss Krishnados*(1). See also *Radhakrishna Aiyar v. Srinivasa Aiyar*(2) as to the construction of section 146. As to the construction of rule 12 of Order XXII, see *Monmotho Nath Mitter v. Rakhal Chandra Tewary*(3) and *Hakim Syed Muhammad Taki v. Rai Fateh Bahadur Singh*(4). The right of the representative of a decree-holder to continue the proceedings started by him has been recognised in *Gulabdas v. Lakshman Narhar*(5), *Govind Shanbhog v. Appaya*(6), *Keshavlal Bechar v. Pitamberdas Tribhuvandas*(7),

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(1) (1921) I.L.R. 44 Mad. 919.

(3) (1909) 10 O.L.J. 396.

(5) (1879) I.L.R. 3 Bom. 221.

(2) (1925) 51 M.L.J. 10.

(4) (1929) I.L.R. 9 Pat. 373 (F.B.).

(6) (1880) I.L.R. 5 Bom. 246.

(7) (1894) I.L.R. 19 Bom. 261.

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Jang Bahadur v. Bank of Upper India, Ltd.(1), *Kedarnath Goenka v. Anant Prasad Singh*(2) and *Venkatalakshamma v. Seshagiri Rao*(3). The application by the legal representative is not a fresh application; see *Appaniangar v. Dharni Mudaly* (4), *Akhoy Kumar Talukdar v. Surendra Lal Pal*(5), *Baij Nath v. Ram Bharos*(6), *Mirza Muhammad Sadiq Ali Khan v. Sajjad Mirza alias Munney Agha*(7) and *Mussummat Bhagwanta Kuer v. Dewan Zamir Ahmad Khan*(8). When a judgment-debtor dies during the pendency of an execution proceeding against him, the proceeding can be continued against his representative by substituting his name in the place of the deceased and it is not necessary to file a fresh application against him; see *Purushottam v. Rajbai*(9). This Court has in *Sundayee Ammal v. Krishnan Chetti*(10) refused to apply the principle of the decision in *Palaniappa Chettiar v. Valliammai Achi*(11) to a case of an appeal against an order in execution. The ordinary procedure referred to in the former case is the procedure of the legal representative applying for continuance of the appeal. As regards the limitation for the representative coming on record, the rule of three years under article 181 of the Limitation Act may, if necessary, be applied. As to limitation applicable in execution appeals, see Civil Miscellaneous Petitions Nos. 687 of 1931 and 3223 of 1923, Civil Miscellaneous Second Appeal No. 140 of 1928 and *Ramanathan Chettiar v. Ramanathan Chettiar*(12).

V. Govindarajachari (*amicus curiae*) for respondent.—The Code does not contemplate the substitution of the legal representative in the execution petition on the death of the decree-holder but contemplates only the filing of a fresh execution petition. The anomalies and hardships said to result from *Palaniappa Chettiar v. Valliammai Achi*(11) are more imaginary than real, because a fresh execution petition is not barred within a period of three years. The only case in which there will be any hardship is when the execution petition is filed at about the close of the twelfth year and the decree-holder dies

(1) (1928) I.L.R. 3 Luck. 314; L.R. 55 I.A. 227.

(2) (1925) I.L.R. 4 Pat. 507; L.R. 52 I.A. 183.

(3) (1930) 33 L.W. 359.

(4) (1907) 17 M.L.J. 475.

(5) (1923) 30 C.W.N. 735, 737.

(6) (1927) I.L.R. 49 All. 509, 514, 515 (F.B.).

(7) (1927) I.L.R. 3 Luck. 126.

(8) (1924) I.L.R. 3 Pat. 596, 604.

(9) (1909) I.L.R. 34 Bom. 142.

(10) (1928) L.L.R. 51 Mad. 858.

(11) (1925) I.L.R. 50 Mad. 1.

(12) (1928) 30 L.W. 995, 1003.

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after the lapse of twelve years from the date of the decree so as to attract the provisions of section 48 of the Code. Article 181 of the Limitation Act is inapplicable to an application by the legal representative to have himself brought on record. Only article 182 applies and the petition contemplated by it is an execution petition and not a continuation of any pending petition. There is no provision of law entitling a legal representative to file an application for having himself substituted; see *Baij Nath v. Ram Bharos*(1). The further point decided in that case that the application under rule 16 of Order XXI of the Code filed by the representative is not a fresh application is, I submit, wrong.

[I do not see why the transferee should not go on executing the decree at the stage in which it was when he was brought on record. Why should he apply afresh?—JACKSON J.]

Rule 16 of Order XXI does not speak of continuance of an execution application.

[That rule does not by itself prohibit continuance of the execution application by the transferee—JACKSON J.]

Wherever the Code provides for the continuance of an execution petition it expressly refers to such continuance; see rule 10 of Order XXII. *Mirza Muhammad Sadiq Ali Khan v. Sajjad Mirza alias Munney Agha*(2) construing *Baij Nath v. Ram Bharos*(1) held that an application by the legal representative for mere substitution of names was incompetent and that the application made by him was one for execution. *Akhoy Kumar Talukdar v. Surendra Lal Pal*(3) may also be referred to.

[That case holds that the moment the decree-holder dies the execution proceeding abates—JACKSON J.]

Yes; and that is one view as to the effect of the death of the decree-holder. The other view is that, though there is no abatement, the legal representative must come in by a fresh execution proceeding. *Palaniappa Chettiar v. Valliammai Achi*(4) will be right even in the latter view.

[*Akhoy Kumar Talukdar v. Surendra Lal Pal*(3) seems to recognize the right of the representative to carry on the proceeding—MADHAVAN NAIR J.]

In view of the actual decision in the case the Court must be deemed to have held against the doctrine of carrying on of the

(1) (1927) I.L.R. 49 All. 509 (F.B.).

(2) (1927) I.L.R. 3 Luck. 123.

(3) (1926) 30 C.W.N. 735.

(4) (1926) I.L.R. 50 Mad. 1.

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proceeding by the representative. *Palaniappa Chettiar v. Valliammai Achi*(1) is approved of by Mulla in his Civil Procedure Code; see page 661. The decisions under the old Code are of no avail, because under it the definition of "decree-holder" included the transferee of a decree, while the present Code confines the term to a person in whose favour the decree is passed. Under the present Code, therefore, some other provision must be found enabling the transferee to come in. There is a distinction between the case of a decree-holder and that of a judgment-debtor arising out of section 50 of the Code. Its language is unqualified while that of section 146 is qualified by the words "save as otherwise provided". The intention of the framers of the Code that there should be no continuance of an execution proceeding in the case of the death of a decree-holder being clear from Order XXII, section 146 cannot apply. *Hakim Syed Muhammad Taki v. Rai Fateh Bahadur Singh*(2), *Sundayee Ammal v. Krishnan Chetti*(3) and *Monmotho Nath Mitter v. Rakhal Chandra Tewary*(4), which are cases of appeals, are distinguishable, because the procedure as to suits, execution and appeals are different. Articles 176 and 177 of the Limitation Act are applied in practice to execution appeals and, so far as the language of the articles is concerned, no distinction is made by it between execution appeals and other appeals. Civil Miscellaneous Petitions Nos. 3223 of 1923 and 687 of 1931 erred in applying article 181. Further the point was not decided in the latter case. The cases referred to by the other side where reference is made to article 182 really support me. Thus *Gulabdas v. Lakshman Narhar*(5), while leaving open the question whether the application by the representative should be one for substitution merely or for execution also, decides that the application by him is governed by article 179 of the old Limitation Act. The application to which that article refers is one for execution. The language of section 48 of the Code is the same as that of article 182 of the Limitation Act. The application in the present case by the representative is one for substitution and is not maintainable even according to *Gulabdas v. Lakshman Narhar*(5). *Bhagwan Das v. Jugul Kishore*(6) was a case of the death of a judgment-debtor and the decision

(1) (1926) I.L.R. 50 Mad. 1.
(3) (1928) I.L.R. 51 Mad. 858.
(5) (1879) I.L.R. 3 Bom. 221.

(2) (1929) I.L.R. 9 Pat. 372 (F.B.).
(4) (1909) 10 C.L.J. 396.
(6) (1920) I.L.R. 42 All. 570.

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could have been rested on section 50 of the Code. The construction put upon rule 12 of Order XXII in that case is wrong. The observation in *Jang Bahadur v. Bank of Upper India, Ltd.*(1) is *obiter*. *Kedarnath Goenka v. Anant Prasad Singh*(2) was a case of a proceeding for the ascertainment of mesne profits. Such a proceeding is a proceeding in the suit itself for which an application by the party is not necessary. Not being an execution application, an application for ascertainment of profits is not governed by article 182. *Appaniangar v. Dharni Mudaly*(3) is opposed to *Ramachandra Aiyar v. Subramania Chettiar*(4) and *Alagappa Chetty v. Ramaswami Chetty*(5) which hold that an application for mere recognition does not lie.

[Mulla cites *Mussammat Bhagwanta Kuer v. Dewan Zamir Ahmad Khan*(6) as evidencing the existing practice of allowing the legal representative to continue the proceeding and doubts it with reference to *Palaniappa Chettiar v. Valliammai Achi*(7) —JACKSON J.]

K. Balasubramania Ayyar in reply.—*Musammat Gulab Kuer v. Syed Mohamed Zaffar Hassan Khan*(8) and *Mussammat Bhagwanta Kuer v. Dewan Zamir Ahmad Khan*(6) are authorities for the position that a fresh application for execution by the legal representative is not necessary, because the old execution petition does not abate, and that the application by him is a continuation of the pending execution petition. *Baij Nath v. Ram Bharos*(9), which is followed in *Mirza Muhammad Sadiq Ali Khan v. Sajjad Mirza alias Munney Agha*(10), expressly decides that the application by the legal representative is not a fresh application within the meaning of section 48 of the Code; see page 515.

[*Akhoy Kumar Talukdar v. Surendra Lal Pal*(11) is to the same effect—JACKSON J.]

Govind Shanbhog v. Appaya(12) and *Keshavlal Bechar v. Pitamberdas Tribhuvandas*(13), which decide that an application by the legal representative is a step in aid to recognize his right

(1) (1928) I.L.R. 3 Luck. 814; L.R. 53 I.A. 227.

(2) (1925) I.L.R. 4 Pat. 507; L.R. 52 I.A. 188.

(3) (1907) 17 M.L.J. 475.

(4) (1903) 14 M.L.J. 393.

(6) (1924) I.L.R. 3 Pat. 596.

(8) (1921) 6 P.L.J. 358, 361.

(10) (1927) I.L.R. 3 Luck. 126.

(12) (1880) I.L.R. 5 Bom. 246.

(5) (1913) 14 M.L.T. 513.

(7) (1926) I.L.R. 50 Mad. 1.

(9) (1927) I.L.R. 49 All. 509 (F.B.).

(11) (1926) 30 O.W.N. 785.

(13) (1894) I.L.R. 19 Bom. 261.

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to put in such an application and hold that such an application is a proper application. *Ramachandra Aiyar v. Subramania Chettiar*(1) is distinguishable because under the old Code the definition of decree-holder included a transferee of the decree while the definition under the present Code does not include a transferee. There is no distinction between the case of a judgment-debtor and that of a decree-holder, because the language of rule 16 of Order XXI is practically the same as that of section 50 of the Code. The view in *Palaniappa Chettiar v. Valliammai Achi*(2) will present great difficulty in appeals in execution cases. Such appeals are merely continuations of the execution proceedings and the rule applicable to them is the same as that applicable to execution proceedings themselves.

Cur. adv. vult.

JUDGMENT.

MADHAVAN
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MADHAVAN NAIR J.—The question for decision in this case is whether the legal representative of a deceased decree-holder who died during the pendency of an execution petition filed by him can be substituted in his place and be allowed to continue it. The deceased decree-holder obtained a decree against the respondent in Small Cause Suit No. 266 of 1914 on the file of the Sub-Court of Sivaganga and filed several execution petitions to execute it. Before the last petition, Execution Petition No. 330 of 1926, was disposed of, he died. His legal representative, the petitioner before us, then applied to the Court for permission to amend the execution petition filed by his father by adding his name to it and to continue the execution proceedings. The present petition is more than twelve years after the decree and would, therefore, be barred by section 48 of the Code of Civil Procedure if it is treated as a fresh execution petition; but, if the petitioner is allowed to continue the execution petition already

(1) (1903) 14 M.L.J. 393.

(2) (1926) I.L.R. 50 Mad. 1.

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filed by the deceased decree-holder, then his execution petition is not barred by limitation. The District Munsif passed the following order on the petition:—

“This is an application by the legal representative of a deceased decree-holder for permission to continue the execution (petition) filed by the deceased decree-holder. The decision in *Palaniappa Chettiar v. Valliammai Achi*(1), which is applicable to the facts of the case, lays down that an execution petition filed by a decree-holder cannot be prosecuted or continued after his death by his legal representative. I follow the decision and dismiss the application. The fact that the decree is more than twelve years ago is no ground for giving the go-by to the said decision. The application is dismissed.”

In *Palaniappa Chettiar v. Valliammai Achi*(1) the transferee decree-holder in a suit on the Original Side of this Court applied for execution of the decree. When the application was pending he died and his widow made an application that she should be brought on record as his representative and be permitted to continue the execution petition filed by him. The learned Judge passed an order complying with her request. In appeal, this order was set aside; and the learned Judges held that it followed from the provisions of Order XXII of the Code of Civil Procedure that the only course open to the legal representative in the circumstance was to file a separate and fresh application. If this decision is correct, there is no doubt that it would cover the present case as pointed out by the learned District Munsif; but doubts have been thrown on the soundness of the reasoning of the judgment in this case in some of the subsequent decisions of this Court, especially in the decision in *Venkatalakshamma v. Seshagiri Rao*(2). In *Sundayee Ammal v. Krishnan Chetti*(3) the learned Judges (WALLACE and TIRUVENKATA

(1) (1926) I.L.R. 50 Mad. 1.

(2) (1930) 33 L.W. 356.

(3) (1928) I.L.R. 51 Mad. 858.

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ACHARIYAR JJ.), without saying anything about the correctness or otherwise of the ruling in *Palaniappa Chettiar v. Valliammai Achi*(1), refused to apply it to the case of an appeal against an order in execution as they were of opinion that there were obvious difficulties which will arise if the ruling is applied to cases of appeal. In *Ramanathan Chettiar v. Ramanathan Chettiar*(2) the learned Judges (WALLACE and MADHAVAN NAIR JJ.) expressed the opinion that they were not prepared to extend to the case of a judgment-debtor the ruling in *Palaniappa Chettiar v. Valliammai Achi*(1). In Civil Miscellaneous Second Appeal No. 140 of 1928 it was expressly held by JACKSON J. that the ruling in *Palaniappa Chettiar v. Valliammai Achi*(1) would not apply to the case of a judgment-debtor. In none of these cases was the correctness of the ruling in *Palaniappa Chettiar v. Valliammai Achi*(1) directly challenged. It will be noticed that all these cases related to petitions in regard to the legal representatives of a deceased judgment-debtor and are on that ground distinguishable from the decision in *Palaniappa Chettiar v. Valliammai Achi*(1), which dealt with a petition by the legal representative of a deceased decree-holder. In the next case, *Venkatalakshamma v. Seshagiri Rao*(3), which was also one which related to execution of a decree against the legal representative of a judgment-debtor, the learned Judges (REILLY and ANANTAKRISHNA AYYAR JJ.) pointed out the abovementioned distinction between the case before them and the case in *Palaniappa Chettiar v. Valliammai Achi*(1), but directly dealt with the soundness of the judgment in *Palaniappa Chettiar v. Valliammai Achi*(1). Apart from the serious inconveniences

(1) (1928) I.L.R. 50 Mad. 1.

(2) (1928) 30 L.W. 995.

(3) (1930) 33 L.W. 359.

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and unjust consequences which were involved in the decision, the learned Judges pointed out that the decision was based upon an erroneous interpretation of the rules in Order XXII of the Code of Civil Procedure; and that the decision is in conflict with the long-established practice not only of this Court but also of the other High Courts in India according to, which, subject to the rule of limitation, the legal representative of a deceased decree-holder was always allowed to continue the application filed by his predecessor without being compelled to file a fresh execution application. They also pointed out that some important decisions which have a direct bearing on the question were not considered in *Palaniappa Chettiar v. Valliammai Achi*(1). The arguments before us have proceeded more or less on the lines of reasoning adopted in *Venkatalakshamma v. Seshagiri Rao*(2), the appellant taking his stand on that decision and the respondent arguing against it.

At the outset, it will be convenient to refer to a few of the relevant provisions of the Code of Civil Procedure. If these provisions make it necessary that a fresh application should be filed by the legal representative of a deceased decree-holder as pointed out in *Palaniappa Chettiar v. Valliammai Achi*(1), then the ruling in that case will have to be applied irrespective of the unjust consequences that may result from its application, and also of the fact that it marks a departure from the long-established practice. Order XXII of the Code of Civil Procedure deals with the procedure that should be followed on the death, marriage and insolvency of parties. Rule 1 of that order states that

“the death of a plaintiff or a defendant shall not cause the suit to abate if the right to sue survives.”

(1) (1928) I.L.R. 50 Mad. 1.

(2) (1930) 33 L.W. 359.

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Rules 3 and 4 respectively provide for the substitution during the course of a suit of a legal representative for a deceased plaintiff or of a deceased defendant. Rule 3 with which we are concerned provides in sub-rule 1 that where a plaintiff dies and the right to sue survives

“the Court on an application made in that behalf shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit”, and in sub-rule 2 it is stated that

“where, within the time limited by law no application is made under sub-rule 1, the suit shall abate so far as the deceased plaintiff is concerned . . .”

Rule 4 contains a similar provision relating to the death of a defendant. These are followed by the important rule, rule 12, newly introduced in the present Code, which states that

“nothing in rules 3 and 4 . . . shall apply to proceedings in execution of a decree or order.”

In this connection, I may also draw attention to the other provisions of the Code, section 146 and Order XXI, rule 16. Section 146 states:

“Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.”

Order XXI, rule 16, provides that

“where a decree . . . is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder.”

The reasoning adopted by the learned Judges in *Palaniappa Chettiur v. Valliammai Achi*(1) in arriving

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at their conclusion is as follows:—It would appear from the judgment that it was argued before them that it was open to the legal representative of a deceased decree-holder to carry on proceedings in execution under section 146 of the Code of Civil Procedure and under Order XXI, rule 16. The learned Judges repelled this argument by pointing out that these provisions only declare that a proceeding which may be taken by one person may be taken by another claiming under him, and that they did not lay down any procedure. This is what they stated:

“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 representative of a deceased decree-holder such as we are now dealing with, the matter is carried no further.”

And then they pointed out that the answer to the question raised is to be found in rule 12 of Order XXII read with rules 3 and 4. Their observations on this point which form the basis of the judgment are as follows:—

“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 clear that it is really unnecessary to look further.”

(1) (1926) I.L.R. 50 Mad. 1.

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From these extracts it is clear that the learned Judges thought that rule 3 of Order XXII with which we are concerned read with rule 12 indicated the procedure applicable to the case before them, that such a procedure being provided for, section 146, Civil Procedure Code, would not apply to the case and that therefore the legal representative should file a fresh application and that it was not open to him to continue the execution proceedings already pending. Rule 12 says that nothing in rule 3 shall apply to proceedings in execution of a decree or order. It does not say that the legal representative should not be brought on record in the course of execution proceedings. It appears to me that the learned Judges derived their conclusion as a sort of inference from sub-rule 1 of rule 3. Their reasoning seems to be this; that, if the provision in rule 3, sub-rule 1, that when a plaintiff in a suit dies and the right to sue survives, the Court in the course of the suit shall make the legal representative, on an application made in that behalf, a party to the suit, will not apply to execution proceedings, as indeed it will not by force of rule 12, then it must follow inferentially that, in the case of the death of a decree-holder during the pendency of an execution petition filed by him, his legal representative can come on the record and proceed with the execution only by filing a *separate* execution petition. Otherwise he would be following the procedure of sub-rule 1 of rule 3 which is declared inapplicable by rule 12. This it appears to me amounts to, if I may say so respectfully, applying rule 3, sub-rule 1, to execution proceedings which is what is prohibited by rule 12. This construction of the rule would also result in this anomaly that, while execution proceedings can in law never abate on the death of a decree-holder, they will nevertheless abate because it is

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not open to the legal representative to get himself substituted in the pending execution petition. Either rule 3 of Order XXII applies to execution proceedings or it does not. The Legislature says distinctly in rule 12 that it does not apply to execution proceedings. What does it mean? The Legislature has provided under rule 3 that, if a plaintiff dies, his legal representative should come on record to continue the suit within the time allowed by law, i.e., ninety days from the date of the death of the deceased plaintiff, and, if he does not do so, then the suit will abate. This is a penalty imposed upon the legal representative for not taking prompt steps to proceed with the suit. Rule 12 simply says that this penalty which applies to suits will not attach to *execution proceedings* in the case of the death of a decree-holder; or, in other words, in the case of the death of a decree-holder the execution proceedings do not abate. This, in my opinion, is all what the rule means and nothing more. It is not necessary to pause and enquire for what reasons the Legislature made this difference between suits and execution proceedings. It may be that it wanted to treat the decree-holder who has obtained a decree in his favour with more indulgence than a plaintiff who has not obtained a decree, or it may be that there were other reasons. The remark of WALLIS C.J. in *Muthiah Chettiar v. Govinddoss Krisnadoss*(1) that

“it (the Code) expressly provides by Order XXII, rule 12, that nothing in rules 3, 4 and 8 of that Order, which provide for abatements, shall apply to execution . . .”

shows that it was in the abovementioned sense that the learned Judge also understood the meaning of the rule. In *Monmotho Nath Mitter v. Rakhal Ohandra Tewary*(2) MOOREJEE J. interpreted the rule in the same way as

(1) (1921) I.L.R. 44 Mad. 919, 924.

(2) (1909) 10 O.L.J. 396.

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may be seen from his observations at page 399 where he discusses the very point now under consideration. In this connection, attention may also be drawn to the decision in *Bhagwan Das v. Jugul Kishore*(1) where, after referring to rule 3 of Order XXII, the learned Judges refer to rule 12 and observe:

"Rule 12 distinctly shows that this rule (rule 3) shall not apply to execution proceedings, i.e., that it is not compulsory upon a decree-holder to have the names of the heirs brought upon the record in that way, on penalty of his decree (execution application) abating."

REILLY and ANANTAKRISHNA AYYAR JJ. also express the same opinion in *Venkatalakshamma v. Seshagiri Rao*(2). For these reasons, with all deference to the learned Judges, I am not prepared to accept the interpretation put by them on rules 3 and 12 in *Palaniappa Chettiar v. Valliammai Achi*(3).

If, as I have said, nothing in rule 3 of Order XXII applies to execution proceedings, then the question whether the legal representative of a decree-holder can be substituted in the pending execution application and be allowed to proceed with that application or whether he should be compelled to file a fresh application should be considered in the light of the other provisions of the Code. If rule 3 of Order XXII does not apply, it is argued that there is no procedure provided in the Code for bringing on record the legal representative of a deceased decree-holder in execution proceedings. It is true that there is no specific machinery in the Code for that purpose, but does it necessarily follow from this that the Code prohibits the legal representative from making an application to continue the pending petition after substituting his name in it? I think not. If rule 3 does not apply, then obviously there can be no objection

(1) (1920) I.L.R. 42 All. 570.

(2) (1930) 33 L.W. 359.

(3) (1926) I.L.R. 50 Mad. 1

for proceeding under section 146 of the Code and Order XXI, rule 16. Under section 146, there being no other procedure provided, a legal representative of a decree-holder may make an application which may be made by the decree-holder, and under Order XXI, rule 16, where a decree is transferred by assignment or operation of law as happens in the case of the death of a decree-holder, the transferee may apply for the execution of the decree. Cases have held that, where a decree-holder dies or transfers his decree pending the execution application filed by him, then the transferee decree-holder including his heir is entitled under Order XXI, rule 16, to apply for continuing the pending execution application by substituting his name in it and that such an application is not to be considered as a fresh execution application.

In *Akhoy Kumar Talukdar v. Surendra Lal Pal*(1) it is stated:

"On the death of the applicant for execution, it was open to the legal representatives of the deceased decree-holder to apply immediately for carrying on the proceedings in execution of the decree or to apply for a fresh execution under Order XXI, rule 16, Civil Procedure Code. It was not necessary for them nor was it competent to make an application for substitution."

In *Baij Nath v. Ram Bharos*(2) a decree for sale had been passed on 28th September 1912. Various applications for execution of the decree had been made. The fourth application for execution was made on 22nd October 1923. During the pendency of this application, the decree-holder, Ram Lal, died and his sons applied on 28th April 1925 praying that they may be brought on record in the place of their father and the execution might be proceeded with. The question was

(1) (1926) 30 C.W.N. 735, 737.

(2) (1927) I.L.R. 49 All. 509 (F.B.).

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whether this application was to be treated as a fresh application for execution in which case it would be time-barred under section 4, Civil Procedure Code. The learned Judges held that the application was not a fresh application. The following observations in the judgment deal with the point:—

“When the sons of Ram Lal, on his death, made the application of the 28th of April, 1925, they did not ask for any fresh proceedings. They said that Ram Lal's name might be removed and the petitioners' names might be entered in the array of decree-holders. They had to make an application in the usual form of ten columns, because there is no rule of law which enables the legal representative of a deceased decree-holder to apply for mere substitution of names. He must apply, whenever he does apply, for execution of the decree—vide Order XXI, rule 16, of the Code of Civil Procedure. It is clear, therefore, that neither the application of the 28th of January, 1925, nor the application of the 28th of April, 1925, was a ‘fresh application’ within the meaning of section 48 of the Code of Civil Procedure.”

Mr. Govindarajachari's only comment on this case is that the learned Judges, after stating the rule correctly that there is no machinery for substituting the name of a legal representative in a pending execution application, have illogically refused to apply the principle to the case before them. This is not so; for what they say is that the legal representative cannot *merely apply* for the substitution of his name in a pending application but should file an application which must be an *application for execution* under Order XXI, rule 16, and by that application the pending execution may be continued after substitution of the name of the legal representative.

The above case was followed in *Mirza Muhammad Sadiq Ali Khan v. Sajjad Mirza alias Munney Agha*(1). Referring to it, the learned Judges stated thus:

(1) (1927) I.L.R. 3 Luck. 126.

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“It has been laid down in a Full Bench decision of the Allahabad High Court in *Baij Nath v. Ram Bharos*(1), that there is no rule under which the legal representative of a deceased decree-holder can or should apply merely for substitution of names. The application should be for execution. We take the same view.”

No doubt, as pointed out by Mr. Govindarajachari, the question, whether the application was a fresh one or one merely to continue the pending application, was not very material in this case as, having regard to the dates, the plea of limitation under section 48 of the Code of Civil Procedure could not have been raised with respect to it.

In *Musammat Gulab Kuer v. Syed Mohamed Zaffar Hassan Khan*(2) a decree was passed on 3rd February 1908. An execution petition had been filed on 7th November 1918. The facts show that this petition was well within time. During its pendency the decree-holder assigned his interest in the decree to his son and on 24th January 1920 the son applied for the substitution of his name in the place of his father. It was contended that, as this application for substitution was beyond the period of twelve years from 3rd February 1908, the application was barred by limitation under section 48, Civil Procedure Code. The Court refused to treat the application in question as a fresh application for execution but held that the application should be considered to be one under Order XXI, rule 16, Civil Procedure Code, and that it was in substance an application in continuation of the proceedings then pending in the Court and that no question of limitation arose in the circumstances of the case. This decision was followed in *Mussammat Bhagwanta Kuer v. Dewan Zamir Ahmad Khan*(3), the learned Judge (ADAMI J.) remarking about the petition in question that.

(1) (1927) I.L.R. 49 All. 509 (F.B.).

(2) (1921) 8 P.L.J. 358.

(3) (1924) I.L.R. 3 Pat. 596.

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"when the petitions for substitution of the transferees were filed on June 7th, 1919, and were granted on June 14th there was no reason why the execution should not have proceeded with the transferees substituted for the decree-holders; there was no necessity to strike off the execution proceedings."

I shall now refer to two decisions where the application of rule 12 of Order XXII arose in an appeal filed against an order in execution proceedings and not in the course of the execution proceeding itself as in the cases already examined; see *Monmotho Nath Mitter v. Rakhal Chandra Tewary*(1) and *Hakim Syed Muhammad Taki v. Rai Fateh Bahadur Singh*(2). In *Monmotho Nath Mitter v. Rakhal Chandra Tewary*(1) it was held that, when the decree-holder, the appellant, died in the course of an appeal preferred against an order in execution, it was open to his legal representatives to continue the appeal and that Order XXII, rule 12, read with rules 3 and 4, was no bar. In that case a preliminary objection was taken that, upon the death of the appellant, his legal representatives were not entitled to prosecute the appeal and in support of the objection reliance was placed upon Order XXII, rule 12, of the Code. The objection was characterized as one "of a somewhat novel character and not worthy of serious consideration but for the insistence with which it was pressed". After pointing out that, even before the present Code, the Courts held that the corresponding provisions of the old Code did not apply to execution proceedings and that Courts had power to bring legal representatives of deceased decree-holders in pending execution applications, the learned Judges observed that this practice cannot be considered to be negatived by rule 12 of Order XXII. In *Hakim Syed Muhammad Taki v. Rai Fateh Bahadur Singh*(2) it was held, DAS J. dissenting,

(1) (1909) 10 C.L.J. 896.

(2) (1929) I.L.R. 9 Pat. 372 (F.B.).

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that by virtue of rule 12 of Order XXII, rules 3 and 4 did not apply to appeals arising out of an order passed in the course of a proceeding in execution of a decree or order and that, therefore, such an appeal does not abate on the death of the respondent, if the appellant fails to apply and make the legal representative of the deceased respondent a party to the appeal within the time prescribed by law. The dissenting judgment of DAS J. was pressed before us by the respondent with great force, but I am inclined to accept the view of the majority of the Bench. It follows from these decisions that in appeals also the same view of rule 12 of Order XXII was accepted, as in the case of execution petitions. I have already drawn attention to *Sundayee Ammal v. Krishnan Chetti*(1) where this Court refused to apply *Palaniappa Chetti v. Valliammai Achi*(2) to an appeal against an order in execution.

In view of the above decisions I fail to see how the legal representative of a deceased decree-holder cannot be permitted to substitute his name in a pending execution application and proceed with it. It is said that, having regard to the definition of the term "decree-holder" in the present Code, which does not include any person to whom a decree or order is transferred as under the definition of the term under the old Code of 1882, the conclusion arrived at by the learned Judges in these cases is based upon the old notion of the term and is therefore open to objection; and that the transferee will not acquire the status of a decree-holder until after an order in execution is made in his favour. But I cannot see why that order cannot be made in the pending execution petition itself ordering execution to proceed just as in a fresh execution

(1) (1928) I.L.R. 51 Mad. 858.

(2) (1926) I.L.R. 50 Mad. 1.

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application. It appears to me that the change in the definition of the term "decree-holder" does not really affect the question.

I shall now refer to two Privy Council decisions relied on by the petitioner in support of his contention, i.e., *Jang Bahadur v. Bank of Upper India, Ltd.*(1) and *Kedarnath Goenka v. Anant Prasad Singh*(2). These decisions do not directly bear on the point; but there are observations in them which would help the appellant. In *Jang Bahadur v. Bank of Upper India, Ltd.*(1) their Lordships of the Privy Council observed :

"If the judgment-debtor dies before any such certificate is issued, the Court of transfer does not lose its jurisdiction over the execution proceeding, which does not abate by reason of the death. But before execution can proceed against the legal representative of the deceased judgment-debtor, the decree-holder must get an order for substitution from the Court which passed the decree. This is a matter of procedure and not of jurisdiction."

In this case, their Lordships were considering whether a Court to which a decree had been transferred had jurisdiction to bring on record the legal representative of a deceased judgment-debtor; and the certificate referred to in the extract quoted above refers to a certificate as regards satisfaction of the decree. From the statement of their Lordships it is clear that an execution proceeding does not abate by reason of the death of a judgment-debtor and that the decree-holder may proceed against him after getting an order for substitution from the Court which passed the decree and this is referred to as a matter of procedure. I think it follows fairly from these observations that it is not necessary that the decree-holder should resort to a fresh application for

(1) (1928) I.L.R. 3 Luck. 314; L.R. 55 I.A. 227.

(2) (1925) I.L.R. 4 Pat. 507; L.R. 52 I.A. 188.

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execution to proceed against the legal representative of the deceased judgment-debtor. It seems to me that the passage suggests that he may get the name of the legal representative substituted in the pending execution application itself which has not abated and may then proceed with that application for execution. The judgment of their Lordships in *Kedarnath Goenka v. Anant Prasad Singh*(1), the other Privy Council case, is very brief and does not contain the facts of the case. Their Lordships approve of the following passage in DAS J.'s judgment which they quote in their own judgment :

"I hold that, under the Code of 1882, a proceeding for the ascertainment of mesne profits was a proceeding in execution, and that, as the decree, in the present case, was passed under the Code of 1882, such proceedings must be held in execution and not in the suit. That being so, Order XXII, rule 12, applies and it must follow that substitution was not necessary."

The facts of the case are these: The Subordinate Judge in 1905 made a decree for possession and mesne profits. Appeals to the High Court and to the Privy Council were dismissed, the latter in 1913, and inquiry as to the mesne profits recoverable was held subsequently and during it, in 1918, two of the plaintiffs, Bhoop Narain Singh and Baijnath Singh, died. About two years after, the sons of Bhoop Narain Singh obtained an *ex parte* order to be substituted on the record for their father. The appellant then contended that the order of substitution should be cancelled and that the suit had abated as the legal representatives had not been brought on record within six months. The petitioner contends that this decision may be taken to be an authority for holding that the inquiry as to mesne profits being a proceeding in execution under the Code of 1882, Order XXII, rule 12, applies to it, and that

(1) (1925) I.L.R. 4 Pat. 507; L.R. 52 I.A. 188.

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there is no abatement under Order XXII, rule 3, and that therefore no substitution (of the legal representative) was necessary. Though it may not be quite clear as to what was exactly meant by "substitution was not necessary", I think that on the authority of this decision the petitioner may well contend that the legal representative is, at any rate, entitled to ask the Court to substitute his name in the pending petition and to proceed with the execution.

In the light of all the above decisions, I would hold that the legal representative of a decree-holder who died during the pendency of an execution petition filed by him can be substituted in his place in the execution petition and be allowed to continue it.

The petition by the legal representative being an application for the execution of the decree, the question may arise as to what article of the Limitation Act should be applied to such an application. The point is one of some difficulty; but it is not necessary to discuss it here as it does not arise in this case. However, I may observe that, if there is difficulty in applying article 182 of the Limitation Act, then why should not such an application be treated as one governed by article 181? I think authority may be found in support of this position, see *Kalyani Pillai v. Thiruvengkadaswami Ayyangar*(1); but I do not desire to express any definite opinion on the point, as it was only glanced at in the course of the arguments.

Under the old Code also some Courts in India had to consider whether the legal representatives of a decree-holder or a judgment-debtor could be substituted in a pending execution petition and be allowed to continue the execution. Sections 363, 364 and 366 of the Code

(1) (1924) I.L.R. 47 Mad. 618.

of 1882 correspond to Order XXII, rule 3, of the present Code. Section 368 corresponds to Order XXII, rule 4. There was no section in the old Code corresponding to rule 12 of Order XXII.

The earliest case brought to our notice is the decision in *Gulabdas v. Lakshman Narhar*(1) which related to the death of a decree-holder. In that case one Lakshman was allowed to continue the execution proceedings begun by his father. The actual decision turned on the question of limitation; but in dealing with it the learned Judges referred to section 365 relating to the death of a sole plaintiff and observed that

"the Code of Civil Procedure does not provide that applications for execution shall, like suits, abate by the death of a judgment-creditor, nor have any cases been cited to us to show that the analogy of the sections applicable to pending suits governs pending proceedings in execution."

It is worthy of notice that this opinion was expressed even though there was no rule in the old Code corresponding to rule 12. It was also contended in that case that the deceased decree-holder's sons could not come in as mere representatives to carry on his application but they were bound as representatives to make a new application on their own accord. This is precisely the very argument that is now put before us. The learned Judges did not decide the question as the objection was not taken before, but they observed that "it goes rather to the form than the substance of their application". Though the point was not expressly decided, it is easy to see which way the inclination of the learned Judges lay. The next case, *Govind Shanbhog v. Appaya*(2), which was also a case of a deceased decree-holder, does not throw much light on the matter. The same may be said about the case of

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(1) (1879) I.L.R. 3 Bom. 221.

(2) (1880) I.L.R. 5 Bom. 246.

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Keshavlal Bechar v. Pitamberdas Tribhuvandas(1). In *Purushottam v. Rajbai*(2), which related to the death of a judgment-debtor during the pendency of an execution petition, it was held :

"When execution proceedings are commenced against a judgment-debtor, they can be continued after his death by substituting the name of the legal representative in place of that of the deceased judgment-debtor in the application for execution. It is not necessary to file a fresh application under the provisions of section 235 of the Code of Civil Procedure (Order XXI, rule 11)."

In the course of their judgment the learned Judges referred to a prior decision of their own Court, *Hirachand Harjivandas v. Kasturchand Kasidas*(3), and said "Sections 361 to 372, Civil Procedure Code, do not relate to proceedings in execution" and further on observed :

"No authority has been cited to us in support of the contention that execution proceedings already commenced cannot be continued after the death of the judgment-debtor by substitution of the name of the legal representative in place of that of the judgment-debtor in the application for execution. We think therefore that there is no objection to the continuance of the execution proceeding against the present respondent without fresh application under section 235."

This decision may well be taken as an express authority for the position that in Bombay the same interpretation that is now sought to be put on Order XXII, rules 3, 4 and 12, was definitely put on the corresponding sections of the Code of 1882 and that, under that Code, an execution petition pending against a deceased judgment-debtor was allowed to be continued without filing a fresh application for that purpose.

In Madras, the question does not seem to have been dealt with explicitly in any decision under the old Code ;

(1) (1894) I.L.R. 19 Bom. 261.

(2) (1909) I.L.R. 34 Bom. 142.

(3) (1893) I.L.R. 18 Bom. 224.

but there is a decision in *Appaniangar v. Dharni Mudaly*(1) which has some bearing on the point. In that case it was held by BENSON and MILLER JJ. that an application by the legal representative of a decree-holder for an order recognizing him as the decree-holder is not prohibited by the Code of Civil Procedure and, consequently, such an application is a step in aid of execution within the meaning of clause 4 of article 179 of the Limitation Act of 1877. If so, it would be unreasonable to call such an application a fresh application. This decision is really not opposed to the previous decision in *Ramachandra Aiyar v. Subramania Chettiar*(2), in which it was held that a transferee decree-holder cannot apply merely for recognising him as transferee inasmuch as by force of the definition of the term 'decree-holder' he himself is a decree-holder ; and it was for this reason that the learned Judge held in that case that a transferee decree-holder can only apply to execute the decree. In Madras, as a matter of 'practice', the legal representative of a deceased decree-holder who dies pending an execution application filed by him has always been allowed prior to the decision in *Palaniappa Chettiar v. Valliammai Achi*(3) to continue the pending petition by substituting his name without being put to the necessity of filing a fresh execution application. No decisions of the other High Courts under the old Code of 1882 have been cited before us ; but, judging from the decisions of those Courts under the present Code, there is no reason to believe that, under the old Code, they followed a different procedure. On the whole I am inclined to think that the practice in Indian Courts was always to allow the legal representative of a deceased decree-holder to continue

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(1) (1907) 17 M.L.J. 475.

(2) (1903) 14 M.L.J. 893.

(3) (1926) I.L.R. 50 Mad. 1.

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the pending execution petition filed by him by substituting his name in it in the place of the deceased decree-holder and then to proceed with the execution. I do not think his application to proceed with the execution petition was ever considered in the light of a fresh execution petition. If this view is correct, then the decision in *Palaniappa Chettiar v. Valliammai Achi*(1) is in conflict with the well-established practice of this and other Courts.

That decision had also seriously affected the rights of the legal representative of a deceased decree-holder. The following extract from the judgment of ANANTA-KRISHNA AYYAR J. in *Venkatalakshamma v. Seshagiri Rao*(2) will make this point clear :—

“ If the only remedy open to the legal representative of a deceased decree-holder in such a case is to file a fresh execution petition, then fresh pleas of limitation might be open to the judgment-debtor, the intervening period affording him basis for such contention. Attachments which were effected pending the prior execution petition would *prima facie* no longer be available when a fresh execution petition is filed. The advantages which a decree-holder has as a result of his having filed an execution petition, such as the right to share in the proceeds of auction sales held by the same Court after the filing of such execution petition, might not be necessarily available to him on such fresh execution petition. Other disadvantages to the decree-holder's representative also could be readily imagined . . . ”

See also the remarks of REILLY J.

Of course if the Legislature has deliberately introduced a change in the existing procedure, then, disastrous consequences notwithstanding, that procedure has to be followed ; but I have endeavoured to show in this judgment that no such change has been introduced in the Code by the insertion of rule 12 in Order XXII. If a change was intended, then, having regard to the

(1) (1926) I.L.R. 50 Mad. 1.

(2) (1930) 38 L.W. 359.

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long-continued practice in the Courts, the Legislature would have expressed its intention in clearer and more explicit terms. In my opinion, rule 12 of Order XXII, Civil Procedure Code, though it is a new provision introduced in the Code of 1908, did not in any way introduce a new rule of procedure but only gave, in the words of MOOKERJEE J. in *Monmotho Nath Mitter v. Rakhal Chandra Tewary*(1),

“ legislative sanction to the fairly well-settled doctrine under the old Code that the provisions of the chapter relating to substitution upon the death, marriage or insolvency of parties, do not apply to proceedings in execution between the decree-holder and the judgment-debtor.”

In this view, for the reasons mentioned above, I must express my respectful dissent from the decision in *Palaniappa Chettiar v. Valliammai Achi*(2). I would therefore set aside the order of the learned District Munsif and ask him to restore the petition to his file and proceed with it according to law. I make no order as to costs.

In conclusion, I must express my thanks to Mr. Govindarajachari who has argued the case ably as *amicus curiae* for the respondent.

JACKSON J.—I agree, and would also like to express my thanks to Mr. Govindarajachari. If nothing in rules 3, 4 and 8 of Order XXII shall apply to proceedings in execution of a decree, then rules 3, 4 and 8 have nothing whatsoever to do with execution proceedings. To evolve from rules 3, 4 and 12 a precept like the headnote to *Palaniappa Chettiar v. Valliammai Achi*(2),

“ 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.”

(1) (1908) 10 C.L.J. 396, 399.

(2) (1926) I.L.R. 50 Mad. 1.

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is, in effect, to do precisely what rule 12 deprecates, and to apply rules 3 and 4 to execution proceedings, deriving from their silence, as it were, a fresh sub-clause to these rules, with a most curious result; for, read with this addition, rule 3 lays down that on the death of the decree-holder the execution proceedings shall never abate, but shall nevertheless always abate because no one can be substituted in his place.

It seems better therefore at the outset to treat Order XXII as having no application to execution proceedings, and then this question whether the legal representative can be brought on in the pending execution petition instead of being relegated to a fresh application would seem to present little difficulty. Under section 146 a proceeding taken by a person may be taken by the person claiming under him and, if Order XXII has nothing to do with the matter, it does not provide otherwise. Then under Order XXI, rule 16, a transferee by operation of law, an heir for instance, may apply for execution. As clearly set forth on page 617 of the eighth edition of Mr. Mulla's Civil Procedure Code,

"where a decree-holder applies for execution and pending execution assigns his interest in the decree, an application by the transferee of the decree for substitution of his name is not a fresh application for execution but merely an application for continuing the execution proceedings then pending."

For this statement there is ample authority:

"On the death of the applicant for execution it was open to the legal representative of the deceased decree-holder to apply immediately for carrying on the proceedings in execution of the decree or to apply for fresh execution."

Akhoy Kumar Talukdar v. Surendra Lal Pal(1).

"When the sons of Ram Lal, on his death, made the application . . . , they did not ask for any fresh proceedings.

(1) (1926) 30 C.W.N. 735, 737.

. . . He must apply . . . for execution of the decree . . . (but it was not) a 'fresh application'."

Baij Nath v. Ram Bharos(1).

"We take the same view."

Mirza Muhammad Sadiq Ali Khan v. Sajjad Mirza alias *Munney Agha*(2).

"There was no reason why the execution should not have proceeded with the transferees substituted for the decree-holders."

Mussammat Bhagwanta Kuer v. Dewan Zamir Ahmad Khan(3).

In the light of these rulings Mr. Mulla pays an exaggerated compliment to our Court, by excising the above note from his ninth edition, and relegating *Mussammat Bhagwanta Kuer v. Dewan Zamir Ahmad Khan*(3) to the realm of obsolete cases governed by the old Code. In the old Code the definition of decree-holder included a person to whom a decree is transferred. In the present Code, section 2 (3) runs:

"'Decree-holder' means any person in whose favour a decree has been passed or an order capable of execution has been made."

As observed by Mr. Mulla (page 661) the transferee may not acquire the status of a decree-holder until an order for execution is made in his favour, but that order can as well be, Let the pending execution proceed, as, Let a fresh execution begin.

CURGENVEN J. —The case-law, most of which was not cited before us in *Palaniappa Chettiar v. Valliammai Achi*(4), presents some curious features, but, since there is no doubt that it is very preponderantly in favour of giving Courts the power now in question, to survey it is not within my present purpose. I wish

(1) (1927) I.L.R. 48 All. 509, 514, 515 (F.B.).

(2) (1927) I.L.R. 3 Luck. 126, 127-8.

(3) (1924) I.L.R. 8 Pat. 596, 604.

(4) (1926) I.L.R. 50 Mad. 1.

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only to say a word or two about the grounds of our decision in the case which has given rise to this Full Bench.

Upon general principles of procedure, and apart from the specific provisions of the Code, there are two ways in which the legal representative of a deceased decree-holder may conceivably enforce the decree, either (a) by an original application to enforce it, or (b) by obtaining leave to continue an execution proceeding already begun by his predecessor.

Section 146 enacts that "save as otherwise provided" where any proceeding may be taken by any person, then the proceeding may be taken by any person claiming under him. That in express terms provides that, unless a rule exists to the contrary, course (a) is open to the legal representative of a decree-holder. It says nothing about course (b) unless it be held that the one necessarily includes the other. Similarly, Order XXI, rule 16, which enables a transferee to apply for the execution of a decree, does not expressly enable him to apply to continue a proceeding already pending when his predecessor died. If the Code provided elsewhere against such a course, the provision would not be in conflict with the terms of this rule. Turning now to suits, there can be no question, I think, that in the case of a suit the power of a Court to allow a legal representative to proceed with the suit is specifically derived from rule 3 of Order XXII. Sub-rule 1 says:

"The Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party, and shall proceed with the suit."

It may be true that this rule, besides giving the power, does other things, but it cannot seriously be argued that that circumstance makes it any the less an empowering rule. Rule 12 of Order XXII says that

nothing in this rule shall apply to execution proceedings. In the case of such proceedings, can we look elsewhere for the power? In *Palaniappa Chettiar v. Valliammai Achi*(1) we answered "No". If in one place in the Code, dealing specifically with the process of substituting a legal representative for the purpose of continuing a proceeding, the power is expressly given in the case of a suit, and as expressly withheld in the case of an execution proceeding, it is not permissible, we thought, to have recourse to a general provision, to be found elsewhere, which, liberally construed, might, in the absence of the more specific provisions, afford the required power. It is, I still think, not an unreasonable inference that the terms of Order XXII qualify Order XXI, rule 16. I observe that REILLY J., who in *Venkatalakshamma v. Seshagiri Rao*(2) has some hard words to say about our decision, appears to assume that the problem of construction would be unaffected if rules 3 and 4 of Order XXII had no existence. Such an alteration in the Code would of course remove the whole difficulty we felt in deciding *Palaniappa Chettiar v. Valliammai Achi*(1), which was created by the terms of those rules. Perhaps an illustration will make the point clearer. Suppose I am the proprietor of a theatre, and say to my manager, "subject to any rules I may make, you may order matters according to your discretion." I make a rule, "Men may smoke in the theatre, but this does not apply to boys under 16." If I find boys under 16 smoking and ask my manager for an explanation, should I be satisfied if he answered, "Your rule said that it did not apply to boys under 16, so as regards them I acted as though it had no existence, and fell back on my general discretionary powers"?

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If the framers of the Code were willing to concede this most important power to executing Courts, it is a little surprising to me that they should have failed to provide an express rule, and should have left the Courts, in the words of ANANTAKRISHNA AYYAR J., "to mould its procedure according to the equities of the case"; and the Legislature seems to have left the question of limitation to take care of itself, with results which, thanks probably to an erroneous view of the law, have not yet become fully apparent. I agree that, if Order XXI, rule 16, may be read as if it said, "the transferee may apply for execution of the decree, or for leave to continue a proceeding in execution pending at the date of the transfer", the question of the effect of rule 12 of Order XXII in debarring a transferee from continuing an execution petition would assume a different aspect; nor would I demur to reading it in this way, if Order XXII formed no part of the Code. I confess that, as matters stand, I still find a difficulty in extracting the required power from the terms of the Code. But, since that power had been so universally exercised, and so generally assumed by the Courts to exist, I do not dissent from a construction which achieves the desired object.

I must add my own thanks to Mr. Govindarajachari for the great assistance which he has given us in this case.

A.S.V.

APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice and
Mr. Justice Cornish.

N. CHINNAPPA MUDALI AND THREE OTHERS (RESPONDENTS
1, 3, 4 AND 6), APPELLANTS,

1931,
September
18.

v.

THE OFFICIAL ASSIGNEE OF MADRAS (APPLICANT),
RESPONDENT.*

*Presidency Towns Insolvency Act (III of 1909), ss. 7 and 36,
sub-ss. 4 and 5—Presidency Towns Insolvency (Amend-
ment) Act (XIX of 1927), sec 2—Scope and effect of.*

The Official Assignee of Madras examined the father of the insolvent and one of his brothers, under section 36 of the Presidency Towns Insolvency Act (III of 1909), for the purpose of ascertaining whether the status of joint family was subsisting between the insolvent and the other members of his family and whether a business was a joint family business. Later on, he took out an application under section 7 of the Act for, *inter alia*, a declaration that the business was a joint family business and that the deed of partition entered into between the insolvent and the other members of his family was void against him.

Held that the amendment of section 7 of the Act by section 2 of the amending Act (XIX of 1927) refers only to such proceedings under section 36 of the Act (III of 1909) as come under sub-section 4 which deals with simple money claims and sub-section 5 which deals with the examination of persons supposed to be in possession of some property of the insolvent and to no other matters. Sub-section 5 of section 36 does not touch the case of a person who is examined for the purposes mentioned above and as such the application under section 7 of the Act (III of 1909) was a proper one.

Official Assignee of Madras v. Narasimha Mudaliar, (1929) I.L.R. 52 Mad. 717 (F.B.), distinguished.

* Original Side Appeal No. 80 of 1931.

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APPEAL from the judgment and order of WALLER J. passed in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 85 of 1930 in Insolvency Petition No. 29 of 1930.

T. R. Vijiaraghavachari for appellants.

V. C. Gopalaratnam for *V. V. Srinivasa Ayyangar* for respondent.

JUDGMENT.

BEASLEY C.J. BEASLEY C.J.—This is an appeal from an order of WALLER J. sitting in insolvency. The Official Assignee put in an application in the Insolvency Court for a declaration that the business of S. Chinnappa Mudaliar and Sons was the joint family business of the insolvent, his father, and the respondents to the application, and that the deed of partition entered into by them was void as against him, and for an injunction restraining the respondents from alienating any of the joint family property. WALLER J. held that there was a joint family, that with the exception of some property the property was joint family property, and that the yarn business carried on was the joint family business. The present appeal is against that order.

Before WALLER J., apart from facts, the point of law was raised that the Official Assignee was not entitled to make an application under section 7 of the Presidency Towns Insolvency Act because he had at an earlier stage examined the father of the insolvent and one of the brothers. That examination was for the purpose of ascertaining whether the status of joint family was subsisting and whether the business carried on was a joint family business. It was contended before WALLER J. that, under section 7 of the Presidency Towns Insolvency Act as amended by Act XIX of 1927, once there having been an examination of these two persons and a

denial by them that there was a joint family and that this was a joint family business, the jurisdiction of the Insolvency Court was ousted; and in support of this argument a Full Bench decision of this Court, viz., *Official Assignee of Madras v. Narasimha Mudaliar*(1), was quoted. I myself was a member of that Full Bench. WALLER J. held that that case arose directly under section 36 (4) of the Act, the supposed debtor not admitting indebtedness to the insolvent. That was the case of a simple money claim made by the Official Assignee against a person alleged to be indebted to the insolvency or the insolvent's estate; and what the Court was there considering was an appeal from an order of WALLER J. who had decided that, in so far as the person against whom the claim was made admitted the claim, a decree could be passed against him but that, in so far as he disputed the claim, proceedings could not be taken against him in the Insolvency Court, and therefore declined to pass a decree against him. That decision the Full Bench upheld. In view, however, of the importance of the question as to whether or not in a simple money claim, when the garnishee in the proceedings has been examined under section 36 and has disputed the claim, he can have proceedings brought against him under section 7 of the Insolvency Act, we were asked to decide that point and accordingly we did. Throughout the decision in that case the only case in contemplation was the case of a simple money claim, so that upon this point the Full Bench decision has no application at all and WALLER J. quite properly so held. Before us it was argued that what the amending section 2 of Act XIX of 1927 says is that, where an enquiry has been held under section 36 and where the

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person questioned at such enquiry is unwilling for the matter to be decided, it cannot so be decided under section 7 of the Act. That, in my view, is far too wide an interpretation to be put upon the amending section.

In my view, the amending section merely refers to such proceedings under section 36 as come under sub-sections 4 and 5. Sub-section 4 of course deals with simple money claims. Sub-section 5 deals with the examination of persons supposed to be in possession of some property of the insolvent. In my view, sub-section 5 does not touch the case of a person who is examined in order to discover whether the insolvent was or was not a member of a joint family or whether the business carried on by him was a joint family business. That, in my view, is quite outside the scope of sub-sections 4 and 5. In my opinion, section 7 of Act III of 1909 as amended by section 2 of Act XIX of 1927 only applies to matters appearing in sub-sections 4 and 5 of section 36 and to no other matters. That being so, WALLER J. was quite right in holding that the application under section 7 against all the respondents was a proper one.

We have further, of course, to consider the question as to whether he was right on the facts in holding that this was a joint family and that the insolvent was a member of it and that the yarn business was a joint family business. Those three questions were pure questions of fact. The learned Judge had before him the witnesses and had also before him certain documents, and it is quite futile to contend on behalf of the appellants that there was no evidence—indeed he had ample evidence before him—upon which to come to the conclusions of fact which he did, namely, that this was a joint family, that the insolvent was a member of it and that the yarn business was a joint family business.

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Produced in the case there was the partition deed. That the learned Judge has found to be a fraudulent one and he set it aside. Obviously it was a fraudulent one. It came into being only a year before the insolvency, failed to disclose as family debt any of the debts set out in the schedule, and was a contrivance clearly to defeat the creditors of the insolvent. It placed the entire debt upon the insolvent's shoulders and allowed the other members of the family to go away with the bulk of the property which otherwise would have been in the possession of the Official Assignee for the benefit of the creditors. The partition deed begins by stating that up to that time the status of joint family existed. That, we are asked to say, was an incorrect statement, that the joint family was not in existence, and that as a matter of fact the members of the joint family had years before divided themselves. We are asked to say that the statement was due to the mistake of a petition-writer. That of course is a perfectly futile argument to address to us. The partition deed was signed by all the members of the family, the signatures were witnessed, and the document was registered, and in view of that statement there was ample evidence before WALLER J. to say that this was a joint family. There was also other evidence to show that it was a joint family business. The account books of the yarn business were produced and they clearly showed that payments were made to the other members of the family. There being evidence before WALLER J. upon which he could come to the conclusion that this was a joint family and that it was a joint family business, we decline to consider the question as to whether or not he came to a right conclusion. I do not think it is proper for an appellate Court, where there is evidence and where the trial Judge on the Original

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Side or Insolvency comes to a conclusion upon the facts, to lightly upset such conclusion. That being so, this appeal must be dismissed with taxed costs.

CORNISH J.—I entirely agree. The appellant's argument seems to go to this length that, whenever the Official Assignee has held an examination under section 36, he can have no recourse to the provisions of section 7, but must have the matter which has to be determined decided in a suit. That startling result, which could never have been contemplated by the Legislature, can, I think, be avoided by giving, what seems to me, the natural construction to section 7. The section, as amended, provides that the Insolvency Court can decide all questions arising in any case of insolvency, provided that, unless all parties otherwise agree, the power shall be exercised in the manner and to the extent provided by section 36 for the purpose of deciding any matter arising under section 36. What are the matters arising for decision under section 36? They are contained in sub-sections 4 and 5, namely, whether a person supposed to be indebted to the insolvent is so indebted, and whether a person suspected of having in his possession property belonging to the insolvent has in fact any such property in his possession. If the person supposed to be a debtor to the insolvent or to have the insolvent's property in his possession does not admit the fact, then, unless all the parties otherwise agree, the Insolvency Court cannot determine the matter under section 7. But questions, whether the insolvent is a member of a joint family, or whether the business carried on by the insolvent is a business of the joint family, are not in my opinion matters falling within sub-section 4 or 5 of section 36, and they can be decided by the Insolvency Court in the exercise of its powers under section 7.

G.R.

APPELLATE CIVIL.

*Before Sir V. Ramesam, Kt., Officiating Chief Justice and
Mr. Justice Cornish.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
REPRESENTED BY THE COLLECTOR OF SALEM (RESPONDENT),
APPELLANT,

1931,
August 11.

v.

R. NARAYANASWAMY CHETTIAR (CLAIMANT),
RESPONDENT.*

*Land Acquisition Act (I of 1894), ss. 31 (2) and 49—Order on
reference under—If a decree—Acquisition of a portion of
a house—Test to be applied—Madras Town Planning Act
(VII of 1920), ss. 12 and 35 (2) (a)—Power of Local Govern-
ment to extend time fixed under sec. 12—Date to be adopted
under sec. 35 (2) (a) when the time is extended.*

The order of a Court on a reference to it under section 49 of the Land Acquisition Act (I of 1894) is a decree and as such appealable. On such a reference, in coming to the conclusion whether a portion of the house "is reasonably required for the full and unimpaired use of the house", regard should be had to the existence of ample space within the compound in which a similar portion could be built without any particular inconvenience to the use of the house, and if there is such space the whole house need not be acquired.

The Local Government have ample power, by notification, to extend the time fixed by them under section 12 of the Town Planning Act.

Per RAMESAM OFFG. C.J.—If the time is extended, the date of the further notification would be the date to be adopted under section 35 (2) (a) of the Town Planning Act.

Per CORNISH J.—The extended date for submission of a draft scheme is not to be treated as the date of publication of the notification for the purpose of section 35 (2) (a).

Per RAMESAM OFFG. C.J.—*Semble.* In the present condition of the Act all awards are decrees and all orders other than awards on a reference under section 31 (2) are also decrees.

* Appeals Nos. 217 to 229 and 443 of 1929.

SECRETARY
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NARAYANA-
SWAMY
CHETTIAR.

APPEALS against the awards of the District Court of Salem in Land Acquisition Cases Nos. 27, 29, 30, 28, 32, 33, 35, 34, 36 to 40 and 37 of 1926, respectively.

Government Pleader (*P. Venkataramana Rao*) for appellant.

B. Sitarama Rao for respondent.

Cur. adv. vult.

JUDGMENT.

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RAMESAM OFFG. C.J.—These are appeals against the award of the District Judge of Salem made in certain land acquisition proceedings which were taken pursuant to the Town Planning Act (VII of 1920). The scheme was generally known as Maravaneri Extension and was intended to enlarge the accommodation of Salem Town. The facts of the case may now be stated.

On 1st February 1921 the Madras Government invited the Municipal Council of Salem, by a notification published in the *Fort St. George Gazette*, to submit for their sanction, within three months from the date of the publication of the notification, a scheme in respect of the area now in question (Exhibit A). This was under section 12 of the Town Planning Act. That section authorises the Government to fix a date within which the Municipal Council should submit the scheme and the Government fixed three months as the period. The Salem Municipal Council did not submit their scheme within three months. The draft scheme was submitted on 28th August 1921 (Exhibit B). Seeing that the Government ultimately published a notification on 21st September 1923 under section 14 (3) of the Act (vide Exhibit D) we must assume that the Madras Government has accepted the draft scheme though it was submitted late and condoned the delay of the Municipal Council. Section 34 of the Town Planning

Act provides that a notification under section 14 of that Act shall operate in respect of any land covered by it as a declaration under section 6 of the Land Acquisition Act. So further proceedings were taken under the Land Acquisition Act. An Acquisition Officer was appointed and he made an award on 2nd September 1926. Many of the claimants were not satisfied with it and required a reference to the Civil Court under section 18 of the Land Acquisition Act. It was thus that the matter came up before the District Judge of Salem and against his award these appeals are filed by the Government and one claimant.

The District Judge held that, as the Salem Municipal Council had not complied with the notification of the Government within three months as required in Exhibit A, the notification became spent, as it were, and any action taken by the Municipal Council subsequently for the purpose of settling a scheme and getting the approval of the Government could not be regarded as one under section 12 of the Town Planning Act. He then observed that the Government had no power to extend the time mentioned in the notification and therefore the notification, Exhibit A, had no legal effect whatever; but he also held that the subsequent proceedings taken under the Act were still valid. He pointed out that, apart from the notification under section 12, the Municipal Council could *suo motu* frame a scheme under section 10 (3) or section 11, and the Government may approve of the scheme under section 14 (3), and further proceedings can follow a notification by the Government under section 14 of the Act. He finally held that, though the notification under section 12 lapsed and there was no notification under section 10 (1) and therefore section 35 (2) (a) of the Town Planning Act could not be applied, the notification under section 14

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could still be utilized for a date to calculate the values. Under section 23 of the Land Acquisition Act the market-value of the land on the date of the publication of the declaration under section 6 must be taken into consideration. Under section 34 of the Town Planning Act the notification published under section 14 of the Town Planning Act is itself deemed to be a declaration under section 6 of the Land Acquisition Act. He therefore held that 21st September 1923, the date of Exhibit D, the final notification under section 14, must be taken to be the date at which the value of the plots belonging to the claimants should be ascertained, and he proceeded to give his award. This conclusion is challenged by the learned Government Pleader. He cited some cases before us to show that the District Judge had no jurisdiction to go behind the reference. But I do not think that this point arises before us. The learned District Judge did not say that the reference to him was invalid, nor is any such proposition contended for by the respondent. The District Judge held that the notification under section 14 was a valid notification and the further proceedings were valid. All that he said was that there was no notification under section 10 (1), nor any operative notification, under section 12 of the Town Planning Act, and therefore section 35 (2) (a) could not be applied. He therefore chose the notification under section 14 which is equivalent to a declaration under section 6 of the Land Acquisition Act and proceeded to estimate the value as on that date. It is therefore unnecessary to consider the cases cited by the learned Government Pleader.

The next question is whether there was an operative notification under section 12 so that we might take its date as the date with reference to which the lands have to be estimated under section 35 (2) (a) of

the Town Planning Act. Now, taking section 14 of the Act, clause 1 refers to the date of the publication of a draft scheme. It is clear that there are two draft schemes referred to in the prior sections of the Act, one published by the Municipal Council under section 11 *suo motu* and another prepared by the Council under section 12 on the invitation of the Government. It seems as if both the sections 13 and 14 were intended to apply to both kinds of draft schemes. But unfortunately section 12 did not make any provision for the publication of the draft scheme as section 11 did, with the result that the words "the date of the publication of a draft scheme" cannot refer to the publication of a scheme under section 12. Nevertheless section 14 (3) may refer to a draft scheme under section 11 (1) or a draft scheme submitted under section 12. This is the view adopted by the learned District Judge, and also contended for before us by the learned Government Pleader. I agree with this contention. This defect in section 12 has since been remedied by an amending Act and now it is clear that section 14 (1) applies to draft schemes under section 11 or section 12 and the original intention is now properly carried out. But this conclusion that section 14 (3) applies even to a draft scheme prepared *suo motu* by the Municipal Council and therefore the proceedings under the Town Planning Act are valid does not solve the question of the date of the notification which has to be adopted under section 35 (2) (a). The District Judge thought that the Government had no power to extend the time mentioned in its notification of February 1921. The learned Government Pleader argues that this view is not correct. To this extent I agree with the learned Government Pleader. In the first place, the Act itself does not fix any period of time before which the scheme

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must be submitted by the Municipal Council. The date was to be fixed by the Government. The Government had so fixed the date, but the Municipal Council did not submit its scheme within that date. If at this stage the Government sent another communication to the Municipal Council fixing another date and published it by a notification, it would be perfectly valid. Only in such a case the date of the second notification would be the date to be adopted under section 35(2)(a). Whether we call it an extension of the original date or whether we call it a fresh notification it matters little. But what the learned Government Pleader requires for his argument is that, while an extension of the original date may be made by the Government, the date of the first notification, the time prescribed in which is extended, is still the date to be adopted under section 35 (2) (a). I am unable to agree with this contention. The whole policy of the Act is that a reasonable date should be fixed within which the Council should submit its scheme and this date should be notified by the Government. If the Council submits its scheme within that date, the proceedings will continue with reasonable speed and the owners of lands will have the satisfaction of their lands being acquired and prices given to them corresponding to a date not unreasonably remote from the actual acquisition; but if delay is committed by the Municipal Council and if the Government extends the time, for the same reason for which the first notification mentioning a date for the submission of the scheme by the Municipal Council should be published, there must be a notification containing the second date and this notification should be equally published. What the Act contemplates under section 35 (2) (a) is the date of a notification which prescribes a date within which the

Municipal Council should act and has acted. The date of Exhibit A does not satisfy this condition. The Act does not expressly speak of any power in the Local Government to extend. As the sections are worded the Act contemplates that the Council has to take action within the time mentioned by the Government, but as I said an extension can always be granted by a further notification. If so, the date of the further notification will be the date to be adopted under section 35 (2) (a). Now, the final notification of the Government of September 1923 (Exhibit D) certainly shows that the Government was willing to condone the delay of the Salem Municipal Council and accept the scheme submitted by the Council and by some straining of language it may be regarded as a notification under section 12, though in such a view we have got a merger of the notification under section 12 and the notification under section 14 (4); but I do not see anything illegal in it, though this was not what was contemplated by the Act. In this view I am willing to say that the proceedings validly continued under the Town Planning Act and the date to be utilized under section 35 (2) (a) is 21st September 1923, and we need not fall back upon the date fixed by the Land Acquisition Act. I might add that, if this view of mine is not permissible, the only alternative view, in my opinion, seems to be that adopted by the District Judge.

But it seems to me that the whole discussion is academic. In my opinion there is plenty of documentary evidence in the case showing that on 1st February 1921 the rate of two annas and three pies a square foot should be adopted as the value of the lands.

[His Lordship discussed the evidence about the rate and dealt with points not material for this report and proceeded :—]

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This disposes of all the appeals in which special points were raised except Appeals Nos. 226 and 443 which are cross appeals in the same case, namely Land Acquisition Case No. 37. It will be convenient to take up these two appeals separately. The other appeals are dismissed with costs.

In these two appeals (Nos. 226 and 443) the facts are these: One of the suggested roads according to the Town Planning scheme cuts off a corner of the house of Mr. R. Srinivasa Rao, an Advocate. The frontage of the house is on the western side and the road cuts off a slice in the backyard on the eastern side. When the proposal originally became known, the claimant pointed out the inconvenience caused to the house, and it was then thought that the Municipal Council should address the Government for a diversion of the proposed road. It may be mentioned here that an extension was made to the main building in about May 1925 by the addition of a kitchen. The proposed road does not encroach on the kitchen but runs by the side of it. When the Municipal Council recommended a diversion of the road to the Local Government, the owner of another plot objected to the diversion as it caused him considerable inconvenience. The Government passed orders to the effect that unless the Municipal Council enters into an agreement with all the persons affected by the diversion the Government cannot approve of the diversion proposed. This was on 8th December 1926. The claimant apparently anticipating that the Government would not sanction the diversion, filed his statement on 29th September 1926 before the Land Acquisition Officer in which he prayed that his whole house might be acquired under section 49 of the Land Acquisition Act. The Land Acquisition Officer deals with this matter in paragraph 24 of his award. He says: "In response

to the notice under sections 9 and 10 of the Act, Vakil R. Srinivasa Rao states that he has moved the Municipal Council about diverting the road at this spot and that the question of acquisition may be deferred till the Municipality decides the matter." It does not appear when this statement was made. The Land Acquisition Officer then says that the Council have since approved of the deviation. But the statement of the claimant and the approval of the Council must have been prior to the date of the award, namely, 2nd September. The Land Acquisition Officer then observes: "As however it involves a variation of the scheme sanctioned by Government the deviation cannot be acted upon without Government sanction." Then he proceeds to dispose of the matter. The award of the Land Acquisition Officer does not clearly show whether he passed any order deferring the question of this particular acquisition till the Municipality decided the matter as was requested by the claimant. The next sentence of the officer suggests that he did defer his own enquiry until the Municipality decided the question. If so, it is not clear whether he gave a further notice to the claimant saying that there was no use of a fresh adjournment as the deviation cannot be acted upon without Government sanction. The sanction of the Government has been applied for by the Municipal Council on 21st November long after the award (Exhibit III). So at the time of the award there was no application made by the Municipal Council to the Government. But it seems to me that the Land Acquisition Officer ought at least to have informed the claimant that further adjournment of the matter would be useless and he would proceed with it. It does not appear that he has given any such notice. It cannot therefore be said that the request of the claimant in his statement of 29th September was made

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too late. On the request of the claimant the matter was simply forwarded by the Land Acquisition Officer to the District Judge. The learned District Judge held that this was not a case in which the whole house should be acquired and he gave Rs. 500 as damages for severance besides the price of the land.

The first question that arises in this case is whether an appeal lies. Two sets of cases have been cited by the Advocates on both sides. One set of cases cited by Mr. B. Sitarama Rao, Advocate for the claimant, shows that appeals under section 49 have been entertained and considered by the High Court without any objection. The cases cited by the Government Pleader show that some Courts have held that no appeal lies. All these cases were decided before (i) the amendment of sections 26 and 54 of the Land Acquisition Act by Act X of 1921 and (ii) the decision of the Privy Council, *Ramachandra Rao v. Ramachandra Rao*(1), dated 31st January 1922. Prior to the said amendment and the said decision, the view generally prevailing was that awards under the Land Acquisition Act were not decrees, for it was so decided by the Privy Council in *Rangoon Botatoung Company, Ltd. v. The Collector, Rangoon*(2) and secondly apart from an award there could be no decree under the Act so as to make the matter *res judicata* between the parties. Now, the amendment and the decision of the Privy Council in *Ramachandra Rao v. Ramachandra Rao*(1) have effected a change in both these matters. In *Ramachandra Rao v. Ramachandra Rao*(1) the Privy Council held that, if any question other than the amount of compensation was decided under the Land Acquisition Act by the Civil Court after reference, the order of the Civil Court amounts to a decree and an appeal lies and

(1) (1922) I.L.R. 45 Mad. 320 (P.O.).

(2) (1912) I.L.R. 40 Calo. 21 (P.O.).

the decision would be *res judicata*. In that case reference to the Civil Court was made under section 31 (2); but there is nothing in the judgment of their Lordships which shows that the decision turned upon anything peculiar to section 31. Section 31 (2) refers to the Court to which a reference under section 18 would be submitted. In section 49 of the Act the language used is,

“the Collector shall refer the determination of such question to the Court . . . In deciding on such a reference the Court shall have regard to the question . . .”

This shows that the conclusion of the Court on a reference under section 49 is regarded as a decision and if the conclusion on a reference under section 31 is a decree there is no reason why a decision under section 49 should not be regarded as a decree. In the present condition of the Act all awards are decrees and all decisions of the Civil Court other than awards on a reference under section 31 (2) are also decrees. I do not see any reason why decisions on reference under section 49 should not also be decrees. The earlier decisions therefore are of no value now. The whole scheme of the Act from the point of view of the question whether decisions of Court are decrees and whether appeals lie therefrom has entirely changed. The preliminary objection is therefore overruled and I hold that both the appeals lie.

The next question is whether the claimant has precluded himself from insisting on the whole house being acquired by any delay in making his claim. I have already set forth the circumstances under which he made his claim on 29th September, that is, after the award, and I think there is nothing in his conduct amounting to laches or estoppel. But apart from this, there is nothing in section 49 requiring the claimant to put forward this particular claim, namely, that the

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whole house should be acquired, at any particular stage of the proceedings. The learned Government Pleader argued that this sub-clause 2 of section 49 (1) shows that it should be made before the Collector made his award. But I do not think it shows anything of the kind. It only shows that in a case where it was made before the award the owner may withdraw or modify his desire. I cannot imply from this clause that such claims should be made before the Collector made his award. I do not think that legislation by implication of this kind is justified, and apart from this clause there is no other clause which could be relied on to show that the owner should make this kind of claim before the award is made.

The third question that arises in the case is with reference to the merits. The question is whether the land proposed to be taken is reasonably required for the full and unimpaired use of the house under the last clause of section 49 (1). Mr. Sitarama Rao, the learned Advocate for the claimant, referred to a number of English decisions and also the decision in *Khairati Lal v. The Secretary of State for India in Council* (1). The English Act and the Indian Act (X of 1870) on which these decisions were based did not contain a clause similar to that in section 49 (1). As was pointed out in the decision in *Venkataratnam Naidu v. The Collector of Godavari* (2) the clause was inserted to meet these decisions. I do not therefore think that these decisions are of any value to us. In the present case a small slice of the backyard is taken away for the road. It cuts off a small fuel shed which is a thatched structure. It also cuts off a portion of a latrine at the north-east corner of the compound. It is true that a latrine is necessary for the enjoyment of a house. If there is no other

place within the compound where a latrine can be built for the use of this house, I think the owner can reasonably insist on the whole house being acquired. I do not think it is proper to point out to him that he should build a latrine beyond the compound by purchasing some other site outside the present compound. But it seems to me that the District Judge is right in holding that there is ample space within the backyard in which a latrine of the former size, namely, 8 feet 9 inches by 10 feet 3 inches, can be built without any particular inconvenience to the use of the house. Similarly a fuel shed can be put up. It cannot be successfully argued that a latrine and a fuel shed can be put up only at the places at which they stood at the time of the acquisition. Only then, can it be successfully argued that the land acquired is reasonably necessary for the enjoyment of the house. I therefore agree with the view of the District Judge that this is not a case in which the claimant can insist on the acquisition of the whole house. The result is that Appeal No. 443 should be dismissed with costs.

The District Judge thinks that the amenities of the house have somewhat suffered by taking away a substantial portion of the backyard and for this he gives damages for severance—Rs. 500. We do not see any reason why we should differ from the view of the District Judge. I think therefore that Appeal No. 226 should also be dismissed with costs.

CORNISH J.—In the Appeals 217 to 229 I entirely agree with the judgment just delivered, except upon one point, namely, the date for ascertaining market-value for the purpose of compensation.

In my opinion, 1st February 1921, the date of publication in the *Fort St. George Gazette* of the Government's notification under section 12, is the date at

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(1) (1889) I.L.R. 11 All. 378.

(2) (1903) I.L.R. 27 Mad. 350, 354.

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which the market-value is to be determined. In the lower Court it appears to have been thought that, because the Government was empowered by section 12 to fix a date for the preparation and submission of a draft scheme by the Municipal Council, the date when once fixed was unchangeable. But the date is not fixed by the Act. Section 12 says that the Local Government may require the Municipal Council "before a fixed date" to prepare and submit a scheme. This clearly means that the Government is to fix a date, and a power to fix a date carries with it a power to extend the date originally fixed, unless there is anything in the Act to the contrary. On the other hand, when a Municipal Council proceeds under sections 9 and 10 to initiate a scheme, section 11 fixes the time within which the draft scheme is to be prepared and published, and the power of the Local Government to extend this period is expressly limited by section 11. But the provision made by section 12 is "notwithstanding anything contained in sections 8 to 11", and this means that the power of the Government to fix a date under section 12 is free from the limitation imposed by section 11.

The question is, does the fact of the Local Government altering the date originally fixed for submitting a scheme under section 12 affect the date of the notification for the purpose of section 35 (2)? It seems to me that the fixing of a date for the submission of a scheme is subsidiary to the main object of the publication of the notification, which is to give public intimation of the Government's resolve that a town-planning scheme shall be made by the Municipal Council. This also appears to be the main object of the notification under section 10 (1) when a Municipal Council has in the exercise of its powers under section 9 resolved to make

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a town-planning scheme. That is the reason, I think, why section 35 (2) provides that, "in determining the amount of compensation to be awarded for land required under the Act, the Collector and the Court shall take into consideration (a) the market-value of the land at the date of publication of the notification under section 10 (1) or section 12, as the case may be." It could not, in my opinion, be successfully contended that, if after publication of a notification under section 10 (1) the Municipal Council obtained an extension of time from the Local Government under section 11 (1) for the preparation and publication of the draft scheme, the date for determining the market-value under section 35 (2) would be correspondingly shifted, (and more than one extension might be granted) for, that would be to make the date for determining the market-value not the date of publication of the notification under section 10 (1), but the date when time was finally extended under section 11 (1). And I see no reason why an extension of the time originally fixed by Government under section 12 should have any different result. In neither case does the Act require the publication of a fresh notification when an extension of time is given, and in the absence of such statutory requirement it appears to me that there is no foundation for the argument that the extended date for the submission of the draft scheme must be treated as the date of publication of the notification for the purpose of section 35 (2) (a).

But, as my Lord has pointed out, the question is not of practical importance in this case. The evidence of sales of plots between November 1919 to May 1920 and May 1921—excluding the six-pies plot which was obviously exceptional and should not be taken into account in striking an average—shows that a rate of a

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little over two annas per square foot would be a fair market-value for February 1921.

With regard to Appeal 443 of 1929 I agree that this appeal should be dismissed, not on the two preliminary objections taken by the learned Government Pleader, but on the ground that the District Judge has rightly held that the appellant is not entitled to compel the Municipal Council to acquire the whole of his premises. Section 49 of the Land Acquisition Act cannot, in my opinion, be construed as requiring that an owner must before the award has been made express his desire to have the whole of the house or building acquired; though that would be the normal procedure. No doubt the section provides that an owner may withdraw or modify his expressed desire before the award is made. But that does not imply that an owner who has not made his claim prior to the award can in no circumstances make it afterwards. It has been suggested that the Acquisition Officer's notice under section 9 of the Land Acquisition Act furnished the proper opportunity to the appellant to make a claim under section 49. But the particulars required to be put forward under section 9 are quite different from a claim under section 49. It is not necessary to decide whether, when a draft scheme is published under section 14 (1) of the Town Planning Act, the objections and suggestions relating to the scheme which have to be made within the period of sixty days would include a claim of an owner under section 49 to have the whole of his premises acquired when the scheme proposes to take only a part, or whether, if an owner neglected to put forward this claim within the prescribed period for making objections and suggestions, he would be precluded from doing so thereafter. The question does not arise, because there was no publication of the draft

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scheme here. It is clear that the appellant is not otherwise estopped by anything he did or failed to do. At the time when the award was made there was no occasion for him to put forward a claim under section 49. The Municipal Council had agreed with him to divert a road, and if this deviation from the scheme had been carried out there would have been no necessity for the taking of any portion of his premises. Unfortunately, the Government refused to concur in this arrangement and only signified their refusal after the award had been made. In this state of facts I do not think that the appellant was debarred from having the question whether the Municipal Council should take the whole of his premises referred to the Court. On the authority of *Venkatareddi v. Adinarayana Rao*(1) which in turn followed the Privy Council ruling in *Ramachandra Rao v. Ramachandra Rao*(2) the decision of the Court upon this reference under section 49 must be held to be a decree and therefore appealable. But I think that the appeal fails on the merits. The appellant can only insist on the whole of his house being acquired if the parts proposed to be taken "form part of the house". This is entirely a question of fact which the Court in deciding is required by section 49 to "have regard to the question whether the land proposed to be taken is reasonably required for the full and unimpaired use of the house". Looking at the plan of the appellant's premises it appears to me that there are good reasons for the District Judge holding that the portion taken under the scheme is not reasonably required for the full and unimpaired use of the appellant's house, and consequently the appellant cannot compel the Municipal Council to acquire the whole.

G.R.

(1) (1928) I.L.R. 52 Mad. 142.

(2) (1922) I.L.R. 45 Mad. 320 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

1931,
August 3.

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PLAINTIFFS), APPELLANTS,

v.

SANKARA VELAYUDAM CHETTIAR (APPELLANT-
DEFENDANT), RESPONDENT.*

Hindu Law—Adoption—Agreement between an adoptive and a natural father at time of—Disposition of family property by former pursuant to, contrary to rule in the case of Krishnamurthi Ayyar v. Krishnamurthi Ayyar, (1927) I.L.R. 50 Mad. 508 (P.C.)—Void or voidable—Ratification by adopted son of—Validity of—Conditions—Dispositions by adoptive father forming part of same arrangement—Ratification by adopted son of one of—Inference of, from ratification by him of the other dispositions—When proper.

An arrangement between an adoptive and a natural father disposing of the former's family property in violation of the rule in *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*, (1927) I.L.R. 50 Mad. 508 (P.C.), is not voidable in the ordinary sense of the term but is void against the adopted son. But such an arrangement is capable of validation by the adopted son by his own ratification after he comes of age. Such a ratification need not necessarily be accompanied by all the ingredients of a valid contract and need not be made between the adopted son and the party benefited by the invalid disposition; *Ramasami Aiyar v. Venkataramaiyan*, (1879) I.L.R. 2 Mad. 91 (P.C.), followed. An act amounting to an election by the adopted son to hold it good, sufficient according to the doctrine enunciated by the Privy Council in *Rangasami Gounden v. Nachiappa Gounden*, (1918) I.L.R. 42 Mad. 523 (P.C.), followed and applied in *Ramakottayya v. Viraraghavayya*, (1928) I.L.R. 52 Mad. 556 (F.B.), is sufficient for that purpose.

Whether a ratification by the adopted son is of the whole transaction or arrangement or only of a particular portion of it is essentially a question of fact.

* Letters Patent Appeal No. 33 of 1930.

In a case in which a Hindu had disposed of by way of bequest portions of his family property in favour of his deceased brother's widow for life with remainder absolutely to her daughter, it was found that that and other dispositions of family property were made in pursuance of an arrangement made by the testator with the natural father of the boy whom he wished to adopt in consideration of the adoption, and that the adopted son had ratified all the other dispositions forming part of the same arrangement and had not questioned the disposition in favour of the testator's brother's widow and her daughter for a period of more than twenty years after attaining majority. From all this and from the oral evidence of the adopted son himself the first appellate Court came to the conclusion that the adopted son in affirming and accepting the arrangements made by his natural father affirmed them in their entirety without leaving any exception in respect of the disposition in favour of the testator's brother's widow and her daughter.

Held that it was competent for the first appellate Court to come to that conclusion and that its finding was a finding of fact which was binding in second appeal.

APPEAL under clause 15 of the Letters Patent against the judgment of ANANTAKRISHNA AYYAR J. passed in Second Appeal No. 1732 of 1925 preferred to the High Court against the decree of the Court of the Additional Subordinate Judge of Tinnevely in Appeal Suit No. 267 of 1924 (Appeal Suit No. 438 of 1924, District Court, Tinnevely—Original Suit No. 137 of 1921, District Munsif's Court, Ambasamudram).

K. V. Venkatasubramania Ayyar for appellants.

B. Sitarama Rao and K. Venkateswaran for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by KRISHNAN PANDALAI J.—The question in this appeal is whether a disposition by way of bequest by a Hindu of portions of the family property in favour of his deceased brother's widow for life with remainder

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absolutely to her daughter can be held to be ratified by his adopted son when it is found that this and other dispositions of family property were made in pursuance of an arrangement made by the adoptive father with the natural father of the boy whom he wished to adopt in consideration of the adoption and it is also found that the adopted son has ratified all the other dispositions forming part of the same arrangement and has not questioned the disposition in dispute for a period of more than twenty years after attaining majority.

The facts are fully stated in the judgments of the District Munsif and the learned Subordinate Judge. One Veerabahu died in 1889, having a short time before his death adopted the present respondent and at the time of the adoption having made, in pursuance of an arrangement with the respondent's natural father, certain dispositions by way of two wills, Exhibits A and B, in respect of his family property. The substance of the arrangement was that he set apart certain properties for the maintenance of his two wives and his brother's widow for their lives, gave certain other property absolutely to his brother's daughter, and provided that the brother's daughter should take the property given for maintenance to the brother's widow after the latter's death. He also set apart certain property for charity and left the rest of the estate to the son who was to be adopted. The brother's daughter (first plaintiff-appellant's mother) died in 1918. The suit was brought in 1921 by the appellants because the respondent, who had attained majority in 1899 and till then raised no dispute about the disposition in the father's wills and had ratified and affirmed them so far as other dispositions are concerned, began to interfere with the first appellant's possession of the property in dispute soon after the death of

Veerabahu's brother's widow who had been in possession till her death in 1921. So far as is now material, the first appellant urged that the respondent, defendant, had accepted and affirmed the wills and attested a sale deed for property conveyed under the wills to the first appellant's mother and grandmother and that the respondent is therefore estopped from questioning the dispositions in the wills. The respondent, after contending that the wills were invalid as against him as they related to ancestral property, contended that he had not accepted or affirmed those dispositions because he had attested the sale deed mentioned in the plaint without knowing its contents. The first and fourth issues raised two questions, the former as to the validity and binding character of the wills and the latter as to estoppel by the defendant's conduct. In dealing with these issues both the District Munsif and the Subordinate Judge dealt with the long period of thirty-two years which had elapsed since Veerabahu's death before the suit and the acts of the defendant-respondent which showed that at the time of the adoption of the respondent, Veerabahu and the respondent's natural father had agreed to the dispositions of the wills as a just provision for the two branches of the family and also that the wills were acted upon during this whole period and that the respondent himself had accepted and affirmed their validity by attesting a sale deed by the first appellant and his mother and grandmother of the properties left to their branch to a stranger and by entering into an arrangement for managing the charities established by the wills with the other branch of the family. They therefore held that both by virtue of the agreement between the father and Veerabahu at the time of the adoption and also by virtue of the defendant's conduct in ratifying the dispositions

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of the wills after Veerabahu's death the defendant-respondent is estopped from contesting the first appellant's rights. These judgments were pronounced in December 1923 and January 1925. The respondent filed a second appeal to this Court in September 1925. Before the appeal came on for hearing before ANANTAKRISHNA AYYAR J. in August 1929, the decision of the Privy Council in *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*(1) was pronounced in March 1927 and was reported in the same year. In view of this decision, which reversed the decision of this Court in *Krishnamurthi Aiyar v. Krishnamurthi Aiyar*(2), the learned Judge thought that the lower Courts had failed to appreciate clearly the points for consideration and he therefore called for findings on three matters, (1) the exact nature of the arrangement entered into at the time of the adoption, (2) whether the defendant is in any way equitably estopped from claiming the properties and (3) whether the defendant has in any way ratified the arrangement, if any, come to at the time of the adoption. Another learned Subordinate Judge returned findings on these issues. As to the arrangement he found that Veerabahu and the respondent's natural father at the time of the adoption of the respondent entered into an arrangement whereby the natural father consented to the bequests under the two wills and agreed to the respondent taking the properties undisposed of by them. On the question of ratification he found that the above described arrangement as well as the bequests made by the wills were accepted by the respondent as valid. He went on to say that it was not a case of ratification in the strict sense as the bequests evidenced by the wills were not made on

(1) (1927) I.L.R. 50 Mad. 508 (P.C.).

(2) (1924) 49 M.L.J. 252.

behalf of the respondent, but he added that nevertheless the defendant can (must) be held to have ratified his natural father's consent to abide by the bequests made in the two wills. On the question of estoppel he held that there was no estoppel in the proper sense because the respondent had made no representation on which the first appellant or his predecessors in title had acted to their prejudice. After recording these findings which was all that he was required to do, the Subordinate Judge went on to consider the validity of the wills in view of the recent decision of the Privy Council, and in the end opined that the two wills are valid only to the extent of the bequests made in favour of Veerabahu's wife and the brother's widow. This was an opinion on a question of law and was as such not binding on the learned Judge in second appeal.

The learned Judge in second appeal held that, according to the decision in *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*(1), the dispositions of the two wills, although they were assented to by the respondent's natural father, were not binding on the respondent so far as they went beyond the provisions for his own wives and his brother's widow who was entitled to maintenance. In short the wills were invalid to the extent of the dispositions therein contained in favour of Veerabahu's brother's daughter, the first appellant's mother. To this extent we agree with the learned Judge.

But this does not dispose of the case because the respondent would be bound by the dispositions if he had, as found by the Subordinate Judge, ratified them by subsequent conduct. We are unable to agree with the learned Judge's view as to the nature of this finding

(1) (1927) I.L.R. 50 Mad. 508 (P.C.).

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and its effect upon the case. He says that the finding on the question of ratification is against the appellants and in favour of the respondent so far as the suit properties are concerned. In other words he limited the effect of the ratification to the dispositions other than that in respect of the suit properties. There is no doubt, according to the decision of the Privy Council in *Ramasami Aiyar v. Venkataramaiyan*(1), that invalid dispositions by an adoptive father at the time of the adoption and in consideration of it may become binding on the adopted son if he subsequently ratifies them and this was recognized by the learned Judge. Unless, therefore, his view that the respondent's ratification, though it affected the other dispositions of the will, did not affect the disposition of the property now in dispute can be supported, that disposition would be binding on the respondent, its original invalidity notwithstanding. Whether a ratification is of a whole transaction or arrangement or only of a particular portion of it is essentially a question of fact. If there is evidence upon which the Subordinate Judge could have found that there had been ratification of the entire arrangement in pursuance of which the wills were executed, his finding that they were ratified as a whole could not be disturbed in second appeal. We have carefully examined the finding of the Subordinate Judge and we are unable to see in it any justification for any distinction so far as ratification is concerned between the dispositions of the other properties and the disposition of the property now in dispute. The Subordinate Judge expresses himself as above stated quite generally in that portion of his judgment where he records his finding as to ratification. We have already stated that

(1) (1879) I.L.R. 2 Mad. 91 (P.C.).

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the Subordinate Judge's view as to the invalidity of the wills in respect of this property was based upon his view of the decision in *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*(1). As to this he bases his opinion upon what he considers to be the view of the Judicial Committee, namely, that the doctrine of "approve and reprobate" is not applicable. Their Lordships were not in this passage referring to ratification at all. They were simply enforcing the view that the adopted son cannot be defeated by an invalid disposition on the ground that he is approving and reprobating. They point out that the only thing which he approves is his adoption which has the result of making him entitled to all the property of the family which had not been validly alienated away. Nor can he therefore be said to be reprobating a disposition which he need not reprobate at all but which is simply invalid against him by reason of his having become a member of the family. This explanation of the true ground of the adopted son's right to disregard invalid dispositions made by the adoptive father at the time of the adoption is entirely independent of and does not affect the question of ratification. In other words it is not affected by the doctrine enunciated in *Ramasami Aiyar v. Venkataramaiyan*(2) that, even though a disposition by the adoptive father be such that the adopted son may disregard it, he may, by his subsequent conduct of affirming those invalid dispositions, put it beyond his power to disavow them. The latter is the question in this case. The finding, so far as it is one of fact, of the Subordinate Judge being that the respondent had ratified and affirmed the bequests under Exhibits A and B, that finding in our opinion was binding on the second

(1) (1927) I.L.R. 50 Mad. 508 (P.C.). (2) (1879) I.L.R. 2 Mad. 91 (P.C.).

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appellate Court if there were evidence to support it. In our opinion, there was ample evidence to support the finding that the respondent had affirmed the whole of the arrangement and dispositions covered by the two wills, Exhibits A and B. It is not merely that for more than twenty years after he attained majority he did not question them. So long ago as 1892 the first appellant's mother on her attaining majority had got possession in pursuance of the wills from the respondent's natural father of the properties given to her absolutely under the will. The respondent has not questioned this and has said in the box he has no intention of questioning it. It is impossible for him to do so at this distance of time. In 1918 he attested a sale deed by the first appellant, his mother and grandmother of some property left to them on exactly the same terms as the property now in dispute, that is, to the grandmother for life and afterwards to the mother absolutely. In 1920 the respondent and the first appellant entered into mutual agreements for the management of the charities established by the wills. From all this and from the oral evidence of the respondent himself there was sufficient evidence on which the Subordinate Judge might have come to the conclusion that the respondent in affirming and accepting the arrangements made by his natural father affirmed them in their entirety without leaving any exception in respect of the property now in dispute. In this view of the case the learned Judge should have upheld the finding and dismissed the appeal.

But the learned Advocate for the respondent has urged that the ratification by an adopted son which might validate an invalid disposition according to the decision in *Ramasami Aiyan v. Venkataramaiyan*(1)

(1) (1879) I.L.R. 2 Mad. 91 (P.C.).

is not what is proved in this case. He argued (1) that the ratification in such a case must have all the ingredients of a valid contract, that is, consideration and the rest, and that it is not enough that a mere unilateral affirmation not addressed to the party benefited by the disposition is made; (2) that an arrangement entered into by a natural father at the time of his son's adoption is not a voidable transaction like a widow's or guardian's alienation which requires to be set aside by the reversioner or ward but is void and remains void until it is validated by an independent and valid act of the adopted son—the argument was that the ratification in this case does not satisfy the above requirements but amounts at the most to the exercise by the respondent of an option not to question certain matters which must be limited to those particular matters—; (3) that such ratification as there was in this case was made at a time when such agreements between the adoptive father and natural father were considered valid so long as they were reasonable and was therefore made in ignorance of the respondent's rights and therefore cannot avail after the decision in *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*(1). We may at once concede that an arrangement between an adoptive and a natural father disposing of the father's family property in violation of the rule laid down in *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*(1) is not voidable in the ordinary sense of the term but that it is void against the adopted son. At the same time there can be no doubt that such arrangements are capable of validation by the party affected, the adopted son. In the words of their Lordships in *Ramasami Aiyan v. Venkataramaiyan*(2),

(1) (1927) I.L.R. 50 Mad. 508 (P.C.).

(2) (1879) I.L.R. 2 Mad. 91, 101 (P.C.).

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“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 came of age.”

The word “void” in this context has been explained in *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*(1) as meaning not an agreement that was *funditus null*, one incapable of producing any legal result. It is not that; but so far capable of legal results as to be capable of ratification by the son when he comes of age. But this conclusion does not materially advance the respondent's case. The question still remains whether the respondent in this case validated his adoptive father's disposition by his own ratification after he came of age. That was the precise question which was remitted by the learned Judge and found as we have observed in favour of the appellants. We have not been referred to any authority to show that such ratification must necessarily be accompanied by all the ingredients of a valid contract and must be made between the adopted son and the party benefited by the invalid disposition. On the contrary, the agreement of 19th August 1871 in *Ramasami Aiyar v. Venkataramaiyan*(2), which, according to their Lordships, was a sufficient ratification, was one between the adopted son and the widow, the alienor, and not between him and the alienees. Still it was held that the alienations were sufficiently ratified. Nor are we able to see why, if it is open to the adopted son by his own act to ratify and validate arrangements made by his adoptive father, an act amounting to an election to hold it good, sufficient according to the doctrine enunciated by the Privy Council in *Rangasami Gounden v. Nachiappa*.

(1) (1927) I.L.R. 50 Mad. 508 (P.C.).
(2) (1879) I.L.R. 2 Mad. 91, 101 (P.C.).

Gounden(1), followed and applied in *Ramakottayya v. Viraraghavayya*(2), should not be sufficient for that purpose. In this case the acts by which the respondent affirmed some of the dispositions of Virabahu's wills were acts to which the first appellant and his mother were parties (Exhibits C and C-1). The ratification in this case, therefore, cannot be objected to on the ground that it was made to a third party. Lastly, it cannot be said that the respondent was ignorant of his rights at the time of ratification because the decision in *Krishnamurthi Ayyar's* case was not then given. The question to what extent arrangements made by the natural father at the time of the adoption are binding on the adopted son had engaged the Courts long prior to the decision in *Ramasami Aiyar v. Venkataramaiyan*(3). In that case their Lordships left the general question open, saying that it was not altogether unattended with difficulty and that the decision of the Bombay High Court in *Chitko Raghunath Rajadiksh v. Janaki*(4) 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. The numerous decisions considered in *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*(5) reflect the ebb and flow of judicial opinion on this topic and they leave no room for the view that the respondent could have been ignorant of his right to question the disposition of the wills in this case assented to by his natural father. The respondent was certainly ignorant of the particular decision which their Lordships of the Privy Council delivered in *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*(5). He could not have anticipated it, but that

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(1) (1918) I.J.B. 42 Mad. 523 (P.C.). (2) (1928) I.L.R. 52 Mad. 556 (F.B.).
(3) (1879) I.L.R. 2 Mad. 91 (P.C.). (4) (1874) 11 B.H.C.B. 199.
(5) (1927) I.L.R. 50 Mad. 508 (P.C.).

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could not absolve him from the consequence of his previous and deliberate acts done at a time when the adopted son's rights were well-known, and if, knowing of such rights as the Courts would then have upheld, he elected to ratify the arrangement and the dispositions under the wills, he cannot now be allowed to go back upon it. The result is in our opinion that the learned Judge should have dismissed the second appeal. We set aside the decision appealed from and restore the decree of the District Munsif with costs throughout.
A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Curgenvven.

S. R. M. A. R. RAMANATHAN CHETTIAR (RESPONDENT),
PETITIONER,

1931,
August 26.

v.

THE HONOURABLE RAJAH SIR ANNAMALAI
CHETTIAR (PETITIONER), RESPONDENT.*

*Code of Civil Procedure (Act V of 1908), O. XI, rr. 15 and 18—
Inspection—Right of—Documents relied upon by plaintiff as
evidence in support of his claim—Documents entered in list
attached to plaint—Right if extends to—Defence—Inspection
before filing of—Right of—Discretion of Court to allow
or disallow inspection—Principles regulating exercise of.*

The right to inspection conferred by rule 15 of Order XI of the Code of Civil Procedure is not limited to documents sued upon but extends to documents relied upon by the plaintiff as evidence in support of his claim.

Documents entered in a list attached to the plaint come within the description in rule 15 of Order XI of documents to which reference is made in the pleadings. The only reasonable way of reading Order VII, rule 14, with Order XI, rule 15, is to hold that the expression "referred to" is equivalent to "entered in the list". For this purpose the list must be deemed to be part of the plaint.

Chandmull Goneshmull v. Dhanraj Ganapatroy, (1919) 24 C.W.N. 302, dissented from.

To the extent indicated in the proviso to rule 18 (1) of Order XI the Court has a discretion to withhold inspection; but the onus rests on the party resisting an order for inspection to show that it should not be made in the special circumstances of the case.

The English rule is ordinarily to allow inspection even though the defence may not have been put in. In India, while the Court has a certain discretion, limited to the terms of the

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proviso to rule 18 (1) of Order XI, it would not be a proper exercise of that discretion to refuse inspection on the general ground that it was sought before the written statement was filed.

PETITIONS under section 115 of the Code of Civil Procedure (Act V of 1908) praying the High Court to revise the order of the Principal Subordinate Judge of Devakotta, dated 13th December 1930 and made in Interlocutory Applications Nos. 1204, 1231, 1269, 1373 and 1374 of 1930.

S. Srinivasa Ayyangar (V. *Ramaswami Ayyar* with him) for petitioner.—*Quilter v. Heatly*(1), relied upon by the Court below, was a case where the documents inspection of which was allowed were, though not documents sued upon, yet documents which formed part of the cause of action of the plaintiff. Inspection before the filing of the defence is not allowed as a general rule; see *Halsbury's Laws of England*, Volume XI, page 50; *Quilter v. Heatly*(1), *In re H. W. Strachan (an Alleged Lunatic)*(2), *Hope v. Brash*(3), *In re Fenner and Lord*(4) and *Benbow v. Low*(5). As to how the discretion has to be exercised, see *Halliday v. Temple*(6), *Turner v. Burkinshaw*(7), *Disney v. Longbourne*(8), *In re H. W. Strachan (an Alleged Lunatic)*(2), *Egremont Burial Board v. Egremont Iron Ore Company*(9), *Roberts v. Oppenheim*(10), *Bustros v. White*(11) and *In re Fenner and Lord*(4). There is no rule excluding the jurisdiction of the Court to grant discovery before the filing of the defence, but the Court will not in its discretion grant discovery at that stage; see *Sachs v. Spielman*(12). Documents in the list are not documents in the plaint; see *Chandmull Goneshmull v. Dhanraj Ganapatroy*(13). This case is also authority for the position that inspection will not be allowed before the filing of the written statement. Pleading means plaint or written statement; see Order VI, rule 1, of the Code. The list to be put in under the Code is not pleading or part thereof. Order VI,

(1) (1883) 23 Ch.D. 42, 50.

(3) [1897] 2 Q.B. 188.

(5) (1880) 18 Ch.D. 93.

(7) (1863) 66 E.R. 762.

(9) (1880) 14 Ch.D. 158.

(11) (1876) 1 Q.B.D. 423.

(2) [1895] 1 Ch. 439, 445.

(4) [1897] 1 Q.B. 667.

(6) (1856) 44 E.R. 325.

(8) (1876) 2 Ch.D. 704.

(10) (1884) 28 Ch.D. 724.

(12) (1887) 37 Ch.D. 295.

(13) (1919) 24 C.W.N. 302.

rule 2, of the Code makes a distinction between evidence and pleading. Endorsement on a writ is not pleading; see *Wallis v. Jackson*(1). Order VII, rule 9, of the Code refers to a case of endorsement; see *Ramprasad Chimanlal v. Hazarimull Lalchand*(2). A list is required not for the purpose of pleading but for guaranteeing the genuineness of documents. The penalty for not putting in a list is that those documents cannot be produced in evidence. Lists are not required to be contents of the plaint. *Minakshi v. Velu*(3) shows why the rule as to lists was introduced. *Ram Dayal Saligram v. Nurhurry Balkrishna*(4) was decided under the old Code. It is also distinguishable because there the document was referred to in the plaint. *Rapaport v. Kallianji Hirachand*(5) shows that inspection of documents referred to incidentally in the plaint ought not to be allowed.

Advocate-General (*A. Krishnaswami Ayyar*), with him *M. Patanjali Sastri*, *M. Subbaroya Ayyar*, *K. S. Rajagopala Ayyangar*, *K. Umamaheswaram* and *T. S. Krishnamurthi Ayyar* for respondents.—Prior to the Judicature Acts the ordinary rule on the Common Law side was to order discovery before the filing of the defence; see *Bray on Discovery*, 1883 edn., pages 263, 269. The Chancery rule was no doubt different; see *Bray*, page 161. The Judicature Acts reproduced the Common Law rule. For the present practice see *Bray*, page 240. Under those Acts, in case of documents referred to in the pleadings, the defendant is entitled to inspection; see *Bray*, page 243. The rule at the time when *Quilter v. Heatly*(6) was decided was that inspection would be given except in cases where good cause was shown. The effect of the introduction of the proviso to rule 18 of the English rules is not to change the rule as to discretion. The defendant is entitled to inspection or discovery unless the plaintiff shows that it is not necessary for the disposal of the suit. *In re H. W. Strachan (an Alleged Lunatic)*(7) has nothing to do with the inspection or discovery of documents referred to in the pleadings or in the possession of a party. The observations in that case as to prying of the opponent's evidence have no application to cases of documents referred to in the pleadings,

(1) (1883) 23 Ch. D. 204.

(2) (1930) I.L.R. 58 Calc. 418, 426.

(4) (1894) I.L.R. 18 Bom. 368.

(6) (1883) 23 Ch.D. 42.

(3) (1885) I.L.R. 8 Mad. 373.

(5) (1921) I.L.R. 46 Bom. 866.

(7) [1895] 1 Ch. 439.

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because with reference to them the theory is that the plaintiff himself offers them for inspection. *Benbow v. Low*(1) was a case of interrogatories and has no application. *Hope v. Brash*(2) was not a case of documents which plaintiff proposed to produce in a list. *Parnell v. Walter*(3) also was not a case in which the party relied upon the documents for purposes of his case. *Sachs v. Speilman*(4) was a case relating to particulars. *In re Fenner and Lord*(5) also has no bearing except as to the observation of CHITTY L.J. as to the effect of the proviso to rule 18. *Disney v. Longbourne*(6) was a case of interrogatories. As to when discovery is to be given, see Chancery Practice, 1931 edn., page 538. To entitle the other party to inspection the documents need not be identified or particularly described in the pleadings; see *Smith v. Harris*(7). As to the meaning of "referred to in the pleadings" in rule 15 of Order XI of the Code, *In re Hinchliffe, a Person of Unsound Mind, Deceased*(8). Clause 2 of rule 18 of the English rules says "at any time". The restriction of the right to inspection to the stage after the filing of the written statement is therefore not justified. Mulla, in his Civil Procedure Code, ninth edition, page 571, treats the right as a *prima facie* right. *Khetsidas v. Narotumdas*(9), following *Ram Dayal Saligram v. Nurhurry Balkrishna*(10), recognizes the distinction between documents annexed in a list and those not so annexed. The latter case is treated as good law. The observations at page 154 of the former case show that a minor is entitled to inspection.

[That case would fall under rule 18 (2) which is quite different—BY COURT.]

I am referring to it only to show that documents mentioned in a list are treated on the same footing as documents referred to in the plaint. Further the other side has not shown that the documents do not bear upon the question of management, the question in issue in this case.

V. Ramaswami Ayyar in reply.—The documents in *Quilter v. Heatly*(11) and *Smith v. Harris*(7) were documents which formed part of the plaintiff's cause of action and not

(1) (1880) 16 Ch.D. 93.

(3) (1890) 24 Q.B.D. 445.

(5) [1897] 1 Q.B. 667.

(8) [1895] 1 Ch. 117.

(10) (1894) I.L.R. 18 Bom. 388.

(2) [1897] 2 Q.B. 188, 192.

(4) (1887) 37 Ch.D. 295.

(6) (1876) 2 Ch.D. 704.

(7) (1883) 48 L.T. 869.

(9) (1907) I.L.R. 32 Bom. 152.

(11) (1888) 23 Ch.D. 42.

documents which were merely evidentiary. *In re Hinchliffe, a Person of Unsound Mind, Deceased*(1) was not a case of discovery or inspection. *Khetsidas v. Narotumdas*(2) follows the old rule.

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Cur. adv. vult.

JUDGMENT.

These five civil revision petitions are preferred against an order of the Subordinate Judge of Devakotta passed under Order XI, rule 18 (1), of the Code of Civil Procedure and allowing the respondents, who are defendants in Original Suit No. 109 of 1930 on his file, inspection of the documents contained in a list attached to the plaint. The substantial questions which I have to decide are, firstly, whether the Court could pass such an order in respect of these documents and, secondly, whether it was justified in allowing inspection before the defendants had filed their written statements.

A plaintiff's documents are of two kinds, differentiated by Order VII, rule 14, into (1) those which he sues upon and (2) those which he relies upon as evidence in support of his claim. The order requires him to produce class (1) with his plaint and to enter class (2) in a list to be added or annexed to the plaint. Under rule 15 of Order XI a party may at any time give notice to any other party in whose pleadings or affidavits reference is made to any document to produce such document for the inspection of the party giving such notice. An attempt has been made to contend that this rule only refers to documents of the former class, those on which the plaintiff sues, and not to documents relied on as evidence in support of his claim. It appears to me that this contention must fail because,

(1) [1895] 1 Ch. 117.

(2) (1907) I.L.R. 32 Bom. 152.

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in the first place, since the plaintiff has to produce documents upon which he sues at the time when he presents his plaint and has to deliver them or copies of them with the plaint, no necessity could arise to call upon him to give inspection of such documents. If a party wants to inspect the documents or copies of the documents filed with the plaint, provision is made for his doing so at the Court by rule 63 of the Civil Rules of Practice. Further, if the right to inspection were limited to documents sued upon, the rule would have been framed in different language. It is then argued that documents entered in a list attached to the plaint do not come within the description in rule 15 of Order XI of documents to which reference is made in the pleadings. This position too, I think, is untenable. The method which the Code prescribes of specifying the documents relied on in the plaint is to enter them in a list to be added or annexed to the plaint, and to hold that inspection could not be granted because these documents are mentioned in a list and not in the body of the plaint would be to render the rules relating to inspection futile. The only reasonable way of reading Order VII, rule 14, with Order XI, rule 15, is to hold that the expression "referred to" is equivalent to "entered in the list". It seems to me that for this purpose the list must be deemed to be part of the plaint, as for instance would be a schedule of property. It is to be noted that rule 14 of Order VII is headed "Documents relied on in plaint," which goes in support of this view. It is probable enough, as has been suggested, that one at least of the reasons for requiring the plaintiff to furnish a list of his documents with the plaint is to enable a defendant to apply for their inspection. I am unable to agree with *Chandmull*

Goneshmull v. Dhanraj Ganapatroy(1), where a learned Judge of the Calcutta High Court expressed a contrary opinion. I think that the learned Subordinate Judge has decided this point correctly.

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It is then said that he has conceded inspection to the defendants as a matter of right, whereas rule 18 (1) of Order XI invests him with a discretion which he should have used in order to refuse the request. It is not very clear from the terms of the lower Court's order what amount of discretion it believed itself to possess. After adverting to a conflict in the Indian decisions the learned Subordinate Judge decides to follow the English law on the subject which he says allows the defendant "as a matter of course" to inspect the documents referred to by the plaintiff in his statement of claim, even before the defendant files his written statement. On the other hand, in one particular at least he does consider the special position of the defendants, because he remarks that the fourth defendant being a minor it would be unjust to call upon him to answer the plaintiff's claim without being allowed to inspect the documents. As to there being a discretion in the Court to withhold inspection, it is unnecessary to go beyond the terms of Order XI, rule 18 (1), which closes with the proviso :

"Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs."

To the extent indicated the Court clearly has a discretion, though it is equally clear, I think, that the onus rests on the party resisting an order to show that it should not be made in the special circumstances of the case. This view of the intention of the rule is, I think, borne out by an examination of the corresponding

(1) (1919) 24 C.W.N. 302.

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English provision and of the case-law based upon it. Before doing this it is perhaps advisable to set out the grounds upon which the plaintiff claims that discretion should have been exercised in his favour. He disclaims any intention of founding his objections upon the nature of any particular documents and the question accordingly is whether the request should be granted or refused as a whole. The main objection raised, as has been already noted, is that it would be unfair to the plaintiff to allow inspection of his documents before the defendants file their written statements. It has also been urged that, considering the nature of the subject-matter of the suit, and the large body of documentary evidence involved, it would be oppressive to make such an order. The case-law cannot be expected to give much assistance in deciding this latter point, but it has been examined with special reference to the question whether it is usual to grant inspection before the written statement is filed.

There is a statement in Halsbury, Volume XI, page 50, that

"as a general rule discovery cannot be obtained till after defence has been delivered, since it is not until then that it is known what are the matters in dispute."

But this statement, I think, is general as regards discovery, which includes various methods of obtaining information from the opposite party such as the administration of interrogatories, calling for affidavits, etc. As regards the production of documents for inspection the rule is given (page 68) much in the terms of our Order XI, rule 15. It is unnecessary to go back to the rules in force before the Judicature Acts, when they appear to have been different on the Chancery side from what they were at Common Law. Such a case

for instance as *Halliday v. Temple*(1), decided in 1856, is probably no longer good law. In Bray's Law of Discovery, page 244, the law is noted as

"that a defendant is as a rule entitled to see the documents referred to in the statement of claim before putting in his defence",

which was the old Common Law rule. The leading case since the Judicature Acts is *Quilter v. Heatly*(2), which was decided under a rule corresponding to our rule 18 but without the proviso. The Court of Appeal, while holding that the rule even as it stood then gave the Court a discretion to refuse an application if good cause was shown, was of opinion that a defendant could claim inspection before putting in his defence. JESSEL M.R. says :

"It is suggested that although the terms of the rule are general it is sufficient for the plaintiff, in answer to such an application by a defendant to say that the defendant has not put in his defence. I cannot conceive that this is a sufficient answer. The defendant may say, 'Your case depends partly on a set of documents which you may have set out incorrectly. I wish to see them. It may be that I have made admissions which will put me out of Court. I wish to see the documents to know whether I have made such admissions and it is important for me to see them before I put in my defence.'"

And LINDLEY L.J. expresses the view that the rules were intended to give the opposite party the same advantage as if the documents referred to had been fully set out in the pleadings. It is true that this learned Judge in *In re H. W. Strachan (an Alleged Lunatic)*(3) has stated that in England it is considered contrary to the interests of justice to compel a litigant to disclose to his opponent before trial the evidence to be adduced against him, but I doubt whether in making that general statement he had in view the production

(1) (1856) 44 E.R. 325.

(2) (1888) 23 Ch.D. 42.

(3) [1895] 1 Ch. 439.

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for inspection of a plaintiff's document. The case related to an application for the production of documents not in the party's custody but in the custody of the Court in Lunacy. So too in *Hope v. Brash*(1) the question related not to the inspection of a document which the defendants proposed to produce in evidence but of a document in their possession which they had no intention of producing and which the plaintiff only wanted to see for a purpose unconnected with the prosecution of the suit. Several other English cases have been cited before me on behalf of the petitioner but they deal with some other form of discovery, such as the filing of interrogatories, and cannot be followed upon the subject of inspection. I see no reason to doubt that the English rule is ordinarily to allow inspection even though the defence may not have been put in. For an authority in India *Ram Dayal Saligram v. Nurhurry Balkrishna*(2), which follows *Quilter v. Heatly*(3), may be referred to. My conclusion is that while the Court has a certain discretion, limited to the terms of the proviso to Order XI, rule 18 (1), it would not be a proper exercise of that discretion to refuse inspection on the general ground that it was sought before the written statement was filed. Nor can I find anything in the special circumstances of this case to depart from the general principle. It has been urged that, having regard to the nature of the subject-matter of the suit and especially to the number of documents (834), to make such an order would be oppressive. The mere number of documents can afford no guide to the exercise of discretion and we have to look at the nature of the claims made in the plaint. It contains allegations that the first defendant and the fourth

defendant's adoptive father had assumed management and control of the plaintiff's estate and used that position in order to despoil it over a long term of years and in the course of a large number of transactions in India and elsewhere. The first defendant in his reply to the plaintiff, dated the 11th August 1930, has denied that he ever managed the estate, but this denial does not amount to an assertion that he never had anything to do with it, whether as adviser or in some other capacity falling short of management. The allegations in the plaint are made in a more or less general form and it would certainly be very difficult for the first defendant, having regard to their multiplicity and range, to prepare an answer unless he is allowed to see upon what documentary evidence they are based. As for the fourth defendant, who is a minor and who cannot be supposed to have any acquaintance with these transactions, it would be a sheer impossibility. I think accordingly that, so far from this being a case in which the ordinary rule should be relaxed in plaintiff's favour, it is eminently one in which it should be applied. Even though the learned Subordinate Judge has not dealt expressly with these aspects of the matter, yet, after hearing the petitioner's learned Advocate at length, I have come to the conclusion that there are no grounds to set aside the lower Court's order and re-open the application.

The civil revision petitions are dismissed but in the circumstances I make no order as to costs.

A.S.V.

(1) [1897] 2 Q.B. 188.

(2) (1894) I.L.R. 18 Bom. 368.

(3) (1883) 23 Ch.D. 42.

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APPELLATE CRIMINAL.

*Before Mr. Justice Curgenvven.*1931,
November 12.THE PRESIDENT, DISTRICT BOARD, TANJORE
(COMPLAINANT), PETITIONER,

v.

ADAM GHANNI ROWTHER (ACCUSED), RESPONDENT.*

Madras Local Boards Act (XIV of 1920 as amended by Act XI of 1930), sec. 223, proviso—Using a motor vehicle for hire without licence—Prosecution by District Board—Three months period—Starting point.

Under the proviso to section 223 of the Madras Local Boards Act, read with that section, a person, who does an act for which a licence is required, and fails to obtain a licence, may be prosecuted within three months of the expiry of the period for which the licence, if granted, would have been current.

Arthur v. Appavu Velan, (1927) 108 I.C. 411, 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 Second-class Magistrate of Nidamangalam in Calendar Case No. 38 of 1931.

P. Venkataramana Rao for petitioner.*K. Swaminathan* for respondent.*Public Prosecutor (L. H. Bewes)* for the Crown.*Our. adv. vult.*

JUDGMENT.

This petition has been filed by the President of the District Board, Tanjore, against a judgment acquitting the respondent of the offence of using a motor vehicle for hire without a licence. Such an act is prohibited by section 166 (1) of the Madras Local Boards Act

(XIV of 1920 as amended by Act XI of 1930), and is rendered punishable by section 207 read with Schedule VIII. The lower Court has found indeed that the respondent used his motor bus for hire without taking out a licence, but it considers that complaint was not made within the time prescribed by section 223.

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The question turns upon the construction of that section. It provides that no person shall be tried for an offence under the Act,

“unless complaint is made by the police, or the president of a local board, or by a person expressly authorized in this behalf by the local board or its president within three months of the commission of the offence.”

To the section is added this proviso:

“Provided that failure to take out a licence or obtain permission under this Act shall for the purposes of this section be deemed a continuing offence until the expiration of the period, if any, for which the licence or permission is required, and if no period is specified, complaint may be made at any time within twelve months from the commencement of the offence.”

It is urged for the petitioner that, the offence being a continuing one until the 31st December 1930, when the period expired for which the licence was required, a complaint made within three months of that date, as was the case here, would be in time. For the respondent I am asked to hold with the lower Court that time must be reckoned from the commencement of the continuing offence, i.e., from the date, 1st October, from which the licence, which was issued quarterly, should have been taken out.

In *King Emperor v. U Thin Ohn and others*(1) a question of this kind arose under the City of Rangoon Municipal Act in connexion with a case of keeping a private market without a licence: but I have been unable to apply the reasoning there employed, because

* Criminal Revision Case No. 599 of 1931.

(1) (1928) I.L.R. 7 Rang. 23.

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the learned Judge who decided the case based his decision upon the date when the Commissioner of the Corporation came to know that the offence was being committed. I have not seen the Rangoon Act; but such a test will not, I think, accord with the terms of the Madras Act. There is however this principle recognized in the decision, that time has not to be counted from the point when commission of the offence began. That was the view taken in *Emperor v. Bechardas*(1). The prosecution there was for allowing to remain undemolished a house constructed in contravention of municipal regulations, and the learned Judges point out that any other construction placed upon provisions of this character would in such circumstances enable the municipality to prosecute the owner of a completed building after any period whatever. The same considerations certainly do not arise here, where the owner of the motor bus breaks the law every time he uses it without a licence. On the other hand, I have been referred to a case of this Court, *Arthur v. Appavu Velan*(2), where DEVADOSS J. held that a person who kept an unlicensed potter's kiln was liable to prosecution at any time within three months of the expiry of the period during which the licence, if it had been granted, would have been current.

This last case is, I think, clear authority for the view put forward for the petitioner. It is objected that, on the wording of the proviso, it is not possible to apply it to the circumstances of such a case as the present; that the offence does not really consist, as the proviso would require, in a failure to take out a licence, but in an act, or a series of acts, of using a motor vehicle without licence; and that the section, without the proviso,

(1) (1930) 32 Bom. L.R. 768.

(2) (1927) 108 I.C. 411.

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requires that the period of three months should embrace that act or series of acts. Verbally, no doubt, there is some ground for a criticism of this kind. But I think that the intention of the section, read with its proviso, is clear. The essential part of the offence, from the point of view of the District Board, is a failure to take out a licence, on the part of a person who has by his conduct obliged himself to do so, for the period under reference—here the last quarter of 1930. It is not very material when and on how many occasions he used his bus during that quarter. Even if he used it only once he was no less bound to obtain a licence for the whole quarter. The terms of the proviso support this view by allowing in such cases a period of three months from the date when the licence would have expired for complaint to be made. The rule accordingly is simply this: If a person does an act for which a licence is required, and fails to obtain a licence, he may be prosecuted within three months of the expiry of the period for which the licence, if granted, would have been current. That, I think, is what the proviso, read with the section, means, and so construed it does not seem to afford undue opportunity for delay in taking action.

I conclude therefore that the complaint in the present case was within time. Since the learned Second-class Magistrate has not recorded any finding upon the facts I allow the petition, set aside his order of acquittal and direct him to dispose of the case in the light of the foregoing observations.

K.N.G.

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Pakenham Walsh.

1931,
September 8.

AKELLA SURYANARAYANA RAO PANTULU GARU
AND THREE OTHERS (DEFENDANTS FIVE TO SEVEN AND LEGAL
REPRESENTATIVE OF SIXTH DEFENDANT), APPELLANTS,

v.

DWARAMPUDI BASIVIREDDI AND SEVEN OTHERS
(PLAINTIFF AND DEFENDANTS ONE TO FOUR AND EIGHT TO TEN),
RESPONDENTS.*

*Contract—Charge created in favour of a third party—Third
party's right to sue on same.*

By a compromise entered into between the parties to a partition suit certain properties were allotted to certain branches to which were also allotted certain debts. It was stipulated that, until the debts mentioned therein were fully discharged, the properties allotted to the shares of the respective branches should be liable in the first instance, and that, "if any one sharer should fail to discharge the debts mentioned and consequently either obstruction is caused to the properties of the remaining sharers or the other sharers should be necessitated to discharge such debts, the sharer who has committed default should pay these amounts from and out of his properties as well as the losses sustained thereby together with interest to the sharers who have discharged those debts." In a suit by a creditor who was not a party to the compromise but whose debt had been directed to be paid as mentioned above, on a plea by him that the above recitals created a charge in his favour on the family properties,

held that the above recitals created neither a charge nor a trust in his favour but only a contract of indemnity among the parties to the compromise.

Held further that, even supposing a charge had been created in his favour, he being a stranger to the agreement, could not sue the parties to the same on foot of the agreement.

The headnotes in *Iswaram Pillai v. Sonnivaveru Taragan*, (1913) I.L.R. 38 Mad. 753, and *Subbu Chetti v. Arunachalam*

* Appeal No. 191 of 1929.

Chettiar, (1929) I.L.R. 53 Mad. 270 (F.B.), in so far as they state that an exception to the rule that a stranger to the contract cannot sue thereon exists in a case where a charge on immovable property is created in his favour by the contract, are misleading.

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APPEAL preferred against the decree of the Court of Subordinate Judge of Cocanada in Original Suit No. 43 of 1925.

Advocate-General (A. Krishnaswami Ayyar) with
Y. Suryanarayana and V. Govindarajachari for appellants.
T. R. Venkatarama Sastri with T. Satyanarayana
for first respondent.

M. Appalachari for fourth and fifth respondents.

P. Somasundaram for fifth and sixth respondents.

Second, third, seventh, and eighth respondents were
unrepresented.

Cur. adv. vult.

JUDGMENT.

JACKSON J.—Suit to recover Rs. 35,776-4-9 on the JACKSON J.
plea that the mortgages on the properties cited in
schedule A of the plaint executed by defendants 1 and
2 in favour of defendants 5 to 7, as well as the attach-
ment by eighth defendant, and court purchases by
defendants 9 and 10 are subject to the first charge
created in favour of plaintiff by the family partition
deed of 9th January 1920, Exhibit O.

This family derives from one Basivireddi who died
in 1915. He was a rich man and his son-in-law,
Venkayya, the father of the plaintiff, left considerable
sums in his hands, which he acknowledged by a pronote.
After his death the estate was in the hands of a receiver
who renewed the note. This is the basis of the plaintiff's
claim and the reality of the debt is not now disputed.
Issue 1 as to its validity was found in the affirmative
by the lower Court and that finding stands.

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The question for our determination is whether this debt was secured in 1920 when the members of Basivireddi's family, who were involved in a partition suit, came to a compromise which was embodied in a decree (see order at foot of compromise, Exhibit O. The actual decree is not exhibited but is admitted).

In the compromise certain properties were given to certain branches to which also were allotted certain debts as set forth in paragraph 13 of the document, and then it was provided :

"that until the debts mentioned above are fully discharged the properties allotted to the shares of the respective persons shall be liable in the first instance."

We prefer to read this as the similar deeds in the Madras Law Journal cases were read, simply as a contract of indemnity conferring no benefit upon the creditors; *T. A. Sesha Iyer v. S. N. Srinivasa Ayyar*(1) and *Imbioli v. Achampat Avukoya Haji*(2).

This finding rebuts the plaintiff's claim, and there is no real necessity for the appellant-defendants to fall back upon their second line of defence that, even supposing a charge had been created in his favour, plaintiff, as no party to that contract, cannot make it part of his cause of action. However, since the point has been fully argued, we will give our decision.

It is now recognized law that if A contract with B that B shall pay the debt owing by A to C, C cannot sue upon that contract alone unless he stand in the capacity of *cestui que trust*. The rule of Common Law laid down in *Tweddle v. Atkinson*(3) is that he must have been a party to the agreement and the rule of Equity in *Gandy v. Gandy*(4) is that he must stand as

(1) (1921) 41 M.L.J. 282.
(3) (1861) 1 B. & S. 393.

(2) (1916) 38 M.L.J. 58.
(4) (1885) 30 Ch. D. 57.

the beneficiary of a trust. It was formerly questioned how far that rule applied in India, and the matter came before a Full Bench of this Court in *Subbu Chetti v. Arunachalam Chettiar*(1) where the simple proposition was considered whether, if B promise A that B will pay the debt of A to C, C can sue B upon that promise.

The opinion of the Full Bench (page 237) is

"that where all that appears is that a person transfers property to another and stipulates for the payment of money to a third person, a suit to enforce that stipulation by the third party will not lie."

Consequently in this Presidency, at any rate, the law in India and in England is the same. C can only sue as a *cestui que trust*.

A cursory reading of the Madras Reports may suggest that another special exception has been approved by this Court, viz., the creation of a charge on immovable property by the contracting parties A and B.

In *Iswaram Pillai v. Sonnivaveru Taragan*(2) A contracted with B that B should pay C and C sued. Two grounds were taken: that C was a *cestui que trust* and that *Tweddle v. Atkinson*(3) did not apply to India as held in *Debnarayan Dutt v. Chunilal Ghose*(4). The discussion on the first ground proceeds to page 757 where it is held that no trust was created.

* * * *

On page 762 this result is reached, that unless the contract has been performed so that a trust has already been created, the suit cannot be maintained.

* * * *

The headnote runs :—

"Held, that C who was a stranger to the contract cannot sue B for the payment of his debt without joining A as a party.

(1) (1929) I.L.R. 53 Mad. 270 (F.B.).
(3) (1861) 1 B. & S. 393.

(2) (1913) I.L.R. 38 Mad. 753.
(4) (1913) I.L.R. 41 Cal. 137.

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SURYANARA-
YANA RAO . . . *Khwaja Muhammad Khan v. Husaini Begam*(1) and
v. *Debnarain Dutt v. Ramsadhan Mondol*(2), distinguished."

BANIVIREDDI.
JACKSON J. So far this is unexceptionable except that Ramsadhan should be Chunilal Ghose, and, as XLI Calcutta was published, a reference to a private magazine was unnecessary.

But then there is interpolated between these two passages a list of four exceptions as coming *per curiam*. Inasmuch as the whole judgment is *per curiam* this phrase is here otiose.

The second exception (b) is

"the creation of a charge on immovable property by the promisor . . ."

In the whole of this judgment a charge is only mentioned twice, once, the charge in *Debnarayan Dutt v. Chunilal Ghose*(3) which A erroneously thought he had given C when the debt originated and he deposited his patta with C, a matter which has no bearing on the legal question whatsoever, inasmuch as B is not concerned; and again at the end where *Khwaja Muhammad Khan v. Husaini Begam*(1) is held to refer to a specific charge for the benefit of a minor culminating in a trust. This suggestion of the headnote that C can sue B, if B has created a charge, is absolutely and entirely unwarranted by the judgment. It is a pure interpolation.

In *Subbu Chetti v. Arunachallam Chettiar*(4) the case in question was again the simple proposition of B contracting to pay the debt of A to C. The summary of the case-law on page 278 quotes the headnote to *Iswaram Pillai v. Sonnivaveru Taragan*(5) and the final decision on page 287 is that a person not a party to a contract cannot sue

(1) (1910) I.L.R. 32 All. 410 (P.C.). (2) (1913) 17 C.W.N. 1143.

(3) (1913) I.L.R. 41 Cal. 137.

(4) (1928) I.L.R. 53 Mad. 270 (F.B.).

(5) (1913) I.L.R. 38 Mad. 753.

"unless the case falls within the exceptions indicated in the case above referred to."

These exceptions were no material part of the question before the Bench, and the reference to them is merely by the way; in fact one might go far to seek a better illustration of an *obiter dictum*, yet the headnote details all these exceptions with no reference at all to *Iswaram Pillai v. Sonnivaveru Taragan*(1) as though they were the direct ruling of the Full Bench.

Nothing so crude has ever been ruled by this Court as that C may sue where the contract of A and B charges the money to be paid out of some immovable property.

* * * *

If plaintiff is to succeed it would be necessary to find, in the terms of *Cunningham v. Foot*(2) upon the construction of the written instrument, that there is land, the trustee of the land, and the *cestui que trust* for whose benefit in this respect the land is to be held; and it cannot be said here that plaintiff is such *cestui que trust* under the terms of Exhibit O. Therefore the plaintiff cannot derive any title under that document so as to make it part of his cause of action.

The appeal must accordingly be allowed with costs throughout to the appellant payable by plaintiff-respondent. The suit is dismissed as against defendants 5 to 7, 8 and 10 with costs to defendants below.

PAKENHAM WALSH J.—I have had the advantage of perusing my learned brother's judgment and entirely agree with it. At the best, paragraph 13 of the compromise agreement, Exhibit O, is ambiguous and therefore the conduct of the parties to it can be looked at in order to see in what sense they understood its terms. Their subsequent conduct leaves no room for

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(1) (1913) I.L.R. 38 Mad. 753.

(2) (1878) 3 App. Cas. 974, 984.

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doubt on the matter as pointed out by my learned brother. It is impossible also to see how the terms of the compromise were to be worked out if they created a first charge in favour of the creditors. The word "creditor" does not appear in the paragraph at all. The obligation to discharge the debts assigned to each member was a continuing one, and it is to be observed that according to the same paragraph 13,

"if any one sharer should fail to discharge the debts mentioned above and consequently, either obstruction is caused to the properties of the remaining sharers or the other sharers should be necessitated to discharge such debts, the sharer who has committed default should pay these amounts from out of his properties . . . to the sharers who have discharged such debts."

So that, a mere obstruction, say the attachment of a sharer's land by the creditor, brings the clause into action, and yet we must suppose, if a first charge was created in favour of the creditor on the lands allotted to the sharer who was to discharge the debt, that the aggrieved co-sharer had only some sort of second charge which had to be deferred till the creditor worked out his first charge or was otherwise satisfied.

As my learned brother remarks we have authoritative interpretations of what such clauses in a partition deed mean in *T. A. Sessa Iyer v. S. N. Srinivasa Ayyar*(1) and *Imbiohi v. Achampat Avukoya Haji*(2). I have no hesitation in holding that no charge in favour of creditors was created by Exhibit O, and consequently the plaintiff's suit as regards the respondents must fail.

As a member of the Full Bench of this Court in *Subbu Chetti v. Arunachalam Chettiar*(3), I am much obliged to my learned brother for pointing out the error which has crept into an *obiter* remark in that

(1) (1921) 41 M.L.J. 282.

(2) (1916) 33 M.L.J. 58.

(3) (1929) I.L.R. 53 Mad. 270 (F.B.).

decision, on a matter that was not at all directly before us. This was in consequence of an entirely misleading and incorrect headnote in *Iswaram Pillai v. Sannivaveru Taragan*(1). There was no discussion whatever before us as to the effect of a mere charge on property as enabling a third person not a party to the contract to sue. As the misleading *obiter dictum* has in one subsequent case at least, before a single Judge, been relied on, apparently with some success (vide Second Appeal No. 1192 of 1927) I am glad that the error should now have been traced to its source and pointed out.

G.R.

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PRIVY COUNCIL.

KADIYALA VENKATA SUBAMMA AND ANOTHER
(PLAINTIFFS), APPELLANTS,

v.

KATREDDI RAMAYYA, SINCE DECEASED, AND OTHERS
(DEFENDANTS), RESPONDENTS.

J.O.*
1982,
January 12.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Executor—Will of Hindu—Will to which Hindu Wills Act (XXI of 1870) does not apply—Absence of Probate—Vesting of Property—Powers of executor—Probate and Administration Act (V of 1881), ss. 4 and 90.

In the case of a Hindu will to which the Hindu Wills Act, 1870, does not apply the estate of the testator vests in the executor, if he accepts office, from the date of the testator's death, and he has the powers of an executor under the Probate

(1) (1913) I.L.R. 38 Mad. 753.

* Present :—Viscount DUNEDIN, Sir LANOELOT SANDERSON
and Sir GEORGE LOWNDEN.

VENKATA
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and Administration Act, 1881, even though probate has not been obtained.

Observations in *Administrator-General of Bengal v. Prem-lal Mullick*, (1895) I.L.R. 22 Calc. 788 ; L.R. 22 I.A. 107, and *Kurrutulain Bahadur v. Nuzbat-ud-dowla Abbas Hossein Khan*, (1905) I.L.R. 33 Calc. 116 ; L.R. 32 I.A. 244, discussed.

APPEAL (No. 95 of 1929) from an order of the High Court (December 9, 1925) setting aside a decree of the Additional Subordinate Judge of Ellore (March 6, 1922) and remanding the suit for trial.

The order appealed from was made consequent upon a judgment of the Full Bench, dated March 21, 1925, delivered by KUMARASWAMI SASTRI J. (CUTTS TROTTER C.J. and PHILLIPS J. concurring), reported as *Ramiah v. Venkatasubhamma*(1). The judgment held that in the case of wills to which the Hindu Wills Act, 1870, does not apply, the estate vests in the executor, if he has accepted office, from the date of the death of the testator, and the executor has the powers given by the Probate and Administration Act, 1881, although probate has not been obtained.

The present appeal was in effect an appeal from that decision. The facts appear from the judgment of the Judicial Committee.

E. B. Raikes K. C., Narasimham and W. Lakshmana Rao for appellants.—The Probate and Administration Act, 1881, applies only where probate has been obtained; it is an enabling Act. That is indicated by the preamble. That section 4 applies only where a grant has been made is shown by the heading of Chapter II, of which it is the first section. An executor of a will made in the mufassal was merely a manager before the Act, and if his position was intended to be altered although probate was not granted the Act would have so provided. Section 12 by which probate validates the earlier acts of the executor is unnecessary if the view of the Full Bench is right. Sections 59 and 127 show that the Act is dealing

(1) (1925) I.L.R. 49 Mad. 261 (F.B.).

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with cases in which probate has been granted. Section 92, sub-section 2, has been treated as against the appellants' contention, but its effect is merely to empower the Court when granting probate to remove restrictions in the will; the section in its present form was enacted in 1889 and was not intended to alter the law. Previous decisions of the High Courts of Madras and Bombay are against the appellants, but the decisions of the Calcutta High Court in *Sarat Chandra Banerjee v. Bhupendra Nath Bosu*(1) and *Sakina Bibee v. Mahomed Ishak*(2) are in their favour. The present question has not been directly before the Board but the appellants are supported by observations in the judgments in *Administrator-General of Bengal v. Prem-lal Mullick*(3) and *Kurrutulain Bahadur v. Nuzbat-ud-dowla Abbas Hossein Khan*(4). The judgment in *Meyappa Chetty v. Subramanian Chetty*(5), a Straits Settlements case, was regarded as being against the appellants, but it is submitted that it does not touch the present case.

[Reference was made also to *Fatma v. Shaik Essa*(6), *Shaik Moosa v. Shaik Essa*(7), *Ganapathi Aiyar v. Siramalai Goundan*(8) and *Sir Mahomed Yusuf v. Hargovandas Jivan*(9)].

Subba Row for respondents was not called upon.

The JUDGMENT of their Lordships was delivered by Sir GEORGE LOWNDES.—The appellants are beneficiaries under the will of one Madduru Venkata Subanna, who died on the 5th January 1917. He was a Hindu residing at Pedakapavaram, in the Kistna District of Madras. The respondent, Madduri Gangamma, is his widow, and was appointed (as is now admitted) executrix according to the tenor of the will, but has not obtained probate. The other respondents are a minor son, adopted by the widow, and various persons interested in the properties of the testator under alienations made by the widow purporting to act as his executrix.

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| (1) (1897) I.L.R. 25 Calo. 103. | (2) (1910) I.L.R. 37 Calo. 839. |
| (3) (1895) I.L.R. 22 Calo. 788 ; L.R. 22 I.A. 107. | |
| (4) (1905) I.L.R. 33 Calo. 116 ; L.R. 32 I.A. 244. | |
| (5) (1916) L.R. 43 I.A. 113. | (6) (1883) I.L.R. 7 Bom. 266. |
| (7) (1884) I.L.R. 8 Bom. 241. | (8) (1912) I.L.R. 36 Mad. 575. |
| (9) (1922) I.L.R. 47 Bom. 231. | |

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The suit out of which the appeal arises was instituted by the appellants to enforce their right to particular parcels of land which they alleged had been allotted to their shares under a family arrangement made shortly after the testator's death, or in the alternative for partition of the estate without regard to the alienations which, it was contended, the executrix had, in the absence of probate, no power to make, and which were further charged as fraudulent.

The trial Judge held against the appellants as to the family arrangement, and this is no longer in dispute. He was of opinion, however, that the alienations were incompetent, and he accordingly passed a preliminary decree in the appellants' favour, declaring the rights of the parties, and appointing a Commissioner to carry out the partition and to assess mesne profits. The Commissioner duly reported to the Judge, and eventually a final decree was made.

Appeals and cross-objections were filed against both these decrees by some of the respondents, and on the hearing in the High Court the following question, upon which the decision of the appeals turned, was referred to a Full Bench, viz. :—

“Whether an executor appointed by a will made in the mufassal of the Presidency has vested in him the estate of a testator and has all the powers of an executor as set out in the Probate and Administration Act, even though such executor does not obtain probate of the will, or whether his powers, unless he obtains probate, are only those of a mere manager as held in respect of executors previous to the Probate and Administration Act.”

The reference was heard by the Chief Justice and two puisne Judges, who recorded their opinion that :

“In cases of Hindu wills to which the Hindu Wills Act does not apply the estate vests in the executor (who accepts office) from the date of the testator's death, and that the

provisions of the Probate and Administration Act are applicable, even though probate has not been obtained.”

The appeals then came on again before the referring Judges who by their order of the 9th December, 1925, set aside the decrees of the trial Judge and remanded the suit for disposal on the basis of their judgment, with directions to try the question of the *bona fides* of the widow's alienations, and for that purpose to ascertain what debts were outstanding at the death of the testator.

From this order of remand the appellants have brought their appeal to His Majesty in Council, and the sole matter for the consideration of the Board is whether the judgment of the Full Bench, upon which the order under appeal rests, should be upheld.

The Hindu Wills Act (XXI of 1870) has no application to the present case, but the greater part of the Probate and Administration Act (V of 1881) applies to the wills of Hindus generally, and it is upon the terms of this Act that the result of the appeal turns.

The authorities have been discussed at length by KUMARASWAMI SASTRI J., who delivered the judgment of the Full Bench, and their Lordships think that nothing can be added by them to his careful examination of the case law on this subject. They will, however, refer later on to two decisions of the Board which have been relied upon by the appellants.

There has been a divergence of opinion between the High Courts of Madras and Bombay on the one hand, and of Calcutta on the other. It is the view of the former that has now prevailed, and their Lordships think that it is undoubtedly the right one.

The provisions of the Act directly in point are the first part of section 4 and sub-sections 1 and 2 of section 90, which run as follows :—

“Section 4. The executor or administrator, as the case may be, of a deceased person is his legal representative for all

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purposes, and all the property of the deceased person vests in him as such."

"Section 90. (1) An executor or administrator has, subject to the provisions of this section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under section 4.

"(2) The power of an executor to dispose of immovable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him, and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order. . . ."

The reasoning of the Calcutta decisions as to the meaning of section 4 was based largely on the preamble, which showed that the object of the Act was to provide for grants of probate and letters of administration, and upon the heading of Chapter II, in which the section occurred, "of grant of probate and letters of administration", and it was thought to follow from this that "executor" in section 4 could only mean an executor to whom probate had been granted.

This argument was elaborated before their Lordships, and reference was made to other sections of the Act which, it was urged, contained the same implication, particular reliance being placed upon sections 12 and 59.

With regard to the first branch of the argument, their Lordships note that the wording of the opening paragraph of section 4 is identical with that of section 179 of the Succession Act of 1865, which occurs in a chapter bearing the same heading as that of Chapter II of the Act of 1881. But, so far as their Lordships are aware, it has never been held that section 179 of the Act of 1865 applies only to an executor who has proved the will.

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Section 12 of the Probate and Administration Act no doubt implies that until probate is granted the will is not "established", and it validates all intermediate acts of the executor. It is contended for the appellants that this necessarily leads to the inference that before probate there is no valid will and no authority in the executor. This was the view taken by West J. in *Fatma v. Shaik Essa*(1), but which failed to find acceptance on appeal; *Shaik Moosa v. Shaik Essa*(2). It is, their Lordships think, based upon a misconception of the object of the section. Before the grant, it is obvious that in every case where either the will itself, or anything done under it by the executor, is challenged, proof of execution and capacity on the part of the testator, and of the appointment of the executor, would be required. The object of the section is only to get rid of this multiplication of proofs. Probate once granted authenticates the will against all the world; it affords a ready means of proof of the contents of the will (*see* sections 41 and 91 of the Evidence Act); and it is a complete answer by the executor to any challenge of his authority as such. The provisions of the section do not, in their Lordships' opinion, suggest that before probate the executor had no title, but are only intended to simplify the proof of his title as dating from the testator's death.

Section 59 merely amplifies the position by making probate conclusive of the executor's representative title against debtors of the estate, and provides for their indemnification on making payments to him. This again is only a matter of simplification of proof, with the necessary corollary protecting debtors who have paid on the faith of the probate.

(1) (1883) I.L.R. 7 Bom. 266.

(2) (1884) I.L.R. 8 Bom. 241.

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There can be no doubt that in England the title of an executor is derived from the will and not from probate, though it is probate alone which authenticates his right (*see Williams on Executors*, 12th edition, page 1226). Section 12 of the Probate and Administration Act is a reproduction of section 188 of the Succession Act of 1865, and it has always been recognized that the latter Act was largely based on English law. It is not suggested that this doctrine is for any reason inapplicable to the wills of Hindus, and their Lordships think that the material parts of sections 4 and 90, which are set out above, afford a strong indication in themselves that the Legislature intended to adopt it.

Section 4 makes no reference to probate, nor does the definition of "executor" in section 3 (again a reproduction from the Act of 1865) suggest that probate is any part of his title: he is merely the person to whom the testator has confided the carrying out of his dispositions.

So, too, section 90 (2) clearly conceives of an executor not clothed with probate being able to dispose of the property "vested in him under section 4". It makes such power subject to any restriction imposed by the will "unless probate has been granted", in which case the Court may relieve him from the restriction. In view of the terms of this section their Lordships think it would be impossible to hold that before probate nothing vested in the executor, and that he had no power of disposal at all.

Reference was made in argument to the terms of the original section 90, which was repealed in 1889, when the present section was substituted. It may well be that upon the old section the argument on behalf of the appellants would have had more force, but their Lordships have to interpret the Act as it has stood

since 1889, and they cannot attribute to section 4 a meaning based on the reading of the repealed section.

It only remains to consider whether the two decisions of this Board, to which allusion was made above, afford any support to the appellants.

In *Administrator-General of Bengal v. Premlal Mullick*(1), the executors of a Hindu testator, whose will was governed by the Hindu Wills Act of 1870, after obtaining probate, transferred to the Administrator-General "all estates, effects and interest vested in them by virtue of the probate." Such a transfer was authorized in the case of "any private executor" by section 31 of the Administrator-General's Act (II of 1874). The majority of the Judges before whom the case came in the Calcutta High Court held that the executors of a Hindu will, governed by the Act of 1870, were not within the purview of the section, and this was the only question before the Board.

The judgment was delivered by Lord WATSON, who in dealing with various portions of the Succession Act which were incorporated in the Hindu Wills Act, says:—

"It is sufficient for the purposes of this case to refer to two of these clauses. Section 181 is to the effect that probate can be granted only to an executor appointed by the will. Section 179 provides that the executor or legal administrator, as the case may be, of a deceased person, shall be his legal representative for all purposes, and that all the property of the deceased person shall vest in him as such."

He continues as follows, and it is this passage which is principally relied on in the present appeal:—

"It is not disputed that the immediate effect of the Act of 1870 was to place a Hindu executor who was in a position, and chose to take advantage of its provisions, on precisely the same footing as the executor of an Anglo-Indian

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testator, in so far as concerns the taking out of probate, and the vesting in him of the estate of the deceased. The will of the late Nundo Lal Mullick was executed in August 1889; and his executors therefore, on their obtaining probate, became immediately vested, by force of statute, with the whole estates which belonged to him at the time of his decease."

The question now before their Lordships as to the effect of the words of section 179 (reappearing in the present case as section 4 of the Probate and Administration Act) *unaccompanied by probate*, was clearly not under the consideration of the Board in the case cited, as the authority to transfer under section 31 of the Administrator-General's Act was expressly dependent upon the grant of probate, and their Lordships have no doubt that the words used by Lord WATSON were not intended to have the wider significance which the appellants seek to attribute to them.

In *Kurrutulain Bahadur v. Nuzbat-ud-dowla Abbas Hossein Khan*(1), the question considered by the Board was one of estoppel, affecting a Mahomedan will of which probate had been granted. Here again, therefore, the contention now raised as to the effect of sections 4 and 90 of the Act of 1881 standing alone, did not arise, and the only support that the appellants claim from it is derived from two sentences in the judgment which will be found on pages 256 and 257 of the report in the Indian Appeals. The first of these speaks of "the title thus conferred upon every executor who has obtained probate," and the second, of the trusteeship for the purposes of the will "created . . . by the will established by the probate." Their Lordships are unable to treat these isolated quotations as affording any support to the argument of the appellants. There is, they think, nothing in the judgment of Sir ARTHUR

WILSON, read as a whole, to suggest that the vesting under section 4, or the power of disposal under section 90, is dependent upon the grant of probate.

For the reasons given their Lordships are of opinion that the order of remand made by the High Court on the 9th December 1925, was right, and that this appeal should be dismissed, and they will humbly advise His Majesty accordingly. The appellants must pay the costs of the respondents of the appeal.

Solicitors for appellants—*Douglas Grant & Dold.*

Solicitors for respondents—*Chapman-Walker & Shephard.*

A.M.T.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Waller, Mr. Justice Jackson and
Mr. Justice Krishnan Pandalai.*

CHINTADA CHITTAYYA AND TWO OTHERS (PLAINTIFFS
1 TO 3), APPELLANTS,

1931,
November 27.

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
REPRESENTED BY THE COLLECTOR OF KISTNA AND ANOTHER
(DEFENDANTS 1 AND 2), RESPONDENTS.*

Madras Revenue Recovery Act (II of 1864)—Auction sale under—Confirmation of sale by Revenue Divisional Officer—District Collector's powers of revision—Madras General Clauses Act (I of 1891), sec. 3 (6)—Definition—Collector—Inapplicability to Madras Regulation VII of 1828 or Act II of 1864.

G was in arrears of revenue and his land was put up to auction by the revenue authorities and was purchased by C. The Revenue Divisional Officer confirmed the sale in C's favour.

* Second Appeal No. 1938 of 1926.

(1) (1905) I.L.R. 33 Cal. 116, 128; L.R. 32 I.A. 241.

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On a petition put in by G, the District Collector cancelled the sale in favour of C.

Held, that confirmation of sales held under the Revenue Recovery Act and the issue of certificates, etc., are to be done by the Collector of the District and the exercise of similar power by the Deputy Collector in charge of a division is subject to the complete control of, and supervision and revision by, the Collector of the District who may "confirm, modify or annul" the order of his subordinate and issue "any further order in the case as he may see fit."

Gnana Sambanda Pandara Sannadhi v. David Nadar, (1904) 14 M.L.J. 433, followed.

Brahmayya v. Pappasetty, (1921) I.L.R. 51 Mad. 695, overruled.

APPEAL against the decree of the District Court of Kistna at Masulipatam in Appeal Suit No. 201 of 1925 preferred against the decree of the Court of the Principal District Munsif of Gudivada in Original Suit No. 255 of 1923.

The second appeal came on for hearing in the first instance before MADHAVAN NAIR J. when his Lordship directed it to be posted before a Bench. The second appeal then came on for hearing before WALLER and JACKSON JJ. when their Lordships directed the matter to be placed before His Lordship the Chief Justice for being posted before a Full Bench. Pursuant to the orders of the Chief Justice, the second appeal came on for hearing before the Full Bench constituted as above.

A. Venkatasubba Rao for appellants.

Government Pleader (P. Venkataramana Rao) for first respondent.

C. S. Govindaraja Mudaliar for second respondent.

The JUDGMENT of the Court was delivered by

WALLER J.

WALLER J.—This Second Appeal has been referred to a Full Bench on account of a conflict between the cases reported as *Gnana Sambanda Pandara Sannadhi v. David*

Nadar (1) and *Brahmayya v. Pappasetty* (2). We do not think it necessary to say more than that, in our opinion, the first case, which was not brought to the notice of the Bench in the second, was rightly decided. The second case proceeds on the misconception that the definition in section 3 clause 6 of the Madras General Clauses Act of 1891 applied to Regulation VII of 1828 or to Act II of 1864.

Following the decision in *Gnana Sambanda Pandara Sannadhi v. David Nadar* (1) we dismiss the second appeal with costs (two sets).

G.R.

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WALLER J.

APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice and
Mr. Justice Cornish.

P. KRISHNAMACHARIAR (CLAIMANT—APPLICANT),
APPELLANT,

v.

THE OFFICIAL ASSIGNEE OF MADRAS (RESPONDENT),
RESPONDENT.*

1931,
November 24.

Advocate—Property recovered by his exertions for client—Lien.

An advocate has no lien upon property recovered by his exertions for a client, apart from any express agreement with the client to that effect.

APPEAL from the judgment of STONE J., dated 13th April 1931, and passed in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 256 of 1931 in Insolvency Petition No. 79 of 1926.

(1) (1904) 14 M.L.J. 433.

(2) (1921) I.L.R. 51 Mad. 695.

* Original Side Appeal No. 70 of 1931.

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Vere Mockett for appellant.
V. Radhakrishnayya and S. G. Satagopa Mudaliyar
 for respondent.

JUDGMENT.

CORNISH J.

CORNISH J.—The appellant is an advocate of this Court. He put in a claim to the Official Assignee for certain moneys due to him by the insolvent for work done for the insolvent in probate proceedings in respect of a will of which the insolvent was the executor and a legatee, and also for other work done by him on behalf of the insolvent. The Official Assignee disallowed a portion of the claim as excessive. There was an appeal against that order, and STONE J. held that the claim of the appellant should be allowed in full with interest against the estate of the insolvent. The appellant impeaches that order on the ground that he was entitled to payment from the estate of the testator, Appaswami Pillai, inasmuch as he was entitled to a lien on that property as having been recovered for the insolvent by his exertions in the probate litigation.

With regard to the first part of this contention, it appears to us that it would not have been competent for the Insolvency Court to make an order against the estate of the testator. The only property which was vested in the Official Assignee by reason of the executor's insolvency was the property of the insolvent. The insolvency of the executor did not have the effect of divesting him of Appasami Pillai's estate which was vested in him as executor and of vesting it in the Official Assignee. The Insolvency Court could not, therefore, have made an order directing the Official Assignee to satisfy the claim out of the estate of the testator.

With regard to the other point, I do not think that it is sustainable. There is no enactment in this country

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recognizing the particular lien for costs which is sanctioned by the Solicitors' Act, 1860, in favour of a solicitor upon property recovered by his exertions for a client; though it has been held that solicitors who have been admitted attorneys of an Indian High Court have this lien; see *Tyabji Dayabhai & Co. v. Jetha Devji & Co.*(1). But the appellant is an advocate and not a solicitor or attorney, and the only possible ground for supporting a claim to such a lien in his favour would be an express agreement by the client to that effect. But no such agreement is forthcoming, on the contrary it appears that the appellant took a promissory note for Rs. 3,000 as security for his costs in the probate litigation. There is, therefore, no ground for holding that the appellant had a lien. Under these circumstances, the appeal fails and must be dismissed with costs.

BEASLEY C.J.—I agree.

Solicitor for appellant — *N. T. Shamanna.*

G.R.

(1) (1927) I.L.R. 51 Bom. 855.

APPELLATE CIVIL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandurai.

1931,
September 17.

PANA ANA RANA ARUNACHALLAM PILLAI
(DEFENDANT), APPELLANT,

v.

GOVINDASWAMI NAICKER AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

Tender—Money claim not based on mortgage—Tender before suit improperly refused—Effect—Interest if ceases to run—Suit for money filed shortly after—Debtor not depositing amount in Court—Effect

In the case of ordinary money claims not based on mortgage a tender before suit of the amount due though improperly refused is ineffective to stop the running of interest where the debtor does not deposit the amount in Court when sued for it.

Haji Abdul Rahman v. Haji Noor Mahomed, (1891) I.L.R. 16 Bom. 141, and *Rakhal Chandra Chakraborty v. Baikuntha Nath Barai*, (1928) 32 C.W.N. 1082, followed.

Pedda Veeranna v. Gondimalla Veeranna, (1916) 5 L.W. 718, considered.

Gajendra Narain Maity v. Sita Nath Das, (1925) 90 I.C. 637, dissented from.

APPEAL against the decree of the Court of the Subordinate Judge of Sivaganga, dated 31st October 1925, and passed in Appeal Suits Nos. 23 and 26 of 1925 preferred against the decree of the Court of the Principal District Munsif of Sivaganga, dated 31st January 1925, and passed in Original Suit No. 470 of 1923.

A. Sundaram Ayyar for appellant.—The case being one of pledge is a case of reciprocal promises within the meaning of section 51 of the Indian Contract Act and is not one falling under sections 37 and 38 of that Act. The appellant's part of the contract is to tender the money whereupon the respondent must return the jewel. By his refusal to accept the

* Second Appeal No. 1180 of 1926.

tender, he has dispensed with the need for payment. *Haji Abdul Rahman v. Haji Noor Mahomed*(1) is inapplicable to a case falling under section 51 of the Contract Act. The case of a pledge being analogous to that of a mortgage the principle of section 84 of the Transfer of Property Act is applicable to the case. Section 37 of the Contract Act does not make payment of money into Court a condition. Order XXIV, rule 3, of the Code of Civil Procedure only refers to a case of payment and does not purport to deal with a case of tender at all. The corresponding rule in the rules of the Supreme Court in England, on the other hand, deals with the three classes separately. Section 84 of the Transfer of Property Act and section 80 of the Negotiable Instruments Act deal with a case of tender, and under neither provision is payment into Court a condition. *Sabapathy v. Vanmahalinga*(2) was a case of a tender of document and the observation therein relied upon by the Court below was *obiter*. *Pedda Veeranna v. Gondimalla Veeranna*(3) and *Gajendra Narain Maity v. Sita Nath Das*(4) are directly in favour of appellant. Payment into Court is only one test of readiness and willingness to pay and is not a condition of the validity of a tender; see also *Velayuda Naicker v. Hyder Hussan Khan Sahib*(5) followed in *Pedda Veeranna v. Gondimalla Veeranna*(3); *Krishnasami Chettiar v. Ramasami Chettiar*(6); *Thevaraya Reddy v. Venkatachalam Pandithan*(7); *Ramabhadra Thevar v. Arunachalam Pillai*(8) (as to what amounts to proof of debtor's readiness and willingness to pay); *Venkatrama Ayyar v. Gopalakrishna Pillai*(9) (as to the proper construction of sections 37 and 38 of the Contract Act); and *Pandurang v. Dadabhoy*(10). A valid tender made prior to suit entitles the defendant to his costs of the action, even if interest does not cease to run. That is the rule even in England; see *Edmondson v. Copland*(11).

K. Rajah Ayyar for respondents.—Tender imports continued readiness to pay and in the case of an action the true test of such readiness is the production of the money into Court. Order XXIV, rule 3, of the Code provides only for a particular class

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| (1) (1891) I.L.R. 16 Bom. 141. | (2) (1914) I.L.R. 38 Mad. 959. |
| (3) (1916) 5 L.W. 718. | (4) (1925) 90 I.C. 637. |
| (5) (1909) I.L.R. 33 Mad. 100. | (6) (1910) I.L.R. 35 Mad. 44. |
| (7) (1916) I.L.R. 40 Mad. 804, 809. | (8) (1926) I.L.R. 49 Mad. 609 (F.B.). |
| (9) (1928) I.L.R. 52 Mad. 322, 327. | (10) (1902) I.L.R. 26 Bom. 643. |
| (11) [1911] 2 Ch. 301, 309. | |

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of cases, namely, payment into Court; but that does not make the English Law inapplicable. Form No. IV of written statements in Appendix A to the Code provides for the case of tender before suit and shows that money must be brought into Court, and that, if it is not so brought, the plea of tender before suit is not maintainable. As to the English rule on the point and the strictness with which it is enforced, see *Dixon v. Clark*(1), *Kinnaird v. Trollope*(2) and *Strange's Notes of Cases*, page 750. *Bolye Chund Sing v. Moulard*(3) and *Rakhal Chandra Chakladar v. Baikuntha Nath Barai*(4) are to the same effect.

V. Ramaswami Ayyar (continuing).—*Rakhal Chandra Chakladar v. Baikuntha Nath Barai*(4) follows *Haji Abdul Rahman v. Haji Noor Mahomed*(5) and in terms refers to the forms in the Code. *Gajendra Narain Maity v. Sita Nath Das*(6) merely purports to follow *Jagat Tarini Dasi v. Naba Gopal Chaki*(7) but ignores the fact that in the latter case the money was actually paid into Court. Cases to the contrary effect cited for the appellant are most of them mortgage cases and are distinguishable. In *Peddu Veeranna v. Gondimalla Veeranna*(8) the debtor was the plaintiff and not a defendant pleading a tender without deposit of money along with the written statement.

A. Sundaram Ayyar in reply.—The effect of a valid tender is to stop the running of interest not only up to date of suit but even thereafter. Order XXIV, rule 3, of the Code refers only to a case of payment. The rule of payment into Court is a mere rule of evidence. *Harris on Tender*, page 196, shows that payment into Court has not always been prevalent in England; see also *Dent v. Dunn*(9). The English Common Law ought not to be applied because section 84 of the Transfer of Property Act specifically deals with tender. *Velayuda Naicker v. Hyder Hussan Khan Sahib*(10) was not a case of payment into Court. *Jagat Tarini Dasi v. Naba Gopal Chaki*(7) was not a case of mortgage; see page 323. The case being one of pledge, payment into Court is not necessary to constitute a valid tender; see *Harris on Tender*, page 92.

Cur. adv. vult.

(1) (1847) 136 E.R. 919.

(3) (1878) I.L.R. 4 Cal. 572.

(5) (1891) I.L.R. 16 Bom. 141.

(7) (1907) I.L.R. 34 Cal. 305.

(9) (1812) 170 E.R. 1388.

(2) (1889) 42 Ch. D. 810, 815.

(4) (1928) 32 C.W.N. 1082.

(6) (1925) 90 I.C. 637.

(8) (1916) 5 L.W. 718.

(10) (1909) I.L.R. 33 Mad. 100.

The JUDGMENT of the Court was delivered by KRISHNAN PANDALAI J.—This appeal is by the defendant in a suit for money and raises two points as to interest. The amount sued for consisted partly of the price of cloth sold by the plaintiff, a trader, to the defendant, who is also a trader in cloth, and partly of an amount of Rs. 500 advanced to the defendant on a pledge of a kasumalai. The defence as to interest on the price of the cloth was that there was no contract for interest either express or to be implied from the usage of trade, and, as to interest on the loan on the pledge, that the defendant had tendered the amount borrowed (Rs. 500) with interest at Re. 1-2-0 per cent per mensem on 20th September 1923, i.e., about twenty-five days before the suit, that the plaintiff had improperly refused to accept the amount and return the pledged jewel and that therefore the plaintiff was not entitled to further interest from the date of tender or to costs of suit on that head of the claim.

As to interest on the price of cloth, it has been found by both the lower Courts that according to the usage of trade interest was payable. There is considerable evidence to support this finding including the defendant's own admission that he has charged interest against other traders on similar transactions and, in view of this finding which is one of fact, the appellant's objection is not sustainable.

As to interest on the pledge, the question is whether, on the findings of both Courts that the defendant did tender the money on 20th September 1923 and that the plaintiff improperly refused to accept the tender on the allegation that the pledge covered the price of the cloth also, subsequent interest on that amount of Rs. 500 was allowable. The District Munsif disallowed subsequent interest and proportionate costs. But the

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learned Subordinate Judge held that, as defendant had not deposited the money in Court when sued for it, the tender prior to suit though improperly refused was ineffective to stop the running of interest. He awarded plaintiff interest at the contract rate up to the date of decree and also the costs disallowed by the first Court. This is the question which was strenuously argued before us for the appellant. Before going into the question it may be pointed out that in this case the tender was made on 20th September 1923 and the suit was brought on 15th October 1923. By section 34 of the Code of Civil Procedure the award of interest as well as the rate at which it is to be awarded from the date of suit to date of decree is in the discretion of the Court though, where the contract rate is not inequitable, that rate will be adopted; *Sophia Orde v. Alexander Skinner*(1). Therefore the only interest to which the appellant's objection, if successful, can apply is that for the period of twenty-five days between the above two dates which amounts to Rs. 4-11-0.

The Subordinate Judge has relied on *Sabapathy v. Vanmahalinga*(2), which itself follows *Haji Abdul Rahman v. Haji Noor Mahomed*(3), for the proposition that in order to stop the running of interest a tender before suit must be followed by payment into Court when the creditor sues for the money. The appellant's Advocate argues that there was no decision of the point in *Sabapathy v. Vanmahalinga*(2) and that the observation to that effect at page 970 was *obiter*. This argument is correct. But the observation is based on *Haji Abdul Rahman v. Haji Noor Mahomed*(3) where the point was expressly decided. The rule is based on English authorities and practice of long standing mentioned

(1) (1880) I.L.R. 3 All. 91, 106, 107 (P.C.). (2) (1914) I.L.R. 38 Mad. 959.
(3) (1891) I.L.R. 16 Bom. 141.

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there. The general rule is referred to by WILSON J. in *Bolye Chund Sing v. Moulard*(1) and by a Bench of the Calcutta High Court in *Rakhal Chandra Chakladar v. Baikuntha Nath Barai*(2), which was a case under the Bengal Tenancy Act, by section 150 of which the defendant is required to deposit the admitted amount of rent into Court before the Court can take cognizance of a plea that the plaintiff's suit is for an excessive amount. The principle on which a valid tender must be kept good in order to stop the running of interest is explained at length in *Jagat Tarini Dasi v. Naba Gopal Chaki*(3). In the case of ordinary money claims not based on mortgage, as to which the effect of tender is laid down by section 84 of the Transfer of Property Act, the best way in which a defendant whose tender has been refused can show that he has kept the tender good is by depositing the money in Court when sued for it. That appears to be the reason of the rule. The rule is expressly stated in Mulla's Civil Procedure Code in the commentary on Order XXIV, rule 3, and is illustrated by Form No. IV of written statements in Appendix A to the Code.

But the appellant's Advocate has referred to *Pedda Veeranna v. Gondimalla Veeranna*(4) and *Gajendra Narain Maity v. Sita Nath Das*(5) in addition to numerous decisions turning on section 84 of the Transfer of Property Act. In *Pedda Veeranna v. Gondimalla Veeranna*(4) there was an award ordering payment of a debt in three instalments. After one instalment was paid the creditor refused the debtor's tender of the other two instalments though made on or before the due dates. The debtor thereupon got the award made

(1) (1878) I.L.R. 4 Calo. 572. (2) (1928) 32 C.W.N. 1082, 1082.
(3) (1907) I.L.R. 34 Calo. 305, 322. (4) (1916) 5 L.W. 718.
(5) (1925) 90 I.C. 437.

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into a decree of Court by which the instalments were made payable on the dates mentioned in the award which had already expired and apparently without providing for any interest on the sums mentioned. As this decree was passed after contest by the creditor who attacked the award as invalid, one would have thought he could not in execution claim any interest which would be held to have been refused by the decree; see section 34, Civil Procedure Code. But he did make such a claim and it was refused by the District Judge. In upholding such refusal their Lordships made no mention of what appears the plainest ground for the refusal that the decree did not provide for interest. But they supported the refusal by accepting the respondent's argument that, as he had made tenders which were wrongfully refused before the award decree, interest ceased to run from the date of tender even without paying the money into Court. For this section 84 of the Transfer of Property Act and the decision in *Velayuda Naicker v. Hyder Hussan Khan Sahib*(1), which was a mortgage case, were relied on. We must respectfully say that neither section 84 of the Transfer of Property Act nor the decision cited governed the case as it was not a mortgage case. We may add that it was the debtor who applied to have the award made a decree of Court and that therefore there was no proceeding or suit by the creditor in answer to which the debtor could have paid the money into Court to keep the tender good. On this point therefore we are unable to follow the grounds of that decision, though the decision itself was correct on the ground mentioned above. The language of the decision in *Gajendra Narain Maity v. Sita Nath Das*(2) is directly in favour of the appellant's argument. The defendant who had

(1) (1909) I.L.R. 33 Mad. 100.

(2) (1925) 90 I.O. 637.

borrowed Rs. 350 at thirty-six per cent from the plaintiff tendered the money with interest in July 1916. But the plaintiff wrongfully refused it and brought a suit in 1920 for the sum with interest to date of suit. The lower appellate Court held the tender good and the plaintiff's refusal wrong, but, as the defendant had not deposited the money in Court, awarded the plaintiff six per cent interest from the date of tender. The plaintiff appealed and it was obvious that, if the other tender without payment into Court did not stop the running of interest as the award of six per cent showed, the plaintiff should have got not six per cent but the contract rate of thirty-six per cent. But if the tender stopped the running of interest the award of six per cent was wrong, though in the absence of an appeal by the defendant the Court could not interfere with that. That Court consisting of SUHRAWARDY and DEVAL JJ. held that in the absence of any provision in the law of contract or of procedure applicable to Indian Courts it cannot be laid down as a binding rule of law that if a tender is not followed by a deposit in Court it is ineffectual to stop the running of interest. The reasoning of this decision, pronounced in 1925, is in direct conflict with that of *Rukhal Chandra Chakladar v. Baikuntha Nath Barai*(1), pronounced in 1928, and in both of them SUHRAWARDY J. participated. We consider the latter Calcutta decision more in accord with precedent and the reason of the thing. A debtor who is required to keep his tender good must when he is sued certainly understand that the debt is being demanded through the Court, and, as he must be able and willing at any time after tender to pay it on demand, he can demonstrate his ability and willingness after the matter has come to Court only by bringing the money into Court. Although

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(1) (1928) 32 C.W.N. 1082.

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in the abstract it is possible to argue that, though the defendant has not deposited the money in Court and so placed his ability and willingness beyond question, he may be able to prove by other evidence that he was always ready and willing to pay the debt, to accept that argument would be to introduce much uncertainty into a test which is simple and conclusive and which has been accepted and acted on by the Courts in England and India for a very long time.

We think it unnecessary to consider in detail the effect of tender in mortgage transactions which is governed by section 84 of the Transfer of Property Act or the large number of decisions which have been cited; *Velayuda Naicker v. Hyder Hussan Khan Sahib*(1), *Krishnasami Chettiar v. Ramasami Chettiar*(2), *Thevaraya Reddy v. Venkatachalam Pandithan*(3), *Ramabhadra Thevar v. Arunachalam Pillai*(4), *Venkatrama Ayyar v. Gopalakrishna Pillai*(5) and *Pandurang v. Dadabhoy*(6). It is clear from section 84 that in mortgages a tender alone has the effect of stopping interest from the date of the tender. The reason of the difference between mortgages and other debts in this respect would appear to be that the rule in Chancery was different from that at Common Law.

"A tender of the amount due on the mortgage at a time when the mortgagee is bound to receive it stops interest from running if the mortgagor keeps the money ready to pay over to the mortgagee."

(Halsbury's Laws of England, Vol. XXI, page 229.)

"Refusal of a proper tender is not equal to payment, but if the money, after the refusal, has been paid into Court or kept ready for immediate payment to the mortgagee, no further interest is payable." (*Ibid* page 149).

(1) (1909) I.L.R. 33 Mad. 100.

(3) (1916) I.L.R. 40 Mad. 304.

(5) 1928 I.L.R. 52 Mad. 322.

(2) (1910) I.L.R. 35 Mad. 44.

(4) (1926) I.L.R. 49 Mad. 609 (F.B.).

(6) (1902) I.L.R. 28 Bom. 643.

The rule at law is stated to be that, where the promise is to pay a sum of money, tender coupled with continued readiness to pay the debt is an answer to a subsequent action for non-payment if the amount of the debt is paid into Court, and operates as a bar to any claim to subsequent interest; Halsbury's Laws of England, Vol. VII, page 418.

For these reasons, we think that the opinion of the Subordinate Judge on this point was right.

The second appeal is dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

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APPELLANT,

v.

K. ALAGAPPA MANIAGARAR AND SIX OTHERS
(PLAINTIFF AND DEFENDANTS ONE AND THREE TO
SEVEN), RESPONDENTS.*

Madras Estates Land Act (I of 1908), ss. 5 and 128—Charge created by—Right to—Persons entitled to, and circumstances in which they are entitled—Co-sharers—Rent decree against—Arrest in execution of—Co-sharer paying up decree amount to prevent—Contribution suit by, against other co-sharer—First charge on latter's portion of holding, i.e., priority over encumbrances existing on it on date of payment by reason of which contribution claimed—No right to, either under ss. 5 and 128 of Madras Estates Land Act or under general law or by virtue of ss. 82 and 100 of Transfer of Property Act—Co-sharers like joint pattadars if within intent of sec. 128 of Madras Estates Land Act.

A co-sharer, who, to prevent arrest in execution of a decree obtained by the landlord against himself and another co-sharer for arrears of rent due by both under the Madras Estates Land Act, pays the whole rent and brings a suit for contribution, is not entitled, either by virtue of sections 5 and 128 of that Act or under the general law or by virtue of sections 82 and 100 of the Transfer of Property Act, to a first charge on the other co-sharer's portion of the holding, i.e., to priority over encumbrances existing on that portion on the date of the payment by reason of which contribution is claimed.

The first charge created by section 5 of the Madras Estates Land Act is a charge created for the benefit of the landholder and applies to rent only so long as it is due to him in that character.

Section 128 of the Madras Estates Land Act is inapplicable to the case, because the charge given by that section is one

* Second Appell No. 274 of 1929.

given to other persons than the landlord for a sum different from the rent and given only in the particular circumstance mentioned, i.e., that a sale by the Revenue Court has been averted after proclamation for sale by that Court.

Semble.—Co-sharers like joint pattadars are not within the intent of section 128.

The claim to contribution being against the co-owner and the charge which springs into existence on the date of payment being against his property it can only avail against that property as it stood on the date of payment and cannot avail retrospectively against prior mortgagees and others who have in good faith and without any suspicion that such a charge may come into future existence advanced money on the property.

APPEAL against the decree of the Court of the Subordinate Judge of Dindigul in Appeal Suit No. 24 of 1928, preferred against the decree of the Court of the District Munsif of Palni in Original Suit No. 421 of 1926.

T. V. Muthukrishna Ayyar (P. N. Appuswami Ayyar with him) for appellant.—The statutory charge under the Madras Estates Land Act has been held to be available to the landholder himself only if he proceeds in the ways prescribed by that Act for enforcing that charge and not in other cases. *A fortiori* it will not enure for the benefit of a person who pays under arrest. If such a person has a charge at all it can only be subject to prior charges on the property. Neither *Rajah of Vizianagram v. Rajah Setrucherla Somasekhararaz*(1) nor *Kotayya v. Kotappa*(2) decides that such a person has a first charge. The corresponding section of the Bengal Tenancy Act, 1885, is section 65, and it has been held on the construction of that section that the charge does not avail when the tenure itself has not been, or is not sought to be, proceeded against; see *Soshi Bhusun Guha v. Gogan Chunder Shaha*(3) and *Sital v. Parbati*(4).

B. Sitarama Rao for first respondent.—Section 5 of the Estates Land Act creates a first charge on the holding in respect of rent. A co-sharer who is interested in a portion of the property and who pays off the amount and sues for contribution

(1) (1903) I L.R. 26 Mad. 686 (F.B.).
(3) (1894) I L.R. 22 Cal. 364, 374.

(2) (1925) 49 M.L.J. 117.
(4) (1921) 35 C.L.J. 1, 8.

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is entitled to have that first charge. The way the amount has been recovered does not affect the question whether or not the person paying has a first charge. Section 125 of the Act merely states the effect of the sale. The Act prescribes the procedure to be followed by the landholder himself and has nothing to do with the rights of a person who is not himself the landholder and who pays rent by reason of his being interested in the holding. So far as the charge itself is concerned that is created by section 5. The Court must have regard to the nature of the charge that was discharged. The questions how it was discharged and when are quite immaterial to the decision of the question of the right to the first charge of the person paying. The rights of the person paying are not dependent upon any of the provisions of the Estates Land Act. Under the general law the person who pays a first charge is entitled to be subrogated to the rights of the holder of that charge; see *Rajah of Vizianagram v. Rajah Setrucherla Somasekhararaz*(1). There was no doubt no question of priority in that case. But the basis of the decision shows that the person paying off a first charge will have priority; see pages 700, 692, 696. As regards priority BHASHYAM AYYANGAR J. (at page 703) would seem to be inclined to the view that a co-owner paying *bona fide* would be entitled to priority. He points out that a mortgagee or other person paying by virtue of the provision in section 35 of the Madras Revenue Recovery Act is in a less favourable position than a co-owner paying; see also *Seshagiri v. Pichu*(2). *Nugenderchunder Ghose v. Sreemutty Kaminee Dossee*(3) was a case in which a mortgagee paying revenue due on land was held entitled to a first charge, and this case has recently been followed in *Monohar Das Mohanta v. Hazarimull*(4). The co-owner paying will have no first charge as against the landlord. Subject to that, however, his charge will have priority. The charge is on the land itself in respect of which the rent is due, on all the interests in it, and not merely on the interest of the defaulter; see *Amman Pariyayi v. Pakran Haji*(5), *Naraina Pai v. Appu*(6), *Alayakimmal v. Subbaraya Goundan*(7) and *Seth Chitor Mal v. Shib Lal*(8). As to the nature of salvage lien and as to the priority of the person paying

(1) (1903) I.L.R. 26 Mad. 686 (F.B.). (2) (1887) I.L.R. 11 Mad. 452, 455.
 (3) (1887) 11 M.I.A. 241. (4) (1931) L.R. 58 I.A. 341.
 (5) (1912) I.L.R. 36 Mad. 493. (6) (1914) 28 I.O. 496.
 (7) (1905) I.L.R. 28 Mad. 493.
 (8) (1892) I.L.R. 14 All. 273, 325, 331, 332 (F.B.).

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salvage money over every other interest protected, see *Kinmu Ram Das v. Mozaffer Hosain Shaha*(1). The principle is that every interest in the property protected by the payment is subject to the charge acquired by the person paying. *Nugenderchunder Ghose v. Sreemutty Kaminee Dossee*(2) is treated as an authority in *Monohar Das Mohanta v. Hazarimull*(3) for the position that a person so paying is entitled to a salvage lien. The decision in the former case was based not upon any special statutes but upon general principles and that is how it has been understood and applied in the latter case.

[Section 122 of the Estates Land Act provides for payment by a co-pattadar but gives him no right whatever, evidently because he pays only what is due by himself—WALLER J.]

[The words "person having an interest therein which would be affected by the sale" in section 128 of the Act cannot include a co-pattadar but must be confined to persons other than pattadars—KRISHNAN PANDALAI J.]

That section provides for one specific case and does not override the general law as to the right of a co-owner paying. Then as to subrogation, a co-owner redeeming a mortgage is entitled to contribution with the same priority as the person whose mortgage is paid off had. That is the principle underlying sections 82 and 95 of the Transfer of Property Act; see also *Har Prasad v. Raghunandan Prasad*(4), *Kashi Ram v. Het Singh*(5) and *Aziz Ahmad Khan v. Chhote Lal*(6).

[Those cases are quite intelligible because a person who pays off a mortgage is undoubtedly entitled to the priority of the mortgagee under that mortgage. In the present case the question is whether a co-owner paying off rent due by another co-owner is entitled to the priority which the landlord himself has, in other words, whether he becomes what may be said to be a quasi-landlord—KRISHNAN PANDALAI J.]

He becomes a mortgagee with the priority which the landholder has.

[The co-owner is paying off his own debt and he may be entitled to priority as against another co-owner. But why

(1) (1887) I.L.R. 14 Cal. 809, 821 (F.B.). (2) (1887) 11 M.I.A. 241.
 (3) (1931) L.R. 58 I.A. 341. (4) (1908) I.L.R. 21 All. 166.
 (5) (1914) I.L.R. 37 All. 101, 104. (6) (1928) I.L.R. 60 All. 569, 579.

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should he have such priority as against an independent person such as a prior mortgagee?—KRISHNAN PANDALAI J.]

The mortgagee is a representative of the defaulting co-owner and but for the payment his mortgage would have been wiped off. By giving priority to the co-owner paying the position of the mortgagee is not made worse, because his mortgage was subject to the liability to pay the rent due on the land. Under section 82 of the Transfer of Property Act the charge is on the property liable and the question has nothing to do with the person liable. Applying the principle of sections 82 and 100 of that Act, as was done in *Rajah of Vizianagram v. Rajah Setrucherla Somasekhararaz*(1) and in *Amman Pariyayi v. Pakran Haji*(2), the co-owner paying is entitled to priority over all interests protected by the payment regardless of the circumstance that the charge-holder sought to enforce his remedy in one way rather than in another. *Sital v. Parbati*(3) has no bearing, because under the Bengal Tenancy Act under which that case fell to be decided there is no declaration of charge as in the case of the Madras Estates Land Act. Further, under the Bengal Tenancy Act the purchaser has to annul prior encumbrances and the purchaser in that case did not adopt the procedure prescribed for that purpose. Hence it was held that the purchaser could not have priority against the prior encumbrances.

T. V. Muthukrishna Ayyar in reply.—*Rajah of Vizianagram v. Rajah Setrucherla Somasekhararaz*(1) proceeds upon the ground that the charge is a common law charge only and not a statutory charge. To give the co-owner so paying a first charge would be to put him in a higher position than even the landholder himself. The first charge given by section 5 of the Estates Land Act will be available to the landholder himself only if he proceeds in the ways prescribed by that Act for enforcing the charge and will not avail him in other cases. *A fortiori* the charge will not avail a third party.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by
KRISHNAN PANDALAI J.—The question in this second appeal is whether a co-sharer, who, to prevent arrest for

(1) (1903) I.L.R. 25 Mad. 686 (F.B.). (2) (1912) I.L.R. 36 Mad. 498.
(3) (1921) 35 C.L.J. 1.

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a decree against himself and another co-sharer for arrears of rent due by both under the Madras Estates Land Act, pays the whole rent and brings a suit for contribution is entitled to a first charge on the other co-sharer's portion of the holding.

The plaintiff and his cousin, the first defendant's late husband, were jointly holders of ryoti land in the Ayakudi Zamin. They divided the holding among themselves in 1906 but as the patta remained joint in the Zamin accounts they were jointly sued for rent for faslis 1323, 1324 and 1325 (1914 to 1916) and a personal decree was obtained against them in the Revenue Court by the Zamindar. The plaintiff's cousin not having paid his share of the decree-debt the plaintiff was on threat of arrest compelled to pay, in addition to his own share, the share of his cousin also on 2nd July 1926. This suit was brought on 11th August 1926 to enforce the plaintiff's right of contribution impleading the first defendant, the widow of the cousin, who had died, and defendants 2 to 4 who are mortgagees of the cousin's share of the holding and defendants 5, 6 and 7 purchasers of portions of that share. The plaintiff claimed in addition to a decree against the widow (the first defendant) a charge against the property in priority to the interests of defendants 2 to 7. The Munsif granted a decree against the widow and also made the decree amount a charge on the property subject to the rights of the contesting defendants 2, 5 and 7. The defendants did not appeal. But the plaintiff appealed to the learned Subordinate Judge who declared that the plaintiff was entitled to a charge for his decree amount in preference to the defendants' interest, i.e., a first charge on the land.

The second defendant, a mortgagee, appeals to this Court and the only point argued in the appeal is that,

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though the plaintiff may be entitled to a charge, he is not entitled to a first charge, i.e., to priority over encumbrances existing on the property on the date of the payment by reason of which the plaintiff claims contribution.

The learned Subordinate Judge's opinion is that the plaintiff is entitled to a charge and a first charge by virtue of sections 5 and 128 of the Madras Estates Land Act and he also relies on *Kotayya v. Kotappa*(1) which he says is a direct authority on the point. The learned Advocate for the plaintiff-respondent does not support the Judge's opinion on these grounds but he argues that the plaintiff is entitled to a charge and first charge on grounds outside the Madras Estates Land Act, i.e., on general principles and on sections 82 and 100 of the Transfer of Property Act.

The learned Judge's grounds are clearly incorrect. What section 5 declares in effect is that, subject to any right of Government, the rent of ryoti land shall be a first charge on the holding and on the produce of the holding or any part thereof. That is a charge created for the benefit of the landholder and applies to rent only so long as it is due to him, in that character; *Forbes v. Maharaj Bahadur Singh*(2). The present claim is not for rent but for contribution by a ryot against his co-sharer—though the claim arises from the former's payment of rent which the latter was bound to pay—which is a different thing. Section 128 is still less applicable though the Judge says erroneously that it only reiterates the right which the parties are entitled to under section 5. Section 128 has nothing to do with section 5. It creates an entirely new right in favour of different persons, i.e., those who like mortgagees and other owners of subordinate interests in the holding would be adversely

affected by the sale by a Revenue Court of the holding for rent, i.e., those against whom the purchaser's right would prevail by section 125. Such persons are given the right when a proclamation for sale is made to pay to the Collector or selling officer the amount requisite to prevent the sale and in case they do so they are entitled in respect of the sum paid and interest thereon at six per cent to a charge in priority to every other charge except the landlord's charge for arrears of rent and any prior charge in respect of previous payments under the same section. It is clear that this is a charge given to other persons than the landlord, for a sum different from the rent and given only in the particular circumstance mentioned, i.e., that a sale by the Revenue Court has been averted after proclamation for sale by that Court; see *Subbarayudu v. Venkataratnam*(1), *Venkata Lakshamma v. Seetayya*(2) and *Sital v. Parbati*(3). As there was no proclamation of sale in this case but only a threatened arrest of the plaintiff, section 128 would be of no use to the plaintiff even if a co-sharer were to be held as included in the class of persons on whom a charge is conferred by that section. We may, however, say, though it is not necessary to decide it, that in our opinion co-sharers like joint pattadars are not within the intent of that section which seems to have been intended to benefit not the pattadar or his joint pattadar, who are the persons liable to pay the rent and on whose default their holding is under sale, but others who, though not liable to pay the rent, have subordinate interests in the holding which are liable to be destroyed by the sale. As in this section, the persons mentioned in section 35 of the Madras Revenue Recovery Act, section 9 of the Bengal Acts I of 1845

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(1) (1927) I.L.R. 51 Mad. 632.

(2) (1920) I.L.R. 43 Mad. 786.

(3) (1921) 35 C.L.J. 1, 8.

(1) (1925) 49 M.L.J. 117.

(2) (1914) I.L.R. 41 Calo. 926 (P.O.).

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and XI of 1859 as paying or depositing money to save the estate are persons other than the proprietor of the estate in arrear. The decision in *Kotayya v. Kotappa*(1) has also no application to the case so far as the question of first charge is concerned. All that it decided was that a person like the plaintiff who pays off the share of rent due by his co-sharers is entitled according to the Full Bench decision in *Rajah of Vizianagram v. Rajah Setrucherla Somasekhararaz*(2) to a charge by operation of law on the co-sharer's share of the holding and that there is nothing in section 132 of the Madras Estates Land Act which prevents the Civil Court from enforcing that charge in a suit in a Civil Court.

The grounds stated by the learned Judge being thus unavailing to support his opinion as to a first charge, the learned Advocate for the respondent has sought to support it by appealing to the general law on grounds of justice, equity and good conscience and he has also invoked by way of analogy the law of mortgages as stated in sections 82 and 100 of the Transfer of Property Act as now amended. As to the general law no authority is forthcoming to support the contention and we are not aware of any. The decision in *Rajah of Vizianagram v. Rajah Setrucherla Somasekhararaz*(2) was referred to. But all that it decided was that where a co-sharer in an estate subject to payment of Government revenue pays the whole revenue to save and does save the estate from liability to sale by Government, he is by operation of law entitled to a charge upon the share of his other co-sharers for the latter's share of the revenue. There was no question in that case of priority between such charge and a mortgage by any of the defaulting co-sharers of his share. Certain observations at page 703 were referred to as tending to show that in

(1) (1925) 49 M.L.J. 117.

(2) (1903) I.L.R. 28 Mad. 686 (F.B.).

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the opinion of BHASHYAM AYYANGAR J. a part-owner paying the revenue will acquire a priority of charge over mortgagees. But the learned Judge himself says that he was not expressing any decided opinion as no question of priority arose in the case. It is also to be noted that the observations were made with reference to section 35 of the Madras Revenue Recovery Act, which does not mention co-owners but only lessees and mortgagees and persons out of possession claiming adversely to the defaulter and in their case confers on payments to prevent a revenue sale only a priority of charge according to date of payment. We are bound by this decision, but we find in it and in *Alayakammal v. Subbaraya Goundan*(1), which followed it, nothing to support the respondent's contention as to priority.

Such indications as there are in decisions arising from the Revenue and Rent Laws to which we have been referred lend no support to the argument. In *Nugenderchunder Ghose v. Sreemutty Kaminee Dossee*(2) the widow of the mortgagor of a taluk which was liable to pay Government revenue having failed to pay it, the mortgagee had to pay it to preserve her security. The mortgagee having obtained a decree against the widow under section 9 of Act I of 1845, the question was whether it could be executed against the whole estate including the reversionary interest or whether it was a personal decree executable only against the widow's estate. The payment was made under section 9 of Act I of 1845 by which a person interested in saving the estate from a revenue sale was authorised to deposit the revenue with the Collector to the credit of the estate and, if he established before a Civil Court that he had an interest which would suffer by the sale, he was entitled to recover the amount deposited with interest

(1) (1905) I.L.R. 28 Mad. 493.

(2) (1867) 11 M.L.A. 241.

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from the proprietor of the said estate. The decree obtained was in pursuance of this provision. The Zilla Judge allowed the claim of the mortgagee-decree-holder to execute the decree against the estate. The High Court reversed this, holding that the decree obtained under section 9 of Act I of 1845 was a personal one. In the Privy Council their Lordships upheld this view, at the same time intimating that the mortgagee could by adopting the proper form of suit have proceeded against the estate. They say:

“Considering that the payment of the revenue by the mortgagee will prevent the *Talook* from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the *Talook* as entitled him to pay the revenue to the Government, and did actually pay it, was thereby entitled to a charge on the *Talook* as against all persons interested therein for the amount of the money so paid.”

After stating that the question did not come before them in that form but whether the charge could be enforced in the suit as actually brought, they proceed:—

“There were two courses open to her (mortgagee); she might have instituted a suit to enforce the mortgage and to tack to the mortgage the amount of the revenue paid by her to save the estate and to have the estate sold to pay that amount; or she might proceed under section 9 of Act I of 1845. . . .”

The question of priority was not before the Privy Council, but if we may derive guidance from this passage the method of enforcing the charge above laid down by tacking it on to the mortgage would seem to imply that an earlier mortgage would not be affected. The decision of the same tribunal in *Monohar Das Mohanta v. Hazarimull*(1) turned on the corresponding section 9 of Act XI of 1859 which replaced Act I

of 1845. The point decided has no bearing on the point before us. It was that a mortgagee who has obtained a decree for sale may maintain a separate suit for having the amount of revenue subsequently paid by him to save the property added to the decree amount. The point of present interest is that the absence of any charge in favour of a person paying revenue under the earlier Act was supplied by the addition of a sentence in section 9 of the new Act to the effect that the amount deposited shall be added to the amount of the original lien of the person so depositing. There was in addition a covenant in the mortgage sued on that amounts paid by the mortgagee for revenue defaulted by the mortgagor were to be added to the mortgage amount. Thus both by statute and by contract the payments made by the mortgagee in the case could only rank with the mortgage-money. This is all that was decided though the expression “first charge in the sale proceeds” is used in the decretal portion of the judgment and the words “first charge” occur in an earlier passage. We do not read the decision as holding that the plaintiff was granted a charge in priority to the first mortgage which was usufructuary and which therefore does not appear to have been intended to be paid off out of the sale proceeds.

There being nothing in the Madras Estates Land Act to support the plaintiff's claim to a first charge in the circumstances of this case, the question is whether sections 82 and 100 of the Transfer of Property Act support it. The argument was put in this form. The charge for rent is a charge created by operation of law within the meaning of section 100 of the Transfer of Property Act and subject to all the incidents of a simple mortgage. The pattadars are in the position of co-mortgagors. Therefore one of them paying off the charge is entitled

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(1) (1931) L.R. 58 I.A. 341.

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as against the other to contribution under section 82 for his excess payment and by virtue of section 92 is entitled to stand in respect of priority in the same position as the charge paid off, i.e., before all the mortgages created by the defaulter. There is more than one answer which is fatal to this reasoning. That the charge for rent created by the Madras Estates Land Act is not a charge within the meaning of section 100 of the Transfer of Property Act was decided in *Suramma v. Suriyanarayana Jagapathi Razu*(1), though SADASIVA AYYAR J. doubted this in *Venkata Lakshamma v. Seetayya*(2). However that may be, and assuming that it is a charge within section 100 of the Transfer of Property Act, it is clear that it is not the landlord's charge for rent which the plaintiff claims but something different though having its roots there. The decision of the Privy Council in *Forbes v. Maharaj Bahadur Singh*(3), already referred to, has been understood in this Court in *Venkata Lakshamma v. Seetayya*(2) as applicable to cases under the Madras Estates Land Act and as meaning that the claim of first charge is available only to a landlord and while the relationship of landlord and tenant subsists. The plaintiff's charge for the first time came into existence on his payment of his co-sharer's share of the rent and both its character and extent are determined by the equitable doctrine that common burdens should be equally borne and

"once the right of contribution is established, (it is not) an inequitable or violent stretch of such right to make it a charge against the co-owner's share, at any rate in certain classes of cases and as against him."

See *Rajah of Vizianagram v. Rajah Setrucherla Somasekhararaz*(4). The claim being thus against the co-owner

(1) (1918) I.L.R. 42 Mad. 114.

(2) (1920) I.L.R. 43 Mad. 786.

(3) (1914) I.L.R. 41 Cal. 926 (P.O.).

(4) (1903) I.L.R. 26 Mad. 686, 703 (F.B.).

and the charge which springs into existence on the date of payment being against his property, it follows that it can only avail against that property as it stood on the date of payment and cannot avail retrospectively against prior mortgagees and others who have in good faith and without any suspicion that such a charge may come into future existence advanced money on the property. The same result is arrived at by the rule now expressly stated in section 100 that, save as expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge. When the real nature of the landlord's charge and of the plaintiff's charge is understood, there is no basis for the application of sections 82 and 92 of the Transfer of Property Act (old sections 82 and 101) by treating the plaintiff as a co-mortgagor who has redeemed a previously existing mortgage or charge.

But it is contended that all the interests in the property which have benefited by the rent sale being averted by the plaintiff's payment including the mortgages existing on the property must be subjected to the charge. For this the expression in the Privy Council decision in *Nugenderchunder Ghose v. Sreemutty Kaminee Dossee*(1), already referred to, that the charge is against all persons interested therein which is extracted in the later Privy Council decision is relied on. The question of priority not being before their Lordships in either case it is not permissible to give a meaning to their words which have no bearing to the facts before them. On the contrary there is the authority of the House of Lords in *Ruabon Steamship Company v. London Assurance*(2), which is referred to by

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(1) (1867) 11 M.I.A. 241, 258.

(2) [1900] A.C. 6.

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BHASHYAM AYYANGAR J. in *Rajah of Vizianagram v. Rajah Setrucherla Somasekhararaz*(1), for the view that there is no general principle of law that where one person gets some advantage from the act of another a right of contribution towards the expenses for that act arises on behalf of the person who has done it. In the Allahabad case, *Seth Chitor Mal v. Shib Lal*(2), the contention was as in this case that the charge should prevail over a prior mortgage. The decision denied not only the priority but the charge. Though on this last point *Rajah of Vizianagram v. Rajah Setrucherla Somasekhararaz*(1) came to the opposite conclusion and is the binding authority in this Court, the discussion shews that it does not follow that, because the plaintiff may be entitled to a charge, he is also entitled to priority over encumbrances existing on the date of payment.

In our opinion the plaintiff-respondent has not established any right to a prior charge in preference to the contesting defendants 2, 5 and 7. The decree of the lower appellate Court is reversed and that of the District Munsif restored. The appellant will have his costs here and in the Court below from the first respondent.

A.S.V.

(1) (1903) I.L.R. 26 Mad. 686, 703 (F.B.). (2) (1892) I.L.R. 14 All. 273 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Pakenham Walsh.

KUMARAPPA CHETTIAR AND TWO OTHERS (PLAINTIFFS),
APPELLANTS,

1931,
September
29.

v.

ADAIKKALAM CHETTY AND SIX OTHERS (DEFENDANTS),
RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 11—Res judicata—Finding declaring joint title of parties to suit and third parties—If operates as res judicata between parties—Adverse finding against a party who could not appeal—If operates as res judicata—Hindu Law—Partition—Complete or partial—Presumption.

There were five brothers A., V., S., R., and another. A. filed a suit in 1906 against S. and Z. (a stranger to the family) claiming that a certain sum of money lent on mortgage to Z. by him in 1885 was his exclusive property. In that suit S. who did not represent V. and R. stated that the sum of money belonged to himself and V. and R., and that A. had no right to the same; Z. contended that the suit was bad for non-joinder of proper parties since the sum of money belonged to all the five brothers jointly. Nobody raised the point that there was a partition in 1887 among the brothers. The Court held that, on the date of the transaction of 1885, A. lived separately from his brothers, and that he took the mortgage of 1885 in his name with funds in which his brothers were interested and in which they had a share, and that there was no ground for supposing that when A. lent the money he was acting as the managing member of the joint family or was representing any interest but his own and as such the suit was not bad for non-joinder of proper parties. A decree was passed in A.'s favour for the amount claimed. In a later suit by V.'s widow against the other members of the family it was held that in 1887 there was a partition among the five brothers. S. filed a suit in 1924

* Appeals Nos. 173 of 1929 and 376 of 1924.

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against A. and several others, claiming a fifth share of the sum of money that was the subject-matter of the suit of 1906, basing his claim on the findings in that suit and also alleging that the sum was not disposed of by the partition of 1887.

Held (1) that where a partition has taken place the presumption is that it was a complete partition and the burden lies upon him who alleges that a certain property was excluded from the partition to show that it was a partial partition;

(2) that the finding in the suit of 1906 cannot operate as *res judicata* between A. and S. because the suit, in spite of the finding, was decided in A.'s favour and as a result he had no right to appeal for the purpose of challenging the finding;

and (3) that the finding in that suit cannot operate as *res judicata* between A. on the one hand and V. and R. on the other since the latter were not parties to that suit and it cannot operate as *res judicata* between A. and S. by the mere fact that they were parties to that suit, since the joint title of all the five brothers (including V. and R.) to that sum was found in that suit and not the exclusive title of S., V., and R.

APPEALS against the decrees of the District Court of West Tanjore in Original Suits Nos. 19 of 1924 and 4 of 1923.

K. S. Sankara Ayyar and K. R. R. Sastri for appellants.

B. Sitarama Rao and S. R. Muthuswami Ayyar for first respondent.

The other respondents were unrepresented.

Our. adv. vult.

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The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—These appeals relate to the ownership of a certain sum of money. To dispose of them, it is unnecessary to refer to more than a few facts. There were five brothers: (1) Adaikkalam Chetty, (2) Veerappa Chetty, (3) Subban Chetty, (4) Rengan Chetty and (5) Vaidyalinga Chetty. In 1885 Adaikkalam lent on the mortgage of certain properties a sum of Rs. 13,000 to a person whom we shall call the Zamindar. The deed

of mortgage was taken in the name of Adaikkalam. In 1888 the last three brothers (Subban, Rengan and Vaidyalinga) lent to the same person Rs. 4,000 on a second mortgage of those properties. The deed was taken jointly in the names of the three brothers mentioned above. That deed provides for the payment by them of Rs. 13,000 due to the first mortgagee, Adaikkalam. He, however, was not paid and the mortgage in his favour remained in force. On the 28th of December 1905 Vaidyalinga assigned by Exhibit II his one-third share in Rs. 4,000 in favour of Adaikkalam. On the 6th of January 1906 Rengan similarly assigned his share in favour of the same person, Exhibit III. On the 10th of October 1906 Adaikkalam filed Original Suit No. 49 of 1906 to enforce his rights under the two mortgages referred to above. In that suit the Zamindar was made the first defendant and Subban, Adaikkalam's brother, the second. As subsequent mortgagees, certain others were impleaded as defendants 3 to 6. Adaikkalam as plaintiff claimed not only Rs. 13,000 but also two-third of Rs. 4,000 basing his right thereto on the assignments executed in his favour by Rengan and Vaidyalinga. In the plaint in that suit he alleged that Subban was entitled to a third of Rs. 4,000, that he was therefore asked to join with him as plaintiff, and that, on his failing to do so, he was impleaded as a defendant. He prayed that a decree might be passed both in favour of himself and Subban for the respective amounts due to them. In effect, Adaikkalam asked for no relief against Subban but prayed, on the contrary, that a decree might be passed both in his and Subban's favour. The suit was resisted both by the Zamindar and Subban. To the defence raised by Subban we shall advert presently. The Zamindar pleaded, *inter alia*, that the amount of the first mortgage belonged not solely to

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Adaikkalam but to the joint family of which he was a member and that the suit was bad for the non-joinder of the other coparceners. An issue was framed as to whether Adaikkalam was solely entitled to the sum of Rs. 13,000, and the trial Judge, coming to the conclusion that it did not, dismissed the suit. From his decree an appeal was taken to the High Court, Appeal No. 189 of 1909. What the effect is of the decision then given by the High Court is one of the matters we have to decide. For the present it is sufficient to state that the High Court allowed the appeal of Adaikkalam and passed a decree in his favour, holding nevertheless that the Rs. 13,000 belonged not to him solely but to the joint family. In the present appeals, the question to decide is, is Subban entitled to a fifth of this sum of Rs. 13,000? There were two suits filed in the lower Court and each of them raised the question, is Subban entitled to a fifth of the amount or is Adaikkalam the sole owner? For the sake of brevity Subban may be treated as the plaintiff and Adaikkalam as the defendant. The lower Court has disallowed the claim of Subban.

On behalf of Subban, his learned Counsel, Mr. K. S. Sankara Ayyar, has strongly urged that the decision of the High Court in Original Suit No. 49 of 1906 operates as *res judicata* in his favour. Before examining that contention, we shall deal with the merits of the case. The question of fact that arises is, on the date of the mortgage suit, to whom did the Rs. 13,000 belong, to Adaikkalam solely or to the five brothers jointly?

In Suit No. 49 of 1906, that question, as we have said, was raised at the instance of the Zamindar. Adaikkalam's case then was, that there was a partition of the joint family property in 1882 and that the sum lent in 1885 was his separate property. Subban, after

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pleading that the family in 1885 was joint, went on to allege that by some arrangement the last three brothers (Subban, Rengan and Vaidyalinga) became exclusively entitled to the mortgage amount, namely, Rs. 13,000. It is important to bear in mind that each of the three contending parties gave a different version—Adaikkalam stating that the amount was his separate property, the Zamindar that it belonged to the joint family, and Subban that it belonged solely to the last three brothers. We may usefully quote a passage or two from Subban's written statement:—

"Then, I, Rengan Chetty and Vythi Chetty, in all, three persons, arranged that the said bond for Rs. 13,000 should be allotted to our share, at the time of future division of our family properties, that the plaintiff should have no right whatever to the said bond of Rs. 13,000, that he should not claim any right to it, that we three alone should jointly pay Rs. 4,000 to the first defendant, and that in respect of the othi deed for Rs. 17,000 to be obtained from the first defendant in our favour after such payment, plaintiff should have no right whatever. We paid Rs. 4,000 to 1st defendant and obtained a othi deed for Rs. 17,000 on 21st June 1888."

"Thereupon the plaintiff and the deceased Veerappa Chettiar lived together, and myself and the other two brothers, namely, Rengan Chettiar and Vythi Chettiar, together. Subsequent to our othi deed for Rs. 17,000 the plaintiff had no sort of enjoyment in the villages in dispute."

"From the date of the said othi deed, we three have been enjoying the suit villages adversely to the plaintiff. From the date of our othi deed for Rs. 17,000, the plaintiff had no sort of claim or enjoyment whatever in the suit villages."

In effect, Subban denied Adaikkalam's right to any part of the sum of Rs. 17,000 and distinctly prayed that the suit should be dismissed with costs. The significance of this, will shortly appear when we consider the point of *res judicata*. But, to proceed, the trial Court, as we have said, dismissed that suit holding that

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Adaikkalam and his brothers were undivided and that the money belonged jointly to all of them. The High Court, while confirming the finding that the amount was their joint property, set aside the decree dismissing the suit. On what grounds, then, did the High Court come to that decision? It held (i) that Adaikkalam was on the date of the transaction of 1885 living separately but that he took the mortgage in his own name with funds in which his brothers were interested and had a share and (ii) that there was no ground for supposing that when Adaikkalam lent the money he was acting as the managing member of an undivided family or was representing any interests but his own; see *Adaikkalam Chetti v. Subban Chetty* (1). On these findings, the learned Judges held as a question of law that the mortgagee could maintain the suit in his own name. They then go on to observe that, even assuming that Adaikkalam was on the date of the mortgage the managing member of an undivided family, he could still sue on the contract entered into by him in his own name without impleading the other members of his family; (see page 626). Acting on this view, the High Court decreed Adaikkalam's suit. But since then an important event which alters the aspect of the case has occurred. A suit commenced in 1919 was, after these appeals had been filed, finally decided by the High Court in 1930. That was a suit filed by Vaidyalinga's widow against the other members of his family. In that suit, the question as to the status of the family was directly raised: Was there a partition and, if so, when? The High Court held (i) that in 1887 there was a partition among the five brothers and (ii) that the last three brothers who reunited became divided in 1905.

(1) (1914) 27 M.L.J. 621, 624.

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It is common ground that by this finding as to the status of their family, the parties are bound. When the High Court decided the mortgage suit of 1906, none of the three contestants put forward the partition of 1887. When we approach the evidence in the case, this fact must be borne in mind. Having regard to the then contentions, all that the High Court had to decide was whether Adaikkalam became divided in 1882, that is, previous to the mortgage. If that was found in the negative, it necessarily followed that the money was the property of the joint family. But the recent decision has declared that there was a partition in 1887, that is, subsequent to the mortgage. If so, whose property did this mortgage become by reason of that partition? That is the question we have now to decide—very different from what the High Court had then to determine. Having this in view, let us proceed to examine the evidence. When the second mortgage (the one of 1888) was executed, Subban and his two brothers agreed to redeem the first mortgage in favour of Adaikkalam. The mortgage deed contains a stipulation that they were to pay him Rs. 13,000. If Subban's present case is true, he and his two brothers were entitled to three-fifths of that amount. Why then did they agree to pay the entire Rs. 13,000 to Adaikkalam? To this admission, made as it were close after the partition of 1887, great weight must be given; for, it is Subban's case that the mortgage was at that partition, kept joint. Then, again, in the 1905 partition Subban and his two younger brothers treated this mortgage as the joint property belonging to them exclusively. How is this conduct of Subban consistent with the mortgage having been set apart as joint property in 1887? We have already said that Rengan and Vaidyalinga assigned their interests in the Rs. 4,000 to Adaikkalam. This

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happened shortly before the suit of 1906. In the assignment deeds these two brothers distinctly recognize Adaikkalam's sole right to the sum of Rs. 13,000. Then came the mortgage suit of 1906. Subban did not then set up as we have pointed out, that the Rs. 13,000, was the joint property of the five brothers. He alleged, on the contrary, that it was the sole property of himself and his two younger brothers. What value then can be attached to his present case that he is entitled to a fifth of the sum on the ground that it belongs to the five brothers jointly? His plaint is as vague as it can be on the point. The only person examined in the case is Adaikkalam, who, of course, denies Subban's claim. The depositions in Original Suit No. 49 of 1906 of Subban, Rengan and Vaidyalinga have been treated as evidence, those persons having since died. There was, they deposed, a partition in 1887; but, according to them, it was an incomplete one. Rengan stated that in property worth about Rs. 20,000 Adaikkalam refused to give the others a share and that the Rs. 13,000 in question was a part of that Rs. 20,000. Referring to the undertaking by him, Subban, and Vaidyalinga to redeem the first mortgage, this is what he says: "It is only with the idea of paying Rs. 13,000 to the plaintiff (Adaikkalam) that we obtained the document for Rs. 17,000." There is nothing worth noting in Vaidyalinga's deposition beyond the fact that he spoke to the partition of 1887 and admitted that the sum of Rs. 13,000 belonged to Adaikkalam. Subban was concerned with making out that the defence he set up in his written statement was true, namely, that he and his two brothers became the exclusive owners of Rs. 13,000. As regards the partition of 1887, he stated that it was an incomplete one, as Adaikkalam did not include "Athani village, some jewels, and the deed for Rs. 13,000." He

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then went on to suggest that, at the time of the second mortgage, Adaikkalam gave up his right to the Rs. 13,000 saying "that he (Adaikkalam) would adjust the sum of Rs. 13,000 from the unpartitioned jewels and other properties." What then emerges from these facts? That Adaikkalam asserted at the partition of 1887 his sole right to this sum, that it accordingly was not made the subject of division, that in 1888, shortly after the partition, all the three brothers recognised his right, that two of them (Rengan and Vaidyalinga) in 1905 and 1906 admitted his title in the assignments and in the suit that followed gave evidence in support of it, and (this is significant) that they have consistently adhered to this position and have never since claimed any right in the suit amount.

Moreover, the burden was upon Subban to prove that the partition was not a complete one. When it is admitted or proved that a partition has already taken place, the presumption is that it has been a complete partition, and it lies upon a person alleging that family property in the exclusive possession of one of the members of the family after such partition is liable to be partitioned to make good his allegation by proof; *Narayan Babaji v. Nana Manohar* (1).

There is no presumption that any property was excluded at a partition; on the contrary, the burden lies upon him who alleges exclusion, to establish his assertion; *Kailas v. Bijay* (2). Both on the evidence and the probabilities we must find that Subban's claim to a fifth of this sum is unfounded. The finding to the contrary of the lower Court in Civil Suit No. 199 of 1924 (one of the two suits out of which the appeals arise), given as it was before the recent adjudication by the High Court, is not entitled to any weight.

(1) (1870) 7 B.H.O. R. (A.C.J.) 153, 177. (2) (1922) 36 C.L.J. 424.

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Now that Subban has no case on the merits, can he succeed on the point of *res judicata*? In Original Suit No. 49 of 1906 there was a finding that the money belonged to the five brothers, but, in spite of it, Adaikkalam's suit was decreed. The decree, far from being based on the finding as to the ownership of the money, was made "in spite of it." In such a case, no issue decided against the plaintiff can be *res judicata*. The law on the point may be thus stated. If the decree is wholly in favour of the defendant, no issue decided against him can operate as *res judicata* so as to bind him in a subsequent suit, for he cannot appeal from a finding on any such issue. Conversely, if the plaintiff's suit is decreed in its entirety, no issue decided against him can be *res judicata*, for, he cannot appeal from a finding on any such issue, the decree being wholly in his favour; see Mulla's Civil Procedure Code, commentary on section 11. The first part of this rule is illustrated by *Run Bahadur Singh v. Luchu Koer*(1). The suit was brought by a Hindu against the widow of his deceased brother claiming his property by right of survivorship. The suit was dismissed upon a technical ground, but it was nevertheless found as a question of fact that the brothers were joint in estate. In this case the widow wholly succeeded, although the finding was against her. The Judicial Committee held that the finding did not constitute *res judicata* against the widow. *Midnapur Zamindari Company, Ltd. v. Naresk Narayan Roy*(2) recognises the same principle. In a suit against certain tenants, they pleaded (i) occupancy right, (ii) that the suit was premature. The High Court dismissed the suit on the ground that the suit was premature, but gave a finding that the tenants had no occupancy right. Their Lordships held

(1) (1884) I.L.R. 11 Cal. 301 (P.C.). (2) (1920) I.L.R. 48 Cal. 460 (P.C.).

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that the finding on the question of occupancy rights did not operate as *res judicata* against the tenants as the decree was wholly in their favour and they could not have appealed from the finding (see pages 467 and 468).

The second part of the rule (it is with this we are concerned) is illustrated by *Rango v. Mudiyeppa*(1). A, alleging that he was the adopted son of X, sued B to recover certain property granted to him by X under a deed. The Court found that A was not the adopted son of X, but that he was nevertheless entitled to the property under the deed, and a decree was passed for A. A's suit was thus decreed in its entirety, in spite of the finding against him on the question of adoption. It held that that finding did not operate as *res judicata* in a subsequent suit between A and B; for the decree having been in favour of A, A could not have appealed from the finding that was adverse to him.

But, contends Mr. Sankara Ayyar, the learned Counsel for Subban, the High Court did not give merely a finding, but made it the basis of a part of their decree. As the money was held to be the property of the joint family (Mr. Sankara Ayyar contends), the High Court, in order to safeguard its interests, directed Adaikkalam to give security. The judgment, we must say, is not clear on the point. Was this direction given as a necessary consequence of their finding, or on account of the offer made by Adaikkalam's Counsel? However, we consider it unnecessary to examine this point further, having regard to our view on the next contention of Mr. Sitarama Rao as to *res judicata*, with which we shall now deal.

That contention, in our opinion, must prevail. In the previous suit, was this question as to the ownership

(1) (1898) I.L.R. 23 Bom. 296.

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of the money directly and substantially in issue between the same parties, that is to say, between Adaikkalam and Subban? It was the zamindar (as we have pointed out) that pleaded that the money was the property of the joint family; Subban, far from pleading that it was its property, alleged that it belonged exclusively to the last three brothers. The other members of the coparcenary had not been impleaded, and can it be said that Subban was representing the absent members? The case he set up was adverse to their interests, and the point on which the finding in question was given was different from the one he raised. Supposing the finding had been against the joint family, could the absent members have been bound? If it could not have been *res judicata* against them, it could not be *res judicata* in their favour. The mere presence of a party on the record is not decisive of the question when the point of *res judicata* is raised; see *Malhi Kunwar v. Imam-ud-din*(1), where it was pointed out that the plaintiff and the newly added defendants were not at issue on the point raised: See also *Ramdas v. Vazirsaheb*(2). We cannot accept Mr. Sankara Ayyar's arguments that, because Subban happened to be a party to that suit, he could take advantage of the finding, although his absent brothers could not. In Original Suit No. 49 of 1906, it was not the exclusive title of the last three brothers that was found, but the joint title of all the five. If the Court had found in favour of Subban's case, Adaikkalam would have had no right at all. But, in the present suits, his right to a fifth is admitted by Subban and it is on the footing that each of the other brothers has likewise a fifth share that Subban has now claimed a share for himself. We must therefore decide that

(1) (1904) I.L.R. 27 All. 59.

(2) (1901) I.L.R. 25 Bom. 589.

the finding in the previous suit does not constitute *res judicata* in Subban's favour.

The lower Court has also held on the point of *res judicata* against Subban, but on an erroneous ground.

We have thus held that Subban cannot succeed on the point of *res judicata*. We have further held that, on the merits, he is bound to fail. In this view, it is unnecessary to decide the other points raised in the case. The result is that the decree of the lower Court in Original Suit No. 19 of 1924 is confirmed and the Appeal No. 173 of 1929 is dismissed with costs. It follows that Appeal No. 376 of 1924 is also dismissed, but we make no order as to costs.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

KASARABADA VENKATACHALAPATHI RAO
(RESPONDENT), APPELLANT,

1931,
September 1.

v.

GADIRAJU VENKATAPPAYYA AND ANOTHER
(APPELLANTS), RESPONDENTS *

Code of Civil Procedure (Act V of 1908), sec. 11—Execution of money decree—Attachment of immovable property in—Validity of—Decision as to—Purchaser of that property from judgment-debtor during pendency of proceedings raising question of validity of such attachment not party to such proceedings if and when bound by—Res judicata—Lis pendens—Applicability of principles of.

Where, during the pendency of proceedings between the decree-holder and the judgment-debtor raising the question of

* Letters Patent Appeal No. 349 of 1926.

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the validity of an attachment of immovable property in execution of a money decree, a third party purchases that property from the judgment-debtor, he is, in the absence of proof of fraud or collusion between the decree-holder and the judgment-debtor in connection with those proceedings, bound by the decision therein upholding the validity of the attachment, though not himself a party to the proceedings. The decision is *res judicata* against him and the principle of the doctrine of *lis pendens* will also apply to such a case.

APPEAL under clause 15 of the Letters Patent against the decree of DEVADOSS J., dated 20th August 1926 and made in Second Appeal No. 1805 of 1923 on the file of the High Court, preferred against the decree of the Court of the Subordinate Judge of Narasapur in Appeal Suit No. 12 of 1922 (Appeal Suit No. 416 of 1921, Sub-Court, Ellore) preferred against the decree of the Court of the Additional District Munsif of Narasapur in Original Suit No. 142 of 1920 (Original Suit No. 508 of 1920 on the file of the Principal District Munsif's Court of Narasapur).

V. Viyyanna for appellant.

P. Somasundaram for respondents.

Cur. adv. vult.

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The JUDGMENT of the Court was delivered by ANANTAKRISHNA AYYAR J.—The first defendant in Original Suit No. 142 of 1920 on the file of the Additional District Munsif's Court of Narasapur is the appellant before us. He was the plaintiff in Original Suit No. 38 of 1912 on the file of the Principal District Munsif's Court, Narasapur, wherein he obtained a decree for money against M. Venkataramanayya on 30th September 1913. He applied to execute his decree in Original Suit No. 38 of 1912 by attachment and sale of certain immovable property and on the 14th March 1914 the District Munsif passed an order for attachment. In the meantime, M. Venkataramanayya, having filed an appeal

against the District Munsif's decree, obtained an *ad interim* order staying execution, from the appellate Court on 13th March 1914. The interim stay order was received in the District Munsif's Court on 16th March 1914, and before the amin was informed of the order, the amin reported on the 17th March 1914 that attachment was carried out on that very date (17th March) by affixing a copy of the proclamation on the land. Subsequently the *ad interim* order was vacated on the 15th April 1914 as the judgment debtor failed to furnish security as required by the appellate Court. Venkataramanayya filed an application—Miscellaneous Petition No. 1950 of 1914—on 6th October 1914 under section 47 of the Code of Civil Procedure alleging that the attachment made on 17th March 1914 after the appellate Court ordered stay of execution was *ultra vires* and illegal, and that the application for sale made by the decree-holder on the strength of the said attachment was not maintainable, and he prayed that “the Court may cancel the attachment and the sale application made by the decree-holder”. The District Munsif overruled the contentions of the decree-holder and directed that “the attachment in question be raised and all further proceedings following thereon quashed”. On appeal the said order was confirmed by the Subordinate Judge. When the appeal was pending, Venkataramanayya died and his widow, Kameswaramma, was brought in as his legal representative by the appellate Court. The decree-holder in Original Suit No. 38 of 1912 preferred a civil miscellaneous second appeal to the High Court. There was a reference to the Full Bench in that civil miscellaneous second appeal. The Full Bench held:

“Where subsequent to an interim order for stay of execution made by an appellate Court without notice to the decree-holder, but before its communication to the Court of first

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instance, an order of attachment is made by the latter Court, the order of attachment is not void and ineffectual as having been made without jurisdiction, but is legally valid, (and that) the order is effective only from the time it is communicated to the first Court."

See *Venkatachalapati Rao v. Kameswaramma*(1). The case came on for final disposal before the referring Judges (ABDUR RAHIM and BAKEWELL JJ.), and they passed the following judgment in the case on 18th December 1917:—

"The appeal will be allowed, the respondent's petition dismissed, and the attachment restored. The appellant will recover his costs from the respondent throughout."

On the allegation that by a sale deed, dated 27th May 1914, Gadiraju Venkatappayya and others had purchased the property in question from Venkataramanayya, they (the vendees) filed a petition on 26th August 1918 under Order XXI, rule 58, of the Code of Civil Procedure to raise the attachment on the ground that there was no valid attachment on the properties on the date of their purchase. The decree-holder contested the position with the result that the petition was dismissed on 31st October 1919. The vendees (Gadiraju people) filed Original Suit No. 142 of 1920 purporting to be under Order XXI, rule 63, of the Code for setting aside the order passed on the 31st October 1919, and they made the decree-holder in Original Suit No. 38 of 1912 the first defendant to their suit and Kameswaramma (the widow of the judgment-debtor in Original Suit No. 38 of 1912) was made the second defendant. Various contentions were raised by the parties such as, for example, whether there was a valid attachment of the properties, whether the question was *res judicata* by reason of the order passed by the High Court on 18th December 1917, whether the plaintiffs were estopped

(1) (1917) I.L.R. 41 Mad. 151 (F.B.).

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from questioning the attachment, and whether the suit was barred by section 47 of the Code. Both the lower Courts having dismissed the suit, the plaintiffs (Gadiraju people) preferred a second appeal to the High Court. The learned Judge who heard the second appeal was of opinion that on the facts disclosed by the evidence in the present case there was no legal and valid attachment on the properties, that the plaintiffs who were not parties to the proceedings that came before the High Court in connection with the execution of the decree in Original Suit No. 38 of 1912 were not bound by the orders passed therein, and that it was open to the plaintiffs to show that there was no valid attachment on the property when they purchased the same on the 27th May 1914. The learned Judge came to the conclusion that, after the *ad interim* stay order passed by the appellate Court on the 13th March 1914 was received in the District Munsif's Court on the 16th March 1914, no proceedings in execution could be legally taken in the case, and that the attachment which was effected by affixing a notice on the properties on the 17th March 1914, and on the Court-house and the Collector's office on the 23rd March, was not merely irregular but illegal and void. Holding that the plaintiffs were not bound by the orders passed against their vendor—the judgment-debtor—after the judgment-debtor had sold the properties to them, the learned Judge reversed the judgments of both the lower Courts and set aside the order passed in the claim petition on the 31st October 1919.

The first defendant has preferred this letters patent appeal.

Though several points were sought to be raised before us by the learned Counsel on either side, we thought it advisable to restrict arguments in the first instance to the issue whether the main question has become

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res judicata by reason of the order passed by the High Court on the 18th December 1917, and whether the plaintiffs are bound by the said order. After hearing full arguments on that question, we have come to the conclusion that the plaintiffs are so bound, and that it is not necessary to consider the other points raised in the case.

Venkataramanayya—the judgment-debtor in Original Suit No. 38 of 1912—must be taken to have had full knowledge of all the proceedings that took place in execution of the decree in that suit, and pending the disposal of the appeal he got an *ad interim* order of stay of execution on the 13th March 1914. The further proceedings that took place in the District Munsif's Court in connection with the attachment proceedings also must have been known to him, viz., that the amin reported on the 17th March 1914 that he had in pursuance of the order passed by the District Munsif on 14th March 1914 carried out the attachment by affixing a copy of the proclamation on the lands on 17th March 1914, and that similar copies were affixed to the notice-board in the Court-house and in the Collector's office on 23rd April 1914, though the stay order passed by the appellate Court was received in the District Munsif's Court on the 16th March 1914. All this is not denied. He also knew that the said *ad interim* stay order was vacated on 15th April 1914 by the appellate Court as he had failed to furnish security as directed by that Court. It is in these circumstances that he sold the property to the Gadiraju people on 27th May 1914. What the exact effect of the proceedings that had taken place in the District Munsif's Court would be, in the circumstances, is a matter essentially relating to the execution of the decree in Original Suit No. 38 of 1912. The judgment-debtor would be bound by the decision of the executing Court as regards the effect of those

proceedings, and *prima facie* any person who claims title under the judgment-debtor after the happening of those events would also be bound by the decision of the executing Court as to the exact effect of those proceedings. The judgment-debtor could not, by transferring the property at that stage, render the decision that may be—and in ordinary circumstances would be—passed by the executing Court as regards the effect of those past events nugatory as far as the decree-holder is concerned. On the other hand, the purchaser from the judgment-debtor in such circumstances would *prima facie* take the property only subject to the disabilities it was under when in the hands of the judgment-debtor. When therefore the decree-holder sought to proceed further with his execution application which he had already filed in March 1914 and wanted to bring the property to sale in pursuance of the steps taken by him in March 1914, the executing Court had to decide whether there was a valid attachment of the property in March 1914. The circumstance that the Court was called upon to decide that question formally only after the judgment-debtor has sold the property to the plaintiffs should not alter the essential nature of the said proceedings, nor take away the jurisdiction of the Court in which the said execution proceedings were then pending to adjudicate on that question; nor is it material that the question came up for consideration on a petition filed by the judgment-debtor. It is clear from that petition (Civil Miscellaneous Petition No. 1950 of 1914) that the decree-holder in Original Suit No. 33 of 1912 had applied for sale in pursuance of the attachment effected in March 1914. The Courts had accordingly to consider what exactly would be the effect of the proceedings that had taken place in March 1914, and the High Court on 18th December 1917 passed final orders on that question in

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the following terms:—"The appeal will be allowed, the respondent's petition dismissed, and the attachment restored." The judgment-debtor's widow was a party to the said proceedings in the High Court, and she could not therefore contest the binding nature of the said decision; but are the present plaintiffs (the vendees from the judgment-debtor under a sale-deed, dated in May 1914) in a better position? We were not referred to any reported decision directly bearing on the point. After consideration of the question we have come to the conclusion that they are not.

In our opinion, when proceedings by way of attachment of immovable property in execution of a money decree have been taken by the executing Court in an execution application filed by the decree-holder, any question that might be raised whether the proceedings taken by the Court did amount to a valid attachment or not is one that falls to be decided by the Court in the execution department; any stranger purchasing the property from the judgment-debtor in those circumstances would only take the property subject to the Court's decision as to the effect of the proceedings actually taken before his purchase. Such purchaser would be bound by the Court's decision of the question in the execution department though he was not a party to the same. To hold otherwise would be to impair the rights of the decree-holder and to enable the judgment-debtor to set at naught decisions of Courts competent to adjudicate on the rights of parties, and give the go-by to the principle of law giving finality to decisions of Courts in matters properly before them.

The present is not a case where the proceeding pending before the Court is only an execution application to attach property. Further proceedings by way of actual attachment had taken place; and the proceedings

by way of attachment of the properties in dispute took place in a Court of competent jurisdiction; it was when those proceedings were pending that the present plaintiffs purchased those properties from the judgment-debtor; *prima facie* they must be taken to have purchased them subject to the result of those proceedings. The principle of the doctrine of *lis pendens* would apply to such a case. If for any reason the proceedings that were had relating to the properties in question prior to the plaintiffs' purchase should prove abortive and infructuous, and the decree-holder had to take entirely fresh execution proceedings after the plaintiffs' purchase, then there would be force in the respondents' contention that such fresh execution proceedings would not be binding on them unless they were made parties to the same. On the other hand, it is not open to a party to a proceeding to nullify the effect of proceedings already properly taken with reference to that property by transferring the same to strangers. As already remarked, it does not really matter whether the actual decision of the Courts as to the effect of the past proceedings is given only after the plaintiffs' purchase, if the adjudication is really with reference to matters that happened before such purchase and regarding the effect of the legal proceedings that were had prior to the same. To safeguard the purchasers' rights, the purchasers should in such circumstances get themselves impleaded as parties.

To take an analogous case, in a suit to recover money, if questions should arise whether the plaint contained sufficient allegations claiming and justifying a charge, and whether the prayer claiming a charge on certain properties was specific or not, the trial Court would have to decide those questions by its final judgment and decree, and if the Court should decide the questions in favour of the plaintiff and give him a decree for money

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charged on the properties mentioned, it would seem that the decision would be binding on a purchaser from the defendant pending suit, though he be not actually a party to the decree. He would not be allowed to show in a subsequent suit that the prior decision was wrong in the absence of fraud or collusion. The case might be different if the plaint was subsequently amended so as to claim a charge on a particular property after that property had been sold away by the defendant to a stranger.

In the case before us, it is not contended (not even suggested) that the proceedings conducted by the judgment-debtor were not conducted *bona fide* or that there was any fraud or collusion between the judgment-debtor and the decree-holder in connection with the same. On the other hand, it is admitted by one of the present plaintiffs, when examined as a witness in the present suit, that he was really conducting those proceedings on behalf of the judgment-debtor's representative—the widow. After the sale of the suit properties to the plaintiffs on 27th May 1914, it is difficult to understand why the judgment-debtor should have troubled himself, and why a petition—Civil Miscellaneous Petition No. 1950 of 1914—should have been filed on 6th October 1914 to “cancel the attachment and the sale application made by the decree-holder”. As remarked by the lower appellate Court, “it seems difficult to avoid the inference that the plaintiffs, having been worsted in their attempt to get the attachment set aside by proceedings in the name of Venkataramanayya, have hit upon the expedient of claim petition and the suit to achieve the same object.”

It was further argued that the attachment made in March 1914 should be taken to have been completed only on 23rd March 1914, when copies of the

proclamation were affixed in the Court-house and in the Collector's Office in accordance with the provisions of Order 21, rule 54, of the Code of Civil Procedure and, as the stay order was perused by the District Munsif on 17th March 1914, the subsequent acts done on 23rd March 1914 should be taken to be *ultra vires*, and that there was no complete and valid attachment in the eye of the law; and the decision of the Full Bench in *Sinnappan v. Arunachalam Pillai*(1) was relied on. Assuming the argument to be correct, that does not take away the binding nature of the decision passed by this Court on 18th December 1917 that the attachment was valid and restoring the attachment.

Orders passed in the course of execution proceedings adjudicating on the rights of the parties are *res judicata* and could not be called in question by the parties or their representatives. When once the said orders become final, that effect could not be sought to be avoided by making allegations that the previous decisions were wrong on the merits because full facts were not placed before the Court or that all available evidence was not let in on the former occasion; see *Ram Kirpal v. Rup Kuari*(2); *Mungul Pershad Dichit v. Grija Kant Lahiri*(3) and *Raja of Ramnad v. Velusami Tevar*(4).

It therefore seems to us that the present plaintiffs are bound by the orders passed by the High Court restoring the attachment.

It is a matter for satisfaction that we have been able to reach this result, since there is no doubt that the conduct of the judgment-debtor in getting an interim stay from the appellate Court (which was finally

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(1) (1919) I.L.R. 42 Mad. 844 (F.B). (2) (1-83. I.L.R. 6 All. 269 (P.C.).
(3) (1881) I.L.R. 8 Calc. 51 (P.O.). (4) (1920) L.R. 48 I.A. 45.

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dismissed as no security was furnished) and then transferring the properties to the plaintiffs—who had (there is no doubt) notice of all the proceedings—thus defeating the decree-holder would surely be reprehensible from the moral point of view.

We accordingly hold that the present plaintiffs are bound by the final orders passed in execution proceedings in Original Suit No. 38 of 1912 in which it was held by the High Court in effect that there was a valid attachment in March 1914 of the properties in dispute, and that the said “attachment should be restored”. The plaintiffs’ purchase from the judgment-debtor in May 1914 should be taken to be subject to that attachment. Allowing this letters patent appeal, we restore the decision of the lower appellate Court with costs here and in second appeal.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

VADDE VENKATASWAMI AND ANOTHER (DEFENDANTS
ELEVEN AND TWELVE), APPELLANTS,

1931,
September 14.

v.

BOMMARAJU VENKATA SUBBAYYA AND THIRTEEN
OTHERS (PLAINTIFF AND DEFENDANTS FORTY-TWO TO FORTY-
FIVE, TWO TO SIX, EIGHT TO TEN AND LEGAL REPRESENTATIVE
OF THE FIRST DEFENDANT), RESPONDENTS.*

*Vendor and purchaser—Sale-deed—Registration of—Fraud on
registration law—Invalidity of sale-deed on ground of—
Plea by vendor of—Maintainability of—Maxim “In pari
delicto potior est conditio possidentis”—Statute—Rule of
public policy embodied in—Contravention of—Maxim applic-
able to case of.*

A vendor of immovable property cannot be allowed to plead or to take advantage of the invalidity of the registration of his sale-deed on the ground that by the inclusion of a particular item of property in the document and getting the document so registered in an office where otherwise it could not have been registered a fraud on the registration law was committed, in which he participated.

As a general rule a plaintiff cannot plead his own fraud or illegal act as a basis of his claim or as a necessary step towards the success of his claim. His position in that matter is not made better by showing that the defendant has joined him in the fraud or illegal act or by the fraud or illegal act not being pleaded but coming to light in the course of the trial of the suit or even in the hearing of an appeal. The rule applies even where the fraud or illegality disclosed was in contravention of some rule of public policy embodied in a statute.

APPEALS against the decrees of the Court of the Additional Subordinate Judge of Bapatla in Appeal Suits Nos. 28,

* Second Appeals Nos. 717, 1541 and 1893 of 1925.

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27 and 28, and 28 of 1924 preferred against the decree of the Court of the District Munsif of Ongole in Original Suit No. 601 of 1921.

The facts of the case necessary for the portion of the judgment reported appear fully from the same.

P. Venkataramana Rao for appellants.

B. Somayya for first respondent.

JUDGMENT.

REILLY J.

REILLY J.—[Part of the judgment has been omitted as not being necessary for this report.] It is not now disputed that all the property concerned in the suit, as has been found by the lower Courts, was the property of Karavadi Ramaswami at the time of his death in 1860 and that after his death Mahalakshamma had only a widow's interest in it. The sale-deed, Exhibit I, which I have mentioned, was dated the 7th September 1908 and was executed by Rangamma and her three sons then living, the plaintiff, defendant 43 and an elder brother, Venkatapayya, now dead. It was in favour of defendant 1, who is now represented by defendants 2 to 4 as his legal representatives, and by other contesting defendants as transferees from him. Exhibit I is a registered document; but in it a small item of one cent is included, which never belonged to the vendors and which it has been found was never intended by any of the parties to Exhibit I to pass to the vendee. It was included only for the purpose of getting the document registered in a particular Sub-Registrar's office, in which no sale-deed relating to the other items, which were intended to be transferred, could have been registered. The plaintiff in his plaint pleads that the inclusion of the fourth item in the document and getting the document so registered in an office where otherwise it could not have been

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registered was a fraud on the Registration law and that therefore the document has not been validly registered and he can ignore it. On the facts there is no doubt that that was a fraud against the Registration Act. The evidence is in effect that the plaintiff, his brother, defendant 43, and defendant 1, the vendee, all joined in that fraud. The District Munsif and the Subordinate Judge therefore found that Exhibit I was not validly registered and had no legal effect. Before us a contention has been raised for the contesting defendants that the plaintiff cannot plead his own fraud in that way and that, even if this fraud had come to the notice of the Court otherwise, no relief could be given to the plaintiff in the suit on that basis, but that the maxim *In pari delicto potior est conditio defendentis et possidentis* should be applied. It cannot be denied that as a general rule a plaintiff cannot plead his own fraud or illegal act as a basis of his claim or as a necessary step towards the success of his claim. His position in that matter is not made better by showing that the defendant has joined him in the fraud or illegal act or by the fraud or illegal act not being pleaded but coming to light in the course of the trial of the suit or even in the hearing of an appeal; *Gascoigne v. Gascoigne*(1) and *Scott v. Brown*(2). In the latter case the plaintiffs sued on an illegal contract involving an indictable offence. The illegality was not pleaded, and, although the trial Judge noticed it, he did not let it affect the disposal of the case before him. It was the Lords Justices in the Court of Appeal who themselves took the point. SMITH L.J. said:

“If a plaintiff cannot maintain his cause of action without shewing, as part of such cause of action, that he has been

(1) [1918] 1 K.B. 223.

(2) [1892] 2 Q.B. 724.

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guilty of illegality, then the Courts will not assist him in his cause of action."

and he applied the maxim *In pari delicto potior est conditio possidentis*. LINDLEY L.J. said :

"It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him."

I do not think there can be any doubt about the general rule. But it has been suggested that there is an exception when the fraud or illegality disclosed is in contravention of some rule of public policy embodied in a statute and that, if that is so, the plaintiff may be allowed to vindicate the law and public policy to his own profit in spite of his own fraudulent or illegal act. So far as I understand the matter, there is no such exception. In *Cottington v. Fletcher*(1) the plaintiff was a Papist who owned an advowson, i.e., the right to present to a living in the Church of England. By a statute, 1 Will. and Mary C. 26, no Papist can present to a living in the Church of England, nor can any one who holds an advowson in trust for a Papist. To protect his property Cottington assigned the advowson to Fletcher under an arrangement that Fletcher should hold it in trust for him, and Fletcher presented to the living the second defendant in the case. Subsequently Cottington became a conforming Protestant, and he then sued for a re-assignment of the advowson. Lord HARDWICKE indicated his opinion that, if Fletcher had raised a demurrer that Cottington could not plead his fraud against the law in that way, Fletcher would have succeeded. The report of that case is not very full; but in *Muckleston v. Brown*(2) Lord ELDON, commenting upon the case, expressed strongly the same

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view, though he appears to have doubted whether the report was correct in another respect. There it will be seen that Cottington was disclosing a contravention of what was regarded as a matter of the highest public policy, and yet he would not have been allowed to do so if objection had been raised. In *Curtis v. Perry*(1) Chiswell, a Member of Parliament, had allowed ships bought by his partner, Nantes, with partnership money to be registered in the name of Nantes alone in order that they might be used for contracts with the Government in violation of the Contractors' Act, under which no Member of Parliament could have any interest in any contract with the Government. Lord ELDON said :—

"The moment the purpose to defeat the policy of the law by fraudulently concealing that this was his (Chiswell's) property is admitted, it is very clear he ought not to be heard in this Court to say that is his property."

And there the rule was applied, although there had been a fraud against another statute also, 34 Geo. III. C. 68, under which the name of the owner of every ship had to be registered. But no vindication of public policy even in those very important matters could avail against the general rule. In the same case Lord ELDON quoted an unnamed and unreported case, in which Lord KENYON dismissed a bill for the reconveyance of property given by the plaintiff to his son as a nominal qualification for a seat in Parliament in fraud of a statute regarding qualifications for Parliament. In none of those cases was the fact that the confession of fraud would have disclosed the contravention of an important rule of public policy embodied in a statute treated as having any effect in qualification of the general rule. It will be observed that Cottington was

(1) (1740) 2 Atk. 158; 28 E.R. 498. (2) (1801) 6 Ves. Jun. 52; 81 E.R. 984.

(1) (1802) 6 Ves. Jun. 740; 81 E.R. 1285.

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trying by his plea to undo the evasion of a statute and thereby to recover his property, almost exactly what the plaintiff is trying to do in respect of Exhibit I in this case.

Can we suppose that there is any special sanctity about the Registration Act, which would bring in an exception to the general rule? No doubt the registration of a sale-deed in the proper office is a matter of public policy. But it can hardly be suggested that it is a matter of higher public policy than the questions dealt with in the cases I have quoted. Why should the plaintiff, who has joined in the fraud in this case, be allowed to profit by it or to plead it? Is it a matter of over-mastering public policy that the vendee under Exhibit I should not be allowed to remain in possession because Exhibit I was not validly registered? I think a recent amendment of the law by the Legislature shows that there can be no such over-mastering public policy in connection with the Registration Act. Under section 53-A recently added to the Transfer of Property Act a vendee, who has got only an unregistered sale-deed, may protect his possession by pleading part-performance and may actually use the unregistered sale-deed to prove the terms of the sale. When the Legislature has provided in that way for effect being given to a transfer, though the Registration Act has not been complied with, we cannot say that it is even a matter of public policy that the vendee under Exhibit I should not be allowed to remain in possession. In my opinion the plaintiff cannot be allowed to plead or take advantage of any invalidity in the registration of Exhibit I. Exhibit I on its face is a validly registered document, and for the purpose of this case we must treat it as such.

[The rest of the judgment dealt with other points in the case.]

ANANTAKRISHNA AYYAR J. [Part of the judgment has been omitted as not being necessary for this report.] Under Exhibit I, four items of properties are purported to be sold to the first defendant. The fourth item covered by Exhibit I is one cent of inam dry land situate in Chadala village attached to Ongole Sub-Registration District; whereas items 1, 2 and 3 of Exhibit I are lands attached to Kothapatnam Sub-Registration District. The document was presented to the Ongole Sub-Registrar for registration and was registered by him. The allegation in paragraph 3 of the plaint regarding this matter was as follows:—

“Besides this, whereas the first defendant should have got the said document registered at Kothapatnam, he got it registered at Ongole by including unjustly and fraudulently some other properties unnecessarily. Hence the said document is not at all valid in law and the first defendant cannot acquire any right whatever under the said document.”

The first defendant's plea was that item four also was sold to him but that the plaintiff and others repurchased from the first defendant the one cent of land (item four) on payment of a small amount and are in possession thereof.

Both the lower Courts have held that the parties to Exhibit I could never have intended that item four should form part of the property conveyed by the document, and that it could never have been intended that any title should pass thereunder in item four—one cent—and that the executants of Exhibit I had no shadow of title to that one cent and that the first defendant also must be taken to have been aware of the same. It was for the convenience of the plaintiff, and his brother, the forty-third defendant—who was employed at Ongole—and at their suggestion that item four was included in

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Exhibit I, and the document registered at Ongole. On these facts it was argued for the plaintiff that the registration of Exhibit I is invalid in law. On behalf of the first defendant it was argued that the plaintiff was equally party to the fraud as the first defendant and that it is not open to the plaintiff to allege his own fraud and claim relief on that basis. The plaintiff's learned Advocate replied to this argument by saying that the Registration Act is a statute of public policy, and that there could be no estoppel against the provisions of such a statute. Our attention was also drawn to the decisions of the Privy Council in *Harendra Lal Roy Chowdhuri v. Haridasi Debi*(1) and *Biswanath Prasad v. Chandra Narayan Chowdhuri*(2). After having the question argued before us, I have come to the conclusion that it is not open to the plaintiff in such circumstances to allege his own fraud and claim relief on that basis. In Broom's Legal Maxims, the maxim is quoted—'*Nemo allegans turpitudinem suam est audiendus*'—No one alleging his own baseness ought to be heard. Another maxim is referred to, viz., *Nullus commodum capere potest de injuria sua propria*—No one can take advantage of his own wrong. It is also said '*In pari delicto potior est conditio possidentis*'—In equal fault, the condition of the possessor is more favourable. Various decisions have been cited in support of the principle underlying the above legal maxim, but I do not propose to go into the same.

It is stated in Story's Equity Jurisprudence, Vol. I, section 421 :

"In general, where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, Courts of equity, following the rule

(1) (1914) I.L.R. 41 Calc. 972 (P.C.).

(2) (1921) I.L.R. 48 Calc. 509 (P.C.).

of law as to participators in a common crime, will not interpose to grant any relief; acting upon the known maxim, *In pari delicto potior est conditio defendentis et possidentis*. The old cases often gave relief, both at law and in equity, where the party would otherwise derive an advantage from his iniquity. But the modern doctrine has adopted a more severely just, and probably politic and moral rule, which is, to leave the parties where it finds them, giving no relief and no countenance to claims of this sort."

See also third edition of Story's Equity Jurisprudence by Randall, section 298.

In *Raghupati v. Nrishingha*(1) MOOKERJEE J. discusses this question. The learned Judge in addition to quoting some English authorities also quotes the following passages from certain American decisions :

"The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practised fraud, which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other, or to equalize the benefits or burthens which may have resulted by the violation of every principle of morals and of laws. Or, as Chancellor Walworth states it: 'Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of those persons as against the other from the consequences of their own misconduct.'"

In *Scott v. Brown*(2) the Court of Appeal made certain observations which are relevant to the present case. LINDLEY L.J. said:—

"*Ex turpi causa non oritur actio*. This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal

(1) (1922) 36 C.L.J. 491.

(2) [1892] 2 Q.B. 724.

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contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him. If authority is wanted for this proposition, it will be found in the well-known judgment of Lord MANSFIELD in *Holman v. Johnson*(1)."

LOPES L.J. quoted an extract from the judgment of COCKBURN C.J. in *Begbie v. Phosphate Sewage Co.*(2) to the following effect:—

"The plaintiff cannot present his case to the jury without necessarily disclosing the unlawful purpose in furtherance of which this money was paid."

It has to be observed that, though the illegality of the contract was not pleaded by the defendant, the point was taken by the Court and acted upon.

A. L. SMITH L.J. observed at page 734:—

"Now, how does the law stand upon the subject? If a plaintiff cannot maintain his cause of action without shewing, as part of such cause of action, that he has been guilty of illegality, then the Courts will not assist him in his cause of action. This was decided in *Taylor v. Chester*(3), where the illegality was pleaded, and also in *Begbie v. Phosphate Sewage Co.*(2), where it was not pleaded, but, the fraud being apparent, the Court would not interfere."

In *Petherperumal Chetty v. Muniandy Servai*(4) the Privy Council held that the contemplated fraud must, according to the authorities, have been effected and that then, and then alone, does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with (see page 559).

In the present case the fraud has been effected, the plaintiff has got his money, and the defendant was put

in possession of the properties. Therefore the plaintiff could not be given relief. Reference may be made to a decision of this Court in *Janu Sait v. Ramasami Naidu*(1). There the plaintiff entered into a contract for the purchase of rice in violation of rice control regulations. The rice purchased was subsequently commandeered by the Government under the regulations. It was held that the purchaser was not entitled to recover the portion of the price paid by him to the defendant by reason of such commandeering when it was proved that both the plaintiff and the defendant knew of those restrictions and were parties to the illegal contract. PHILLIPS J. observed at page 568:

"When both parties are *in pari delicto*, the maxim '*In pari delicto potior est conditio possidentis*' applies and the Courts will not assist the plaintiff to recover in such a case."

DEVADOSS J. observed at page 576 as follows:—

"In this case, the contract has been fully completed and the plaintiff who seeks relief on the ground of fraud is not entitled to it, as I find on the evidence that he was not deceived as regards the terms of the licence, and his conduct in getting rice without a licence to buy in Negapatam was in violation of the rules framed in the interests of the public. This point is fatal to the plaintiff's case and he is entitled to no relief."

See also *Jones v. Merionethshire Permanent Benefit Building Society*(2), where LINDLEY L.J. observed:—

"A plaintiff is not entitled to relief in a Court of Equity on the ground of the illegality of his own conduct. In order to obtain relief in Equity he must prove not only that the transaction is illegal, but something more; he must prove either pressure or undue influence. If all that he proves is an illegal agreement he is not entitled to relief."

Some very early English decisions were also cited to us in which the Court made similar observations that the plaintiff in such circumstances would not be

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(1) (1775) 1 Cowp. 343; 98 E.R. 1120.

(2) (1875) L.R. 10 Q.B. 491, 500.

(3) (1869) L.R. 4 Q.B. 309.

(4) (1908) I.L.R. 35 Calo. 551 (P.O.).

(1) (1922) 18 L.W. 564.

(2) [1892] 1 Ch. 173, 182.

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given any relief when he has to plead his own fraud as part of his cause of action.

The fraud in this particular case having been effected, as already mentioned, it is enough to rely on the decision in *Petherperumal Chetty v. Muniandy Servai*(1) to decide this point against the plaintiff. The Privy Council decisions in *Harendra Lal Roy Chowdhuri v. Haridasi Debi*(2) and *Biswanath Prasad v. Chandra Narayan Chowdhuri*(3) are not really applicable to the exact point that we are now considering. The question there was not whether the plaintiff could be allowed to set up his own fraud, but whether registration was properly and validly effected when the question arose with reference to third parties.

[The rest of the judgment dealt with other points in the case.]

[Their Lordships eventually dismissed the plaintiff's second appeal and allowed the second appeals of defendants two to six and nine to twelve, with the result that the plaintiff's suit was dismissed except with reference to the fifth item.]

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(1) (1908) I.L.R. 35 Calo. 551 (P.C.).

(2) (1914) I.L.R. 41 Calo. 972 (P.C.).

(3) (1921) I.L.R. 48 Calo. 509 (P.C.)

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

THAYINGOLI VALIYA KALYANI (APPELLANT-PLAINTIFF),
APPELLANT,

1931,
October 27.

v.

VAYARODATHIL PARKUM THAYINGOLI KRISHNAN
NAMBIAR AND THREE OTHERS (FIRST AND FOURTH RES-
PONDENTS AND LEGAL REPRESENTATIVES OF DECEASED THIRD,
FIRST AND SECOND RESPONDENTS—FIRST AND FOURTH
DEFENDANTS AND LEGAL REPRESENTATIVES OF DEFENDANTS
3, 1 AND 4), RESPONDENTS.*

*Malabar Law—Kanam—Renewal of—Agreement for—Notice
of—Melkanamdar when will be held to have—Specific
performance—Kanam—Agreement to grant or to renew—
Specific performance of—Notice—Constructive notice—
Principles of—English decisions as to—Application in
India of—Caution as to.*

In Malabar a person who takes a melkanam, the term of which is to begin after the expiry of a kanam in force in favour of a third party, must be held to have had notice of an agreement for renewal obtained by the kanamdar.

The principle that no decree should be made for specific performance of a contract to advance or take a loan is inapplicable to a suit for specific performance of an agreement for the renewal of a kanam. In proper cases there is no difficulty in making a decree for specific performance of an agreement to grant a kanam.

Unniri Kutti v. Narayana, A.I.R. 1929 Mad. 777, followed.

Per REILLY J.—Courts should be very careful about applying to this country English decisions in regard to the principle of constructive notice and should do so only when they are quite sure that the circumstances are really similar.

* Letters Patent Appeal No. 163 of 1927.

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APPEAL under clause 15 of the Letters Patent against the judgment of RAMESAM J., dated 18th November 1926 and passed in Second Appeal No. 157 of 1924 preferred against the decree of the District Court of North Malabar in Appeal Suit No. 308 of 1923 preferred against the decree of the Court of the Principal District Munsif of Tellicherry in Original Suit No. 419 of 1921.

K. Sankara Menon for appellant.

O. T. G. Nambiar and *A. Achutan Nambiar* for respondents.

JUDGMENT.

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ANANTAKRISHNA AYYAR J.—The second and third defendants were holding certain properties under a janmi. On the 28th January 1909, the second defendant executed in favour of the first, Exhibit I called “Kanam-kuzhikanam-mortgage” document, under which the first defendant was entitled to hold the properties till the 28th January 1921. Subsequently the second defendant received some renewal fee from the first and executed on the 19th December 1918 Exhibit III in his (first defendant's) favour. The second defendant seems to have subsequently changed his mind and executed in favour of the plaintiff a melcharth, Exhibit A, on the 5th January 1919. After the expiry of the period covered by Exhibit I, the plaintiff on the basis of Exhibit A instituted Original Suit No. 419 of 1921 to redeem Exhibit I. The first defendant contested the suit, and relied on an agreement by the second defendant to renew Exhibit I, and produced Exhibit III to evidence the said agreement; he also pleaded that the second defendant had as a matter of fact executed a renewal of the kanam kuzhikanam deed in his favour on the 19th December 1920, Exhibit II.

The plaintiff succeeded in the trial Court, but on appeal the learned District Judge reversed the first Court's decree. He found that Exhibit III was a genuine document, and that the plaintiff must be taken to have had notice of the agreement entered into between the first defendant and the second defendant with reference to the granting of the renewal by the second defendant in favour of the first. From the dismissal of the suit by the lower Appellate Court the plaintiff preferred a second appeal to this Court, and the learned Judge (RAMESAM J.) before whom the second appeal came on for hearing held that Exhibit III should be taken to evidence only an agreement to renew and that the appellant's contention that it was a demise by itself should not be accepted. The learned Judge also found that the finding of the lower Appellate Court on the question of notice on the part of the plaintiff of the agreement, Exhibit III, should be upheld. He also held that, having regard to the fact that the first defendant was in possession of the properties under a kanam kuzhikanam deed, and having regard to the agreement entered into between the first defendant and the second, the plaintiff was bound to have inquired into the rights of the first defendant in the circumstances, and not having done so the plaintiff's melcharth document, Exhibit A, should not be allowed to prevail over the first defendant's rights. In the result the learned Judge dismissed the second appeal. The present letters patent appeal has been filed by the plaintiff against that decision of the learned Judge.

Before noticing the arguments advanced by the learned Advocate for the appellant, I may say that I agree with the opinion of RAMESAM J. that “Exhibit III could not operate as a present demise and that it is

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admissible in evidence though unregistered, and that the parties did not intend a demise until payment of the balance manusham of Rs. 5-1-3 by the first defendant."

It was first contended before us by the learned Advocate on behalf of the plaintiff that having regard to certain decisions of this Court a lessee in the position of the first defendant, whose term had expired but who had an agreement of renewal in his favour, could not for that reason withstand a suit for possession brought by a lessor or a purchaser from the lessor, and it was argued that the decision of the learned Judge in this case is not correct. Our attention was drawn to the decisions in *Achutan Nambudri v. Koman Nair*(1), *Gopalan Nair v. Kunhan Menon*(2) and *Kanna Kurup v. Sankara Varma Rajah*(3). With reference to this argument it has to be observed that while the tenant's (first defendant's) possession by itself, though coupled with an agreement to renew, would not be a complete defence to a suit for possession by a person in the position of the plaintiff in the circumstances, yet, as was pointed out by one of the learned Judges in the Full Bench case of *Kurri Veerareddi v. Kurri Bapireddi*(4), where the right of the defendant to enforce specific performance of the agreement in his favour had not become barred by limitation, it would be open to him to apply to the Court to have the suit for ejectment stayed, and in the meantime he could file in his turn a suit for specific performance of the agreement, and, after having got a duly registered document, he could file the same in the first suit and thus completely sustain the plea that the plaintiff is not entitled to the relief asked; (see page 351). This view has been approved by their Lordships of the Privy Council

in a recent case, *Ariff v. Jadunath Majumdar*(1). That being so, we have to see whether in the present case, if this question had been raised in its proper form before the trial Court, it would not have been open to the first defendant to adopt the procedure suggested in the cases I have mentioned. At the time of filing the written statement—in fact even at the time of the delivery of the judgment by the trial Court—the right of the first defendant to sue for specific performance had not become barred by limitation. That being so, there is no real substance in the contention raised by the learned Advocate for the appellant before us that the first defendant had no manner of right to continue in possession. Further, if it is open to a person in the position of the first defendant to apply for the adjournment of the suit with a view to file a separate suit in his turn for specific performance and get a registered document, the position of the first defendant in the present case is surely better, for the first defendant has as a matter of fact obtained a registered deed, Exhibit II, from the second defendant in pursuance of the agreement, Exhibit III. That being so, the absence of a registered deed in favour of the first defendant at the time of the melcharth to the plaintiff should not be taken, in the circumstances, to stand against the right of the first defendant.

It was also suggested that after the grant of Exhibit A in favour of the plaintiff by the second defendant on the 5th January 1919, the document, Exhibit II, which the first defendant got from the second on the 19th December 1920 should not be taken to have really conveyed the rights now in dispute to the first defendant. This technical plea was not raised in any of the

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(1) (1902) 13 M.L.J. 217.

(3) (1920) I.L.R. 44 Mad. 344.

(2) (1907) I.L.R. 80 Mad. 300.

(4) (1906) I.L.R. 29 Mad. 336 (F.B.).

(1) (1931) I.L.R. 58 Calc. 1235, 1249; I.R. 58 I.A. 91.

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lower Courts, nor was it raised before the learned Judge of this Court ; nor do we find it specifically raised in the grounds of the letters patent appeal either. In these circumstances we think that there is some force in the contention raised by the learned Advocate for the respondents that such a matter should not be allowed to be raised for the first time here at this stage of the litigation. In the circumstances I do not think that we should allow this new point to be raised for the first time here. If it had been raised in proper form in the trial Court, it would have been open to the first defendant to file a suit for specific performance against the plaintiff also to have a document similar to Exhibit II executed by the plaintiff to the first defendant. I accordingly overrule the main contention raised by the learned Advocate for the appellant.

The next point raised by him related to the finding on the question of notice. It was argued that the first defendant was in possession only as a mortgagee, and that a kanam should be taken to be a mortgage and not a lease. It is too late in the day to raise such a contention. It has been held that a kanam is a combination of both a mortgage and a lease, and some of the recognized incidents of a kanam could not be explained but for the fact that it also partakes of the incidents of a lease, for example, the question of the forfeiture of the term in case the kanamdar denies the title of the janmi-demisor. However, looking into the contents of the documents in question before us, Exhibit I, it is styled a 'kanam kuzhikanam deed'. Under it, express authority is conferred on the first defendant to plant coconut trees, etc. To say that in those circumstances Exhibit I evidences only a mortgage and that the question of notice should be decided on that basis only, is, we think, not quite correct.

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Then, it was further argued that, even assuming that Exhibit I is a combination of a mortgage and a lease, yet the inference sought to be drawn on behalf of the first defendant from the possession of the land by the first defendant is too farfetched and that the principle of constructive notice should not be extended to such cases. We find that the doctrine of constructive notice of the rights of a person in possession has been discussed in several decisions that were quoted before us—*Daniels v. Davison*(1), *Faki Ibrahim v. Faki Gulam*(2), *Babasah v. Hajee Mahomed Akbar Sahib*(3), *Parthasarathy Aiyar v. Subbaraya Gramany*(4), *Annalath Chathu v. Vengadan Pakker*(5) and *Balchand Mahton v. Bulaki Singh*(6). Section 27 of the Specific Relief Act was also referred to. But it was argued that those were cases where the question arose as between the lessee in possession and a purchaser of the properties and it was contended that some of the learned Judges who had to consider this question expressed the opinion that the doctrine had probably been pressed too far.

But, having regard to the incidents of the transaction evidenced by Exhibit I and having regard to the fact that, with reference to holdings under a kanam kuzhikanam and other similar demises, the tenants do as a matter of fact expect renewals, and renewals are granted in a very large majority of cases, we think that with reference to a case like the one before us it is not a case of *extension* of the doctrine referred to. I may note that the Legislature has recently recognized the practice and conferred a legal right on the part of the kanam-holders to a renewal of such demise on certain terms. Having regard to this usual practice, I think that the present is not a case of extension of

(1) (1809) 16 Ves. Jun. 249; 33 E.R. 978. (2) (1920) I.L.R. 45 Bom. 910.
(3) (1923) 45 M.L.J. 157. (4) (1923) 45 M.L.J. 175.
(5) (1916) 2 M.W.N. 31. (6) (1928) I.L.R. 8 Pat. 316.

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the principle already recognized in several cases quoted before us. I may also refer to *Hunt v. Luck*(1) and the decision of the Privy Council in *Barnhart v. Green-shields*(2). The learned Judge who heard the second appeal thought that it was not a case of extension of the doctrine if he applied it to the kuzhikanam in question, and we are not satisfied that any sufficient reasons have been shown as to why we should differ from that opinion. I accordingly overrule this contention also of the learned Advocate for the appellant.

It was finally argued before us that a kanam is a mortgage and that specific performance of an agreement to grant a kanam should not be decreed by the Courts. There is however a recent decision of KRISHNAN PANDALAI J. in *Ummiri Kutti v. Narayana*(3) where a substantially similar question arose for decision, and the learned Judge held that it cannot be said that the transaction of "kanam"—well known in Malabar—is in essence one of loan or mortgage. I agree with that decision of the learned Judge. In the case before us, we have got the specific condition of the letting, namely, that the first defendant should plant trees and otherwise enjoy the property. The argument that a suit for specific performance of an agreement to grant a loan would not ordinarily be decreed by Courts is in our opinion not applicable to a transaction similar to the one before us. I am therefore unable to agree with this contention of the appellant.

I would accordingly dismiss the letters patent appeal with costs.

REILLY J.—I agree with my learned brother on all points. There are only three matters on which I should like to say a few words.

(1) [1902] 1 Ch. 428, 433.

(2) (1853) 9 Moo.P.C. 18, 32 and 33; 14 E.R. 204.

(3) A.I.R. 1929 Mad. 777.

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I agree with the decision of KRISHNAN PANDALAI J. in *Ummiri Kutti v. Narayana*(1) that in proper cases there is no difficulty in making a decree for specific performance of an agreement to grant a kanam. And in this particular case, if there had been a suit for specific performance, there would have been no difficulty at all, as what the first defendant would have been seeking would have been, not the grant of an original kanam, but merely a renewal of a kanam, which he already held and for which no further advance was to be made but on the contrary he was paying a considerable manusham. The principle that no decree should be made for specific performance of a contract to advance or take a loan in my opinion does not apply to a case such as this.

I agree too that we should not, at this stage of the case, drive the first defendant to a suit for specific performance of the agreement embodied in Exhibit III. As my learned brother has pointed out, in 1920 he got a renewal of the kanam-deed, Exhibit II, and that contains the very terms which would have been contained in any kanam-deed which he could have got executed as a result of a suit for specific performance. It is true that Exhibit II was executed by the second defendant, not by the plaintiff. But in a suit for specific performance the plaintiff would have been ordered to execute a similar kanam-deed in his favour; and everything that the plaintiff could have properly urged in such a suit she was at liberty to urge and she did urge in this suit. I think there is no necessity at this late stage to require the first defendant to sue for specific performance.

(1) A.I.R. 1929 Mad. 777.

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RAMESAM J. was of opinion that the plaintiff must be held to have had notice of the agreement, Exhibit III. It is not contended that she had actual notice. The finding is that she had constructive notice. RAMESAM J. arrived at that finding by applying the principle that a purchaser, who finds a tenant in possession of land which he buys, must be held to have had notice of the conditions under which that tenant is in possession. There are plenty of cases to that effect, both in England and in this country. RAMESAM J. has relied particularly upon *Daniels v. Davison*(1) and upon *Barnhart v. Greenshields*(2) and a number of cases in this country in which *Daniels v. Davison*(1) has been followed. Now all those cases relate to the notice which must be imputed to a purchaser of land. *Daniels v. Davison*(1), as has been recognized frequently, carries that principle to great lengths. In that case the purchaser, who knew that there was a tenant in possession, was held to have had notice that the tenant had in his pocket an agreement from the vendor to sell the very property to him, a thing that one would hardly expect of a tenant. That case goes very far; and learned Judges in England have sometimes said that they would certainly not extend the doctrine of notice to a purchaser any farther. But here we are dealing with something quite different. The question is whether the plaintiff, having obtained a lease from the second defendant, must be imputed with notice of an agreement to renew obtained by the prior lessee, whose term was still running. That seems to me very different from the case of a purchaser, who, finding a tenant in possession, does not care to make inquiries about the tenant's rights. With very great respect I doubt

(1) (1809) 16 Ves. Jun. 249; 33 E.R. 978.
(2) (1853) 9 Moo. P.C. 18; 14 E.R. 204.

whether the English cases quoted are of use to us in this particular matter; and, if I may say so, we should be very careful about applying to this country English decisions in regard to notice, and we should do so only when we are quite sure that the circumstances are really similar. When we apply the principle of constructive notice—that a man has notice because, if he had made reasonable inquiries, he would have ascertained the facts and, if he has not ascertained the facts, he has been guilty of gross negligence—we must carefully regard all the circumstances of the case and of the country and of the people to whom we are going to apply that principle. I am not sure myself that one could say generally in this country that, if a man took a lease, the term of which was to start on the expiry of an existing term held by some other person, it was his duty as a reasonable man to inquire whether that other person had an agreement for renewal in his pocket and that he would be guilty of gross negligence if he failed to make any inquiry about that. But in this case we are dealing with Malabar, and we are dealing with the case of a person who takes a melkanam, the term of which is to begin after the expiry of the kanam still in force: in her own document the terms of the kanam in force are set out, and she knows that the kanamdar is in possession. Now can any one who is acquainted with Malabar say that the melkanamdar has no reason to suppose that the kanamdar in possession is likely to be hoping for a renewal? Nobody could say that. Can anybody say that the melkanamdar as a reasonable person could be unaware that the sitting kanamdar may very well have approached the janmi and have asked for a renewal and may very well have got an agreement for renewal already? I agree with my learned brother that, when

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we are dealing with Malabar, we must remember Malabar conditions; and I have no doubt whatever that the melkanamdar, the plaintiff, if she chose to make no inquiry whether the first defendant had obtained an agreement for renewal, was merely choosing to shut her eyes, and having done that she cannot say that she had no notice. Therefore I agree, not on the strength of *Daniels v. Davison*(1) or *Barnhart v. Greenshields*(2) or the other cases quoted by RAMESAM J., but on an application of the doctrine of constructive notice which appears to me to be appropriate to the conditions in the part of the country with which we are concerned in this case, that the plaintiff had notice of Exhibit III.

I agree with my learned brother that this appeal should be dismissed with costs.

A.S.V.

(1) (1809) 18 Ves. Jun. 249; 33 E.R. 978.

(2) (1853) 9 Moo. P.C. 18; 14 E.R. 204.

APPELLATE CIVIL.

Before Mr. Justice Curgenvven.

PENDYALA SUBBARAYUDU (FIRST RESPONDENT),
PETITIONER.

1931,
October 27.

v.

GUDI VADA GOPAYYA (PETITIONER), RESPONDENT.*

Code of Criminal Procedure (Act V of 1898), secs. 476 and 195 (1) (b), (c)—Offence committed "in or in relation to any proceeding in any Court"—Meaning of—Termination of proceeding in which document produced but document remaining in custody of Court—Forgery in respect of such document—Jurisdiction of Court to complain under sec. 476.

The offence of forgery of an endorsement of payment on a mortgage bond, committed after the termination of the proceeding in which the bond was produced, but while the document was among the Court records, cannot be said to have been committed "in or in relation to the proceeding" within the meaning of section 476 of the Code of Criminal Procedure, and the Court which disposed of the proceeding has no jurisdiction to take action under section 476 in respect of that offence.

An offence cannot be said to have been committed in relation to a judicial proceeding unless it has entered as a component into that proceeding, or unless in some manner it has affected that proceeding or been designed to affect it or come to light in the course of it. An offence committed after the close of the proceeding is wholly outside the scope of the provision and the circumstance that the document was still in the custody of the Court does not make the offence one committed in relation to the proceeding which had previously terminated.

PETITION under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court of Guntur, dated 16th July 1931 and made in Appeal Suit No. 357 of 1930 preferred against the order of the

* Civil Revision Petition No. 1105 of 1931.

SUBBARAYUDU
v.
GOPATYA. Court of the District Munsif of Guntur, dated 23rd June 1930 and made in Original Petition No. 19 of 1929 in Original Suit No. 1136 of 1927.

K. S. Jayarama Ayyar for petitioner.

K. N. Ganpati for Public Prosecutor (*L. H. Bewes*) for the Crown.

Ch. Raghava Rao for respondent.

Cur. adv. vult.

JUDGMENT.

This petition is preferred against an order of the District Judge of Guntur directing under section 476-B of the Code of Criminal Procedure that a complaint be made under sections 193 and 467 of the Indian Penal Code against the petitioner. The facts may be briefly stated as follows:—The petitioner had executed a mortgage deed to the respondent for Rs. 8,000, and subsequently he filed a suit (Original Suit No. 1136 of 1927) against third parties and applied for an interim injunction, in which application the respondent, under summons, produced the document in Court. The production was on 7th January 1928, and an order granting the injunction, and thus terminating the proceeding in which the mortgage bond was produced, was passed two days later, on the 9th, but the bond was not taken back from the Court's custody by the mortgagee. Then some time later the respondent obtained a money decree against the petitioner in Original Suit No. 164 of 1925, and proceeded to bring the mortgaged property to sale, subject to his own mortgage. The petitioner applied for a postponement of the sale, and in connexion with the application asserted that the respondent had not given him credit for a sum of Rs. 6,000 which he had paid towards discharge of the mortgage debt. This statement led to

an examination of the document, which was still among the Court records, and it was found to bear an endorsement which the respondent denounced as a forgery which must have been committed after he produced the deed in Court on 7th January 1928. He accordingly applied to the District Munsif before whom the document had been produced for an order complaining of the alleged act of forgery. The application was dismissed, but on appeal the learned District Judge has directed that a complaint should be filed under sections 193 and 467, Indian Penal Code.

The question is whether the circumstances were such as to give the Court jurisdiction to complain under sections 476 and 195 of the Code of Criminal Procedure. It is necessary to observe in the first place, that the application was made in Original Suit No. 1136 of 1927, and that that must be taken to be the "proceeding" for the purposes of these sections. As a matter of fact the document was not even produced in the execution proceedings in Original Suit No. 164, so that, so far as that proceeding is concerned, no question of the applicability of section 195 (1) (c) of the Code of Criminal Procedure could arise. Nor, I think, as the District Munsif observes, could it be said, with reference to section 195 (1) (b), that the offence was committed "in or in relation to" that proceeding. The question accordingly is whether the complaint of the Court which disposed of the interlocutory application in Original Suit No. 1136 was an act within its competence.

The power of the Court to make a complaint is derived from section 476 of the Code of Criminal Procedure, and the offence must be one referred to in section 195, sub-section 1, clause (b) or clause (c) "which appears to have been committed in or in relation to a proceeding in that Court." This latter qualification

SUBBARAYUDU is to be found also in clause (b) of section 195 (1), but
 v.
 GOPAYYA. not in clause (c). Its absence from clause (c) cannot however affect the jurisdiction conferred by section 476, so that I conclude that whether the offence be one mentioned in clause (b) or clause (c), it must appear to have been committed in or in relation to a proceeding before the Court that makes the complaint. And this appears to be reasonable upon general considerations. Clause (c) of section 195 (1), if read without reference to the terms of section 476, would debar a Court from taking cognizance of any offence of forgery committed by a party to a proceeding in respect of a document produced or given in evidence in that proceeding, whether or not the act of forgery bore any relation to the proceeding or not, and consequently whether or not the Court before which the proceeding took place had any opportunity or occasion to deal with the circumstances into which the act of forgery entered. I do not think that that can be the intention of the clause. The connection between the act and the proceedings must be something more than casual or accidental. The learned District Judge in the present case has indeed accepted the condition that the offence must appear to have been committed in or in relation to the proceeding. He holds that it is satisfied by the circumstance that the document, when the forgery was committed, was in the custody of the Court. Now, as has been said, the document was filed in Court by the respondent on 7th January 1928, and two days later the proceeding in which it was filed came to an end. It is not known when the act was committed, but since it did not come to light until more than a year had elapsed it may be presumed to relate to the period of time after the proceeding had been disposed of. The question is whether an offence of this character, committed after

the proceeding has terminated, but while the document SUBBARAYUDU
 is still among the Court records, can be said to have v.
 been committed "in or in relation to the proceeding". GOPAYYA. The expression is, no doubt, capable of a very wide construction,—a good deal wider than the words as they stood before amendment—"committed before it or brought under its notice in the course of a judicial proceeding", application of which would certainly be decisive in the present case.

It is of course not open to argument that the offence was committed "in" the proceeding. Was it committed "in relation to" it? The answer must depend upon the intention with which that very general phrase may be presumed to have been used. The object of these provisions of the Code is to give the Court, and not a private party, power to make a complaint, where the offence has entered as a component into some judicial proceeding. The offence need not have been committed before the Court, and it may have been committed before the proceedings began. But it seems to me indispensable that it must in some manner have affected those proceedings (see the heading of Chapter XXXV of the Code) or been designed to affect them, or come to light in the course of them, and that an offence committed after their close is wholly outside the scope of the provisions. The mere fact that the document is still in the custody of the Court may impose upon the presiding officer, as the executive head of his establishment, certain responsibilities, but they are different in kind from those of a Court acting judicially, and I do not think that the inquiry which it may be his duty to make is such as is contemplated in section 476. Documents sometimes remain in the custody of a Court for a number of years, and to relate them for this purpose to the proceeding in which they were filed

SUBBARAYUDU would be, I think, to extend these requirements of the Code beyond reasonable limits. I am, therefore, led to the conclusion that there was no jurisdictional basis in this case for taking action under section 476 of the Code of Criminal Procedure. I allow the petition, set aside the order of the District Judge and restore that of the District Munsif. The petitioner will have his costs in this Court.

K.N.G.

APPELLATE CRIMINAL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

1931,
February 11, 12. *IN RE* ATHI AMBALAGARAN AND SIX OTHERS (PROSECUTION WITNESSES IN SESSIONS CASE NO. 15 OF 1931), APPELLANTS.*

Code of Criminal Procedure (Act V of 1898), s. 476—Perjury in respect of contradictory statements made before committing Magistrate and in Sessions Court—Action under s. 476 regarding—Jurisdiction to take.

The Sessions Court has jurisdiction, under section 476 of the Code of Criminal Procedure (Act V of 1898), to file a complaint for perjury against a witness examined before it in respect of contradictory statements made by him before itself and before the committing Magistrate.

A statement made by a witness at the preliminary enquiry is one made in relation to the subsequent proceedings in the Sessions Court.

Narayanan Nadan v. Palaniappa Nadan, (1917) M.W.N. 141, approved.

It is neither desirable nor necessary for the committing Magistrate also to file a complaint in such cases.

Observations to the contrary in *In re Ganesh Mull*, (1932) I.L.R. 55 Mad. 178 and in *Rex v. Veeraiya Moopan*, (Criminal Appeals Nos. 46 and 47 of 1931), dissented from.

* Criminal Appeals Nos. 570 of 1931 and 5 to 11 of 1932.

APPEAL against the order of the Court of Session of the West Tanjore Division, dated 20th July 1931, in Criminal Miscellaneous Petition No. 27 of 1931 in Sessions Case No. 15 of 1931.

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AMBALA-
GARAN,
In re.

Appeals originally filed in the Court of the District Magistrate of Tanjore as Criminal Appeals Nos. 24 to 30 of 1931 and subsequently transferred to the High Court by its order, dated 11th December 1931, and made in Criminal Appeal No. 570 of 1931 against the complaints lodged by the Taluk Second-class Magistrate of Arantangi in Calendar Case Nos. 54 to 60 of 1931 on the file of the Court of the Sub-divisional First-class Magistrate of Pattukkottai, respectively.

[Their Lordships heard the appellants in the first instance on the preliminary objection as to the jurisdiction of the Courts below to take action under section 476 of the Code of Criminal Procedure.]

V. K. John for appellants.

N. S. Mani for Public Prosecutor (*L. H. Bewes*) for the Crown.

Our. adv. vult.

The JUDGMENT of the Court was delivered by WALLER J.—Criminal Appeal No. 570 of 1931 is an appeal by seven persons against an order of the Sessions Judge, West Tanjore, directing their prosecution for perjury. They were to be prosecuted for having made contradictory statements before himself and before the committing Magistrate. As a measure of precaution, the committing Magistrate also directed their prosecution. Seven appeals were presented against his order to the Sub-divisional Magistrate, Pattukkottai, and they have been called up to this Court for consideration with the other appeal.

The main contention is that both of the Courts have acted without jurisdiction. No Court, it is argued, can

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direct a prosecution for perjury committed in another Court. In other words, such a prosecution as this—for making contradictory statements—can be ordered only when the statements have been made in the same Court or by a Court to which appeals lie from both of the Courts in which the contradictory statements were made. It follows that in a case like this, which is precisely the case stated in the illustration to section 236 of the Code of Criminal Procedure, although the law contemplates the possibility of a prosecution, a prosecution is impossible; for the statements have been made in different Courts and appeals from these Courts lie not to one and the same Court but to two different Courts.

The question has arisen before and been answered in different ways. It arose in *Rami Reddi v. Public Prosecutor of Kurnool*(1) and the answer was, apparently, that each of the Courts should sanction, which negatives part of Dr. John's contention. The statements in question were made one before a Sub-Magistrate under section 164 of the Code of Criminal Procedure and the other in the Sessions Court. In *Narayanan Nadan v. Palaniappa Nadan*(2), a case exactly parallel to this, it was held that the Sessions Judge could grant sanction in regard to both statements, the one made to the committing Magistrate having been "brought to the notice of the Sessions Court in relation to proceedings" before it. In *In re Ganesh Mull*(3), JACKSON J., followed this last decision, but added the observation that by way of superabundant caution in such cases it would be well to have complaints from both Courts. In another judgment, Criminal Appeals Nos. 46 and 47 of 1931,

(1) (1914) 27 M.L.J. 586.

(2) (1917) M.W.N. 141.

(3) (1931) I.L.R. 55 Mad. 178; 61 M.L.J. 914.

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delivered on the same day, he went further and said that the committing Magistrate also "must complain." And in another unreported case (Criminal Appeal No. 281 of 1931) LAKSHMANA RAO J. followed the decision in *Narayanan Nadan v. Palaniappa Nadan*(1).

On account of these somewhat conflicting pronouncements, the appeals were sent to us in order that the question might be settled by a Bench. Our answer must be that it was correctly decided in *Narayanan Nadan v. Palaniappa Nadan*(1). Section 476 of the Code of Criminal Procedure is framed in very wide terms and allows a Court to direct an enquiry to be made into certain offences, including perjury, which appear to have been committed in or in relation to a proceeding in that Court. The wording seems to us to cover exactly a case like this. The perjury was committed either in the Sessions Court or at the preliminary enquiry which preceded and led up to the trial in the Sessions Court. We find it impossible to say that a statement made by a witness at the preliminary enquiry has not been made in relation to the subsequent proceeding in the Sessions Court. The Sessions Judge had therefore jurisdiction to direct the prosecution of the appellants before us for contradictory statements made before himself and before the committing Magistrate. We do not agree with JACKSON J., that it was either advisable or necessary for the committing Magistrate to direct their prosecution also. The appellants' first objection therefore fails and we must hear Dr. John on the merits.

[The appeals were heard on the merits on the next day and judgment was delivered :]

(1) (1917) M.W.N. 141.

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The first objection taken, on the merits, is that the Sessions Judge found in the course of the judgment that the story told at the preliminary enquiry was untrue. That is not how we understand the judgment. The next objection is more substantial; it is that the contradictory statements have not been sufficiently specified in the complaints. That seems to us to be correct. It should not be left to a Magistrate to endeavour to ascertain what is being complained about. We must, therefore, direct the withdrawal of the complaints made by the Sessions Judge and also those made by the Magistrate which latter were superfluous.

As at present advised we can see no obstacle to the Sessions Judge passing fresh proceedings and directing fresh complaints to be made, if he thinks it worth while to do so.

K.N.G.

APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice and
Mr. Justice Cornish.

A. M. M. MURUGAPPA CHETTIAR (FIRST DEFENDANT),
APPELLANT,

1931,
October 30.

v.

ARANGARAJA KUMARANANDASWAMI AND ANOTHER
(PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Banker and customer—Customer—Moneys of third party held in fiduciary capacity by—Deposit by him with bank of—Third party's suit to recover money from banker—Maintainability of—Party to suit—Customer, if a necessary party.

Where K. endorsed over certain hundies drawn in his name in favour of R. with instructions to collect the hundies and invest the proceeds in his (K.'s) name with a banker and R. collected the hundies but contrary to the instructions invested the same in his own name in a separate account with M., a banker in Madras,

held, that R. stood to K. in a fiduciary relationship and that K. could follow the proceeds of the hundies in the hands of M.

Burdick v. Garrick, (1870) 5 Ch.App. 233; *In re Hallett's Estate*, *Knatchbull v. Hallett*, (1879) 13 Ch.D. 696; and *Sinclair v. Brougham*, [1914] A.C. 398, followed.

Held further, that in the suit by K. against M. to recover the proceeds of the hundies, neither R. nor his representatives were necessary parties.

APPEALS against the judgment of KUMARASWAMI SASTRI J., dated 21st December 1928, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 608 of 1927.

Advocate-General (A. Krishnaswamy Ayyar), with him S. Parthasarathy and V. K. Thiruvengadachari, for appellant.—There is no privity of contract between appellant and first respondent. The hundies were given by Ramanathan

* Original Side Appeals Nos. 7 and 8 of 1929.

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Chetty as his property and, when they were realized, they were treated as his property and dealt with as such. The appellant is a banker. He will have no defence to a suit by Ramanathan or his heirs for the recovery of the proceeds of the hundies unless the matter is adjudicated upon in the presence of Ramanathan or his heirs; see *Tassell v. Cooper*(1), *Pinto v. Santos*(2) and Grant's Law of Banking, 6th Edition, page 190.

M. Patanjali Sastri, with him *R. Narasimhachari*, for second respondent.—The first respondent had to prove his title to the fund as against the second respondent as a preliminary step to his getting a declaration against the appellant. The Court was concerned in a dispute really between the respondents and had no jurisdiction to decide such dispute since no part of the cause of action arose in Madras. There is no submission to jurisdiction and, in a case of total want of jurisdiction, neither submission nor consent nor waiver could confer jurisdiction on the Courts; see *Provas Chandra Sinha v. Ashutosh Mukherji*(3). Even if part of the cause of action could be said to have arisen in Madras, since the plaintiff had not obtained leave to sue the second respondent, the Court had no jurisdiction; see clause 12 of the Letters Patent. *Ram Partab Samrathrai v. Foolibai and Goolibai*(4) is in point. The defect could not be cured by obtaining leave later. Even if the suit had been properly laid against the appellant, the addition of the second respondent is not a mere matter of procedure but one of substance and deals with the power of the Court to try the suit against the second respondent also. The second respondent was at first added as a *pro forma* defendant. If that had continued, the matter in issue would not be *res judicata* between him and the other parties to the suit; see *Ramdas v. Vazirsaheb*(5) and *Malhi Kunwar v. Imam-ud-din*(6).

S. Doraiswami Ayyar, with him *K. S. Rajagopala Ayyangar*, for first respondent.—In the circumstances that have happened, the second respondent need not be on the record to enable the first respondent to get a declaration against the second respondent who stands to the first respondent in a fiduciary relationship; *Burdick v. Garrick*(7). If such money could be

(1) (1850) 9 C.B. 509; 137 E.R. 990.

(3) (1929) I.L.R. 56 Cal. 979.

(4) (1896) I.L.R. 20 Bom. 737.

(6) (1904) I.L.R. 27 All. 59.

(2) (1814) 5 Taunt. 447;
128 E.R. 763.

(5) (1901) I.L.R. 25 Bom. 589.

(7) (1870) 5 Ch. App. 233.

traced to the hands of the appellant, he could be sued; *In re Hallett's Estate, Knatchbull v. Hallett*(1). The true principle of the above decision was explained in *Sinclair v. Brougham*(2).

Advocate-General replied.

Cur. adv. vult.

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JUDGMENT.

BEASLEY C.J.—These are appeals from a judgment of BEASLEY C.J. of KUMARASWAMI SASTRI J., decreeing the suit under appeal in favour of the plaintiff. The plaintiff is a *pandaram*, the first defendant is a banker carrying on business in Madras, and the second defendant is a minor defending by his mother and guardian and the son of one S. M. R. M. Ramanathan Chettiar of Pallathur who died some years ago. The plaintiff is the founder and head of a mutt at Karaikal, known as the Sriman Swami Mutt. With a view to create an endowment for that mutt, the plaintiff collected subscriptions from several persons, and the amounts so collected were paid to the makers of four hundies in favour of the plaintiff. The aggregate sum of those four hundies is Rs. 11,996-7-6. In December, 1925, the plaintiff endorsed those four hundies to the second defendant's father, Ramanathan Chetty, with instructions to him to realize the amount thereof and invest the amount so collected on the plaintiff's behalf and account with a respectable Nattukottai Chetty firm in Madras for interest according to the Madras *Nadappu* rate for six months' *tavanai*. Ramanathan Chetty, it is alleged in the plaint, acting on behalf of the plaintiff endorsed the hundies in favour of the first defendant who agreed to collect the amounts of the hundies for the benefit of the plaintiff. The plaintiff, accordingly, having

(1) (1879) 13 Ch.D. 696.

(2) [1914] A.C. 398.

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without success made demands upon the first defendant for payment of the money so collected and thought by him to be standing in his account with the first defendant, sued the first defendant for that amount.

The first defendant filed a written statement in which he set up the case that Ramanathan Chetty delivered the hundies to him with instructions to collect the amounts thereof and credit them to his own account and that accordingly he collected the amounts and duly credited them to the account of Ramanathan Chetty. He contended that the hundies in question were delivered to him as the property of Ramanathan Chetty and that according to his instructions they were dealt with on the footing that they were his property. He pleaded that there was no privity of contract between him and the plaintiff and contended that the plaintiff's remedy, if any, was against Ramanathan Chetty or his heirs. In consequence of this written statement, the second defendant by his guardian was brought upon the record as a defendant, and in the second defendant's written statement the case put forward was that the plaintiff did not collect the money represented by the hundies as a trustee of the mutt but that he did so at the request of Ramanathan Chetty who gave him letters of recommendation to his friends and that the money collected was collected for Ramanathan Chetty who was the trustee of the money to be applied by him for the purposes of the mutt, though the case was subsequently developed at the trial that he was the trustee of the mutt. The second defendant's case, therefore, was that Ramanathan Chetty was the trustee of the money and that the plaintiff had no right whatever to the funds beyond merely the collection of them on Ramanathan Chetty's behalf. It was admitted that the

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money realized on the hundies was credited to Ramanathan Chetty's account with the first defendant. The second defendant also denied that the plaintiff was the founder or head of any mutt or charities in the name of Sriman Swami in Karaikal. In the last paragraph of his written statement the second defendant pleaded that the Court had no jurisdiction to entertain the suit as no part of the cause of action as against the second defendant arose in Madras, and that, even if a part of the cause of action had arisen in Madras, no leave of the Court to sue in Madras had been obtained.

The learned trial Judge after a very careful trial of the suit gave judgment in favour of the plaintiff holding that he had collected the money in question as the head of the mutt and on behalf of the mutt, that the second defendant's contentions that Ramanathan Chetty was the trustee for the money and that the plaintiff was making collections on his behalf and under his directions were untrue, and that the first defendant was liable to have the suit decreed against him because Ramanathan Chetty was in a position of trust to the plaintiff and enjoying that fiduciary relationship and in breach of his trust had paid the money into his own account, and the plaintiff was therefore entitled to follow it and get it from the first defendant. It is not clear from the very careful judgment of the trial Judge whether he intended to do more than make the second defendant liable as a *pro forma* defendant. The second defendant, it is quite clear, was made a party only because of the defence raised by the first defendant in his written statement. It seems to have been thought necessary by the plaintiff's legal advisers to make the second defendant a party to the suit so that the rights of all the parties could be properly determined; and the right of the plaintiff, even in the absence on the

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record of the second defendant, to follow the money into the hands of the first defendant under the circumstances of the case appears not to have been appreciated by the plaintiff's legal advisers. Consequently, both in the trial Court and before us, a great deal of time was taken up by a discussion of the question of the jurisdiction of the Court to entertain a suit against the second defendant. Mr. S. Doraiswamy Ayyar, however, did not take up the position that it was necessary to have the second defendant before the Court; his contention being, firstly, that on the evidence the relationship between the plaintiff and Ramanathan Chetty was a fiduciary one, and secondly, that Ramanathan Chetty was guilty of a breach of trust in putting the money realized on the hundies into his own account, and therefore the legal position was that the plaintiff was entitled to get that money back from the first defendant. Accordingly we think it quite unnecessary to decide the point as to jurisdiction. That was decided in the lower Court in favour of the plaintiff; but in view of the fact that Mr. Doraiswamy Ayyar did not support that finding, it only remains for this Court to say that it would appear that the lower Court had no jurisdiction to entertain the suit as against the second defendant. Therefore, so far as the second defendant's appeal is concerned, it must be allowed though it must be observed that the second defendant took no steps whatever to have the decree, when drawn up, posted "to be spoken to on minutes" before the learned Judge, and set right any errors or doubt therein but has come straight here instead. In view of the fact that most of the time in the Court below was taken up in a consideration of the case set up by the second defendant which was found to be untrue, in my opinion, the second defendant is not entitled to his costs either

here or in the Court below. Since, however, the decree as it stands makes the second defendant liable to pay costs, that part of it will be amended and the order substituted that the second defendant will bear his own costs.

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It is now necessary to consider the first defendant's appeal and whether the learned trial Judge was right in coming to the conclusion that the relationship between the plaintiff and Ramanathan Chetty was a fiduciary one. The learned trial Judge has obviously given the most careful consideration to this aspect of the case, as indeed he has to the case in its other aspects, and, in my opinion, it would be impossible to come to a different conclusion.

[His Lordship discussed the evidence and proceeded:]

It is sufficient to say, as I have already stated, that it is impossible to differ from the learned trial Judge's conclusions on this part of the case and to add that the second defendant's case is obviously a false one. It is clear, therefore, that the plaintiff was collecting money for the mutt at Karaikal, that having collected this large amount he got four hundies in which he was named the payee and endorsed them over to Ramanathan Chetty, not so as to give Ramanathan Chetty any right to the money but because Ramanathan Chetty was to negotiate the hundies for the plaintiff and pay the money into the plaintiff's account which Ramanathan Chetty was to open with some respectable firm in Madras. The money was entrusted to Ramanathan Chetty for that purpose, and in putting the money into his own account he was guilty of a breach of trust, and any difficulty there might have been in identifying this money after it got into the hands of the first defendant is removed by reason of the fact that

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Ramanathan Chetty had two accounts with the first defendant, namely a *tavanai* account and a *tanathu* account. The latter was an account of Ramanathan Chetty's own dealings. The former account was opened in order to pay into it the realizations from the hundies and there the money remained. The legal position is perfectly clear. The first case to which reference must be made is *Burdick v. Garrick* (1). There an agent, who was a solicitor in London, held a power of attorney from his principal in America to sell his property and invest the proceeds in his name. The agent received certain moneys under the power and paid them into his own bankers to the general account of his firm. The principal died in 1859 intestate. In 1867 his widow took out administration to his estate, and in 1868 she filed a bill against the agent for an account. The Statute of Limitations was pleaded, but it was held that the agent held the money in trust for his principal, and therefore the Statute of Limitations was no bar to the suit. On page 240 Lord HATHERLEY L.C. says:

"In the present case we have an agent who is intrusted with those funds, not for the purpose of being remitted when received to the principal, but for the purpose of being employed in a particular manner, in the purchase of land or stock; and which moneys the factor or agent is bound to keep totally distinct and separate from his own money; and in no way whatever to deal with or make use of them. How a person who is intrusted with funds under such circumstances differs from one in an ordinary fiduciary position I am unable to see."

It is clear from this decision that Ramanathan Chetty stood to the plaintiff in a fiduciary relationship. Next it has to be seen whether money placed by a person in fiduciary relationship in breach of that trust in the hands of another can be got back from that other person; and here we have the authority of the

(1) (1870) 5 Ch. App. 233.

well-known case of *In re Hallett's Estate, Knatchbull v. Hallett*(1) where it was held that if money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his bankers the person for whom he held the money can follow it, and has a charge on the balance in the bankers' hands. In a later case, *Sinclair v. Brougham*(2), the principle in *In re Hallett's Estate*(1) was applied. It is quite clear that the plaintiff was entitled in the lower Court to succeed in his claim against the first defendant and therefore the first defendant's appeal must be dismissed with costs.

CORNISH J.—I concur.

G.B.

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice and
Mr. Justice Cornish.*

HASARIMULL CHANDUKCHAND AND ANOTHER
(SECOND DEFENDANT AND HIS LEGAL REPRESENTATIVE),
APPELLANTS,

v.

N. R. VEDACHALA CHETTIAR AND ANOTHER
(PLAINTIFFS), RESPONDENTS.*

Madras Hindu Religious Endowments Act II of 1927 (as amended by Act I of 1928), sec. 73 (2)—Wrongful alienation of trust property by trustee—Suit by other trustees to recover property from alienees—Jurisdiction of Civil Courts.

Section 73 (2) of the Madras Hindu Religious Endowments Act II of 1927 (as amended by Act I of 1928) is not a bar to the institution of a suit by a trustee of a temple against strangers

(1) (1879) 13 Ch.D. 696.

(2) [1914] A.C. 398.

* Original Side Appeal No. 27 of 1930.

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to the trust claiming to be alienees of trust property wrongly obtained by them through the maladministration of a trustee.

Vythilinga Pandara Sannadhi v. Temple Committee, Tinnevely Circle, (1931) I.L.R. 54 Mad. 1011, discussed.

Budree Das Mukim v. Chooni Lall Johurry, (1906) I.L.R. 33 Calc. 789, followed.

Sembla.—There is nothing in section 92 of the Code of Civil Procedure which has not been taken out of that section and placed either in section 73 or other sections of the Madras Hindu Religious Endowments Act and section 73 of the said Act does not embrace any relief which could not formerly have been obtained under the procedure set out in section 92 of the Code.

APPEAL against the judgment of WALLER J., dated 28th January, 1930, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 85 of 1927.

T. G. Raghuvachari for second appellant.—The suit, as framed, is one for the recovery of property on the basis of a breach of trust by the trustee. The first clause of section 73 of the Madras Hindu Religious Endowments Act is the same as section 92 of the Code of Civil Procedure, 1908. The second clause of section 73 is wide enough to cover any suit in which the primary issue to be tried is whether the trustee has committed a breach of trust or not. The observations in *Vythilinga Pandara Sannadhi v. Temple Committee, Tinnevely Circle*(1) support the above submission. Section 73 (2) came to be enacted in this manner on account of the observations in *Venkataramana Ayyangar v. Kasturiranga Ayyangar*(2).

K. Narasimha Ayyar for respondents.—The plaintiff had given up the reliefs which might bring the case under section 73 and confined the suit to reliefs against the appellant who is a stranger to the trust. The reliefs now claimed against the appellants do not come within the purview of the section. Practically there is no difference between section 92 (1) of the Code of Civil Procedure, 1908, and section 73 of the Madras Hindu Religious Endowments Act. In *Budree Das Mukim v. Chooni Lall Johurry*(3) it was held that section 92

(1) (1931) I.L.R. 54 Mad. 1011.

(2) (1918) I.L.R. 40 Mad. 212 (F.B.).

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

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has no application to suits against strangers to the trust. See also *Budh Singh Dudhuria v. Niradbaran Roy*(1) and *Abdur Rahim v. Mohamed Barkat Ali*(2).

[Counsel was stopped]

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—This is an appeal from a judgment BEASLEY C.J. of WALLER J. He had before him a suit claiming reliefs against seven defendants. The first defendant was one of the trustees of a temple in the Chingleput District and the reliefs sought against him were his removal from trusteeship, an account, and various other reliefs which are properly to be obtained under section 73 of the Madras Hindu Religious Endowments Act. It was alleged that he had badly administered the trust and that as a result of the maladministration some property belonging to the temple and set out in the plaint got into the hands of the other defendants. The only defendant appealing here is the second defendant and he is admittedly the alienee of the most valuable of all the trust property, and that property is wholly situate in Madras. It is quite true that the suit has all the appearances of a suit under the Madras Hindu Religious Endowments Act. The sanction of the Endowments Board has been obtained and the reliefs sought are, as already pointed out, reliefs which are properly obtainable under that Act. But something happened in the lower Court; Mr. Narasimha Ayyar who was appearing for the plaintiffs did not press his claim against the first defendant. It should be remarked that the first plaintiff is also a trustee of the temple and, whether it was so stated at the time or not, it is quite clear that

(1) (1905) 2 C.L.J. 431.

(2) (1927) I.L.R. 55 Calc. 519 (P.C.).

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he could not have pursued his remedy here against the first defendant by reason of the fact that the suit in this High Court was barred by the provisions of section 73 of the Madras Hindu Religious Endowments Act. Accordingly, the suit against the first defendant was dismissed. That leaves only the alienees. Of these the alienees other than the second defendant have been content with the position of affairs as decided in the lower Court, which was, that, as regards the suit properties, the question whether their transfers can be set aside is to be inquired into. The second defendant appeals. His contention here is that the claim against him is one within the provisions of section 73 (2) of the Madras Hindu Religious Endowments Act and that this Court therefore has no jurisdiction to try the suit. He puts forward this contention by reason of the wording of that sub-section which is as follows:—

“Sections 92 and 93 and Rule 8 of Order I of the First Schedule of the Code of Civil Procedure, 1908, shall have no application to any suit claiming any relief in respect of the administration or management of a religious endowment and no suit in respect of such administration or management shall be instituted except as provided by this Act.”

These words, it is argued, mean that any suit between any parties in which the question of the administration of a religious endowment comes into question immediately attracts the provisions of section 73 of the Madras Hindu Religious Endowments Act. It is argued that that section is wide enough to embrace any suit in which such a matter has to be considered. The appellant prays in aid *Vythilinga Pandara Sannadhi v. Temple Committee, Tinnevely Circle*(1), a decision of a Bench of this Court consisting of CURGENVEN and CORNISH JJ. There, what the Court had to consider

(1) (1931) I.L.R. 54 Mad. 1011.

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was a claim of a purely personal nature. It was a suit to establish the plaintiff's personal right as hereditary trustee of a certain village temple; and it was held that the provisions of section 73 did not apply to any such claim. Then the Bench went on to state as follows:—

“The suit raises no issue as to the manner in which the trust property has been administered or should in future be administered.”

That, it is argued, is a decision to the effect that in all cases where there arises a question involving the consideration of administration of trust property the provisions of section 73 of the Madras Hindu Religious Endowments Act are at once attracted. In my view, that is going much beyond what was expressed in that decision. What we have got to consider here is whether, in a case where trustees of a temple are suing entire strangers to the temple, the provisions of section 73 of the Madras Hindu Religious Endowments Act apply at all. As between a trustee of a temple and other trustees of the temple, or as between the worshippers of a temple and the trustees of a temple and the persons interested in the temple, clearly, when questions of administration of the trust arise, those are matters which come within the scope of section 73 of the Madras Hindu Religious Endowments Act. But entirely different considerations apply where the parties are on the one hand trustees of a temple and on the other hand entire strangers who are claiming to be alienees of property wrongly obtained by them through the maladministration of a trustee. It seems to me that there is nothing in section 92 of the Code of Civil Procedure which has not been taken bodily out of that section and placed either in section 73 or other sections of the Madras Hindu Religious Endowments Act; and

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it seems to me clear that the Madras Hindu Religious Endowments Act, particularly section 73, does not embrace any relief which could not formerly have been obtained under the procedure set out in section 92 of the Code of Civil Procedure. It is admitted that such a claim as this would not have been one which was within the provisions or subject to the procedure of section 92 of the Code of Civil Procedure. Except for the decision of the Bench already referred to and some observations which appear in a Full Bench Case, *Venkataramana Ayyangar v. Kasturiranga Ayyangar*(1), no authorities have been quoted in support of the extreme contention of the appellant here. In that case the Full Bench was dealing with a case very similar to this and it held that the claim there was not one which was within the provisions of section 92 of the Code of Civil Procedure. It is true that at the end of his judgment SESHAGIRI AYYAR J. says at page 232 as follows:—

“If I may venture a suggestion, the time is come for the intervention of the Legislature to insert a clear and unambiguous provision in the Code of Civil Procedure that all reliefs relating to public, religious and charitable trusts, except those which partake of the character of personal or communal rights, should be litigated only under the provisions of section 92 (1). An amendment of Act XX of 1863 may be necessary to give full effect to this suggestion.”

Then PHILLIPS J. makes similar observations. It is suggested that it was in consequence of those expressions of opinion that section 73 of the Madras Hindu Religious Endowments Act came to be drafted in the form in which it is. It is curious that it should be suggested that observations made in 1917 were the reason and cause of a statute which was only passed 10 years later. Personally I can see no connection between those observations and section 73 of the Act. There

(1) (1916) I.L.R. 40 Mad. 212, 232 (F.B.).

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is ample authority in support of the position that section 92 of the Code of Civil Procedure and the corresponding section of the old Code do not apply to suits between trustees of a temple and alienees from trustee of a temple of trust property. In *Budree Das Mukim v. Chooni Lall Johurry*(1) WOODROFFE J. at page 804 says:

“It is on this principle, viz., that the suit contemplated by the section is directed against trustees, that it has been held that as against strangers it does not apply.”

He then sets out a number of decisions, two of which are decisions of this High Court, on that point, establishing that principle, and then continues:—

“It has doubtless been held in one case that, where there is a claim for administration of trust, which falls within the section, a claim to eject an alienee may be joined with it: *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav*(2). But the latter claim does not, in my opinion, come within the scope of the section and is open to the charge of misjoinder, and the decision has been dissented from in a later case, *Budh Singh Dudhuria v. Niradbaran Roy*(3), with which I agree.”

This decision of the Calcutta High Court was one under the corresponding section of the old Code. There is further authority to be found with regard to section 92 of the present Code in a decision of the Privy Council, *Abdur Rahim v. Mohamed Barkat Ali*(4). Lord SINHA in delivering the judgment of their Lordships states at page 526:

“It is urged broadly on behalf of the respondents that all suits founded upon any breach of trust for public purposes of a charitable or religious nature, irrespective of the relief sought, must be brought in accordance with the provisions of section 92, Code of Civil Procedure.

The short answer to that argument is that the Legislature has not so enacted. If it had so intended, it would have said so in express words, whereas it said, on the contrary, that

(1) (1906) I.L.R. 33 Calc. 782.
(3) (1905) 2 C.L.J. 431.

(2) (1897) I.L.R. 24 Calc. 418.
(4) (1927) I.L.R. 55 Calc. 519 (P.O.).

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only suits claiming any of the reliefs specified in sub-section (1) shall be instituted in conformity with the provisions of section 92 (1)."

Nevertheless the contention of the learned Counsel for the appellant here is that, although suits between a trustee of a temple and trespassers or alienees from the trustee of a temple are not within section 92 of the Code of Civil Procedure, directly it is necessary to prove the plaintiff's case by evidence that the alienation was the result of mismanagement by that trustee, the provisions of section 73 of the Madras Hindu Religious Endowments Act are at once attracted. I can see no warrant for any such contention. To so contend is to very widely amend the words in sub-section (2) of that section. If it had been intended to deprive the litigant of his right of the choice of the forum, it would have been done so by express enactment and not left to be a matter of mere implication. I cannot myself see that that deprivation is even implied in sub-section (2) to that section. Under these circumstances it is quite clear to me that the learned trial Judge was quite right in deciding that the Court had jurisdiction to proceed with the case as against the appellant. It is very difficult to see with what object this appeal has been presented. The other alienee-defendants have been quite content with the position imposed upon them in the lower Court and it is conceded here by the learned Counsel for the appellant that there can be no bar of limitation, even in the event of the appellant's success here, to a suit claiming exactly the same reliefs being filed in the District Court at Chingleput. Under these circumstances, it is very difficult to see what the appellant had to gain by presenting this appeal unless it be time. This appeal must be dismissed with costs.

CORNISH J. — I agree. I find it difficult to understand how the judgment in *Vythilinga Pandara Sannadhi*

v. Temple Committee, Tinnevely Circle(1), to which I was a party, is supposed to give support to the appellant's contention that, if a suit raises a question touching the validity of an alienation of trust property by a trustee, it is a suit in respect of the administration or management of the trust within section 73 of the Madras Hindu Religious Endowments Act. The sole question in that case was whether a suit to establish a claim to the hereditary trusteeship of a temple was barred by section 73. We held that it was not, for the reason that it was a suit to establish a private right and not a suit in respect of the administration or management of a temple. In my opinion, the effect of section 73 of the Act is simply this; that a suit which could only be instituted by the Advocate-General or some persons with his consent under section 92, Civil Procedure Code, must, when it relates to a religious endowment governed by the Act, be instituted by the Endowments Board or by some person, having an interest, with the consent of the Board. It is pointed out in *Vythilinga Pandara Sannadhi v. Temple Committee, Tinnevely Circle*(1) that, though some of the reliefs specified in section 92 of the Code of Civil Procedure are reproduced verbatim in section 73 of the Act, the others are provided for elsewhere in the Act. And as it has been held by the Full Bench in *Venkata-ramana Ayyangar v. Kasturiranga Ayyangar*(2) that a suit to recover trust property from its alienees does not come within section 92 of the Code, I think it follows that such a suit is equally outside the scope of section 73 of the Act, and that this appeal fails.

G.R.

(1) (1931) I.L.R. 54 Mad. 1011.

(2) (1918) I.L.R. 40 Mad. 212 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

P. V. S. KRISHNAMURTHY PILLAI AND ANOTHER
(PLAINTIFFS), APPELLANTS,

v.

P. V. S. SUNDARAMURTHY PILLAI AND SIX OTHERS
(DEFENDANTS), RESPONDENTS.*

Presidency Towns Insolvency Act (III of 1909), ss. 7, 18, and 36—Insolvency Court—Power to file partition suits in—Pending partition suit—Power of insolvency Court to stay proceedings in—Hindu father's debts—Binding nature of—Power of Insolvency Courts to summon son for ascertaining—Power of attorney to collect rents—Creditor having a—If, a secured creditor.

S. and his minor son K. were members of a joint Hindu family. S. had made certain alienations of the family property. He had also borrowed a sum of money from R. and had executed a power of attorney in favour of R. permitting him to collect the rents of certain family houses and to let them to other tenants when necessary. S. had also given a letter to R. by which he undertook not to cancel the power of attorney and not to deal with the houses so long as R's debt remained undischarged. On 11th February, 1927, K's mother as the next friend of K. filed a suit for partition against S. and certain other creditors of the joint family, *inter alia*, alleging that the debts contracted by S. from them were not binding on K. In March, 1927, S. became an insolvent and in September, 1927, the Official Assignee was added as a party to this suit. In 1929, R. filed a suit against S. and the Official Assignee for specific performance of an agreement to give a mortgage of the abovementioned houses alleged to have been entered into between him and S. in 1926. R. alternatively contended that he should be treated as a secured creditor in

* Original Side Appeals Nos. 3 and 30 of 1930.

the insolvency of S., in view of the terms of the power of attorney abovementioned.

Held that, inasmuch as the power of attorney created an interest in the rents only and not in the property by enabling R. to take possession of the houses, R. was not a secured creditor.

Spooner v. Sandilands, (1842) 62 E.R. 939, referred to.

Per RAMESAM J.—(1) Section 7 of the Presidency Towns Insolvency Act (III of 1909) does not enable partition suits to be filed in the Insolvency Courts. Observations to the contrary in *Ramachandra Ayyar v. Official Assignee of Madras*, (1930) I.L.R. 54 Mad. 739, discussed.

(2) On the insolvency of a Hindu father, the Insolvency Court has no jurisdiction to summon the son under section 36 of the Presidency Towns Insolvency Act in order to find out the binding nature of the father's debts on the sons, unless the son chooses to appear before the Insolvency Court and raise the question about the binding nature of the debt.

In re Balusami Ayyar, (1928) I.L.R. 51 Mad. 417 (F.B.), explained.

(3) Under section 18 of the Presidency Towns Insolvency Act the Insolvency Court has no power to stay the proceedings in a pending partition suit in which the insolvent is a party.

APPEALS against the judgment of KUMARASWAMI SASTRI J., dated 22nd January, 1929, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 83 of 1927.

A. Parameswaran and K. Gopalaswami for appellant.

O. T. G. Nambiar for second respondent. *C. Srinivasachari* for third respondent. *R. Swaminatha Ayyar* for fourth respondent. *V. Viswanatha Sastri* and *N. Panchanatha Ayyar* for fifth respondent. *A. Ramachandra Ayyar* for sixth respondent. *Abdur Rahim and Devarajan* for seventh respondent.

First respondent was unrepresented.

Cur. adv. vult.

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JUDGMENT.

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RAMESAM J.—The facts out of which these appeals arise are briefly these. One P. Venkatachalam was a well-known condiment and ice manufacturer of Madras. He acquired considerable property and died. One of his sons, Subbaraya Pillai, predeceased him leaving a son, Sundaramurthi. Another son of P. Venkatachalam, namely, Subrahmania Pillai, was appointed executor of his last will and testament. Another son, Murugesam Pillai, and some others including Sundaramurthi instituted Civil Suit No. 238 of 1905 in the High Court (Original Side), Madras, for partition and administration of the properties of Venkatachalam. Sundaramurthi claimed in that suit a fifth share in the properties of the deceased Venkatachalam. By the decree in that suit Sundaramurthi was declared entitled to a fifth share in all the properties, and under that decree he got various properties besides a sum of about rupees two lakhs. During the pendency of that suit a son was born, namely, Krishnamurthi. Sundaramurthi seems to have lived an extravagant life leading to wastage of the family property and heavy debts. The present suit was filed on 11th February 1927 by his minor son, Krishnamurthi, already mentioned, and his daughter appearing through their mother as next friend for partition and for other reliefs appropriate to a son and daughter. Sundaramurthi was the first defendant in the suit. Defendants two, four, and five are creditors claiming to hold mortgage rights over some of the family properties, and the plaintiff questions the validity of these debts. The third defendant is a purchaser of house and ground No. 182, Pophams Broadway, Madras, belonging to the family under a sale by public auction held at the instance of the fourth defendant under power contained in a mortgage executed by the first defendant in favour

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of the fourth defendant. The validity of the mortgage and sale is also impugned by the plaintiffs. Meanwhile on 3rd March, 1927, an application was filed to declare the first defendant an insolvent. The act of insolvency with which he was charged was that his property was attached on 29th January and it was allowed to remain under attachment for a period of three weeks, that is, up to 19th February. The first defendant was adjudicated insolvent on 14th March. As a result of this adjudication the Official Assignee of Madras was added as seventh defendant on 1st September 1927. On the ground that one, V. Rangayya, claimed to be in possession of two houses, Nos. 76 and 77, Poonamallee High Road, under a mortgage and claimed to recover rents thereof on the ground of an equitable assignment of rents executed by the first defendant on 5th November, 1926, the said Rangayya was made the sixth defendant. KUMARASWAMI SASTRI J., before whom the case came on for trial, passed a decree for partition after declaring that the sale to the third defendant was valid and that the mortgage in favour of the fourth defendant was made for discharging the antecedent liability of the first defendant and was therefore binding on the plaintiffs. So far as the second defendant was concerned, the first defendant had incurred debts under three documents, Exhibits XV, XVI and XVII; but Exhibits XV and XVII were not registered and therefore were invalid as mortgages. As to Exhibit XVI it was valid as a mortgage but it was not for an antecedent debt and did not bind the share of the first plaintiff. There were two debts, Rs. 4,000 and Rs. 2,000, due to the sixth defendant. So far as the first debt of Rs. 4,000 was concerned, though the creditor, the sixth defendant, had the right to collect the rents, he had no actual mortgage. As to the other debt of Rs. 2,000, it was incurred after

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insolvency and was not binding on the plaintiffs. The learned Judge also directed an account to be taken and passed a preliminary decree accordingly. Original Side Appeal No. 3 of 1930 is an appeal against this decree by the plaintiffs. The sixth defendant and the Official Assignee have filed a memorandum of objections.

Taking up Original Side Appeal No. 3 first, it is argued by the learned Advocate that the mortgage in favour of the fourth defendant was not incurred for an antecedent debt.

[His Lordship discussed the evidence and proceeded:]

On these facts the learned Judge found that there was an antecedent debt and the mortgage was made by the first defendant representing that money was required for the purpose of paying off debts and therefore it was binding on the plaintiffs. We agree with the finding. The fact that the first defendant did not actually utilize this amount for the purpose of the sales but for some purpose of his own does not matter. The result is that Original Side Appeal No. 3 must be dismissed with costs. Respondents, numbers two, three, four and five, and seven, will each get one set (in all four sets) proportionate to the value of their claims. The appellant did not press the binding nature of the debts of the other respondents in this appeal.

There is a memorandum of objections filed by the sixth defendant, Rangayya, in this appeal. It will be convenient to take up the memorandum of objections with his own Appeal No. 30 of 1930 as the points covered by both are practically the same.

Coming to Original Side Appeal No. 30 of 1930, the facts relating to this appeal are these. The appellant is a money-lender of Madras. He is also a joint trustee of some temple. On 5th November, 1926, the

first defendant borrowed a sum of Rs. 4,000 and executed a promissory note for the amount, Exhibit XVII. On the same day he executed a power of attorney and an agreement enabling the creditor to collect the rents of the two houses, Nos. 76 and 77, Poonamallee High Road, and to let them out to others, if necessary, if the then tenants vacated the premises. This is Exhibit XXVIII. On the same day he wrote letters to the tenants asking them to pay rents to Rangayya. The tenants replied agreeing to do so. Sundaramurthi also wrote another letter to Rangayya undertaking not to cancel the power of attorney and not to deal with the properties until the debt is discharged; vide Exhibit XXIX to which these are enclosures. On 9th March, 1927, the first defendant executed in favour of Rangayya another promissory note for Rs. 2,000, Exhibit XXXIV. There is one other document on the record which is found stitched along with the power of attorney, Exhibit XXVIII, which also purports to bear the date, 5th November, 1926. It purports to be an agreement to execute a mortgage within three months of the two houses, Nos. 76 and 77, in respect of which the power of attorney was executed. On the basis of this agreement Rangayya filed a suit, Civil Suit No. 40 of 1929, for specific performance of the agreement by execution of a mortgage deed. This suit came on before WALLER J. who found that the agreement was antedated and that it was really executed on 9th March, 1927, and therefore dismissed the suit. Original Side Appeal No. 30 is against this decree. The grounds raised in this appeal were also raised by Rangayya in the memorandum of objections he filed in Original Side Appeal No. 3 of 1930. It will therefore be convenient to dispose of these together.

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[His Lordship discussed certain points not necessary for this report and proceeded:]

The next question we have to discuss in this appeal is whether the agreement on which the suit for specific performance was based was antedated.

[His Lordship discussed the evidence and proceeded:]

We are therefore inclined to agree with WALLER J. that this agreement was really antedated. We are not therefore prepared to give a decree for specific performance on the basis of this letter which was actually executed on 9th March, that is, after Sundaramurthi became an insolvent. Though the actual adjudication was on 14th March, the adjudication dates back to the act of insolvency, namely, 19th February.

Mr. Viswanatha Sastri, the learned Advocate for the appellant, then contended in the alternative that, even apart from the agreement, he had already an equitable mortgage or at least an irrevocable power of attorney creating an interest, and that these are enough to be binding on the Official Assignee, and that, also on the ground of part-performance, he is entitled to stand in the position of a mortgagee. The power of attorney creates an interest only in the rents and not in the property. The learned Advocate relied on Bowstead on Agency, Article 138; according to this article where the authority of an agent is given by deed for the purpose of protecting or securing any interest of the agent it is irrevocable during the subsistence of such interest. As already observed, the only interest created is in the rents. There is no interest in the immovable property. So far as rents had already accrued, one may say that the creditor, Rangayya, acquired an interest in them and until that interest is realised the agency is irrevocable. But as to rents which are to accrue in future, they are not property in existence and it cannot be said that the creditor has an interest in such

property. The utmost is there is only an agreement which enables him to collect rents of the property after they accrue. This does not amount to a mortgage or transfer of the interest in rent so as to bind the Official Assignee. In the partition suit, Mr. A. K. Ramachandran was appointed receiver on 23rd March. Immediately after his appointment he gave notice to tenants demanding them to pay rent. Mr. Viswanatha Sastri replied on behalf of Rangayya by Exhibit XXXII claiming some right over these rents and mentioning that he had also written to the Official Assignee. Mr. Ramachandran replied that he took charge of the property under orders of Court and suggested to him to apply to the Court, Exhibit XXXII-a. It was as a result of this correspondence that Rangayya was made a defendant in the partition suit. Practically he lost possession of the property. It is true that he was authorized to let the premises to other tenants if the original tenants vacated. But this is different from his being authorized to get into possession. Article 138 of Bowstead on Agency declares that an authority expressed to be irrevocable in the article is not determined by the bankruptcy of the principal. But, as I have already observed, the power of attorney is effectual as conveying his interest only as to rents that have accrued; neither as to future rents nor as to the property can it prevent its vesting in the Official Assignee. The learned Advocate also relied on Coote on Mortgages, page 61, and a number of English cases cited therein. It must be remembered that there is no law of registration in England, and where possession is given for the purpose of securing a debt it will easily be construed as a mortgage, a process not permissible in India; and an equitable mortgage can be made here only by deposit of title-deeds. It is admitted that the title-deeds of the two houses in the Poonamallee High Road were really

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with the second defendant, the Royal Bank of Scotland, and were not deposited with Rangayya. In *Spooner v. Sandilands*(1) a warrant of attorney which was executed as collateral security authorized the creditor to take possession of the lands. In the present case the power of attorney authorized Rangayya only to let the premises again to other tenants and not to take possession himself. In *In re Davis & Co., Ex parte Rawlings*(2) the property assigned consisted of a definite number of instalments in respect of a hire-purchase agreement relating to property and it was held that the assignment was valid against the trustee in bankruptcy. But in the case before us the rents accruing due in future cannot be regarded as property *in esse* and therefore there can be no valid assignment of the rents so as to bind the Official Assignee. Rent does not accrue unless there is a tenant occupying the premises. As a matter of fact, one of the tenants vacated one of the houses almost immediately after the transaction and it remained vacant. No rent can accrue unless a new tenant occupies the house. Therefore the assignment of rent to accrue in future cannot be regarded as assignment of property *in esse* and even then it does not avail to give a mortgage over the property. It is true that contracts enforceable against an insolvent may be enforceable against the Official Assignee, though even then there is a discretion in the Court; vide *Nagarathna v. Chidambaram*(3). But in the present case we find that there was no agreement in November 1926. Mr. Viswanatha Sastri relied on *Official Assignee v. Fakirji Cowasji*(4), where it was held that, though legal formalities had not been complied with, equity treats the transaction as an agreement to make over the benefit of the mortgage which will be

(1) (1842) 82 E.R. 939.
(3) A.I.R. 1928 Mad. 860.

(2) (1888) 22 Q.B.D. 193.
(4) A.I.R. 1930 Sind 77.

enforced. But in this case there is no agreement to mortgage, nor is there any equitable mortgage. That being so, there is nothing to enforce. The result is that Original Side Appeal No. 30 of 1930 in so far as it is against the decree refusing specific performance must be dismissed with costs of the second respondent, the Official Assignee, first respondent (one set) in both Courts. Any other finding in the judgment as to consideration must be vacated.

We now come to the memorandum of objections filed by the Official Assignee in Original Side Appeal No. 3 of 1930; he complains against the direction in clause (6) of the decree (at page 72) that as regards debts which the first defendant has contracted, if the first plaintiff is proceeded against by the creditors, the first defendant is liable to make good to the first plaintiff the loss occasioned to him by such proceedings. I think this complaint is justified. All that has been laid down in the cases is that in a suit for partition provision must be made for the payment of the father's debts and the rest of the property must be divided; *Venkureddi v. Venku Reddi*(1). The decree in this case directs that, whenever creditors proceed against the plaintiff in the first instance, the plaintiff is entitled to contribution from the first defendant. This kind of accounting between father and son in respect of pre-partition debts cannot be allowed. In the present case all the properties were sold by the receiver, and so far as the secured creditors are concerned most of their debts have been paid off. But it happens in many cases that some more amounts are due. The whole debt due to the second defendant remains due and the amount realized is lying in Court. No part of this money ought to be

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(1) (1926) I.L.R. 50 Mad. 535.

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paid to the first plaintiff until all the debts of the father are paid off and only in the balance so left the first plaintiff should get a half-share. In this case it seems to be practically admitted that the funds now lying in Court will not be enough to pay off all the debts binding on the son. Whether it is so or not, in this case on the report of the Official Referee a further direction will have to be given for paying off all the debts binding on the son and the balance will be divided. There is no need for a direction of the kind mentioned in clause (6) of the decree. Clause (16) of the decree directs that the Official Referee should take accounts and submit his report and proceedings to this Court. We are informed that on an *ex parte* application made by the Official Assignee before WALLER J., without giving notice to the various creditors, he passed an order staying further action on the part of the Official Referee and directed the amount lying in Court to be paid into the hands of the Official Assignee. But on further application made by the creditors an order was obtained from another Bench, consisting of BEASLEY C.J., staying this portion of WALLER J.'s order and directing that the amount should remain in Court to the credit of the partition suit. We thus see a sort of conflict between the insolvency jurisdiction and the ordinary jurisdiction of this Court and it is desirable to indicate a procedure so as to avoid this conflict. It has been held in *Sat Narain v. Behari Lal*(1) that the insolvency of a father does not involve the insolvency of the son and the son's share does not vest in the Official Assignee though the father's power to sell the son's share for debts binding on the family may vest in the Official Assignee. But it was held by a Full Bench,

In re Balusami Ayyar(1), that such power of sale terminates with the severance of the joint family status. In the present case, neither the father nor the Official Assignee has any power to deal with the son's share after 11th February 1927. In the course of argument in that case there was a suggestion that wherever a partition is allowed to have this effect the Official Assignee's rights are prejudiced by the partition, and with reference to that suggestion which found favour with my brother PHILLIPS J., I observed that no substantial right of the Official Assignee was affected but only that one of several remedies open to him was lost. I tried to enumerate these remedies. The first I mentioned was that the Official Assignee associating himself with the creditors can file suits against the sons and obtain decrees. Secondly I suggested that in the suit for partition he can be made a party and he can ask for decrees in favour of the creditors. I then observed :

"There is possibly a third remedy open . . . The Judge sitting in insolvency, may, if he thinks proper, decide the questions raised by the Official Assignee as between himself and the sons *provided the sons fill the character of garnishees.*"

At page 443, I again repeated the observation that, if the Judge sitting in insolvency thinks it would serve any purpose, he should enquire into the binding nature of the debts; he may do so *provided the sons fill the character of garnishees*. In that case whether the sons can fill the character of garnishees was not argued before us and I did not decide the question. Because I did not like to decide the question whether they did or did not fill the character of garnishees, I said that the Judge sitting in insolvency may enquire into the matter provided the sons fill the character of garnishees; and

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(1) (1928) I.L.R. 51 Mad. 417 (F.B.).

(1) (1924) I.L.R. 6 Lah. 1 (P.C.).

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I preceded my observation with the word "possibly", because, if the sons did not fill the character of garnishees, this third remedy does not exist. Relying on my observations, CURGENVEN and BHASHYAM AYYANGAR JJ., in a later stage of the same case reported as *Ramachandra Ayyar v. Official Assignee of Madras*(1), said that there is no objection to the question of the binding nature of the debts as between father and son being decided in insolvency proceedings at the instance of the Official Assignee. At page 748 CURGENVEN J., after quoting from my judgment, proceeds to refer to the Full Bench decision, *Official Assignee, Madras v. Narasimha Mudaliar*(2), about the scope of section 7. He then refers to *Ramasomayajulu v. The Official Receiver, Godavari at Rajahmundry*(3) and *Doraippa Iyer v. Official Assignee of Madras*(4) as instances where section 7 has been utilized. The learned Judge then proceeds to observe :

"On the other hand, it is worth note that no decision against the applicability of the section has been cited before us. There is, for instance, no authority for the view that, if it should suit the Official Assignee, as representing the insolvent, to bring what in effect would be a suit for partition, the Insolvency Court would have no jurisdiction to entertain it."

With reference to these observations of the learned Judge I wish to make the following observations. Wide as the provisions of section 7 of the Presidency Towns Insolvency Act are, it does not follow that every possible dispute between the Official Assignee and the sons can be dealt with under section 7. Section 7 says that

"the Court shall have full power to decide all questions of priorities . . . which may arise in any case of insolvency and decide all other questions."

So long as the son has not appeared before the Insolvency Court, I do not see how any question can arise

(1) (1930) I.L.R. 54 Mad. 739.

(3) (1925) 23 L.W. 80.

(2) (1929) I.L.R. 52 Mad. 717 (F.B.).

(4) (1921) 42 M.L.J. 141.

between him and the Official Assignee. If the son himself chooses to appear before the Insolvency Court and raise questions as to the binding nature of a debt it may perhaps be decided, but so long as he does not choose to appear I do not see how any question of the binding nature of the father's debts can be decided in insolvency behind the back of the son at the instance of the Official Assignee. The question then arises whether the Official Assignee can take steps to compel the son to appear before the Insolvency Court and have the question adjudicated. The only section which enables the Court to do anything on the application of the Official Assignee is section 36 which says :

"The Court may, on the application of the Official Assignee or of any creditor who has proved his debt, at any time after an order of adjudication has been made, summon . . . the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to the insolvent, or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property."

None of these descriptions apply to the son. The half-share of the son which is liable to be sold by the father or the Official Assignee to pay off the father's debts which are not immoral or illegal does not become the property of the insolvent. It is only the power of sale which the father and the Official Assignee possess. This power does not convert the son's property into the insolvent's property, especially when we remember that the power ceases to exist on the severance of the joint family. In my opinion the Insolvency Court has no jurisdiction under section 36 to summon the son at the instance of the Official Assignee who wants to decide the binding nature of the debt between the father and son. The word "garnishee" is not used in the Presidency Towns Insolvency Act. Whether a person

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fills the character of a garnishee merely depends upon the language of section 36. The learned Judges, CURGENVEN and BHASHYAM AYYANGAR JJ., have not discussed the terms of section 36 in coming to the conclusion that the questions between the Official Assignee and the son can be decided in the Insolvency Court. I am also clearly of opinion that no suit for partition can ever be filed in the Insolvency Court by the Official Assignee representing the father. The Insolvency Court exists to distribute the assets between the creditors, and not for deciding partition suits or other questions between the insolvent and the rest of the world. Section 7 enables the Court to decide only such questions as may incidentally arise. But, when the son is not a party to the insolvency proceedings, no such questions can arise between him and the Official Assignee, and the son can never be summoned under section 36. The English case relied on by the learned Judges only enables important questions to be determined before distribution is made. It cannot enable partition suits to be filed before the Insolvency Court, or compel persons who do not fall under the description of section 36 to be summoned before the Insolvency Court. I am therefore of opinion that no questions between the Official Assignee and the son can be decided by the Insolvency Court but they must be decided in a partition suit to which the Official Assignee is a party. I do not agree with the observation of CURGENVEN J. that by money claim is meant any claim which can be ranked as divisible assets, nor can it be said that because the father has got a right to sell the son's share in the joint family he has got a money claim against the son. The father can never sue the son for a money decree simply because he has got a right to sell the son's share. The effect of the Hindu joint family law is to

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give the father or creditor a right to sell the son's share but no more. We ought not to extend this privilege so as to convert it into a money claim.

In the partition suit we have already found that the debt of Rs. 2,000 is not binding on the son and that the debt of Rs. 4,000 is binding on the son. So far as the half-share of the father in the net proceeds of the sale is concerned, it should be handed over to the Official Assignee because it vests in him, and the Official Assignee may proceed with further distribution of that sum in the insolvency jurisdiction, but, so far as the half-share of the son in that amount is concerned, the Official Assignee has no right to ask that amount to be paid to him either under section 7 or section 36 of the Insolvency Act, and all further proceedings in connection with that fund must be for the purpose of distributing it to such of the creditors whose debts are held to be binding in the partition suit. In my opinion, the Insolvency Court has no power to stay proceedings in the partition suit now pending before the Official Referee so far as the son's share is concerned. The learned Advocate for the Official Assignee relied on section 18 of the Act which says:

"The Court may . . . stay any suit or other proceeding pending against the insolvent before any judge or judges of the Court or in any other Court subject to the superintendence of the Court."

In my opinion, a partition suit which the sons file to separate the property of the insolvent from the properties of the other sharers is not a suit involving a claim against the insolvent except in so far as it may involve a claim to account or a claim for a money decree against the insolvent. It will be extraordinary if the Insolvency Court in the exercise of powers vested under section 18 should stop partition suits in which the

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insolvent happens to be a party-defendant. In my opinion, the order of WALLER J. restraining the Official Referee from proceeding as per the direction in clause 16 of KUMARASWAMI SASTRI J.'s decree is without jurisdiction so far as the half-share of the son is concerned. No doubt it can be justified so far as the father's half is concerned, and as we have directed that it may be paid to the Official Assignee there is no need for any stay of further proceedings before the Official Referee so far as they relate to the son's half. We therefore direct the Official Referee to proceed with the taking of accounts as directed in clause 16 of KUMARASWAMI SASTRI J.'s decree and send up his report to the Court so that the Court may distribute the sums to the various creditors.

The costs of the creditors, respondents (in both courts), will be paid out of the fund in Court belonging to the first plaintiff.

The Official Assignee will be entitled to take his costs out of the estate.

We make no order as to costs on the memorandum of objections as between party and party.

CORNISH J. CORNISH J.—I agree. I think that the Official Assignee's claim to the whole of the fund paid into Court by the receiver appointed in the partition suit is not sustainable. The effect of the son's severance of the joint status prior to his father's insolvency was that the father's power, which on his insolvency vests in the Official Assignee, to sell the son's interest in the family property in liquidation of the father's debts, no longer existed. The partition suit put an end to it. The Official Assignee, therefore, has no right whatever to the son's share. He can only proceed against the debtors of the insolvent; and the fact that the Hindu Law imposes on the son a liability for his father's debts

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does not make him in any way a debtor of the insolvent father. Half of the fund paid into Court, which represents the insolvent father's share, is all that the Official Assignee can be entitled to out of that fund. Turning to the other appeal, Original Side Appeal No. 30, there is no doubt that if the appellant (who was the fifth defendant in the partition suit, Civil Suit No. 83 of 1927) could enforce against the insolvent the agreement to execute a mortgage, the agreement would likewise be enforceable against the Official Assignee, provided that the agreement was unimpeachable under the Insolvency Law. But WALLER J. has come to the conclusion, which appears to me to be entirely warranted by the evidence of the documents themselves, that the agreement, though it purports to have been executed on 5th November 1926, was in reality brought into existence on 9th March 1927 when the second pro-note for Rs. 2,000 was executed by the insolvent in the appellants's favour, that is to say, on a date between the presentation of the insolvency petition and the adjudication. Section 57, Presidency Towns Insolvency Act, protects any contract with the insolvent for valuable consideration, provided that such transaction takes place before the date of the order of adjudication, and that the person with whom such transaction takes place has not at the time notice of the presentation of an insolvency petition against the debtor. The appellant must have known of the antedating of the agreement; and its purpose was obviously to defeat the Insolvency Law, and it is consequently not protected by section 57 as a *bona fide* transaction. It follows that specific performance of it cannot be enforced against the Official Assignee.

[His Lordship dealt with points not material for this report and proceeded:]

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The question that remains is whether the appellant is entitled by virtue of the power of attorney to stand in the position of a secured creditor in respect of his loan to the insolvent. In order to rank as a secured creditor the appellant must be a mortgagee, or have a charge or a lien. The power of attorney being unregistered would be ineffectual to create a charge on the property, even if it purported to do so which I do not think it did; and I do not see how the appellant can be regarded as having a lien in respect of the property. The power of attorney in his favour is limited to two things; to collect the rent from the present tenants, and, in the event of a vacancy, to let the premises to some other tenant or tenants in the name of the insolvent and to collect the rent from those tenants. By a letter of the same date the insolvent authorized the appellant to appropriate the rents so collected towards the interest due on the loan, and he undertook not to cancel the power of attorney till the debt was discharged. The learned Counsel for appellant has contended that his client has possession of the property under an irrevocable power, and he has referred to a passage in Coote on Mortgages, page 61, where it is stated that a power of attorney authorizing a party to take possession of land is a contract to charge and is not revoked by the death of the principal, or, as here, by his insolvency. But the power in favour of the appellant is limited to receiving the rent from the tenants when such rent becomes payable. It does not authorize him to take possession of the houses. The power of attorney cannot be regarded as a contract to charge the houses. There seems to me therefore no ground for holding the power of attorney to be irrevocable. A power of attorney must, as a general rule, be treated as revoked by the insolvency of the donor of

the power as against the trustee under a subsequent bankruptcy; see Williams on Bankruptcy, 13th edition, page 321. In my opinion, the appellant is entitled to rank only as an unsecured creditor in respect of his promissory-note debt.

Solicitors for second respondent: *King and Partridge.*

G.R.

APPELLATE CIVIL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

CHINTAPENTA NARASIMHAM (SEVENTH DEFENDANT),
APPELLANT,

1932,
January 25.

v.

CHINTAPENTA NARASIMHAM AND FIVE OTHERS
(PLAINTIFF AND DEFENDANTS 1 to 3, 12 AND NIL), RESPONDENTS.*

*Hindu Law—Inheritance—Father—Self-acquisition of—
Succession to—Right of—Divided son—Undivided son—
Rights of.*

On the death of a Hindu leaving self-acquired property, his undivided sons succeed to such property to the exclusion of a divided son.

Nana Tawker v. Ramachandra Tawker, (1908) I.L.R. 32 Mad. 377, was rightly decided as regards the order—though not as to the nature—of succession in such a case.

Vairavan Chettiar v. Srinivasachariar, (1921) I.L.R. 44 Mad. 499 (F.B.), explained.

APPEALS against the decrees of the Court of the Subordinate Judge of Amalapuram in Appeal Suit Nos. 154 and 153 of 1924 respectively preferred against the decrees of the Court of the District Munsif of

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G. Lakshmananna and K. Ramamurti for appellant.

T. Satyanarayana for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by
WALLER J. WALLER J.—Two questions arise in these second appeals. The first is whether Exhibits IV and IV-A evidence a partition between Sivaramayya and Seshayya, one of his three sons. As to that we see no reason to dissent from the conclusion arrived at by both of the Courts below that they do. The circumstances, it seems to us, indicate that it was the intention of both parties to enter into a complete separation of interest. The second question is whether, on the death of a father leaving self-acquired property, his undivided sons succeed to such property to the exclusion of a divided son. That question was answered in the affirmative in *Nana Tawker v. Ramachandra Tawker*(1). It has, however, been referred to a Bench for reconsideration on the grounds that some doubt has been thrown on the correctness of that decision in a later Madras case and that it has been expressly dissented from by the Chief Court of Oudh. The later Madras case is *Vairavan Ohettiar v. Srinivasachariar*(2). It dissents from *Nana Tawker v. Ramachandra Tawker*(1) on one point, no doubt, but it does not dissent from it on the material point as to the exclusion from inheritance to the father of divided by undivided sons. As OLDFIELD J. observed, only the order of succession was then in dispute and not the nature of the succession. As to the order of succession, he thought, and the other two Judges did not dissent from him, that *Nana Tawker v. Ramachandra Tawker*(1) was

(1) (1908) I.L.R. 32 Mad. 377.

(2) (1921) I.L.R. 44 Mad. 499 (F.B.).

correctly decided. As to the nature of the succession, NARASIMHAM v. NARASIMHAM. however, they thought that the earlier decision NARASIMHAM v. WALLER J. was incorrect. To put it briefly, they were of opinion that the succession was not by survivorship, but by inheritance. Mr. Lakshmananna argues that, logically, this leads to the conclusion that, as partition does not put an end to the right of inheritance, the divided son must succeed to the father's self-acquired property equally with the undivided son. The answer to his argument is that the divided son has ceased to be a member of the co-parcenary. This was pointed out by Mayne in his comments on a Bombay case, *Fakirappa v. Yellappa*(1), which is directly in point and against the appellant.

"A grandson",
he observed,

"sued his grandfather and uncles for a partition. He obtained a decree as to all the joint property, but failed as to part which was held to be the separate property of the grandfather. On the death of the grandfather he brought a fresh suit for a share of this, contending that by descent it had become joint property. This was perfectly true, but the answer to the plaintiff was that he was no longer a member of the co-parcenary. On the grandfather's death, his interest in the joint property passed to the remaining co-parceners by survivorship. His own separate property passed to his united sons as heirs, and in their hands became an addition to the joint property, in which the divided grandson had no interest."

In other words, the separate property becomes part of the joint property in the hands of the heirs and, as a divided member no longer belongs to the coparcenary and has no interest in its property, he can take no share in it. So far, then, the cases are all against the appellant. *Badri Nath v. Hardeo*(2) is the only decision *contra*. It dissents from *Fakirappa v. Yellappa*(1) and

(1) (1896) I.L.R. 22 Bom. 101.

(2) (1929) I.L.R. 5 Luck. 649.

NARASIMHAM *Nana Tawker v. Ramachandra Tawker*(1) and follows
 NARASIMHAM. *Kunwar Bahadur v. Madho Prasad*(2). It is impossible
 WALLER J. to understand how this last case can be treated as an
 authority on the question at issue. There was, no
 doubt, a dispute as to the right to succeed to a father's
 self-acquired property, but it was conceded that the sons,
 who were living apart from the father, had not
 partitioned the joint property and severed themselves
 from him and the sons who continued to live with him.
 That being so, it is obvious that the family remained
 joint and that the question now at issue could not
 have arisen. All that the Judges then said was this:—

"If however we accept the finding of the Court below
 that the property was the self-acquired property of Asharfi
 upon his death all his sons including the defendants would be
 entitled and the mere fact that some of those sons continued
 to live in his house joint in food with him would not deprive
 the sons who were living away from him of their share in his
 estate."

In other words, the mere fact of separate living did
 not operate as a division and naturally the latter were
 equally entitled with the rest to succeed. It is a
 legitimate inference from emphasis laid on the fact
 that there had been no partition that, had there been
 a partition, the decision would have been in the opposite
 sense.

We find that *Nana Tawker v. Ramachandra Taw-*
ker(1) was rightly decided as regards the order, though
 not as to the nature, of succession in a case like this and
 dismiss the appeals with costs in Second Appeal No. 707
 of 1928 the contesting respondent.

A.S.V.

(1) (1908) I.L.R. 32 Mad. 377.

(2) (1918) 17 A.L.J. 151.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice
 Pakenham Walsh.

PANYAM alias NARAVAJJULA SEETHARAMAYYA
 AND ANOTHER (PLAINTIFFS), APPELLANTS,

1931,
 October 22.

v.

AVADHANAM RAMALAKSHMAMMA AND ANOTHER
 (DEFENDANTS), RESPONDENTS.*

*Hindu Law—Adoption—Widow's power of—Limit to—Test to
 be applied.*

B., a Hindu, died leaving him surviving his widow and a
 daughter R.L. After the death of the widow, R.L. succeeded
 to his properties. R.L. was married to R.K. who died without
 issue as a member of a joint family in or about 1892. Subse-
 quently there was a partition among the other members of the
 joint family. In 1922, after the said partition, R.L. adopted
 A.I., a distant agnatic relation of her father, with the consent of
 all her husband's agnates. B.'s reversioners questioned the
 validity of this adoption on the ground that the power of R.L.
 to adopt came to an end with the partition and became incap-
 able of revival with the extinction of her husband's joint
 family.

Held that the true test of the principle defining the limit
 of the widow's power of adoption is to be sought, not in the
 rule of divesting or otherwise of an estate, but in the rule that
 requires the continuance of a person to perform all the requisite
 religious services and the limit is reached on the happening of
 the event mentioned by CHANDAVARKAR J., viz., "where a
 Hindu dies, leaving a widow and a son, and that son himself
 dies leaving a natural-born or adopted son or leaving no son
 but his own widow to continue the line by means of adoption,
 the power of the former widow is extinguished and can never
 afterwards be revived", in *Ramkrishna v. Shamrao*, (1902)
 I.L.R. 26 Bom. 526 (F.B.).

* Appeal No. 160 of 1930.

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v.
RAMA-
LAKSHMANNA,
APPEAL against the decree of the Court of the Subordi-
nate Judge of Kurnool in Original Suit No. 25 of 1927.

B. Somayya for appellants.

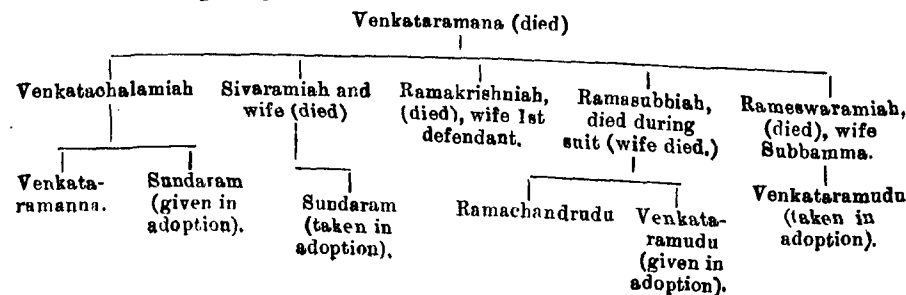
W. Kothandaramayya and *N. A. Krishna Ayyar* for respondents.

Cur. adv. vult.

VENKATA-
SUBBA RAO J. The JUDGMENT of the Court was delivered by
VENKATASUBBA RAO J.—This appeal raises an important question relating to the law of adoption not covered by any direct authority. The plaintiffs are the reversioners to the estate of one Bhaskarayya. He died leaving him surviving his widow, Chidambaramma, and his only daughter, Ramalakshamma, the first defendant. After the death of his widow, Bhaskarayya's properties devolved on the first defendant. It is stated in the plaint that soon after the latter's marriage, more than forty years ago, she became a widow, while still under age. In the year 1922 the second defendant, a distant agnatic relation of her father, was taken by her in adoption. The plaintiffs attack the adoption as being invalid and pray for a declaration that their reversionary right is not affected by it.

For understanding the objection taken to the adoption we must turn to the pedigree which sets forth her husband's relations, although the last full owner of the estate in question was her father and not her husband.

The pedigree is as follows:—



Ramakrishnayya, the husband of the first defendant, died about 1892 when the family was joint. But there was subsequently a partition among the members of the family. It is admitted that the adoption was made after that partition and the contention advanced for the plaintiffs is that, with the extinction of the joint family, the widow's power to adopt came to an end and became incapable of execution. It is worthy of note that before making the adoption she obtained the consent of all her husband's agnates. But it is argued for the plaintiffs that, the power having once come to an end, it cannot be subsequently revived by consent. The lower Court, holding that the widow's power did not become extinguished and that the adoption was therefore valid, dismissed the suit.

The question argued before us is, what is the proper limit to the exercise of the widow's power? According to the plaintiffs, the limit is reached when the adoption divests an estate vested in a third party. Thus, the widow of a separated husband can adopt either when she takes his estate from him immediately or as heiress of her son who surviving his father dies subsequently. In these two cases the adoption cannot divest any estate other than that vested in the adopting widow herself, and this is said to be the reason for the adoption being treated as valid. Applying this rule, if, on the son's death, his estate vests in his widow or his son, the original widow's power comes to an end, and, on the principle that what is gone cannot be revived, she is forbidden to adopt, even though she succeeds to the estate on the death of the son's nearer heir. So much then for an adoption to a separated Hindu.

Now turning to the case of a joint family, the widow of a deceased member can adopt, provided the family is still joint when the adoption is made; for, what is

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defeated by the adoption is not an absolute estate, the vesting in the survivors being only provisional. On this principle, it is argued that, if the co-parcenary becomes extinct either because the surviving members have come to a partition or because the joint property has passed by succession from the last survivor to his heirs, the power to adopt becomes exhausted and is incapable of execution.

These rules, Mr. Somayya, the plaintiffs' learned Counsel, contends, are deducible from the decisions on the subject. The adoption in question, if allowed, would defeat the estate taken by the survivors absolutely on partition. On that ground, it is impeached as being invalid.

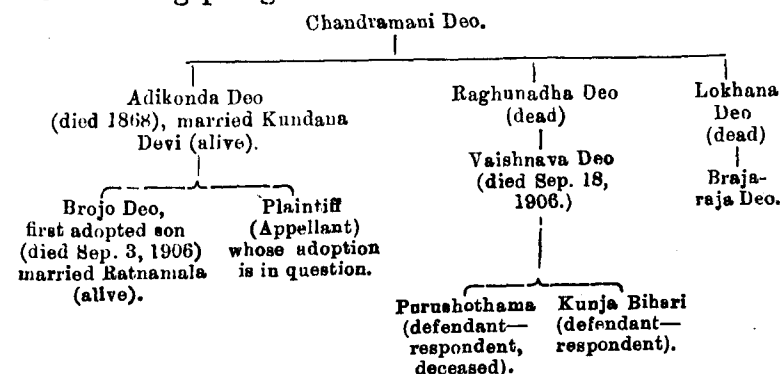
The test, then, of the principle defining the limit which Mr. Somayya deduces from the numerous cases referred to by him in his lucid and exhaustive argument, depends upon whether the adoption divests or not the estate vested in a third party. Whether a Hindu dies leaving a son or not or whether he had no son ever born to him at all (as in the present case) is, if this be the true test, an irrelevant consideration. According to Mr. Kodandaramayya, the defendants' learned Counsel, the decisive factor is not whether some estate is or is not divested, but whether, the adoption being in essence a religious act, the spiritual purposes of a son have been satisfied. He contends that, if the effect of invalidating an adoption would be to deprive a Hindu father of the services of a competent son, the result would be repugnant to the spirit of the Hindu Law. The test of the limiting principle, according to him, is that laid down by the Full Bench in the judgment of CHANDAVARKAR J. in *Ramkrishna v. Shamrao*(1), namely,

(1) (1902) I.L.B. 26 Bom. 526 (F.B.).

"Where a Hindu dies, leaving a widow and a son, and that son himself dies leaving a natural-born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived."

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Both sides have relied upon the decisions of the Privy Council, and the question is, what is the correct test that is deducible from them? There are two cases decided by the Board relating to the same estate, which throw a good deal of light on the point. Let us take the following pedigree:—



On the death of Adikonda, a member of a joint Hindu family, his brother Raghunadha took possession of the Zemindari. Kundana Devi, acting on her husband's authority, adopted Brojo Deo. The adopted son filed a suit to recover the Zemindari from Raghunadha and the Privy Council, holding his adoption valid, upheld his claim. These are the facts of *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo*(1) (the first Chinnakimedi case). Then certain further events happened and the same estate came up again before the Privy Council. Brojo, the adopted son, recovered possession and died about 30 years afterwards leaving his widow Ratnamala but no son. Possession of the Zemindari was then taken by Vaishnava Deo who

(1) (1876) I.L.B. 1 Mad. 69 (P.C.); L.R. 3 I.A. 154.

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was in his turn succeeded by his son Purushothama. The widow of Adikonda purported to make a second adoption to her husband by adopting the person shown as the plaintiff in the pedigree. The latter thereupon claiming the Zemindari filed a suit for recovering it. The Judicial Committee, holding that the adoption was bad, dismissed the suit. These are the facts of *Madana Mohana Deo v. Purushothama Deo*(1) (the second Chinnakimedi case). Do these decisions support the theory put forward by Mr. Somayya? On both the occasions, the adopting widow belonged to a joint family. Her first adoption was held good, but the second bad. Mr. Somayya suggests that, in the first case the family being a joint one, the vesting of the joint family property was only provisional and that therefore the adoption was upheld. This contention is obviously wrong, for, although the family was joint, the Zemindari, being an impartible one, was held in severalty and not in coparcenary. On Adikonda's death it did not pass to the surviving members, but to a single heir, Raghunatha. His succession was no doubt in a sense provisional as stated by the Judicial Committee, but it was not provisional in the sense that a coparcener's share is liable by fluctuation to increase or diminish. The point to note is that the adoption was held valid in spite of the fact that Raghunatha was thereby divested. Now, turning to the second case, was the adoption by Kundana Devi held invalid on the ground that it would divest Purushothama? His succession, like that of his predecessor Raghunatha, was in a sense provisional, for it was "subject to defeasance by the emergence of a male heir" to the last full owner who, however, was not Adikonda but Brojo

(1) (1918) I.L.R. 41 Mad. 855 (P.C.); L.R. 45 I.A. 158.

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Deo. In other words, if the adoption had been made by Ratnamala on the very grounds stated by the Privy Council it would have been upheld (granting it was otherwise valid). That this is the effect of the decision is shown by the judgments of WALLIS C.J. and SESHAGIRI IYER J. in *Ananga Bhima Deo v. Kunja Bihari Deo*(1), (the third Chinnakimedi case). Mr. Somayya says that the *first Chinnakimedi case*(2) was understood as validating an adoption made by the widow of an unseparated Hindu on the ground of the vesting of the coparcenary property being provisional although, in the case itself, there was no reference to the existence of any partible property. If that be so, in the *second Chinnakimedi case*(3) also the adoption should have been held valid; but he suggests that this case is generally regarded as having established a new principle. He is constrained to put forward this argument, as otherwise, his theory that the divesting rule furnishes the limiting principle must fall to the ground. If, on the other hand, the principle contended for by Mr. Kodandaramayya is accepted, these two decisions become perfectly reconcilable. What distinguishes the first from the second case is, that, in the latter, Brojo died "after attaining full legal capacity to continue the line either by the birth of a natural-born son or by the adoption to him of a son by his own widow." It must not be forgotten that, in the passage immediately preceding these words, their Lordships expressly affirm and approve the principle enunciated by CHANDAVARKAR J. in *Ramkrishna v. Shamrao*(4). These words, therefore, mean neither more nor less than the passage already quoted by us from CHANDAVARKAR J.'s judgment.

(1) (1918) 25 M.L.T. 204.

(2) (1876) I.L.R. 1 Mad. 69 (P.C.); L.R. 3 I.A. 154.

(3) (1918) I.L.R. 41 Mad. 855 (P.C.); L.R. 45 I.A. 158.

(4) (1902) I.L.R. 28 Bom. 526 (F.B.).

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Madana Mohana Deo v. Purushotthama Deo(1) (the second Chinnakimedi case) bears a close resemblance to *Mussumat Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry*(2), which is referred to and followed in the previous case. Gaur Kishore died leaving Bhavani Kishore, his only son, and his widow Chandraboli. On Bhavani Kishore's death leaving Bhooban Moyee as his widow, Chandraboli purported to take in adoption Ram Kishore. The Judicial Committee held that adoption bad. The only difference (and that is immaterial) between this and *Madana Mohana Deo v. Purushotthama Deo*(1) is, that, whereas in the first case the son (Bhavani Kishore) was a natural-born son, in the second he (Brojo Deo) was an adopted son. In both the cases, as we have pointed out, the adoption was declared invalid. We have examined the grounds of the decision in the second case. Let us now turn to the first. Their Lordships refer to "all the spiritual purposes of a son" which would, in a certain event, have been satisfied and to "all the religious services, which a son could perform for a father." The true test, therefore, of the principle defining the limit, is to be sought not in the rule of divesting or otherwise of an estate, but in the rule that requires the continuance of a person to perform all the requisite religious services. The line must be drawn somewhere in applying this principle and it must be taken as established that the limit is reached on the happening of the event mentioned in the judgment of CHANDAVARKAR J. In some decisions of the Judicial Committee, such as *Bhoobun Moyee's Case*(2), already cited, and *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi*(3), there are no doubt observations adverting to the divesting

(1) (1918) I.L.R. 41 Mad. 855 (P.C.); L.R. 45 I.A. 156.

(2) (1885) 10 M.I.A. 279.

(3) (1876) I.L.R. 1 Mad. 174 (P.C.); L.R. 4 I.A. 1.

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rule; but the principle of divesting must not be taken as having furnished the ground of decision, but the divesting or otherwise of the estate must be understood as having been referred to as the result of the adoption being held either good or bad. That their Lordships always laid stress on the religious aspect of the act of adoption appears from several cases. In the *Ramnad Case*(1) their Lordships describe it as a meritorious act and refer to "the existence of a direct line competent to the full performance of religious duties" and to the "religious obligation to adopt a son in order to complete or fulfil defective religious rites." The following observations of their Lordships in the *first Chinnakimedi Case*(2) are pertinent to the matter in hand.

"They may, however, observe that a distinction which is founded on the nature of property seems to belong to the law of property, and to militate against the principle which Mr. Justice HOLLOWAY has himself strenuously insisted upon elsewhere, viz., that the validity of an adoption is to be determined by spiritual rather than temporal considerations; that the substitution of a son of the deceased for spiritual reasons is the essence of the thing, and the consequent devolution of property a mere accessory to it."

It is unnecessary to refer to the more recent Privy Council cases beyond stating that in *Pratab Singh v. Agar Singh*(3) the principle laid down in *Bhoobun Moyee's Case*(4) and *Madana Mohana Deo v. Purushotthama Deo*(5) has been re-affirmed. Incidentally, it may be remarked that in that case, *Pratab Singh v. Agar Singh*(3), the fact that the adoption would detract from the plaintiff's right did not stand in the way of the adoption being held valid on the ground that the power

(1) (1868) 12 M.I.A. 397.

(2) (1876) I.L.R. 1 Mad. 69 (P.C.); L.R. 3 I.A. 154.

(3) (1918) I.L.R. 43 Bom. 778 (P.C.); L.R. 46 I.A. 97.

(4) (1885) 10 M.I.A. 279.

(5) (1918) I.L.R. 41 Mad. 855 (P.C.); L.R. 45 I.A. 156.

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had not become exhausted. The result, then, of this examination of the Privy Council cases is that, when properly understood, they do not bear out Mr. Somayya's contention. See the judgments of REILLY J. in *Sukdevdoss Ramprasad v. Musamat Choti Bai*(1), of OLDFIELD J. in *Venkataramier v. Gopalan*(2), and of KUMARASWAMI SASTRI J. in *Maharaja of Kolhapur v. Sundaram Ayyar*(3).

Mr. Somayya has referred us to numerous decisions of the Indian Courts where the adoption by a widow was held invalid, although the result of so holding would be that her deceased husband would never have had any male issue to continue his line. As typical of these cases may be mentioned *Adivi Suryaprakasa Rao v. Nidamarty Gangaraju*(4), *Chandra v. Gojara-bai*(5) and *Shri Dharnidhar v. Chinto*(6). These are cases where the widow's deceased husband was an unseparated Hindu, but by the time she made the adoption the joint property had passed by succession from the last survivor to his heirs. The reason for holding the adoption invalid was that when the estate vested in the heir the power of the widow came to an end. Whether these decisions, though in conflict with the principle affirmed by the Judicial Committee, will, so far as they go, be followed or not on the ground of *stare decisis*, is a point on which we need express no opinion; but there is no warrant for extending the rule beyond the facts of those cases. As we have said, those facts are that the co-parcenary became extinct by the death of the last survivor and his property thereupon devolved on his heir. The facts in the present case are different. The co-parcenary became extinct not in that

(1) (1927) 27 L.W. 145.

(2) (1918) 35 M.L.J. 698.

(3) (1924) I.L.R. 48 Mad. 1, 209, 214. (4) (1909) I.L.R. 33 Mad. 228.

(5) (1890) I.L.R. 14 Bom. 463.

(6) (1895) I.L.R. 20 Bom. 260.

manner, but by the survivors having come to a partition of the joint family property. We are not prepared to hold that in such a case the widow's power comes to an end.

There is no reported decision on the actual point raised in the appeal. But the opinion of Mr. Sirkar Sastry supports the plaintiffs' contention. According to that learned author "the power of adoption cannot be exercised after a partition of the family property takes place" and this view is based on grounds of supposed convenience. Says Sirkar Sastry:

"To re-open the partition for giving a share to the adopted son, would lead to great difficulties, for one of the co-sharers might alienate his share to a purchaser for valuable consideration without notice."

But he goes on to observe that the point is not free from difficulty and refers to some conflict, which he supposes to exist between the two Privy Council decisions; *Bhoobun Moyee's case*(1) and the *first Chinna-kimedi case*(2); (Sarkar's Hindu Law of Adoption, 1891 Edition, pages 253 and 254). In *Krishna v. Sami*(3) a Full Bench of five Judges deduces from the Hindu Law a principle which is the exact opposite of that stated by Mr. Sirkar Sastry. The following passage contains the relevant observation:

"Again, let C have died before partition, leaving a widow and having given her power to adopt which she does not exercise till after a partition has been made by B, D and E. When she exercises her power we apprehend that the adopted son would be entitled to call upon his uncles to make over to him a portion of the wealth equal to that which would have been taken by his father—*Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo*(2)."

(1) (1865) 10 M.I.A. 279.

(2) (1876) I.L.R. 1 Mad. 69 (P.C.); L.R. 3 I.A. 154.

(3) (1886) I.L.R. 9 Mad. 64 (F.B.).

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If these observations were not merely *obiter*, the case would have been a direct authority in favour of the respondents.

We shall now examine the matter on principle. What does the statement, that, when the rights acquired by third parties are defeated, the widow's power comes to an end, imply? That the object of assigning a limit to the widow's power is to safeguard the rights of such third parties. If this be the true view to take, why should it be held that the adoption is bad when the adopting widow, as in *Ramakrishna v. Shamrao*(1), is the very person whose estate is thereby defeated? Again, why should the adoption be held invalid not only as against the person whom it divests, but even as against, as held in *Padma Kumari Debi Chowdrani v. Court of Wards*(2) and *Thayammal v. Venkatarama*(3), distant reversioners? Mr. Somayya's answer is that the power having come to an end cannot be revived. This is merely arguing in a circle. Why should it be held at all on *his* theory that the power came to an end? The object being the safeguarding of other peoples' rights (as his argument assumes), it would be sufficient for achieving that end to hold that the power is in abeyance ready to revive on the removal of the obstruction. If, on the other hand, the test of the limiting principle is what we have stated above, it stands to reason that, when once the spiritual purposes are satisfied, the power to adopt finally and for ever comes to an end.

Again, the validity of an adoption must be judged intrinsically on its own merits and not with reference to considerations extraneous to it. The facts of the present case which are somewhat unusual serve forcibly

(1) (1902) I.L.R. 26 Bom. 526 (F.B.).
(2) (1881) I.L.R. 8 Calo. 302 (P.C.); I.L.R. 8 I.A. 229.
(3) (1887) I.L.R. 10 Mad. 205 (P.C.); I.L.R. 14 I.A. 67.

to illustrate the incongruity of the position taken up by the plaintiffs. The suit relates to the estate not of the adopting widow's husband but of her father. The plaintiffs are not interested in the rights which are said to be defeated, nor are the husband's agnates interested in the estate which the plaintiffs represent. The adoption in this case having been made with the consent of these agnates, no question of the safeguarding of their rights can arise. The test suggested by the plaintiffs is altogether unsatisfactory and cannot furnish the true criterion.

Mr. Somayya advances an alternative contention. He puts his case thus: Rameswaramayya died after the partition and the properties allotted to him vested on his death in his widow Subbamma. The argument is that, whether or not the widow's power became extinct on the partition, it came to an end, at any rate, on Subbamma succeeding to her husband. The plaint proceeds on an altogether different assumption. It is stated in paragraph 3 that the joint family consisted only of four brothers, the name of Rameswaramayya being omitted. Then the plaint goes on to say that Ramakrishniah (the first defendant's husband) died first and then Sivaramiah and that the two remaining brothers (Venkatachalamiah and Ramasubbiah) entered into a partition. There is thus no mention of Rameswaramayya. Nor have the defendants alleged in their written statement that he also was a party to the partition. The parties thus, when they went to trial, entirely ignored Rameswaramayya. But the alternative contention not only assumes that he was a party to the partition, but that, on his death, his property vested in his widow. Even the lower Court's judgment does not contain any reference to this argument. But the plaintiffs point to some statements made by the defence

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witnesses, which we are asked to treat as admissions. We do not think that a point of this importance, not raised in the pleadings and not referred to in the lower Court's judgment, should be allowed to be raised.

In the result, we hold that the adoption made by the first defendant is valid and, confirming the decision of the lower Court, dismiss the appeal with costs.

The memorandum of objections is allowed with costs.

G.B.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Pakenham Walsh.

1931,
October 29.

K. M. PARTHASARATHI CHETTI (SECOND RESPONDENT-
TRANSFEREE-DECREE-HOLDER), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
AND ANOTHER (APPELLANT AND FIRST RESPONDENT,
DEFENDANT AND PLAINTIFF), RESPONDENTS.*

Madras Salt Act (IV of 1889), sec. 84—Purchaser of salt removing salt purchased from factory on payment of salt duty then thought to be correct—Enhancement of duty prior to removal, enhanced duty, however, not being collected from purchaser—Personal liability for enhanced duty—Purchaser not under.

A purchaser of salt from a salt licensee applied for and obtained permission to remove the salt from the licensee's factory but could not do so until after some time. In the interval the salt-tax had been increased but the enhanced duty was not collected from the purchaser and the salt was taken away by him.

* Letters Patent Appeal No. 119 of 1927.

Held that the purchaser was not personally liable to pay the enhanced duty and that the same could not be subsequently recovered from him under section 84 of the Madras Salt Act (IV of 1889).

City Civil Court Appeal No. 14 of 1918 followed.

The addition of the words "to be paid by the applicants" found in Rule 81 (2) (i) of the Salt Manual is without any authority whatever.

APPEAL under Clause 15 of the Letters Patent against the judgment of WALLER J. made in City Civil Court Appeal No. 57 of 1925 on the file of the High Court (Original Suit No. 235 of 1924 on the file of the Court of the City Civil Judge, Madras).

V. Radhakrishnayya for appellant.

P. Venkataramana Rao (Government Pleader) for first respondent.

Cur. adv. vult.

THE JUDGMENT of the Court was delivered by PAKENHAM WALSH J.—The plaintiff in this case purchased eight hundred maunds of salt from one Chengalvaroya Chetti who was a salt licensee at Covelong factory, Chingleput District. He applied on the 27th February 1923 for permission to remove the said eight hundred maunds and obtained the same. But on account of certain restrictions made by the Government authorities as to hours of removal he could not remove the salt till 1st March 1923. On that day the salt-tax had been increased by another Re. 1-4-0 per maund. This sum was not collected from the plaintiff at that time and the salt was taken away. A demand for the payment of the sum of Rs. 1,000 was made on the 23rd March 1923 and, although he denied the liability, he paid the Rs. 1,000 under protest as he was threatened with coercive process and in order to avoid attachment and loss of his property. He brought this

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suit against the Secretary of State for India to recover the sum he paid under protest.

The defendant, the Secretary of State for India, pleaded in paragraph 5 of his written statement that

"under the Government of India Notification No. 4361, dated 24th April 1915 printed in G.O. No. 300 of 3rd May 1915, of the Government of Madras, the duty payable is at the rate in force on the date on which the salt is actually removed."

The learned City Civil Judge found in favour of the plaintiff and this decree was reversed in appeal by WALLER J. and the present letters patent appeal is against that decree.

In order to understand the contention of the plaintiff it is necessary to quote the rule under which salt, which is the property of a licensee, can be removed from the factory. This is found in the Salt Manual, section 81(2), which runs as follows:—

"(i) An application in the prescribed form, signed by the licensee and the purchaser or their authorized agents must be presented to the officer in charge of the factory together with the Shiroff's receipt for the amount of the duty and the other charges under section 43-B of the Salt Act (sic.) on the salt at least the day before the delivery of the salt is required. This rule may, however, be relaxed at the discretion of the Commissioner in factories where the issues *per diem* are small and where previous arrangements to provide officers for the conduct of sales are not required. An order for the delivery of the salt in the prescribed form will in any case be sent to the weighing officer. The duty and other charges to be paid by the applicants shall be those in force at the time of the removal of the salt from the factory."

Sub-section (ii) says:

"When the weighment and bagging of the salt is completed, the weighing officer will fill up and sign the permit which will be countersigned after check-weighment by the officer in charge of the factory, who will then allow the removal of the salt."

The notification quoted in paragraph 5 of the written statement was not produced at the trial or in the first appellate Court and in fact WALLER J. based his judgment on the fact that, as he says,

"a perfectly valid rule had been framed under section 85 of the Act laying down that the duty payable is that in force at the time of the removal."

Relying also on this rule he was not prepared to follow *Brito v. The Secretary of State for India in Council*(1) on the ground that it was not known whether such a rule as this was in force in Bombay at the time of that decision.

Before us it was argued that the rule framed under section 85 (2) (b) of the Madras Salt Act IV of 1889 by the Governor in Council, Madras, was *ultra vires*; but when it came to arguments it was for the first time pointed out that the Government Order mentioned in paragraph 5 of the written statement was not one professing to be framed under section 85 of Act IV of 1889 but professed to announce the rules framed by the Governor-General in Council under section 28 of the Indian Salt Act, Act XII of 1882, Notification No. 4631, dated the 24th April 1915. We think that we can decide this case on another branch of the argument without going into the question of whether the rule relied on was *ultra vires*. It is contended for the appellant that under the Madras Salt Act IV of 1889 no personal liability attaches to the purchaser in such a case and that consequently section 84 of the Salt Act under which this sum was sought to be recovered is not applicable. We think that this contention is well-founded, and it has the support of the decision of a Bench of two Judges of this Court in *City Civil*

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(1) (1881) I.L.R. 6 Bom. 251.

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Court Appeal No. 14 of 1918, with the reasoning in which we agree. This decision was relied on by the learned City Civil Judge. WALLER J. refused to follow it relying on the rule framed quoted above; but the rule does not touch the question of personal liability, and he does not discuss the question as to whether the liability is on the person or on the salt. Section 43 of Act IV of 1889 deals with the removal of salt from the factory, and it says:

“Subject to any rules which may be made by the Governor-General in Council under section 85 and the (Collector of Salt Revenue) under section 85-A no salt shall be removed from any salt-factory, otherwise than on account of Government or for transport to a place of storage authorized by the (Collector of Salt Revenue) and no salt shall be removed from such authorized place of storage, except under a permit and upon payment of duty at the rate fixed by the Governor-General in Council under the Indian Salt Act, 1882, and of the following charges.”

There is nothing here which creates any personal liability. However, it was attempted to be argued before us that rule 81 (2) of the Salt Manual as amended laid down that

“the duty and other charges *to be paid by the applicants* shall be those in force at the time of the removal of salt from the factory.”

It was argued that this rule throws the personal liability on the applicants. Now we find from the earlier part of the rule that the application is to be signed by “the licensee and the purchaser or his authorized agents.” So presumably these persons are the applicants. The addition of the words “to be paid by the applicants” found in the Manual appears to be without any authority whatever. In the amendment slip in the book it purports to be authorized by a G.O. No. 411, Separate Revenue, dated 14th June 1915, which was

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issued with reference to G.O. No. 300, dated the 3rd May 1915, alluded to above. In the whole of that order there is nothing about the payment by the applicants and the alteration which is referred to in the slip is clearly the first which runs: “Add the following at the end of the Rule (1): ‘And the rate of such duty shall be that in force on the date of removal of the salt from the factory.’” There is no justification whatever for the addition of the words “to be paid by the applicants”. The learned Government Pleader has admitted that there would be no justification in calling on the licensee in a case like the present when he is not the person who has removed the salt to pay the amount of the duty, and that it is payable only by the purchaser. Yet the words relied on would obviously make the licensee liable also. The argument founded on the amendment of rule 81 (2) (i) therefore fails; but we would like to point out the very grave result of the alteration throwing personal responsibility on to persons on whom no personal responsibility has been cast by the Act by some irresponsible editor in issuing the slip.

The learned Government Pleader then relies on the words in section 84 of Act IV of 1889:

“All sums recoverable under this Act or in any way due to Government on account of the salt revenue may be deducted by the (Collector of Salt Revenue) from any money owing to the person from whom such sums may be recoverable or due which may be in the hands of the (Collector of Salt Revenue) or under his disposal or control or may be recovered by the (Collector of Salt Revenue) by attachment and sale of salt belonging to such person and remaining within the limits of a factory. If not so recovered such sums may be recovered by Collectors of districts on application from the (Collector of Salt Revenue) as if they were arrears of land revenue.”

This is really begging the question. The point at issue is (1) whether the sum is recoverable at all and (2)

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whether, if it is "due to the Government" at all, it is due from anyone personally.

It is an elementary principle that fiscal enactments must be construed strictly in favour of the subject. We find nothing in the Act which creates a personal liability in this case. It may be noted that under section 41, when a licensee fails when called on to pay salt duty on salt still in the factory, it cannot be recovered from him personally but only by sale of the salt, and the only charge for which he is personally liable is the cost of destroying the salt if that course is found necessary.

In the light of section 41 it would be extraordinary to hold that a person, not the licensee but the purchaser, can be personally liable for the duty on salt which is not even inside the factory but has been allowed to leave it after paying what was considered the correct duty. Agreeing with the decision already quoted we find that plaintiff was not personally liable to pay the enhanced duty.

It therefore becomes unnecessary to consider a third ground raised in appeal that, assuming the order notifying the change of the rule 81 (2) (i) is not *ultra vires*, it conflicts with the rest of the rule which says that the duty should be paid on the day previous to presenting the application; that hence arises an ambiguity; and that in enforcing a fiscal liability the subject should be given the benefit of the ambiguity. It has not been seriously contended that the relaxation of the rule mentioned in the second part of rule 81 (2) (ii) can apply to the present case because the restriction of hours was deliberately made to reduce removals to the normal daily amounts when it was anticipated that otherwise they would be greater. There certainly does appear to us to be a clear contradiction involved in the

case of a purchaser who has not the credit alluded to in rule 86 (1), but we need not consider that matter further. The appeal succeeds and is allowed with costs in all Courts.

Solicitor for respondent: *The Government Solicitor.*
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APPELLATE CIVIL.

Before Mr. Justice Krishnan Pandalai and Mr. Justice Curgenvven.

BHAGAVATULA KRISHNA RAO (PLAINTIFF), APPELLANT,

1931,
November 12.

MUNGARA SANYASI AND FOUR OTHERS (DEFENDANTS);
RESPONDENTS.*

Landlord and tenant—Decree for possession obtained by third party against both landlord and tenant—Effect of—No termination of tenancy or destruction of landlord's title merely by reason of—Execution of decree allowed by third party to become barred—Subsequent suit by landlord against tenant for possession—Maintainability of—Eviction of tenant by title paramount—What amounts to—Unexecuted decree for possession obtained by third party if amounts to.

A suit by a lessor for the recovery of a portion of a house alleged to have been let by him to the defendant was dismissed by the Courts below on the preliminary ground that it was not maintainable by reason of a decree for possession of the suit house obtained in a prior suit by a third party against both the lessor (plaintiff) and the lessee (defendant). Possession of the suit house was decreed to the third party in the prior suit on the ground that he was the owner thereof, that the possession of the house by the lessor (plaintiff) became adverse to the third party only within twelve years of his suit, and

* Second Appeal No. 146 of 1927.

KRISHNA RAO that his suit was therefore in time. The third party did not, however, execute the decree in his favour and it had become barred on the date of the lessor's suit.

Held, reversing the Courts below, that, in the absence of anything further done or alleged amounting to a new arrangement between the third party and the lessee (defendant) or to an attornment, the decree obtained by the third party had not the effect as between the lessor and the lessee of destroying whatever rights the lessor might have previously had or of automatically putting an end to the tenancy pleaded by the lessor.

The finding as to title in the prior suit is not *res judicata* between the lessor and the lessee who were only co-defendants therein and the unexecuted decree for possession obtained by the third party therein had not the effect of destroying the lessor's title as between him and his tenant.

Bala v. Abai, (1909) 11 Bom. L.R. 1093, dissented from on this point.

An unexecuted decree for possession obtained by a third party does not operate as an eviction of the tenant by title paramount liberating him from the estoppel against pleading *jus tertii*.

Devalraju v. Mahamed Jaffer Saheb, (1911) I.L.R. 36 Mad. 53, followed.

Ram v. Pramatha, (1921) 35 C.L.J. 146, 154, 155, considered.

APPEAL against the decree of the District Court of Vizagapatam in Appeal Suit No. 312 of 1924 preferred against the decree of the Court of the District Munsif of Vizagapatam in Original Suit No. 341 of 1923.

P. Somasundaram for appellant.

V. Govindarajachari for respondents.

Our. adv. vult.

JUDGMENT.

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KRISHNAN PANDALAI J.—The plaintiff's suit for recovery from the five defendants, of whom two to five are minor sons of the first defendant, of a portion of a house alleged to have been let by plaintiff to the first

defendant in 1909 and for which he alleges that that defendant paid rent to him till 1915 has been dismissed by both the Courts below without taking evidence on these allegations, though they were denied by the defendants, on the preliminary ground that the suit is not maintainable by reason of the decree for possession of the suit house obtained in Original Suit No. 12 of 1915 against the plaintiff and the first defendant by the Putta family who established their title to the house but who allowed that decree to become time-barred. The lower Courts took the view that the passing of that decree had the effect as between the parties to this suit of destroying whatever rights the plaintiff may have previously had and of automatically putting an end to the tenancy pleaded by the plaintiff and that, even if the plaintiff's allegations that he let the defendants into possession as tenants be true, he would not be entitled to recover against them after that decree. The only question for determination is whether that view is correct.

Exhibit 1 is the judgment in Original Suit No. 12 of 1915. Five members of the Putta family were plaintiffs, the fifth defendant was another member who did not join as plaintiff and was therefore impleaded as a defendant. The present plaintiff was the second defendant and his mother, since deceased, was the first defendant. The present first defendant was the fourth defendant. He and the third defendant, another member of his family, were added as sub-tenants of a portion under the first and second defendants to whom the plaintiffs alleged they had let the whole house. The third and the fourth defendants remained *ex parte*. The first and second defendants contested the suit setting up that they were not tenants but owners and also that they were in adverse possession for more than

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twelve years. It was found that the plaintiffs were the owners, that, though the tenancy alleged was not proved, the possession of the first and second defendants which had begun before 1897 was only permissive at the beginning and that, though it may have become hostile later, i.e., in 1904, as more than twelve years had not elapsed thereafter before the suit was brought, the suit was in time. A decree for possession was accordingly passed in favour of the plaintiffs. That decree was never executed and has now become barred.

It is difficult to see how this decree merely as a decree could have any such effect as the lower Courts attribute to it as between the present parties who were co-defendants in that suit. The finding as to title like every other finding in the case was one between the Putta family on one side and these parties both of whom were defendants on the other. As between the present parties the matters decided are certainly not *res judicata* and the respondents' Advocate admits that this is so. In spite of that judgment and decree, it is certainly open to the plaintiff as against these defendants to prove that the findings in it as to title and permissive possession are wrong and, even if they were right, to show that when this suit was brought he had acquired an unquestionable title by possession as owner for about nineteen years. The statement of the District Judge that on the appellant's own pleadings he has no title on which he can sue, for the fact that the decree became barred cannot revive a title once lost, shows that he entirely misapprehended the effect of judgments not *inter partes*. There is no question of reviving the appellant's title because it was never lost as between the present parties. If those facts are proved again in this suit they will only show that so early as 1904 the present plaintiff and his mother had asserted adverse

possession as against the true owner and, as the true owner never executed the decree obtained by him, his remedy to get possession was lost as a natural consequence of which they perfected their title by enjoyment till 1923 when this suit was brought; *Ameeroonissa Begum v. Amir Khan*(1), *Singaravelu Mudaliar v. Ohokkalinga Mudaliar*(2) and *Puthia Valappil Ayissa v. Lakshmana Prabhu*(3).

Similarly the idea that by reason of that decree the tenancy granted by the plaintiff to the first defendant became as between themselves automatically extinguished as the Munsif says and ended as the learned District Judge says is also based on the same erroneous idea that that decree did or indeed could affect the legal relations *inter se* between parties who were co-defendants.

According to section 116 of the Indian Evidence Act and the decisions of the Privy Council on it, *Bilas Kunwar v. Desraj Ranjit Singh*(4) and *Vertannes and others v. Robinson and another*(5), if it is proved that the first defendant was let into possession as tenant of the portion of the house sued for by the plaintiff, he will be estopped from pleading plaintiff's want of title at the time of the lease even after the expiry of the term so long as he has not surrendered possession. It was to meet this difficulty that the defendants put forward the decree in Original Suit No. 12 of 1915 as having the effect of destroying the plaintiff's title and terminating the tenancy between the plaintiff and defendants. That the decree did not destroy plaintiff's title as between these parties has been explained. And mere termination of the tenancy by expiry of the term is no use to

(1) (1872) 17 W.R. 119.

(2) (1922) I.L.R. 46 Mad. 525, 534.

(3) (1911) 1 M.W.N. 207.

(4) (1915) I.L.R. 37 All. 557 (P.C.).

(5) (1927) I.L.R. 5 Rang. 427, 440 (P.C.).

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the defendants for as tenants they will still be bound by the same estoppel until they have surrendered possession. The defendants (respondents) have therefore cast about for other grounds for supporting the decision of the lower Courts. Their learned Advocate attempted first to argue that their plea was that the plaintiff has lost his title not by force of the decree as such but by withdrawal or termination of the licence under which he was holding from the true owner. This is a question of fact which was never pleaded and, in spite of the learned Advocate's strenuous argument, I am of opinion that it is an after-thought. That is not the ground on which the plaintiff has been non-suited and, if it were, evidence should have been taken on it. The Advocate indeed asked us to reserve to him leave, if the case is sent back, to give evidence on the point. We have had the plaint and written statements translated and placed before us by the respondents' Advocate. There is nothing in the written statement to show that the defendants pleaded that plaintiff's rights in the property were terminated or were transferred except by virtue of the decree. Indeed they could not have pleaded termination by the Putta people of their licence or permission of which the only indication is the opinion of the District Munsif in Exhibit 1, because, according to that judgment itself, that termination took place in or about 1904, five years prior to the tenancy now sued on. It is therefore plain that no such plea can be allowed to be taken now or hereafter.

The next argument is that the decree in Original Suit No. 12 of 1915 operated as an eviction by title paramount and that the defendant was thereby liberated from the estoppel against pleading *jus tertii*. Here again the pleadings have to be examined to see what the

defendants pleaded. The only plea of any title derived by defendants from the Putta people is contained in paragraph five of the written statement where it is said that the defendant has learnt from his father that the original owners of the suit property, namely, the Putta people, granted the same to him. This is a matter to be established by evidence to be given by the defendant, which has not been done, and therefore it is not available at this stage of the case, whatever its effect may be even if proved. Then it is urged that the defendant has urged in paragraph four that, as the Putta people agreed not to disturb this defendant's father and they were only intent upon ejecting the present plaintiff, this defendant's father did not contest the suit. This was not a plea of any facts amounting to eviction by title paramount, but was only put forward as a reason for those defendants being *ex parte* in the former suit, and this only means that the defendants being tenants in any case took no interest in the dispute about the title. Nowhere is it stated that the defendants became the tenants of Putta people or attorned to them or paid rent to them. Thus there is no other plea of eviction by title paramount unless the decree itself has that legal effect. The question is whether it has.

The lower Courts relied on *Bala v. Abai*(1) and *Ram v. Pramatha*(2). The former case somewhat resembles the present one on the facts with the material difference that the tenant had, after the decree for possession against himself and his lessor by a third party (Babajee), accepted a sale-deed from that third party's heirs. Though this sale-deed was held to be collusive and does not appear to have been the ground for

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(1) (1908) 11 Bom. L.R. 1093.

(2) (1921) 35 C.L.J. 143.

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holding that the tenants had been evicted by title paramount, that fact is sufficient to support the decision though not on the grounds stated. The learned Chief Justice at page 1098 and BATCHELOR J. at page 1101 observe that the estoppel against the tenant under section 116 expired on the expiry of the term. This cannot be supported in view of the Privy Council decisions that it continues till possession is surrendered. He also took the view that the decree obtained by Babaji, which, as in this case, was not executed, had the effect of destroying the plaintiff's (lessor's) title as between him and his tenant. In my opinion this view is too widely stated to be correct as between co-defendants to a decree obtained by a third party. Though the case was itself rightly decided on the facts, it is not an authority for the respondents' proposition as to the effect of a decree for possession as an eviction by title paramount, and the general observations are too widely expressed to be literally accepted. In the case of *Ram v. Pramatha*(1) also the tenant had attorned to the true owner and in such a case it has been held that to constitute eviction by title paramount dispossession need not be by the tenant actually giving up possession to the third party but may be by attornment to him. In the passage at pages 154 and 155 which deals with what amounts to an eviction by title paramount RICHARDSON J., after referring to the absence of Indian decisions, first refers to early English decisions which establish the proposition that it is enough if the tenant on threat of eviction by the heir is obliged to attorn to him and that amounts to an entry by him. He then refers to other decisions that the bringing of an action of ejectment is equivalent to an entry. This sentence is relied on by

(1) (1921) 35 C.L.J. 146.

the respondents. In view of the decisions of our own KRISHNA RAO
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Court to be presently mentioned, I am reluctant to extend to decrees for possession made under the Indian practice and procedure the effect attributed in this respect to actions for ejectment according to the English practice. Those who are curious to follow the development of the old English doctrine of livery of seisin which required "entry" and how gradually the requirement of livery of seisin and entry was dispensed with will find the matter dealt with by Sir F. Pollock in *Pollock and Wright on Possession*, pages 47 to 57. The learned writer deals at pages 84 and 85 with the acts necessary to work change of possession or disseisin according to earlier authorities and points out:

"The action of ejectment in its modern form tried the right to possession by means of the fiction that the nominal plaintiff, having entered under a lease made by the real plaintiff, was ousted by a mere stranger; and the real defendant was brought in by a rule of Court upon the terms that he should 'confess lease, entry and ouster and insist upon his title only.' And when this form of action, from its greater convenience, became the general and accepted method of trying the title to the freehold as well as to chattel interests, disseisin or ouster ceased to be a principal fact."

Having regard to these historical reasons which probably explain the effect of an action of ejectment as implying by fiction an ouster, it is not safe to apply it without qualification and regard to the reason of the thing to Indian Law. The decisions of our own Court bearing on the question require something more than the obtaining of a decree by a third party to enable the tenant to plead that he has been evicted by a title paramount to his lessors. In *Devalraju v. Mahamed Jaffer Saheb*(1) A, a dharmakarta who had leased temple property, was at the suit of B

(1) (1911) I.L.R. 36 Mad. 53.

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held not to be and B was held to be the rightful officeholder. (The District Judge in this case makes a mistake when he says that the tenant was not a party to the suit. He was a defendant but remained *ex parte*—see page 56). In a subsequent suit brought by A (in which B was also added) to recover for himself the rent due for the period of the lease for which rent A had accounted to B in the previous suit, the tenant pleaded that A had no title to recover, he having been found not to be the rightful dharmakarta. It was held that, as the tenant had not surrendered the land to A, or been evicted by B, or attorned to him or even notified A that he intends to hold under B, he continued to be under the estoppel laid down by section 116 of the Evidence Act. SPENCER J., after citing text-books on the point, said that an unexecuted decree for possession would not amount to eviction. In *Alaya Pillai v. Ramaswami Thevan*(1), where a tenant being served by Government with a notice under section 7 of the Madras Land Encroachment Act had accepted a patta from Government and thereafter held under Government, it was held that the notice and acceptance of patta amounted in those circumstances to eviction and that actual dispossession was not necessary. That case emphasises the requisites of constructive eviction and is of no use to the respondents. See also *Hattikudur Narain Rao v. Andar Sayad Abbas Sahib*(2).

In my opinion the decree in Original Suit No. 12 of 1915, in the absence of anything further done or alleged amounting to a new arrangement between the Putta people and the defendant or to an attornment, has not the effect attributed to it, and the dismissal of the suit on that ground, assuming that was the ground, was

(1)(1925) 49 M.L.J. 742.

(2) (1914) 28 M.L.J. 44.

wrong. The decree of the lower Courts is reversed and the suit remanded to the District Munsif for trial on the merits of the other issues recorded. The respondents must pay the costs of the appellant in this and in the lower appellate Court. The costs hitherto incurred in the Munsif's Court will be provided for in the revised decree. The appellant will have refund of the fee paid on the memorandum of appeal.

CURGENVEN J.—I agree.

A.S.V.

APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Justice Wallace, Mr. Justice Waller and
Mr. Justice Krishnan Pandalai.

THE REGISTRAR, HIGH COURT, MADRAS, PETITIONER,

v.

KODANGI *alias* ARUNACHALAM SERVAI, RESPONDENT.*

Code of Criminal Procedure (Act V of 1898), ss. 476 and 195 (1)
(b)—*Meaning of the words "in relation to the proceeding"—*
Complaint to police against accused and others not charged—
Court has no jurisdiction to take action under sec. 476
against complainant, under sec. 211, Indian Penal Code, in
respect of persons not charged.

When a charge is made by a complainant to the police against more than one individual, and the police, while charging before the Court one or more of such individuals with the offence complained of, do not charge them all, the Court has no jurisdiction to take action, under section 476 of the Code of Criminal Procedure, against the complainant, under section 211, Indian Penal Code, in respect of those not so charged.

* Criminal Miscellaneous Petition No. 693 of 1930.

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Where a witness for the prosecution sends a telegram to the District Superintendent of Police that the accused, with other persons not charged, stabbed the deceased, the mere fact that the telegram is exhibited and filed in the case does not make the contents of it a matter "in relation to the proceeding" in the Court so as to give the Court jurisdiction to take action under section 476.

PETITION praying that in the circumstances stated in the judgment in Criminal Appeal No. 178 of 1930, on the file of the High Court, the High Court will be pleased to direct that a complaint under section 211 of the Indian Penal Code be preferred against Kodangi *alias* Arunachalam Servai, Prosecution Witness No. 20 in Sessions Case No. 7 of 1930, on the file of the Court of Session, Madura Division.

The petition coming on for hearing the Court (BEASLEY C.J. and PAKENHAM WALSH J.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

On the 19th October 1929 at about 6 p.m. or a little earlier a man named Tirumeni Servai was stabbed in the neck at Appantirupathi and died almost immediately. One Malayalam *alias* Veeranan Ambalam was tried for that offence in the Sessions Court of Madura, convicted of it and sentenced to transportation for life. It was clearly established that Tirumeni Servai was stabbed in a mantapam by the side of the road and this fact is of considerable importance. Shortly after 9 p.m. on the same day, Kodangi *alias* Arunachalam Servai, a nephew of the deceased, sent a telegram to the District Superintendent of Police at Madura North. It is worded as follows:

"Self and Tirumeni Servai went to Alagarkoil Road, Alagapuri. Our enemies, Madar Moideen, elder brother's son of Ottaikundi Mohamed Gani, Mohamed Gani's sister's son, Raja Rowther, Anupanadhi Alagumalai Pillai, Vellayakundram Manthayan's son Malayalam, these four stabbed Tirumeni Servai. Tirumeni Servai lying unconscious on Appantirupathi road. Pray take immediate steps. Arunachalam Servai, Kilavadam-poki Street."

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The fourth name mentioned in the telegram is that of the convicted man. This telegram was later on for obvious reasons treated as a false document and no charge was brought against the other three persons mentioned in the telegram. The only statement in the telegram that was true was that Tirumeni Servai had been stabbed by Malayalam. The evidence shows that the murder could not have taken place where the respondent in this petition stated in his telegram that it had. It clearly took place in the mantapam. The evidence also shows that the respondent who was Prosecution Witness 20 in the Sessions Case was not present at the stabbing. It also clearly shows that the other three persons mentioned in the telegram did not stab the deceased. In the Committing Magistrate's Court, the respondent admitted that the contents of the telegram were not true. This admission he repeated in the Sessions Court where the telegram was admitted in evidence. He explained that he got from Prosecution Witness 22 a message sent by means of a bus driver who was not a witness in the case giving a brief account of the occurrence and said that he thought that other enemies of the deceased besides Malayalam must have been involved and that therefore he despatched that telegram. He admitted that he was in Madura at the time of the occurrence and therefore did not see anything of the stabbing. The police from the beginning treated the respondent's statement as deliberately false. The discovery of blood on the floor in the north-east corner of the mantapam and a lot of blood on the platform together with the evidence of some of the witnesses conclusively proved that the respondent's account was false. The convicted man filed Criminal Appeal No. 178 of 1930 against his conviction and the appeal came before the Criminal Bench as at present constituted. The appeal was dismissed but we took a very serious view of the conduct of the respondent and in our judgment made the following order:

"As the evidence in this case, in our opinion, clearly discloses conduct which renders Prosecution Witness 20 Kodangi *alias* Arunachalam Servai liable to criminal proceedings we direct that notice be served upon him calling upon him to show cause before us why a complaint charging him with an offence under section 211 of the Indian Penal Code should not be made by us under section 476 of the Code of Criminal Procedure. Notice returnable on 28th August 1930."

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On 4th September 1930 Mr. Jayarama Ayyar on behalf of the respondent appeared and contended that the Criminal Bench hearing the appeal was not competent to make any such order under section 476 of the Code of Criminal Procedure. His contention was that the offence alleged to have been committed by the respondent (namely, that with intent to cause injury to the persons falsely accused in the telegram and knowing that there was no just or lawful ground for any such accusation, he falsely charged them with having committed the offence of murder) was not committed in or in relation to proceedings in the Sessions Court and subsequently in the Appellate Court because the only person charged in the Sessions Court was Malayalam alias Veeranan Ambalam. He contends therefore that unless it is shown that the person or persons falsely accused are proceeded against in a Court and shown to have been falsely accused, section 476 of the Code of Criminal Procedure has no application. Section 211, Indian Penal Code, is one of the sections set out in section 195 (1) (b) of the Code of Criminal Procedure. The latter section says that no Court shall take cognizance of any offence punishable under any of the sections enumerated there—section 211 is one of them—and proceeds “when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate.” Therefore his argument was that as the alleged offence was not committed in or in relation to any proceeding in any Court, the High Court could not take cognizance of that offence and that the complaint in writing of such Court is only necessary when the offence has been committed in or in relation to any proceeding in a Court. In support of his argument several cases were referred to by him. The first of these was *Muhammada v. The Crown*(1). In that case the petitioner made a report at the Police Station, Ferozepore, that he was in the Ferozepore hospital on a certain night attending on his sister who was an in-door patient there when one Nihal Singh came into the compound with a takwa in his hand intending to murder his sister, that Nihal Singh was accompanied by Raushan Beg and Ahmad Din, who were the expectant heirs of his sister and who had instigated him to commit the crime and that he was able

(1) (1928) I.L.R. 9 Lah. 408.

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to catch Nihal Singh, his companions having run away. The police after enquiry found that the story he had given was false. They took no action against Raushan Beg or Ahmad Din but charged Nihal Singh under the Arms Act for being in possession of the takwa. He was, however, acquitted. Raushan Beg then lodged a complaint under section 211, Indian Penal Code, against Muhammada for having made a false charge against him. Muhammada was tried by the First-class Magistrate, Ferozepore, and found guilty under that section and sentenced to undergo rigorous imprisonment for four months and to pay a fine of Rs. 100. His appeal to the Sessions Court being unsuccessful, he preferred a revision to the High Court and the case came up before Sir SHADI LAL C.J. and AGA HAIDAR J. on reference by a single Judge. The Division Bench held that clause (1) (b) of section 195 of the Code of Criminal Procedure did not apply to the prosecution of the accused by Raushan Beg under section 211, Indian Penal Code, the offence alleged thereunder not having been committed ‘in or in relation to any proceedings in any Court’ within the meaning of the clause. On page 417 it is stated, “Raushan Beg was never charged in any Court, nor was he ever put upon his trial before any magistrate, nor were any proceedings taken against him before the Court in which Nihal Singh was involved. This being so, it cannot be said that the offence under section 211 of the Indian Penal Code with which Muhammada, the applicant, had been charged, was an offence which was committed in or in relation to any proceeding in Court. This being our view it was not necessary that the present prosecution should have been initiated on the complaint in writing of the magistrate who tried and disposed of Nihal Singh’s case. Under these circumstances the objection as to the maintainability of the present complaint fails.” In the course of the judgment reference was also made to some other cases and in particular to *Emperor v. Hardwar Pal*(1) where a contrary view, to that taken by the Division Bench of the Lahore High Court, was taken. There Hardwar Pal made a report against several persons including one Sher Bahadur Singh at a police station charging them with rioting and voluntarily causing hurt. The police made enquiry and sent up several persons for trial but not Sher Bahadur Singh. Some of these were convicted by the magistrate but acquitted by the Sessions Judge. Thereupon Sher

(1) (1912) I.L.R. 34 All. 522.

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Bahadur Singh made a complaint to the magistrate charging Hardwar Pal with having made a false report in respect of himself to the police. The magistrate took cognizance of the complaint but it was held that the magistrate had no power to take cognizance of the complaint by reason of the absence of sanction. Considerable doubt as to the correctness of this decision was thrown by two learned Judges of the same High Court in *Emperor v. Kashi Ram*(1). In that case it was held that there was no necessity for sanction for the prosecution of the person charged and it was held that if the complainant confines himself to reporting what he knows of the facts, stating his suspicions, and leaving the matter to be further investigated by the police or leaving the police to take such course as they think right in the performance of their duty, he may be making a report but he is not making a charge. But if he takes the further step, without waiting for any further investigation, of definitely alleging his belief in the guilt of a specified person and his desire that the specified person be proceeded against in Court, that act of his, whether verbal or written, if made to an officer of the law authorized to initiate proceedings based upon the complainant's statement whether amounting to an expression of the complainant's belief in the guilt of the specified person or his desire that Court proceedings be taken against him amounts to making a charge. The Court held that under section 195 (1) (b) of the Code of Criminal Procedure a complaint of the Court was not necessary because the charge was not in a Court. In *Tayebulla v. Emperor*(2) a false charge was made by a person to the police and it was held that no sanction was necessary under section 195 (1) (b) of the Code of Criminal Procedure to prosecute an informant under section 211 of the Indian Penal Code but that sanction would be required if he subsequently preferred a complaint to the magistrate praying for judicial investigation, and it was held that having laid information before the police and not having subsequently applied to the magistrate for an investigation or impugned the correctness of the police report and prayed for trial, he had not made a "complaint" within the meaning of section 4 (h) of the Code. Another case referred to by Mr. Jayarama Ayyar was *Brown v. Anunda Lal Mullick*(3). There it was held that

(1) (1924) I.L.R. 48 All. 906.

(2) (1916) I.L.R. 43 Calo. 1152.

(3) (1916) I.L.R. 44, Calo. 850.

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where an information to the police is followed by a complaint to the Court based on the same allegations and the same charge and such complaint has been investigated by the Court, the sanction or complaint of the Court itself is necessary even for a prosecution of the informant under section 211, Indian Penal Code, in respect of the false charge made to the police. SANDERSON C.J. in the course of his judgment referred to *Emperor v. Hardwar Pal*(1) but did not express any opinion as to the correctness of that judgment because the judgment in that case went a great deal further than the facts in the case then before the Calcutta Bench. A case on the other side following *Emperor v. Hardwar Pal*(1) is reported in *Emperor v. Gurditta*(2) a decision of a single Judge. There the accused made a report to the police against seven persons five of whom were sent up for trial in a magistrate's Court and the other two were not sent up and the charge against the accused was that he had brought a false case against them. The Public Prosecutor filed a complaint against the accused to that effect and the latter was committed for trial by the magistrate. It was held that the offence under section 211, Indian Penal Code, if any, committed by the accused was committed by him in relation to a proceeding in Court, and that as the sanction of the Court was not obtained and there was no complaint by it, the Committing Magistrate had no power to take cognizance of the offence. In *Daroga Gope v. King-Emperor*(3) the Court had to consider what offences may be said to have been committed in relation to the proceedings in a Court within the meaning of section 195 (1) (b) of the Code of Criminal Procedure. There the petitioner laid a false charge before the police which caused the police to submit a report against the petitioner which in its turn caused the petitioner to institute a judicial proceeding before the magistrate by lodging a formal complaint and repeating the allegations made in his information to the police and the magistrate on the written complaint of the Sub-Inspector of Police summoned the petitioner under sections 211 and 182, Indian Penal Code, and it was held that the laying of the false information before the police was an offence committed in relation to a judicial proceeding and the magistrate had no jurisdiction to summon the petitioner under section 211, Indian

(1) (1912) I.L.R. 34 All. 522.

(2) (1916) 39 I.O. 692.

(3) (1925) I.L.R. 5 Pat. 33.

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Penal Code, without a complaint made in writing by the Court under section 195 (1) (b). In this case *Emperor v. Hardwar Pal*(1) and *Brown v. Ananda Lal Mullick*(2) were considered.

As it appears to us that conflicting views have been taken in the cases referred to, we consider it necessary to refer the following questions to a Full Bench:—

(1) When a charge is made by a complainant to the police against more than one individual and the police while charging before the Court one or more of such individuals of the offence complained of, do not charge them all, is a complaint of the Court under section 476 of the Code of Criminal Procedure necessary to prosecute the complainant under section 211, Indian Penal Code, in respect of the person or persons whom the police have not charged before the Court?

(2) If the answer is in the negative, is such a complaint under section 476 of the Code of Criminal Procedure required on the particular facts of this case, owing to the complaint telegram having been exhibited and filed for the prosecution?

ON THIS REFERENCE:

K. N. Ganpati for Public Prosecutor (L. H. Bewes) for the Crown.

K. S. Jayarama Ayyar and G. Gopalaswami for respondent.

Cur. adv. vult.

THE OPINION of the Court was delivered by
WALLACE J. WALLACE J.—The two questions referred to the Full Bench are: first, when a charge is made by a complainant to the police against more than one individual, and the police, while charging before the Court one or more of such individuals of the offence complained of, do not charge them all, is a complaint of the Court under section 476 of the Code of Criminal Procedure necessary to prosecute the complainant under section 211, Indian Penal Code, in respect of the person or persons whom the police have not charged before the Court; second, if the answer is in the negative, is such a complaint under

(1) (1912) I.L.R. 34 All. 522.

(2) (1916) I.L.R. 44 Calo. 680.

section 476 of the Code of Criminal Procedure required on the particular facts of this case owing to the complaint telegram having been exhibited and filed for the prosecution? What question I is intended to cover is whether in the circumstances stated the Court had jurisdiction or was competent to act under section 476. It is unnecessary to go more into detail into the facts. Question I sufficiently sets out the necessary data.

Under section 476 of the Code of Criminal Procedure the Court only gets jurisdiction to inquire and make a complaint under section 211, Indian Penal Code, if the offence under section 211 appears to have been "committed in or in relation to any proceeding in any Court". Here there is no question of an offence having been committed in the Court, and the point is whether the words "in relation to any proceeding in any Court" are wide enough to cover the case stated. The "false" complaint was in a telegram to the District Superintendent of Police charging four persons with stabbing another. The police investigated and charged only one of these four with the stabbing and the trial of that charge is the relevant "proceeding" in the Court, as the charge of stabbing against the other three was not brought before the Court and did not properly form the subject-matter of any inquiry or trial before the Court.

The combined effect of sections 195 (1) (b) and 476 of the Code of Criminal Procedure is restrictive. In so far as the matter to be dealt with under the various sections mentioned in section 195 (1) (b) is in relation to a proceeding in a Court, the unrestricted authority of the police to arrest for and charge a cognizable offence is taken away. In a case under section 211, Indian Penal Code, when the police or the complainant or any one else brings the charge, which is the subject-matter of the offence, to trial in a Court, then it may be fairly

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contended that the offence has been committed in relation to a proceeding in the Court. But where neither the complainant nor the police nor any one else brings it into Court, we can see no sound reason why the Court should interpret sections 195 and 476 of the Code of Criminal Procedure so as to hamper the otherwise unrestricted right of any one to complain direct of the offence under section 211, Indian Penal Code. We do not think that the fact that the trial was the effect of the complaint *ipso facto* brings all matters mentioned in the complaint "in relation to" the trial, or in fact brings any matters mentioned in the complaint into that relation except those which are relevant to the charge being tried in the trial itself. It is not difficult to conceive of cases where false matters might be stated in a complaint to the police but are not made matter of charge or trial because they were wholly separable from the subject of the proceeding in Court and have no real relation to it. Judicial action taken solemnly by the Court under section 476 of the Code of Criminal Procedure should be confined to cases in which the observation of the Court itself or an inquiry or trial *ad hoc* has brought the offence to notice.

Not many rulings on the point are cited before us. Those that assist are *Muhammada v. The Crown*(1), *Emperor v. Hardwar Pal*(2) and *Emperor v. Kashi Ram*(3). The earliest of these is *Emperor v. Hardwar Pal*(2) which is to the effect that, in a case like the present, under the old section 195, the sanction of the Court would be necessary. In *Emperor v. Kashi Ram*(3) the referring Judge doubted the correctness of *Emperor v. Hardwar Pal*(2) and went further, holding that a complaint not made to the Court could not retrospectively

(1) (1928) I.L.R. 9 Lah. 408.

(2) (1912) I.L.R. 34 All. 522.

(3) (1924) I.L.R. 46 All. 906.

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be regarded as in relation to a proceeding in the Court, merely because it had subsequently come to be tried by the Court. The Bench agreed with him so far as to hold that a charge made against one person and others will not amount to a charge against him in relation to a proceeding in Court simply because the others were brought to trial. This was followed by a Bench in Lahore in *Muhammada v. The Crown*(1). The ruling in *Tayebulla v. Emperor*(2) which the Bench in Lahore follows would indicate that the Calcutta Court holds that it is only in so far as the police or the complainant himself had brought the complaint to the stage of a judicial inquiry or trial that section 476 of the Code of Criminal Procedure will apply. That is on the lines of the Lahore and the later Allahabad ruling. We find ourselves in agreement with these views. We would therefore answer the first question that when the charge is made by the complainant to the police against more than one individual, and the police, while charging before the Court one or more of such individuals with the offence complained of, do not charge them all, the Court has no jurisdiction to take action under section 476 against the complainant in respect of those not so charged.

As to question II, we are agreed that the mere fact of the telegram being exhibited and filed in the case does not make the contents of it a matter "in relation to the proceeding" in the Court, so as to give the Court jurisdiction to take action under section 476 of the Code of Criminal Procedure.

K.N.G.

(1) (1928) I.L.R. 9 Lah. 408.

(2) (1916) I.L.R. 43 Calc. 1152.

APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Justice Waller, Mr. Justice Krishnan Pandalai
and Mr. Justice Curgenvven.

1931,
October 8.

IN RE PONNUSWAMI GOUNDAN AND ANOTHER
(ACCUSED 2 AND 3), PETITIONERS.*

Code of Criminal Procedure (Act V of 1898), sec. 203—Dismissal of complaint under—No bar to any magistrate taking cognizance of a subsequent complaint.

When a complaint is dismissed under section 203 of the Code of Criminal Procedure, any magistrate having co-ordinate jurisdiction can take cognizance of a subsequent complaint on the same facts, notwithstanding that the order of dismissal has not been set aside.

Emperor v. Chinna Kaliappa Gounden, (1905) I.L.R. 29 Mad. 126 (F.B.), followed.

PETITION praying that, in the circumstances stated therein, the High Court will be pleased to quash the proceedings in Preliminary Register Case No. 3 of 1931, on the file of the Court of the Second-class Magistrate of Perundurai as without jurisdiction, so far as the petitioners are concerned.

This petition coming on for hearing the Court (WALLER and KRISHNAN PANDALAI JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

We think that the question raised in this case should be decided by a Full Bench. It is this—whether, a complaint having been dismissed by a Sub-divisional Magistrate under section 203 of the Code of Criminal Procedure, a Sub-Magistrate has jurisdiction to entertain a charge-sheet founded on a subsequent complaint, the order of dismissal not having been set aside. The ruling in *Emperor v. Chinna Kaliappa Gounden*(1) is limited expressly to the case of the same magistrate re-entertaining a complaint. *Mahomed Abdul*

* Criminal Miscellaneous Petition No. 324 of 1931.
(1) (1905) I.L.R. 29 Mad. 126 (F.B.).

Mennan v. Panduranga Row(1) is a case of different Magistrates, though the headnote states the decision in wider terms; see *Grish Chunder Roy v. Dwarka Dass Agarwallah*(2) and *Queen Empress v. Adam Khan*(3). But the decisions are not uniform—vide *In re Mahadev Lazman*(4). It is desirable, though a case of this kind must be of very rare occurrence, that the question should be authoritatively settled. We therefore refer the above question for decision by a Full Bench.

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In re.

ON THIS REFERENCE:

K. S. Jayarama Ayyar (with him *A. Venkatakrishna Ayyar*) for petitioners.

K. N. Ganpati for Public Prosecutor (*L. H. Bewes*) for the Crown.

Cur. adv. vult.

The OPINION of the Court was delivered by WALLER J.—The petitioners are two out of five persons who have been charge-sheeted by the police before the Sub-Magistrate of Perundurai for offences under sections 419 and 467, Indian Penal Code and section 82 of the Registration Act. A sale-deed had been presented for registration to the Sub-Registrar of Kunnathur on 12th January this year. It purported to have been executed by one Kanni Moopan and by his mother on behalf of his minor brother and was registered the next day. On 28th January Kanni Moopan complained to the Sub-Registrar that he had not executed the deed and that there had been false personation. The Sub-Registrar forwarded his complaint to the District Registrar, who on 2nd February directed the Sub-Registrar to advise Kanni Moopan to complain to a magistrate. The next day, somewhat inconsistently, he sent a copy of the Sub-Registrar's letter and of the complaint to the Police Inspector at Erode, who on 4th

(1) (1904) I.L.R. 28 Mad. 255.
(3) (1899) I.L.R. 22 All. 106.

(2) (1897) I.L.R. 24 Calo. 528.
(4) A.I.R. 1925 Bom. 258.

or 5th ordered the case to be registered for investigation. In the meantime, Kanni Moopan, in compliance with the advice given him on 2nd, had lodged a complaint before the Sub-divisional Magistrate, Erode, who proceeded to dismiss it summarily, mainly on the surprising ground that the complainant knew nothing about the contents of the sale-deed in question. As his complaint was that he had not signed the deed and that some one had personated him before the Sub-Registrar, his ignorance of its contents was nothing more than was to be expected. On 22nd the police put in their charge-sheet, which was taken on file by the Sub-Magistrate of Perundurai. In May the case was adjourned at the request of the petitioners on the allegation that they were going to move the High Court for a transfer. On 15th May they informed the Court that they had so moved. That was untrue. What they had done was to move the High Court to quash the proceedings on the ground that the Sub-Magistrate had no jurisdiction to entertain the charge-sheet, the Sub-divisional Magistrate's order dismissing Kanni Moopan's complaint not having been set aside. JACKSON J. referred the application to a Bench, which, in its turn, referred it to a Full Bench for decision of the following question:—

Whether, a complaint having been dismissed by a Sub-divisional Magistrate under section 203 of the Code of Criminal Procedure, a Sub-Magistrate has jurisdiction to entertain a charge-sheet founded on a subsequent complaint, the order of dismissal not having been set aside.

The leading case on the point, as far as this Court is concerned, is *Emperor v. Chinna Kaliappa Gounden*(1). That was, of course, a case in which a dismissed complaint was re-entertained by the same magistrate as

(1) (1905) I.L.R. 29 Mad. 126 (F.B.).

had dismissed it and the majority of the Full Bench held that he had jurisdiction to do so. It had previously been decided in *Mahomed Abdul Mennan v. Panduranga Row*(1) that a magistrate had no power to entertain a complaint that had already been dismissed by another magistrate of co-ordinate jurisdiction. In the case we are now considering the prior dismissal was by a magistrate of superior jurisdiction, but that, in our opinion, makes no difference in principle—apart from the fact that, as far as the subject-matter of the particular complaint was concerned, their jurisdiction was co-ordinate. A very considerable number of rulings has been cited before us, to most of which we consider it unnecessary to refer. What, in effect, Mr. Jayarama Ayyar has pressed us to say is that the case, *Emperor v. Chinna Kaliappa Gounden*(2), was wrongly decided. We see no reason to do anything of the sort. It is curious, no doubt, that the Code, while empowering superior Courts to direct further enquiry into complaints that have been dismissed under section 203 which would seem to supply a complete and adequate remedy against improper dismissal should, at the same time, allow a complainant and a magistrate to dispense with that formality and permit the one to present and the other to entertain a complaint on the same facts as a complaint that has already been presented and dismissed. But that is not our concern. We have to interpret the Code as it stands and not in the light of any anomaly to which its wording may give rise. Something has been sought to be made out of the difference between section 147 of the Code of 1872 and section 403 of the present Code. As to that, we are of opinion that the difference is one merely of language and not of

(1) (1904) I.L.R. 28 Mad. 255.

(2) (1905) I.L.R. 29 Mad. 126 (F.B.).

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substance. Section 147 of the old Code provided that "the dismissal of a complaint shall not prevent subsequent proceedings." There is no similar provision in the present Code and it is argued that the absence of such a provision leads to the inference that the dismissal of a complaint is now a bar to further proceedings until it is set aside. That is not, in our opinion, the proper inference from the language of section 403. The section begins by laying down that a man who has been tried for an offence and convicted or acquitted of it shall not be liable to be tried again for the same offence and it ends with the explanation that the dismissal of a complaint is not an acquittal for the purposes of the section. That, however, is not all; there is in regard to an acquittal a qualification which is not to be found in the explanation. It is that an acquittal to be a bar to a second trial must still remain in force. In regard to the dismissal of a complaint, it is not stated that the order of dismissal is a bar until it is set aside. The only meaning we can put on the wording of the explanation is that an order dismissing a complaint is not an acquittal, in the sense that it bars a further enquiry until it has been set aside. That being so, we must follow the ruling in *Emperor v. Chinna Kaliappa Gounden*(1), which, in our opinion, really covers the present case. There is, it seems to us, no difference in principle between the entertainment of a second complaint by the same or by a different magistrate. That was pointed out by MACLEAN C.J. in *Queen-Empress v. Dolegobind Dass*(2) whose opinion was approved by PHILLIPS J. in *Pompalli Subba Reddi v. Chaduboyigari Kamal Saib*(3).

K.N.G.

(1) (1905) I.L.R. 29 Mad. 128 (F.B.).

(2) (1900) I.L.R. 28 Cal. 211.

(3) (1915) 7 Cr. L. Rev. 255.

APPELLATE CIVIL—FULL BENCH.

Before Sir Owen Beasley Kt., Chief Justice,
Mr. Justice Ramesam and Mr. Justice Cornish.

J. J. MARTIS, PLAINTIFF,

v.

CUTHBERT D'SOUZA, DEFENDANT.*

1932,
January 15.

Indian Stamp Act (II of 1899), sec. 37—Quarter-anna postage stamps—If stamps of improper description—Government of India Stamp Rules, rule 18—Power of Collector to validate quarter-anna postage stamps.

Quarter-anna postage stamps are stamps of improper description within the meaning of section 37 of the Indian Stamp Act and a promissory note stamped with quarter-anna postage stamps of sufficient amount can be validated by the Collector under rule 18 of the Government of India Stamp Rules.

CASE stated under section 57 of the Indian Stamp Act (II of 1899) by the Secretary to the Commissioner of Excise, Madras.

P. V. Rajamannar for Government Pleader (*P. Venkataramana Rao*) for Government.

S. Tyagaraja Ayyar for *G. A. Pais* for plaintiff.
Defendant was unrepresented.

The JUDGMENT of the Court was delivered by

CORNISH J.—The question referred is whether a promissory note stamped with quarter-anna postage stamps can be validated by the Collector under rule 18 of the Government of India Stamp Rules.

Section 37 of the Indian Stamp Act empowers the Governor-General in Council to make rules providing that, where an instrument bears a stamp of sufficient amount but of improper description, it may, on payment of the duty with which the same is chargeable, be certified to be duly stamped, and any instrument so

* Referred Case No. 1 of 1931.

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certified shall then be deemed to have been duly stamped as from the date of its execution. Rule 18 which has been made in pursuance of this power enables the Collector, where an instrument bears a stamp of sufficient amount, but of improper description, on payment of the duty with which the instrument is chargeable to certify by endorsement that it is duly stamped.

The answer to the question referred depends on whether the quarter-anna stamps on the instrument are stamps of improper description.

A Bench of the Bombay High Court has held in *Venkatraman Ganap Hedge v. Shankarnarayan Sitaram Bhat*(1), a case similar on the facts to the present case, that a promissory note stamped with four quarter-anna postage stamps was not an instrument bearing a stamp of improper description to which the remedial provisions of section 37 could be applied. The Court followed the ruling of the Full Bench in *Reference under section 57 of Act II of 1899*(2) that, inasmuch as the rule (now rule 3 of the 1925 Stamp Rules) required that payment of the duty with which an instrument is chargeable shall be indicated on such instrument by means of stamps issued by the Government for the purpose of the Act, a "postage stamp", not being a stamp issued for indicating the payment of duty chargeable on an instrument, did not come within the words "stamp of improper description". But in *Ma Pwa May v. S.R.M.M.A. Chettyar Firm*(3) the Judicial Committee dissented from the view that a revenue stamp only can be a stamp of improper description within section 37, observing:

"Their Lordships entertain no doubt that in pursuance of this section and the rules made thereunder . . . , the Collector would have been entitled in this case to exercise the

(1) (1917) 42 I.C. 947.
(2) (1901) I.L.R. 28 All. 218 (F.B.). (3) (1929) I.L.R. 7 Rang. 624 (P.C.).

powers given by the section. The contention to the contrary is that the section has no reference to any stamp except a revenue stamp pure and simple, and that a revenue stamp surcharged "Court-fee" is not within the meaning of the section a stamp of improper description. This appears to their Lordships to be putting too narrow a construction upon a remedial section, and their Lordships would not be prepared to assent to the opinion of the High Court of Allahabad in *Reference under section 57 of Act II of 1899*(1) so far as it concerns Court Fees stamps in their present form."

Rule 16 of the Stamp Rules prescribes what stamps are to be used for denoting payment of duty. It says:

"Except as otherwise provided by these rules, the adhesive stamps used to denote duty shall be the requisite number of stamps bearing the words 'Four-annas' or 'Two-annas' or 'One-anna' or 'Half-anna' and such stamps may be inscribed for use either for postage or for revenue, or for both postage and revenue."

The rule expressly recognizes postage stamps as usable to indicate payment of duty on an instrument chargeable with duty. If postage stamps are of the description designated in the rule they are stamps of a proper description; and it seems to us that it would be only putting a reasonable construction upon the section and rule to hold that quarter-anna postage stamps, not being included in rule 16, are stamps of improper description, and that if such stamps of sufficient amount are borne by the instrument it can be validated by the Collector under rule 18.

The costs of this reference which we fix at Rs. 50 will be added to the costs to be paid by the defendant if the plaintiff succeeds in the suit.

G.R.

(1) (1901) I.L.R. 28 All. 213 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Owen Beasley Kt., Chief Justice,
Mr. Justice Ramesam and Mr. Justice Cornish.

1931,
December 14.

FATMA BI BY HER DULY AUTHORIZED AGENT
JAINULABDEEN SAHIB (SECOND RESPONDENT),
APPELLANT,

v.

NAGOORKHAN AND ANOTHER (APPLICANT AND
FIRST RESPONDENT), RESPONDENTS.*

*Presidency-towns Insolvency Act (III of 1909), sec. 46 (3)—
Barred debt—Right to sue on same subsisting on date of
adjudication—Proof of—Indian Limitation Act (IX of
1908), sec. 4.*

A barred debt is provable in insolvency, under section 46 (3) of the Presidency-towns Insolvency Act, where the right to sue on the debt subsisted on the date of the order of adjudication, by reason of the provisions of section 4 of the Indian Limitation Act.

APPEAL against the judgment of WALLER J. passed in the exercise of Insolvency Jurisdiction of the High Court in Application No. 73 of 1931 in Insolvency Petition No. 441 of 1928.

A. Ramachandra Ayyar for appellant.—Though the claim on the promissory note was barred on 20th October 1928, since the 20th and the 21st October were holidays, a suit could have been filed on the 22nd. The debtors were adjudicated on the 22nd. The properties vested in the Official Assignee and no suit could have been filed except with the leave of Court. Section 4 of the Indian Limitation Act should be read along with sections 17 and 46 of the Presidency-towns Insolvency Act. Under the circumstances the filing of a suit will be an expensive formality. The debt could be proved in Insolvency. In *In re Hepburn*. *Ex parte Smith*(1) it was held that, for purposes of finding out

* Original Side Appeal No. 87 of 1931.
(1) (1884) 14 Q.B.D. 394, 400.

if a debt could be proved, the Court should see if the remedy by action subsists. See also *Ex parte Lancaster Banking Corporation*. In *re Westby*(1); In *re General Rolling Stock Company, Joint Stock Discount Company's Claim*(2); and *Ex parte Dewdney*(3).

K. Krishnaswami Ayyangar and *V. Varadaraja Mudaliyar* for first respondent.—Section 4 of the Indian Limitation Act is an enabling section. Only a right of suit is given. No other method of claim is open under the section. It is only by filing a suit on the 22nd that the debt could have been made subsisting. In *In re General Rolling Stock Company, Joint Stock Discount Company's Claim*(2), there was no consideration of any section analogous to section 4 of the Indian Limitation Act. It has been distinguished in *Ramaswami Pillai v. Govindasami Naicker*(4). Unless the debt is subsisting, it cannot be proved; *Sivasubramania v. Theethiappa*(5). See also *Debendra Nath Roy v. Kartic Prasad Das*(6).

Second respondent was unrepresented.

JUDGMENT.

BEASLEY C.J.—This is an appeal from a judgment of BEASLEY C.J. WALLER J. sitting in Insolvency. The Official Assignee allowed the claim of the appellant here which was in respect of a debt alleged to be due to her on a promissory note by the insolvent. A creditor preferred an appeal from the order of the Official Assignee to WALLER J., and he allowed the appeal.

The facts can be briefly stated. The insolvent owed the appellant money on a promissory note. The last payment was a payment of interest on the 20th October 1925. No further payment was made by the insolvent and the debt would have become and did become barred by limitation on the 20th October 1928. Up to that time the appellant had taken no steps to enforce her claim

(1) (1879) 10 Ch. D. 776, 784. (2) (1872) 7 Ch. App. 646, 650.
(3) (1809) 15 Ves. Jun. 479; 83 E.R. 836, 842.
(4) (1918) I.L.R. 42 Mad. 319. (5) (1928) I.L.R. 47 Mad. 120.
(6) (1928) I.L.R. 55 Cal. 1210.

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against the insolvent on the promissory note. The 20th of October, which was a Saturday, was a public holiday and the High Court was closed. The next day, the 21st, was a Sunday and the Court was closed that day also. On the 22nd October the appellant could have filed a suit against the insolvent upon the promissory note and enforced her claim because, by reason of the provisions of section 4 of the Limitation Act, the insolvent could not successfully set up as bar to the suit the Limitation Act. Section 4 of the Limitation Act is as follows:—

“Where the period of limitation prescribed for any suit, appeal or application, expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens.”

However, on the morning of the 22nd October 1928, the insolvent was adjudicated an insolvent, and it is admitted that no steps were taken thereafter with regard to this claim by the appellant until she preferred her claim in the insolvency. WALLER J. held that, as the claim on the promissory note was barred on the 20th October and as the appellant had not filed a suit on the 22nd October, the first available day after that, her claim was one which could not be proved in the insolvency and accordingly allowed the appeal.

What we have got to consider here is, what effect an adjudication in Insolvency has upon section 4 of the Limitation Act. It is argued by the respondent here that it has no effect at all, and that the appellant's claim was barred by limitation on October 20th, and she did not avail herself of the time given her for enforcing her claim against the insolvent on October 22nd. On behalf of the appellant it is argued that, when the adjudication took place on the 22nd October, no further steps could reasonably be taken by the appellant, and that her claim was one to be dealt with in the

insolvency. What has got to be considered is the meaning of section 46 (3) of the Presidency-towns Insolvency Act. That states that all debts to which the debtor is subject when he is adjudged an insolvent shall be deemed to be debts provable in Insolvency. It is argued on behalf of the appellant that on the 22nd October this was a debt to which the debtor was subject and that, being so, it was provable in Insolvency. It seems to me that, at any rate, throughout the 22nd October this was a debt to which the debtor was subject, and the question as to whether or not it was provable cannot depend upon the action taken thereafter by the creditor. It is argued for the respondent that it was a conditional debt only, conditional on the appellant filing a suit against the debtor. In my view, on that date the appellant had an enforceable claim against the debtor and the debtor had a debt which could be enforced against him. We have now got to consider whether it was necessary, the adjudication having supervened, for the creditor to file a suit. After the adjudication of a debtor all his property by reason of section 17 of the Presidency-towns Insolvency Act vests in the Official Assignee and no one can bring any suit to enforce any right against the property without the leave of the Court. It is argued here that, notwithstanding this vesting of the insolvent's property in the Official Assignee, the appellant should have come to Court on the 22nd October after the adjudication of the insolvent and applied for leave to file a suit. That would have meant of course that he would have had to pay court-fee on his plaint and that if, on an examination of his claim, it appeared to the Official Assignee that the claim was a good one, the filing of the suit would have been entirely unnecessary and would have cast upon the estate of the insolvent the burden of

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paying the costs of that plaint. A position somewhat similar, though the facts were slightly different, arose in *In re General Rolling Stock Company, Joint Stock Discount Company's Claim*(1). In that case, which was a company winding-up case, it is true that it appears that the debt was not barred at the time of the making of the winding-up order but became time-barred during the pendency of the liquidation. It was held there that the creditor had a good claim. On page 649 JAMES L.J. says:

"After a winding-up order has been made, no action is to be brought by a creditor except by the special leave of the Court, . . ."

Here, after an adjudication no suit can be filed by a creditor against a debtor without the leave of the Court. Then he proceeds:

"And it cannot have been the intention of the Legislature that special leave to bring an action should be given merely in order to get rid of the Statute of Limitations."

Here the obvious effect of filing a suit on the 22nd October would have been to deprive the debtor of his plea that the suit was barred by limitation. That seems to me to be the same thing as filing a suit for the purpose of getting rid of the Limitation Act; nor does it seem to me to make any difference at all that, in that case, there was at the time of the winding-up order a debt which was not barred by limitation. Here was an enforceable debt; before it could be enforced the adjudication happened, and it seems to me to be quite an unreasonable thing to force a creditor under such circumstances to apply for the leave of the Court to file a suit. Supposing the Court refused leave, then, although the Limitation Act gave the creditor the right to file a suit and enforce his claim on that day, that

(1) (1872) 7 Ch. App. 646.

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right would be taken away by the action of the Court. Another case to which reference can usefully be made is *Ex parte Lancaster Banking Corporation. In re Westby*(1). There BACON C.J. says:

"When a bankruptcy ensues, there is an end to the operation of that statute, with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy, and the *Statute of Limitations* has no application at all to such a case, or to the principles by which it is governed."

It is perfectly clear that, but for the intervention of the insolvency here, if the creditor did not file the suit on October 22nd she could not enforce her claim. What I have said here must not be taken as meaning that section 4 of the Limitation Act extends the period of limitation. It does not; it merely gives an extended time to a creditor in which to enforce his claim under certain circumstances. For these reasons, the appeal must be allowed with costs (throughout) on the Original Side scale.

RAMESAM J.—I agree.

CORNISH J.—I agree.

G.R.

(1) (1879) 10 Ch. D. 776.

APPELLATE CIVIL.

*Before Sir Owen Beasley Kt., Chief Justice, and
Mr. Justice Cornish.*

1932,
February 1.

BOARD OF COMMISSIONERS FOR THE HINDU
RELIGIOUS ENDOWMENTS, MADRAS, AND FOUR OTHERS
(DEFENDANT SIX AND DEFENDANTS TWO TO FIVE), APPELLANTS,

v.

SREEMATHI RUGMINI *alias* KUNHIKAVU *alias*
KUTHIRAVATTATH KONGASSERI PUTHUKULAN-
GARA AMMA NEETHIYAR AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

*Madras Hindu Religious Endowments Act (II of 1927), ss. 7,
9 cl. (2), 67, and 84—Non-existent temple—Hindu
Religious Endowments Board—Jurisdiction.*

The control of the Hindu Religious Endowments Board over the endowments of a temple is dependent on the temple being one to which the Madras Hindu Religious Endowments Act applies and the Board has no jurisdiction over the endowments where the temple is clearly non-existent, not temporarily but permanently, and there is no apparent intention of bringing it into existence again.

APPEAL against the judgment of KUMARASWAMI SASTRI J., dated 8th August, 1919, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 424 of 1926.

*T. R. Venkatarama Sastri, P. Venkataramana Rao
and D. Adinarayaniah* for appellants.

*T. Rangachari, C. Unikanda Menon and K. Chandra-
sekhar Thampam* for respondents.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J. BEASLEY C.J.—The claim in the suit under appeal is similar to the claims in the other suits but the facts are

* Original Side Appeal No. 101 of 1928.

somewhat different. The learned trial Judge dismissed those other suits because, in his opinion, section 7 of the Madras Act II of 1927 was validly enacted by the Local Legislature and section 84 gave power to the Board to decide whether a mutt or temple was a public or a private one when a dispute arose with regard to that. In this case, however, he held that the Board had no jurisdiction to control the property of the respondents and granted an injunction restraining the Board from exercising any of the powers conferred on it by the Act or interfering with the respondents' management of the properties. The Board has appealed against that decision.

The facts, quite shortly, are that the temple in question ceased to exist many years ago and that all that now remains of it are its ruins. About this there is no dispute. It is no doubt true that some of the properties are described as *devaswom* properties and that probably the income was formerly used by the members of the tarwad for the performance of worship in the temple. The learned Judge was of the opinion that the mere fact that there were these properties, the income of which should be devoted to the temple, were there a temple in existence, did not give the Board jurisdiction either to direct the restoration of the temple or to invoke the doctrine of *cypres* for the purpose of dealing with the income. He held that section 9 clause 12 of the Act clearly contemplates a temple in actual existence as a place of public worship and that there was nothing in the Act or in section 84 giving the Board any jurisdiction to decide the way in which the income or particular endowments attached to temples, which before the Act came into force ceased to exist as places of public worship, is to be applied.

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On behalf of the Board it is contended that one of the matters to be decided by the Board under section 84 of the Act is whether an institution is a mutt or a temple as defined in the Act. That is quite true. But, on the other side for the respondents, it is contended that there must at least be an institution in existence and that, if there is, the Board has jurisdiction to decide whether it is a mutt or a temple as defined in the Act. The definition of a mutt or temple in the Act is contained in section 9 clause 12, namely :

“ ‘ Temple ’ means a place, by whatever designation known, used as a place of public religious worship and dedicated to, or for the benefit of, or used as of right by, the Hindu community, or any section thereof, as a place of religious worship.”

In support of the contention that it is not necessary for the temple actually to exist in order to give the Board jurisdiction over its property, it is argued that section 67 of the Act clearly has in contemplation the case where there has been a temple and it has ceased to exist before the Act came into force, and the Board having power to appropriate the income derived from the property for the purposes set out in that section. But, in my view, that section does not assist the appellants because the proper construction of it seems to me to be that it is to enable the Board to deal with religious endowments, the original purposes of which subsequent to the Act become impossible of realisation, that is to say, by the temple ceasing to exist, or with religious endowments which come into existence after the passing of the Act and the purposes of which are never realized. If this is the right view of that section, then it is of no assistance to the appellants. The definition of a temple in the Act requires it to be a place which is used ; and this temple not only was not used and is not being used but cannot be

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used unless it is rebuilt. It has in fact been in ruins for many years. I, therefore, think that the learned trial Judge was perfectly right in holding that the Board had no jurisdiction with regard to its properties. The difficulty, however, is in laying down that the building of the temple must actually exist in order to give the Board jurisdiction, as cases can be imagined where clearly the Board should and must be intended by the Legislature to exercise its control. For instance a temple may be temporarily non-existent because it may have been washed away by a flood or temporarily submerged or may have been burnt down. Nevertheless the property from which its income is derived may still exist, so may its trustees, and the intention may be to rebuild the temple and resume religious worship as soon as it is rebuilt or the waters that have submerged the temple recede. All that is necessary, in my opinion, to say is that the Board has no jurisdiction where the temple clearly is non-existent, not temporarily but permanently, and there is no apparent intention of bringing it into existence again. For these reasons, this appeal must be dismissed with costs.

An objection to the order of the learned trial Judge directing the Board to pay the respondents only half the costs of the suit was taken by Mr. Rangachari, on behalf of the respondents, who argued that the Board ought to have been directed to pay the entire costs of the respondents. With that contention I do not agree because the order was made because the respondents had failed on other important issues and this was the only issue upon which they succeeded. The respondents' memorandum of objections must, therefore, be dismissed but without costs.

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CORNISH J. — I am of the same opinion. The report of the Board's inspector shows that what was once a temple is now a mere collection of debris. Except the base-work of the temple and a mass of broken idols etc., nothing remains of it. The respondents' allegation in the written statement is that the temple was destroyed some 150 or so years ago in an invasion by Tippoo Sultan, and that no attempt was ever made to rebuild it. This ancient ruin would not in ordinary language be correctly described as a temple, and I do not think that the provisions of the Hindu Religious Endowments Act require that it should be deemed to be a temple for the purposes of the Act. Temple, in the definition clause 12 of section 9, signifies a temple in the ordinary sense of the word, namely, a place dedicated and used for public worship. The Act appears, therefore, to contemplate a place having an existence as a temple. It may be, however, that a temple which, at the time when the Act came into force, had been temporarily abandoned as a place of worship for any of the reasons suggested in the course of the arguments, such as destruction by fire or flood, would still be a temple to which the Act applied and be subject to the special powers given to the Board by section 67 of the Act. But that is a question which would have to be decided upon the facts and circumstances of the particular case. The present case is an entirely different one. There is here nothing remaining of a temple except a heap of stones, its site, and its name Kottamala. The establishment of the temple has completely disappeared. It ceased to be used as a place of public worship at a time long beyond living memory; and, as far as one knows, it was not until the year 1925, when a local municipal councillor petitioned the Board, that it occurred to anybody that

the temple should be restored as a place of public worship. On these facts the place is, in my view, incapable of being the subject of a dispute as to whether it is a temple to which the Act applies and consequently the Board had no jurisdiction under section 84 (1).

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G.R.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Cornish.

CHINTAKAYALA THAMMAYYA NAIDU, PETITIONER,

1932,
February 3.

v.

CHINTAKAYALA VENKATARAMANAMMA AND ANOTHER,
RESPONDENTS.*

Court-fee—Land Acquisition Act (I of 1894), sec. 32—Compensation money awarded to Hindu widow having life-interest only directed to be invested in Bank under—Appeal by another claimant claiming exclusive right to—Court-fee payable on memorandum of—Excess court-fee paid in appeal—Refund of—Order for—Inherent power of High Court to make—Court-Fees Act (VII of 1870), ss. 13, 14 and 15—Cases not covered by—Code of Civil Procedure (Act V of 1908), sec. 151.

On a reference under section 18 of the Land Acquisition Act (I of 1894) the District Judge held that one of the claimants, a Hindu widow, was entitled to a life-interest in the compensation money awarded for the melwaram, but, on account of the limited interest held by her, he, under section 32 of the Act, ordered the money to be invested in a Bank, which was accordingly done. In an appeal filed by another claimant claiming that the compensation was payable to him alone,

held that the proper court-fee payable on the memorandum of appeal was not a court-fee *ad valorem* on the amount of the award but a court-fee as for a mere declaration.

* Civil Miscellaneous Petition No. 4190 of 1931.

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The compensation money was not payable to the widow in person but was held in trust for her by the Court, and therefore a mere declaration of the appellate Court to the lower Court directing that the money is not any longer to be so held in trust for the widow but is to be handed over to the appellant is sufficient.

Even in cases not covered by sections 13, 14 and 15 of the Court-Fees Act, the High Court can, under section 151 of the Code of Civil Procedure, order refund of court-fee paid in excess when obvious injustice would be done if it were not repaid.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing refund of the court-fee paid in excess of legal requirements on the memorandum of appeal in Appeal Suit No. 277 of 1929 preferred to the High Court against the award dated 30th March 1929 and passed in Original Petition No. 34 of 1926 on the file of the Court of the Subordinate Judge of Vizagapatam.

Y. Suryanarayana for petitioner.

Government Pleader (P. Venkataramana Rao) for the Crown.

WALLACE J. The ORDER of the Court was delivered by WALLACE J.—This is a petition by the appellant in Appeal Suit No. 277 of 1929 on the file of this Court for refund of the excess court-fee paid on the memorandum of appeal. The appeal was in a land acquisition matter. On a reference by the Land Acquisition Officer under section 18 of the Land Acquisition Act the District Judge held the third claimant, who is a widow, entitled to a life-interest in the compensation money awarded for the *melwaram*, but on account of the limited interest held by this widow he, under section 32 of the Act, ordered the money to be invested in the Imperial Bank and that was so done in April 1929. The present

petitioner, who was the second claimant, appealed, claiming that the compensation was payable to him alone. He paid a court-fee *ad valorem* of Rs. 2,332-7-0 on the amount of the award, but he now claims that the proper court-fee was as for a mere declaration, and that Rs. 500 would have been sufficient, and he claims refund of the difference. Notice was given to the learned Government Pleader and we heard the petition argued.

Two points arise, first, whether the court-fee paid was right or in excess, and secondly, whether the Court has power to order the refund. On the first point it cannot be doubted that as a general principle, where a successful claimant before the District Judge is declared entitled to immediate payment, the appeal against such an order would be an appeal praying for the recovery of the money from the successful claimant and would have to be valued *ad valorem* as a claim for money; see *Mahalinga Kudumban v. Theetharappa Mudaliar*(1), which enunciates the general practice of this Court. The petitioner however maintains that his case has to be distinguished from the general case because here the compensation money was not payable to the widow in person but was held in trust for her by the Court, and that therefore a mere declaration of this Court to the lower Court directing that the money is not any longer to be so held in trust for the widow but is to be handed over to the petitioner is sufficient. We think that contention is well-founded. The widow never got possession and never could get possession of the principal amount. The possession and control of it lies with the District Court and the property is in *custodia legis*. No doubt, if any interest on the principal had been paid out to the widow, the petitioner, if he sought

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(1) (1928) 56 M.L.J. 387.

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to recover that also, would have to pay court-fee *ad valorem* on that, but there is no question of that sort here since the petitioner does not include any such interest in his appeal memorandum of valuation. The ruling in *Mangaldas Girdhardas v. The Assistant Collector of Prant, Ahmedabad*(1), which was cited by the learned Government Pleader, enunciates the same principle as *Mahalinga Kudumban v. Theetharappa Mudaliar*(2) and does not cover the present point. The ruling in *Vedanayaga Mudaliar v. Vedammal*(3), although not a parallel case, is on a similar point and supports the petitioner. We therefore think that the proper stamp fee payable was Rs. 500.

As to the second point the learned Government Pleader maintains that this Court has no power to go beyond the provisions of the Court-Fees Act, which allow refund of court-fee stamps only in cases covered by sections 13, 14 and 15 and these sections do not cover the present case. It is true that an early Bench of the Calcutta High Court in 1873 has taken this uncompromising view; see *In the matter of Peary Mohun Goocho*(4). But there is a series of decisions in Calcutta itself and by other High Courts, based on a still earlier decision of the Calcutta High Court, *In re Mr. G. H. Grant*(5), which lay down that section 151, Civil Procedure Code, enables a High Court to order refund of court-fee paid in excess when obvious injustice would be done if it were not repaid; see *Harihar Guru v. Ananda Mahanty*(6), *Girish Chandra Mali v. Girish Chandra Dutta*(7), a judgment of the Allahabad High Court in *In the matter of Charbe Munna Lal*(8)

(1) (1920) I.L.R. 45 Bom. 277.
(3) (1904) I.L.R. 27 Mad. 591.
(5) (1870) 14 W.R. 47.
(7) (1931) 38 C.W.N. 190.

(2) (1928) 56 M.L.J. 387.
(4) (1873) 11 Beng. L.R. 312, 317.
(6) (1912) I.L.R. 40 Calo. 365.
(8) (1930) I.L.R. 52 All. 546.

and judgments of the Patna High Court in *Chandradhari Singh v. Tippan Prasad Singh*(1), *Muhammad Reza v. Rajballabh Nath Singh*(2) and *Sasibushan Mazumdar v. Manik Lal Chandra*(3). This seems to us the reasonable view to take. It would be unreasonable and unjust for the High Court not to assist a party to recover excess court-fee erroneously paid under its own order or under the orders of Courts subordinate to it. Of course what the High Court really does judicially in such a case is to decide judicially what is the proper court-fee and then issue a certificate to the party that excess court-fee has been levied. It still lies with the revenue authorities to decide whether or not they will refund the excess in the circumstances. We direct that in this case the necessary certificate do issue. In the circumstances of the case we pass no order as to costs.

A.S.V.

(1) (1918) 3 P.L.J. 452.

(2) (1927) 107 I.C. 320.

(3) (1928) 107 I.C. 325.

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WALLACE J.

APPELLATE CIVIL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

1931,
December
18.

YEDITHA BHUPATHI RAJU GARU (PLAINTIFF),
APPELLANT,

v.

NYAPATI SUBBA RAO PANTULU GARU (DEPENDANT),
RESPONDENT.*

Madras Local Boards Act (XIV of 1920), sec. 88, pro. 1—
“Intermediate landholder” within meaning of—Minor
inamdar holding under landholder within meaning of
Madras Estates Land Act (I of 1908) and entitled to
occupancy right in his holding if an—Land-cess payable
to landholder by—Mode of recovery of—Explanation to
sec. 89 of Madras Local Boards Act added in 1930—Change
of law if effected by.

The test of being an “intermediate landholder” within the meaning of the Madras Local Boards Act (XIV of 1920) is not whether a person is the owner of only the melvaram but whether he holds on an under-tenure created, continued or recognized by the landholder. If he satisfies the latter test he is an “intermediate landholder” though he may be entitled to one or both varams.

Held that a minor inamdar holding under a landholder within the meaning of the Madras Estates Land Act (I of 1908) was an “intermediate landholder” within the meaning of proviso 1 to section 88 of the Madras Local Boards Act, although he was entitled to an occupancy right in his holding, and that he was, under that proviso, liable to pay the landholder the whole of the land-cess paid by him on the inamdar’s holding less one-half of the cess assessable on the quit-rent.

Held further that, in respect of the land-cess so recoverable from him, the inamdar could be proceeded against, as if he were a ryot owing rent, under the Madras Estates Land Act.

* Second Appeal No. 631 of 1930.

Per KRISHNAN PANDALAI J. (WALLER J. inclining to the same view without deciding the point expressly).—The explanation to section 89 of the Madras Local Boards Act (added in 1930), which expressly subjects intermediate landholders to the procedure for realization of rents from ryots under the Madras Estates Land Act, has not altered the law, and section 74 of the Madras Local Boards Act of 1884 and section 89 of the Act of 1920 before the amendment were intended to have the same effect.

Lakshminarasimham Pantulu v. Sree Sree Ramachandra Mardaraja Deo, (1913) I.L.R. 37 Mad. 319, considered.

APPEAL against the decree of the District Court of East Gōdāvari at Rajahmundry in Appeal Suit No. 216 of 1926 preferred against the decree of the Court of the Sub-Collector of Rajahmundry Division in Original Suit No. 23 of 1925.

V. Ramadoss and K. Subba Rao for appellant.

N. Rama Rao for respondent.

Cur. adv. vult.

JUDGMENT.

WALLER J.—The respondent in this second appeal is a landholder within the meaning of the Madras Estates Land Act. The appellant, who is a minor inamdar holding under him, was found by a Bench of this Court in a litigation, to which he was not a party, to be one of his occupancy tenants; see *Bhupatiraju v. Venkataratnam*(1). Up till that time the appellant had been treated as an intermediate landholder and land-cess had been calculated on the rental paid to him by his tenants. The Collector continued to calculate it on that basis and collected it from the respondent. The appellant not having paid, the respondent proceeded against him under section 112 of the Madras Estates Land Act. The result was a suit by the appellant

(1) (1921) 41 M.L.J. 512.

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contesting his right so to proceed. Put shortly, the suit is based on the plea that the cess should have been calculated on the comparatively insignificant amount payable to the landholder by way of quit-rent. The trial Court, finding that the appellant was a tenant and not an intermediate landholder within the meaning of section 88 of the Madras Local Boards Act, decreed the suit. On appeal, the District Judge dismissed it on the ground that it should have been brought against the Secretary of State, a ground which has not been pressed before us in second appeal.

The short question for decision is whether the appellant is an intermediate landholder within the meaning of the Madras Local Boards Act. To that question there can, I think, be only one answer—that he is. The first proviso to the section refers to a person who “holds lands with . . . a right of occupancy as an intermediate landholder”, and that is precisely the position occupied by the appellant. The respondent is therefore entitled, under the proviso, to collect from him the whole of the cess he had paid on his holding less one-half of the cess assessable on the quit-rent.

The appellant's next argument is that, if he is an intermediate landholder, he cannot be proceeded against, as if he were a tenant, under the Madras Estates Land Act. He relies on a decision of this Court, *Lakshminarasimham Pantulu v. Sree Sree Ramachandra Mardaraja Deo*(1). That decision was passed with reference to sections 73 and 74 of the old Madras Local Boards Act. The explanation recently added to section 89 of the present Act makes it clear that a landholder who proceeds against an intermediate

(1) (1918) I.L.R. 87 Mad. 819.

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landholder to recover land-cess under the first proviso to section 88 can treat him as if he were a tenant within the meaning of the Madras Estates Land Act. That probably was the intention of the corresponding section of the former Act and it is possible to argue that the explanation has not altered the law, but explains what it always was and was meant to be. Apart from that, it hardly lies in the mouth of the appellant, who bases his claim on the decision in *Bhupatiraju v. Venkataratnam*(1) that he is an occupancy ryot, to turn round and plead that he is not. And, as I have already pointed out, the Madras Local Boards Act contemplates the possibility of an intermediate landholder being a person with an occupancy right in his holding. The appeal is dismissed with costs.

KRISHNAN PANDALAI J.—The appellant, plaintiff, who is a post-settlement minor inamdar, brought this suit before the Sub-Collector under section 112 of the Madras Estates Land Act for a declaration that the notice of sale of the holding issued at the instance of the respondent, zamindar, is invalid as the amount of land-cess, Rs. 33-11-4, for fasli 1333 for non-payment of which the notice was issued was not legally due from him. The Sub-Collector gave the appellant a decree. The zamindar appealed to the learned District Judge who reversed that decision and dismissed the plaintiff's suit.

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The circumstances which led to the suit are as follows:—In an ejectment suit between the plaintiff and one of his tenants it was held by this Court in April 1921 that the plaintiff became by the grant of the *darmilla* inam owner of both varams and that therefore the plaintiff's tenants are not entitled to occupancy

(1) (1921) 41 M.L.J. 512.

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rights under the Madras Estates Land Act; See *Bhupatiraju v. Venkataratnam*(1). The general question as to the position of minor inamdars like the plaintiff was referred to a Full Bench and decided by a majority in the opposite sense in March 1922, *Brahmayya v. Achiraju*(2). But of course the rights of the parties to the litigation in *Bhupatiraju v. Venkataratnam*(1) will be governed by the decision therein. The present defendant, the zamindar, not being a party thereto is not bound by that decision. So much for the plaintiff's position under the Madras Estates Land Act.

The Collector acting under the Madras Local Boards Act had been before 1921 assessing the land-cess on the property on the rents paid by the plaintiff's tenants. On reference by the Tahsildar he decided in view of the above conflicting decisions to continue that practice. The zamindar who is bound in the first instance to pay the cess took the matter to the Board of Revenue who confirmed the Collector's decision. Under section 86 of the Madras Local Boards Act the decision of the Board of Revenue is final. The zamindar, having under section 88 paid the local cess as assessed by the Collector for fasli 1333, demanded payment of the amount so paid (less one-half of the amount assessable on the jodi) under the first proviso to that section from the plaintiff, treating him as an intermediate landholder. The plaintiff refused to pay anything more than one-half of the amount assessable on the jodi on the ground that he is not an intermediate landholder but a tenant or ryot and the jodi paid by him is the rent on which the land-cess should have been assessed. The zamindar issued a notice of sale of the inam. Hence the suit.

(1) (1921) 41 M.L.J. 512.

(2) (1922) I.L.R. 45 Mad. 716 (F.B.).

The question depends on whether the land-cess on the property should have been assessed on the basis of the jodi of about Rs. 30 paid by the plaintiff to the zamindar, as the plaintiff claims, or on the basis of the rents received by plaintiff from his tenants, as the Collector assessed it. This depends on whether the plaintiff is an intermediate landholder within the meaning of the first proviso to section 88 of the Madras Local Boards Act liable to pay the landholder the whole of the cess paid by him (less one-half of the cess assessable on the jodi) or a tenant within the meaning of the second proviso to that section liable to pay only one-half of the cess.

The plaintiff-appellant's argument is that he, having been found to be owner of both varams and a ryot under the Madras Estates Land Act, cannot be an intermediate landholder within the meaning of the first proviso to section 88 of the Madras Local Boards Act. This contention ignores two points. Firstly, it has not been found as between the present parties that the plaintiff is the owner of both varams. Secondly, and this is the more important point, the question whether the plaintiff is an intermediate landholder for the purpose of the Madras Local Boards Act depends on the definitions and scheme of that Act and not on the definitions and scheme of the Madras Estates Land Act. The definitions of the term landholder in the two Acts are entirely different. In the Madras Estates Land Act a landholder is a person owning an estate, the term estate being itself defined in the Act. In the Madras Local Boards Act, the term landholder includes a very much larger class of persons including, *inter alia*, holders of land under ryotwari settlement. In the Madras Estates Land Act, the term ryot means the holder of land in an estate for agriculture on payment

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of rent. This term is not used in the Madras Local Boards Act. But the term tenant is used and defined as including all persons who occupy land under a landholder or intermediate landholder whether or not they pay rent. These differences are due to the two Acts not being in *pari materia* and therefore the application of ideas derived from one Act to questions arising under the other are bound to be wholly misleading. The Madras Estates Land Act is designed to regulate the rights of landholder and ryots in an estate as defined by the Act. The taxation provisions of the Madras Local Boards Act are designed to raise a fund for the purpose of Local Self-Government. Therefore section 78 of the Madras Local Boards Act provides that land-cess shall be levied on the annual rent value of all occupied lands on whatever tenure held. Section 79 lays down how the annual rent value is to be computed for the various classes of lands mentioned in clauses 1 to 3. The present case falls under clause 3 which deals with all lands not dealt with in clauses 1 and 2 and says that the annual rent value is the annual rent payable to the landholder or intermediate landholder holding under an under-tenure created, continued or recognized by a landholder together with water-rate, if any, and, in the case of lands in the occupation of the owner himself or of any one holding from him free or at a favourable rate of rent, the annual rent value shall be taken to be the rent ordinarily payable for lands of similar quality in the neighbourhood, together with the water-rate if any. Though the term "intermediate landholder" is not separately defined in the Act, its meaning is clear from the context in sections 79 and 88. He is a person holding land on an under-tenure created, continued or recognized by a landholder and may hold with or

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without right of occupancy. The test of being an intermediate landholder is not whether the person is the owner of only the melwaram but whether he holds on an under-tenure created, continued or recognized by the landholder. If he satisfies the latter test he is an intermediate landholder though he may be entitled to one or both varams. In *Jagannaikulu v. Manager of Nandigam Estate*(1) it was held that a mortgagee in possession of a zamindar's rights is an intermediate landholder. Whether there is or is not an intermediate landholder, the annual rent value is the rent payable by tenants, if any, together with what might have been received as rent for lands not let out if they had been let out and also the full rent of land let out either rent-free or at a favourable rent. The object is clearly to subject to land-cess the full rent on the property which would have been payable by the occupants (tenants) to the landholder as if there had been no under-tenure and irrespective of remissions or favourable rates of rent granted by the landholder or intermediate landholder.

The plaintiff is a minor *darmilla* inamdar. The terms of his grant are discussed in *Bhupatiraju v. Venkataratnam*(2). SPENCER J. describes it as a simultaneous grant of the kudivaram and a part of the melwaram. The plaintiff being thus a grantee on favourable terms of the melwaram, it is idle to contend that he is not holding on an under-tenure from the landholder for the purpose of the Madras Local Boards Act and it is for that purpose perfectly immaterial whether he is also entitled to the kudivaram. In both cases he is an intermediate landholder under that Act and is subject to the duties and entitled to the rights

(1) (1914) I.L.B. 39 Mad. 269, 276. (2) (1921) 41 M.L.J. 512, 514.

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conferred on them by the Act. His duty is to pay to the landholder the land-cess as assessed by the Collector or on appeal by the Revenue Board if the landholder has paid it, and his right is if the land or any part of it is in the occupation of tenants to recover one-half of the land-cess attributable to their holding from them.

It follows that the plaintiff cannot at the same time be a tenant also in respect of the land of which he is an intermediate landholder. According to the definition of 'tenant' he must be a person who occupies land under a landholder or intermediate landholder. He must be a person different from the person under whom he holds. It was objected that if the appellant is an intermediate landholder he cannot be proceeded against under the Madras Estates Land Act for his dues under the Madras Local Boards Act, and for this *Lakshminarasimham Pantulu v. Sree Sree Ramachandra Mardaraja Deo*(1) was relied on. That was a decision under sections 73 and 74 of the Madras Local Boards Act of 1884. Section 74 of that Act corresponds to section 89 of the Act of 1920. This case has to be decided on section 89 as it stood before the amendment of 1930 which expressly subjects intermediate landholders to the procedure for realisation of rents from ryots under the Madras Estates Land Act. In my opinion, the sections even before the amendment were intended to have the same effect. The decision relied on put too narrow a construction on the words when it held that the powers given by old section 74 cannot be used except against ryots as defined in the Madras Estates Land Act. The object and intention of section 74 of the Act of 1884 and of the corresponding section 89 of the Act of 1920 is to make the procedure

(1) (1918) I.L.R. 37 Mad. 819.

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for realization of rents in force for the time being applicable to the realization of amounts due respectively under both the provisos to section 73 of the Act of 1884, corresponding to section 88 of the Act of 1920.

It remains only to add that so far as concerns the determination of the annual rent value for the purpose of land-cess, the decision of the Board of Revenue on appeal, if any, by the landowner being final, it is not open to the intermediate landholder or tenant, if any, to question that determination when required by the landholder to pay what is due from them under the Act. The learned District Judge's grounds for dismissing the suit were that the Collector assessed the lands wrongly at a larger figure than was due; that the defendant as the agent of the Government collected more from the plaintiff than was really due; that the defendant cannot impeach the assessment under the law as he has done all that was open to him under the Act; that the plaintiff cannot get back the sum from the defendant; and that the plaintiff should and could sue the defendant's principal, i.e., the Government, to pay to him the excess collected from him. The learned Judge was in error in thinking that the plaintiff had paid the amount demanded to the defendant.

From what I have said it follows that the above views are incorrect though the learned Judge's conclusion that the plaintiff's suit is unsustainable is correct. I agree to the order proposed.

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APPELLATE CIVIL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

1931,
December 2. PAZHANCHERI PANANGAT BLAHAYIL, KARNAVAN AND
MANAGER KUNJUNNI NAIR (DEAD) AND ANOTHER (PLAINTIFF
AND HIS LEGAL REPRESENTATIVE), APPELLANTS,

v.

ARAKAL KALAPURAYIL KALLIANI AMMA'S CHILDREN
ACHUTA MENON AND SEVEN OTHERS (DEFENDANTS),
RESPONDENTS.*

Malabar Compensation for Tenants' Improvements Act (Madras Act I of 1900), sec. 19—Kanam given before 1st January 1886—Renewal of, after that date—Compensation to be given for improvements in case of—Rate of—Rate fixed in original kanam—Enforceability of, up to date of renewal and thereafter.

A kanam of 1900 was given in renewal of a kanam of 1884 one of the terms of which was that compensation for improvements was to be at half their value. That term was repeated in the kanam of 1900. In a suit brought on the kanam of 1900 the question arose as to the rate at which the tenants had to be compensated for their improvements.

Held that the rates in the 1884 contract were enforceable only up to the date of the renewal in 1900 and not after it.

Rayarappa Atioti v. Kelappa Kurup, (1916) I.L.R. 40 Mad. 594 (F.B.), is not an authority for the view that, in the case of renewals, compensation should be given at the rate originally fixed before the Madras Malabar Compensation for Tenants' Improvements Act came into force.

Rayarappa Atioti v. Kelappa Kurup, (1916) I.L.R. 40 Mad. 594 (F.B.), explained.

Trivangalath v. Niroliparkam, (1928) 115 I.C. 349, and Second Appeal No. 1545 of 1926, dissented from.

Second Appeal No. 215 of 1924 considered.

The practice of Courts in the Malabar District of issuing several commissions in succession and arriving at valuations by

* Second Appeal No. 356 of 1928.

a process of selection from the reports of each commissioner condemned as being lax and irregular.

APPEAL against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in Appeal Suit No. 5 of 1925 (Appeal Suit No. 71 of 1924, District Court, South Malabar) preferred against the decree of the Court of the District Munsif of Chowghat in Original Suit No. 493 of 1922.

P. Govinda Menon for appellants.

K. Kuttikrishna Menon and *C. Ravunni Nair* for respondents.

Our. adv. vult.

The JUDGMENT of the Court was delivered by WALLER J.—Two questions have been raised in this second appeal. The first is at what rate the tenants have to be compensated for their improvements. The suit was brought on a kanam of 1900, which has been given in renewal of a kanam of 1884. One of the terms of the earlier contract, which was repeated in the later, was that compensation for improvements was to be at half their value. Under section 19 of the Malabar Compensation for Tenants' Improvements Act contracts entered into before first of January 1886 are not affected by the provisions of the Act. The rate fixed by the contract of 1884 would therefore hold good till 1900. The contention of the appellants is that, by force of the renewal in that year, it would continue to be effective under the fresh contract. The District Munsif held that the half rate was payable only up till 1st January 1886, when the Act came into force. The Subordinate Judge in appeal thought that the case was governed by the Full Bench ruling in *Rayarappa Atioti v. Kelappa Kurup*(1). He, however, found for the tenants on

(1) (1916) I.L.R. 40 Mad. 594 (F.B.).

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another ground which we need not further consider. The case is, of course, governed, as he thought it was, by the Full Bench ruling, the true import of which has, we consider, not been appreciated in some of the subsequent decisions of this Court. In Second Appeal No. 215 of 1924 JACKSON J. had to deal with a case where a contract of 1884 had been renewed in 1905. The District Munsif, who understood the Full Bench ruling correctly, held that the improvements up till 1905 had to be paid for at the rate fixed in the contract of 1884. The District Judge on appeal found for the tenants on the ground that the renewal had extinguished the original contract. In second appeal JACKSON J. agreed with the District Judge. Incidentally, however, he observed that *Rayarappa Atioti v. Kelappa Kurup*(1) did not "cover a case where over and above the original contract another contract has been entered into after the passing of the Act". That was not correct, for there were three contracts of 1876, 1888 and 1898, two of which were after the passing of the Act. In *Trivangalath v. Niroliparkam*(2) REILLY J. had a case before him, in which a contract of 1884 was renewed in 1897. The District Munsif awarded compensation at the contract rate of 1884 up till the date of the renewal. His judgment was reversed by the same District Judge, on the same ground as in the previous case, but restored by REILLY J. in second appeal. It does not seem to have been argued that the same rate would prevail after the renewal in 1897. The learned Judge, however, appears to have thought that that would be the effect of the ruling in *Rayarappa Atioti v. Kelappa Kurup*(1). In this view he was followed by KUMARASWAMI SASTRI J. in Second Appeal No. 1545 of 1926 where there were contracts for the same rate in 1855,

(1) (1916) I.L.R. 40 Mad. 594 (F.B.). (2) (1928) 115 I.C. 849.

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July 1886 and 1910. The learned Judge held that, in the case of renewals, compensation should be given at the rate originally fixed before the Act came into force. He was of opinion, as REILLY J. was, that that was the effect of *Rayarappa Atioti v. Kelappa Kurup*(1). It becomes necessary for us, therefore, to consider what really were the facts of that case, and what was actually decided; for a decision is authority only for what it decides. The facts were these. There were three contracts in 1876, which were renewed in 1888 and in 1898 on the same terms. What the plaintiffs asked for was compensation up till 1888 at the rate agreed on in 1876. The trial Court and the first appellate Court gave them what they asked for. In second appeal the defendants—the tenants—relied on a Full Bench ruling reported as *Kochu Rabia v. Abdurahman*(2) which laid down that, even where a contract had been entered into before 1st January 1886, its terms would not be enforceable, if they were less favourable to the tenants than those prescribed by the Act. A reference was made to another Full Bench, raising the question whether the terms of a contract entered into before 1st January 1886 were valid and binding, whether the rates were more or less favourable to either party than the rates prescribed by the Malabar Compensation for 'Tenants' Improvements Act. The Full Bench overruled *Kochu Rabia v. Abdurahman*(2) and answered the question referred to them in the affirmative. On this, the referring Bench dismissed the second appeal, subject to a slight modification, which is not now material. What, then, was actually decided was that the plaintiffs were justified in enforcing the contracts of 1876 up till the renewal in 1888. They did not claim anything more than that and

(1) (1916) I.L.R. 40 Mad. 594 (F.B.). (2) (1913) I.L.R. 38 Mad. 589 (F.B.).

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it was certainly not decided that the 1876 rates were enforceable after the renewal. We are of opinion that the real scope of the ruling was not appreciated by REILLY and KUMARASWAMI SASTRI JJ. in the cases above referred to. Applying it to the facts now under consideration we hold that the rates in the 1884 contract are enforceable only up to the date of the renewal in 1900 and not after it.

The other question is one that has frequently arisen before. It is as to the practice of Courts in Malabar District of issuing several commissions in succession and arriving at valuations by a process of selection from the reports of each commissioner. In the present case, the Munsif issued two commissions. The report of the first commissioner was objected to and the Munsif issued a fresh commission on the ground that some trees had not been separately valued. That was a defect that the first commissioner could have remedied and there was no necessity for the issue of a second commission. In the end the Munsif adopted the report of the second commissioner. In appeal, this procedure was objected to by the appellants, but the Subordinate Judge brushed the objection aside with contempt and proceeded to arrive at a conclusion based in part on the report of the first commissioner and in part on that of the second. The High Court has repeatedly condemned lax and irregular procedure of this kind and the Subordinate Judge was most certainly not justified in treating the appellants' objection as much ado about nothing. Still less was he justified in acting on the first report, which, he conceded, should be deemed to have been set aside. The question, then, is what should be done. On the whole, we think it better not to reopen the matter. The reports were made eight or nine years ago and it would put the parties to unnecessary

trouble and expense to go into it again. We adopt, therefore, the valuation fixed by the Subordinate Judge and the Advocates on both sides have agreed to work out the figures at that valuation, on the basis of our finding on the first question. The figure of Rs. 1,022 will be substituted for Rs. 1,462-13-2. The parties will pay and receive proportionate costs in this and the lower appellate Court.

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APPELLATE CIVIL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalar.

K. S. VENKATARAMA AYYAR (PLAINTIFF),
APPELLANT,

1931,
December 2.

v.

THE COLLECTOR OF TANJORE AND THREE OTHERS
(DEFENDANTS), RESPONDENTS.*

*Madras Revenue Recovery Act (II of 1864), sec. 11—Inamdar
—Quit-rent arrears due by—Distraint for, of crops raised
by occupancy ryot under inamdar—Legality of.*

Under the Madras Revenue Recovery Act crops raised by an occupancy ryot under an inamdar are liable to be distrained for arrears of quit-rent due by the inamdar.

APPEALS against the decrees of the Court of the Subordinate Judge of Kumbakonam in Appeal Suits Nos. 90 of 1927 and 89 of 1927 respectively, preferred against the decrees of the Court of the District Munsif of Kumbakonam in Original Suits Nos. 147 and 58 of 1927, respectively.

* Second Appeals Nos. 173 and 174 of 1928.

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v.
COLLECTOR
OF TANJORE.

M. S. Venkatarama Ayyar for appellant.
Government Pleader (P. Venkataramana Rao) and
K. S. Sankara Ayyar and *K. R. R. Sastri* for
respondents.

Our. adv. vult.

WALLER J. The JUDGMENT of the Court was delivered by
WALLER J.—The appellant in these two appeals is the
plaintiff. He is an occupancy ryot under an inamdar
and his crops have been distrained by the Collector for
arrears of quit-rent due by the landholder. He contends
that the crops are not liable to be distrained under
the Madras Revenue Recovery Act, for the reason that
they are not crops of land “belonging to a defaulter”
within the meaning of section 11. His argument is
that the inamdar is grantee only of the land-revenue,
that the land consequently does not belong to him and
that he himself is not a tenant properly so called. He
proceeds to the length of asserting that the kudi-
varamdar is the owner of the land, which most certainly
is not the case. If his reasoning were sound, it would
follow that, where the landholder is grantee only of
the land-revenue, no one owns the land and the Govern-
ment could not attach the crops on it or sell it under
the Madras Revenue Recovery Act for arrears of quit-
rent. No doubt, in a Madras Case in 1902, the holders
of the melwaram and the kudivaram were described as
co-owners, but the correct view seems to be that the
latter, though not described as such in the Madras
Estates Land Act, is in the position of a tenant. And
the Act itself describes a person in the position of the
inamdar in this case as a landholder owning an estate—
see clauses (2) and (5) of section 3. Under section 1
of the Madras Revenue Recovery Act also, an inamdar
is a landholder; in other words, for the purpose of the
Act, he is treated as the owner of the land.

We are, however, concerned here to consider not a
case of sale of the land and what interest in it would
pass by the sale, but the case of an attachment of crops
in possession of a tenant. It seems to us to present
no difficulty. By section 2 of the Act, the land, the
buildings on it and its products are to be regarded as
“the security of the public revenue”. Nothing could
be more comprehensive. Section 11 deals with the
sale of attached crops. The appellant relies on the
words “the land belonging to a defaulter”. In our
view, they cover a case like this, where, for the purpose
of the Act, the land is regarded as belonging to the
landholder in default. It is with him that the Govern-
ment is concerned and not with any subordinate holder
under him. And the section affords the utmost pro-
tection to his tenants, who can deduct the value of
their crops that have been sold from any rent which
may then or later be due by them to the landowner.
For the purpose of the section, the appellant is, we
think, clearly such a tenant. The appeals fail and must
be dismissed with costs of the first and second
respondents.

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APPELLATE CIVIL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

1932,
February 12.

IN RE UPPUTHAYAMMAL AND TWO OTHERS (DEPENDANTS
5 AND 4), APPELLANTS. *

*Court-fees Act (VII of 1870), sec. 7 (iv) (f) and Sch. 1, art. 1—
Accounts—Suit for—Final decree in—Appeal from—
Court-fee payable on memorandum of—Preliminary decree
in same suit—Appeal previously filed by same party to same
Court from—Court-fee paid on memorandum of—Credit for
—Appellant's right to—Conditions.*

When a party, who has filed an appeal against a preliminary decree for accounts and paid court-fee on the value as fixed by the plaintiff in his plaint, files along with or pending that appeal an appeal to the same Court against the final decree ascertaining the amount due according to the preliminary decree, he is entitled to get credit in the appeal attacking that amount for the court-fee already paid on the appeal against the preliminary decree. This doctrine ought not, however, to be extended to cases where the appeal against the final decree is filed after the decision in the appeal against the preliminary decree. In such cases the court-fee in appeal would be governed by article (1) of Schedule I to the Court-Fees Act.

APPEAL against the decrees of the District Court of Madura in Appeal Suits Nos. 79 and 254 of 1928 preferred against the preliminary and final decrees of the Court of the Subordinate Judge of Madura in Original Suit No. 42 of 1926.

R. Gopalaswami Ayyangar for appellants.

Government Pleader (P. Venkataramana Rao) for the Crown.

Cur. adv. vult.

Second Appeal No. 618 of 1931.

The JUDGMENT of the Court was delivered by KRISHNAN PANDALAI J.—A question has been raised in this second appeal under section 12 (2) of the Court-Fees Act that the appellants in the lower appellate Court, who are two of the three appellants in this Court, did not pay proper court-fee on their appeal to the lower appellate Court and should now be ordered to pay the deficiency.

The suit was by a co-sharer against his co-sharers for accounts. A preliminary decree declaring the liability of the defendants to account and giving direction to take the account was passed. The defendants appealed to the lower appellate Court against that decree paying *ad valorem* court-fee on the amount at which the plaintiff valued his relief. Subsequently accounts were taken and a smaller sum than that at which the suit was valued was awarded by the final decree. Pending the appeal against the preliminary decree the defendants appealed to the same Court against the final decree and paid a court-fee of only one rupee. The question is whether they should have paid *ad valorem* court-fee on the amount decreed.

By section 97 of the Code of Civil Procedure unless a party who is aggrieved by a preliminary decree appeals from it he would be precluded from disputing its correctness in any appeal from the final decree. This was a new provision introduced into the Code in 1908. The provision in the Court-Fees Act relating to suits for accounts is section 7 (iv) (f) which prescribes that in such suits the court-fee payable is an *ad valorem* fee according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. This provision has remained in force both before and after 1908.

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There is no decision on the point in our Court. But there are a number of decisions in other Courts that, when the same party appeals first from a preliminary decree having paid an *ad valorem* fee on the amount mentioned in the plaint and either before or after the decision of that appeal appeals from the final decree, he need not again pay *ad valorem* fee on the amount on which he has paid fee in the first appeal as that would be paying twice over for the same matter which must be regarded as a continuation of the earlier appeal and need only pay fee on the amount if any in excess of that on which fees were already paid.

In *Kanchan v. Kamala*(1) there was a decree for possession and for mesne profits before suit to be ascertained subsequently. The defendant appealed paying court-fee on the plaintiff's valuation of the whole claim including the sum claimed as mesne profits. Then the mesne profits were ascertained at a lower figure. The defendant wanted to appeal against the final decree awarding the sum ascertained. The question was whether he having already paid court-fee on the whole amount claimed in the main appeal should pay court-fee again on the actual amount awarded. It was held that the defendant cannot be called upon to pay court-fee a second time as all that had happened was that the preliminary decree had meanwhile been carried into effect and the liability of the defendants fixed at a lower sum. The Government Pleader conceded that this view was correct though no provision of the Court-Fees Act was referred to. In *Budhu Ram v. Niamat Rai*(2) there was a preliminary decree in a redemption suit fixing the amount payable by the mortgagor and a date for payment. The money was paid and a final decree

(1) (1912) 16 C.L.J. 564.

(2) (1928) I.L.R. 4 Lab. 406.

for redemption was passed. The plaintiff-mortgagor appealed from the preliminary decree in which he prayed that the amount due might be reduced by about Rs. 7,000 and also from the final decree. In the former he paid *ad valorem* court-fee on the amount in dispute and in the latter two rupees. The Court held that a redemption decree consists really of two parts and that the preliminary decree having been obeyed by payment, the final decree was a mere corollary and that, as the appeal against the final decree did not contest anything beyond what was contested in the appeal from the preliminary decree, no separate fee need therefore be paid. In *Ram Mander v. Maharani Nawlakhabati*(1) the facts were similar to those in *Kanchan v. Kamala*(2), except that in *Ram Mander v. Maharani Nawlakhabati*(1) the appeal against the decree for possession and mesne profits to be subsequently ascertained was dismissed by the High Court before the appeal against the decree for the amount as ascertained was filed in the District Court. The Court held that this made no difference and that proper court-fee having been paid on the appeal against the main decree it need not be paid again on the appeal against the amount when ascertained. The Court added that the District Court had no jurisdiction to entertain the appeal and should have returned it to be presented to the High Court where the allowance of the fee would have been granted. In *Kanti Chandra v. Radha Raman*(3) there was a preliminary decree for account and an appeal against it valued at Rs. 1,300. After the defendant had appealed against the preliminary decree, the amount due was ascertained to be more than Rs. 6,000 and a decree was passed therefor. The defendant appealed against this

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(1) (1924) I.L.R. 3 Pat. 815.

(2) (1912) 16 C.L.J. 564.

(3) A.I.R. 1929 Cal. 815.

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decree and the question was whether the plaintiff not having paid additional court-fee on the excess amount as required by section 11 of the Court-Fees Act to enable him to execute the decree, the defendant was bound to pay court-fee on that sum in the appeal. RANKIN C.J. held that he should pay court-fee on the whole amount but could get credit for the fee already paid in the previous appeal on Rs. 1,300.

These decisions are based on the principle that in a suit for accounts the preliminary and final decrees are only stages of the same proceeding and though for the purposes of appealing two successive stages are now provided by section 97 of the Code of Civil Procedure the suit or appeal is not fully decided till both stages are completed and therefore the plaintiff or appellant who has already paid the fee provided by the Court-Fees Act cannot be called upon to pay an additional fee at the second stage. There are grounds for accepting this view within limits but we may at once point out that we must not be understood as approving its unlimited application.

So far as this Court is concerned, in *Damodara Padhana v. Haribandhu Patnaick*(1) SPENCER J., in an application for review of a judgment pronounced by BAKEWELL J. and himself, held that it was competent for the appellant to prefer a single combined appeal against the preliminary and final decrees if the dates permitted him to do so and that in such an appeal it would be reasonable for computing court-fees to treat the greater amount claimed in the plaint as including the lesser amount ascertained by the final decree. As against this our attention has been called by the Government Pleader to an unreported decision by WHITE C.J. on a

(1) (1921) 14 L.W. 389.

reference under section 5 of the Court-Fees Act (S.R. 13871 of 1910). There an appeal against a preliminary decree for partition had been filed on payment of an *ad valorem* fee. Afterwards an appeal against the final decree was presented with a court-fee of Rs. 10 which was less than the *ad valorem* fee. Two questions were considered—what is the proper fee payable in the High Court on (1) an appeal from a preliminary decree in a suit for partition and (2) an appeal from a final decree in such a suit. The Chief Justice held that in both classes of appeals the fee is *ad valorem* and is regulated by the amount or subject-matter in dispute in the appeal as fixed by the appellant. That was a case under section 7 (iv) (b) of the Court-Fees Act. Besides, the precise question now before us was not considered or decided. Also, in view of the decision in *Samiya Mavali v. Minammal*(1), approved in *Srinivasacharlu v. Perindevamma*(2), the view that it is open to the appellant to fix the value of the subject-matter in appeal cannot now be supported in this Court, at any rate in cases where the whole of the subject-matter in the first Court is in dispute in appeal.

To the extent that, when the same party, who has filed an appeal against a preliminary decree for accounts and paid court-fee on the value as fixed by the plaintiff in his plaint, files along with or pending that appeal an appeal to the same Court against the final decree ascertaining the amount due according to the preliminary decree, he may get credit in the appeal attacking that amount for the court-fee already paid on the appeal against the preliminary decree, we are prepared to follow and act upon the Calcutta, Patna and Lahore decisions referred to.

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(1) (1899) I.L.R. 23 Mad. 490. (2) (1915) I.L.R. 39 Mad. 725 (F.B.).

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But there are difficulties in extending the doctrine to cases where the appeal against the final decree is filed after the decision in the appeal against the preliminary decree. If a plaintiff's suit for accounts is dismissed on the ground that the defendant is not accountable and he appeals and gets a preliminary decree in his favour in appeal, and then in the first Court a final decree is passed from which also he appeals disputing the amount decreed, there seems to be little justification for the argument that he need not pay the fee on the amount disputed in appeal. Similarly, in the case of a defendant who has appealed from a preliminary decree, if the appeal is dismissed, and then a final decree is passed from which also he appeals disputing the amount, there seems as little justification for saying that he need not pay the fee on the amount disputed in appeal. In both cases there is no ground for saying that the earlier appeal contemplated consideration of a final decree which had not and which might never come into existence. In those cases the fee in appeal would be governed by article 1 of the first Schedule. We need not mention other cases.

Having given the matter our best consideration and having regard to the desirability of uniformity in matters of practice between the different Courts in India, where the Court-Fees Act does not lay down any definite rule, we are of opinion that the appellants were not bound to pay any more court-fee in the lower Court than they did. The second appeal will now be proceeded with in due course.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

MARIYAYEE AMMAL (DEFENDANT), PETITIONER,

v.

PONNUSAMI CHETTIAR (PLAINTIFF), RESPONDENT.*

1931,
December 9.

Code of Civil Procedure (Act V of 1908), O. XX, r. 4—Small Cause suit—Judgment in—Proper judgment if and when is—Fact only—Law—Fact and law—Questions of—Suits involving—Distinction—Provincial Small Cause Courts Act (IX of 1887), sec. 25; Code of Civil Procedure (Act V of 1908), O. L, r. 1—Applicability and effect of.

The test whether rule 4 (1) of Order XX of the Code of Civil Procedure has been used or abused lies in the answer to the question whether the judgment has been made intelligible. If with the aid of the record the judgment, however brief, shows that the Judge has grasped the questions for decision and has answered them, not arbitrarily, but for reasons which can be readily understood, then he has complied with the provisions which regulate his procedure.

On a question of fact it will ordinarily be enough if the Judge gives his actual decision on that question—his answer to it.

Per REILLY J.—In a case in which a question of law is raised, if the question is, when the facts are once settled, very simple to answer, the Judge may in a large proportion of cases be able to give quite an intelligible answer, sufficient for all purposes, to the question in a word or two. But, when a more difficult question of law or of mixed law and fact arises, a Small Cause Judge cannot perform his duty of making his judgment intelligible, unless he at least sets out so much of his reasoning as will make clear the road by which he has reached his conclusion.

Per ANANTAKRISHNA AYYAR J.—A Small Cause Judge is under a duty to record his finding on a question of law in such a

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way as will enable the High Court in revision to appreciate the exact finding on the question on the face of the judgment. A judgment recording simply "in the affirmative" or "in the negative"—the finding on such a point—is not ordinarily a proper judgment. How much of discussion is necessary in any particular case regarding any particular point of law will largely depend upon the circumstances of each case and on the nature of the question of law that arises.

PETITION under section 25 of Act IX of 1887, praying the High Court to revise the order of the Subordinate Judge of Madura in Small Cause Suit No. 1912 of 1926.

V. Ramaswami Ayyar for petitioner.

T. L. Venkatarama Ayyar and *M. S. Ratnasabhapathi Mudaliar* for respondent.

JUDGMENT.

REILLY J.—This petition relates to Small Cause Suit 1912 of 1926 on the file of the Subordinate Judge of Madura. That suit was tried by the Subordinate Judge with another small cause suit between the same parties, No. 1530 of 1926. The plaintiff in each case was the brother of the defendant, a Hindu widow, who, it appears, was engaged in litigation with the representatives of a deceased co-widow about the property of her late husband. In Small Cause Suit 1530 of 1926 the plaintiff sued for the value of certain movables, which his sister, the defendant, had recovered in a suit against her co-widow's representatives on the strength of an alleged agreement, under which according to him, as he had given security for her in that suit, he was entitled to have possession of the movable property which she recovered or its value, if she recovered its value in money. In Small Cause Suit 1912 of 1926 he sued for arrears of salary claimed by him under a clause of the same agreement for his services to the

defendant in connection with that suit and with other litigation and other matters and interest on the arrears of salary. The two suits were tried together, and the learned Judge eventually after a number of hearings and a great many more adjournments disposed of them by one judgment. In that judgment he set out the pleadings at very considerable length. He then set out eight points for determination, which in the judgment he called "issues". But, though the trial had occupied him a long time, about fifty documents had been exhibited and eleven witnesses had been examined, he disposed of the whole matter in the briefest possible way. He said nothing more than this in the effective part of his judgment:—

"I find issues 1, 2 and 6 in the affirmative and issues 3 to 5 and 7 in the negative, and on issue 8 I find that the plaintiff is entitled to interest at six per cent per annum only by way of damages under the Interest Act."

That certainly in the circumstances appears to be a rather surprising judgment as the result of so much judicial labour as has been devoted to the trial of these two suits.

Revision petitions against the decrees made by the learned Judge in accordance with those findings in favour of the plaintiff in both suits were preferred to this Court by the defendant. Civil Revision Petition 143 of 1928 against the decree in Small Cause Suit 1530 has already been dismissed, and we have nothing to do with that now. The present civil revision petition against the decree in the other suit, i.e., the suit for the arrears of salary, came on first before WALLACE J. It was urged by the defendant in this petition that the judgment recorded by the learned Subordinate Judge was not in proper compliance with the provisions of law on the subject. WALLACE J., finding that different views have been taken by different

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Judges of this Court on different occasions as to what must be contained in the judgment in a small cause suit, referred the petition to a Bench, expressing the opinion that it was desirable to have the ruling of a Bench on the question whether, when points of law arise for decision in a small cause suit, the Judge is bound to give some reasons for his decision. That is how the matter has come before us.

The direct provision of law regarding the contents of a Small Cause Court judgment, so far as Provincial Small Cause Courts are concerned, is to be found in Order XX of the Code of Civil Procedure. Rule 4 (1) of that Order lays down that the judgment of a Court of Small Causes need not contain more than the points for determination and the decision thereon. But, although that is the only direct provision regarding what a judgment in a small cause suit should contain, we cannot leave out of consideration altogether on this question the provision in the Provincial Small Cause Courts Act itself which gives the High Court power to interfere in revision in a case like this. That is to be found in section 25 of that Act, which runs:

"The High Court, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as it thinks fit."

As I have mentioned, there has been some divergence of opinion about the exact interpretation of the first part of rule 4 of Order XX of the Code, which I have quoted. Mr. Ramaswami Ayyar, who appears for the petitioner in this case, has referred to several decisions on the question. He relies on a strong expression of opinion given by SESHAGIRI AYYAR J. in *Kandasami Chetty v. Ramalinga Chetty* (1). The learned Judge in

(1) (1920) 12 L.W. 225.

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that case, having before him a very curious judgment in a small cause suit, which contained nothing more than this—"Point: Is the plaint claim true? I find the plaint claim true."—not only decided that that was an entirely insufficient judgment but expressed himself at some length upon the subject. What he said was:

"Speaking for myself, I have been under the impression while at the Bar that in this Court it had always been insisted upon that the Judge of the Small Cause Court should give some reasons which would satisfy the High Court that he had applied his mind to the materials placed before him. Brought up in that tradition, while sitting in the Admission Court, I have always insisted upon the lower Court exercising small cause jurisdiction giving some indication as to what was in its mind, so that I may be in a position to say whether its conclusion is right or not. There are three reasons for this attitude of mine. First of all, the High Court in exercising its powers of revision under section 25 is really supervising the work of the lower Court. In order to enable it effectually to do its work, the lower Court must give us some materials upon which we can say that it has done its duty properly. Otherwise, we will have to go into the whole record to see whether the work has been properly done. That is from the point of view of the Judge of the High Court revising the work of the Small Cause Judge. Secondly, a party who has adduced evidence—it may be one or two witnesses in a case or half a dozen witnesses in another—must have some satisfaction that the Judge really has come to the conclusion whether his witnesses should be believed or not and whether his documents should be accepted as genuine or not. If after the examination of all the witnesses and documents a particular point is decided in a particular manner, the party will be able to see whether what he did has the approval of the Judge or not. Thirdly, what is most important is that the High Court should not encourage this habit of mind in the lower Court."

the habit of mind, as indicated further on in the judgment, being a slack habit in disposing of such cases. That is a strong expression of opinion that rule 4 of Order XX of the Code should not be interpreted literally. But not long after that the question came

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before a Bench in *K. M. Koppa Kurup v. Velayichettichiar*(1); this decision of SESHAGIRI AYYAR J. was quoted, and the learned Judges very definitely dissented from it. They said :

" We think that the learned Judge's judgment was based on his opinion of what the practice should be in such matter rather than on what the law of procedure actually is. It seems to us that Order XX, rule 4 (1), is self-contained and does not need any expansion or explanation by judicial rulings." After that a similar question came before SRINIVASA AYYANGAR J. in *Moideen Koya v. Moideen Kutti Haji*(2). In that case the learned Judge had to deal with a small cause suit for damages for breach of contract. He felt himself bound by the decision in *K. M. Koppa Kurup v. Velayichettichiar*(1), which I have quoted. But in the particular case before him he found that, though the District Munsif, who tried the small cause suit, had set out the points for determination, he had not troubled to give a separate decision or finding on each one of them but had clubbed them all together and had found them all for the plaintiffs. Among other things that implied that he found that the defendants in the suit had committed breach of contract. But SRINIVASA AYYANGAR J. found from the record that it was impossible to understand how the District Munsif had come to that decision. He therefore regarded that method of writing a small cause judgment as improper and remanded the suit for fresh trial. More recently SUNDARAM CHETTI J. has considered the question in Civil Revision Petition 1758 of 1927. There he had to deal with a complicated small cause suit, in which, as in this case, the pleadings had been set out at considerable length and then the trial Judge had merely said, as has been said in this case, that he found issues so

(1) (1922) 42 M.L.J. 583.

(2) (1925) 49 M.L.J. 354.

and so in the negative and so and so in the affirmative. SUNDARAM CHETTI J. in remanding that case for fresh trial said :

" But in cases though triable by a Small Cause Court, if the facts are somewhat complicated and the points involved require a due consideration of mixed questions of law and fact, it goes without saying that any reasonable Judge would consider it his duty to express himself in the judgment in such a way as to give the indication that he has come to the conclusion after judicially applying his mind to the real points of controversy. If his judgment is contrary to law, that would be a ground for interference in revision. On complicated questions of law, if the Small Cause Court Judge contents himself with giving a finding in a monosyllable ' Yes ' or ' No ' it would be extremely difficult for a Court exercising revisional powers to understand how the learned trial Judge came to arrive at such a finding. It may be said that it would be strictly within the words of rule 4 of Order XX even if he did not give any reason for the finding, but yet one would expect him to give some reasons in justification of the finding arrived at by him."

So it will be seen that even after the decision of the Bench in *K. M. Koppa Kurup v. Velayichettichiar*(1) learned Judges of this Court have not found it always possible or proper to interpret rule 4 of Order XX of the Code literally. Though these are the only cases of this Court which have been quoted before us, I think it is well-known that there have been other instances in which the same divergence of opinion on this question has been shown as in the cases which I have mentioned.

For myself I think we must be careful not to strain the interpretation of rule 4 of Order XX in any way nor to impose any undue burden upon Judges of Small Cause Courts, who are intended by the law to dispose of their cases in a rapid and simple way. But, when we are interpreting rule 4 of Order XX, we ought not

(1) (1922) 42 M.L.J. 583.

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in my opinion to divorce that rule from general principles which are applicable to all Courts. It is a principle of our administration of justice that Courts should conduct their work in public. The object of that is, not that the Courts or the Judges sitting in them should be a show to the public, but that the public should be assured that decisions are not arbitrary. Now neither the public nor the parties concerned can be assured that decisions are not arbitrary unless they are made intelligible to those who follow them and, where revisional powers are given to superior Courts, the record is made intelligible to those revisional Courts. And every conscientious Judge must wish to make his decisions intelligible, not only out of consideration for the parties, whose rights and claims are laid before him for decision between them, but out of a sense of duty to the public, whose servant he is. Remembering that principle, is there anything against it in rule 4 of Order XX of the Code as it stands? I think, if we examine that rule, we shall find indication in it that the principle is to be maintained even in the judgments of Small Cause Courts. The rule does not provide that a Judge of a Small Cause Court can dispose of a suit by saying merely "judgment for the plaintiff" or "judgment for the defendant." It is laid down that his judgment must contain the points for determination and the decision thereon. What is the object of that? Obviously to make his judgment intelligible to those who are interested in it and to those who have to deal with it. And that fits in with section 25 of the Provincial Small Cause Courts Act. Under that section the High Court is given the power of revising the decrees or orders of Small Cause Courts, and it may call for the record of the proceedings of such a Court in order

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to satisfy itself that the decree or order made in any case is according to law. It may be observed that that provision means, not only that the High Court may take action when some party moves it to do so, but that the High Court has the power and the duty in proper cases of taking such revisional action, even though not moved to do so by any party, when the matter comes to its notice. That provision is a strong indication to my mind that there is no intention that Small Cause Court Judges any more than other Judges should be allowed to deliver unintelligible judgments.

But I have been referring so far only to the first part of rule 4 of Order XX. Rule 4 (2) deals with judgments of other Courts, and its wording is important because it provides such a marked contrast with the wording of sub-rule (1). Sub-rule (2) is:

"Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."

There it is laid down that in Courts other than Small Cause Courts reasons for the decisions must be given. There is nothing said about reasons for the decisions in sub-rule (1) dealing with Small Cause Courts. In my opinion we should certainly not interpret the rule so far as it applies to Small Cause Courts in such a way as to obliterate the very marked distinction drawn between the two classes of Courts by the omission of the words "and the reasons for such decision" in sub-rule (1). Any interpretation of the rule which laid down that Small Cause Courts must always give reasons in their judgment would in my opinion be entirely unjustifiable. And I should be very reluctant to say anything which laid any unnecessary burden upon Small Cause Judges, who are expected to do a large amount of work at high speed.

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I think the solution of the question before us is to be found in the difference between the various kinds of points which may come up for decision in a small cause suit. The rule is that the judgment need not contain more than the points for determination and the decision thereon. There is nothing in the rule to the effect that the judgment may not contain more. Applying that rule reasonably without forgetting the principles which should govern the administration of justice in all Courts, my own opinion is that, when the Judge has to deal with a question of fact, we cannot demand that he should give anything more than his actual decision on that question—his answer to it—if he does not think more to be necessary. In a small cause suit the Judge has to record a memorandum or note of all oral evidence given before him. The documents exhibited by the parties are in the record of the case. In a great majority of instances, if the Judge states briefly what the contentions of the parties are and then mentions the points for determination, the answer to any question of fact raised as a point for determination will be quite intelligible, even if monosyllabic, when taken with the notes of evidence and the exhibits in the record. And in small cause suits a great many of the questions of law which have to be stated as points for determination are, when the facts are once settled, very simple to answer. I see no reason why in a very large proportion of cases the Judge should not be able to give quite an intelligible answer, sufficient for all purposes, to a simple question of law in a word or two. But in a Small Cause Court, as in other Courts, difficult questions of law may arise; and when a more difficult question of law or of mixed law and fact arises, in my opinion a Small Cause Judge cannot perform his duty of making his judgment intelligible,

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unless he at least sets out so much of his reasoning as will make clear the road by which he has reached his conclusion. Personally I do not think it necessary to express any more definite opinion than that. The test whether rule 4 (1) of Order XX has been used or abused appears to me to lie in the answer to the question whether the judgment has been made intelligible. If with the aid of the record the judgment, however brief, shows that the Judge has grasped the questions for decision and has answered them, not arbitrarily, but for reasons which can be readily understood, then he has complied with the provisions which regulate his procedure.

But we are concerned immediately with the case before us. How is the interpretation of the rule which I have adopted to be applied to this particular case? It is often easier to set out a general principle than to apply it to particular cases. Fortunately this is not a very difficult case in that respect. As I mentioned, the learned Judge set out eight "issues". Before going further I may refer to one contention raised by Mr. Ramaswami Ayyar, viz. that in this particular case the learned Judge did not mean to record merely the points for determination, as is done in an ordinary small cause suit, but actually framed issues for trial in the case. Mr. Ramaswami Ayyar argued that, as issues had been framed, rule 5 of Order XX and not rule 4 applied, and therefore it was quite clear that reasons ought to have been given for the findings. But on examining the record I feel no doubt that, although the learned Judge called the points for determination in the suit "issues", he did not mean issues in the sense of issues framed before the trial of the suit in order to guide the parties as to the point or points on which evidence or argument was required. The

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notes-paper in this case does not show any sign that regular issues were ever framed, and there would surely be a record of it, if such issues had been framed. The learned Judge I think obviously used the word "issues" merely as an abbreviation for the expression "points for determination". Of the eight points for determination in the two suits tried together only five relate to this particular suit for arrears of salary. They are Nos. 1, 5, 6, 7, and 8. Point 1 is "Is the agreement set up in the plaint true?" That is a question of fact. Point 5 is "Did the defendant terminate plaintiff's service prior to 31st August 1926?"—another question of fact. Point 6 is "Has the plaintiff actually performed service for the defendant after 31st July 1925?"—another question of fact. A large amount of evidence was recorded in this case, and it cannot be suggested that the evidence does not support the learned Judge's findings on those questions of fact. In my opinion, although he answered those questions merely with "Yes" or "No", we certainly cannot say that his answers are unintelligible or such as we could properly interfere with. Point 7 runs "Is the plaintiff bound to render accounts under the agreement, and if so, is Small Cause No. 1912 of 1926 not maintainable?", and Point 8 "Is the plaintiff entitled to interest?". Point 8 is a simple question of fact and law, and on that the learned Judge's answer is that the plaintiff is entitled to interest at six *per cent* by way of damages under the Interest Act. It is suggested by Mr. Ramaswami Ayyar that that is a mistake; but no one can say it is unintelligible. The answer to the simple question in Point 7 depends directly upon the interpretation of the agreement, Exhibit A. There is no doubt that the learned Judge is right in finding that under Exhibit A itself the

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plaintiff was not bound to render accounts. It has been urged by Mr. Ramaswami Ayyar that, if the defendant was bound to pay salary to the plaintiff, the plaintiff as her agent was bound to render accounts to her. Well, if the defendant wished to sue the plaintiff for accounts, she could have done so, but not in a small cause suit. There is nothing unintelligible or, so far as I can see, against the law in the learned Judge's finding on point 7. Therefore, examining this particular case in the light of my view how rule 4 (1) of Order XX of the Code should be interpreted, I do not find that the learned Judge's judgment is unintelligible or insufficient or such as we can properly interfere with in revision.

In my opinion this petition should be dismissed with costs.

ANANTAKRISHNA AYYAR J.—This revision petition has been referred to a Bench by WALLACE J. by the following order:—

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"While no doubt a judge in a Small Cause case is not bound to write a judgment, it is obvious that, if points of law arise for decision, judges should give some grounds; otherwise it is impossible for a Court of revision to say whether the Court has decided 'according to law' as it is bound to do under section 25 of the Provincial Small Cause Courts Act, unless 'according to law' means nothing else than in accordance with the law of Civil Procedure. On the other hand it is difficult to say that the Judge has erred in law when his reasons for his decision are unknown because he is not bound to give reasons at all.

I understand that there is no Bench ruling on the point and that several cases of the same kind are pending in this Court. It is better to have a definite ruling once for all, instead of having different single judges giving different rulings. I refer the case to a Bench for decision."

In order to arrive at a satisfactory solution of the question, it is necessary to bear in mind that the main object of the Legislature in creating Courts of Small

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Causes is that in suits of small value, except when expressly excluded, the trial should be summary and justice should be speedily administered. Unlike judgments of ordinary Civil Courts in original suits, the decrees from which are open to appeal, and, in which, for obvious reasons, the Legislature has directed that the judgments should contain the points for decision, the decision thereon and the reasons for the findings, the Legislature has specifically provided that, in case of suits tried by Courts of Small Causes, the judgments need contain only the points for determination and the decision thereon; see Order XX, rule 4 (1), and compare it with the wording of Order XX, rule 4 (2). See also Order L, rule 1, Civil Procedure Code. Thus the provision in Order XX, rule 4 (2), that judgments should contain the reasons for the findings does not apply to judgments of Courts of Small Causes. The points for decision, called "the issues" in cases of original suits, may raise questions of fact in dispute between the parties or questions of law that may arise on the findings of Courts on questions of fact. As there is no appeal against findings of fact arrived at by a Court of Small Causes, it would ordinarily be enough that, on points raising pure questions of fact, mere definite intelligible findings are recorded without giving reasons for the findings. The evidence in the case has to be recorded though not fully and in the manner prescribed in the case of original suits; but "notes of evidence" have to be recorded by the Court, and any finding arrived at in the absence of any evidence could be dealt with by the Court of revision as it thinks fit. Similarly if the notes of evidence could not reasonably, or possibly, lead to the finding recorded, apparently on its basis, then, too, the Court of revision could deal with it in any way it deems proper.

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Points of law may involve mere "abstract questions of law", or "mixed questions of fact and law". Under section 25 of the Provincial Small Causes Courts Act, the High Court is given power, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, to call for the case and pass such order with respect thereto as it thinks fit.

We have thus two provisions of law to bear in mind with reference to points raising questions of law in a small cause suit. While on the one hand the provision applicable to judgments in ordinary suits that reasons for findings should be given does not apply to judgments passed by a Small Cause Court, yet there is also the circumstance that the High Court is given the right to call for the records of a case to satisfy itself that a decree or order made in a case decided by a Court of Small Causes was according to law. The two provisions could not be treated quite independently as if one had nothing to do with the other. It is a sound rule of interpretation that the various provisions of a statute should if possible be so construed as to give a consistent and harmonious result.

As regards points raising "mixed questions of fact and law", it is obvious that the High Court should know what the finding of fact is, and also what the finding on the question of law involved is. Difficult questions of law do sometimes arise, though I may say that even there the particular aspect in which and the circumstances under which the question of law arises may, with advantage, be stated, and is capable of being stated in simple terms, in a large number of cases.

To see whether a finding in the simple affirmative or negative would be enough I will take, for example

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a question of limitation. The defendant might have pleaded that the suit is barred by limitation.

1. Limitation might have been pleaded on the ground that the acknowledgment alleged to be contained in a particular document was in fact not made by the defendant, and, in any event, is insufficient to operate in law as a valid acknowledgment.

2. Part-payment of principal or interest might be pleaded by plaintiff while denied by the defendant.

3. The defendant might have pleaded that the plaintiff became a major more than three years prior to the date of the plaint.

I need not multiply instances. If the "point" noted in the judgment simply be "Is the claim time-barred?", and the finding be—a simple "yes" or "no", the High Court could not properly exercise its powers of revision in such a matter. In such cases, such a finding could not be said to satisfy the requirements of a proper finding even in a small cause case.

When the High Court is given the jurisdiction to examine the correctness of the decree or order passed by a Court of Small Causes, it seems to me that a correlative duty is also placed on the Small Cause Court to record its finding on the question of law in such a way as would enable the High Court to appreciate the exact finding on such a point on the face of the judgment with a view to decide whether it is right or not. No doubt, questions of law could be discussed "very elaborately", and also "succinctly". How much of discussion is necessary in any particular case regarding any particular point of law will largely depend upon the circumstances of each case, and on the nature of the question of law that arises. But I am not able to accept the view that a Court of Small Causes does its duty legitimately—and in all cases—with reference to a point

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raising a question of law by simply saying "yes" or "no" as its finding thereon, irrespective of any other consideration. I am not just now considering whether, even in the matter of doing bare justice to the judgment of the lower Court, mere recording "yes" or "no" on such points by the lower Court would ordinarily be really helpful; but the adoption of such a procedure by the Small Cause Court would often leave the High Court in a difficult position in the matter of discharging its duties under section 25. Revisional jurisdiction conferred by section 25 is similar to a right of appeal, but limited to consideration of questions of law only; see generally about the nature of revisional jurisdiction the Full Bench decision, *Chappan v. Moidin Kutti*(1). I should not forget that the High Court could call for the records of a case under section 25 even without a petition from the parties if it chose to do so; see *Anthony v. Dupont*(2), *Baikanta Nath Goswami v. Sita Nath Goswami*(3) and *Batcha Sait v. Abdul Gunny*(4).

No case directly deciding the point now before us has been quoted to us. I do not propose to discuss the cases which have got only a remote bearing on the point now before us. I am of opinion that as regards points raising questions of law in a small cause suit, the judgment recording—simply "in the affirmative" or "in the negative"—the finding on such a point, is not ordinarily a proper judgment within the meaning of the Provincial Small Cause Courts Act. The actual extent of the discussion, or of the reasoning, which led to the finding, would depend upon the circumstances of each case; and this is the inference that I draw from the provisions which lay down what the judgments of Courts of Small Causes should contain and from the provisions

(1) (1898) I.L.R. 22 Mad. 68 (F.B.).
(3) (1911) I.L.R. 38 Calo. 421.

(2) (1881) I.L.R. 4 Mad. 217.
(4) (1913) 25 M.L.J. 507.

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which confer powers of revision on the High Court to satisfy itself that a decree or order made in such a case was according to law. I do not think it advisable to say anything more than what I have said.

The only decision of a Bench of this Court binding on us, *K. M. Koppa Kurup v. Velayichettichiar*(1) supports the view that we are inclined to adopt, regarding questions of fact arising in small cause suits. As regards questions of law, or mixed questions of fact and law, certain decisions by learned single judges were cited. They are generally in consonance with the view I am inclined to take on such questions of law or mixed questions of fact and law.

On the merits of the case before us, fortunately the findings of the learned Judge in this particular suit are intelligible and there is evidence to support the same. No doubt, the judgment speaks of "8 issues"; but we have satisfied ourselves by a reference to the "note-paper" that they were no more than "points" noted by the Judge at the time of writing the judgment, the findings on which would have a material bearing on the actual decree to be passed. The Court did not "frame issues" in this case, as one understands the expression in connection with original suits. The present is not a case where, for any particular reason, the Court thought it proper to frame "issues" and have them tried in the usual way, under Orders XIV and XV, Civil Procedure Code. I need not therefore say anything more about Mr. Ramaswami Ayyar's contention based on Order XX, rule 5, Civil Procedure Code.

I therefore agree that the civil revision petition should be dismissed with costs.

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(1) (1922) 42 M.L.J. 583.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

V. N. KRISHNA IYER (DEFENDANT), APPELLANT,

v.

V. N. SUBBARAMA IYER AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

1932,
January 11.

Code of Civil Procedure (Act V of 1908), Sch. II, para. 20—
"Subject-matter of award" in—Meaning of—Court within
whose jurisdiction portion only of immovable properties
forming subject-matter of award is situate—Jurisdiction of,
to entertain application to file the award—Application to
file award under para. 20.—Separate order on, for filing
of award under para. 21—Necessity for—Absence of—
Appeal—Right of, in such a case.

The expression "the subject-matter of the award" in paragraph 20 of Schedule II of the Code of Civil Procedure means the whole, and not the whole or a portion, of the subject-matter of the award. A Court within whose jurisdiction a portion of the immovable properties forming the subject-matter of an award is not situated has, therefore, no jurisdiction to entertain an application to file the award made under that paragraph.

When an application is made under paragraph 20 of Schedule II of the Code, the Court should first pass a separate order that the award be filed under paragraph 21 of that schedule and then proceed to pronounce judgment according to the award. In a case in which there is no such separate order the Court must be deemed to have passed such an order and the party affected will have the right to appeal from it.

APPEAL against the order of the Court of the Subordinate Judge of South Malabar at Palghat, dated 19th August 1930 and made in Original Suit No. 47 of 1926.

T. M. Krishnaswami Ayyar (with him *O. K. Viswanatha Ayyar*) for appellant.

* Appeal against Order No. 69 of 1931.

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Advocate-General (A. Krishnaswami Ayyar), with him P. S. Raghava Raman and C. S. Vaidyalinga Ayyar for respondents.

JUDGMENT.

ANANTAKRISHNA AYYAR J.—The appellant before us is the youngest of the three brothers of an undivided Hindu family, the eldest being the first respondent, and the other brother being the second respondent. The family had a cloth trade at Palghat, and another business at Mysore and Bangalore relating to mining leases, etc. The family possessed immovable properties in Malabar, in Bangalore and in Travancore. Disputes having arisen between the brothers, they executed an agreement in favour of three persons to settle as arbitrators the matter of partition of all the joint family properties including the businesses at Palghat and Bangalore. On the allegation that the arbitrators passed the award—Exhibit C—dividing the immovable properties among the brothers in the way they thought fit and also deciding how the business should be disposed of and fixing the liability of the parties to each other in various respects, the two respondents filed an application in the Court of the Subordinate Judge of Palghat under paragraph 20 of the second schedule of the Code of Civil Procedure—praying that “the award may be filed in Court and a decree passed in terms thereof.” The appellant, who was made the respondent to the said petition, raised various objections to the filing of the award, one of the objections being that the lower Court had no jurisdiction to entertain the application as the whole of the subject-matter of the award was not within the jurisdiction of the lower Court [paragraph 14 (a) of the defendant’s statement of objections filed in the lower Court]. The lower Court

overruled that objection, and, finding that the objections raised by the appellant on the merits had not been made good, directed the award to be filed in Court and a decree drawn up, remarking at the same time,

“but there will be no directions in the decree as regards the immovable properties situated in Parur (Travancore) and Bangalore.”

The decree as drafted however contained the provision in paragraph 9 that

“the plaintiffs be at liberty to institute proper proceedings in Courts having jurisdiction over the properties situated in Mysore and Travancore States based on this judgment and to obtain reliefs as provided for in the award.”

In this appeal, the appellant reiterated his objection as regards jurisdiction of the lower Court to entertain the application under paragraph 20 of Schedule II of the Code of Civil Procedure, and also complained against the decision of the learned Subordinate Judge on the merits. The objection as to the jurisdiction, since it goes to the root of the whole proceedings, has first to be considered. The arbitrators awarded the house properties in Bangalore to the first respondent, and the immovable properties in Travancore to the first and the second respondents jointly. The other immovable properties in Malabar were allotted some to the first respondent, some to the second respondent, and some to the appellant. We need not here give details of the mode in which the business at Palghat and Bangalore was dealt with by the arbitrators.

The application to the lower Court was made under paragraph 20 of Schedule II of the Code of Civil Procedure. Sub-clause (1) of the said paragraph enacts as follows:—

“Where any matter has been referred to arbitration without the intervention of a Court and an award has been

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made thereon, any person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court."

It is argued that the Court to which an application is made should have jurisdiction "over the subject-matter of the award", that is, it is contended—over "the whole" of the subject-matter of the award; as the lower Court had admittedly no jurisdiction over the immovable properties of the joint family situated in Travancore, it is argued that the lower Court had no jurisdiction to entertain an application under paragraph 20.

On the other side, it was argued that the words "subject-matter of the award" should be considered with reference to the jurisdiction of the Courts in British India and as meaning "subject-matter situated in British India"; and as the Subordinate Judge's Court is a Court of unlimited jurisdiction, and, as many items of immovable properties included in the award are situated in Malabar within the lower Court's jurisdiction, the lower Court should be taken to have jurisdiction over the subject-matter of the award.

In this case we need not decide whether the properties situated in Bangalore should be taken to be properties situated outside British India, since it is admitted that the award has dealt with the immovable properties of the family situated in the Travancore State, and, as the lower Court had no jurisdiction over immovable properties in the Travancore State, the present is a case where a portion of the properties which form the subject-matter of the award is situated outside British India.

No direct decision on the question that we have to decide has been quoted to us. A similar question was

raised in *Ramlal Hargopal v. Kishanchand*(1). There also an application was made to file a private award under section 525 of the Code of 1882. At page 372, their Lordships of the Privy Council observed as follows :—

"It was contended on behalf of the appellant that if an award relates to more than one subject-matter and only one is within the jurisdiction of the Court, it cannot be filed in that Court; in fact, that it can be filed in no Court, because no one Court would have jurisdiction over the whole subject-matter. Their Lordships deem it unnecessary to rest their judgment on any such general proposition. In their view, there is no substantial question decided by the award which affects property within the jurisdiction of the Berar Court. No one of the three temples is within that jurisdiction, and two of them are within the dominions of the Nizam and outside British India. A large part of the award relates to family questions and money payments to be made by members of the family; and all the members of the family are within the Nizam's dominions. It was urged that two of the villages which form the principal endowments of the temples are situated in Berar. But their Lordships cannot find that there was any dispute concerning the ownership or management of the villages nor any denial that the revenues must be appropriated to the three temples."

Each side claimed that the observations made by their Lordships at pages 372 and 373 of the report supported its respective contentions; but we are unable to gather that their Lordships decided the question now before us. Finding as a fact that there was no dispute concerning the ownership or management of the villages within British India, they proceeded to observe that no decree could be framed upon that award which would affect any person or property within the jurisdiction. Their Lordships therefore had not to decide the question whether such an award could be filed and a decree passed thereon if the subject-matter

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(1) (1923) I.L.R. 51 Cal. 361 (P.C.).

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of the award comprised immovable properties both within British India and outside.

One has therefore to seek light on this question from other sources. *Prima facie*, the expression "over the subject-matter of the award" would seem to imply over the *whole* of the subject-matter of the award. The words "whole" or "in part" occur in paragraph 11, of the second Schedule, and, in section 17 of the Code, the words "any portion of the property" occur. If therefore the intention of the Legislature was that the words "subject-matter of the award" should mean the whole or a portion of the subject-matter of the award, then it is reasonable to expect that it would have said so expressly. An analogous question arose under section 327 of the Code of Civil Procedure (Act VIII of 1859) in *Gangappa v. Kapinappa*(1), and SCOTLAND C.J. and COLLETT J. observed at pages 128 and 129 as follows:—

"The application must be made to a Court having jurisdiction in the matter 'to which the award relates'. . . From this it appears quite clear to us that the Court applied to must be one having jurisdiction in respect of the whole matter."

In *Rethamalai Servai v. Ramaswami Servai*(2) KUMARASWAMI SASTRI J. observed at page 58 as follows:—

"Paragraph 20 of the second Schedule of the Code of Civil Procedure directs the filing of the award in any Court having jurisdiction over the subject-matter of the award. By 'subject-matter of the award', I think, is meant the whole matter dealt with and decreed by the award, and not any particular portion which affects any particular party. The jurisdiction of the Court will depend upon the reliefs awarded by the award."

The same view was taken by the same learned Judge in *Nemichand Sowcar v. Kesarimull Sowcar*(3), where an

(1) (1869) 5 M.H.C.R. 128.

(2) (1919) 10 L.W. 57.

(3) (1928) 56 M. L.J. 85.

application for a decree in terms of an award was dismissed, the properties being situated some outside British India and some within Madras. No doubt the learned Judge's decision was based on other grounds also. The decision in *Murli Mal v. Sant Ram*(1) was relied on, as a case similar to the present. Our attention was also drawn to the observations made by the learned referring Judges in *S. A. Mathan v. S. R. Samson*(2). The award in that case dealt not only with the immovable properties within the jurisdiction of the British Courts but also with immovable properties in the French territory of Pondicherry. The award was filed and a decree passed in terms thereof by the Subordinate Judge of Cuddalore, but the learned Judges of the High Court held that the Court of the Subordinate Judge of Cuddalore had no jurisdiction to have the award filed in the circumstances nor to pass a decree in terms thereof.

Thus, whatever authority there is on the point seems to favour the contention raised by the learned Advocate for the appellant. When an application is made under paragraph 20, notice is given to the other parties to the arbitration; and under paragraph 21, when the Court is satisfied of certain particulars mentioned therein, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. Upon judgment so pronounced, a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award. Thus the judgment should be in accordance with the award; and the decree that should follow should be in accordance with the judgment. Therefore the decree should be in accordance with the award. The award deals with immovable property

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(1) A.I.R. 1929 Lah. 24.

(2) (1931) I.L.R. 9 Rang. 480, 484, 485.

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outside British India. The decree also therefore should deal with immovable property outside British India. Has the Court in British India jurisdiction to pass such a decree? *Prima facie*, not.

Then it was suggested that the decree should be confined to the subject-matter of the award in so far as the same is within the jurisdiction of the British Indian Courts according to the Municipal law of British India. That probably is the view taken by the learned Subordinate Judge in the present case; for in his judgment, in paragraph 75, he observed as follows:—

“The award will be filed in Court and a decree will be drawn up, but there will be no directions in the decree as regards the immovable properties situated in Parur (Travancore) and Bangalore.”, though, as already noted, the decree in paragraph 9 declared that

“the plaintiffs be at liberty to institute proper proceedings in Courts having jurisdiction over the properties situated in Mysore and Travancore States based on this judgment and to obtain reliefs as provided for in the award.”

Has the Court jurisdiction to direct the award to be filed in part and pass a decree in terms of portions only of the award under paragraph 20 of the second Schedule? It seems to us that it is not open to the Courts to do so in a case like the present. The wording of paragraph 21 that “the Court shall pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow” would seem to be, *prima facie*, against such a contention. That contention is also opposed to various decisions passed by several Courts in India. In *Mana Vikrama, the Zamorin of Calicut v. Mallichery Kristnan Nambudri*(1) TURNER C.J. and MUTTUSWAMI AYYAR J. held that

“a Court could not file an award under section 525 of the Code of 1882 only as regards a portion of the award.”

(1) (1880) I.L.R. 3 Mad. 68.

They further observed at page 69 as follows:—

“Although an award may perhaps be held enforceable in this country if the invalid portion can be separated from, and is independent of, the valid portions of the award, it cannot be enforced by summary proceedings under section 526 of the Code. It is not without reason that in such a case the Legislature should think it inexpedient to give the party seeking to enforce the award a summary remedy, and it may have advisedly left him to obtain from the Court the relief to which he may be entitled by regular proceedings.”

See also *Allarakhia Shivji v. Jehangir Hormasji*(1); *Altaf Hossein v. Grish Chunder Roy*(2); *Dandekar v. Dandekars*(3); *Thiruvengadathiengar v. Vaidinatha Ayyar*(4) and *Mustafa Khan v. Phulja Bibi*(5).

In *Narsingh Narain Singh v. Ajodhya Prasad Singh*(6) the learned judges, MOOKERJEE and CARNDUFF JJ., observed at page 114 as follows:—

“We may add that it is not competent to the Courts below in a proceeding under section 525 of the Code of 1882 to direct that the award be filed in part; the Court was bound to refuse the application if in its opinion the award was open to attack in part.”

Turning to English Law we find the following:—

“It is clear that the property to be partitioned must be within the jurisdiction of the Court. The Chancery Division has no jurisdiction to order partition of immovable property outside the jurisdiction.”

See Halsbury's Laws of England, Volume XXI, page 838, paragraph 1569. In such cases it is not entirely correct to say that the relief sought for can be entirely obtained through the personal obedience of the defendants within the meaning of section 16 of the Code of Civil Procedure. The principle of *Penn v. Baltimore*(7) would not, in our opinion, apply to such a case, having

(1) (1878) 10 B.H.C.R. 391.

(3) (1882) I.L.R. 8 Bom. 663, 668.

(5) (1905) I.L.R. 27 All. 526.

(2) (1871) 15 W.R. 556.

(4) (1905) I.L.R. 29 Mad. 308.

(6) (1911) 15 C.L.J. 110.

(7) (1750) 27 E.R. 1132.

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regard to the wordings of paragraphs 20 and 21 of the second Schedule. Anyhow we are here concerned only with the question of jurisdiction to entertain the application, and not with the subsequent question whether a private award which the Court had jurisdiction to file could be split up when separable, and filed in part, with a decree following only the portion of the award so directed to be filed.

As observed in *Bindessuri Pershad Singh v. Jankee Pershad Singh*(1), when the question of jurisdiction is raised, that question has to be decided first before proceeding further with the matter. In that case, with reference to an application filed under section 525 of the Code of 1882, the other side raised objection to the jurisdiction of the Subordinate Judge before whom the application was filed. The learned Judges, MITTER and BEVERLEY JJ., observed at page 486 as follows :—

“The Subordinate Judge, before entertaining the application of the respondent, was bound to satisfy himself that he had jurisdiction to entertain it.”; and they added that

“with reference to such objections he was bound even to take evidence before assuming jurisdiction.”

The question of jurisdiction to entertain the application under paragraph 20 of the second Schedule of the Code of Civil Procedure has thus to be first considered and decided by us; and, having regard to the considerations mentioned above, we think that our answer should be that the lower Court had no jurisdiction to entertain the application to file the award in the present case.

It is perhaps needless to mention that paragraph 20 provides a special procedure for filing awards in matters referred to arbitration without the intervention of

(1) (1889) I.L.R. 16 Cal. 482.

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Courts and to have decrees passed according to the award. It will be noticed that no appeal lies against such a decree except in so far as the decree is in excess of or not in accordance with the award. There is an appeal provided against an order filing or refusing to file an award in an arbitration without the intervention of the Court by clause (f) of section 104 of the Code of Civil Procedure. Filing awards under paragraph 20 is only an extra and special statutory right conferred on parties under particular conditions imposed by that paragraph. The provisions in paragraph 20 do not constitute any bar to a regular suit to enforce the rights created by an award. Though in the first and the second drafts of the present Code of Civil Procedure it was sought to enact otherwise by the addition of a special clause to that effect to section 525, that was not ultimately done. The framers of the first draft observed as follows with reference to clause 525 :

“One of the principal reasons for the ineffectiveness of arbitration without the intervention of the Courts is that the procedure allowed by the present section has been held not to exclude alternative remedies. It is considered expedient to negative the rulings to this effect.”

The special clause to that effect which was sought to be inserted in the first two drafts was omitted by the expert committee from the Bill which ultimately was enacted as the present Civil Procedure Code. The decisions on the point, therefore, remain good law at present, and the decisions are clear on that point; and it is only necessary to mention the Privy Council decision in *Muhammad Nawaz Khan v. Alam Khan*(1). As observed by their Lordships,

“the refusal of an application for the filing of an award, under section 525 of the Code of Civil Procedure, merely leaves the award to have its own ordinary legal effect; and it cannot

(1) (1891) I.L.R. 18 Cal. 414 (P.O.).

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be contended that an award is not to be relied on as a defence in a suit relating to the special matter dealt with by it only because such an application has not been granted."

Regular suits to enforce rights conferred by an award have been held to lie in *Bhajahari Saha Banikya v. Behary Lal Basak*(1), *Gopi Reddi v. Mahanandi Reddi*(2), *Narasayya v. Ramabadra*(3), *Krishna Panda v. Balaram Panda*(4), *Rajmal Girdharlal v. Maruti Shivram*(5) and *Harakh Ram Jani v. Lakshmi Ram Jani*(6). We may probably conclude our judgment, as did the learned Judges in the case in *Mustafa Khan v. Phulja Bibi*(7), under somewhat similar circumstances as follows:—

"We wish it to be understood that we decide this appeal entirely upon the question of the true meaning of section 526 of the Code of 1882 (corresponding to paragraphs 20 and 21 of the second Schedule of the present Code), and that we do not determine any other question raised before the Court below."

Without going into any other questions raised, this miscellaneous appeal must be allowed with costs here and in the Court below; and the application filed in the lower Court will be returned to those who presented it.

The learned Subordinate Judge ought to have first passed an order that the award be filed under paragraph 21 of the second Schedule of the Code of Civil Procedure. He should then have proceeded to pronounce judgment according to the award; and a decree should follow the judgment so pronounced. In this case it does not appear that there was a separate order, as contemplated by paragraph 21; but that would not prejudice the party affected from filing an appeal against the order, which should be deemed to have

(1) (1906) I.L.R. 33 Calc. 881.

(2) (1891) I.L.R. 15 Mad. 99.

(3) (1892) I.L.R. 15 Mad. 474.

(4) (1898) I.L.R. 19 Mad. 290.

(5) (1920) I.L.R. 45 Bom. 329.

(6) (1920) I.L.R. 43 All. 108.

(7) (1905) I.L.R. 27 All. 526.

been passed by the lower Court in the circumstances. In fact, it was not disputed before us that the matter should be viewed in this light, and it is clear that the present civil miscellaneous appeal is competent; see *Selvarayan Samson v. Amalorpavanadham*(1).

REILLY J.—I agree.

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APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

P. O. KARTHIRUMA GOUNDAN (FIRST RESPONDENT),
PETITIONER,

1922,
March 2.

v.

RANGAMMAL AND ANOTHER (PETITIONER AND THIRD
RESPONDENT), RESPONDENTS.*

Indian Succession Act (XXXIX of 1925), sec. 192—Petition presented under—Jurisdiction of Subordinate Judge to deal with—Madras Civil Courts Act (III of 1873), sec. 29—General notification of High Court issued under—Subordinate Judge empowered to deal with matters under Indian Succession Act by—Sec. 29 (1) of Madras Civil Courts Act—Effect of.

A Subordinate Judge empowered to deal with matters under the Indian Succession Act by a general notification of the High Court issued under section 29 of the Madras Civil Courts Act has jurisdiction to deal with a petition presented to him under section 192 of the Indian Succession Act.

Section 29 (1) of the Madras Civil Courts Act extends not only to proceedings under Part IX of the Indian Succession Act but to proceedings under any part of that Act other than those of which a District Delegate can dispose. The words "which cannot be disposed of by District Delegates" do not

(1) (1927) 55 M.L.J. 262.

* Civil Revision Petition No. 1033 of 1931.

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limit the proceedings with which a Subordinate Judge can be authorized to deal to those comparatively few matters which may have been brought before a District Delegate but of which under section 286 or 287 or 288 of the Indian Succession Act he finds himself for some reason unable to dispose.

PETITION under section 115 of Code of Civil Procedure (Act V of 1908) and section 107 of the Government of India Act praying the High Court to revise the order, dated the 6th July 1931, of the Court of the Subordinate Judge of Coimbatore in Original Petition No. 46 of 1929.

T. M. Krishnaswami Ayyar and K. V. Ramachandra Ayyar for petitioner.

A. C. Sampath Ayyangar for respondents.

REILLY J. The JUDGMENT of the Court was delivered by REILLY J.—The petitioners object to the Subordinate Judge dealing with a petition presented to him under section 192 of the Indian Succession Act and contend that he has no jurisdiction to do so. The Subordinate Judge has been empowered to deal with matters under that Act by a general notification of the High Court issued under section 29 of the Madras Civil Courts Act. It is not disputed that the Subordinate Judge has so been invested with all the powers with which he could be invested under that section. But it is contended that properly interpreted that section makes it possible to authorize Subordinate Judges only to deal with matters which come before a District Delegate under Part IX of the Succession Act but of which he cannot dispose. The words of section 29 (1) of the Madras Civil Courts Act are :

“The High Court may by general or special order authorize any Subordinate Judge to take cognizance of, or any District Judge to transfer to any Subordinate Judge under his control, any proceedings under the Indian Succession Act which cannot be disposed of by District Delegates.”

Grammatically that provision extends not only to proceedings under Part IX of the Indian Succession Act but to proceedings under any part of that Act other than those of which a District Delegate can dispose. The use of the words “which cannot be disposed of by District Delegates” is perhaps not very happy. But they do not appear to justify the contention for the petitioner that they limit the proceedings with which a Subordinate Judge can be authorized to deal to those comparatively few matters which may have been brought before a District Delegate but of which under section 286 or 287 or 288 of the Indian Succession Act he finds himself for some reason unable to dispose. If that had been the intention, the words used would be a very clumsy way of expressing it, and the proceedings would naturally have been described as “any proceedings under Part IX of the Indian Succession Act”, with which alone District Delegates are concerned, instead of in more general terms. And to introduce the new section 29 of the Madras Civil Courts Act by special enactment, as was done by Act XIV of 1926, for such a limited purpose would be surprising. It may be noticed that in several other parts of India, e.g. Bengal, Bombay and the Punjab, legislation had already made it possible to empower Subordinate Judges to deal with a much larger class of testamentary matters. If the words of section 29 of the Madras Civil Courts Act are interpreted in their plain, grammatical meaning, the result is that they make it possible to extend the powers of Subordinate Judges over the whole field of the Indian Succession Act to the relief of District Judges except over the narrow field already covered by the powers of District Delegates, in respect of which District Judges require no further relief. The grammatical meaning of section 29 of the Madras Civil

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Courts Act fits in therefore with what is the apparent object of its enactment.

We are therefore of opinion that the Subordinate Judge has jurisdiction in this matter. This petition is dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Curgenven.

1931,
November 17. PERVELA RAMAKRISHNIAH (PETITIONER), PETITIONER,
v.

PANDIRI SATYANANDAM AND THREE OTHERS
(RESPONDENTS), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XI, r. 15—
Inspection—Right of party to—Inability on his part to
particularise in his allegations—Effect.*

The plaintiffs, commission agents for the sale of timber despatched to them by the defendants, sued for the recovery of the balance due to them on accounts, being the excess of advances made over the value of timber received, alleging a settlement of account prior to suit followed by further dealings. The defendants pleaded, *inter alia*, that the alleged settlement based admittedly wholly upon plaintiffs' accounts, even if definite, was vitiated by fraud and that they were therefore entitled to re-open the same; and, in order to obtain material upon an issue framed upon that point, they applied for permission to inspect the plaintiffs' accounts relating to the pre-settlement period.

Held that the defendants were not disentitled to inspection upon the sole ground that their allegations of fraud and misconduct against the plaintiffs were couched in general terms and that they had adduced no specific instances.

* Civil Revision Petitions Nos. 777, 778, 915 and 916 of 1931.

The mere inability of a party to particularise in his allegations does not afford a sufficient ground for refusing to grant him inspection.

Whyte v. Ahrens, (1884) 26 Ch.D. 717; *Leitch v. Abbott*, (1886) 31 Ch.D. 374; and *Sachs v. Speilman*, (1888) 37 Ch.D. 295, followed.

PETITIONS under section 115 of the Code of Civil Procedure (Act V of 1908), praying the High Court to revise the orders of the Court of the Subordinate Judge of Rajahmundry, dated 19th March 1931, and made in Civil Miscellaneous Petitions Nos. 126 and 127 of 1931 in Original Suits Nos. 56 and 58 of 1926 respectively and the orders of the Court, dated 23rd March 1931, and made in Civil Miscellaneous Petitions Nos. 322 and 323 of 1931 in Original Suits Nos. 56 and 58 of 1926 respectively.

K. Subba Rao for petitioner.

G. Lakshmanna and *G. Chandrasekhara Sastri* for respondents.

Cur. adv. vult.

JUDGMENT.

Civil Revision Petitions Nos. 777 and 778 of 1931.—These petitions arise out of two suits, Original Suits Nos. 56 and 58 of 1926 on the file of the Additional Subordinate Judge of Rajahmundry. The plaintiffs in both suits are the same, being commission agents who also undertook to finance the operation of the merchants who employed them. The defendants are timber merchants who used to procure timber from the Agency tracts and despatch it to the plaintiffs for sale. In Original Suit No. 58 there is a single defendant, who traded alone, and in Original Suit No. 56 the fourth defendant was his partner in dealings of this character. The plaintiffs claimed considerable sums of money as due to them on accounts, being the excess of advances made over the

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value of timber received. They pleaded in each case a settlement of account as having taken place in the year 1922, these settlements being followed by further dealings. The defendants disputed these settlements, although not in very unequivocal terms. Their case in fact was twofold, first, that the so-called settlements were to be subject to further scrutiny, and secondly, that even if it be held that they were definite settlements of accounts they were vitiated by fraud. The first issue in each case inquired whether for the reasons stated in their written statements the defendants were entitled to reopen these settlements of account. In order to obtain material upon this issue the petitioner, who is the sole defendant in the one suit and the first defendant in the other, applied in the two suits for permission to inspect the plaintiffs' accounts relating to the pre-settlement period and then to cross-examine them upon the results of the inspection. When the applications came on for hearing both the petitioner and the pleader were absent, so that the Court had to come to an *ex parte* decision. It held that the petitioner had not qualified himself to make such a request because his allegations of fraud and misconduct against the plaintiffs were couched in general terms, and no specific instances were adduced. Since that was the sole ground upon which the petitions were dismissed I propose first to consider whether the request should have been rejected for this reason.

It is common ground that the settlements were based wholly upon plaintiffs' accounts, the defendants not having maintained any accounts. It is accordingly urged before me that in such circumstances, where the specific evidence is exclusively in the hands of one party, it is not reasonable to insist upon the other party giving definite particulars of misconduct which an

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examination of that evidence alone would disclose. The very reason why inspection is needed is in order that the principal may be in a position to formulate his charges against the agent. It is not therefore essential in every case to require specific allegations before making an order of the kind sought. I have not been shown any Indian Law directly upon this point but I think that English decisions clearly show that this position is correct. The learned Additional Subordinate Judge refers to only one English case, *Parkinson v. Hanbury*(1). What that case decided was that where a plaintiff seeks to open a settled account there must be in the bill a distinct statement of specific errors in the account. This is what Lord Westbury calls "the old rule, clearly enunciated by Lord Hardwicke", and he goes on to observe that having regard to the manner in which the evidence is taken in Courts of Equity there would be no protection to a defendant if he had not, by proper averments in the bill, distinct notice of the allegation that he had to meet. This objection, I think, may be got over, under our procedure, by requiring a party to file additional pleadings embodying the necessary particulars obtained from inspection; and, having regard to later case-law more precisely upon the topic now in question, I do not think that this case can be regarded as conclusively settling the law. If it did so settle it, clearly not only this application but the connected issue could not be entertained. In *Whyte v. Ahrens*(2) a firm of merchants in London sued a firm carrying on business in Japan whom they had employed as agents to purchase Japanese goods and forward them to England, the allegation being that the defendants had purchased the goods at prices higher than the current

(1) (1867) L.R. 2 H.L. 1.

(2) (1884) 23 Ch.D. 717.

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prices and had secretly received commissions from the vendors and made profits in other ways. The charges were stated only in general terms, no particulars being mentioned. The defendants pleaded a settlement of account and the plaintiffs applied for a summons for discovery of documents in order to upset it. BECON V.C. in allowing the application referred to Order XIX, rule 6, which corresponds to our Order VI, rule 4, but pointed out that the plaintiffs were unable to state particulars because all the papers relating to the transactions were in the possession of the defendants :—

“They say they have not given evidence because they cannot, but if the defendants furnish them with the papers or books of account they will then give the particulars and shew more distinctly the grounds on which they claim to be entitled to relief.”

In the Court of Appeal COTTON L.J. agreed with the view taken by the learned Vice-Chancellor but FRY L.J. dissented, basing himself upon *Parkinson v. Hanbury*(1). He considered that the pleadings were not adequate for the trial of the particular issue and that the rule required a statement of “a particular error or errors, or fraud or frauds, or suppression of moneys received; in fact a distinct allegation of the specific error.” The same question came before the Court of Appeal in *Leitch v. Abbott*(2) where CURRY J. had refused to make an order. The Court of Appeal reversed the decision for the reasons given in the judgments of COTTON and BOWEN L.JJ., FRY L.J. only remarking that the inclination of his opinion was in favour of the judgment of the Court below.

“There is here a general allegation of fraud”,
COTTON L.J. observes,

“and the plaintiff wants the discovery to enable him to prove his allegation. It may be that he will afterwards have

(1) (1867) L.R. 2 H.L. 1.

(2) (1886) 31 Ch.D. 374.

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to amend his pleadings, but to say that he must give details of the fraud in the first instance would be to reduce the right of discovery in cases of fraud to very narrow limits indeed.”

BOWEN L.J. puts the matter cogently thus :

“Ought, then, the generality of an allegation of fraud to be a bar to the right of discovery? It seems to me that the very fact that the pleader is unable to plead except in general terms is, in many cases, the very reason why he should have discovery from the other party, so as to enable him to plead the fraud in detail.”

Again in *Sachs v. Speilman*(1), where the defendants asked for further particulars of the transaction alleged in the plaint before putting in their statement of defence, NORTON J., after reviewing the previous cases, based his decision upon similar considerations.

It appears to me that, in the absence of any reasons for holding that the procedure should be different under our Code, these decisions ought to be followed and that the correct view accordingly is that the mere inability of a party to particularise in his allegations does not afford a sufficient ground for refusing to grant him inspection. This, as I have said, was the only reason given for dismissing the applications and unless there be any other grounds for refusing them I think that they should be granted. The issue has been framed and the nature of the case is such that the defendant may well be unable to secure justice without inspecting the plaintiffs' accounts. I have been asked to refrain from interfering upon the ground that these are very old suits, dating from 1925, and that the defendants have been responsible for much of the delay that has occurred. This argument has not been supported however by explanations showing how the defendants, or which of them, were responsible. It is not contended that this

(1) (1887) 37 Ch.D. 295.

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application itself has led to delay and I cannot therefore find that this would be good ground for refusing it. A better argument is that the application came at a late stage. The issues were framed in February 1926, and no satisfactory reason has been given why these applications were not made as soon as the parties went to trial on the question of reopening the settlement. What I have to consider, however, is whether the plaintiffs are likely to be prejudiced by the order being made now. The first plaintiff is said to have died and the second plaintiff's examination has been proceeding for some time and has not been completed. This is the witness whom it is desired to cross-examine after inspection of the accounts and I have not been shown how such an inspection at the present stage would result in prejudice. The lateness of the application may better, I think, be dealt with by an order as to costs than by denying the defendants facilities which they ought otherwise to enjoy. For these reasons I allow the petitions and direct the lower Court to grant the inspection applied for and thereafter to allow due opportunity for cross-examination. This order will however be contingent upon the petitioner paying the costs of the respondents of these applications in the lower Court and here unconditionally and before the inspection is permitted. After inspection and before the trial is resumed the defendant in Original Suit No. 58 and the first defendant in Original Suit No. 56, who is the petitioner here, will file a statement specifying in detail the objections which he takes to the accounts the settlement of which in each case he desires to reopen.

A.S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

IN RE VELLAMOONJI GOUNDAN (FIRST ACCUSED),
PRISONER.*

1931,
December 17.

*Code of Criminal Procedure (Act V of 1898), sec. 164 (3)—
Caution prescribed by—Omission to administer—Admissibility in evidence of confession in case of—Indian Evidence Act (I of 1872), sec. 29—Effect of—Code of Criminal Procedure (Act V of 1898), ss. 164 (3) and 163 (2)—Inconsistency between provisions of.*

A confession, otherwise admissible in evidence, is, by virtue of section 29 of the Indian Evidence Act, admissible even though the caution prescribed by section 164 (3) of the Code of Criminal Procedure has not been administered. Section 164 of the Code of Criminal Procedure does not override section 29 of the Evidence Act, and it is the latter Act that must, as a rule, be looked to when there is a question of the admissibility of a particular piece of evidence.

Inconsistency between the provisions of section 164 (3) and section 163 (2) of the Code of Criminal Procedure as regards the necessity or propriety of administering a caution pointed out.

TRIAL referred by the Court of Session of the North Arcot Division at Vellore for confirmation of the sentence of death passed upon the said prisoner in Case No. 14 of the Calendar for 1931.

K. S. Jayarama Ayyar for first accused.

Public Prosecutor (L. H. Bewes) for the Crown.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by
WALLER J.—The appellant has been convicted of WALLER J.
the murder of a woman called Chinnathayee. Three

* Referred Trial No. 158 of 1931.

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other men, who were tried with him, were acquitted. The case against him was based on the evidence of an approver, corroborated by that of a number of witnesses, on a confession and on the discovery of some of the murdered woman's jewellery in his possession. The Sessions Judge disbelieved the evidence of the approver and of the corroborating witnesses and convicted on the confession, supported by the production of the jewels.

Chinnathayee disappeared on 28th April. On 21st May the approver and the appellant led the magistrate and the police to a place, where, they said, her body had been buried. The earth was removed and the disintegrated skeleton of a human being, with some flesh adhering to parts of it, was discovered, which the medical officer certified to be that of a woman. The shoulder-blades and collar-bones and eight ribs were missing—a very strange circumstance, as there is no suggestion that the body had not been buried immediately after death or that it had been dug up and attacked by jackals. Apart from that, the various parts of the skeleton had become detached from each other, a circumstance which is not reconcilable with the theory that it was that of a woman who had been killed and buried only twenty-three days before the exhumation. That being so, we find it impossible to say that we are satisfied that the body was that of Chinnathayee. It follows that the confession, on which the conviction mainly rests, cannot be accepted as true on a very material point. That leaves only the alleged discovery of Chinnathayee's jewels, the identification of which is not entirely satisfactory. The conviction must accordingly be set aside. Mr. Jayarama Ayyar raised, in the course of his argument, an interesting point. The confession, on which the Sessions Judge relied, did not bear the certificate required by section 164 (3) of the Code of

Criminal Procedure. The magistrate was called, therefore, to prove that he not only administered the required caution to the appellant, but also satisfied himself that the confession had been made voluntarily. Exhibit M, the confessional statement, itself shews that the appellant assured the magistrate that he was not acting under any compulsion. The only question, then, that remained was as to the caution prescribed by the section. The magistrate swore that he administered it and, if he was speaking the truth, Mr. Jayarama Ayyar's objection disappears. Let us, however, assume that he was not and that no caution was given, does it follow necessarily that Exhibit M could not be admitted in evidence? The general effect of the decisions on section 164 is that it could not. We venture to express a doubt whether they are correct. The Legislature, when it amended the section so as to prescribe that an accused person must be warned that he is not bound to confess and that his confession may be used against him, apparently overlooked section 29 of the Evidence Act. That section provides, *inter alia*, that a confession otherwise admissible—as Exhibit M is—does not become inadmissible, because the accused person “was not warned that he was not bound to make such confession and that evidence of it might be given against him”. The Code of Criminal Procedure does not, save in Chapter XLI, and in certain sections, such as 287, 288, 512, 507 and 533 itself, lay down any rules as to the admissibility of evidence. And all that section 533 seems to do is to allow oral evidence to be given in a case where the Evidence Act would not allow it to be given and the overriding of the Evidence Act is specifically provided for in the section itself. Section 164 of the Code of Criminal Procedure, however, does not pretend to override section 29 of the Evidence Act.

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The position would therefore seem to be this that, though section 164 of the one Act makes it imperative that the accused person should be cautioned, section 29 of the other says that his statement is not inadmissible in evidence, merely because the prescribed caution has not been administered. And it is to the latter Act that, as a rule, we have to look, when there is a question of the admissibility of a particular piece of evidence; see *Emperor v. Misri*(1).

There is another provision of law that the Legislature appears to have overlooked, that is, sub-section (2) of section 163 of the Code of Criminal Procedure. It says that "no police-officer or other person", which presumably includes a magistrate, "shall prevent by any caution or otherwise any person from making, in the course of any investigation under this Chapter, any statement which he may be disposed to make of his own free will." That was entirely consistent with section 164 in its unamended form, when all that a magistrate had to consider was whether the confession was voluntary. Now that he is directed to administer a caution as well, the position has become anomalous. One section deprecates the administering of a caution, the other makes it imperative. If the caution is successful and the accused person, as a result of it, is prevented from making a statement he wishes to make of his own free will, has not the magistrate done something illegal? That is a question we need not answer at present. It is sufficient for us to point out that the position is far from being as clear as the decisions that have been placed before us indicate. We allow the appeal and direct that the appellant be set at liberty.

K.N.G.

(1) (1909) I.L.R. 31 All. 582 (F.B.).

APPELLATE CRIMINAL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

IN RE PACHAIMUTHU *alias* CHINNAPAYYAN AND FOUR
OTHERS, ACCUSED.*

1932,
January 21.

Code of Criminal Procedure (Act V of 1898), sec. 307—Reference under—Case triable, as regards some offences, by jury and, as regards others, with aid of assessors—Reference of whole case not proper—Judge must dispose of assessor-charges and then make reference.

Five accused persons were tried by the Assistant Sessions Judge of Salem on charges of rioting, assault and causing hurt and grievous hurt to public servants in the discharge of their duty (under sections 147, 353, 332 and 333, Indian Penal Code) and also under section 379, Indian Penal Code, for having committed theft of a log of wood from the reserve forest. The jury were asked to give their verdict on the charge of theft and their individual opinion as assessors on the other charges. The jury returned a unanimous verdict that the accused were not guilty of theft; as assessors they were individually of opinion that none of the accused was guilty of any offence. The Assistant Sessions Judge did not agree with the verdict of the jury. He was of opinion that the case of theft against accused 1 to 5 was established and also that the other charges of rioting, assault, hurt and grievous hurt were made out against the various accused. Under section 307 of the Code of Criminal Procedure he referred the whole case to the High Court, being of opinion that, under clause 2 of section 307, when a reference to the High Court is made on any one charge, the Court referring the case cannot record judgment of acquittal or conviction on the other charges.

Held, that the Court had no jurisdiction to refer the whole case, that it ought to have disposed of the other charges which were triable with the aid of assessors and then, if necessary, referred the jury-charge to the High Court.

Emperor v. Kalidas, (1898) 8 Bom. L.R. 599, and *Emperor v. Vyankatsing*, (1907) 9 Bom. L.R. 1057, referred to.

* Reference No. 12 of 1931.

PAGHAI-
MUTHU,
In re.

REFERENCE under section 307 of the Code of Criminal Procedure, 1898, by the Assistant Sessions Judge of the Court of Session, Salem Division, in Case No. 88 of the Calendar for 1931.

Public Prosecutor (L. H. Bewes) for the Crown.
C. S. Swaminathan for accused.

The JUDGMENT of the Court was delivered by

WALLER J. WALLER J.—We must decline to accept the reference, which seems to be premature. The Assistant Sessions Judge should have disposed of the charges which were triable with the aid of assessors. When he has done so, it will be open to him to consider whether the interests of justice require that he should make a reference under section 307 of the Code of Criminal Procedure on the other charge. He had no jurisdiction to refer the whole case; see *Emperor v. Kalidas*(1) and *Emperor v. Vyankatsing*(2). The case reported as *Re Mutyalu*(3) raises a different question.

The records will be returned to the Assistant Sessions Judge for disposal in accordance with law.

K.N.G.

(1) (1898) 8 Bom. L.R. 599.

(2) (1907) 9 Bom. L.R. 1057.

(3) (1912) I.L.R. 37 Mad. 236.

APPELLATE CRIMINAL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

IN RE ARUNACHALA REDDI (ACCUSED), PRISONER.*

1932,
January 25.

Code of Criminal Procedure (Act V of 1898), sec. 190 (1) (c)—
Information by offender himself amounting to a confession—Cognizance of offence on—Magistrate entitled to take—Confession—Admissibility in evidence of—Conditions—Evidence Act (I of 1872), ss. 24, 25 and 26—Sec. 164 of Code of Criminal Procedure—Effect of.

A magistrate, duly empowered to take cognizance of any offence under section 190 (1) (c) of the Code of Criminal Procedure, is entitled to record and act on the information furnished by the offender himself even though such information amounts to a confession. Confessions, like admissions, are relevant evidence under the Indian Evidence Act unless they are rendered inadmissible by circumstances which the Act declares to be of an invalidating nature. Examples of such circumstances are to be found in sections 24, 25 and 26 of the Act. Section 164 of the Code of Criminal Procedure does not exclude confessions otherwise admissible. It provides for the manner in which confessions made during a police investigation shall be recorded.

TRIAL referred by the Court of Session of the South Arcot Division for confirmation of the sentence of death passed upon the said prisoner in Case No. 44 of the Calendar for 1931.

N. Somasundaram for accused.

Public Prosecutor (L. H. Bewes) for the Crown.

Cur. adv. vult.

THE JUDGMENT of the Court was delivered by
WALLER J.—The appellant has been convicted of the murder of his maternal uncle and brother-in-law, Thirumalai Reddi. The main evidence against him is

WALLER J.

* Referred Trial No. 174 of 1931.

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his own confession (Exhibit A), corroborated by the evidence of P.W. 4 and by the fact that the cloths he had been wearing were stained with human blood. The first information of the occurrence was given by the appellant himself. After killing his uncle, he went straight to the nearest magistrate (P.W. 1) and told him what he had done. The magistrate told him to pull himself together and gave him an hour for reflection. At the end of that time, the appellant was still in the same mood and made a complete confession, which the magistrate recorded in the manner prescribed by section 164 of the Code of Criminal Procedure, which he need not have done, as the confession was not taken under that section. It is contended now, as it was contended in the Court below, that Exhibit A is inadmissible in evidence, because the investigation had not then begun. The Sessions Judge rejected the contention, holding that the magistrate was entitled, under section 190 (1) (c) of the Code of Criminal Procedure, to record and act on the information furnished by the appellant himself. His view was, in short, that an investigation by the police was not an indispensable condition for the initiation of proceedings against the appellant and that section 164 of the Code of Criminal Procedure applied only to confessions made during the course of an investigation by the police. Assuming that the magistrate was duly empowered to act under section 190 (1) (c), his view was correct. Apart from that, confessions, like other admissions, are relevant evidence under the Evidence Act, unless they are rendered inadmissible by some circumstance or circumstances which the Act declares to be of an invalidating nature. Examples of such circumstances are to be found in sections 24, 25 and 26 of the Indian Evidence Act. They do not exist here. Section 164 of the Code of Criminal Procedure

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does not exclude confessions otherwise admissible. It provides for the manner in which confessions made during a police investigation shall be recorded. We must hold that Exhibit A was rightly admitted in evidence. The confession was made under circumstances that indicate that it was not merely true, but also made quite voluntarily. No doubt, the appellant has since retracted it, but the reason he gave for making a false confession, that he was so horrified at learning that his relatives were going to implicate him falsely and that he saved them the trouble by implicating himself, is so absurd as to deserve no consideration whatever.

In addition to the confession to P.W. 1 he is alleged to have confessed to several of the other witnesses while he was on his way to the magistrate. The Sessions Judge did not accept the evidence of those witnesses, but we can see no reason why they should have been disbelieved. The appellant obviously was in the mood to tell every one all about the affair and doubtless confessed to any of his acquaintance that he happened to meet. In addition to the confessions, there is the evidence of P.W. 4, which would by itself, if believed—and we can find no adequate ground for disbelieving it—be sufficient to bring home the charge to the appellant. There is also the fact that the cloths which he was wearing when he was arrested were stained with human blood.

The conviction is right. The only sentence that seems appropriate is that which has been imposed. Both it and the conviction are confirmed and the appeal is dismissed.

K.N.G.

APPELLATE CIVIL—FULL BENCH.

Before Sir Owen Beasley Kt., Chief Justice, Mr. Justice —
Ramesam and Mr. Justice Cornish.

1932,
January 19.

NALAM SUBRAMANYAM (PETITIONER-TRANSFEREE-
DECREE-HOLDER), PETITIONER,

v.

DEVARA RAMASWAMI AND FOUR OTHERS (COUNTER-
PETITIONERS AND JUDGMENT-DEBTORS), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XXI, r. 16—
Application by transferee-decree-holder under—Plea of
uncertified adjustment of decree by judgment-debtor—If
sustainable.*

In an application under Order XXI, rule 16, of the Code of Civil Procedure by a transferee-decree-holder, the judgment-debtor cannot plead an uncertified adjustment of the decree as an objection to its execution.

Pamidimarri Gnanamma v. Raja Seetharama Chandra, (1929) 119 I.C. 480, followed. *Raghunath Govind v. Gangaram Yesu*, (1923) I.L.R. 47 Bom. 643, dissented from. *Ramayya v. Krishnamurti*, (1916) I.L.R. 40 Mad. 296, overruled on this point.

PETITION under section 25 of the Provincial Small Cause Courts Act (IX of 1887) to revise the order of the Court of the Subordinate Judge of Cocanada in Execution Petition No. 449 of 1926 in Small Cause Suit No. 747 of 1919.

S. Srinivasa Ayyar for petitioner.—The question for consideration is, whether an executing Court can recognize an uncertified payment when the party seeking execution is a transferee-decree-holder. The two relevant rules are rules 2 and 16 of Order XXI, Civil Procedure Code. The application by the transferee-decree-holder under rule 16 is one for execution of the decree. If the Court to which he applies is an executing Court, then an uncertified adjustment of the decree

* Civil Revision Petition No. 1205 of 1927.

cannot be recognized by that Court under rule 2. The case of *Raghunath Govind v. Gangaram Yesu*(1) which is in favour of recognition of an uncertified adjustment of a decree does not consider the fact that the application under rule 16 is one for execution. In *Venkataswami Naidu v. Rangappa Naidu*(2) an uncertified adjustment has not been recognized. This case was followed in *Anantha Rama Aiyar v. Kumarasami Pandaram*(3). See also *Pamidimarri Gnanamma v. Raja Seetharama Chandra*(4).

V. Viyyanna for respondents.—The respondents can show that the transfer should not be recognized inasmuch as the decree is satisfied.

[BEASLEY C.J.—How can he show it unless by asking the Court to recognize an uncertified adjustment?]

Raghunath Govind v. Gangaram Yesu(1) is on all fours with the present case. This case was followed in *Ganpaya v. Krishnappa*(5). See also the judgment in *Agra Bank v. Cripps*(6) and the judgment of SUNDARA AYYAR J. in *Ponnusami Nadar v. Letchmanan Chettiar*(7) and of SADASIYA AYYAR J. in *Ramayya v. Krishnamurti*(8) and of WALLER J. in an unreported case, viz., Civil Suit No. 354 of 1913 on the file of High Court of Judicature at Madras.

Our. adv. vult.

JUDGMENT.

BEASLEY C.J.—In this civil revision petition the question raised is whether a judgment-debtor, debarred under Order XXI, rule 2, of the Code of Civil Procedure for failure to certify from pleading adjustment of a decree, can nevertheless plead such adjustment when opposing a transfer under Order XXI, rule 16, of the Code of Civil Procedure.

The petition was argued before our learned brother JACKSON J. and, in view of the differing opinions of various Judges in cases to which reference was made

(1) (1923) I.L.R. 47 Bom. 643.
(3) (1919) 10 L.W. 179.
(5) (1924) 26 Bom. L.R. 491.
(7) (1911) I.L.R. 35 Mad. 659.

(2) (1914) 2 L.W. 109.
(4) (1929) 119 I.C. 480.
(6) (1885) I.L.R. 8 Mad. 455.
(8) (1916) I.L.R. 40 Mad. 296.

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in the course of the argument the matter has been posted for argument before a Full Bench.

JACKSON J. is inclined to the view that the question raised is one which should be answered in the negative.

Upon this question the High Courts in India have taken different views. In this High Court, WALLACE and PAKENHAM WALSH JJ. in *Pamidimarri Gnanamma v. Raja Seetharama Chandra*(1) held that the judgment-debtor could not plead an uncertified adjustment in opposition to an application for recognition of a transfer of a decree. The Bombay High Court has, however, taken the opposite view in *Raghunath Govind v. Gangaram Yesu*(2). The reason underlying that decision is that, where an application is made under Order XXI, rule 16, Civil Procedure Code, it is open to the judgment-debtor to oppose such application on the ground that the transferee-applicant is not the transferee of the decree because the decree has ceased to exist by reason of a previous, though uncertified, adjustment, that is to say, the uncertified adjustment is made available to the judgment-debtor for the purpose of attacking the transferee-applicant's character as transferee. A distinction is also drawn between the Court passing the decree and the Court executing the decree. It was contended in that case and here that the bar of recognition of an uncertified adjustment can only be set up in the executing Court and that by reference only to the executing Court in rule 2 of Order XXI the Court which passed the decree is ruled out. A similar view to that taken by the Bombay High Court in *Raghunath Govind v. Gangaram Yesu*(2) was taken in *Ponnusami Nadar v. Letchmanan Chettiar*(3) by SUNDARA

(1) (1929) 119 I.C. 480.

(2) (1928) I.L.R. 47 Bom. 643.

(3) (1911) I.L.R. 35 Mad. 659.

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AYYAR J., who held that Order XXI, rule 2, does not make an uncertified adjustment invalid but merely forbids effect being given to such an adjustment when it is set up as a defence to the execution of a decree by one entitled to do so, and that the section will not disentitle the judgment-debtor to prove facts which will show that the applicant is not the real transferee, even if the facts he relies on show that the decree has been adjusted. ABDUR RAHIM J., the other member of that Bench, however, took the contrary view. In *Ramayya v. Krishnamurti*(1) SADASIVA AYYAR J. took the same view as SUNDARA AYYAR J., and MOORE J. agreed with him. In that case the judgment-debtor was held not debarred from proving facts which will show that a transferee of a decree applying for execution is merely a *benamidar* of another judgment-debtor even if the facts on which he relies show that there has been a payment which has not been certified. In *Anantha Rama Aiyar v. Kumarasami Pandaram*(2) AYLING J. held that an uncertified adjustment cannot be considered by the Court as a ground for refusing to recognize the transfer of the decree and that, where the transferee-decree-holder applies for execution, the Court has no discretion to refuse execution on the ground that there has been an adjustment, though not certified to the Court. We have also been referred to a recent decision of WALLER J. in Civil Suit No. 354 of 1913. In that case it was successfully contended that the decision in *Raghunath Govind v. Gangaram Yesu*(3) was correct. As before stated, in *Raghunath Govind v. Gangaram Yesu*(3) it was held that the Court passing the decree was not the executing Court and was, therefore, not prohibited from recognizing an uncertified adjustment, whereas by Order XXI, rule 2, it is the

(1) (1916) I.L.R. 40 Mad. 296.

(2) (1919) 10 L.W. 179.

(3) (1923) I.L.R. 47 Bom. 643.

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executing Court which is prohibited from recognizing it. In my view, it is incorrect to regard the Court which passed the decree as not being the executing Court as well. In the case before us the decree had not been transferred for execution to another Court and the application was by the transferee-decree-holder for execution. The fact that the executing Court is the same Court that passed the decree does not deprive the Court of its character as an executing Court as well. It is not correct, in my opinion, to treat applications under Order XXI, rule 16, as applications merely for the recognition of the transfer of a decree to the transferee. The marginal note to rule 16 is "Application for execution by transferee of decree." The transferee-decree-holder has of course to be recognized as the transferee but the application is for execution by him in that capacity, and it seems to me that the application is not deprived of its character as an execution petition by reason of the fact that the position of the transferee has at the same time to be recognized and is open to attack by the judgment-debtor. WALLER J., in Civil Suit No. 354 of 1913 to which reference has already been made, is of the opinion that the Court is both a Court which passed the decree and a Court executing the decree. With that view I agree; but it seems to me to follow that, as soon as its character as a Court executing the decree is recognized, the bar to recognition by it as the executing Court of an uncertified adjustment arises under Order, XXI, rule 2, and as I have before stated the application under Order XXI, rule 16, is an application for execution. In impeaching the character of the transferee it is not, in my opinion, open to the judgment-debtor to contend that the transferee is not a transferee because there is no existing decree to be transferred. The decree is in the Court

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and it remains an effective decree and has to be recognized as such until it is shown that there has been an adjustment which has been certified, either wholly in which case there is no decree or partially in which case the decretal amount is diminished by the amount certified. It is open to the judgment-debtor to attack the transferee's position by showing that he cannot legally possess that character or that he is a *benamidar* and for reasons of a similar nature. But, in my view, it is not permissible to argue that there is no decree to be transferred to him where there has been no certified adjustment. The transferee of the decree should occupy no better position than the decree-holder and he should not occupy a worse one. If *Raghunath Govind v. Gangaram Yesu*(1) correctly states the law, the judgment-debtor is put in a better position than he occupied before the debt was assigned and the transferee of the decree in a worse one than the decree-holder. Where a decree has been adjusted, if the decree-holder does not certify such adjustment to the Court, the judgment-debtor himself may apply to the Court to issue a notice to the decree-holder to show cause why such an adjustment should not be recorded as certified. Under article 174 of the Limitation Act he has 90 days in which to do this. If the decree-holder has not certified the adjustment and the judgment-debtor has not got the adjustment recorded within that period, such an adjustment cannot be recognized by the Court executing the decree. If the decisions in *Raghunath Govind v. Gangaram Yesu*(1) and the other cases holding the same view are correct, then if the decree is subsequently assigned, it may be years after the 90 days' period of limitation has expired, the bar of limitation is removed

(1) (1923) I.L.R. 47 Bom. 643.

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in favour of the judgment-debtor. This seems to me to place the judgment-debtor in a privileged position which is quite unwarranted. In my view, we should not follow the decision in *Raghunath Govind v. Gangaram Yesu*(1) and the other decisions to the same effect and must hold that the judgment-debtor cannot plead an uncertified adjustment in opposition to an application under Order XXI, rule 16, by the transferee-decreeholder.

The civil revision petition is allowed with costs in the High Court.

RAMESAM J.—I agree.

CORNISH J.—I agree.

G.R.

(1) (1923) I.L.R. 47 Bom. 643.

APPELLATE CIVIL.

Before Sir Owen Beasley Kt., Chief Justice,
and Mr. Justice Cornish.

A. D. NARAYANA SAH AND THREE OTHERS (DEFENDANTS
ONE TO FOUR), APPELLANTS,

1931,
November 20.

v.

KANNAMMA BAI AND FIVE OTHERS (PLAINTIFF AND NIL),
RESPONDENTS.*

Defamation—Slander—Spoken words imputing unchastity to a Hindu woman—Special damage—Maintainability of suit by her on the Original Side of the High Court without proof of—Caste—Wrongful expulsion from—If actionable, apart from slander—‘Justice and right’ and ‘Justice, equity, and good conscience’—Meaning of—Law in Presidency-town same as in mofussil—Mayor’s Court Charters, 1687, 1726 and 1753; Recorder’s Court Charter, 1798; Supreme Court Charter, 1800; Regulation II of 1802; Letters Patent (Madras) 1862 and 1865, cl. 19—Discussed.

A suit for defamation in respect of spoken words imputing unchastity is maintainable by a Hindu woman on the Original Side of the High Court without proof of special damage.

A wrongful expulsion from caste gives rise to a cause of action quite apart from the slander, although such slander was the cause of the expulsion, and a suit claiming damages for wrongful expulsion from caste is maintainable.

There is no real distinction between the words “justice and right” and “justice, equity and good conscience” and the law as regards slander suits claiming damages is the same in the Presidency-town as in the mofussil.

APPEAL against the judgment of EDDY J., dated 25th November 1929, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 494 of 1928.

* Original Side Appeal No. 8 of 1930.

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S. Doraiswami Ayyar for *T. R. Venkatarama Sastri*
and *V. Sivaprakasa Mudaliyar* for appellants.

K. Krishnaswami Ayyangar for *M. A. T. Coelho* and
T. Krishnarajan for respondents.

Our. adv. vult.

JUDGMENT.

BEASLEY C.J.—This is an appeal from a judgment of EDDY J. The plaintiff in the Court below, who has since died, was a Hindu widow claiming to be a member of the Bhujakshatriya community. The first two defendants are brothers and all the defendants with the exception of the second defendant are responsible officers of that community. The plaintiff's claim was for damages for slander and for a declaration, injunction, and damages for excommunication. Her case was that the defendants orally stated that she had given birth to an illegitimate child in the Gosha Hospital, Madras. The learned trial Judge found that all the defendants uttered the slander complained of and gave the plaintiff Rs. 2,000 in respect of her claim for damages. Then the next claim of the plaintiff was that she was excommunicated by the defendants without being given an opportunity of defending herself against a charge of unchastity made by two women to the defendants that she had given birth to an illegitimate child at the Gosha Hospital and praying for a decision of the caste Panchayat. This was in May 1927 and the result of the allegation was that the defendants decided in May to excommunicate the plaintiff on account of the charge of unchastity made against her. She was accordingly excommunicated, and it is said that the order of excommunication was promulgated in October 1927 when the defendants uttered the slander complained of by the plaintiff, and in respect of which she

sought damages in the trial Court. In respect of the wrongful excommunication she claimed a declaration that the order of excommunication was invalid and that she was entitled to be readmitted into the Bhujakshatriya community and an injunction restraining the defendants from enforcing the order of excommunication and from publishing the alleged defamatory statements and damages. In the plaint it is alleged that the slander was published on and between the 7th May 1927 and the 15th October 1927. It is obvious that, with regard to the former date, the suit for damages is barred by limitation, but the learned trial Judge has found as a fact that the slander was again published on the 15th October 1927 and, as the suit was filed in September 1928, the plaintiff's claim with regard to that slander was not barred. On the claim for damages for wrongful excommunication, the plaintiff has been awarded by the learned trial Judge Rs. 500 as damages. He has also granted her the declaration and injunction prayed for.

This case raises two very interesting points (i) whether a claim for damages by a Hindu woman in respect of an allegation of unchastity is sustainable on the Original Side of this High Court without proof of special damage and (ii) whether a suit claiming damages for wrongful excommunication is maintainable.

Upon the first point we have had the benefit of the very able arguments of Mr. Doraiswami Ayyar on behalf of the appellants and Mr. K. Krishnaswami Ayyangar on behalf of the respondents. Mr. Doraiswami Ayyar's contention is that the law with regard to slander which has to be administered on the Original Side of this High Court is the Common Law of England and that the Slander of Women Act of 1891 is not made applicable to India, and that, therefore, as no special

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damage was set out in the plaint and proved at the trial, the plaintiff's suit for damages for slander ought to have been dismissed. This contention opens up at once a large and interesting discussion as to what is the law to be administered by the High Courts here; and in order to guide us, we have been taken back to the earliest Charters of the Courts in this Presidency-town. We have had a very careful examination of the first Mayor's Court Charter of 1687, the Mayor's Court Charters of 1726 and 1753, the Recorder's Court Charter of 1798, the Supreme Court Charter of 1800, the Letters Patent of this High Court of 1862 and the amended Letters Patent of 1865. We have also been referred to Regulation II of 1802 applicable to the Madras mofussil Courts. In the Mayor's Court Charter of 1687

"all causes whatsoever, civil and criminal, between party and party whoever they be shall be adjudged according to 'equity and good conscience'."

In the Mayor's Court Charter of 1726 the judgment is to be given according to "justice and right". In the Mayor's Court Charter of 1753 the Court is to give judgment according to "justice and right". In the Recorder's Court Charter of 1798, the Court is

"to have such jurisdiction and authority as Our Justices of Our Court of King's Bench have, and may lawfully exercise, within that part of Great Britain called England, as far as circumstances will admit",

and the Court is to give judgment according to "justice and right". The next Charter is the Supreme Court Charter of 1800. In it the Court is invested with a jurisdiction similar to the jurisdiction of the King's Bench in England and it is also to give judgment according to "justice and right". By clause 21 of the Charter it is provided that

"the Court . . . shall have like power and authority to hear, try and determine all, and all manner of civil suits and actions, which, by the authority of any Act or Acts of Parliament, might have been heard, tried or determined by the said Mayor's Court at Madras aforesaid, or which may now be heard, tried or determined by the said Court of the Recorder of Madras."

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In the Letters Patent of this High Court of 1862 the law to be administered by this High Court in Civil cases in the exercise of its Ordinary Original Civil Jurisdiction is to be such law and equity which would have been applied by the Supreme Court at Madras if these Letters Patent had not been issued. In the amended Letters Patent of this High Court of 1865 the law to be administered by the High Court in its Ordinary Original Civil Jurisdiction is the same as in the earlier Letters Patent. It seems clear, therefore, that the law to be applied in this High Court in the exercise of its Ordinary Original Civil Jurisdiction is that obtaining in the old Mayor's Court. In *The Advocate General of Bengal v. Ranee Surnomoye Dossee*(1) the Calcutta Charter of 1726 was under discussion and it was admitted in argument that it only applied to European servants of the Company. On page 430, Lord Kingsdown in delivering the judgment of the Privy Council states as follows:—

"The English Law, Civil and Criminal, has been usually considered to have been made applicable to Natives, within the limits of *Calcutta*, in the year 1726, by the Charter, 13th Geo. I. Neither that nor the subsequent Charters expressly declare that the English Law shall be so applied, but it seems to have been held to be the necessary consequence of the provisions contained in them."

In that case what was being considered was whether the English Law of *felo de se* and forfeiture of goods

(1) (1863) 9 M.L.A. 391.

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and chattels does not extend to a native Hindoo, though a British subject, committing suicide at Calcutta. The Privy Council declined to apply the English Law and in the course of the judgment it is pointed out that the application of other English Laws, such as bigamy, to the inhabitants of this country would be improper. Dealing with the law which has to be administered, at page 22 of Morley's Digest, Volume 1, the law obtaining in the Supreme Courts at the three Presidency-towns is stated to be under seven distinct heads.

"1. The Common Law, as it prevailed in England in the year 1726, and which has not subsequently been altered by Statutes especially extending to India, or by the Acts of the Legislative Council of India.

2. The Statute Law which prevailed in England in 1726, and which has not subsequently been altered by Statutes especially extending to India, or by the Acts of the Legislative Council of India.

3. The Statute Law expressly extending to India, which has been enacted since 1726, and has not been since repealed, and the Statutes which have been extended to India by the Acts of the Legislative Council of India.

4. The Civil Law as it obtains in the Ecclesiastical and Admiralty Courts in England.

5. Regulations made by the Governor-General in Council and the Governors in Council previously to the 3rd and 4th Will. IV, c. 85, and registered in the Supreme Courts, and the Acts of the Legislative Council of India made under the 3rd and 4th Will. IV, c. 85.

6. The Hindu Law in actions regarding inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party in which a Hindu is a defendant.

7. The Muhammadan Law in actions regarding inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party in which a Muhammadan is a defendant.

We have to consider in this case whether classification No. 1 is correct or not. *The Advocate-General of Bengal*

v. *Ranee Surnomoye Dossee*(1), to which reference has already been made, it will be seen, does not entirely support the learned author of Morley's Digest. In the Supplement to the Government of India Act by Sir Courtenay Ilbert, 3rd Edition, page 360, it is stated as follows :—

"In matters for which neither the authority of Hindu or Muhammadan text-books or advisers nor the regulations and other enactments of the Government supplied sufficient guidance, the Judges of the Civil Courts were usually directed to act in accordance with 'justice, equity and good conscience'. An Englishman would naturally interpret these words as meaning such rules and principles of English Law as he happened to know and considered applicable to the case; and thus under the influence of English Judges, native law and usage were without express Legislation largely supplemented, modified and superseded by English Law."

Then again on page 366 it is stated :

"The law of Torts or civil wrongs, as administered by the Courts of British India, whether to Europeans or to natives, is practically English Law. The draft of a Bill to codify it was prepared some years ago, but the measure has never been introduced."

This latter statement is more in accordance with the view expressed in *The Advocate-General of Bengal v. Ranee Surnomoye Dossee*(1) than that in Morley's Digest because it would seem to mean that the English Common Law is applied in this country wherever practicable. There have been a number of old decisions in this country upon this question. The first of these to which it is necessary to refer is *Bhooni Money Dossee v. Natobar Biswas*(2). This was a decision of a single Judge; and if this correctly states the law, then the judgment of the trial Court was wrong. That was, like this, a suit for damages against the defendant for having falsely and maliciously used slanderous

(1) (1863) 9 M.I.A. 391.

(2) (1901) I.L.R. 28 Cal. 452.

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words imputing unchastity to the plaintiff, a Hindu married woman. No special damage was alleged in the plaint, nor any actual damage proved at the trial; and it was held that, as the words were not *per se* actionable and as no damage in fact was alleged or proved, the action must be dismissed with costs. HARINGTON J. followed the English Common Law holding that the action was not sustainable without proof of special damage. In his view, by the Charter of 1726, the Common Law of England was introduced into Calcutta. The learned Judge dissented from the decision of the Madras High Court in *Parvathi v. Mannar*(1), and he distinguished those cases decided in the mofussil Courts in which the contrary view to that expressed by him had been taken as distinguishable on the ground that the English Law is not to be applied to the mofussil, an argument adopted here by Mr. S. Doraiswami Ayyar in his contention that *Parvathi v. Mannar*(1) has no application to a suit in the High Court. Although the state of the English Law with regard to slander previous to the Slander of Women Act of 1891 was considered unsatisfactory, in HARINGTON J.'s opinion, the reasons rendering that law unsatisfactory do not apply here because the slandered person can have his or her remedy in the Criminal Courts where the slanderer can be punished whether the slanders are reduced to writing or not, that is to say, a slandered lady is able to clear her character as effectually and probably more effectually than it would be cleared if she was entitled to claim pecuniary compensation or damages. The criminal law of England is different as there slander is not a criminal offence. HARINGTON J. states at page 465:

(1) (1894) I.L.R. 8 Mad. 175.

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"Where it is proposed to depart from the rules of English Law, which have been introduced into this country, it must be shown that those rules, if adhered to, in this country, will work an injustice or a hardship. Here no injustice is worked by an adherence to those rules, because in cases where the person aggrieved is unable to prove that he has suffered actual damage, he can call in the criminal law to punish the wrong-doer. *Prima facie* there is nothing repugnant to justice, equity and good conscience in calling on a person, who is claiming pecuniary compensation for damage caused by a wrongful act, to prove that some damage has been caused to him by the act of which he complains."

This judgment, therefore, admits that the Common Law of England need not be rigidly followed where, if it is adhered to in this country, it will work an injustice or hardship. Upon this point, of particular value it seems to me are the observations of KEMP J. in *Hirabai Jehangir v. Dinshaw Edulji*(1). There it was held that in an action for slander, the law to be applied to Parsis, in the town and island of Bombay, is the English Common Law so far as the circumstances of the place and of the inhabitants admit; that, should for any reason such law be inapplicable, the Court must decide the case according to "justice and right", and that accordingly where an imputation of unchastity is falsely made against a Parsi married woman, she can sue for slander without proof of special damage. KEMP J., at page 191, says:

"Adultery is not, except where it amounts to treason, a crime in England, and to impute adultery to a married woman is not to impute to her a crime which would dispense with the necessity of laying special damage. In India, section 497 of the Indian Penal Code specifically makes adultery a crime but says, at the same time, that the wife is not punishable as an abettor. We therefore have this manifest absurdity that, if we apply the English Common Law on the point, a Parsi residing in the town and island of Bombay against whom a false imputation of adultery is levied has a remedy by a suit for

(1) (1926) I.L.R. 51 Bom. 167, 191, 192.

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damages, whilst a married Parsi woman against whom the same false imputation is made has none. I think that a law by the application of which such an unjust distinction arises cannot be said in this respect to be applicable to circumstances arising in India and the case of a married woman to whom unchastity is falsely imputed must be dealt with according to the justice and right enjoined by the Charter."

At page 192 he says :

"The relation also in which the wife stands in India to her husband induced the authors of the Code (Indian Penal Code) to include adultery in the list of offences for which a complaint might be made by the husband against the traducer. At the same time, they exempted from punishment the wife whose lot they regarded at the time when the Code was drafted as already sufficiently hard. That this consideration for the wife should place her at a disadvantage in respect of the relief obtainable through a Civil Court for an aspersion on her chastity was a result which was never contemplated. No doubt virtue in a woman is as much praised in India as it is in England, but whilst in England the punishment of the paramour, apart from the liability for damages in a matrimonial petition, was left to the aggrieved husband, here the law makes the adulterer guilty of an offence under the Indian Penal Code. The absurdity and injustice of the distinction before referred to in the latter case is accentuated when we recognize the fact, which I think we must, that a slander on her chastity is a greater injury to a woman."

To my mind, the absurdity pointed out by KEMP J. would be quite sufficient to justify a departure in India from the English Common Law with regard to this matter. There is also another absurdity if the contention of the appellants here is correct, namely, that *Parvathi v. Mannar*(1) is not applicable to this High Court because the law on the point is different in the mofussil to that here. If that view is correct, the position would be that a woman whose chastity is assailed by words spoken just over the municipal limits of the Presidency-town need not allege special damage

(1) (1884) I.L.R. 8 Mad. 175.

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in order to maintain a suit against her slanderer but that where exactly the same words are uttered inside those limits and no special damage is alleged, the slandered woman has no cause of action. One distinction pointed out by HARRINGTON J., namely, the right to punish the slanderer in Criminal Courts, is of no importance in this example because, in either case, whether in the mofussil or inside the Presidency-town, a slandered woman has her criminal remedy. Having regard to the fact that this absurd distinction is admitted by the appellants—indeed it had to be admitted in order to distinguish *Parvathi v. Mannar*(1)—it would be another reason for not applying the English Common Law. It is not suggested by the respondents that the English Common Law of slander should not be applied in other respects. It is merely contended that the Courts are entitled to say how far it can be applied and that, if it is found owing to the circumstances of the place and of its inhabitants to be inapplicable, the Court must decide the case according to "justice and right". It would appear that the view consistently adopted in Bombay has been that the English Common Law is to be applied where circumstances permit provided it does not owe its origin to conditions peculiar to England. In *The Advocate-General of Bengal v. Ranee Surnomoye Dossee* (2), already referred to, PEACOCK C.J., who delivered the judgment of the Supreme Court, which is set out in the report of that case, referring to the Charter, 13 Geo. I, at page 398, is thus reported :

"There can be no doubt that it was intended that the English law should be administered as nearly as the circumstances of the place, and of the inhabitants, should admit. The words, give judgment according to justice and right, in suits and pleas between party and party, could have no

(1) (1884) I.L.R. 8 Mad. 175.

(2) (1863) 9 M.I.A. 391.

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other reasonable meaning than justice and right, according to the laws of England, so far as they regulated private rights between party and party. Such general words could not possibly refer to any law, such as the Mortmain Act, or the Alien Laws, which had reference merely to some views of public policy, supposed to be applicable to England."

It has been argued that this view can only be understood to mean that in doing "justice and right" the Courts were to do it according to the laws of England without any qualification, but that contention, in my view, cannot be accepted in view of the earlier words of PEACOCK C.J., namely,

"that the English Law should be administered as nearly as the circumstances of the place, and of the inhabitants, should admit."

I now turn to *Parvathi v. Mannar*(1). That case raised the question whether an action for damages for slander with regard to her chastity could be maintained without proof of special damage by a married woman and it was held by TURNER C.J. and MUTHUSWAMI AYYAR J. that the rule of English Law which prohibits, except in certain cases, an action for damages for oral defamation, unless special damage is alleged, being founded on no reasonable basis, should not be adopted by the Courts of British India. This was a suit in a mofussil Court and, as I understand it, has been regarded as good law since its decision in 1884. The argument that it has no application to the suit under appeal because it was a case in a mofussil Court appears to me to state the very reason for holding that the English Common Law is inapplicable having regard to the circumstances of the place, its laws, its people and the consequences of such a slander upon a married woman under the customs of this country. Anything more

(1) (1884) I.L.R. 8 Mad. 175.

manifestly absurd than to make a distinction between slander in the mofussil and one in the Presidency-town it is impossible to imagine. In *Sukkan Teli v. Bipad Teli and another*(1) it was held that the rule laid down in *Bhooni Money Dossee v. Natobar Biswas*(2) does not govern a suit in the mofussil for a slander alleging unchastity on the part of a married woman. It is difficult to follow why there should be any distinction between a suit in the mofussil and one in a Presidency-town in respect of similar slander; and the words used in Regulation II of 1802 applicable to the Madras Mofussil Courts, namely, "justice, equity and good conscience", are not, in my view, so different from the words "justice and right" as to justify any such distinction. Another case of importance is *Mool Chand v. Alwar Chetty*(3). There it was held that a release by a decree-holder of some of the joint judgment-debtors from liability under the decree does not operate as a release of the other judgment-debtors from their liability and that the rule of English Law should not be applied in India, as it is based on the substantive rule applicable to contractual joint-debtors, which is different under section 44 of the Indian Contract Act, and is not in consonance with justice, equity and good conscience. SADASIVA AYYAR J., on page 552, says:

"If the passage (at page 46) in the judgment of MUTHUSWAMI AYYAR J. in *Gurusami v. Chinna Mannar* and *Gurusami v. Sadasiva*(4) was intended to lay down that the High Court on its Original Side is bound to decide questions like the one in controversy on the basis of English precedents and English Common Law procedure even though the following of such precedents and procedure may be against the 'justice and right' or the 'justice, equity and good conscience' which are the true guides to be followed according

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(1) (1906) I.L.R. 34 Calo. 48.
(3) (1915) I.L.R. 39 Mad. 548.

(2) (1901) I.L.R. 28 Calo. 452.
(4) (1881) I.L.R. 5 Mad. 37.

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to the Charter Acts, I respectfully differ from the observation in that passage. The doctrine that the release of one joint-debtor releases the others, is an artificial doctrine not consonant with 'justice and right'."

I agree with SADASIVA AYYAR J.'s observations and cannot see any real distinction between the words "justice and right" and "justice, equity and good conscience". If there is no real distinction, then the law as regards slander suits claiming damages is the same in the mofussil as in the Presidency-towns, as indeed it ought to be. Taking the view, therefore, that it would not be "just and right" or in consonance with "justice, equity and good conscience" to apply the English Common Law as it was before the Slander of Women Act of 1891 on account of the circumstances of the place and other matters, to which I have already drawn attention, I must hold that the learned trial Judge was right in holding that the respondent was entitled to succeed in her claim for damages without proof of special damage, and I see no reason for saying that the damages awarded, namely Rs. 2,000, were excessive. On the other question, that the plaintiff's excommunication was wrongful, the learned trial Judge has found as a fact that it was; and there is clear evidence to support that finding and indeed it is not challenged here; but it is contended that a suit for wrongful excommunication does not lie. It is argued that, in addition to the reliefs for a declaration that the excommunication was wrongful and injunction restraining that excommunication, a claim for damages is a claim for damages for defamation. This argument has for its foundation the decision in *Nathu v. Keshawji*(1), where it was held that suits claiming relief for loss of caste and character are in the nature of suits for libel

(1) (1901) I.L.R. 26 Bom. 174.

and fall within the law applicable to such suits. It is contended, therefore, that what the lower Court did was to award the respondent damages twice over, viz., Rs. 2,000 for slander and Rs. 500 for slander under the description damages for wrongful excommunication. Whatever may have been decided in *Nathu v. Keshawji*(1) can have no possible application to the present case. That was a suit in which the question was entirely a caste question and fell within Bombay Regulation II of 1827. In his notes to section 9, Civil Procedure Code, Sir D. F. Mulla distinguishes the Bombay case from other cases by pointing out that cognizance of such a suit was expressly barred by the Bombay Regulation already referred to, and adds :

"But a suit is maintainable for damages on account of an alleged injury to the caste and character of the plaintiff arising from some illegal act or unjustifiable conduct of the other party."

It is quite true that excommunication from caste causes injury to the character of the person excommunicated but it is quite obvious that injury of a very grave nature, apart from injury to character, must be suffered by the person so expelled or excommunicated. Although at one time it was contended by the appellants that it is not a serious matter to be expelled from a caste, it was subsequently conceded that very serious injury is bound to be suffered. Not only is that person excommunicated, but all those members of the caste who continue afterwards to have social intercourse with him suffer the same fate. Even the members of the same family as the person excommunicated are excommunicated if they have anything to do with the member of the family so expelled. Under these circumstances, in my view, it cannot be said that

(1) (1901) I.L.R. 26 Bom. 174.

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the respondent was not entitled to succeed in her suit. It is not suggested of course that, if there had been a *bona fide* expulsion of the respondent from the caste, she could have succeeded. As before stated, there is a finding here that she was wrongly excommunicated without having been allowed an opportunity of defending herself. The damages awarded in the lower Court were not excessive and this appeal must be dismissed with costs, which will be allowed on the higher scale on account of the great importance of the questions of law argued here. Those costs we fix at Rs. 500.

CORNISH J.

CORNISH J.—I am of the same opinion. The learned trial Judge having found, as I think rightly, that no special damage has been proved, the plaintiff's suit would not be sustainable unless we are to hold, contrary to the English Common Law which would be applicable in this country, that spoken words imputing unchastity to a Hindu woman are in the Presidency-town actionable without proof of special damage. According to the English Law spoken words are actionable *per se* in certain specified cases: (1) when they charge the plaintiff with a crime punishable by imprisonment, (2) if they impute to him a contagious disease which tends to exclude him from society, (3) if they defame him touching his profession or trade, and (4) since the Slander of Women Act, 1891, if they impute unchastity to a woman. With these exceptions defamatory spoken words are not actionable by the law of England without proof of special damage. The question here is whether the High Court administering law and equity in the exercise of its Original Jurisdiction under section 19 of the Letters Patent is bound to decide this case by the English Common Law which means the law as it stood before it was amended by the Slander of Women Act, that Act not having been made

applicable to India. Section 19 of the Letters Patent defines the law and equity to be administered by the High Court in its Original Jurisdiction as the law and equity which would have been applied if the Letters Patent had not issued. It is, therefore, necessary to refer to the law which the predecessors of the High Court, viz., the Mayor's Court, the Court of the Recorder and the Supreme Court, were directed by their Charters to administer. It is a remarkable fact, as was pointed out by their Lordships of the Judicial Committee in *The Advocate-General of Bengal v. Ranee Surnomoye Dossee*(1), that neither the Charter of 13 Geo. I, nor any of the subsequent Charters, expressly declared that English Law should be administered to the natives of India. The Supreme Court Charter of 1800 invested the Court with a jurisdiction similar to the jurisdiction of the King's Bench in England, "as far as circumstances will admit", and the clause in the Charter providing for the proceedings in the Court directed that it should "give judgment according to justice and right." This phrase is also to be found in the earlier Charters regulating proceedings in the Mayor's Court and in the Court of the Recorder. PEACOCK C.J., delivering the judgment of the Supreme Court of Calcutta, which went on appeal to the Judicial Committee as *The Advocate-General of Bengal v. Ranee Surnomoye Dossee*(1), and was approved by their Lordships, said with reference to the law administered by the Courts under the Charter:

"A Charter or Statute by which Courts of Justice are constituted does not necessarily determine the law which they are to administer, but in construing the Charter of George I, there can be no doubt that it was intended that the English law should be administered as nearly as the circumstances of

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(1) (1868) 9 M.I.A. 391.

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the place, and of the inhabitants, should admit. The words 'give judgment according to justice and right' in suits and pleas between party and party, could have no other reasonable meaning than justice and right, according to the laws of England, so far as they regulated private rights between party and party."

The construction, then, which has been put on the language of the Charters is that they do not intend that English Law should be applied in its entirety to India, but only to the extent that the circumstances of the people or the place admit. In *The Advocate-General of Bengal v. Ranee Surnomoye Dossee*(1) the law of forfeiture to the Crown of the goods of a *felo de se* was held to be inapplicable to Hindus. In *Mayor of Lyons v. East India Company*(2) it was held that the introduction of English Law into India did not attract the law relating to aliens. In the *Tagore case*(3) their Lordships ruled that a Hindu testator was not capable of creating an estate known in England as an estate-tail, founded as it was on a highly complicated system of English Law. In the light of the above authorities it may be doubted if the Court should strictly administer to Hindus the English Common Law of slander, which has been described as an artificial law, resting on the most artificial distinctions; see the judgment of Lord HALDANE in *Jones v. Jones*(4).

There are only two reported cases in which the precise question before us has arisen, viz., *Bhooni Money Dossee v. Natobar Biswas*(5) and *Hirabai Jehangir v. Dinshaw Edulji*(6). In the first of these cases it was held by HARRINGTON J. that by the Common Law of England introduced into Calcutta by Charter 13 Geo. I an action of slander in respect of an imputation of

(1) (1863) 9 M.I.A. 391.

(3) (1872) I.A. Supp. 47.

(5) (1901) I.L.R. 28 Calo. 452.

(2) (1838) 1 M.I.A. 175.

(4) [1916] 2 A.O. 481.

(6) (1926) I.L.R. 51 Bom. 167.

unchastity was not maintainable by a Hindu woman without proof of special damage. In *Hirabai Jehangir v. Dinshaw Edulji*(1) a Bench held that such an action was maintainable by a Parsi woman in the Presidency-town without proof of special damage. The learned Judges were of opinion that the anomaly presented by a state of law which permitted a husband charged with adultery to maintain an action (the charge of adultery implying the commission of a criminal offence punishable by the Penal Code without proof of special damage), but which, if the contention for the defendant slanderer prevailed, would not permit his wife charged with adultery (adultery not being a penal offence in the woman under the Code) to maintain an action without proof of special damage, was a circumstance which made the English rule of law in actions for slander of women inapplicable. If it was simply a matter of choice between the decisions in *Bhooni Money Dossee v. Natobar Biswas*(2) and *Hirabai Jehangir v. Dinshaw Edulji*(1), I should be disposed to prefer the view of HARRINGTON J. that there is nothing repugnant to justice and equity in requiring a person who is claiming compensation for slander to prove that some damage has been caused to him or her thereby; the more so, having regard to the effective remedy there is at hand to the slandered person against the slanderer in sections 499 and 500 of the Indian Penal Code. But the cases in this country have gone so far in the direction of relaxing restrictions on the maintainability of suits for defamation that I think it is not now possible to confine suits such as the present one to cases where special damage is proved. Thus, in *Parvathi v. Mannar*(3) it was held by TURNER C.J. and MUTHUSWAMI AYYAR J.

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(1) (1923) I.L.R. 51 Bom. 167.

(2) 1901) I L.R. 23 Calo. 452.

(3) (1884) I.L.R. 8 Mad. 175.

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that the rule of law requiring a woman to prove special damage in a suit for slander was not founded on natural justice and should not be imported into British India. In *Sukkan Teli v. Bipad Teli and another*(1) it was held, following a course of decisions in the Calcutta High Court and on the authority of *Parvathi v. Mannar*(2), that where words are defamatory in themselves and not mere verbal abuse, they are actionable though no special damage is proved. A similar rule has been laid down by the Allahabad High Court; see *Dawan Singh v. Mahip Singh*(3) and *Harakh Chand v. Ganga Prasad Rai*(4). Mr. Doraiswami Ayyar, the learned Counsel for the appellants, has urged that these were cases which came to the High Court on appeal from the mofussil, and that they were governed by a different rule, that of justice, equity and good conscience, which section 21 of the Letters Patent requires shall be administered by the High Court in the exercise of its Appellate Jurisdiction. The Court, in *Sukkan Teli v. Bipad Teli and another*(1), appears to have distinguished the decision in *Bhooni Money Dossee v. Natobar Biswas*(5) on that ground. But, in my judgment, no distinction is to be made between suits arising within or without the limits of the High Court's Original Civil Jurisdiction. "Equity and good conscience", said their Lordships of the Judicial Committee in *Waghela Rajsanji v. Shekh Masludin*(6), "are generally interpreted to mean the rules of English Law found applicable to Indian society and circumstances." The words "justice and right" in the Charters mean the same thing, according to the judgment of PEACOCK C.J. to which reference has already been made. There is then no reason why one rule

(1) (1906) I.L.R. 34 Calc. 48. (2) (1884) I.L.R. 8 Mad. 175.
(3) (1888) I.L.R. 10 All. 425. (4) (1924) I.L.R. 47 All. 391.
(5) (1901) I.L.R. 28 Calc. 452. (6) (1887) I.L.R. 11 Bom. 551 (P.O.).

should be applied under the Charters and another rule under the Letters Patent.

The conclusion I come to upon a consideration of the authorities is that EDDY J. was right in holding that the plaintiff's suit was maintainable without proof of special damage, and that the appeal fails.

With regard to the other subject-matter of appeal, I think that the wrongful expulsion of the plaintiff from caste gave her a cause of action, quite apart from the slander, although the slander was the reason for her being excommunicated. The case in *Nathu v. Keshawji*(1) which has been cited on behalf of the appellant-panchayatdars does not help them, for that case turned on the special provisions of the Bombay Regulation restricting the power of the Courts to interfere in caste disputes. The cases, *Ganapati Bhatta v. Bharati Swami*(2) and *Jagannath Churn v. Akali Dassia*(3), show that panchayatdars may be liable for the exercise of their powers when they act without due care and to the detriment of a member of the caste. The appellants condemned the plaintiff without giving her an opportunity of being heard. They chose to act on mere hearsay which would at once have been proved to be untrue by enquiry at the hospital where the plaintiff was alleged to have given birth to an illegitimate child, and this enquiry could easily have been made as the hospital is in the locality. In my opinion the appellants have made themselves liable for damages, and I agree that this part of their appeal also fails.

G.R.

(1) (1901) I.L.R. 26 Bom. 174. (2) (1894) I.L.R. 17 Mad. 222.
(3) (1893) I.L.R. 21 Calc. 463.

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APPELLATE CIVIL.

*Before Mr. Justice Waller and Mr. Justice Jackson.*1931,
November 16.APPATHURAI CHETTIAR AND TWO OTHERS (PLAINTIFF
AND HIS LEGAL REPRESENTATIVES), APPELLANTS,

v.

A. L. A. R. R. M. V. VELLAYAN CHETTIAR (DEFENDANT),
RESPONDENT.**Code of Civil Procedure (Act V of 1908), O. XXI, r. 63—
Claimant unsuccessful—Suit by—Onus of proof in.*

In a suit by a defeated claimant under rule 63 of Order XXI of the Code of Civil Procedure the onus is on the plaintiff to prove the validity of the alienation under which he claims.

V. E. A. R. M. Firm and another v. Maung Ba Kyin and another, (1927) I.L.R. 5 Rang. 852 (P.C.), explained.

APPEALS against the decrees of the District Court of West Tanjore at Tanjore in Appeal Suits Nos. 223 and 232 of 1925 preferred against the decrees of the Court of the District Munsif of Mannargudi in Original Suits Nos. 122 and 123 of 1924.

T. M. Krishnaswami Ayyar and K. V. Ramachandra Ayyar for appellants.

K. V. Krishnaswami Ayyar, V. Rajagopala Ayyar and T. V. Ramiah for respondents.

Cur. adv. vult.

JACKSON J. The JUDGMENT of the Court was delivered by JACKSON J.—These appeals arise out of suits brought by a defeated claimant under Order XXI, rule 63, of the Code of Civil Procedure. The lower appellate Court has dismissed the suits and plaintiff appeals.

The sole point for determination is whether the learned District Judge was correct in casting the

* Second Appeals Nos. 643 and 644 of 1927.

burden of proving the validity of the alienation under which he claimed upon the plaintiff. It is not a point of much practical importance in this case, or indeed in the generality of cases of this nature. Presumably an attaching defendant has been able to show good cause for impugning the alienation, else the claim would not have been defeated; then when the matter comes to a suit, it is largely a question of form whether the plaintiff begins by asserting the validity of his document, or the defendant by showing his proof of its invalidity. In the present case the defendant seems to be on strong ground, and if the lower appellate Court, after finding that the transaction relied upon by the plaintiff was highly suspicious, that it was extremely doubtful if any portion of the consideration for the sale came out of the plaintiff's pocket, that the plaintiff was father of his vendors, and that at the time of the sale these vendors were heavily indebted, had concluded by definitely finding the transaction to be nominal, there would have been no occasion for this second appeal. By its use of the phrase "the natural inference ought to be that the transaction was a nominal one" and by its observation "the burden of proof lay heavily upon the plaintiff", the door has been opened for the argument that in law the burden lies upon the defendant. Even then there is not much ground for discussion. The Courts of India have uniformly held that in these cases the burden lies upon the plaintiff. The point is very clearly stated by JENKINS C.J. in *Jamahar Kumari Bibi v. Askaran Boid*(1):

"The onus in this case is on Jamahar to show affirmatively that not only the ostensible but the real title also is in her. She is a plaintiff who is calling in question in a suit contemplated by the Code an adverse decision of the Court given, it is

(1) (1915) 30 I.C. 855.

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 true, in a summary proceeding, but conclusive, subject to the result of this suit . . . The plaintiff in the circumstances of this case cannot discharge the burden of proof cast on her by merely pointing to the innocent appearance of the instruments under which she claims; she must show that they are as good as they look. If specific authority for this is needed it is furnished by many cases, among which are the decisions of Sir RICHARD COUGH in *Roop Ram Doss v. Saseeram Nath Kurmohar*(1) and of Sir CHARLES SARGENT in *Govind Atmaram v. Santai*(2)."

To these may be added a more recent case of our own Court in which a full discussion leads to the same conclusion, *Perayya v. Venkayamma*(3).

This would seem to be conclusive, but it is urged that the Privy Council ruling, *V.E.A.R.M. Firm and another v. Maung Ba Kyin and another*(4), places the burden of proof upon the defendant. It is significant that in this case the burden of proof is nowhere mentioned. It is ruled that, where there is a duly registered deed, obviously the party claiming to attach that property for somebody else's debt must show that the sale was a fraudulent one, and

"that could only be done in this case (there is no other evidence) by showing utter inadequacy of consideration. So far as the Rs. 17,000 was concerned, there was adequacy of consideration. Therefore there only remains the Rs. 3,000. . . . Supposing that the payment of this Rs. 3,000 in hard cash was not established it is not enough to allow their Lordships to draw the conclusion that it was a fraudulent sale."

The ruling does not state when the defendant must undertake his obvious task of showing that the duly registered deed was fraudulent. If, following the usual practice, the plaintiff assumes the original burden, and puts in the registered deed, then, if the defendant has nothing at all to say against it, the plaintiff would succeed. If, however, the defendant can then show

(1) (1875) 23 W.R. 141.
 (3) (1924) 47 M.L.J. 14.

(2) (1887) I.L.R. 12 Bom. 270.
 (4) (1927) I.L.R. 5 Rang. 852 (P.O.).

utter inadequacy of consideration or some other circumstance suggesting a fraudulent sale, the plaintiff would in turn have to plead something more than the innocent appearance of the instrument, he must show that it is as good as it looks.

The Judicial Committee does not say that the burden of proof in the first instance lies upon the defendant and not upon the plaintiff, and the notion that it has said so is only derived from the headnote of the Rangoon ruling. The point is cogently discussed in *Mahadeo Missir v. Ram Prashad*(1) and the same conclusion is reached on page 898 that no proposition of law casting the onus upon the defendant is laid down in *V.E.A.R.M. Firm and another v. Maung Ba Kyin and another*(2) and this becomes abundantly clear by reference to *Mohammad Ali Mohammad Khan v. Mt. Bismillah Begam*(3), where the Privy Council casts the onus upon the plaintiff.

In *Thillai Govindasami, In re*(4) TIRUVENKATACHARIAR J. also holds that the Rangoon ruling does not alter the law of onus in these cases, and in *Elayaperumal Thalaivar v. Vellaikannu Thevar*(5) SUNDARAM CHETTI J. is inclined to the same view, though he thinks that where the claim has been dismissed without preliminary investigation the onus may lie upon the defendant. Of course, as observed in the beginning of this judgment, the defendant cannot escape the burden at some stage or other. If the plaintiff produces his deed, and swears that it is genuine and for full consideration, and the defendant has nothing to say to the contrary, the plaintiff will succeed, and where the burden of the plaintiff is so light it is scarcely worth arguing whether

(1) (1929) I.L.R. 8 Pat. 890. (2) (1927) I.L.R. 5 Rang. 852 (P.O.).
 (3) (1930) 60 M.L.J. 341 (P.O.). (4) A.I.R. 1928 Mad. 1259.
 (5) (1929) 82 L.W. 57.

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it is more correct to say that the burden is originally upon the defendant, or upon the plaintiff. But where the defendant has something substantial to say to the contrary the real burden must inevitably fall upon the plaintiff to establish the right which he claims. The lower appellate Court has committed no error and these appeals must be dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Waller and Mr. Justice Jackson.

1931,
December 3.JAYANTI BHAGAVANULA NARASIMHAM
(EIGHTH DEFENDANT), APPELLANT,

v.

JAYANTI VENKATASUBBAMMA AND ELEVEN OTHERS
(PLAINTIFF AND DEFENDANTS NOS. 1 TO 7 AND 9 TO 11
AND PARTY-RESPONDENT), RESPONDENTS.*

Hindu Law—Widow—Maintenance—Suit for, after there has been a partition—Right of widow not enforceable against surviving coparceners who have not taken her husband's share.

When the widow of a coparcener sues for maintenance after there has been a partition, she cannot enforce her right against any of the surviving coparceners except those who have taken her husband's share.

Jayanti Subbiah v. Alamelu Mangamma, (1902) I.L.R. 27 Mad. 45, applied.

APPEAL against the decree of the Court of the Subordinate Judge of Bezwada in Appeal Suit No. 101 of 1926 preferred against the decree of the Court of the

* Second Appeal No. 2214 of 1927.

District Munsif of Nuzvid at Bezwada in Original Suit No. 591 of 1924.

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V. Ramadoss for appellant.—While the coparcenary subsists the widow's claim is against the coparcenary property though limited to her husband's share. But after partition the widow's claim is only against her son and she has no right to claim maintenance from the shares of the other coparceners. *Subbarayalu Chetti v. Kamalavalli Thayaramma*(1) is distinguishable because the family was joint when the widow sued for her maintenance. In such a case any subsequent partition will not affect her right. [*Jayanti Subbiah v. Alamelu Mangamma*(2), per BHASHYAM AYYANGAR J., was referred to. Also Mayne's Hindu Law, page 651, paragraph 455, as to the nature of a wife's claim for maintenance.] The observations in *Rambhabai v. Doongersi*(3), though *obiter*, are directly in favour of appellant's contention. Further that decision correctly explains *Subbarayalu Chetti v. Kamalavalli Thayaramma*(1); see also Mayne, page 646. A widow's rights are limited to the rights of her husband in the family; see *Gopalu Pattar v. Parvathi Ammal*(4) and *Krishna Pattar v. Alamelu Ammal*(5). *Karuppa v. Chinna Nallammal*(6) throws no light upon the point for decision in the present case. Sons are bound to maintain their mother out of their father's property whether divided or undivided.

P. Somasundaram for twelfth respondent.—So long as the coparcenary subsists the widow's claim is against the entire coparcenary property, though the amount is limited to the extent of her husband's share; see *Jayanti Subbiah v. Alamelu Mangamma*(2). The widow's claim stands on the same footing as a family debt. If that is so, partition cannot affect her claim to maintenance; see *Subbarayalu Chetti v. Kamalavalli Thayaramma*(1) where the principle is stated. *Subramania Ayyar v. Sabapathy Ayyar*(7) holds that partition does not affect liability for pre-partition debts. *Sivanananja Perumal Sethuroyer, Zamindar of Oorcaud v. Meenakshi Ammal*(8) was no doubt a case of a step-son. But the ground on which the widow's claim was made to rest was that the claim to maintenance is in the place of her original right to a share, and it was

(1) (1911) I.L.R. 35 Mad. 147. (2) (1902) I.L.R. 27 Mad. 45.
(3) A.I.R. 1929 Sind 102. (4) A.I.R. 1929 Mad. 47, 48.
(5) (1914) 16 M.L.T. 551, 553. (6) A.I.R. 1927 Mad. 1189.
(7) (1927) I.L.R. 51 Mad. 361 (F.B.). (8) (1870) 5 M.H.C.R. 377.

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held that the entire family property was liable. *Srinivasa Iyengar v. Thiruvengadathaiyengar*(1) expressly decides that in a divided family the divided member is liable. It also approves of the principle enunciated in the *Oorcad Zamindar's* case. *Bala Tripura Sundaramma v. Suryanarayana*(2) was also a case of a step-son, and the right to maintenance was said to be a relic of the right to a share. *Subbayya v. Ananta Ramayya*(3) held that a divided son was liable for the expenses of his sister's marriage. At page 92 the right of a daughter to the expenses of her marriage is stated to be in lieu of her right to a share. A daughter's right is stated to stand on the same footing as that of her mother; see pages 97 and 99. As to how *Jayanti Subbiah v. Alamelu Mangamma*(4) has been understood, see *Subbarayalu Chetti v. Kamalavalli Thayaramma*(5) and *Krishna Pattar v. Alamelu Ammal*(6). The other cases cited for the appellant are cases relating to the extent of the charge, whether it is against the entire family property or not.

V. Ramadoss in reply.—The widow's right to maintenance is not analogous to a family debt, because the widow's claim has in all cases been postponed to the claims of creditors and it has never been held to be as good as a debt. The decision in the *Oorcad Zamindar's* case(7) is based upon the text of the Hindu Law relating to step-sons. See *Srinivasa Iyengar v. Thiruvengadathaiyengar*(1).

P. Satyanarayana Rao for respondents two to four.

K. Subba Rao for respondents five to seven.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by

WALLER J. WALLER J.—The plaintiff, who is the first respondent in this second appeal, is the widow of one Narasimham. He died about thirty years before the suit and she adopted the second respondent, one of the sons of her husband's brother Kakulayya. In 1919 a suit for partition was brought and the family property was divided. The second respondent and his sons got a

(1) (1912) I.L.R. 38 Mad. 556, 556, 573.

(3) (1928) I.L.R. 53 Mad. 84.

(5) (1911) I.L.R. 35 Mad. 147, 150.

(2) (1914) 17 M.L.T. 188.

(4) (1902) I.L.R. 27 Mad. 45.

(6) (1914) 16 M.L.T. 551.

(7) (1870) 5 M.H.C.R. 377.

three-eighths share, the other three branches, now represented by the appellant and by various respondents, being allotted the remaining five-eighths. In 1924 the first respondent filed a suit for maintenance, impleading all the former coparceners as defendants. The suit was defended only by the second respondent and his sons (the first, second and third defendants). The fifth, seventh and ninth to eleventh defendants appeared by a pleader, but filed no written statements, and the rest of the defendants did not appear at all. In the result, the first respondent was given a decree for certain sums of money, three-eighths of which were to be paid by the second respondent and his sons and the other five-eighths by the other three branches, the District Munsif observing that the pleaders on both sides had agreed "to the division of the liability in accordance with the shares of the different sets of the defendants." The plaintiff lodged an appeal, claiming a higher rate of maintenance and the eighth to eleventh defendants filed a memorandum of objections, pleading that they should not have been made liable at all. The fourth to seventh defendants appeared by a pleader, but filed no memorandum of objections. The Subordinate Judge enhanced the rate of maintenance and at the same time dismissed the memorandum of objections, holding that the plaintiff's right to maintenance out of the entire family property was not affected by the partition. The eighth defendant has now filed a second appeal, putting forward the same plea that the plaintiff's claim for maintenance was sustainable only against the share allotted to the first three defendants as representing her husband. We have been referred to no decision that bears directly on the question at issue. The Subordinate Judge relied on two cases of this Court. One was *Subbarayalu Chetti v. Kamalavalli*

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Thayaramma(1), where it was held that a widow's right to maintenance was enforceable against the whole family and not merely against her late husband's branch of it and that her right would not be affected by a suit for partition filed after her suit for maintenance—in other words her claim was to be treated as that of a widow of a member of an undivided family. To that rule Mr. V. Ramadoss for the appellant takes no exception, his argument being that it does not apply to a case like this, where the suit for maintenance was brought after the partition. The other decision, which is referred to in *Subbarayalu Chetti v. Kamalavalli Thayaramma*(1), is *Jayanti Subbiah v. Alamelu Mangamma*(2). It laid down that the widow of an undivided coparcener had a right of maintenance against the surviving coparcener or coparceners, but only to the extent of her husband's share or interest in the joint family property and that, wherever it becomes necessary to enforce her right, it should be made a specific charge on a reasonable portion of that property, not exceeding in value her husband's share. In *Subbarayalu Chetti v. Kamalavalli Thayaramma*(1) this view of the law was accepted, the Judges observing :

"It may be that a decree would not be enforceable against a member of a joint family which gave something more than the interest of the deceased husband which passed by survivorship to the surviving members."

If this be the correct rule—and we must accept it as correct—it seems to us to follow that, when the widow of a coparcener sues for maintenance after there has been a partition, she cannot enforce her right against any of the surviving coparceners except those who have taken her husband's share. If her right to relief against the family property is limited to the value of

(1) (1911) I.L.R. 35 Mad. 147.

(2) (1902) I.L.R. 27 Mad. 45.

her husband's share and that share has already been defined and separated, it would be idle to give her relief against any of the coparceners other than those who have succeeded to that share; no other share is liable. If the value of her claim is less than that share, there is no reason why any other share should be resorted to. If it exceeds it, no other share is chargeable for the excess. Several other cases were cited for the respondents. Two of them, *Sivananjanja Perumal Sethuroyer, Zamindar of Oorcaud v. Meenakshi Ammal*(1) and *Srinivasa Iyengar v. Thiruvengadathaiyengar*(2), do not really touch the point. In the first, the only coparceners were the widow's sons and step-son, the latter of whom contended that his step brothers' divided share alone was liable and it was that contention that was overruled. The second was a similar case in which a similar contention was put forward and rejected. In another case, *Karuppa v. Chinna Nallammal*(3), a Bench of this Court followed *Jayanti Subbiah v. Alamelu Mangamma*(4) holding that, if a widow's right to maintenance was limited to the value of her husband's interest in the joint property, her maintenance might reasonably be charged against that interest alone. No doubt, in the result the Judges gave a charge over the whole property, but that was because another maintenance-holder had a prior charge over the whole, which might have been utilised to defeat a subsequent charge over a part of it. Another case cited, *Bala Tripura Sundaramma v. Suryanarayana*(5), resembles and follows *Sivananjanja Perumal Sethuroyer, Zamindar of Oorcaud v. Meenakshi Ammal*(1).

We are of opinion that the appeal must be allowed. A memorandum of objections has been filed by the fifth

(1) (1870) 5 M.H.C.R. 377.

(2) (1912) I.L.R. 38 Mad. 556.

(3) A.I.R. 1927 Mad. 1149.

(4) (1902) I.L.R. 27 Mad. 45.

(5) (1914) 17 M.L.T. 188.

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and seventh respondents, supporting the appellant. It must, we think, be allowed under Order XLI, rule 33, of the Code of Civil Procedure. In view of the course taken by the case in the Courts below, they and the appellant will pay their own costs. The first three defendants will pay the whole decree amount and the first respondent's costs throughout, and she will pay the fee due to the Government.

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APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Krishnan Pandalai.

1932,
March 22.

P. C. MUTHU CHETTIYAR (PLAINTIFF), APPELLANT,

v.

MUTHUSWAMI AYYANGAR (FIFTH DEFENDANT),
RESPONDENT.*

Indian Limitation Act (IX of 1908), sec. 19 (1)—“Some person through whom he derives title” in—Meaning of—Mortgagor—Acknowledgment of mortgage debt by—Alienee of mortgaged property prior to date of—Binding nature of acknowledgment on.

The words “some person through whom he derives title” in section 19 (1) of the Limitation Act ought not to be read as “some person through whom he derives title subsequently to the acknowledgment”.

Per JACKSON J.—An acknowledgment of a mortgage debt made by a mortgagor after he has alienated the hypotheca affects both the mortgagor and his alienee.

Per KRISHNAN PANDALAI J.—An acknowledgment of a mortgage debt made by a mortgagor who has sold a portion of the mortgaged property but remains personally or in respect of the unsold portion liable on the mortgage is effective to save limitation as against the property sold.

* Second Appeal No. 1206 of 1928.

Quaere—whether, after a mortgagor's personal liability had become barred and he had sold all the mortgaged property, any acknowledgment by him of the mortgage debt can save limitation against the purchaser.

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APPEAL against the decree of the District Court of Madura in Appeal Suit No. 164 of 1927 preferred against the decree of the Court of the Subordinate Judge of Madura in Original Suit No. 75 of 1926.

S. Varadachariar and *K. S. Champakesa Ayyangar* for appellant.

K. Rajah Ayyar for respondent.

Cur. adv. vult.

JUDGMENT.

JACKSON J.—The question for determination is JACKSON J. whether an acknowledgment by the mortgagor in favour of a prior mortgagee precludes a puisne mortgagee, whose title accrued before the acknowledgment was given, from relying upon the Statute of Limitation as a bar. Can a mortgagor alienate the hypotheca and then acknowledge the mortgage debt so as to give a fresh period of limitation as against not only himself, but the alienee?

A plain reading of section 19, Indian Limitation Act, would suggest that the acknowledgment affects both the mortgagor and his alienee. Where before the expiration of the period prescribed . . . an acknowledgment of liability . . . has been made . . . by some person through whom the party derives title, a fresh period shall be computed.

In *Krishna Chandra Saha v. Bhairab Chandra Saha* (1) it was held that the mortgagor is the person from whom the alienee derives his title, and the section does not say that the acknowledgment must necessarily

(1) (1905) I.L.R. 32 Calo. 1077.

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be given before the alienation. This opinion is endorsed in *Velayudam Pillai v. Vaithialingam Pillai*(1) which is affirmed in *Lakshmanan Chetty v. Muthaya Chetty*(2).

On the other hand there is the dissident opinion of a Judge in *Surjiram Marwari v. Barhamdeo Persad*(3) endorsed *obiter* in *Yagnanarayana v. Venkatakrishna Rao*(4) "that the acknowledgment binds only assignees from him after the acknowledgment." But one of the learned Judges of that Bench has questioned whether this *obiter* is correct in Second Appeal No. 1485 of 1927. Therefore the preponderating view both in Calcutta and Madras is that the acknowledgment is equally effective whether it be before or subsequent to the alienation. As MACLEAN C.J. observes in *Krishna Chandra Saha v. Bhairab Chandra Saha*(5): "It seems difficult . . . to get over the precise language of this section."

It has been argued however that the Courts ought to read "derives title subsequently to the acknowledgment" into the section, for otherwise it will run contrary to English Law and to equity. If both parts of this plea were established we should still feel constrained to follow the plain reading of the statute, but it is not so clear that such a reading would offend either English Law or equity.

The words of the English Statutes are not precisely similar to those in section 19 of the Indian Limitation Act, and we have been shown no case directly bearing upon the point.

In Halsbury's Laws of England, Vol. XIX, page 95, it is said that payment by a mortgagor after he has assigned the property charged does not prevent time

(1) (1912) 24 M.L.J. 66.

(3) (1905) I.C.L.J. 337.

(2) (1919) 40 M.L.J. 127.

(4) A.I.R. 1925 Mad. 1108.

(5) (1905) I.L.R. 32 Cal. 1077, 1080.

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running in favour of an assignee. But payment is not the same as acknowledgment, and we have not seen the ruling upon which this statement is based ; apparently it is not forthcoming in Madras. As regards equity, to say that an alienee would be robbed of a natural right if his alienor were allowed to acknowledge a mortgage binding upon the alienated property even after the alienation is to travel very far from actual reality. An alienee who takes property subject to a mortgage expects that he will naturally have to meet that encumbrance, and can only regard it as a remote contingency that the mortgagee may sleep over his right and allow time to run. As the law stands, that contingency is rendered rather more remote by the circumstance that even when time has almost run out the mortgagor by his acknowledgment can extend the period. But if we agree with the respondent and put this extension out of the power of the mortgagor with regard to prior alienees, the contingency of the mortgagee allowing time to run and thus foregoing his right would still be very remote ; and to speak of alienees in general being disappointed because they have not been relieved of their encumbrances by the Statute of Limitation is too fanciful. On the other hand it is plainly equitable that a mortgagee should be paid his debt, and that the time should be extended if the mortgagor acknowledges that debt. It would be a great hardship if the mortgagee were led to put his trust in such an acknowledgment only to find that it was a dead letter because, say a day previously, the mortgagor had parted with the hypotheca. As observed in *Krishna Chandra Saha v. Bhairab Chandra Saha*(1) a mortgagee should not be deprived of his right by the act of parties entitled only to the equity of redemption.

(1) (1905) I.L.R. 32 Cal. 1077, 1080.

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It is unnecessary now to discuss the reasoning in *Surjiram Marwari v. Barhamdeo Persad*(1) which has never met with approval except in *Yagnanarayana v. Venkatakrishna Rao*(2). MOOKERJEE J. admits that there is no English case directly in point and relies upon the analogy of section 13, Civil Procedure Code. But an analogy though it may fortify can hardly be made the basis of an argument; and, since section 19 of the Indian Limitation Act is plain, there is nothing upon which an argument can stand. As the appellant is not precluded by limitation the next question is how far he is entitled to subrogate. We agree with the lower Courts that the obviously equitable arrangement is that set forth in paragraph 21 of the first Court's judgment. A plea of subrogation is a plea in equity and there is no rule of law which would constrain us to decree anything less equitable.

The appellant succeeds in the main and is entitled to costs here and in the lower appellate Court against the fifth defendant.

Time for payment three months from this date.

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KRISHNAN PANDALAI J.—I agree on both points with my learned brother and wish to add a few words of explanation on the first, which is one of acknowledgment as saving limitation. The plaintiff sues on a third mortgage by the first defendant's husband dated 29th September 1911 comprising several properties. In 1913 the mortgagor sold a few of these items to the fifth defendant partly to pay off the first two mortgages due to the fifth defendant himself and partly to pay off a portion of the plaintiff's (third) mortgage. The fifth defendant did not pay to the plaintiff the portion of the mortgage amount which he undertook to pay. In 1920 the mortgagor (first defendant's husband)

(1) (1905) I.C.L.J. 337.

(2) A.I.R. 1925 Mad. 1108.

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made a statement in a deposition in Court which is an acknowledgment of the plaintiff's third mortgage. This suit was brought in 1926. It is plain that without the help of the acknowledgment of 1920 the suit for money by sale of the property would be barred as it is brought more than twelve years from the date for payment and also from any other available starting point of limitation. The fifth defendant's contention is that, after the first defendant's husband's sale to himself, he (first defendant's husband) was incompetent to acknowledge any mortgage liability so as to affect the properties sold, as he had no interest in them and could therefore be under no liability in respect of them.

I wish to guard myself by limiting my present opinion to a case like the present where at the time of making the acknowledgment the mortgagor, through whom the purchaser undoubtedly claims, is under some liability, either personal or in respect of some other property, on the mortgage. It is in the present case unnecessary to say whether, after a mortgagor's personal liability had become barred and he had sold all the mortgaged property, any acknowledgment by him of the mortgage debt can save limitation against the purchaser. It is sufficient to indicate that an acknowledgment under section 19 must be an admission of some present liability of the person acknowledging, corresponding to a present right in some one else. If it did not imply that, it would be hardly correct to talk of it as an acknowledgment. But it is not necessary to pursue this point further.

The more limited point to be decided is whether, when a mortgagor has sold a portion of the mortgaged property but remains personally or in respect of the unsold portion liable on the mortgage, an acknowledgment of the mortgage by him subsequent to the

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sale is ineffective to save limitation as against the property sold. I agree with my learned brother that the language of section 19 does not require that the person through whom the fifth defendant claims (here first defendant's husband) must have made the acknowledgment before the alienation. Nor does the reason of the thing appear to demand it so long as at the time the acknowledgment is made the person making it is liable for what he acknowledges—in other words so long as he is acknowledging his own liability and not alleging some one else's liability. The weight of Indian authority to which my learned brother has referred is also in the same direction.

As, during the argument, reference was made to the English Law of Limitation and decisions on it, I have taken some pains to discover whether there is in that law any corresponding idea to what is contended for by the fifth defendant. I need not say that, except for the discovery of some general principle, it would be totally misleading and profitless to attempt to apply decisions on the English Statutes of Limitation to cases under the Indian Limitation Act. The differences between the two systems are glaring and lie on the surface. There is nothing about acknowledgment or part-payments in the Limitation Act of 1623 which is still in force. The whole law on that topic in the class of suits governed by that Act is still Judge-made law. In such suits acknowledgments may be made even after the expiration of the period of limitation and provided they are within six years of the suit furnish a new cause of action as on a new promise to pay. In the case of acknowledgments statutorily provided for in 3 and 4 Will. IV, c. 27 and 3 and 4 Will. IV, c. 42 and the Real Property Limitation Act, 1874, in some there is no provision as to the person to whom the acknowledgment

is to be made, whereas in the others it is provided that it must be made to the person entitled to the payment or to his agent. In none of them is there any reference to acknowledgments made by a person through whom the defendant claims though much the same result is attained by the provision that the acknowledgment must be signed by the person liable or his agent. In the case of *Newbould v. Smith*(1) it was held that a mortgagor who had in July 1878 assigned the mortgaged property to his nephews could not by making payment of interest in September 1878 to the mortgagee save limitation in favour of the assignees. The ground stated was that, after the assignment, the assignor was not the agent of the person liable (the present owner) to make the payment of interest. I therefore think that the line of argument based on English Law is not fruitful.

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(1) (1886) 33 Ch. D. 127.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

1931,
November 25.

GANGEE PREMJEE AND COMPANY THROUGH ITS
PARTNER, DEVSHI MUNJI (SEVENTH RESPONDENT),
PETITIONER,

v.

O. L. K. K. N. FIRM, COLOMBO, AND NINE OTHERS
(PETITIONERS AND FIRST TO SIXTH RESPONDENTS),
RESPONDENTS.*

Provincial Insolvency Act (V of 1920), sec. 9—Creditor's petition under—Applicability to, of sec. 5 of Limitation Act (IX of 1908)—Creditor's petition under sec. 9 an application within sec. 78 of Provincial Insolvency Act if is—"Petition" and "Application"—Distinction in Provincial Insolvency Act between.

A creditor's petition under section 9 of the Provincial Insolvency Act of 1920 praying that a debtor may be adjudged insolvent is not an application within the meaning of section 78 of that Act, and section 5 of the Limitation Act of 1908 is therefore inapplicable to such a petition.

Appeal against Order No. 523 of 1925 dissented from.

Vaithinatha Aiyar v. Vaithinatha Aiyar, (1931) 61 M.L.J. 544, followed.

The Provincial Insolvency Act draws a very definite distinction between the words "petition" and "application", the former word being used for an application praying that a debtor may be adjudged insolvent, which thereby institutes insolvency proceedings, and the latter for an application to the Court in the course of insolvency proceedings already instituted.

PETITION under section 75 of the Provincial Insolvency Act (V of 1920) praying the High Court to revise the order of the District Court of Ramnad at Madura

* Civil Revision Petition No. 1434 of 1930.

made in Civil Miscellaneous Appeal No. 78 of 1929 (Insolvency Appeal No. 103 of 1929 in Insolvency Petition No. 34 of 1928 on the file of the Court of the Subordinate Judge of Ramnad at Madura).

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K. Rajah Ayyar and V. Ramaswami Ayyar for petitioner.

B. Sitarama Rao, S. R. Muthuswami Ayyar and S. Panchapagesa Ayyar for respondents.

JUDGMENT.

REILLY J.—This civil revision petition relates to a creditor's insolvency petition presented to the Subordinate Judge of Ramnad. That petition alleged a preferential transfer as the act of insolvency necessary to support it; but the date of that transfer according to the document presenting it was more than three months before the date on which the insolvency petition was presented. So with their insolvency petition the creditors presented a petition to excuse the delay under section 5 of the Limitation Act. That petition the Subordinate Judge dismissed. On appeal the District Judge, feeling himself bound by the decision of a Bench of this Court in Appeal against Order No. 523 of 1925, held that section 5 of the Limitation Act applied to the case and reversed the Subordinate Judge's order and remanded the petition to excuse the delay for fresh disposal. The present civil revision petition is preferred by the transferee concerned against the District Judge's remand order.

It was decided by a Full Bench of this Court in *Lingayya v. Chinna Narayana*(1), before the present Provincial Insolvency Act of 1920 came into force, that section 5 and other general provisions of the Limitation Act did not apply to insolvency petitions. When the

(1) (1917) I.L.R. 41 Mad. 169 (F.B.).

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present Provincial Insolvency Act was enacted, a new provision was introduced in section 78 of the Act, the opening words of which are: "The provisions of sections 5 and 12 of the Indian Limitation Act, 1908, shall apply to appeals and applications under this Act." It is contended for the petitioning creditors in this case that under that provision section 5 of the Limitation Act can be applied to their petition for the adjudication of the debtor. It will be noticed that the new provision in section 78 of the Provincial Insolvency Act relates to appeals and applications only, as indeed does section 5 of the Limitation Act. The petitioner before us, the transferee concerned, contends that a creditor's insolvency petition praying that a debtor may be adjudged insolvent is not an application within the meaning of section 78 of the Provincial Insolvency Act. In considering that question I think in the first place we have to remember that section 5 of the Limitation Act is in itself an exception to section 3 of that Act, which directs that suits, appeals and applications presented after the expiry of the periods of limitation prescribed shall be dismissed, and being a provision enacting an exception to a general rule it has to be strictly construed. And in the same way section 78 of the Provincial Insolvency Act, so far as it applies to section 5 of the Limitation Act, must also be strictly construed. Remembering that, does the word "applications" in section 78 of the Provincial Insolvency Act include insolvency petitions, i.e. petitions praying that a debtor may be adjudged insolvent?

Speaking generally, I do not think we can say that in legal phraseology a petition is not an application. Mr. Sitarama Rao for the creditors has pointed out to us that the words are in legislation applicable to this country often interchangeable. In the Limitation Act

it must be noticed that there is no reference to petitions at all, though it cannot be supposed that there is no law of limitation applicable to petitions. Petitions, so far as they are governed by the Limitation Act, are included in the word "applications". Sections 8, 9 and 10 of the Guardians and Wards Act show that an "application" may be a petition. Under section 8 the Court may be moved to appoint a guardian by an "application", and under section 10 the "application" may be made by a "petition". And, what is perhaps even more interesting for our purpose, as Mr. Sitarama Rao has been able to point out, in section 55 of the Code of Civil Procedure the expression "apply to be adjudged an insolvent" appears in sub-sections (3) and (4). Therefore, speaking generally in regard to the Acts applicable to this country, I think it is impossible to say that there is any necessary distinction between an application to a Court and a petition to a Court. For the convenience of the organization of Court records and general administration there are certain rules in force in this Presidency that the term "petition" shall be used for what may be called originating motions, either in execution or otherwise, and that the term "application" shall be used for motions made in pending proceedings. But in this Court itself that rule is not strictly followed. On the Appellate Side of the Court it is not followed at all, as we ordinarily call interlocutory applications in pending proceedings civil miscellaneous petitions. But Mr. Rajah Ayyar for the petitioner here urges that, whatever may be the general practice either in Courts or in legislation in the use of these two words, "application" and "petition", in the Provincial Insolvency Act there is a very definite distinction drawn between them. He has been able to

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show us that in the Provincial Insolvency Act of 1920, as it was enacted, "petition" is used for either a debtor's or a creditor's insolvency petition, praying that the debtor may be adjudged insolvent, but is never used for any application to the Court in the course of insolvency proceedings already instituted. That "petition" should be used for applications praying that a debtor may be adjudged insolvent, which thereby institute insolvency proceedings, and that all applications in pending insolvency proceedings should be described in the Act as "applications" appears to have been a deliberate choice of language. It becomes particularly remarkable when we look at sections 10 (2) and 52, in both of which the word "petition" and the word "application" occur, "petition" being reserved as elsewhere in the Act for a petition that the debtor be adjudged insolvent. Those two sections emphasise what appears to be a deliberate contrast in the use of the two words. In section 6 (f) there is a small point which may be noticed. It is there stated that a debtor commits an act of insolvency if he "petitions" to be adjudged an insolvent. "Petitions" is an awkward and ugly word, not likely to have been used in place of the ordinary word "applies", unless there was some special reason for using it. And the reason appears to be that even in that statement the Legislature wished to maintain the distinction between a "petition" and an "application", which runs right through the rest of the Act.

That was the position in regard to the use of these words, as the Act stood when it was first enacted. It happens however that in 1926 a new section, 54 (A), was introduced in order to allow a creditor to prosecute a petition to have a transfer set aside under section 53 or section 54 of the Act if the Official Receiver

declines to do so. In that new section the opening words are: "A petition for the annulment of any transfer under section 53, or of any transfer, payment, obligation or judicial proceeding under section 54". There we have for the first time in this Act the use of the word "petition" for something other than a petition that the debtor may be adjudged insolvent. The contrast between such a petition for adjudication and any other application to the Court, which had been maintained so far by the use of the two different words, "petition" and "application", was infringed when this amendment was introduced. Mr. Sitarama Rao for the creditors not unnaturally contends that the contrast on which Mr. Rajah Ayyar has based his argument here breaks down. It is a remarkable fact that "petition" was introduced in that way in the new section. But I think we must remember that what we are trying to do now is to interpret the word "application" as it appears in section 78 of the Act. Section 78 of the Act was there when the Act was originally issued in 1920, and the fact that there was the marked contrast between the use of the word "petition" and the use of the word "application" when the Act was issued in 1920 is not destroyed by a different use of the word "petition" in the amendment introduced six years later. It has also been suggested by Mr. Rajah Ayyar that the word "petition" may have crept into this new amendment by oversight, the Legislature not remembering, when the amendment was made, that in this particular Act a distinction had been drawn between the use of the word "petition" and the use of the word "application". But I do not think we are entitled to attribute oversight to the Legislature unless that is clearly necessary. There are other explanations why a proceeding under section 54 (A) of the Act, and so by implication a

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proceeding under section 53 or section 54, should be described as instituted by "petition" rather than by "application". If "petition" was reserved purposely by the Legislature for some motion originating proceedings, then it might well be used in connection with proceedings under sections 53 and 54, as, though connected with insolvency proceedings and possible only while insolvency proceedings are pending, they are really new proceedings originated against outside parties; and in that sense it is not inconsistent with the distinction which Mr. Rajah Ayyar wished to draw between "petition" and "application" that such proceedings should be initiated by "petitions". And it may also be remarked that for such proceedings, so long as insolvency proceedings are going on, there is no period of limitation, and therefore the Legislature may even have used the word "petition" in section 54 (A) advisedly, so as to make it clear that they are outside the scope of section 78. On the whole I do not think that the use of the word "petition" in the new section 54 (A) is sufficient to destroy the strong contrast maintained through the Act as originally framed between a "petition" praying that a debtor may be adjudged insolvent and other applications made in the course of insolvency proceedings.

So much for the mere words used. But there may well be, as Mr. Rajah Ayyar suggests, good reason behind the choice of the word "application" rather than "petition" in section 78. According to the scheme of the Act a petition praying that a debtor be adjudged insolvent initiates very important litigation. By section 12 of the Act it is required that such a petition shall be signed and verified as if it were a plaint. And under section 18 of the Act it is provided that the procedure in regard to the admission of plaints

shall be applied to such petitions. Those two sections recognise that an insolvency petition, praying that a debtor be adjudged insolvent, is not only the beginning of very important litigation, but is of as much importance as a plaint. Indeed, as we know, it may often be of much more importance than a plaint: it may initiate something equal to a whole bundle of suits. If, as appears from these provisions of the Act, the Legislature intended an insolvency petition praying that a debtor be adjudged insolvent to be treated as a plaint in a suit, of as great importance as a plaint in a suit, then there would be good reason for using language which would make it clear that section 5 of the Limitation Act, though being applied by the new section 78 to other matters in connection with insolvency proceedings, that is to appeals and applications, should not be applied to initiating insolvency petitions. Section 5 of the Limitation Act, as is well known, has no application to suits. It does not give the Court any power to extend the period of limitation for instituting a suit; but it does give the Court power on sufficient cause to extend the time for filing an appeal or an application in litigation which has already been properly instituted by suit. When a party has come to Court with his suit in time, then he or other parties to the suit, who are conducting their proceedings under the control of the Court, are allowed to ask for extension of time under section 5 of the Limitation Act for sufficient cause, and the Court may grant such extensions at its discretion. But it is no part of the Limitation Act—indeed it is against the object of the Limitation Act—that the Court should have discretion to extend the periods of limitation for initiating suits. If the Court had power to do that, then one of the main objects of the law of limitation in giving

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security to titles would be defeated. And in the same way, if the Court had discretion to enlarge the time after an act of insolvency within which a creditor's insolvency petition must be filed, the security of many transactions might be imperilled. The acts of insolvency which may be used as one of the justifications for a creditor's petition include even the sale of property in execution of a decree. If a debtor's property is sold in execution of a decree, for three months after that is done it is possible that a petition to adjudge him insolvent may be filed. But after that period other persons doing business with him know that the danger is gone. If the Court had discretion to extend that period of three months, very serious results to merchants and others dealing with a judgment-debtor might happen. It is therefore quite reasonable that, as section 5 is not applicable to suits, so it should not be applicable to creditors' insolvency petitions.

However the learned District Judge, as I have mentioned, felt that he was bound by the decision in Appeal against Order No. 523 of 1925. And on that decision Mr. Sitarama Rao has relied before us. In that case no doubt the two learned Judges were of opinion that section 5 applied to a creditor's petition to adjudge a debtor insolvent. The actual question before them was whether the refusal of the District Judge to apply section 14 of the Limitation Act to such a petition was proper. They were of opinion that section 14 of the Limitation Act did not apply to such an insolvency petition, and they dismissed the appeal before them. But in the course of their judgment they expressed the opinion that section 5 of the Limitation Act may be applied to such insolvency petitions, though in the end they came to the conclusion that the circumstances of that case were not such as to justify the application of

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that section. I think that Mr. Rajah Ayyar is justified in saying that the expression of the learned Judges' opinion in that case to the effect that section 5 of the Limitation Act applies to a creditor's insolvency petition was *obiter dictum*. And I may perhaps also remark with great respect that in that case the learned Judges did not find it necessary to discuss the wording of the Provincial Insolvency Act in the provisions concerned nor did they note the contrast between the use of the word "petition" and the use of the word "application" which I have mentioned. And it may be added that this revision petition comes before us because it has been referred to a Bench by JACKSON J., who delivered the judgment in Appeal against Order No. 523 of 1925 and who it appears therefore does not himself regard that as a binding decision on the present question. On the other hand CORNISH J. in *Vaithinatha Aiyar v. Vaithinatha Aiyar*(1) sitting alone decided that section 5 of the Limitation Act did not apply to a creditor's insolvency petition. In my opinion CORNISH J.'s view on that matter should be followed. I may add that it has been pointed out to us that the only specific provisions regarding limitation in the Provincial Insolvency Act are contained in section 68, relating to applications against orders made by Receivers, and section 75, relating to appeals. It has been suggested that that may explain why it was thought necessary in section 78 to refer only to appeals and applications. That also is an argument which I think supports the view I have taken regarding section 5 of the Limitation Act.

There was another part of Mr. Rajah Ayyar's argument with which I do not think I need deal in any detail on this occasion. He contended that section 9 (1) (e)

(1) (1931) 61 M.L.J. 544.

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of the Provincial Insolvency Act, which provides that the act of insolvency on which the petition is grounded must have occurred within three months before the presentation of the petition, does not prescribe any period of limitation within the meaning of section 5 of the Limitation Act. If that is so, of course any other discussion of the question is unnecessary. His argument is that section 9 does not provide a period of limitation but does by its wording provide a condition precedent, which must be fulfilled before a creditor can prefer an insolvency petition. That section lays down that a creditor shall not be entitled to present an insolvency petition against a debtor unless the debt is Rs. 500, unless it is a liquidated sum and unless the act of insolvency has occurred within three months. Now in form that section undoubtedly does not lay down any explicit rule of limitation. It does not say that, if the petition is not filed within a certain period, it shall be dismissed. In form and in language it does lay down three conditions precedent, as Mr. Rajah Ayyar contends. And I may mention that Mr. Rajah Ayyar's view that this section does not provide a period of limitation was adopted by SPENCER J. in *Aiyapparaju v. Venkatakrishnayya* (1). But, although in form what we find in the section is a statement of conditions precedent and not a rule of limitation, as Mr. Sitarama Rao has pointed out, in effect we get to very much the same thing as a rule of limitation, namely that, unless a creditor files his petition within three months after the act of insolvency, it must be dismissed, which has just the effect of a rule of limitation. But I do not regard this question, whether section 9 of the Provincial Insolvency Act does lay down a rule of limitation, as at

(1) (1922) 44 M.L.J. 803.

all an easy one, and I do not wish to express any decided opinion upon it on this occasion. If we were to find that section 9 of the Provincial Insolvency Act did not prescribe any period of limitation, then very serious consequences would follow. Among other things section 14 of the Limitation Act would not affect such insolvency petitions by reason of section 29 of the Limitation Act, as it might otherwise do. It is not necessary I think to go into this difficult question and its consequences on this occasion, as all that we are concerned with now is the question whether section 5 of the Limitation Act applies to a creditor's insolvency petition. And on that question I agree with Mr. Rajah Ayyar's contention that it does not apply. In my opinion therefore this petition should be allowed with costs in this Court and the remand order of the learned District Judge should be set aside.

ANANTAKRISHNA AYYAR J.—Certain creditors of a debtor filed a petition under the Provincial Insolvency Act to have the debtor adjudicated an insolvent on the ground that he had executed a mortgage in favour of some one creditor, alleging that the mortgage constituted a fraudulent preference under section 54 of the Provincial Insolvency Act; but, as the date mentioned in the mortgage deed was beyond three months from the date of the petition, the petitioners applied to have the delay excused under section 5 of the Limitation Act read with section 78 of the Provincial Insolvency Act. The learned Subordinate Judge held that the Court had no jurisdiction to apply section 5 of the Limitation Act to petitions under the Provincial Insolvency Act. He accordingly dismissed the petition. On appeal by the petitioning creditors, the learned District Judge reversed that decision and remanded the petition for rehearing on the merits whether there was sufficient

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cause to excuse the delay. He relied on the decision of a Bench of this Court in Appeal against Order No. 523 of 1925 (*Peddapalli Samacharu and others v. Yerrajimi Siddappa and another*) and held that section 5 of the Limitation Act was applicable to a petition filed by a creditor under section 9 of the Provincial Insolvency Act. The mortgagee has preferred this revision petition against the decision of the District Judge under section 75 of the Provincial Insolvency Act.

Mr. Rajah Ayyar, who appeared for the mortgagee, based his case on two grounds, (1) that section 5 of the Limitation Act does not apply to the petition in question and (2) that the period of three months mentioned in section 9 of the Provincial Insolvency Act is not "a period of limitation" within the meaning of section 5 of the Limitation Act, and consequently, no question of limitation arises in the case, his contention being that, after the expiry of three months, the transaction which would otherwise be available to ground the insolvency petition would not be available at all as such.

On the question whether section 5 of the Limitation Act applies to the present case, it may be stated that, under the previous Provincial Insolvency Act III of 1907, it was held by a Full Bench of this Court in *Lingayya v. Chinna Narayana*(1) that the general provisions of the Limitation Act dealing with the admission of appeals and applications filed after the periods prescribed for the same could not be applied to extend the periods prescribed by the provisions of the Provincial Insolvency Act III of 1907 for the filing of appeals, etc. The view of the Full Bench was that the Provincial Insolvency Act was a special Act complete

(1) (1917) I.L.R. 41 Mad. 169 (F.B.).

in itself, and that the general provisions of the Limitation Act could not be held applicable to proceedings taken under that Insolvency Act. After that decision, section 78 has been enacted in the present Provincial Insolvency Act of 1920 to the effect that the provisions of sections 5 and 12 of the Indian Limitation Act of 1908 shall apply to "appeals and applications under the Insolvency Act".

On behalf of the respondents, it was argued that the provisions of section 5 of the Limitation Act should now be held to apply to the "petition" filed by the creditors under section 9 of the Provincial Insolvency Act. Mr. Rajah Ayyar contended that section 78 applies only to "appeals" and "applications" under the Provincial Insolvency Act, and that a "petition" under section 9 is not "an application" but "a petition" under the Act. At first sight it appeared to me that the petitioner before us was trying to make too much out of the use of the two different words "petitions" and "applications" in the Insolvency Act, and I was anxious to find out whether these words have any accepted definite legal signification, and whether the two words connote essentially different ideas. These words are not defined in the General Clauses Act, in the Code of Civil Procedure, the Limitation Act or in the Provincial Insolvency Act.

Referring to Wharton's Law Lexicon, I find the following:—"Application" is a request, a motion to a Court or Judge; the disposal of a thing."

As against "Petitions" it is stated "a supplication made by an inferior to a superior having jurisdiction to grant redress." It is further stated that

"in Bankruptcy, proceedings are commenced by one or more creditors of the debtor filing a petition in the Court of Bankruptcy praying that the debtor may be adjudged Bankrupt. Divorce, etc., proceedings are commenced by 'petition'."

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Mention is also made of Election Petitions. The "petitioning creditor" is said to be "one who applies for an adjudication in Bankruptcy against his debtor." It was contended by the learned Advocate for the respondents that the word "application" as used in the Provincial Insolvency Act has no technical meaning and that it is the same as "petition", and he referred us to certain other enactments of the Indian Legislature. In section 55, clauses 3 and 4, Civil Procedure Code, it is stated that the Court, before whom a judgment-debtor arrested in execution of a decree for money is brought, shall inform him that he may "apply" to be declared insolvent. Order XLV, rule 2, relating to appeals to the Privy Council, was also referred to, where the words used are "the appellant shall *apply* by *petition*." (The italics are mine). Further, the provisions of the Guardians and Wards Act, sections 8 and 10, were also referred to. In section 10 it is mentioned that "if the application is not made by the Collector, it shall be by petition, signed and verified, etc." It is not necessary to examine how these words are used in other enactments by the Legislature, and whether each of these words has a definite well-recognized meaning, different from the other. No doubt, in the Civil Rules of Practice, framed by this Court for the guidance of the lower Courts in the Presidency as to how proceedings should be marked for convenience and uniformity, a distinction has been made between a "petition" and an "application"; for example, between an "execution petition" and an "execution application", the latter phraseology being applied to the media by which further and other steps are sought to be taken in the main matter of execution and in a pending execution petition. But, in construing an Act passed by the Indian Legislature, this practice in our Presidency

should not be allowed to have any consideration at all. Again, as observed by the Privy Council in *Adamson v. Melbourne and Metropolitan Board of Works*(1), when a word has no definite and well-understood legal signification,

"it is always unsatisfactory and generally unsafe to seek the meaning of words used in an Act of Parliament in the definition clauses of other statutes dealing with matters more or less cognate, even when enacted by the same Legislature. *A fortiori* must it be so when resort is had . . . for this purpose to the enactments of other Legislatures."

In the circumstances, it seems to me that we must therefore turn to the provisions of the Provincial Insolvency Act, 1920, to find out whether any light is thrown on this matter by the provisions contained therein. On a reading of the several sections of the Act, one thing is clear that the Legislature in this Act has used the words "petition" and "application" intentionally—*prima facie*—differently. It is not necessary to refer to all the relevant sections. It is enough to refer, among others, to sections 7, 19, 20, 12 and 18 where the word "petition" is used, and to sections 27, 31, 35, 41, 68 where the term "application" is used. We also find that the two terms are used—side by side—in each of the two sections 10 (2) and 52. Schedule I also speaks of a "petition" and of an "application". I do not propose to lay any emphasis on the rules framed by this High Court under the Act, where the words "petition" and "application" are used separately; see rules 5, 8, 14, etc., for example. The term "petition" is apparently used in the Act to denote that by which the proceeding is inaugurated and begun; whereas the term "application" is used to denote that by which intermediate steps are taken in connection

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(1) [1929] A.C. 142, 147.

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with an original proceeding. Section 18 enacts that the procedure laid down in the Code of Civil Procedure with reference to admission of complaints shall, so far as it is applicable, be followed in the case of insolvency petitions; and section 12 enacts that every insolvency petition shall be in writing and shall be signed and verified in the manner prescribed by the Code of Civil Procedure for signing and verifying complaints. Having regard to the use of these two terms "petition" and "application" differently in the various sections of the Act, I am led to think that the two words have been used purposely to denote two different matters and that section 78 of the Provincial Insolvency Act, which makes the provisions of section 5 of the Limitation Act applicable to "applications" under the Provincial Insolvency Act, could not be called in aid in connection with "petitions" under the Provincial Insolvency Act. Our attention was however drawn by the learned Advocate for the respondents to the use of the word "petition" in section 54 (A) which circumstance—he argued—is rather against this view. I am not sure that it is so. Section 54 (A) was added by Act XXXIX of 1926. The distinction between "petition" and "application" existed when the Act was passed in 1920. For the purpose of this Act, that distinction does not disappear by the enactment of section 54 (A), whatever light it may throw on the Act as a whole. It is possible that the word "petition" was used in connection with section 54 (A) purposely with a view to point out that proceedings contemplated under that section are to be treated as in the nature of original petitions and to be inquired into and tried accordingly, having regard to their importance and seeing that third parties are interested in the same; but, in any event, the use of the word "petition" in section 54 (A) is not, in my opinion, in

any way conclusive to show that the words "petition" and "application" have been used indiscriminately in the Provincial Insolvency Act.

It should be noted that section 5 of the Limitation Act does not apply to "complaints", but applies only to "appeals and applications". It is clear therefore that the Court has no power under section 5 to excuse the delay in the filing of a "complaint". In cases of minority, fraud, etc., the period of limitation is extended and it is provided that there would be no limitation bar under the provisions of the Act if the necessary deductions on ground of minority, fraud, etc., be made, whereas, under section 5, the Court excuses the delay, having regard to the circumstances proved before it, holding that the proceedings are barred otherwise. Petitions filed by creditors under section 9 of the Insolvency Act are—substantially—in the nature of complaints. If that be so, one can understand why the Legislature did not provide for the application of section 5 to such petitions when it enacted section 78 of the Act. *Prima facie* it would be strange that the Court which could not, under section 5, excuse delay in filing a "complaint" could excuse delay in the filing of an "original petition", in respect of which, according to the assumption, a period of limitation has been prescribed. Thus, it would seem that the Legislature had a purpose in the use of the words "petition" and "application" in the material sections of the Provincial Insolvency Act, and it is not open to Courts, in the absence of clear and cogent indications in the Act to the contrary, to ignore the distinction made by the Legislature.

The learned Advocate for the respondents relied on the decision of a Bench of this Court in Appeal against Order No. 523 of 1925, decided by DEVADOSS and JACKSON JJ. The question for decision in that case was whether the petitioning creditor was entitled to the

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deduction of the time during which the petition filed by him was pending in a Munsif's Court, which had no jurisdiction to entertain that petition. While holding that section 14 did not apply, the learned Judges were of opinion that section 5 would apply, and, holding that no sufficient cause for not making the application earlier had been shown, they dismissed the petition on the merits. That decision is entitled to great weight, and, ordinarily, another Bench would follow the same. But, reading the judgment of the learned Judges, it will be seen that the various provisions of the Provincial Insolvency Act where the words "petition" and "application" are used have not been noticed, nor does the judgment discuss the real nature of a creditor's petition. In fact, the judgment of the Court was delivered by the learned Judge JACKSON J., and the same learned Judge before whom the present civil revision petition came on for hearing directed that the question should be considered by a Bench of two Judges. If the learned Judge thought that the decision in the unreported case referred to above governed the case and should be followed, it was of course open to him to follow it (as the lower appellate Court has done in the present case) and dismiss the revision petition. Instead of that, the learned Judge directed the case to be posted before a Bench, with a view, as I understand the position, to have the question of law re-examined by the Bench. In the circumstances, I do not think that it is not open to us to examine the question in the light of the further considerations placed before us.

Our attention was drawn to the case of *Vaithinatha Aiyar v. Vaithinatha Aiyar*(1), where CORNISH J. took the same view of these provisions of the Provincial Insolvency Act. The learned Judge held that the

provisions of section 5 of the Limitation Act could not be applied to the case of a creditor's "petition" under section 9 of the Provincial Insolvency Act, because such a petition "is not an application" within the meaning of section 78 of the Act of 1920. I respectfully agree.

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In my view, it is not necessary at present to examine the prior decisions of the several Courts in India on the question whether the time taken in getting a copy of a decision passed under the Provincial Insolvency Act could be deducted in computing the period prescribed for an appeal under that Act. Section 78 has made the position clear in cases arising under the new Act.

It could not be said that there are no "applications" mentioned in the Provincial Insolvency Act in respect of which periods of limitation have been fixed by the Act. It is enough to refer, for example, to section 68 of the Act which prescribes a period of twenty-one days in respect of "applications" mentioned therein.

Having regard to the various provisions of the Provincial Insolvency Act, 1920, I think that it is a legitimate inference to draw that the Legislature has, in that Act, used the expressions "petitions" and "applications" for different purposes and with different legal significations, and that power to excuse delay in respect of "applications" given under section 78 of the Act, by reference to section 5 of the Limitation Act, is not applicable to excuse the delay in filing a creditor's "petition" under section 9 of the Provincial Insolvency Act.

The remarks of Lord HALSBURY in *Commissioners for Special Purposes of Income-tax v. Pemsel*(1) came to my mind, where the following passages occur:—

"That, in fact, the language of an Act of Parliament may be founded on some mistake, and that words may be

(1) [1891] A.C. 531, 549.

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clumsily used, I do not deny. But I do not think it is competent to any Court to proceed upon the assumption that the Legislature has made a mistake. Whatever the real fact may be, I think a Court of law is bound to proceed upon the assumption that the Legislature is an ideal person that does not make mistakes. It must be assumed that it has intended what it has said, and I think any other view of the mode in which one must approach the interpretation of a statute would give authority for an interpretation of the language of an Act of Parliament which would be attended with the most serious consequences."

I find that in *Upendranath Galowa v. Hemchandra Koley*(1) SUHRAWARDY and GRAHAM JJ. observed at page 1390 as follows, and that in construing a fiscal enactment:

"Under Chapter XII, rule 3, Appellate Side Rules, a court-fee of Rs. 2 is prescribed for 'swearing, affirming every affidavit', thus indicating that there is some difference between 'swearing' and 'affirming'. It may be that solemn affirmation takes the form of an affidavit."

However much I may feel that the difference practically between a "petition" and an "application" is rather too fine, I feel driven to the conclusion I have arrived at by the use of these two expressions in various sections of the Act in question.

I may observe in passing that, so far as our attention was drawn, no such provision exists in the English Bankruptcy Act or in the Presidency-towns Insolvency Act. I may refer to Maxwell on Interpretation of Statutes, Chapter XII, section 3, pages 516 to 522, regarding the inference to be drawn when there is a change of language in a statute.

In this view, it is not necessary to consider the second question raised by the learned Advocate for the petitioner before us, viz., that the period of three months mentioned in section 9 is not "a period of limitation" at all, but is only one of the factors which along with other factors mentioned in the section created a right

(1) (1931) I.L.R. 58 Cal. 1389.

in the creditor which he could enforce under the Act; that, while limitation bar applies only to the rights that exist, section 9 creates no right in the creditor unless the transaction relied on as constituting an act of insolvency took place within the period mentioned in that section, and, as he contends, there being no right, no question of limitation arises. I do not propose to go into this question at present. In *Aiyapparaju v. Venkatakrishnayya*(1), though SPENCER J. was inclined to adopt that view, VENKATASUBBA RAO J. preferred not to express any opinion on that point, as that learned Judge pointed out on the ground that "the question is a difficult one", and, having regard to my opinion on the first of the two points mentioned above, it is not necessary for the disposal of the present revision petition to decide the second point.

For the above reasons, I agree with my learned brother that the revision petition should be allowed with costs in the High Court only, and the Subordinate Judge's order restored. The order as to costs passed by the lower Courts, namely, that each party is to bear his own costs in each of those Courts, will stand.

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(1) (1922) 44 M.L.J. 303.

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APPELLATE CRIMINAL.

*Before Mr. Justice Cargenven.*1931,
November 5.

SUBBIAH KONE (ACCUSED), PETITIONER IN BOTH,

v.

KANDASAMY KONE (COMPLAINANT IN CRIMINAL REVISION
CASE No. 418 OF 1931), RESPONDENT.**Code of Criminal Procedure (Act V of 1898), sec. 403—Applicability of—Successive convictions under sec. 323, Indian Penal Code, and sec. 3 (12), Towns Nuisances Act (Madras Act III of 1889)—Legality.*

Section 403 of the Code of Criminal Procedure is no bar to convictions successively under section 323, Indian Penal Code, and under section 3 (12) of the Madras Towns Nuisances Act in respect of the same conduct of being guilty of disorderly behaviour. Though the act or series of acts constituting the two offences may have been the same, they are capable of being viewed from two different points of view. The offence of hurt is an offence against an individual, while the offence under the Towns Nuisances Act is an offence against the public. Further, the circumstances to be considered in regard to the two cases are not precisely the same.

Emperor v. Ram Sukh, (1924) I.L.R. 47 All. 284, and *In re Dodhu Kalu*, (1929) 31 Bom. L.R. 922, referred to.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgments of the Court of the First-class Bench of Magistrates, Tinnevely, and of the Court of the First-class Bench of Magistrates of Kokkarakulam, Tinnevely, in Summary Trial No. 46 of 1931 and in Bench Case No. 23 of 1931 (Calendar Case No. 315), respectively.

V. Rathnam for petitioner.

Public Prosecutor (L. H. Bewes) for the Crown.

No one appeared for respondent.

* Criminal Revision Cases Nos. 418 and 417 of 1931.

JUDGMENT.

The petitioner in these two cases has been convicted of causing hurt under section 323, Indian Penal Code, and, in respect of the same conduct of being guilty of disorderly behaviour, under section 3 (12) of the Towns Nuisances Act. The point taken is that one or other of the convictions must be set aside because together they offend against section 403 of the Code of Criminal Procedure. I think that this is taking an incorrect view of the application of that section. Under subsection 2 of section 403 a person can be tried for any distinct offence for which a separate charge might have been made against him under section 235 of the Code of Criminal Procedure, notwithstanding that he may have been convicted or acquitted of another offence committed in the same transaction. Here, although the act or series of acts constituting the two offences may have been the same, they obviously are capable of being viewed from two entirely different points of view. The offence of hurt was an offence against an individual. The offence under the Towns Nuisances Act was an offence against the public. It is not indeed even the case that precisely the same circumstances have to be considered in regard to the two cases, because under section 3 of the Towns Nuisances Act the occurrence must have taken place in some public street, road, thoroughfare or place of public resort in order that the offence may have been committed.

My attention has been drawn to several cases upon the construction of section 403 of the Code of Criminal Procedure but I do not feel disposed to depart from this view after examining them. In *In re Chinnappa Naidu*(1) and *Alfred Laird v. King Emperor*(2) there was only one substantial aspect from which the

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KONE.

(1) A.I.R. 1924 Mad, 473.

(2) A.I.R. 1927 Cal. 224.

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occurrence could be regarded, in the former case as constituting mischief and in the latter case as constituting an assault upon an individual. It is true that the learned Judge who decided *Fatteh Muhammad v. Emperor*(1) accepted as the test that the act was a single one. In that case a tree was cut in a grave yard and one of the offences said to have been committed was under section 297, Indian Penal Code, and another under section 379, Indian Penal Code. With all respect I think this was clearly an instance in which under section 235 of the Code of Criminal Procedure two charges might have been framed and two punishments awarded for the two separable offences committed. The case in *Emperor v. Kallasani*(2) was of a different character, because it related to two offences which were connected in the manner contemplated in section 236 of the Code of Criminal Procedure, that is to say, where the commission of one or the other of them was doubtful. I cannot agree that the test proposed in that case, that the evidence should be the same in respect of the two offences, is a conclusive test, if it is to apply to cases of the kind now under reference. Much more nearly similar to the circumstances of the present cases are those of *Emperor v. Ram Sukh*(3) and *In re Dodhu Kalu*(4). In both of those cases the offences fell under sections 323 and 160, Indian Penal Code and it was held that such offences were distinct and separable and that there was no bar to the trial of one by virtue of a conviction in respect of the other. In the same way in the present cases I can find no bar to the trial of the one offence owing to the conviction in respect of the other, and I accordingly dismiss the criminal revision petitions.

K.N.G.

(1) (1926) I.L.R. 8 Lab. 52.
(3) (1924) I.L.R. 47 All. 284.

(2) A.I.R. 1927 Bom. 629.
(4) (1929) 31 Bom. L.R. 922.

APPELLATE CRIMINAL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

IN RE A. S. RADHAKRISHNA AYYAR (ACCUSED),
PETITIONER.*

1932,
January 28.

Indian Penal Code (Act XLV of 1860), sec. 171G—Offence under—Meaning of “any statement purporting to be a statement of fact”—Mere general imputations not sufficient.

By the words “any statement purporting to be a statement of fact” in section 171G, Indian Penal Code, is intended “any statement which is made as a statement of fact” and to constitute an offence under that section something must be stated as a fact and not as a general imputation or as a matter of opinion.

General imputations of misconduct unaccompanied by any charges of particular acts of misconduct cannot properly be described as statements of fact within the meaning of section 171G, Indian Penal Code.

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 Chingleput Division in Criminal Appeal No. 8 of 1931 preferred against the judgment of the Court of the Sub-Divisional First-class Magistrate of Saidapet in Calendar Case No. 126 of 1931.

A. S. Sivakaminathan for petitioner.

N. S. Mani for Public Prosecutor (L. H. Bewes) for the Crown.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by WALLER J.—The petitioner in this case was convicted of the offence of criminal defamation under section

* Criminal Revision Case No. 710 of 1931.

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500, Indian Penal Code, and his conviction was confirmed on appeal. The defamation was embodied in a document which was published by him during an election to a Taluk Board, at which election one Ramanatha Ayyar (the respondent) was a candidate. In revision it is contended on his behalf that he should have been prosecuted for an offence under section 171G, Indian Penal Code, which could not be done without the sanction of the Local Government. Several decisions have been cited before us on this point but we propose to deal with the petition on another ground. Section 171G, Indian Penal Code, has been framed on the lines of section 1 of an analogous English Act, An Act to amend the Corrupt and Illegal Practices Prevention Act of 1883, which was passed in 1895. Section 1 of that Act defines as an illegal practice the making or publishing of any false statement of fact in relation to the personal character or conduct of a candidate. Section 171G, Indian Penal Code, runs as follows:—

“Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false and which he either knows or believes to be false or does not believe to be true in relation to the personal character or conduct of any candidate shall be punished with fine.”

It is not apparent why the Indian Legislature should have thought fit to use the words “any statement purporting to be a statement of fact”, but what was intended doubtless was “any statement which is made as a statement of fact” and that comes to much the same thing as is conveyed by the English Statute. One thing at any rate is clear, that something must be stated as a fact and not as a general imputation or as a matter of opinion. The document in question is in the following terms:—

“This is to inform all that the Village Munsif Krishnaswami Ayyar and his son Ramanatha Ayyar in zamin Pallavaram

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have no properties. They will not shrink from committing even murder. Both are in enjoyment of some properties by virtue of an adoption which is false and opposed to law. Those properties belong to Government. Krishnaswami Ayyar of them has been making many kinds of forgeries. They are doing many kinds of harm to the poor. Ramanatha Ayyar of them is an atheist. They are eating (misappropriating) Government money unjustly by committing forgeries, misrepresentation and false personation. They are unjustly eating the common money and the temple money in zamin Pallavaram. They are doing acts which even mean-minded men will not (stoop to) do. They are doing many other improper acts. It is understood that the said Ramanatha Ayyar stands as a candidate for membership of the Taluk Board. I respectfully request vote should not be given to him for the above mentioned reasons.”

It begins by asserting that the candidate and his father have no properties. As that statement, which is a statement of fact, is followed by another statement that they are in enjoyment of some properties it requires no consideration. The next imputation is that they will not shrink from committing even murder; that can hardly be described as a statement of fact. The next statement is that they are in enjoyment of some properties by virtue of an adoption which is false and opposed to law; that might possibly be described as a mixed statement of fact and opinion. The next statement is that they are doing many kinds of harm to the poor; that again is not a statement of fact. The next statement is that the candidate is an atheist; that again may possibly be described as a statement of fact. The next four sentences embody general charges of forgery, misrepresentation, false personation, misappropriation, acts “which even mean-minded men will not stoop to do”; not a single specific act of forgery or misrepresentation or misappropriation is charged and the allegations can most certainly not be described as statements of facts. The English Act provides that any person who shall make or publish any false

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statement of fact such as is contemplated by it may be restrained by injunction by the High Court of Justice from repeating the false statement and for the purpose of granting an interim injunction *prima facie* proof of the falsity of the statement shall be sufficient. No similar provision has been made in India but the section of the English Act makes it clear what statements of fact fall within its mischief. They are statements of fact of the falsity of which *prima facie* proof is possible. When the statement is that a man will not shrink from committing murder, how is that expression of opinion to be disproved? When it is alleged that a man does many kinds of harm to the poor, that he misappropriates Government money, that he commits forgery and so forth, how would it be possible, in the absence of particulars, to prove *prima facie* that the allegations are false? It is true that there are in the document in question one or two statements which can properly be described as statements of fact, but the bulk of it is taken up with general imputations of misconduct unaccompanied by any charges of particular acts of misconduct and they cannot properly be described as statements of fact within the meaning of section 171G, Indian Penal Code. That being so, we think that the petitioner was properly convicted and sentenced for an offence under section 500 of the Indian Penal Code. The offending document, as a whole, was not one to which section 171G, Indian Penal Code, applied and he could not therefore be prosecuted under that section. The petition is dismissed.

K.N.G.

APPELLATE CRIMINAL.

Before Mr. Justice Sundaram Chetti.

NANNIER AND ANOTHER (ACCUSED), PETITIONERS,

v.

DASALIER (COMPLAINANT), RESPONDENT.*

1932,
February 4.

Code of Criminal Procedure (Act V of 1898), ss. 403, 350, 259—Oral charge in a summary trial by a First-class Bench—Subsequent transfer of the case to a Second-class magistrate who had no jurisdiction to try it summarily—Complainant not present on the day of hearing—Discharge of accused under sec. 259—Legal—Subsequent complaint—Entertainable.

A First-class Bench of magistrates took up on its file for summary trial a complaint against the accused, and an oral charge under section 323, Indian Penal Code, was framed against them to which they pleaded "not guilty". The case was transferred to the file of a Second-class Magistrate who had no jurisdiction to try the case summarily. The case was called on for hearing on a day to which it had been posted and the complainant not being present, either in person or by pleader, the magistrate discharged the accused under section 259 of the Code of Criminal Procedure. Subsequently another complaint was presented by the same complainant against the same accused on the same facts. Objection was taken that the order of discharge was really an order of acquittal and under section 403 of the Code of Criminal Procedure the second complaint was incompetent.

Held, that the order of discharge was a valid order under section 259 of the Code of Criminal Procedure and being an order of discharge there was no legal bar to entertaining the subsequent complaint; that the oral charge framed by the First-class Bench Court could not be deemed to be subsisting after the transfer of the case to the Second-class Magistrate; that section 350 of the Code of Criminal Procedure had no application to the trial of the case by the Second-class

* Criminal Revision Case No. 806 of 1931.

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DASALIER. Magistrate who could only hold a complete *de novo* trial subsequent to the transfer of the case to his file.

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 Sub-Magistrate of Salem Town dated 9th October 1931 and made in Calendar Case No. 925 of 1931.

S. Ranganadha Ayyar for petitioners.

Salem Ramaswami Ayyar for respondent.

Public Prosecutor (L. H. Bewes) for the Crown.

JUDGMENT.

The petitioners in this case were accused 1 and 2 in a criminal case before the First-class Bench, Salem, which took up this case on file for summary trial. From the register of summary trials kept by that Bench, it would appear that a charge was framed against the accused under section 323, Indian Penal Code, and explained to the accused to which they pleaded not guilty. This was done on 23rd March 1931. Later on, this case appears to have been transferred to the file of the Second-class Magistrate, Salem, in August 1931. The Second-class Magistrate has no jurisdiction to try this case summarily and there is no doubt that he has to try it in the ordinary way provided for the trial of warrant cases. When the case was so pending before him, it was called on for hearing on 4th September 1931 to which it had been posted. The complainant not being present, either in person or by a pleader, the Magistrate discharged the accused under section 259 of the Code of Criminal Procedure. Subsequently another complaint was presented by the same complainant against the same accused on the same facts. That complaint was entertained by the Second-class Magistrate, Salem.

But the accused put in a petition before him stating that he had no jurisdiction to entertain this complaint by reason of the disposal of the former complaint which, according to them, amounts to an acquittal under section 403 of the Code of Criminal Procedure. This objection was overruled by the Sub-Magistrate on 9th October 1931 in his order passed on that petition. Against that order the present revision petition has been filed.

There is no doubt that the Second-class Magistrate purported to discharge the accused in the former case and actually discharged them under section 259 of the Code of Criminal Procedure. He would be entitled to do so, if the default of the complainant in appearance when the case was called on for hearing was at any time before the framing of the charge in that case. It is now contended by Mr. Ranganadha Ayyar for the petitioners that, in view of a charge having been framed by the First-class Bench Court, it must be taken that the Second-class Magistrate was entitled to proceed upon the evidence partly recorded by the Bench Court and to continue the case from the stage at which it was before the transfer, by virtue of section 350 of the Code of Criminal Procedure. It is true that by reason of sub-section 3 of this section, even when a case is transferred from one Magistrate to another, the former shall be deemed to cease to exercise jurisdiction therein and to be succeeded by the latter within the meaning of sub-section 1. If section 350, clause 1, is properly applicable to the present case, I should think that the contention of the learned Counsel for the petitioners is well-founded. The decision in *Sriramulu v. Veerasalingam*(1) is doubtless authority for

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(1) (1914) I.L.R. 38 Mad. 585.

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the position that a second Magistrate who succeeds the first Magistrate and takes up a part-heard criminal case for trial under section 350 of the Code of Criminal Procedure cannot ignore the charge framed by his predecessor. If in the present case also we could hold that the Second-class Magistrate cannot ignore the charge framed by the Bench Court and can act upon the evidence taken by the Bench Court under section 350, clause 1 of the Code of Criminal Procedure, then it may be held that the order passed on 4th September 1931 is not one coming under section 259 of the Code of Criminal Procedure as an order of discharge. In the view taken by a single Judge of the Allahabad High Court in *Emperor v. Nazir Husain*(1) such an order may even be deemed to be an order of acquittal with an implied finding that the accused are not guilty. So far there is no difficulty. But we are confronted with another position which gives a different turn to the view contended for by the petitioners' learned Counsel. As I have already remarked, the former case was triable by the First-class Bench Court under its summary powers, whereas the Second-class Magistrate has no such jurisdiction. Under section 263 of the Code, the Bench Court need not record the evidence of witnesses or frame a formal charge. From the records it would appear that the Bench Court did not even reduce to writing the evidence of the witnesses examined by it and no charge in writing was framed. It seems that the charge was orally framed and explained to the accused. The facts being like these, is it possible to apply section 350 of the Code of Criminal Procedure to the present case? By extending that section, the result would be rather

(1) (1930) I.L.R. 53 All. 89.

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anomalous. The Second-class Magistrate who has no jurisdiction to try this case summarily should be taken to have the power to act upon the evidence heard by the Bench Court at the summary trial and the charge framed by that Court in the exercise of its summary powers, and continue the trial of the case from that stage and take the rest of the evidence in the ordinary way in which it has to be taken in a regular trial. Such a state of affairs can never be allowed to exist, and, if any authority is necessary, reference may be made to the decision of the Calcutta High Court in *Gosta Behary Bosu v. Baistam Das Deura*(1), wherein the learned Judges have said that even when the same Magistrate has got power to try a case summarily and in the regular manner, he cannot adopt one procedure up to a certain stage of the case and adopt a different procedure after that stage in the same case. A conviction in such a case was held to be illegal. *A fortiori*, in the present case, if the Second-class Magistrate could act upon the evidence taken and the charge framed in the Bench Court and proceed to try the case in the regular manner, the trial itself would be illegal and the proceedings would have to be quashed. If the Second-class Magistrate should adopt the evidence taken by the Bench Court at the summary trial, he is virtually trying the offender summarily within the meaning of section 530, clause (g) of the Code. It does not make much difference whether the Second-class Magistrate tries an accused person summarily or acts upon the evidence recorded by a Court under the summary powers. That being so, it is impossible to hold that the former case, after its transfer from the Bench Court to the Second-class Magistrate's file,

(1) (1922) 26 C.W.N. 831.

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Section 350 of the Code has no application to the trial by the Second-class Magistrate subsequent to the transfer of the case to his file. The oral charge framed by the Bench Court cannot be deemed to be subsisting after the transfer of the case to the Second-class Magistrate, and therefore his order of discharge passed on 4th September 1931 was a valid order under section 259 of the Code of Criminal Procedure. That order being an order of discharge, there is no legal bar to entertaining the present complaint. The Sub-Magistrate may have taken the special circumstances into consideration when entertaining the second complaint.

In view of the reasons stated by me, I am constrained to dismiss this revision petition.

K.N.G.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Owen Beasley Kt., Chief Justice,
Mr. Justice Ramesam and Mr. Justice Cornish.*

RAMIER (THIRD RESPONDENT), APPELLANT,

v.

1932,
January 18.

MUTHUKRISHNA AYYAR AND TEN OTHERS (PETITIONERS ONE AND THREE TO SEVEN, AND RESPONDENTS TWO AND FOUR TO SEVEN), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), ss. 24, 37, 38, 39 and 150—Jurisdiction—Final decree in mortgage suit—Transfer of territorial jurisdiction to another Court after—Execution application filed in latter Court without obtaining transmission of decree from former Court—Jurisdiction of the former and latter Courts to execute the decree considered.

After the passing of a final decree in a mortgage suit, the Court which passed the decree ceased to have territorial jurisdiction over any of the mortgaged properties, though the said Court continued to exist, and, in pursuance of a notification which had not the effect of a transfer of business, another Court acquired territorial jurisdiction over the said properties.

Held, that the latter Court could not execute the decree without transmission of the same from the former Court which passed the decree. The *obiter dictum* to the contrary in *Seeni Nadan v. Muthusamy Pillai*, (1919) I.L.R. 42 Mad. 821 (F.B.), disapproved. *Subramanya Iyer v. Swaminatha Chettiar*, (1928) 28 L.W. 885, followed.

Held further, that the Court which passed the mortgage decree retained jurisdiction to execute the decree even after transfer of territorial jurisdiction. Observations to the contrary in *Sivaskanda Raju v. Raja of Jeypore*, (1927) I.L.R. 50 Mad. 882, overruled as being in conflict on this point with *Seeni Nadan v. Muthusamy Pillai*, (1919) I.L.R. 42 Mad. 821 (F.B.).

APPEAL against the order of the District Court of Madura in Appeal Suit No. 104 of 1929 preferred against the

* Appeal against Appellate Order No. 186 of 1929.

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order of the Court of the District Munsif of Madura Taluk at Madura in Execution Petition No. 245 of 1928 in Original Suit No. 997 of 1912 on the file of the Court of the District Munsif of Melur.

K. V. Srinivasa Ayyar for appellant.—Some of the properties covered by the mortgage were within the territorial jurisdiction of the District Munsif's Court of Melur and some within that of the District Munsif's Court of Madura Town. After the passing of the final decree in the mortgage suit by the District Munsif's Court of Melur, the territorial jurisdiction over the suit properties was transferred to another Court, namely to the District Munsif's Court of Madura Taluk, by a Government notification. Application for execution was filed in the latter Court. The District Munsif of Madura Taluk relying upon *Subramanya Iyer v. Swaminatha Chettiar*(1) held that he had no jurisdiction. On appeal the District Judge relying on the *obiter dictum* in *Seeni Nadan v. Muthusamy Pillai*(2) held that the District Munsif had jurisdiction. The present appeal is on all fours with *Subramanya Iyer v. Swaminatha Chettiar*(1) which follows *Venkatasami Naik v. Sivanu Mudali*(3). Complete machinery for execution is provided in the Code by sections 37, 38 and 39. The learned Judges in *Seeni Nadan v. Muthusamy Pillai*(2) did not appreciate the distinction between the words "transfer of business" and "transfer of territorial jurisdiction" when they relied upon section 150 of the Code for the view that they came to. The correct distinction is pointed out in *Subramanya Iyer v. Swaminatha Chettiar*(1). In *Ramanathan Chetty v. Alagappa Chetty*(4) it was held that transfer of jurisdiction does not necessarily imply that pending proceedings are also transferred. See also *Munshi Md. Kazemal v. Munshi Niamuddin Ahmed*(5) and *Chokkalinga Pillay v. Velayudha Mudaliar*(6). A number of cases have held that the Court which passed the mortgage decree can execute its own decree whatever changes in jurisdiction may happen after the passing of the decree. The decision to the contrary in *Sivaskanda Raju v. Raja of Jeypore*(7) is not correct.

(1) (1928) 28 L.W. 885.

(3) (1918) I.L.R. 42 Mad. 481.

(5) (1921) 28 C.W.N. 218.

(2) (1919) I.L.R. 42 Mad. 821 (F.B.).

(4) (1929) I.L.R. 53 Mad. 378.

(6) (1924) 47 M.L.J. 448.

(7) (1927) I.L.R. 50 Mad. 882.

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A. Nagaswami Ayyar for respondents.—The fact that the Court which passed a mortgage decree is a Court in which execution application could be filed does not mean that it is the "only" Court which could entertain the execution application. *Sivaskanda Raju v. Raja of Jeypore*(1) held that first Court had lost jurisdiction. Applying section 150 of the Code the learned Judges in *Seeni Nadan v. Muthusamy Pillai*(2) held that the execution application could be filed in the latter Court. In *Manikka Goundan v. Loganatha Mudaliar*(3) it is stated that the Full Bench has upheld *Subbiah Naicker v. Ramanathan Chettiar*(4).

[Reference was made to the cases referred to in *Subbiah Naicker v. Ramanathan Chettiar*(4).]

Our. adv. vult.

The JUDGMENT of the Court was delivered by RAMESAM J.—The facts out of which this civil miscellaneous second appeal arises are these: The respondents before us obtained a final mortgage decree on 20th January 1916 in the District Munsif's Court of Melur in respect of properties part of which were situated within the jurisdiction of the District Munsif's Court of Melur and part within the jurisdiction of the District Munsif's Court of Madura Town. Subsequent to the passing of the decree (in February 1920) there was a notification by the High Court re-arranging the jurisdictions of the District Munsifs' Courts in the District, the result of which was that the suit properties came within the jurisdiction of a third District Munsif's Court, namely, the District Munsif's Court of Madura Taluk. The present application for execution was filed on 27th July 1927 in the Court of the District Munsif of Madura Taluk without applying for the transfer of the decree from the Melur Court. The Melur Court has always continued to exist. The District Munsif of the Madura Taluk Court, following the decision of

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(1) (1927) I.L.R. 50 Mad. 882.

(3) (1929) 80 L.W. 649.

(2) (1919) I.L.R. 42 Mad. 821 (F.B.).

(4) (1914) I.L.R. 37 Mad. 482.

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myself and DEVADOSS J. in *Subramanya Iyer v. Swaminatha Chettiar*(1) held that, until the decree was transmitted by the Melur Court, the Taluk Court cannot execute the decree. He therefore dismissed the application. On appeal the District Judge of Madura refused to follow our decision on the ground that the decision of the Full Bench in *Seeni Nadan v. Muthusamy Pillai*(2) contained an expression of opinion to the contrary, which he preferred, and, reversing the decision of the District Munsif, remanded the application to the lower Court for disposal according to law. The judgment-debtor files this second appeal.

When this second appeal came on for hearing before our brother JACKSON J., he found not only that there was some conflict of opinion between the decision in *Subramanya Iyer v. Swaminatha Chettiar*(1) and the Full Bench judgment in *Seeni Nadan v. Muthusamy Pillai*(2) but also that there was some other conflict of opinion between the decision in *Subramanya Iyer v. Swaminatha Chettiar*(1) and another decision, *Sivaskanda Raju v. Raja of Jeypore*(3), on a matter intimately connected with the main question. He therefore thought it desirable to refer the case for disposal to a Full Bench.

On the facts stated above and on the view taken by the District Judge, strictly the only question that should arise before the Full Bench is,—which is the correct rule to be followed, the decision of myself and DEVADOSS J. in *Subramanya Iyer v. Swaminatha Chettiar*(1) or the opinion expressed by the Full Bench on the effect of section 150, Civil Procedure Code, if any, when jurisdictions are changed by notification? But before I deal with this question, I would like to dispose

(1) (1928) 28 L.W. 885.

(2) (1919) I.L.R. 42 Mad. 821 (F.B.).

(3) (1927) I.L.R. 50 Mad. 882.

of a connected question, because this point has been strenuously urged before us by the learned Advocate for the respondents, and it is implied in the reference by JACKSON J. to the conflict between the decision in *Sivaskanda Raju v. Raja of Jeypore*(1) and that in *Subramanya Iyer v. Swaminatha Chettiar*(2). The contention of the learned Advocate is that, even after the Full Bench decision in *Seeni Nadan v. Muthusamy Pillai*(3), the Court which passed the decree has no jurisdiction within the meaning of section 37 (b) of the Code of Civil Procedure after the notification. He therefore contends that strictly the second Court is the only Court which has jurisdiction to execute the decree. One would have thought that such an argument is impossible to maintain on its face after the decision of the Full Bench in *Seeni Nadan v. Muthusamy Pillai*(3), in which it was held that the first Court had still jurisdiction to execute its own decree. The learned Advocate contended that the word "jurisdiction" in section 37 has two meanings: (i) the general territorial jurisdiction over the properties and (ii) jurisdiction to execute the decree; and that after the notification the first Court had certainly lost its territorial jurisdiction over the properties and therefore the first Court ceased to have jurisdiction and the second Court is the only Court that can be regarded as falling within the definition of the words "Court which passed a decree" in section 37. But, assuming for a moment that this distinction between the two meanings of the word "jurisdiction" can be supported, the distinction does not avail the learned Advocate because the words used in section 37 (b) are not merely "where the Court of first instance has ceased to have jurisdiction", in

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(1) (1927) I.L.R. 50 Mad. 882.

(2) (1928) 28 L.W. 885.

(3) (1919) I.L.R. 42 Mad. 821 (F.B.).

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which case some countenance may be given to his argument, but they are "where the Court of first instance has ceased to have jurisdiction to execute it", that is, only when the first Court had lost jurisdiction to execute the decree will the second Court take the place of the Court which passed the decree by reason of the section. This is the particular point which was dealt with by the Full Bench and the Full Bench held that the first Court never lost its jurisdiction to execute the decree. Apart from the binding nature of the decision of the Full Bench, we entirely agree with the actual decision in that case, namely, that the first Court which passed the mortgage decree never lost its jurisdiction to execute the decree by reason of the later notification by which the mortgaged properties are taken off from its jurisdiction. If so, the first Court continues to be "the Court which passed a decree" within the meaning of section 37 and the second Court cannot take its place. Apparently the learned Advocate was emboldened to urge this argument striking at the jurisdiction of the first Court because of the decision in *Sivaskanda Raju v. Raja of Jeypore*(1). It was held in *Sivaskanda Raju v. Raja of Jeypore*(1) that the Sub-Court of Vizagapatam which passed a mortgage decree could not execute its decree because the properties to be sold were taken away from the jurisdiction of that Court. Now it seems to me in the first place that this decision is directly opposed to the Full Bench decision in *Seeni Nadan v. Muthusamy Pillai*(2), which overruled the earlier decision in *Subbiah Naicker v. Ramanathan Chettiar*(3), in which it was held that the first Court had no jurisdiction and the second Court only had

(1) (1927) I.L.R. 50 Mad. 882.

(2) (1919) I.L.R. 42 Mad. 821 (F.B.).

(3) (1914) I.L.R. 37 Mad. 462.

jurisdiction. Towards the end of *Sivaskanda Raju v. Raja of Jeypore*(1), the following observation occurs :

"I am of opinion that *Subbiah Naicker v. Ramanathan Chettiar*(2), so far as it lays down the opposite of this proposition, has not been overruled by the Full Bench case in *Seeni Nadan v. Muthusamy Pillai*(3)."

The proposition referred to there is that the Court which originally passed the decree retains jurisdiction to execute and sell in execution. Now, with great respect to the learned Judge who made this observation, I am unable to agree with the statement that the decision in *Subbiah Naicker v. Ramanathan Chettiar*(2), so far as it lays down that the first Court lost its jurisdiction, has not been overruled by the Full Bench case, *Seeni Nadan v. Muthusamy Pillai*(3). On the other hand, in so far as the powers of the first Court are concerned, every part of *Subbiah Naicker v. Ramanathan Chettiar*(2) has been completely overruled by the Full Bench in *Seeni Nadan v. Muthusamy Pillai*(3). The portion in *Subbiah Naicker v. Ramanathan Chettiar*(2) which has not been overruled by the Full Bench case, *Seeni Nadan v. Muthusamy Pillai*(3), is the portion which relates to the powers of the second Court. It is this point that arises now directly for decision but did not arise for decision before the Full Bench and will be dealt with lower down. All that I now wish to say is that the decision in *Subbiah Naicker v. Ramanathan Chettiar*(2) is completely overruled by the Full Bench so far as the powers of the first Court are concerned. But, apart from this observation, the decision in *Sivaskanda Raju v. Raja of Jeypore*(1) is not only opposed to the Full Bench decision itself but to a long series of rulings relating to the powers of a Court which passed a mortgage decree to execute its own

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(1) (1927) I.L.R. 50 Mad. 882.

(2) (1914) I.L.R. 37 Mad. 462.

(3) (1919) I.L.R. 42 Mad. 821 (F.B.).

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decree. Ever since the Code of Civil Procedure of 1859 was passed, it was held that the first Court which passed a mortgage decree can execute its own decree whatever changes in jurisdiction may happen after the passing of the decree. It is enough simply to mention a list of decisions which have so held: *Maseyk v. Steel & Co.*(1), *Kartick Nath Pandey v. Tilukdhari Lall*(2), *Gopi Mohan Roy v. Doybaki Nundun Sen*(3), *Tincouri Debya v. Shib Chandra Pal Chowdhury*(4), *Latchman Pundeh v. Maddan Mohun Shye*(5), *Jahar v. Kamini Debi*(6), the opinion of MOOKERJEE J. in *Begg, Dunlop & Co. v. Jagannath Marwari*(7), *Rajagopala Pandarathar v. Tirupathia Pillai*(8) and *Abdul Hadi v. Kabultunnissa*(9). In my judgment in *Subramanya Iyer v. Swaminatha Chettiar*(10), both myself and DEVADOSS J. expressed the view that we could not agree with the decision in *Sivaskanda Raju v. Raja of Jeypore*(11) and incidentally mentioned some of these cases. It is these decisions that WALLIS C.J. obviously had in his mind when he stated in *Seeni Nadan v. Muthusamy Pillai*(12), at page 835:

"Further the decision is opposed to a long line of authorities which I think the Legislature accepted in 1908.

. . . Both on principle and on the balance of authority and convenience my answer is that the Court which passed the decree is a proper Court . . . "

It is clear from the judgment of WALLIS C.J. that not only with reference to the language of section 37 but also with reference to the long line of authorities from 1859 he held that the first Court had jurisdiction to execute the mortgage decree. In my opinion, the

(1) (1887) I.L.R. 14 Calo. 661.

(8) (1891) I.L.R. 19 Calo. 13.

(5) (1880) I.L.R. 6 Calo. 513.

(7) (1911) I.L.R. 39 Calo. 104, 109.

(9) (1924) 80 I.C. 901.

(11) (1927) I.L.R. 50 Mad 882.

(2) (1888) I.L.R. 15 Calo. 667.

(4) (1894) I.L.R. 21 Calo. 639.

(6) (1900) I.L.R. 28 Calo. 238.

(8) (1925) 50 M.L.J. 161.

(10) (1928) 28 L.W. 885.

(12) (1919) I.L.R. 42 Mad. 821 (F.B.).

decision in *Sivaskanda Raju v. Raja of Jeypore*(1) is directly opposed to the actual Full Bench decision in *Seeni Nadan v. Muthusamy Pillai*(2) and cannot be regarded as good law. As myself and DEVADOSS J. were not sitting in Full Bench but merely as a Division Bench we then merely expressed our dissent.

I now come to the real point that has to be decided in this case with reference to the decision of the District Judge and this point is whether the second Court which acquired territorial jurisdiction by means of notification can execute the decree without transmission of the decree from the first Court which passed the decree. It is in the consideration of this question that the observations in *Seeni Nadan v. Muthusamy Pillai*(2) have to be remembered. I am very anxious to observe at the outset that, both when I and DEVADOSS J. decided the case in *Subramanya Iyer v. Swaminatha Chettiar*(3) and now, I am fully conscious of the fact that I ought to give the utmost weight possible to the observations in the Full Bench decision even though they do not touch the actual decision in the case. I make this observation apart from the great respect I always had for the three learned Judges who were sitting in the Full Bench. But giving every consideration to this aspect, myself and DEVADOSS J. felt bound to differ from the opinion as to the power of the second Court with reference to section 150 of the Code of Civil Procedure. I still adhere to that opinion. But in doing so I do not wish to repeat the arguments I already mentioned in the former judgment but to supplement them by other arguments for most of which I am indebted to the observations of my Lord, the CHIEF JUSTICE, in the course of the argument. But before I do so, I think it

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necessary first to set forth the notification changing the jurisdiction of the Courts. The notification runs as follows:—

His Excellency the Governor in Council having sanctioned in G.O. No. 1056, Home (Judicial), dated the 10th May 1919, the establishment of two Additional District Munsifs' Courts for the Madura District, the High Court hereby directs under sections 5 and 11 of the Madras Civil Courts Acts, 1873, as amended by the Madras Civil Courts Act, 1885, that the said Courts shall continue to hold their sittings at Madura and Dindigul until further orders, and shall be styled "The Court of the District Munsif of Madura Taluk at Madura" and "The Court of the District Munsif of Palni." The Court of the District Munsif of Madura (Principal) and the Court of the Second Additional District Munsif of Madura shall be styled "The Court of the Principal District Munsif of Madura Town" and "The Court of the Additional District Munsif of Madura Town."

The High Court further directs, in supersession of all previous notifications on the subject, that the following District Munsifs' Courts in the Madura District shall be located and have local jurisdiction as follows:—

Number and name of Court.	Place of sitting.	Present jurisdiction.	Proposed jurisdiction.
1. The Principal District Munsif's Court of Madura to be styled "The Court of the Principal District Munsif of Madura Town."	Madura.	Madura Municipality.	Madura Municipality.
The first Additional District Munsif's Court of Madura to be styled "The Court of the District Munsif of Madura Taluk at Madura."	Do.	Madura Municipality (but trying transferred suits).	Madura Municipality (excepting Madura Municipality) and Tirupparankundram firkas of Madura Taluk and Alanganallur firka of Nilakkottai Taluk.

Number and name of Court.	Place of sitting.	Present jurisdiction.	Proposed jurisdiction.	RAMIER v. MUTHU- KRISHNA AYYAR. — RAMESAM J.
3. The District Munsif's Court of Melur.	Madura.	Melur Taluk and Madura Taluk except Madura Municipality and Alanganallur firka of Nilakkottai Taluk.	Melur Taluk and Samayanallur, Tirumukur, Chatrapatti, Kunnathur and Kallandiri firkas of Madura Taluk.	

I think it necessary to set forth the notification clearly because, in my opinion, much of the conflicts of opinion and such decisions as, in my opinion, are erroneous are due to the non-reference to the actual wording of the notification. I observe that in none of the former decisions is the notification actually set forth or its language specifically referred to. It is possible that in some of these decisions the notification actually amounted to a transfer of a certain amount of business either by specifying the cases themselves or the classes of cases from one Court to another. If so, those decisions would be right and I need not expressly dissent from them. It is now unnecessary for me to trace the actual notification in each of the earlier cases which have been cited before us. It is enough for me to look at the notification in the particular case before us. Only if the notification is not such that an inference can be made that business has been transferred from one Court to another, these decisions can be regarded as erroneous and my dissent from them applies. Now looking at the language of this notification, in the first place I observe that it talks of the future; it does not apply to the past; it gives guidance to the people as to what they shall do in future; it tells them what Court has jurisdiction over certain regions. Following this information, suitors who have

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got to file suits relating to properties have got to file their suits in the Court which has jurisdiction over those properties after the notification. But all this has nothing to do with the past. The notification does not in terms transfer any business pending or closed from one Court to a new Court. Myself and DEVADOSS J. have already pointed out some practical disadvantages apart from the inappropriateness of construing a notification which makes no reference to transfer as effecting a transfer of business. It is unnecessary to repeat these disadvantages in this judgment. But as I have already said I will mention some more for which I am indebted to my Lord, the CHIEF JUSTICE. Let us suppose that some suits or applications relating to one property were pending in one Court. A notification is then issued taking away the properties from the jurisdiction of that Court and it comes to the knowledge of the presiding officer of that Court. Can it be said that *ipso facto*, without anything further, without an order of the District Court or the High Court under section 24, Civil Procedure Code, transferring certain work from that Court to the new Court, all the business is transferred? When we put this question to the learned Advocate he said that it must be regarded as so transferred. The next question that arose on this answer was whether the first Court can proceed with the trial of the pending suits. When we put this question to the learned Advocate he at once replied that the first Court also can proceed with the trial of those suits, though it might also send them to the second Court. He had to give this answer because of the decision of our brothers PHILLIPS and VENKATASUBBA RAO JJ. in *Chokkalinga Pillay v. Velayudha Mudaliar*(1), in which it was held that once a suit is filed in

(1) (1924) 47 M.L.J. 448.

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one Court that Court can try the suit even if there is a change of jurisdiction by notification. Though VENKATASUBBA RAO J. bases his decision on the consent of the parties, PHILLIPS J. does not do so. And when we remember the decisions of the Privy Council in *Ledgard v. Bull*(1) and *Minakshi v. Subramanya*(2) that consent cannot give jurisdiction where there is none, it is clear that it is not consent that validates the trials, and I agree with the reason given by PHILLIPS J., namely, that the jurisdiction to try the suits was never lost. At this stage my Lord, the CHIEF JUSTICE, pointed out that if, even after the notification, the first Court had jurisdiction to try the suit, how can it be said that the business of the Court has been transferred to another Court? How can the effect of the notification be properly described as transfer if the first Court can still go on with it? The actual result in practice would be worse if the suit is one which is partly heard by the District Munsif at the time of the notification. Can it be said that he should stop further trial of the suit and send it on to the other Court or can it be said that he can continue the trial of the suit though the suit is transferred from his Court to another? The transfer must be a complete transfer and the suit cannot go on in the place from which the transfer takes place. When this point was put by my Lord to the learned Advocate he had to contend that the further trial of the suit itself by the first Court was not permissible. Such an answer comes into direct conflict with the decision in *Chokkalinga Pillay v. Velayudha Mudaliar*(3). Illustrations of this kind can be multiplied *ad infinitum* to show the anomalies that would result from a construction of the notification merely effecting future change in jurisdiction as effecting transfer of past

(1) (1886) I.L.R. 9 All. 191 (P.C.). (2) (1887) I.L.R. 11 Mad. 26 (P.C.).
(3) (1924) 47 M.L.J. 448.

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business. It seems to me that, unless the language of the notification is plain, directions as to future regarding pending business cannot be implied. In my opinion, unless the notifications of these cases are different in language and purport to transfer business specifically or by general description, such a construction of the notification as was adopted in the decision in *Subbiah Naicker v. Ramanathan Chettiar*(1), which was reiterated by SADASIYA AYYAR J. in *Venkatachellam v. Sithayamma*(2) and followed by other learned Judges in *Ranganatha Rao v. Hanumantha Rao*(3) and *Guruswami Naicker v. Mahommadhu Rowther*(4), is not permissible. In *Venkatachellam v. Sithayamma*(2) SADASIYA AYYAR J. went a step further and said that the transfer of business referred to in section 150 can be only by a notification effecting change of jurisdiction and not transfer of business by specific orders. In this extreme view he was not supported by the later decisions which hold that section 150 applies to both kinds of transfer. But whatever that may be, in my opinion, we cannot interpret a notification effecting change of jurisdiction for the future as effecting transfer of past business without doing violence to the language, and because myself and DEVADOSS J. were of this opinion we had to decide the case in *Subramanya Iyer v. Swaminatha Chettiar*(5) as we did, even after giving every weight to the opinion of the Full Bench. Now coming to the opinions of the Full Bench, so far as WALLIS C.J. is concerned, reference to the effect of section 150 is contained in two sentences, one at page 832 and another in the middle of page 833. In neither of these sentences is there any reference to the actual language of the notification, nor is there a

(1) (1914) I.L.R. 37 Mad. 462.

(2) (1916) 31 M.L.J. 22.

(3) (1922) I.L.R. 46 Mad. 1.

(4) (1922) I.L.R. 46 Mad. 83.

(5) (1928) 28 L.W. 885.

discussion of the phrase "transfer of business" or of the practical disadvantages which would result from such a construction of the notification. It looks to me as if all persons concerned, namely, the Advocates and the Judges, assumed that a notification effects a transfer of business and there is really no argument to the opposite effect. Under such circumstances, whatever respect we may feel for the eminent Judges that were sitting in the Full Bench, we thought we were entitled to take a different view. I may add that this expression of opinion on section 150 following a notification is not part of the chain of reasoning leading to the main conclusion in the case, namely, that the first Court has not lost jurisdiction. If it is a link in the chain of reasoning, myself and DEVADOSS J. would not have felt at liberty to differ from it because not only the actual decision but steps in the reasoning of the Full Bench will be binding on us. As to the other learned Judges, AYLING and SADASIYA AYYAR JJ., it must be remembered that they were the Judges who decided *Subbiah Naicker v. Ramanathan Chettiar*(1), which was being overruled by the Full Bench. And one Judge, AYLING J., made an observation that what after all was necessary for the former decision was not so much the power of the first Court as the power of the second Court and then proceeded to make observations with reference to section 150 though the point did not arise before them. As to SADASIYA AYYAR J., his actual observations were against the correctness of the Full Bench decision. But he was willing to subscribe to the opinion of the other Judges for the sake of uniformity. Under such circumstances it is permissible to observe that their observations with reference to section 150 have less weight than it would have been otherwise. Here I may

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point out that the view of myself and DEVADOSS J. construing the notification as merely changing the jurisdiction is in accord with the opinion of the Calcutta High Court in *Munshi Md. Kazemal v. Munshi Niamuddin Ahmed*(1), with the reasoning of which I entirely agree if I may say so with respect. This is also the view taken by CURGENVEN J. in *Ramanathan Chetty v. Alagappa Chetty*(2). I may here add one word with reference to the opposite construction of section 150 which some time prevailed in this Court. Assuming that on account of the change of territorial jurisdiction the second Court is the more convenient Court for execution, all that the decree-holder has to do is to apply to the first Court for transmission of the decree under section 39 of the Code. Such an application may entail a delay of a few days if the Courts are situated in different places, but in a case like the one before us in which the Courts are in the same building the delay cannot even amount to a day. Under such circumstances what is the need for enacting another section conferring jurisdiction on the second Court? At this stage I may refer to the draft section which was originally inserted in the Code by the Legislature but afterwards dropped. Is it not a more natural inference from the dropping of the draft section that the Legislature found it unnecessary in view of the complete machinery provided in section 39 and not because the result was also effected by the language of section 150—an inference that can only be made by implying in the section what is not specifically stated there? There is only one remark that falls to be made by me. One always feels very unwilling to give the advantage to a judgment-debtor of escaping liability under a decree validly passed against him, as the District Judge observes—an observation with which

(1) (1921) 26 C.W.N. 216.

(2) (1929) I.L.R. 58 Mad. 378, 380.

I agree. But the District Judge then proceeded to observe "if the present execution application is dismissed, any further application is time-barred." Strictly it is so. But having regard to the fact that the present application was filed by the judgment-creditor in December 1927 when the decision of myself and DEVADOSS J. was not passed, it may be possible for the Courts to hold that the decree-holder was pursuing *bona fide* his remedy in another Court, though wrongly, and it is open to the Court to excuse the delay if there is nothing more to be said against him. We can express no final opinion in regard to this matter. If the conduct of the decree-holder is explainable it is open to the Court to excuse the delay and the apprehension that the application will be necessarily time-barred is not justified. I may add that, in the case decided by me and DEVADOSS J., later on an application for execution was filed, objection as to limitation was taken and it was excused by both the lower Courts. The case came up in civil miscellaneous second appeal to the High Court and our brothers REILLY and ANANTAKRISHNA AYYAR JJ. excused the delay. To lay down a wrong proposition of law in order that the execution of the decree may not become time-barred is not justifiable.

The civil miscellaneous second appeal must be allowed and the order of the District Munsif restored with costs here and in the lower appellate Court without prejudice to the decree-holder applying to the Melur District Munsif's Court for transmission of the decree and having the delay excused on proper cause being shown.

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SPECIAL BENCH.

Before Sir Owen Beasley Kt., Chief Justice,
Mr. Justice Ramesam and Mr. Justice Cornish.

1932,
January 5.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
PETITIONER,

v.

MESSRS. K. SIDDHA GOWDER AND SONS
(ASSEESSEES), RESPONDENTS.*

*Indian Income-tax Act (XI of 1922), ss. 10 (2) (iii) and 24—
Capital loss—Trading loss or—Dissolution of partnership—
Distribution of assets and liabilities on—Interest paid on
liabilities—Deduction of, from taxable income—Right to—
More businesses than one carried on by an assessee—Loss
sustained by him in one or more of—Set off of, against
gains and profits of other businesses—Right of—“Profits or
gains of any business carried on by him” in section 10 (1)
—Meaning of.*

The petitioners, who constituted a joint Hindu family, carried on a money-lending business. They had also a share in two firms doing other classes of business. Those two firms were dissolved, an account was taken of their assets and liabilities and those assets and liabilities, when ascertained, were distributed between the petitioners and another partner. Those liabilities represented capital borrowed entirely for the purpose of the two firms and the said borrowed capital was raised by those firms from third parties and not from any of the petitioners' businesses and was actually utilized in those two partnership businesses. During the year of account the petitioners paid interest on the liabilities of the two firms so taken over by their family.

Held that the amount paid by the petitioners for interest on the liabilities of the two firms taken over by them was not a trading loss within the meaning of section 24 of the Income-tax Act of 1922 and that the petitioners could not claim a deduction of that amount from the profits made by them in their joint family money-lending business.

* Original Petition No. 167 of 1931.

The property of the two businesses was distributed after their dissolution; and it was capital.

Where more businesses than one are carried on by an assessee, what has to be ascertained is whether they have resulted in a profit or whether one or some of them have resulted in a profit and others in a loss. If it is discovered, on an account taken in accordance with section 10, that there has been a loss in one or more of them, that loss can be set off under section 24 against the profits and gains of other businesses of whatever description.

Quaere—whether the words “profits or gains of any business carried on by him” in section 10 (1) mean “profits or gains of each and every business” carried on by him.

Commissioner of Income-tax, Madras v. Suppan Chettiar, (1929) I.L.R. 53 Mad. 702 (S.B.), approved.

Commissioner of Income-tax v. Arunachalam Chettiar, (1923) I.L.R. 47 Mad. 660 (S.B.), doubted.

REFERENCE to the High Court under section 66 (2) of the Indian Income-tax Act (XI of 1922) in the matter of K. Siddha Gowder & Sons—Ootacamund Circle—Ootacamund.

S. Doraiswami Ayyar (with him *M. R. Venkataraman and K. Nanjundiah*) for assessees:—Where more businesses than one are carried on by an assessee the loss incurred by him in one of such businesses can be set off against his profits in the other business or businesses; see *Commissioner of Income-tax v. Arunachalam Chettiar* (1). The real basis of the decision in that case is that, in the case of a person carrying on more businesses than one, the real mode of ascertaining his taxable income is to take into account the profits and losses of all the businesses put together. That decision is authority also for the view that for the purposes of such a case the fact that the businesses are totally distinct businesses is immaterial. *Commissioner of Income-tax v. Arunachalam Chettiar* (1) goes further than *Commissioner of Income-tax, Madras v. Suppan Chettiar* (2) in conceding the right of set off even in a case where the different business is not the individual business of the assessee but is only a partnership business. *Karam Ilahi Muhammad Shafi v.*

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(1) (1923) I.L.R. 47 Mad. 660 (S.B.).

(2) (1929) I.L.R. 53 Mad. 702 (S.B.).

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Commissioner of Income-tax, Delhi(1) referred to in *Commissioner of Income-tax, Madras v. Suppan Chettiar*(2) takes the same view as that taken in *Commissioner of Income-tax v. Arunachalam Chettiar*(3).

[It seems to have been conceded by the Government Advocate in that case that the profits and losses of all the distinct businesses might be put together for the purpose of ascertaining the income of the assessee.—CHIEF JUSTICE.]

The assessee in the present case is entitled to deduction even in respect of Rs. 2,200 paid for interest after date of dissolution. It is not necessary that, to entitle the assessee to a right of set off, the business in which loss was incurred should actually be carried on in the year of account. *Arunachalam Chetty v. Commissioner of Income-tax*(4) lends support to this contention, though the facts of that case are not on all fours with those of the present. It is enough if the money in respect of which interest was paid was capital borrowed for the purpose of the business. The words "capital borrowed for purpose of business" in section 10 (2) (iii) must be held to mean capital borrowed for the purpose of the business the subject of assessment whether that business was in fact carried on or not in the year of assessment. *Arunachalam Chetty v. Commissioner of Income-tax*(4) gives that extended meaning to the expression. Though in that case the businesses were in fact branch businesses, that is not a necessary condition of the applicability of the principle laid down therein.

M. Patanjali Sastri for Commissioner of Income-tax.—After the dissolution of a firm and the allotment of profits and losses to the partners, what comes to each of the partners is not profit or loss as such but capitalized asset or capitalized liability; see *Inland Revenue Commissioners v. Burrell*(5). The accounts of the firm cannot be gone into for the purpose of ascertaining which portion of the amount allotted to a partner at the dissolution represented capital and which portion represented profits. A firm cannot be assessed as such if it is dissolved before the end of the year of account. In such a case each of the partners may be liable but not the firm as such. The liability taken over by one of the partners on dissolution is a

(1) (1929) I.L.R. 11 Lah. 88. (2) (1929) I.L.R. 53 Mad. 702 (S.B.).
(3) (1923) I.L.R. 47 Mad. 660 (S.B.). (4) (1928) I.L.R. 52 Mad. 296 (S.B.).
(5) [1924] 2 K.B. 52.

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capital loss and interest paid thereon in the year of account is not deductible. The question whether the interest accrued due before or after the dissolution is immaterial, though, if the firm were a going concern, the amount paid for interest would be deductible under section 10 (2) (iii). All the liabilities allotted to the present assessee were incurred by the firm before the year of account. *Commissioner of Income-tax, Madras v. Suppan Chettiar*(1) was a case concerning the same business and is therefore distinguishable. *Commissioner of Income-tax v. Arunachalam Chettiar*(2) overlooks section 14 of the Act. Under that section a partner can be assessed only if the firm is not assessed. The Act recognizes the firm as an assessable unit and this circumstance has been overlooked in *Commissioner of Income-tax v. Arunachalam Chettiar*(2). The correctness of that decision has been questioned in *Ballarpur Collieries v. Commissioner of Income-tax, C.P.*(3). In the case of an unregistered firm, the firm is the assessable unit and the individual partners are ignored altogether.

K. Nanjundiah in reply.—*Inland Revenue Commissioners v. Burrell*(4) was a case of super-tax. Income-tax was assessed in the first instance and the question raised was one as to super-tax. Further the case was one of liquidation of a company and the principles applicable to such a case are inapplicable to the case of dissolution of a firm or to the case of a man closing up one branch of a firm. Though the firm is in fact closed it must be deemed to continue for the purposes of the Act till the liabilities of that firm are discharged.

JUDGMENT.

BEASLEY C.J.—The Commissioner of Income-tax has BEASLEY C.J. referred the following question to us :—

"Whether on the facts of this case the sum of Rs. 6,967 being the interest on the liabilities allotted to the share of the petitioner-family on the dissolution of the two firms in which it was a partner is allowable as a deduction against the profits and gains of the businesses carried on by it on its own account during the year of account."

The facts with regard to this matter can be shortly stated. The petitioners constitute a Hindu undivided

(1) (1929) I.L.R. 53 Mad. 702 (S.B.). (2) (1923) I.L.R. 47 Mad. 660 (S.B.).
(3) (1929) 4 I.T.C. 255. (4) [1924] 2 K.B. 52.

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family and carry on a money-lending business at Ootacamund. Up to the 24th May 1929 they also owned a half-share in a firm styled "K.G.S. & Co.", and a two-fifths share in a firm styled "B.K.S. & Co." doing other classes of business in Ootacamund. These two firms were dissolved on the 24th May 1929, an account was taken of their assets and liabilities, and those assets and liabilities, when ascertained, were distributed between the petitioners and another partner named B. K. Sunchai Gounder. The total of the liabilities falling to the share of the petitioner-family was Rs. 55,584. On this liability of Rs. 55,584, which represented borrowed money, a sum of Rs. 6,967 was due for interest at the time when the two businesses were dissolved and none of this interest had been paid. What the petitioners here seek to do is to deduct that sum of Rs. 6,967 from the profits made by them in their joint family money-lending business. The following facts have been found by the Income-tax Commissioner—and indeed they were admitted by the petitioners—viz., (1) that the deduction claimed represents the interest on capital borrowed entirely for the purpose of the two partnership businesses, viz., "K.G.S. & Co." and "B.K.S. & Co.", in which the petitioner family had a share, (2) that the said borrowed capital was raised by the two firms (by one of the two partners or by both of them jointly, acting on behalf of the two firms) from third parties and not from any of the petitioners' businesses, (3) that such borrowed capital was actually utilized in the two partnership businesses and (4) that on the dissolution of the two firms on 24th May 1929 the petitioner-family took over the liabilities of the two firms to the extent of Rs. 55,584 and paid Rs. 6,967 as interest thereon during the year of account. Upon those admitted facts the Income-tax Commissioner was of the opinion that the sum of Rs. 6,967 was not an amount

which could be deducted from the profits made by the petitioner joint trading family in Ootacamund in respect of the money-lending business. The argument put forward by Mr. S. Doraiswami Ayyar proceeded to a great extent to the consideration of the question as to whether, when an assessee is carrying on more businesses than one and in respect of one of them he has to borrow capital and pay interest thereon and in respect of that business in the year of account a loss results, such interest paid in respect of that borrowed capital can or cannot be set off against the profits made by the assessee in some other business. We were referred to decisions of this Court in support of that argument. It was not contended by Mr. Doraiswami Ayyar that any such deduction, which, of course, would be one under section 10 (2) (iii) of the Indian Income-tax Act, could be made directly from the profits and gains of the other business; but his contention was that, in respect of the business in which the capital was borrowed and interest upon which was paid and sought to be deducted in the ascertainment of the profits or gains of that business, obviously the deduction allowed under section 10 (2) (iii) could be made with a view to ascertaining whether that business had been carried on at a loss or profit. If it was discovered that the business was carried on at a loss, then it was contended that under section 24 of the Act that loss, so ascertained, could be set off against the profits and gains made in the other business. With that contention we entirely agree. It seems to be quite clear that, where more businesses than one are carried on, what has to be ascertained is whether they have resulted in a profit or whether one or some of them have resulted in a profit and others in a loss. If it is discovered that there has been a loss in one or more of them, that loss can, in our opinion, be set off under section 24 of the

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Act against the profits and gains of the other businesses of whatever description, and this view we take despite that taken by a Bench of this High Court consisting of SCHWABE C.J. and WALLER J. in *Commissioner of Income-tax v. Arunachalam Chettiar*(1). In that case it was held that where a person carries on two different trades, one individually and the other as a member of an unregistered firm, he is under section 10 (2) of the Income-tax Act, XI of 1922, entitled to set off, for purposes of income-tax, the loss incurred by him in respect of the partnership trade against the profit made by him in his individual trade. The view taken in that case by SCHWABE C.J. was that the loss made in the one trade could not be set off against the profit made in the other under section 24, because in his view that only enabled a loss in one class of business to be set off against the loss in another class of business. That, we think, is an incorrect view to take of that section; and the later decision of this High Court in *Commissioner of Income-tax, Madras v. Suppan Chettiar*(2), which takes the view that loss in one kind of business can be set off against a profit in a similar or other kind of business, is in our opinion correct upon that point. But in *Commissioner of Income-tax v. Arunachalam Chettiar*(1), holding the view that section 24 of the Act did not apply, the Bench then held that under section 10 the assessee was entitled to set off his loss in respect of one business against his gains in respect of the other taking the view that the words "profits or gains of any business carried on by him" mean "profits or gains of each and every business" carried on by him. It is not necessary for the purposes of this case to say more than that we doubt the correctness of that construction. The view

(1) (1928) I.L.R. 47 Mad. 660 (S.B.). (2) (1929) I.L.R. 53 Mad. 702 (S.B.).

we take is that the loss in one business after having been ascertained under section 10 can be set off under section 24 against the profits and gains in another business. That, however, does not conclude the matter because it is argued by Mr. Patanjali Sastri that we are not here considering any question of profits and gains made by the dissolved business in the year of account but what we are considering is a distribution of capital. It is pointed out that what happened when these two businesses were dissolved was a distribution of the assets and liabilities of these two businesses and that some assets fell to the share of the petitioner-family and also some of the liabilities, the liabilities in respect of which interest amounting to Rs. 6,967 had to be paid and in respect of which this deduction is claimed in this case. The argument on behalf of the assessee has proceeded on the footing that this is to be dealt with as a trading loss and that, if it is to be considered as a trading loss, the interest can be deducted from the profits, if any, of these businesses under section 10 (2) (iii), and the loss resulting from such deductions can then be deducted from the profits made by the undivided family; but it seems to me to be quite clear that we are here dealing with capital loss as opposed to trading loss. Section 24 speaks of loss of profits or gains; that means trading loss. This was not a trading loss in any sense. In this case the property of these two businesses was distributed after their dissolution; and it was capital; and authority for this view is to be found in the case of *Inland Revenue Commissioners v. Burrell*(1). There on the winding-up of a limited Company the undivided profits of past years and of the year in which the winding-up occurred were distributed among the share-holders of whom the respondent was one and it was held that

(1) [1924] 2 K.B. 52.

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super-tax was not payable on the undivided profits as income, because in the winding-up they had ceased to be profits and were assets only. Several cases are referred to in the course of the judgment of POLLOCK M.R. Amongst them is *In re Armitage*. *Armitage v. Garnett*(1), where LINDLEY L.J. observed as follows (page 346):—

“The moment the company got into liquidation there was an end of all power of declaring dividends and of equalising dividends, and the only thing that the liquidator had to do was to turn the assets into money, and divide the money among the share-holders in proportion to their shares.”; and another case is *In re Crichton's Oil Company*(2), where STIRLING L.J. held that, upon a voluntary liquidation, a surplus of trading profit made in a particular year was distributable rateably among all the share-holders, as capital, and was not to be devoted as profits in the payment of a cumulative preferential dividend. These cases are of assistance to us in this case. It seems to me that what really was done in this case was to make a distribution of the property of the two businesses and that it was not open to the assessee to say upon such a distribution that some part of it represented trading profits and some part of it trading losses. It was in fact capital and, had there been any profit to the assessee on that distribution, it could not have been, it is conceded by Mr. Patanjali Sastri, liable to payment of income-tax. It follows, therefore, that where the distribution results in a loss no deduction in respect of that loss, such as is claimed here, can be claimed by the assessee. Under these circumstances, the answer to the question referred to us must be in the negative. Costs Rs. 250 to the Commissioner of Income-tax.

RAMESAM J.—I agree.

CORNISH J.—I agree.

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(1) [1893] 3 Ch. 387.

(2) [1902] 2 Ch. 88.

SPECIAL BENCH.

Before Sir Owen Beasley Kt., Chief Justice,
Mr. Justice Ramesam and Mr. Justice Cornish.

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PETITIONER,

1931,
December 16.

v.

A. RM. A. L. A. ARUNACHALAM CHETTIAR,
RASIPURAM, SALEM DISTRICT, RESPONDENT.*

Indian Income-tax Act (XI of 1922), sec. 22 (3)—False return deliberately and dishonestly made—Penalty under sec. 28 for—Liability for—Revised correct return made by assessee and treated as revised return for purposes of sec. 22 (3)—Effect.

Section 22 (3) of the Indian Income-tax Act of 1922, which entitles an assessee to furnish a revised return, applies to a case in which he makes a *bona fide* discovery that he has made a previous incorrect return but not to a case in which the previous return was deliberately and dishonestly made.

Where an assessee made a return of his income deliberately and fraudulently omitting therefrom a large sum of money, and, on the point of the Income-tax Officer discovering that omission, the assessee put in a revised return including that sum, held that, although the later return might for the purposes of assessability to income-tax be treated as a revised return under section 22 (3), the Income-tax authorities were entitled to look at the previous incorrect return and were under section 28 of the Act entitled to inflict a penalty on the assessee.

REFERENCE to the High Court under section 66 (2) of the Indian Income-tax Act (XI of 1922) in the matter of Arunachalam Chettiar, Salem District.

R. Kesava Ayyangar for assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

* Original Petition No. 148 of 1930.

JUDGMENT.

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BEASLEY C.J.—The Commissioner of Income-tax has of his own motion referred to us the following question:—

“Whether on the facts of this case the return submitted on the 7th January 1929 should have been treated as a revised return covered by the provisions of section 22 (3) of the Income-tax Act.”

The assessee made a return of his income on the 22nd August 1928. Unfortunately that return was incorrect, not with regard to a small amount but to the extent of Rs. 34,327. The Income-tax Officer has found, and his finding has been upheld by the Assistant Commissioner and the Commissioner of Income-tax, that the omission of that sum was deliberate. We take that to mean that the assessee knew when he made his return that it was false. After the assessee had made that return, the Income-tax Officer, whilst examining some other accounts, made certain discoveries and in the beginning of January 1929 he appeared to be on the point of discovering this deliberate and fraudulent omission of the assessee. Faced with this impending discovery, the assessee put in a revised return on the 7th January 1929 under section 22 (3) of the Indian Income-tax Act which reads as follows:—

“If any person has not furnished a return within the time allowed by or under sub-section (1) or sub-section (2) or having furnished a return under either of those sub-sections, discovers any omission or wrong statement therein, he may furnish a return or a revised return as the case may be at any time before the assessment is made, and any return so made shall be deemed to be a return made in due time under this section.”

The Income-tax Officer assessed the assessee to income-tax on his revised return and at the same time inflicted on him a penalty of Rs. 2,000 under section 28

of the Act on account of the concealment of income. It is argued here that the assessee discovered on the 7th January 1929 that his previous return was an inaccurate one and that he was, therefore, entitled to claim the benefit of section 22 (3) and make a revised return and as that has been accepted no penalty can be inflicted upon him for having concealed his income. That certainly is a correct statement of what an assessee is entitled to claim, if he makes a *bona fide* discovery that he has made a previous incorrect return, but it certainly does not apply to the facts of this case which show clearly that the previous return was deliberately and dishonestly made. It is seriously argued that, notwithstanding that fact, the assessee is still enabled to put in a return correcting his former inaccurate one and that he is to be absolved from liability to have any penalty inflicted upon him. That, it seems to me, is to put a premium on dishonesty and nowhere in the Income-tax Act do we find any provision which does anything of the kind. The contention that this was a discovery within the meaning of section 22 (3) is of course futile. As the Income-tax Commissioner points out in his order of reference, the assessee did not discover on that day that he had made an incorrect return because at the time when he made his previous return he knew it was incorrect and he could not at any subsequent time have discovered something which he knew at an earlier time. Under these circumstances, the Income-tax authorities were perfectly correct and within their rights in inflicting the penalty upon the assessee. The answer to this question must, therefore, be that, although the later return may for the purposes of assessability to income-tax be treated as a revised return under section 22 (3), the Income-tax authorities are entitled to look at the previous incorrect return and are under section 28

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entitled to inflict a penalty upon the person who has made it. Costs to the Commissioner Rs. 250.

RAMESAM J.—I agree.

CORNISH J.—I agree.

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SPECIAL BENCH.

*Before Sir Owen Beasley Kt., Chief Justice,
Mr. Justice Ramesam and Mr. Justice Cornish.*

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THE COMMISSIONER OF INCOME-TAX, MADRAS,
PETITIONER,

v.

RAJAH INUGANTI RAJAGOPALA VENKATA
NARASIMHA RAYANIM BAHADUR VARU (ZAMINDAR
OF KIRLAMPUDI A 2, ETC., ESTATES), RESPONDENT.*

Indian Income-tax Act (XI of 1922), sec. (2) (1) (a)—Agricultural income—Rent arrears and interest due by ryot to landholder—Promissory note taken from ryot by landholder for—Interest accrued due under—Agricultural income, if.

Interest due to a Zamindar under promissory notes taken by him from his ryots for the amount of rent due by them with interest is not "agricultural income" within the meaning of section 2 (1) (a) of the Indian Income-tax Act of 1922.

Sections 61 and 187 (2) of the Madras Estates Land Act only apply if a suit is brought directly on the liability of the ryot to pay rent. They are inapplicable to a case in which by a fresh contract between the Zamindar and the ryots the actual character of the liability has been changed into a loan.

REFERENCE to the High Court under section 66 (2) of the Indian Income-tax Act (XI of 1922) in the matter of the Zamindar of Kirlampudi.

P. V. Rajamannar for assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

* Original Petition No. 112 of 1930.

JUDGMENT.

RAMESAM J.—The petitioner here is the Zamindar of Kirlampudi. He has been assessed to income-tax on Rs. 7,441, on the ground that it is income from money-lending. What happened was that when the ryots were unable to pay rents the Zamindar took promissory notes from them for the amount of rent with interest. The Income-tax Officer has assessed the Zamindar on the amount of accrued interest on such promissory notes. Mr. Rajamannar contends before us that this amount of interest must be regarded as agricultural income and he relies on section 61 of the Madras Estates Land Act. Section 61 says that the rate of interest on arrears of rent should be at half per cent per mensem and section 187 (2) prohibits the landlord from taking a higher rate of interest than that provided by section 61. All this is no doubt quite true. But these sections only apply if a suit is brought directly on the liability of the ryot to pay rent. But in this case by a fresh contract between the Zamindar and the ryots the actual character of the liability has been changed into a loan. It has ceased to be rent and has become merely a loan; and, when so converted, the sections relating to interest do not apply nor does the section which prohibits the landlord from suing in a Civil Court.

The result is that the interest cannot be regarded as agricultural income. Our answer to the question referred must be in the negative. Costs Rs. 250 to the Commissioner.

BEASLEY C. J.—I agree.

CORNISH J.—I agree

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SPECIAL BENCH.

*Before Sir Owen Beasley Kt., Chief Justice,
Mr. Justice Ramesam and Mr. Justice Cornish.*

1932,
January 6.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
PETITIONER,

v.

MESSRS. BEST & CO., LTD., MADRAS (ASSEESSEES),
RESPONDENTS.*

Indian Income-tax Act (XI of 1922), sec. 26 (2)—“Any business” in—Meaning of—Several businesses owned or controlled by a company—Sale of one of, to another company—Purchaser company “successor” of vendor company within meaning of sec. 26 (2) if—Assessability of purchaser company under sec. 26 (2).

Where a company, which owns or controls several other companies, sells one of them to another company, the purchaser company is the successor of the vendor company within the meaning of, and can be assessed under, section 26 (2) of the Indian Income-tax Act of 1922, even in the absence of proof that the purchaser company succeeded to all the other companies owned or controlled by its vendor. Upon whom the burden is ultimately to fall is a matter of arrangement between the vendor company and the purchaser company.

The words “any business” in section 26 (2) do not mean ‘each and every business’ carried on by the former owner of a business.

The effect of section 26 (2) is that, where a person who was not the former owner of a company is found to be owning that company in the year of assessment, that person is to be assessed.

REFERENCE to the High Court under section 66 (2) of the Indian Income-tax Act (XI of 1922) in the matter of Messrs. Best & Co., Ltd., Madras.

* Original Petition No. 78 of 1930.

Advocate-General (A. Krishnaswami Ayyar) for
assesseees.

M. Patanjali Sastri for Commissioner of Income-tax.

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JUDGMENT.

BEASLEY C.J.—The following question has been referred to us by the Income-tax Commissioner, viz.,

“Whether the transfer by the petitioners of Eagle Rolling Mills to a Limited Company on the 31st December 1926 constitutes the latter company successor to the petitioners within the meaning of section 26 (2) of the Act.”

Section 26 (2) of the Indian Income-tax Act reads as follows :

“Where, at the time of making an assessment under section 23, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person the assessment shall be made on such person succeeding as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year.”

As the question referred shows, there was a transfer by the petitioners of the Eagle Rolling Mills to another company at the end of 1926. Messrs. Best & Co., the petitioners here, were up to that time the owners not only of the Eagle Rolling Mills but of other companies carrying on a very extensive business in Madras. On the 31st December 1926 the petitioners transferred the business of the Eagle Rolling Mills to a company formed expressly for the purpose of buying it. The petitioners claimed the benefit of the deductions allowed in the shape of depreciation and also for expenditure for the purpose of earning profits in the year of account under section 10 (2) of the Act. The Income-tax authorities, however, under section 26 (2) assessed the new company holding that the new company had succeeded Best & Co. as owners of the Eagle Rolling Mills. The point taken here by the petitioners is that,

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in accordance with the decision in *Commissioner of Income-tax v. Arunachelum Chettiar* (1), section 10 (1) of the Indian Income-tax Act, where it deals with the ascertainment of the profits of a business, means the ascertainment of the profits of each and every business carried on by an assessee, that is to say, that the profits and losses of all the businesses can be lumped together and so can the other items allowable as deductions and the resulting profit is assessable to income-tax. It is consequently argued that the use of the words "any business" in section 26 means "each and every business" carried on by the former owner of a business and that as, in this case, the new company has not succeeded to all the businesses which Messrs. Best & Co. own and control, section 26 (2) has no application and that the proper persons entitled to be assessed and to claim the deductions are the petitioners. As the learned Income-tax Commissioner points out, to introduce the words "each and every" into section 26 (2) in place of "any" would be to deprive it of any logical meaning and indeed to make an absurdity of it. It would mean this that, where a company, which owns or controls a dozen other companies, sells one of them to another company, unless the Income-tax authorities can show that the purchasing company succeeded to all the other companies owned or controlled by its vendor, it cannot be assessed under section 26 (2). That, to my mind, is an impossible position. Section 26 was designed for the purpose of making somebody assessable to income-tax; and the whole scheme of the Act is not to assess two people at the same time but is to find somebody who is either properly assessable or more conveniently assessable; and what section 26 (2) says

(1) (1928) I.L.R. 47 Mad. 660 (S.B.).

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is that, where a person who was not the former owner of a company is found to be owning that company in the year of assessment, that person is to be assessed. That is not only a convenient course but seems to me to be a just one. Upon whom the burden is ultimately to fall is a matter of arrangement between the vendor company and the purchaser company. Taking this view, in my opinion, our answer to the question referred must be that the new company is the successor of the petitioners. Costs to the Commissioner Rs. 250.

RAMESAM J.—I agree.

CORNISH J.—I agree.

Attorneys for assessees : *King and Partridge.*

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APPELLATE CIVIL.

*Before Sir Owen Beasley Kt., Chief Justice,
and Mr. Justice Curgenvven.*

POORNANANTHACHI (PETITIONER IN CIVIL MISCELLANEOUS
PETITION No. 1494 OF 1931), PETITIONER,

1932,
February 8

v.

T. S. GOPALASWAMI ODAYAR, AND TWELVE OTHERS (RESPONDENTS IN CIVIL MISCELLANEOUS PETITION No. 1494
OF 1931), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XLV, r. 7, as amended
by Act XXVI of 1920, sec. 3—Time for furnishing security—Extension—Power of High Court—Judicial Committee Rules (1920), r. 9—Inability to raise funds—If a
ground for extension.*

The High Court has no power to extend the time for furnishing security beyond the time set out in Order XLV, rule 7, of the

* Civil Miscellaneous Petition No. 6189 of 1931.

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Code of Civil Procedure and no different effect is produced by rule 9 of the Privy Council Rules.

Nilkanth Balwant v. Vidya Narsinha Bharati, (1927) I.L.R. 51 Bom. 430 (F.B.), dissented from.

PETITION under rule 9 of the new Judicial Committee Rules praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to extend the time by two months for furnishing security in the appeal sought, in Civil Miscellaneous Petition No. 1494 of 1931, to be preferred to His Majesty in Council against the decree of the High Court in Appeal No. 411 of 1925 preferred to the High Court against the decree of the Court of the Subordinate Judge of Kumbakonam in Original Suit No. 22 of 1924.

V. V. Srinivasa Ayyangar for *T. V. Ramanatha Ayyar* for petitioner.

K. S. Krishnaswami Ayyangar, *S. Panchanadha Mudaliyar* and *S. Ramannjam* for fifth respondent.

N. A. Krishna Ayyar for first respondent.

M. Ranganatha Sastri for second respondent.

K. V. Krishnaswami Ayyar and *T. R. Srinivasan* for sixth respondent.

S. V. Venugopala Achari for eighth respondent.

R. Gopalaswami Ayyangar and *K. S. Desikan* for ninth and eleventh respondents.

S. Venkatesa Ayyangar for tenth respondent.

The other respondents were unrepresented.

Cur. adv. vult.

ORDER.

BEASLEY C.J. — This is an application for an extension of time by two months for furnishing security for costs. Leave to appeal to the Privy Council was granted on the 16th October 1931 and the petitioner was directed under Order XLV, rule 7, of the Code of Civil Procedure to furnish security for costs of the respondents within

six weeks from the date of the granting of the certificate. The last day for furnishing security was the 27th November 1931. By that date the petitioner had been unable to furnish the security and on the 30th November 1931 she presented this petition praying for an extension of time by two months.

The petition is supported by the affidavit of the *kariasthan* of the petitioner. The two reasons for the granting of the petition set out in that affidavit are (1) the inability of the petitioner to furnish the security owing to her difficulty in getting the necessary funds and (2) because the petitioner is an old widow and for the two months previous to the presentation of the petition had been ill and confined to her bed. With regard to the former reason, it is stated that the sum awarded by the appellate Court to the petitioner for her maintenance, namely, Rs. 175 per mensem, is hardly sufficient for her maintenance and that the sum of Rs. 2,500 which she drew from the lower Court was utilized to pay off sundry creditors and that with the strictest economy she had only been able to save Rs. 1,500 and had not been able to raise the balance, Rs. 3,000, of the amount of the security ordered. It is also stated on her behalf that, after this petition was filed, her Advocate tendered to the Registrar the full amount of the security ordered but that, as the time for furnishing it had expired, the Registrar refused to receive it and that the money is now in the hands of her Advocate awaiting the disposal of the petition. The agent of the guardian of the minor fifth respondent has put in a counter-affidavit in which it is denied that the petitioner had been ill and confined to her bed for two months and the deponent states that he had occasion to meet her during the time when it is alleged she was ill and that she was in good health. It is also stated that

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the petitioner drew from the receiver in the lower Court, Rs. 10,919-11-0, under the order of that Court, dated the 11th November 1930, and that the allegation that she discharged debts is false. It is also pointed out that the judgment of the High Court in the appeal was delivered on the 1st May 1930, that the application for leave to appeal to the Privy Council was filed on the 2nd December 1930 and that leave to appeal was granted on the 16th October 1931. It is also stated that, when leave was applied for, it was claimed for the petitioner that, as the decree of this Court reversed the decree of the lower Court and the value of the appeal was more than Rs. 10,000, she was entitled to leave as of right. It is also alleged that the application for leave to appeal was really a move to obstruct the final decree proceedings of the lower Court and that the real object was to get a stay of the decree of this Court. No stay was obtained, however, and the partition and division of the property was proceeded with. In an affidavit, in reply to this counter-affidavit, sworn to by the petitioner she denies the allegation in the counter-affidavit that she was in good health and further states that the money received by her from the lower Court was in fact used for other necessary purposes, namely, payment of debts incurred for her maintenance for several years and the expenses of the litigation.

Taking the matters deposed to in these affidavits it seems to me clear that this petition must fail upon the merits and that no extension of time should be granted to the petitioner. With regard to the petitioner's alleged ill-health, she has made no attempt, and none has been made on her behalf, to substantiate this allegation. She merely contents herself with repeating it in her reply-affidavit. There is no certificate by her medical attendant, if she had one, and she does not even

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state that she had. Nor is there any affidavit by any independent person in support of her allegation. With regard to her inability to raise the necessary funds, that is not a ground, in my view, for granting an extension of time particularly after such a long time has elapsed since the decree; and it has been held in a number of cases that this alleged reason is not sufficient to justify any extension of time for furnishing such security. In my view, therefore, on the facts, this petition must be dismissed.

Apart from the merits, the question whether the High Court has the power to extend the time for furnishing security beyond the time set out in Order XLV, rule 7, was very fully argued; and in view of some recent decisions of this High Court and one in Bombay which are in conflict with other decisions of this High Court and other High Courts, in my view, it is most desirable that any doubt that there may be should be finally removed and that this matter should receive the consideration of a Full Bench on the next occasion on which this question arises. In view of our rejection of this petition on the merits, I do not think it necessary to do what I at first thought should be done. Nevertheless, I feel bound to express the opinion that the decisions of this High Court taking the view that the High Court has the power to grant extensions of time are wrong, and that the decision of OLDFIELD and RAMESAM JJ., *Nagireddi v. Saki Reddi*(1), holding that the High Court has no power to extend the time is right. Turning to the decisions expressing the opposite view, we have the decision of RAMESAM and MADHAVAN NAIR JJ. in *Kilaru Ramakotiah v. Dharmabhotla Subramanyam and others* in Civil Miscellaneous Petition No. 4993 of 1931, following a decision of REILLY and

(1) (1922) 18 L.W. 29.

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ANANTAKRISHNA AYYAR JJ., in *Ramakrishna Ayyar v. Parameswara Ayyar* in Civil Miscellaneous Petition No. 3644 of 1931, an unreported case, which followed the decision in *Nilkanth Balwant v. Vidya Narsinha Bharati*(1), in which they held that the High Court has power to grant extensions of time, and accordingly extended the time for furnishing security for costs. In the latter case two previous applications for extension of time appear to have been made but were rejected, but on the third occasion the attention of the Court was drawn to the decision of the Bombay High Court, and it was followed, and an extension of time given. *Nilkanth Balwant v. Vidya Narsinha Bharati*(1) is a decision of a Full Bench and was in consequence of a difference of opinion between SHAH J. and FAWCETT J.; SHAH J. was of the opinion that the High Court had such power and FAWCETT J. took the contrary view. The Full Bench consisting of MARTEN C.J. and CRUMP and PATKAR JJ. adopted the view of the former. In the opinion of MARTEN C.J. the High Court has the power to extend the time because there is no express penalty provided by Order XLV, rule 7, for failure to furnish the security and it is therefore in contrast with Order XLV, rules 10 and 11. He is further of the opinion that rule 9 of the Privy Council Rules is in conflict with Order XLV, rule 7, because upon a construction of it the High Court has power to extend the time. Rule 9 is as follows:—

“Where an appellant, having obtained a certificate for the admission of an appeal, fails to furnish the security or make the deposit required (or apply with due diligence to the Court for an order admitting the appeal) the Court may, on its own motion or on an application in that behalf made by the respondent, cancel the certificate for the admission of the appeal, and

(1) (1927) I.L.R. 51 Bom. 480 (F.B.).

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may give such directions as to the costs of the appeal, and the security entered into by the appellant as the Court shall think fit, or make such further or other order in the premises, as in the opinion of the Court the justice of the case requires.”

With all respect to the opinion of MARTEN C.J. I do not think rule 9 of the Privy Council Rules is in conflict with Order XLV, rule 7, because the latter rule does provide for a further extended period not exceeding sixty days upon cause being shown to the Court. Suppose, therefore, the ninety days from the date of the decree have passed without security being furnished; rule 9 of the Privy Council Rules, it seems to me, gives nothing more than the right to cancel the certificate or, if it can be read as giving the Court any power to extend the time, then, if good cause is shown, to extend the time for furnishing the security, provided the extended time does not exceed sixty days. In any event, if, as it appears to me, Order XLV, rule 7, does not entitle the High Court to extend the time beyond that which is provided in the rule, I do not imagine that it was intended in rule 9 of the Privy Council Rules which were to take effect from the same date as the amended rule 7 of Order XLV to have any different effect. Rule 7 of Order XLV was amended in order to put an end to the great delay in appeals to the Privy Council reaching the Privy Council. Under the old rule, the appellant had six months in which to furnish the security from the date of the decree or six weeks from the date of the grant of the certificate, whichever was the later date. In order to expedite the hearing of Privy Council appeals and to remove one serious cause of delay, the six months' period was cut down to ninety days and rule 7 was amended by substituting the following words

“ninety days or such further period, not exceeding sixty days, as the Court may, upon cause shown, allow.”

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In my view, it was not intended by this amendment that the High Court should, for reasons appearing cogent, further extend that period of sixty days, having regard to the fact that in the rule it is thus expressed, "not exceeding sixty days". It is quite true that under the old rule it was held that the High Court had power to extend the period. But in view of the very definite alteration of the rule, I cannot bring myself to suppose that the High Court has any power to grant further extensions. When the case in *Nilkanth Balwant v. Vidya Narsinha Bharati*(1) went to the Privy Council the appeal was decided in favour of the appellant. Their Lordships do not make any reference in the judgment of the Board to the extension of time granted for furnishing security by the Bombay High Court; nor was the power of the Bombay High Court to do so questioned in the argument. The fact that no exception was taken by the Privy Council to the extension of time has been taken by REILLY and ANANTAKRISHNA AYYAR JJ. as significant, but, with all respect, the Privy Council never considered the point and it may well be that the point was never taken by the respondent because the Privy Council itself has power to extend the time, however limited the power of the Indian High Courts may be. And it may well be that, all the heavy costs of that appeal having been incurred, it was thought that the Privy Council would excuse the delay even if the Bombay High Court had no power to extend the time.

Ram Dhan v. Prag Narain(2), *Joti Prasad v. Harkesh Singh*(3), *J. N. Surty (Receiver) v. T. S. Chettyar Firm*(4), *Ramani Ranjan v. Durga Dutt*(5) and *Kamala Kanta*

(1) (1927) I.L.R. 51 Bom. 430 (F.B.).

(2) (1921) I.L.R. 44 All. 216.

(3) (1928) 23 A.L.J. 433.

(4) (1926) I.L.R. 4 Rang. 265, 288.

(5) A.I.R. 1927 Pat. 330.

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v. Bindhumukhi(1) were referred to and it has been held in all these cases that the High Court has no discretion under Order XLV, rule 7, to extend the period for furnishing security beyond that laid down in the rule. It is quite true that in none of those cases was the effect of rule 9 of the Privy Council Rules considered; but as already stated, in my view, rule 9 does not have the effect given to it in *Nilkanth Balwant v. Vidya Narsinha Bharati*(2). I think further that rule 9 obviously has reference to the procedure in Order XLV, rule 7, and this is also clear from rule 10 which is as follows:—

"An applicant whose appeal has been admitted shall prosecute his appeal in accordance with the rules for the time being regulating the general practice and procedure in appeals to His Majesty in Council."

In my opinion, rule 9 of the Privy Council Rules and Order XLV, rule 7, are parts of the same scheme. Quite apart, therefore, from the merits of this case, in my opinion, this petition for an extension of time should be rejected, because the High Court has no power to extend the time beyond that specified in Order XLV, rule 7. This petition must be dismissed with costs of the respondents, one set, and the certificate, dated 16th October 1931, granted in Civil Miscellaneous Petition No. 1494 of 1931, cancelled.

CURGENVEN J.—The question whether this Court has unlimited discretion to extend the time for furnishing security in appeals to the Privy Council resolves itself into the two questions: (1) what is the meaning of Order XLV, rule 7, Civil Procedure Code, read by itself, and (2) if by itself it would limit the discretion to grant time, is it overridden by rule 9 of the new Judicial Committee Rules? The former of these questions has received an almost uniform answer at the

(1) A.I.R. 1929 Pat. 431.

(2) (1927) I.L.R. 51 Bom. 430 (F.B.).

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hands of those Benches which have considered it. The Allahabad High Court in *Ram Dhan v. Prag Narain*(1) has drawn attention to the very careful drafting of the amended Order XLV, rule 7, and has concluded that the real meaning and intended effect is to curtail and limit the discretion of the Court to granting an extension up to the sixty days which the rule lays down as the maximum extension permissible. In particular the learned Judges reject an argument which has since been resorted to before us, that, whereas a limit is set to any extension allowed of the period of ninety days from decree, no such limit is set to the period of six weeks from the grant of certificate. It is sought to take advantage of the absence of any such limit in order to attach to the latter period some such addition as "or such further period as the Court may upon cause shown allow", so that while the Court cannot indefinitely extend the time reckoned from the decree, it can always extend it reckoned from the certificate. Such a construction must, I think, clearly be held untenable in cases where the six weeks from certificate expires before the ninety *plus* sixty days from decree; because it is not reasonable that extension should be made to the period which first expires. But whatever the circumstances, I think that it is difficult to escape from the view taken in the Allahabad case under citation, that to grant an extension beyond the period of six weeks would be to defeat the object and intention of the amendment. This case was followed in *Joti Prasad v. Harkesh Singh*(2). Two other High Courts, those of Rangoon and Patna, have taken the same view, the main argument being that the claim to unfettered discretion can only be justified at the cost of disregarding

(1) (1921) I.L.R. 44 All. 216.

(2) (1928) 26 A.L.J. 433.

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the words "not exceeding sixty days", which we must suppose were deliberately introduced by the amendment of 1920. An opinion to the same effect was expressed by OLDFIELD and RAMESAM JJ. in *Nagireddi v. Saki Reddi*(1). The first dissentient judgment was delivered by SHAH J. in *Nilkanth Balwant v. Vidya Narsinha Bharati*(2) in referring the question to a Full Bench. The learned Judge notices the argument that

"when the Legislature fixed the possible period of extension, the necessary implication is that the further powers of the Court for extending the time were taken away", a consideration which, as he says, much influenced the Judges who decided *Ram Dhan v. Prag Narain*(3). But he goes on to express the view that, although in exercising its powers the Court will have regard to the object of the Legislature, yet

"it (the amendment) cannot be accepted as a ground for negating the powers of the Court, which are as necessary in the broad interests of justice as it is necessary to avoid and reduce delays in the interests of justice."

The only meaning which I can attach to this language is, not that there is any doubt as to the intention of the Legislature in introducing the words "such further period not exceeding sixty days", but that, because the Court may think that strict compliance with them may occasion hardship, it is at liberty to regard them merely as a general direction to avoid excessive delays.

"The provisions of this rule";
the learned Judge says,

"are as directory after the amendment of the rule by Act XXVI of 1920 as they were before the Act was passed."

He finds further support for his position in the terms of rule 9 of the new Judicial Committee Rules,

(1) (1922) 18 L.W. 29.

(2) (1927) I.L.R. 51 Bom. 480 (F.B.).

(3) (1921) I.L.R. 44 All. 216.

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a point to which I will refer presently. FAWCETT J., the learned Judge who joined in making the reference, took the view that the intention of the Legislature was plain, and that the Courts ought to observe the limits now laid down. I respectfully concur in the line of reasoning followed in his judgment. The decision of the Full Bench expressed by MARTEN C.J. leaves open the question of the effect of the present Order XLV, rule 7, read by itself. It is based upon a supposed conflict between that rule and rule 9 of the Privy Council Rules; the latter rule, it is said, read by itself, would allow the Court unlimited discretion to extend time; and the provisions of section 112 of the Code of Civil Procedure are invoked for liberty to proceed under rule 9 unconditioned by Order XLV, rule 7.

This is the subject of the second question which I have framed above. Rule 9 says that the Court may cancel the certificate if the appellant fails to furnish the security and the use of the word 'may', it is urged, shows that, instead of cancelling it upon such failure, the Court may extend without limit the time fixed for compliance. I am unable to see how, even upon this construction, any conflict is thereby created between the two rules, unless it be conflict that the one rule, read by itself, might leave the Court free to do something which the other rule in unmistakable terms forbids. I doubt very much whether section 112, Civil Procedure Code, ought to be used in order to abrogate a rule having the force of law on the ground that it sets bounds to a discretion which the Privy Council Rules leave undefined. Rule 10 of those rules requires an appellant to prosecute his appeal in accordance with the rules regulating the general practice and procedure in Privy Council appeals, among which I suppose are comprised the rules under the Civil Procedure Code.

That the amendment to rule 7 was not made without advertence to the terms of the new Judicial Committee Rules seems clear from the fact that the amendment and the Rules came into force on one and the same day; so that, without saying with FAWCETT J. that the amendment was made at the instance of the Privy Council, it seems specially incumbent upon the Courts to reconcile the two, rather than to enlarge their own powers by seeking to establish a conflict between them. In Civil Miscellaneous Petition No. 3644 of 1931 REILLY and ANANTAKRISHNA AYYAR JJ. have recently followed the Bombay Full Bench Case, but I doubt, with respect, whether the added reason given, that that case went before the Privy Council which must, from the silence of the report, be taken to have adopted the view of the Full Bench, is based upon a justifiable inference. Nor perhaps is it quite correct to say that rule 9 "gives a power", which cannot therefore be restricted by anything in Order XLV of the Code.

I agree accordingly with my Lord that we have no power to extend the time in the present case. I agree too that even if we had the power it would not be a fit case for its exercise.

G.R.

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APPELLATE CIVIL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

1932,
March 3.

CHEENA PENA RENA PERIANAN CHETTI
(PLAINTIFF), PETITIONER,

v.

TALUK BOARD, DEVAKOTTA, THROUGH ITS PRESIDENT,
HOLDING ITS OFFICE WITHIN THE DEVAKOTTA UNION BOARD
LIMITS (DEFENDANT), RESPONDENT.*

Madras Local Boards Act (XIV of 1920), sec. 93—Income accrued to a person outside British India but received by him within the area of a Taluk Board—Taxability by Taluk Board of.

Income accrued to a person outside British India but received by him within the area of a Taluk Board is, under section 93 of the Madras Local Boards Act (XIV of 1920), taxable by that Board. Where part only of the income accruing to him outside British India is received by him within the area of a Taluk Board it can assess him only on that part. The plain meaning of section 93 is that that part of his income is chargeable which he actually receives within the area of the Taluk Board.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Temporary Subordinate Judge of Devakotta, dated 16th July 1927, in Small Cause Suit No. 668 of 1926.

A. Swaminatha Ayyar for petitioner.

K. Rajah Ayyar for respondent.

Cur. adv. vult.

JUDGMENT.

WALLER J. WALLER J.—The petitioner, who was the plaintiff in the suit, has a money-lending business at Rangoon, but

resides within the limits of the Taluk Board of Devakotta. The dispute between him and the Board is as to his liability to pay the profession-tax. The Board seeks to assess him on the whole of the income derived by him from his business at Rangoon. His first contention is that he is not assessable at all, as income cannot be received as income more than once. Alternatively he pleads that, in any event, he cannot be assessed on more than that part of his income which has been remitted to him from Rangoon.

In regard to his first contention, several decisions in income-tax cases have been cited. Two of them are in his favour. The first is *Sundar Das v. The Collector of Gujrat*(1). The assessee had accumulated in Beluchistan, where no income-tax is leviable except on salaries, his profits from military contracts until they amounted to over twenty-three lakhs of rupees. In 1919-20 he transmitted—by what means does not appear—this large sum of money to the Punjab, where the Collector sought to assess it to income-tax. On a reference to the Chief Court, it was held that the money could not be treated as income received in the Punjab, as it had already been received as income in Beluchistan. With great respect, I do not understand the *ratio decidendi* in the case or how income received in an area where it is free from income-tax cannot, when it is transferred to another area where it is liable to the tax, be treated as having been received there as income within the meaning and intendment of the Income-tax Act. The leading case on the point in Madras is *Board of Revenue, Madras v. Ramanadhan Chetty*(2). In that case, it was sought to assess to the tax the whole income derived by a person resident

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(1) (1922) I.L.R. 3 Lah. 349 (F.B.). (2) (1919) I.L.R. 43 Mad. 75 (S.B.).

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in the Madras Presidency from a business conducted on his behalf outside British India. It was decided that the income was not assessable, as no part of it had reached British India. Obviously, if any part of it had reached British India, that part of it would have been held to be taxable. On that ruling, the assessee in *Sundar Das v. The Collector of Gujrat*(1) would have been liable to tax. However, one of the Judges observed that the Madras case was distinguishable, though he did not say how. The truth, I think, is that *Sundar Das's* was a hard case, in which it was sought to assess as the income of one year the accumulated income of years. The Act then in force made no provision for cases of that nature. The present Act does; it exempts from the tax all but the accumulated income of the last three years. In an earlier case from Bombay, *Aurangabad Mills, Limited, In re*(2), the question was whether the whole income of the company, which worked and earned its profits outside British India but had its head office in Bombay, could be assessed to the tax in Bombay. The question was answered in the negative, but it was admitted on behalf of the company that, if its profits had been transmitted to Bombay, they would have been taxable. The same question was raised in Madras and decided in *Board of Revenue v. Ripon Press*(3) in the same way. *Sundar Das v. The Collector of Gujrat*(1) was referred to with approval by one of the three Judges, COUTTS TROTTER J., but the question referred to the Bench was not whether income could be received twice as income, but whether the income of a company which was received outside British India could be taxed

(1) (1922) I.L.R. 3 Lah. 349 (F.B.). (2) (1921) I.L.R. 45 Bom. 1286.
(3) (1923) I.L.R. 46 Mad. 706 (S.B.).

in British India, whether it was received there or not. Sir WALTER SCHWABE said in his judgment :

"Except for the small amount received as the company's money by the company in Bellary, there is no income which accrues or arises or is received in British India."

He was of opinion, I infer, that the company's money received in Bellary was income received by it in British India, but the assessability of that income was not the question then in issue. In a later passage he referred to *Sundar Das v. The Collector of Gujrat*(1) and said that he mentioned it

"because that is a point which may be involved in the event of the question being referred to the Court whether such amounts received by the company as stated by me above, in Bellary, are themselves liable to taxation or not."

It seems to follow that what COUTTS TROTTER J. had to say about *Sundar Das v. The Collector of Gujrat*(1) was entirely *obiter*. The last case cited was *Sir Saiyid Ali Imam v. The Crown*(2), which followed *Sundar Das v. The Collector of Gujrat*(1) and assumed that it had been approved by the Bench in *Board of Revenue v. Ripon Press*(3). As I have already pointed out, the question did not arise in the latter case and all that Sir WALTER SCHWABE said was that *Sundar Das v. The Collector of Gujrat*(1) would have to be considered in relation to it, if and when it did arise. It seems to me that the law was correctly stated in *Board of Revenue, Madras v. Ramanadhan Chetty*(4), and that the admission made on behalf of the company in *Aurangabad Mills, Limited, In re*(5) was in accordance with it. The first contention therefore fails.

The second contention and the claim of the Board raises the real question at issue—on what should the petitioner be taxed—on his total income, wherever it

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(1) (1922) I.L.R. 3 Lah. 349 (F.B.). (2) (1924) I.L.R. 4 Pat. 210.
(3) (1923) I.L.R. 46 Mad. 706 (S.B.). (4) (1919) I.L.R. 43 Mad. 75 (S.B.).
(5) (1921) I.L.R. 45 Bom. 1286.

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may have accrued to him, or on that part of it which reached him at Devakotta. The answer to that question is, I think, to be found in the wording of section 93 of the Madras Local Boards Act (XIV of 1920). The petitioner is a person who "within such area (that is within the area of the Taluk Board, Devakotta) . . . is in receipt of 'an income' from any source other than houses and lands inside the local limits" of that area. The plain meaning of the section seems to be that that part of his income is chargeable which he actually receives within the area of the Taluk Board. A different conclusion was arrived at in *Mahadeva Sastri v. The Municipal Council, Kumbakonam*(1), but that was a case governed by a different Act. What, in effect, the Judges then held was that being in receipt of a pension in a certain area meant the same thing as being a pensioner residing in that area. If the Act meant that, it might have said so. When it spoke of receiving a pension in a certain area, it did not mean receiving a pension outside it. I find that the petitioner is assessable only on that part of his profits that reached him at Devakotta and that his tax, on that basis, is Rs. 18. He will get a decree for Rs. 142. The parties will pay and receive proportionate costs on that amount throughout.

KRISHNAN PANDALAI J.—I agree.

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(1) (1913) M.W.N. 935.

APPELLATE CIVIL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

PENA RINA YENA MANICKAVASAGAM CHETTIAR
(PLAINTIFF), PETITIONER,

1932,
March 8.

v.

THE UNION BOARD OF DEVAKOTTA THROUGH ITS
PRESIDENT O. R. M. M. S. M. MANICKAVASAGAM
CHETTIAR *alias* SEVUGAN CHETTIAR
(DEFENDANT), RESPONDENT.*

Madras Local Boards Act (XIV of 1920), sec. 93—Profession-tax—Person living within area of Union Board and receiving within that area income from business carried on by him outside that area—Profession-tax in respect of such income—Liability for—Person is under, though he had already paid profession-tax thereon in his place of business—Double taxation when not allowed by Act.

Income received by a person living within the area of a Union Board is taxable there under section 93 of the Madras Local Boards Act (XIV of 1920) whether it has been taxed elsewhere or not. The only cases in which double taxation is not allowed by the Act are specified in sub-section (3) of that section.

Held, accordingly, that a person who lived within the area of a Union Board and received within that area income from a business carried on by him at places outside that area was, under section 93, liable to pay profession-tax on that income at his place of residence, even though he had already paid the profession-tax thereon in those places.

PETITIONS under section 115 of Act V of 1908 praying the High Court to revise the decrees of the Court of the Temporary Subordinate Judge of Devakotta in Appeal Suits Nos. 15 and 22 of 1927 (Appeals Nos. 231 and 286 of 1927 on the file of the District Court of Ramnad) preferred against the decrees of the Court of

* Civil Revision Petitions Nos. 382 and 388 of 1932.

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the District Munsif of Devakotta in Original Suit No. 48 of 1926 and Original Suit No. 559 of 1924.

T. M. Krishnaswami Ayyar, M. Subbaraya Ayyar and K. Ramanathan Chettiar for petitioner.

T. R. Srinivasan for K. Bhashyam Ayyangar for respondent.

Cur. adv. vult.

THE JUDGMENT of the Court was delivered by
WALLER J.—In this case two second appeals were originally filed. It is obvious that the matter involved was of a small cause nature and therefore the appeals do not lie. Two applications were filed to convert the appeals into civil revision petitions which were allowed.

The question involved is as to the collection of profession-tax from the petitioner by the respondent, the Union Board of Devakotta. The petitioner lives within the area of the Union Board, but carries on a money-lending business at Madras, Mannargudi and Nellore. His contention is that, as he has already paid the profession-tax on the income from his business in those places, he is not liable to pay again on it at his place of residence. He pleads, in fact, that income cannot be received as income twice over. That is a contention we have rejected in our judgment in *Perianan Chetti v. Taluk Board, Devakotta*(1). We reject it again for the reasons given in our judgment in that case. His next contention is that it is contrary to the policy of the Madras Local Boards Act to tax a man twice over on his income from the same business. That contention we cannot accept. The relevant section of the Act of 1920 is section 93. The petitioner is a person

“who, within such area . . . is in receipt of an income from money-lending or any source other than houses and lands inside the local limits of the area.”

(1) (1932), I.L.R. 55 Mad. 848.

As regards double taxation all that the Act indicates is that an income derived from a source otherwise taxable within the area must not be taxed there twice. If the assessee derives an income from houses and lands within that area, that is otherwise taxable within the area and must not be taxed again. But let his lands and houses be outside the area and it is obvious that his income from them, if it reaches Devakotta, will be taxable there under section 93 whether it has been taxed elsewhere or not. The only cases in which double taxation is not allowed are specified in subsection (3) and the petitioner's is not one of those cases. Under the present Act—the Act of 1930—the exceptions are much wider and the petitioner would not be taxable at all at Devakotta. In the result, we must dismiss the civil revision petitions with costs, on the finding that the petitioner is taxable. No question as to the amount of the tax was argued before us.

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APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

1932,
January 29.

KARUPPAYEE AMMAL, BY AGENT S. N. SANKARA-
LINGA SWAMI NAICKER (SECOND PLAINTIFF—FIRST
RESPONDENT), APPELLANT,

v.

KATTARI NAGAYYAKAMARAJANDRA RAMASWAMI
PANDIYA NAYAKKAR AVARGAL AND ANOTHER
(DEFENDANTS THREE AND SIX—PETITIONER AND
SECOND RESPONDENT), RESPONDENTS.*

Hindu Law—Inheritance—Illegitimate son of Sudra—Widow of last male owner—Moiety devolving upon, on death of last male owner—Illegitimate son of last male owner who had succeeded to other moiety—Right of, on death of widow, to moiety which had vested in her, as against daughter's son of last male owner—"Reverter"—Hindu Law doctrine of—Applicability of—Code of Civil Procedure (Act V of 1908), O. XLV, r. 15—Transmission of order of Privy Council—Order for, made at instance of one of parties—Right of another party to avail himself of—Limitation Act (IX of 1908), art. 183—"Enforce"—Meaning of.

Under the Hindu Law the illegitimate son of a Sudra is entitled only to a moiety of his father's estate, so long as the widow, daughter or daughter's son of the father exists, and the widow, daughter and daughter's son are entitled to take the other moiety one after the other.

On the death of a Sudra, the last male owner of an estate, his widow succeeded to a moiety thereof and his illegitimate son to the other moiety. The widow then died leaving behind her a son of the daughter of the last male owner and the illegitimate son above mentioned.

Held that the daughter's son was entitled to the moiety which had vested in the widow and that the illegitimate son was not entitled to any portion thereof.

* Appeal against Order No. 147 of 1928.

The Hindu Law doctrine of "reverter", that, on the death of a female, who holds only a "woman's estate" in the property inherited by her from the last male owner, the then heir of the last male owner succeeds to his property, is inapplicable to a case where his property vested on his death not in a female heir only but in a male heir also.

Under rule 15 of Order XLV of the Code of Civil Procedure it is not necessary that each party interested in the execution of an order of His Majesty in Council should obtain a separate transmission of the order. An order for transmission made by the High Court at the instance of one of the parties may be taken advantage of by another party.

Balusami Iyer v. Venkatasami Naicken, (1923) 32 M.L.T. 249, followed.

Maharaja Sir Ravaneshwar Prasad Singh v. Rai Baijnath Goenka Bahadur, (1917) 2 P.L.J. 496, referred to.

Quære—Whether the word "enforce" in article 183 of the Limitation Act (IX of 1908) means the same as "execute", or whether its connotation is wider than the connotation of the word "execute".

In re Barlow v. Orde, (1872) 18 W.R. (P.C.) 175, referred to.

APPEAL against the order of the Court of the Subordinate Judge of Dindigul, dated 29th February 1928, and made in Execution Petition No. 72 of 1927 in Original Suit No. 31 of 1902, Sub-Court, Madura.

B. Sitarama Rao and P. N. Appuswami Ayyar for appellant.

K. V. Krishnaswami Ayyar, C. A. Seshagiri Sastri, K. Rajah Ayyar and V. Ramaswami Ayyar for respondents.

Cur. adv. vult.

JUDGMENT.

ANANTAKRISHNA AYYAR J.—Visvanathaswami Naicker, an illegitimate son of the late Zamindar of Bodinaickanoor by the fourth defendant, filed Original Suit No. 31 of 1902 on the file of the Sub-Court of Madura West for a declaration that he is entitled to

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inherit the Zamin of Bodinaickanoor and for possession of the Zamindari with all its appurtenances and for other reliefs. Though his suit was dismissed by the Sub-Court, Madura West, on appeal that decision was reversed and the suit remanded for fresh disposal. On 25th April 1913, the Sub-Court, Madura (which was the name given to the old Sub-Court, Madura West) passed a decree in plaintiff's favour for partition of the separate properties of the late Zamindar and delivery of a one-third share thereof to him. On appeal, the High Court modified that decree and upheld the plaintiff's right to a half-share in the said separate properties. The High Court also held that the plaintiff was not bound by the release deed—Exhibit II—executed to the first defendant, the widow of the late Zamindar, by the fourth defendant, the mother of the plaintiff, for herself and on behalf of her son, the plaintiff, who was then a minor, nor debarred from claiming the said partition, but directed that the plaintiff should deliver possession to the first defendant of items 1 to 3 in schedule 1 of Exhibit II, as they were held to be pannai lands and therefore impartible. The High Court also directed that "the plaintiff and the first defendant do each take a half of item 4 of schedule 1 attached to Exhibit II". The first defendant preferred an appeal to the Privy Council against the decision of the High Court, and, on the 20th of December 1922, the Privy Council dismissed the appeal and confirmed the judgment of the High Court; see *Kamulammal v. Visvanathaswami Naicker*(1).

It must be mentioned that the third defendant is the daughter's son of the first defendant, the fourth defendant is the mother of the plaintiff, and the sixth defendant a gnati of the late Zamindar; the second

(1) (1922) I.L.B. 46 Mad. 187 (P.O.).

defendant—the daughter of the first defendant—and the fifth defendant—elder brother of the sixth defendant—both died pending suit, and we are not concerned with them further.

Pending the appeal to the Privy Council, the first defendant—the widow of the late Zamindar—died on 13th January 1921, and the third defendant was brought on record as the legal representative of the deceased first defendant in the appeal to the Privy Council.

The third defendant—the daughter's son of the late Zamindar—applied in the Court of the Subordinate Judge of Dindigul by Execution Petition No. 72 of 1927 for delivery of possession of items 1 to 3 and of a moiety of item 4 mentioned in schedule I of Exhibit II, since the plaintiff was in possession of the same. The plaintiff having died, the fourth defendant—his mother and legal representative—who had been made the second plaintiff—was added as a respondent to the execution petition, to which the sixth defendant was also made a party-respondent. The Subordinate Judge of Dindigul allowed the third defendant's prayer with reference to a moiety of item 4, but dismissed the petition in other respects. The fourth defendant—the second plaintiff—has preferred the present civil miscellaneous appeal. The third defendant has preferred a memorandum of objections in respect of item 1—the third defendant not having pressed his claim in respect of items 2 and 3 in the lower Court.

At the hearing of this appeal, Mr. B. Sitarama Rao, the learned Advocate for the appellant, raised a preliminary objection that the Subordinate Judge's Court of Dindigul had no jurisdiction to entertain Execution Petition No. 72 of 1927 put in by the third defendant. His contention was that the decree was passed by the Subordinate Judge's Court of

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Madura; and, though the decree was transferred for execution to the Subordinate Judge's Court of Dindigul so far as the rights conferred under the decree on the second plaintiff and sixth defendant were concerned, the same was not transferred so far as the rights conferred by the decree on the first defendant or her legal representative—the third defendant—were concerned, and that the transfer of such a decree at the instance of some of the parties only for execution to another Court does not give that other Court jurisdiction to entertain an execution petition at the instance of the party at whose instance the decree was not so transferred, and that the circumstance that the Sub-Court of Dindigul had local jurisdiction, on the date of Execution Petition No. 72 of 1927, over the items of immovable property in question did not confer jurisdiction on that Court to entertain that execution petition. He relied on some decisions in support of his contention, and on the recent Full Bench decision of this Court in *Ramier v. Muthukrishna Ayyar*(1) in support of his second contention. He also contended that the application was, in any event, barred by limitation, because, though Execution Petition No. 72 of 1927 was filed on 2nd September 1927, and though that was within 12 years from the date of the Privy Council decision (20th December 1922), yet the proper article applicable to the present case is article 181 of the Limitation Act and not article 183. He argued that article 183 applied only to the *execution* of a decree or order, though the word used in the article is “enforce” and not “execute”. Since the Privy Council confirmed only the preliminary decree for partition made by the High Court and did not pass a final partition

(1) (1932) I.L.R. 55 Mad. 801 (F.B.).

decree, he contended that, in such circumstances, the proper course for the plaintiff was to file an application for the passing of a final decree within the period of three years from the date of the Privy Council decision.

On behalf of the third defendant—first respondent—it was argued that, having regard to the terms of the decree in question, the transfer of the decree at the instance of the second plaintiff from the Madura Sub-Court to the Dindigul Court gave the Dindigul Court jurisdiction to entertain the execution petition filed by the third defendant in the circumstances, and that, in any event, having regard to the order passed by the High Court in Civil Miscellaneous Petition No. 1398 of 1924 and Civil Miscellaneous Petition No. 3939 of 1925 on 12th November 1925 transmitting the decree to the Subordinate Judge's Court, Dindigul, for execution, it was not open to the second plaintiff (the appellant before us, who was a party to the said order) to raise any objections to the execution of the decree by the Dindigul Sub-Court. On the question of limitation, he argued that the present execution petition filed in 1927 could not be said to be barred by limitation having regard to the date of the order passed by the High Court, viz., 12th November 1925.

After consideration of the question, we are inclined to agree with the contention raised by the learned Advocate for the third defendant—first respondent.

It must be here mentioned that, in pursuance of the preliminary decree for partition passed by the High Court on 26th October 1915, a final decree was passed by the Sub-Court, Madura, on 26th July 1918. The second plaintiff applied to the Sub-Court, Madura, for the transfer of the decree for execution to the Sub-Court, Dindigul, and the transmission was ordered on 10th April 1922. Subsequently, Execution Petition

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No. 74 of 1924, was filed in the Sub-Court, Dindigul, by the sixth defendant for execution of the decree relating to the immovable properties. Similarly, the third defendant filed Execution Petition No. 120 of 1924 in the Sub-Court, Dindigul, for execution of the decree as regards the immovable properties. It was in these circumstances that the order was passed by the High Court on 12th January 1925 directing that the order of His Majesty in Council be sent to the Sub-Court of Dindigul for execution. If any party wanted to rely on the circumstances that no final decree had been passed after the decision of the Privy Council and that there was no executable decree at that time, though a final decree had been passed by the Sub-Court, Madura, on 26th July 1918 in pursuance of the decision of the High Court (which was confirmed by the Privy Council), he ought to have urged the objections then. But, having regard to the circumstances mentioned already, nobody thought it worth while to raise any objection; the appellant before us, the second plaintiff, was a party to the High Court's order and did not object. Seeing that the second plaintiff, the third defendant and the sixth defendant had, each of them, applied to the Sub-Court of Dindigul to execute the decree, it is not surprising that the parties were agreeable, and anxious, to have the decree executed by the Sub-Court, Dindigul. The High Court had ample jurisdiction to transfer the proceedings from the Sub-Court, Madura, to the Sub-Court, Dindigul; and, having regard to that order, we are inclined to think that the objection as to jurisdiction now raised before us in this appeal for the first time is unsustainable. We may mention that this objection relating to jurisdiction was not raised before the lower Court (Sub-Court, Dindigul) in the present proceedings; nor

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was it raised in the grounds of appeal to this Court; and the learned Advocate for the appellant mentioned to us that it would not have been taken at all even in the argument of the appeal but for the recent decision of the Full Bench in *Ramier v. Muthukrishna Ayyar*(1). However, having regard to the consideration mentioned above, in our view, it is not open to the parties at this stage to raise any such objection.

We must here notice one further argument advanced by the learned Advocate for the appellant on the question of jurisdiction. He argued that, under Order XLV, rule 15, Civil Procedure Code, any party who desired to obtain execution of any order of His Majesty in Council should apply by petition to the High Court to transmit His Majesty's order to the lower Court for execution, and that it is not open to a party to take advantage of an order for such transmission passed by the High Court at the instance of another party; and, in support of this argument, he relied on the decision of the Patna High Court in *Maharaja Sir Ravaneshwar Prasad Singh v. Rai Baijnath Goenka Bahadur*(2). In answer to that contention, we may say that, having regard to the wording of the partition decree in the present case, the transfer of the order for execution, though passed at the instance of the person entitled to a moiety of the property, would necessarily enure to the benefit also of the other party entitled to the other moiety in this case. In such a case, even according to the decision in *Maharaja Sir Ravaneshwar Prasad Singh v. Rai Baijnath Goenka Bahadur*(2), a separate application under Order XLV, rule 15, Civil Procedure Code, would not be necessary. Further, there is a decision of this Court, reported

(1) (1932) I.L.R. 55 Mad. 801 (F.B.).

(2) (1917) 2 P.L.J. 496.

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as *Balusami Iyer v. Venkatasami Naicken*(1), where the learned Judges held that it was not necessary that each person interested in the execution of a particular order should obtain a separate transmission of the order of His Majesty in Council when that order had already been transmitted to the lower Court at the instance of one of the successful parties. They observed as follows :—

“ The lower Court’s order is objected to, first, on the ground that the respondents before us, petitioners before it, were not entitled to apply for restitution when they had not, under Order XLV, rule 15, obtained transmission of the order of His Majesty in Council to the lower Court, the order being the basis of their claim. Order XLV, rule 15, no doubt, does make it part of the procedure for the enforcement of orders of His Majesty in Council that the person desiring to obtain execution of such an order shall obtain its transmission. But in the present case transmission has already been obtained by the 27th defendant, the successful appellant in the Privy Council. It would be inconvenient, if not impossible, to hold that each person interested in the execution of a particular order shall obtain a separate transmission when that order has already been transmitted. This ground of appeal is not sustainable.”

In that case, a decree for possession of land was passed against the landlord and the rival lessees, and for mesne profits against the rival lessees only. The landlord alone appealed to the Privy Council, making the plaintiff the only party-respondent to the Privy Council appeal. The Privy Council reversed the lower appellate Court’s decree and dismissed the plaintiff’s suit. The rival lessees—defendants—applied for restitution of the amount of mesne profits realized from them by the plaintiff before the lower appellate Court’s decree was reversed by the Privy Council. The learned Judges held that the order of His Majesty in Council though passed at the instance of the landlord—the

(1) (1923) 32 M.L.T. 249.

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twenty-seventh defendant—enured for the benefit of the lessees-defendants also and that the lessees-defendants were entitled to apply for restitution, and further that the transfer of His Majesty’s order by the High Court under Order XLV, rule 15, at the instance of the twenty-seventh defendant (landlord) enured to their (lessees-defendants’) benefit also. In a matter of practice like this, we should be loath to dissent from the opinion expressed by the learned Judges of this Court in *Balusami Iyer v. Venkatasami Naicken*(1) unless we see very strong reasons to do so.

In the above view, it is admitted that no question of limitation arises; and it is not necessary for us to consider whether the word “enforce” in article 183 of the Limitation Act means the same as “execute”, or whether its connotation is wider than the connotation of the word “execute”—in deciding which question the observations of the Privy Council in *In re Barlow v. Orde*(2) would be useful.

On the merits, it was argued for the appellant that, on the death of the first defendant, the moiety of item 4 decreed to her would go to the persons who would be the heirs of the last male-holder at the time of the widow’s death, and therefore that moiety should go to the plaintiff and the third defendant on the death of the first defendant, and that the lower Court was in error in directing that the third defendant should recover the whole of that moiety from the plaintiff. The learned Advocate for the appellant based his argument on the theory of “reverter”; and he argued that, when a Hindu widow succeeds to the estate of her husband, on her death, the next heir of the last male-holder would be entitled to the estate. It is on this principle that, on

(1) (1923) 32 M.L.T. 249.

(2) (1872) 18 W.R. (P.C.) 175.

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the widow's death, the daughter succeeds to the estate of the last male-holder, and, on the death of the daughter, the daughter's son succeeds to the last male-holder's estate. He therefore argued that, on the first defendant's death, the moiety of item 4 decreed to her should go to those persons who would be heirs to the last male-holder, if he died, on the date of the widow's death, and, as the illegitimate son would be one of such heirs, it was argued that he would be entitled to a moiety of the moiety decreed to the widow. Thus, the argument advanced on behalf of the appellant comes to this:—If a Sudra dies leaving property, his illegitimate son and his (last male-holder's) widow would each be entitled to a moiety of the estate; that, on the widow's death, the illegitimate son would be entitled to a further one-fourth of the last male-holder's estate, and the last male-holder's daughter to the other one-fourth; and that, on the daughter's death, her son would be entitled to one-eighth and the illegitimate son to the other one-eighth of the last male-holder's estate. Thus, in such circumstances, the illegitimate son would get half plus one-fourth plus one-eighth (that is, seven-eighths) of the last male-holder's properties, if he should be alive when the succession opened to the daughter's son of the last male-holder, and survived both the widow and the daughter. A further question would arise whether, if the illegitimate son should die before the widow, his sons would be entitled to claim such rights against the daughter and the daughter's sons.

On behalf of the respondents it was argued that the doctrine of reverter referred to by the appellant applies only to the ordinary cases arising under the Hindu Law, that the illegitimate son's case does not come within the ordinary rule, and that his case is specially provided for by special Hindu Law texts; and that the

illegitimate son is entitled only to a moiety of his father's estate in such circumstances, so long as the widow, daughter or daughter's son exists. No decisions on the point have been quoted to us, and the case seems to be one of first impression. The position of an illegitimate son is peculiar under the Hindu Law. The illegitimate sons of the three regenerate classes are only entitled to maintenance, and it is only the illegitimate son of a Sudra that would be entitled to a share in his father's separate property in particular circumstances. He does not acquire right by birth. He cannot compel his father to give him a share, for it is only by the father's choice that he would be entitled to a share. His share is not the same as that of a legitimate son. He does not succeed to his father's collaterals. It is not necessary to mention the other incidents of the peculiar position occupied by the illegitimate son under the Hindu Law. It is under section 12 of Chapter I of the Mitakshara that the illegitimate son claims his share. There his rights are mentioned as follows:—

“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 brethren 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.”

The passage has been understood as follows:—

“Should there be no sons of a wedded wife, the illegitimate son takes the whole estate provided there be no widow, nor daughters nor daughters' sons.”

It has been further explained thus:—

“If any, even in the series of heirs down to daughter's son, exist, the son by the female slave does not take the whole estate, but, on the contrary, shares equally with such heir.”
Dattaka Chandrika, v. 31.

Under that text—if read in the ordinary way—the illegitimate son would be entitled to a moiety only of

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his father's estate, when there is the widow, daughter or daughter's son of the last male-holder. In this case the third defendant is the daughter's son, and consequently the illegitimate son would be entitled only to a moiety of his father's estate, which he has already got, and the daughter's son—the third defendant—would seem to be entitled to the other moiety.

Under the doctrine of reverter referred to, on the widow's death the whole of the estate that the widow inherited would (subject to alienations made by her and binding on the estate) vest in the daughter if then alive, and the daughter's son, on the death of the daughter. If the contention of the appellant be upheld that would not be so; only a portion of the estate that vested in the widow would vest in the daughter, and only a portion of the estate that vested in the daughter would vest in the daughter's son. Again, the illegitimate son would, according to the appellant's contention, succeed to his father's estate on three such occasions. There is no other instance mentioned to us where a male, who is heir to a last male-holder, succeeds to the last male-holder's estate on different occasions. The principle underlying the doctrine of reverter referred to is that the last male-holder's estate is inherited by females who have no free right of alienation and who hold a peculiar kind of estate called "woman's estate" and on whose death the then heir of the last male-holder succeeds to the last male-holder's estate. From its very nature, the doctrine could not apply legitimately to a case where the last male-holder's estate vested on his death not in a female heir but in a male heir also. In such a case, the doctrine as such would not strictly apply, nor has it been, so far as we are aware, applied to such a case. We are not now concerned with the question as to what

would become of the property if the last of the daughters died without leaving a daughter's son, in such circumstances. Here, we have the third defendant, who is the daughter's son, and, according to the text under which the illegitimate son claims, he would be entitled to a moiety of his father's estate when there is the widow, the daughter, or the daughter's son. The third defendant being the daughter's son would take one moiety, the illegitimate son having taken the other moiety. In *Chinnammal v. Varadarajulu*(1) the following observations occur:—

"The authorities as to the respective rights of a widow and an illegitimate son are somewhat conflicting. But the following appears to be the general result so far as they are agreed."

Now see *Kamulammal v. Visvanathaswami Naicker*(2).

"If there be a widow and daughters or daughters' sons and an illegitimate son, the latter takes half of the estate, leaving the other half to be enjoyed as woman's estate by the widow and daughters or by daughter's sons in succession." The present question was not before the learned Judges in *Chinnammal v. Varadarajulu*(1), but the observation would seem to support the respondents' contention, if the learned Judges meant by the use of the expression "in succession" nothing more than that they would take one after the other.

In the circumstances, we are not prepared to say that the lower Court's decision was wrong on this point.

We need not go into the question whether it would be open to the first plaintiff to raise this question in execution when the decree directs that he should deliver a moiety of item 4 to the first defendant, where by reason of the first defendant's death after the

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(1) (1892) I.L.R. 15 Mad. 307, 313. (2) (1922) I.L.R. 45 Mad. 167, 187 (P.C.)

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decree it is claimed that the plaintiff has become a co-heir with the third defendant as regards the moiety decreed to the first defendant. Assuming that the contention is open to the plaintiff in these execution proceedings [*Khatija Bi v. Babu Sahib*(1)], we have held against him on the merits of his contention. The second plaintiff's rights are the same as the first plaintiff's in such circumstances.

The appeal is accordingly dismissed with costs of the third defendant—first respondent.

A memorandum of objections has been preferred by the third defendant claiming item 1 disallowed to him by the lower Court. In the judgment of the High Court passed on appeal, item 1 was mentioned as pannai land, and, as such, impartible; the sixth defendant is the present Zamindar, and he disputes the third defendant's rights to the same in the circumstances. The third defendant's claim to item 1 was disallowed by the executing Court on a former occasion. It was mentioned to us that in a suit between the third defendant and the sixth defendant, the third defendant's claim to item 1 has been disallowed, though it was also said that an appeal against that decision is pending. We see therefore no sufficient reason to interfere with the lower Court's order disallowing the third defendant's claim to item 1. The memorandum of objections is also dismissed, with costs (one set) of the second plaintiff and the sixth defendant, each sharing a moiety thereof.

REILLY J.—I agree.

A.S.V.

(1) (1912) 14 I.O. 544.

APPELLATE CIVIL.

Before Mr. Justice Pakenham Walsh.

ACHAMBAT ABDURAHIMAN, MINOR, BY HIS MOTHER
THITHACHUMMA AND ANOTHER (PETITIONERS), APPELLANTS,

1932,
February 25.

v.

K. P. K. IMBICHUNNY, DEAD, AND ANOTHER (COUNTER-
PETITIONER AND HIS LEGAL REPRESENTATIVE), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XLVII—Review
—Order granting—Effect of, on original decree or order—
Appeal filed against original decree or order before filing of
application for review of same—Competency of.*

Where, after filing an appeal against a decree or order, an application is filed in the Court below for a review of the same and that Court, after issuing a notice to the other side to show cause why the review should not be granted and after hearing its objections, passes an order rejecting the review application, the result is that the parties are relegated to the old decree or order and this is so even in a case where the hearing of the review application may involve to some extent an investigation into the merits of the case. In such a case the competency of the appeal previously filed against the old decree or order is not affected. The result will, however, be different in a case in which the review application is granted and the case is reheard on the merits and the old decree or order is either repeated or varied as a result of the rehearing. In such a case, the whole matter having been reopened, there is a fresh decree and the appeal previously filed against the old decree or order is not competent.

APPEAL against the order of the Court of the Subordinate Judge of Ottapalam in Appeal Suit No. 26 of 1929 (Appeal Suit No. 55 of 1929, District Court, Calicut) preferred against the order of the Court of the District Munsif of Parapanangadi in Execution Application No. 166 of 1928 in Original Suit No. 782 of 1916.

* Appeal against Appellate Order No. 107 of 1930.

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N. R. Sesha Ayyar for appellants.
K. Kuttalrishna Menon for respondents.

Cur. adv. vult.

JUDGMENT.

This appeal arises in the following way. In execution of the decree in Original Suit No. 782 of 1916 on the file of the District Munsif's Court of Parapanangadi the suit properties were attached. A petition against such attachment was put in, Execution Application No. 166 of 1928, and the Court found that the petitioners had no right to the property and passed an order dismissing the petition on 10th December 1928. Against that order an appeal was filed in the District Court, which was transferred to the Subordinate Judge's Court of Ottapalam. After the passing of the order against which the appeal was filed, the appellants filed Execution Application No. 1670 of 1928 in the District Munsif's Court of Parapanangadi for a review of the order; and on that review application notice was issued to the respondent to appear by pleader and file objections, and the Court passed its order on 18th January 1929 rejecting the petition. When the appeal against the order in Execution Application No. 166 of 1928 came on for hearing, a preliminary objection was raised that the appeal was not competent and the Subordinate Judge, holding that it was not competent, dismissed it. Against this order the present appeal has been filed.

The matter is one of considerable difficulty. The learned Subordinate Judge held that, though the effect of the order, dated 18th January 1929, on the review application was to repeat the former decree, nevertheless on the authority of *Vadilal v. Fulchand*(1), the whole matter having been re-opened, there was a fresh decree

(1) (1905) I.L.R. 30 Bom. 56, 58.

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and therefore the appeal against the order of 10th December 1928 was not competent. The decisions in *Vadilal v. Fulchand*(1) and *Gour v. Nilmadhab*(2) lay down clearly the procedure which should be followed in regard to an application for review. As stated in the latter case, a review proceeding commences ordinarily with an *ex parte* application. The Court then may either reject the application at once or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the rule may either be admitted or discharged, and the hearing of this rule may involve to some extent an investigation into the merits. If the rule is discharged, then the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached; the case is reheard on the merits and may result in a repetition of the former decree or in some variation of it. Though, in one aspect, the result is the same whether the rule is discharged or on the rehearing the original decree be repeated, in law there is a material difference; for, in the latter case, the whole matter having been re-opened, there is a fresh decree; in the former case, the parties are relegated to and still rest on the old decree. The real difficulty in the present case is to determine whether the order was passed in the second or third stage. It seems to me clear that the Court which passed it did not realize that there were three stages and we have therefore to gather from what has happened at what stage the final order was passed. It is stated at page 487 in *Gour v. Nilmadhab*(2) quoted above that

"the failure to recognise the distinction between the second and third stages has, as appears from the cases in the books, led to the embarrassment of litigants in many instances."

(1) (1905) I.L.R. 30 Bom. 56, 58.

(2) (1922) 36 C.L.J. 484.

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In that case also it was stated that the various stages through which an application for review may pass were not clearly appreciated by the lower appellate Court. In that case, however, the decree was reviewed, so that the present difficulty did not really arise. The appellants rely strongly on this sentence in the order: "The petition is rejected." The other side relies on the order to show that the whole matter was gone into and reliance is specially placed on the words:—

"The mistakes pointed out by the petitioners are quite unimportant and cannot in any way modify the conclusion I have arrived at in that order."

It seems to me that the facts in this case are closely similar to those in *Vadilal v. Fulchand*(1). But though the lower appellate Court has relied on this case for its decision, I am inclined to think that it supports the appellants. It is stated there at page 57:

"A *rule nisi* was issued requiring Vadilal (counter-petitioner in that case) to show cause why the application should not be granted and he resisted the application on the ground that it was time-barred . . . The Subordinate Judge overruled the said plea, and dismissed the application (on 14th September 1903) on the following ground:— 'As to the merits I do not think that the applicant can succeed. Mr. Karpurram has thrown all costs on the applicant Fulchand and Vadilal's darkhast was due to Fulchand's default. He raised frivolous objections in Vadilal's application for execution and I consider the order made is a good one. The application for review is rejected with costs.'"

On appeal against this order the appellate judge amended the order granting review to a certain extent. It was held that no appeal lay from the order of 14th September 1903 and the proper procedure was to file an appeal from the order of 20th December 1902. So far as I gather from this case, the Court which refused review in the first instance did not issue anything

(1) (1905) I.L.R. 30 Bom. 56, 57.

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which it called a *rule nisi*, because we find no reference to a discharge of any such rule in its final order. On the procedure which the Bombay High Court laid down in that case, the High Court must have held that, in spite of the failure to say anything in the order about the discharge of the rule, the rule was in fact discharged in that order and the third stage had not been reached. I gather therefore that by the statement at page 57 that a *rule nisi* was issued what was meant was the issue of a notice to the counter-petitioner to show cause why the application should not be granted. Now, applying this view, it seems to be on all fours with the present case. It is quite clear that the mere fact that the merits were considered will not prevent the order being one in the second stage. The Subordinate Judge in that case, as already stated, apparently did not realise that there are three stages and his order appears to be exactly similar to the one in the present case. He says: "The application for review is rejected with costs." I may note that in the text of the judgment quoted above it is said that the application was "dismissed". If there is any distinction between "dismissal" and "rejection", I think it strengthens the argument for the appellants. In that case the word used by the Court itself was "rejected" as in this. But the High Court seems to have considered that even if the application had been dismissed, the result would have been the same and the proceedings would not have passed the second stage. On full consideration, therefore, I consider that the facts in *Vadilal v. Fulchand*(1) appear to be precisely the same as those in the present case and that this case really supports the contention of the appellants rather than that of the respondents

(1) (1905) I.L.R. 30 Bom. 56.

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seeing that it was there held that the order was passed at the end of the second stage. I therefore allow this appeal, and the original appeal will be remanded for decision on the other points.

Costs of this appeal will abide the result of that appeal.

K.N.G.

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Krishnan Pandalai.

1932,
March 16.

MARUKKOLANDAYAMMAL (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
REPRESENTED BY THE COLLECTOR OF SALEM AND ANOTHER
(FIRST DEFENDANT AND LEGAL REPRESENTATIVE OF SECOND
DEFENDANT), RESPONDENTS.*

Madras Revenue Recovery Act (II of 1864), ss. 8 and 25—Defaulter in the register—Death of—Sale proceedings under the Act conducted after, and without prescribed notices being given to any living person as defaulter—Sale in case of—Void—Irregularity in publishing and conducting sale—Omission of preliminary steps necessary to give jurisdiction to revenue authorities to conduct sale—Distinction—Sec. 59 of Act—Limitation plea based upon—Available in former class of cases but not in latter.

The fundamental requisite for giving the revenue authorities jurisdiction to conduct a sale under the Madras Revenue Recovery Act (II of 1864) is that there should be a defaulter living who can receive the notices and avoid the sale by payment of the arrears.

Held, accordingly, that a sale of land for arrears of revenue under Madras Act II of 1864, all the proceedings in which were conducted after the death of the defaulter in the register

* Second Appeal No. 1203 of 1926.

and without the prescribed notices being given to any living person as defaulter, was void.

There is a clear distinction between irregularities in publishing and conducting the sale and essential preliminary steps which are necessary to give the revenue authorities jurisdiction to conduct the sale, the omission of which makes the sale null and void. The plea of limitation based upon section 59 of Madras Act II of 1864 will avail in the former class of cases but not in the latter. A notice under section 8 in case of movables and under section 25 in case of immovables is of the latter class.

Whether the modes of service of the notice mentioned in section 25 of the Act are dependent or independent, all of them equally contemplate that the defaulter for whose information the notice is intended is alive.

APPEAL against the decree of the Court of the Subordinate Judge of Salem in Appeal Suit No. 9 of 1925 (Appeal Suit No. 20 of 1925 on the file of the District Court of Salem) preferred against the decree of the Court of the District Munsif of Krishnagiri in Original Suit No. 368 of 1923.

Salem Ramaswami Ayyar for appellant.

Government Pleader (P. Venkataramana Rao) for first respondent.

C. V. Harihara Ayyar for second respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by KRISHNAN PANDALAI J.—The question in this case is whether a sale of land for arrears of revenue under Madras Act II of 1864, all the proceedings in which were conducted after the death of the defaulter in the register and without the prescribed notices being given to any living person as defaulter, is valid. There is no direct authority on the point though it must have occurred frequently.

The facts are not in dispute. Chinnaswami Chetti who died about 10 years before the suit was the registered pattadar of field No. 101, 4 acres 79 cents in extent, in Tattampatti village in Krishnagiri taluk in Salem

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district. The plaintiff is his widow. He and his widow lived in Kallavi village in Uttankarai taluk about 10 miles from the property.

After Chinnaswami Chetti's death the register was not corrected as it should have been by the Collector under Regulation XXVI of 1802. But the village officials were content to collect the revenue from the plaintiff who paid it till fasli 1330. In fasli 1331 there was an arrear of Rs. 22-5-4 out of the annual assessment of Rs. 25-12-0. The plaintiff alleged in the suit that the village munsif was scheming to acquire the property and with that object made her believe that there would be a remission of revenue that year and hence she did not pay in time, and that, taking advantage of this, the sale was brought about secretly by the village munsif at which the second defendant, a cousin of his, bought the land for Rs. 310, a gross under-value. This part of the case is however not accepted by the lower Courts and is not material. What is material however is that the village munsif knew, as found by the lower appellate Court, that the registered pattadar was long ago dead. According to the Act the demand notice and attachment and sale notices could not be issued to his widow unless her name was put on the register. In this state of facts, the demand notice under section 25 and the notices of attachment under section 27 and of sale under section 36 were sent addressed to Chinnaswami Chetti. The return to these notices is what was to be expected. The return to the demand notice dated 25th January 1922 reads: "As the pattadar is not present this was affixed to the palmyra of the land." To the attachment notice it is: "The pattadar mentioned herein does not reside in the village. Hence the notice was affixed on the land on 14th June 1922 and proclamation made by tom-tom." The sale notice under section 36 is to the effect that the undermentioned lands selected

out of those attached in satisfaction of arrears of land revenue by Chinnaswami Chetti of Tattampatti, the present registered landholder and a revenue defaulter, will be sold on 18th July. The return to this notice is that as the pattadar mentioned therein does not reside in the village the notice was affixed on the land and publication made by tom-tom and a copy served by affixture on the land. The sale took place on 18th July when the second defendant, a cousin of the village munsif, was the highest bidder for Rs. 310. The Collector duly confirmed the sale on 21st September 1922 and put second defendant in possession. The plaintiff on 16th November and 28th November 1922 filed objection petitions to the Collector who rejected them on 9th January 1923. This suit was brought on 28th of July 1923.

The defence of both defendants was in substance that the sale had been duly conducted under the Act and that, whether this is so or not, the suit was barred by limitation as it was not brought within six months from the date of the cause of action. The plea of limitation will not avail unless the sale proceedings were conducted under the Act in accordance with the provisions of the Act in essential procedure such as gives jurisdiction for the sale; see *Ravala Nagamma v. The Secretary of State for India*(1). There is a clear distinction between irregularities in publishing and conducting the sale, in which case the suit must be brought within the six months prescribed by section 59, and essential preliminary steps which are necessary to give the revenue authorities jurisdiction to conduct the sale, the omission of which makes the sale null and void, in which case section 59 does not apply. A notice under section 8 in case of movables and under section 25 in case of

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immovables is of the latter class. The absence of such notice makes the whole of the subsequent procedure for sale null and void; see *Mekaperuma v. The Collector of Salem*(1) and *Bommayya Naidu v. Chidambaram Chettiar*(2). The Government Pleader relies on *Venkata v. Chengadu*(3) for the view that failure to give notice under section 25 is only an irregularity. But this case has not been followed on this point in subsequent decisions and the better opinion in this Court is as stated above. In *Vadlur Chinna Nagi Reddy v. Devineni Venkataramiah*(4) which followed *Venkata v. Chengadu*(3) the other cases abovementioned were not referred to. It does not appear from the report in *Narayanan Nambudri v. Damodaran Nambudri*(5) in what respect the sale was not duly notified and what was the irregularity. The case was really one of alleged fraud in bringing about the sale. In *Rajah Gounden v. Rajah Gounden*(6) the sale was in contravention of Regulation X of 1831 which prohibits the property of minors from being sold for arrears of revenue and it was held that notwithstanding this the sale could not be attacked except in a suit brought within six months. This decision is no longer law in view of the Full Bench decision in *Swaminatha Ayyar v. Govindaswami Padayachi*(7) that a sale of a minor heir's properties after his father's death for arrears of revenue in contravention of Regulation X of 1831 is *ultra vires*, that this is not cured by the minor's mother's name being entered in the register as the registered pattadar as it is the duty of the Collector under Regulation XXVI of 1802 to enter the name of the minor as the proper owner and that a suit to set aside such a sale is not governed by section 59 of the Act.

(1) (1889) I.L.R. 12 Mad. 445.

(3) (1888) I.L.R. 12 Mad. 168, 176 (F.B.).

(5) (1893) 4 M.L.J. 79.

(2) (1899) I.L.R. 22 Mad. 440, 446.

(4) (1917) 7 L.W. 468.

(6) (1893) 4 M.L.J. 85.

(7) (1918) I.L.R. 41 Mad. 733 (F.B.).

This being the effect of not giving a notice of demand under section 25, the only point left is whether it makes any difference that a notice was addressed to a dead man and affixed to the property on the wholly futile ground that "the pattadar does not reside in the village" or that he is "not present". It seems to us that the whole procedure in connection with sale of immovable property is based on the assumption that there is "a defaulter", i.e., in the case of a human being a living person who is in default. It is the duty of the Collector to maintain the land registers correctly. In this case the village officers knew that the pattadar had long ago died and there appears to have been no valid reason why the register was not corrected before the sale of land was decided upon. However that may be, to go through, with the name of a dead man, the procedure intended for giving living men a chance of saving their property is a farce and a futility. The Government Pleader suggested that, as it has been held in *Venkanna Iyer v. The Secretary of State for India*(1) that the modes of services of the notice mentioned in section 25 are independent, it is open to the revenue authorities to choose any one of the modes prescribed and that in this case the last mode of affixing the notice to a conspicuous part of the land was selected and that this is a sufficient compliance with the law. In the first place, in the decision relied on, both Judges did not lay down the proposition contended for, as one of them did not think it necessary to decide it. But whether the modes of service are dependent or independent, we have no doubt that all of them equally contemplate that the defaulter for whose information the notice is intended is alive. The object of sending a notice, however it may be served, is that the person notified may know the thing notified. How can a notice be intended for a dead man?

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(1) (1913) M.W.N. 494.

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A similar situation to the present arose in *Debi Bakhsh Singh v. Habib Shah*(1), in which a suit was dismissed for default of appearance of the plaintiff, the truth being that before the date of hearing the plaintiff had died and on that day his son was engaged in the funeral ceremonies. The Privy Council set aside the order saying that it is vitiated by applying to a dead man orders and rules applicable to a living man. We think that that is the vice of the sale proceedings in this case which in our opinion were of no force and effect by reason of the absence of the fundamental requisite for giving the revenue authorities jurisdiction to conduct a sale, i.e., that there should be a defaulter living who can receive the notices and avoid the sale by payment of the arrears. The sale was therefore void and section 59 does not stand in the way.

The second respondent asked us, in case we held against the sale, that the purchase-money may be directed to be returned. The Collector will no doubt pass the proper orders in case the sum is still with Government and we need not add that it will be open to him in case of need to take steps in accordance with law to recover any arrears of revenue.

The decrees of the lower Courts are reversed and the plaintiff will have a decree declaring that the revenue sale, dated 18th July 1922, of the suit property is void and of no effect and directing the second respondent (second defendant) to deliver possession of the property to plaintiff with mesne profits from the date of suit to date of delivery at a rate to be determined in execution. The plaintiff will have her costs throughout from the defendants.

A.S.V.

(1) (1918) I.L.R. 35 All. 831 (P.C.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Owen Beasley Kt., Chief Justice, Mr. Justice Ramesam, Mr. Justice Reilly, Mr. Justice Anantakrishna Ayyar and Mr. Justice Sundaram Chetti.

LIEUTENANT SRINIVASA RAJAMANI RAJAH DEO,
THE RAJAH OF MANDASA, AND ANOTHER
(RESPONDENT AND HIS LEGAL REPRESENTATIVE),
PETITIONER,

1931,
November 25.

v.

SENAPATHI JAGANNAYAKULU AND THIRTY-NINE
OTHERS (PETITIONERS), RESPONDENTS.*

*Practice—Full Bench—Question answered by—Division Bench—
Binding character on—Procedure to be adopted by Division
Bench if it considers answer obiter dictum and doubts its
correctness.*

Held by the CHIEF JUSTICE:—The answer to a question referred to a Full Bench cannot be treated by a Division Bench as an *obiter dictum* nor can the matter be referred by a Division Bench to a larger Full Bench if it doubts the correctness of the answer given by the Full Bench. The proper procedure in such cases is to refer the matter to the Chief Justice and it is for him to consider whether the question should be reconsidered by a larger Bench.

PETITION under section 115 of the Code of Civil Procedure and section 107 of the Government of India Act to revise the orders of the Board of Revenue, dated 27th October 1925 and 17th December 1925, revising, under section 172 of the Madras Estates Land Act, the settlement of rent made by the Special Revenue Officer of Ganjām on 18th August 1923.

The following questions had been referred to the Full Bench:—

(1) Whether the High Court has power to interfere with a decision of the Board of Revenue under Chapter XI of the Madras Estates Land Act.

* Civil Revision Petition No. 192 of 1926.

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(2) Whether the Board of Revenue has in this particular case exceeded the jurisdiction conferred upon it and

(3) What should be "the final order to be passed in this case," i.e., on this revision petition.

Only the part of the judgment of his Lordship the CHIEF JUSTICE relating to the procedure to be adopted by a Division Bench in dealing with answers to questions referred to a prior Full Bench is reported hereunder.

S. Varadachari, K. Bashyam, K. S. Champakesa Ayyangar and R. Viswanadhan for petitioners.

B. Jagannadha Doss for respondents.

The Government Pleader (P. Venkataramana Rao) for Board of Revenue.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J. BEASLEY C.J.—I wish, first of all, to observe that the procedure adopted by the referring Judges is, in my opinion, incorrect. They have taken the view that the answer in the negative given by PHILLIPS and ODGERS JJ. in *Raghunadha Patro v. Govinda Patro*(1), to the question "Has the High Court in the exercise of its revisional jurisdiction either under section 115 of the Civil Procedure Code or section 107 of the Government of India Act of 1919 power to revise orders passed by the Board of Revenue under Chapter XI or section 205 of the Estates Land Act?" is *obiter dictum* and they have also doubted the correctness of that answer. The question is precisely the same as the first question that has been referred to us and it has been answered in the negative by the majority of that Full Bench. It being a question referred to that Full Bench, it seems to me that it was not open to the referring Judges to regard

(1) (1928) 55 M.L.J. 798 (F.B.).

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the answer to it either as *obiter dictum* or to refer the matter to a larger Bench because they doubted its correctness. The proper procedure in such cases, in my opinion, is to refer the matter to the Chief Justice and it is then for him to consider whether the question should be reconsidered by a larger Bench.

G.R.

SPECIAL BENCH.

*Before Sir Owen Beasley Kt., Chief Justice,
Mr. Justice Ramesam and Mr. Justice Cornish.*

THE COMMISSIONER OF INCOME-TAX, MADRAS,
PETITIONER,

1932,
January 6.

v.

V. S. K. S. SOMASUNDARAM CHETTIAR, MADURA,
RESPONDENT.*

Indian Income-tax Act (XI of 1922), ss. 3 and 4 (2)—Hindu joint family carrying on business—Residence of—Test of—Applicability of test in Commissioner of Income-tax, Madras v. T. S. Firm, (1927) I.L.R. 50 Mad. 847 (S.B.).

The question as to what is the residence of a joint Hindu family does not depend upon the nature of income it gets. The test of residence cannot be one thing if the family is a trading family and some other thing if it gets income from securities, property or other sources. A joint Hindu family should be said to reside in all those places where members of the family live. The test in *Commissioner of Income-tax, Madras v. T. S. Firm, (1927) I.L.R. 50 Mad. 847 (S.B.)*, cannot apply to what are generally described in decisions as Hindu Law partnerships, i.e., partnerships which are the creatures of Hindu Law and not of the law of contracts.

A joint Hindu family, which consisted of a father and his son and which carried on businesses in several places within and

* Original Petition No. 13 of 1931.

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outside British India, had its permanent home in the Pudukkottah State, where also it had a money-lending business. The father and manager visited the various places of business periodically for the purpose of supervising the businesses. During such visits he stayed at Madura, one of the places of business, for various periods in the business premises which were provided with a kitchen and other conveniences of a residential house.

Held that the abovementioned circumstances constituted legal evidence on which the Commissioner could find that the joint family had its residence in Madura within British India.

REFERENCE to the High Court under section 66 (2), Indian Income-tax Act (XI of 1922), in the matter of Somasundaram Chettiar, Madura.

T. Krishnaswami Ayyangar (K. S. Krishnaswami Ayyangar and S. K. Narasimha Chariar with him) for assessee.—Under section 4 (2) of the Indian Income-tax Act, in order that profits of a business accruing or arising out of British India may be taxed in British India, it is necessary that the profits should be received in or brought into British India and that the person receiving them should be resident in British India. The assessment in the present case being upon a joint Hindu family, the question is what is the place of residence of a joint Hindu family for the purposes of the Act. In the case of a company carrying on a business it has been held that the place where it carries on its business is its place of residence for the purposes of the Act; see *Commissioner of Income-tax, Madras v. T. S. Firm*(1). The facts of that case very much resemble those of the present; see pages 848-9. As in that case so in the present the joint family had no place of business in British India. As regards the place of residence of a company, see *De Beers Consolidated Mines, Limited v. Howe*(2), followed in *Egyptian Delta Land and Investment Co. v. Todd*(3).

[In the case of a business of a joint Hindu family the business is carried on by the manager. Such a case is therefore more analogous to that of a business carried on by an individual than to that of a business carried on by a company—COENISH J.]

(1) (1927) I.L.R. 50 Mad. 847 (S.B.).

(3) [1929] A.C. 1

(2) [1906] A.C. 455.

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But it is the joint family and not the manager that is assessed. [Sections 2 (2) and 2 (9) were referred to.] Section 3 draws a distinction between a case where an individual is assessed and one where a joint Hindu family is assessed; see also section 14 (1). A joint Hindu family is a unit by itself as distinct from the members constituting such family. The residence of a member of a joint Hindu family cannot be held to be the residence of such family for the purposes of the Act.

[In *Commissioner of Income-tax, Madras v. T. S. Firm*(1) a firm was taxed as a firm carrying on a business, whereas in the present case the joint family is taxed as such. It is liable to be taxed as such whether it carries on a business or not. Therefore the decision in *Commissioner of Income-tax, Madras v. T. S. Firm*(1) is inapplicable to the case of a joint Hindu family—CHIEF JUSTICE.]

There is a difference between a case where a joint Hindu family carries on a business and one in which it does not carry on any business. In the former case the residence of the family is the place where the business is controlled by the manager. Otherwise the result will be that the residence of any member of the family will be held to be the residence of the joint family. The joint family is an entity by itself distinct from the members of whom it is composed. The residence of such a family is therefore distinct from that of each of its members. A joint family carrying on a business is a kind of partnership. It has the features of a partnership and some more; see *Raghunathji Tarachand v. The Bank of Bombay*(2). There is no distinction for the present purpose between a partnership and a joint family carrying on a trade.

M. Patanjali Sastri for Commissioner of Income-tax.—In the case of a firm carrying on a business, the firm has no existence apart from its business. Hence, in *Commissioner of Income-tax, Madras v. T. S. Firm*(1), the English rule applicable to a company was applied to a firm. It was held that a firm carrying on a business was similar to a company and that the artificial test of residence applied to companies was applicable to firms. A joint Hindu family need not necessarily carry on a business and exists as an entity apart from any business carried on by it. It is therefore similar to the case of an individual rather than

(1) (1927) I.L.R. 50 Mad. 847 (S.B.).

(2) (1909) I.L.R. 34 Bom 72, 86.

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to that of a firm or a company. Hence the artificial test of place of control of management applicable to the case of a company or a firm is inapplicable to the case of a joint Hindu family. Then the only test left is the test of residence.

The JUDGMENT of the Court was delivered by

RAMESAM J.—The facts out of which this reference arises may be shortly stated as follows: A Hindu joint family consisting of the father and manager, V. S. K. S. Somasundaram Chetty, and his son has been assessed under section 3 of the Act. The permanent home of the family is Lakshmipuram in the Pudukottah State where it has a money-lending business. It also carries on piecegoods businesses at Madras and Madura in British India and a money-lending business at Taiping in the Federated Malay States. It is also a partner in a money-lending business at Klang in the Federated Malay States and in a piecegoods business at Kumbakonam; and apparently it has some money-lending business in Colombo. In the year of account 1928-29 it has been found that the assessee received in British India on various dates sums of money aggregating to Rs. 40,000 from the foreign businesses at Taiping, Klang and from the customers in Colombo. The Income-tax Officer sought to assess the joint family in respect of the foreign remittances on the ground that it was resident in British India. It was contended for the assessee that the family was not resident in British India; and the Commissioner of Income-tax has referred the following questions to us, viz:

(1) "Whether the decision in *Commissioner of Income-tax, Madras v. T. S. Firm*(1) as regards residence is applicable only to cases of partnership and not to cases of joint undivided Hindu family business and whether that decision does not apply to the facts of the present case."

(1) (1927) I.L.R. 50 Mad. 847 (S.B.).

(2) "Whether there is legal evidence in support of the finding of the Income-tax Officer that the joint family firm has its residence in Madura within British India."

Taking the first question, the essential point in this case is that the business carried on by the joint family is a Hindu joint family business. There is no partnership in this case constituted under the law of partnership. Now, a Hindu joint family may have no income arising from a family business but only arising out of interest on securities or property or professional earnings or other sources, that is to say, any of the headings mentioned in section 6 of the Act. The fact that in this case it happens to be a trading family is a mere accident. The question as to what is the residence of a joint family cannot depend upon the nature of income it gets. It cannot be that the test of residence should be one thing if it is a trading family and the test of residence some other thing if it gets income from securities, property or other sources. Thus, obviously, to liken a Hindu joint family to a firm or a company will lead to anomalous conclusions. In *Commissioner of Income-tax, Madras v. T. S. Firm*(1) it was held that in the case of a company or a firm the residence of the company or the firm is that place or those places from which the central management or control is exercised over the whole business of the firm. Such a test may not be available to a joint Hindu family where the joint family happens not to possess any trade.

Therefore, obviously we must apply different tests. It seems to us that, in the case of a Hindu joint family, the family should be said to reside in all those places where members of the family live. Even in the case of a company or a firm it is quite clear that there can be more than one place of residence. That has been laid

(1) (1927) I.L.R. 50 Mad. 847 (S.B.).

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down not only in *Swedish Central Ry. Co. v. Thompson*(1) but also in *Commissioner of Inland Revenue v. Lysaght*(2). Similarly we do not see any reason why a joint Hindu family must not be said to be resident in more than one place. Therefore we are of opinion that the test in *Commissioner of Income-tax, Madras v. T. S. Firm*(3) cannot apply to what are generally described in decisions as Hindu Law partnerships, i.e., partnerships which are the creatures of Hindu Law and not of the law of contracts. If the first question is answered as above, there is no difficulty in answering the second question. In this case it cannot be said that there is no evidence on which the Commissioner can come to a conclusion as to the place of residence. There is some evidence which is set out by the Commissioner as follows :

"The manager visits these places periodically for the purpose of supervising the businesses. During such visits he stays at Madura for varying periods as will be seen from the sworn statement given by the petitioner. Whenever the manager comes to Madura he resides in the business premises which are provided with a kitchen and other conveniences of a residential house."

These circumstances are certainly some evidence and the question as to whether there is enough evidence is not a matter for us but for the Commissioner.

Costs Rs. 250 to the Commissioner. No order necessary on the Court motion.

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(1) [1925] A.C. 495.

(2) [1928] A.C. 234.

(3) (1927) I.L.R. 50 Mad. 847 (S.B.).

SPECIAL BENCH.

Before Sir Owen Beasley Kt., Chief Justice,
Mr. Justice Ramesam and Mr. Justice Cornish.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
PETITIONER,

1932,
January 18.

v.

MRS. J. V. SALDANHA, MANGALORE, RESPONDENT.*

Indian Income-tax Act (XI of 1922), ss. 10 (1) and 40—Guardian—Business carried on by—Assessment of, as a single business—Permissibility—Business for benefit of wards alone or partly for benefit of guardian and partly for benefit of wards—Effect of sec. 40—Guardian not carrying on any business but merely receiving income on behalf of wards—Mode of assessment in case of—Sec. 3—Association—Business carried on by association of individuals—Meaning of.

Section 40 and the following sections of the Income-tax Act are enabling sections, i.e., the Income-tax Officer can take steps to assess the trustees or guardians as representing their separate beneficiaries or wards, as the case may be, if he so chooses. But the sections do not compel the Crown to resort to them. The existence of section 40 cannot prevent an assessment under section 10 (1) if it is otherwise justified.

In a case where guardians or trustees do not carry on business but merely receive incomes on behalf of wards or beneficiaries and there is no question of any business being carried on by guardians or trustees it may be that section 10 will not be available to the Crown and in such a case the incomes of the various minors or beneficiaries cannot be added and each must be separately assessed whether directly or through the guardians or trustees under section 40 of the Act. But where a guardian or trustee carries on a business, though the persons ultimately deriving the benefit of the business may be some wards or beneficiaries, or, as in the present case, partly the guardian and partly the minors, the business can be

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regarded as a business carried on by the trustee or guardian and can be assessed as a single business.

"Association" in section 3 of the Act merely means a group. When properties of a number of individuals are put together and one business is carried on with the combined resources, it is open to the Income-tax Officer to regard it as one business carried on by an association of individuals within the meaning of section 3 of the Act.

REFERENCE to the High Court under section 66 (2) of the Indian Income-tax Act (XI of 1922) in the matter of Mrs. J. V. Saldanha—Mangalore Circle—Mangalore.

M. Subbaraya Ayyar for assessee.—Section 3 refers to the income of an individual, i.e., to income to which an individual is entitled as a matter of right; see also section 55 which deals with super-tax. In regard to the income of the minors, the mother can be assessed only in a representative capacity under section 40. I lay stress on the words "in like manner and to the same extent, etc." in that section. Section 41 refers to the case of an administrator and uses the same words.

[Is there any provision for refund in case a single assessment is made?—CHIEF JUSTICE.]

No.

[What is the position of a trustee of adult beneficiaries?—CORNISH J.]

There will be a distinction between the case of a bare trustee and that of a trustee who is himself entitled to a beneficial interest. Section 42 deals with similar representative assessments. The rule under the Act is that one individual ought not to be taxed for the income of another, the only exception being that made by section 26. The provisions of the English Act correspond exactly to the above provisions. Section 38 of our Act is the other material provision. *Rea v. Newmarket Income Tax Commissioners*. *Huxley, Ex parte*(1) holds that, in the case of a minor getting an income, the minor is the person directly liable to assessment and that the provisions relating to the notice being sent to the guardian are merely the machinery for the collection of the tax. The infant

(1) [1916] 1 K.B. 788.

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is the real assessee and the guardian is resorted to for the easier collection of the tax. [*Drummond v. Collins*(1) referred to]. *Williams v. Singer*(2) deals with the case of a trustee put by CORNISH J. The person liable to be taxed is the beneficiary and not the trustee, though he is taxed in the name of the trustee; see pages 71, 74, 76, 78, 79 and 80 of the last-mentioned case. When the beneficiary is entitled to the income and the income is vested in him and the trustee or guardian is a mere conduit pipe for transmitting the income to the beneficiary or the minor, the beneficiary or the minor and not the trustee or guardian is liable to assessment. A co-owner in possession of the entire estate and managing the estate on behalf of himself and others is not a trustee. A guardian is in a similar, if not a better, position.

M. Patanjali Sastri for Commissioner of Income-tax.—The Income-tax Act contemplates only a single assessment in the case of a business. Its intendment is to impose a single assessment on business profits irrespective of the number of shares into which the profits may be liable to be divided; see section 10. Section 40 is a machinery section intended to enable the Government to catch the assessee, who may not be available, through the guardian. It leaves it to the option of the Government to avail itself of that machinery. *Williams v. Singer*(2) shows that a trustee may be charged in respect of a business carried on by him for the benefit of others.

[But that passage itself states that he is charged in place of the beneficiary—RAMESAM J.]

The guardian is taxed not under section 40 but under section 10 as a person carrying on a business. The guardian may be accountable to the wards but the Act has nothing to do with that. Section 40 is not a taxing section but is merely a machinery section. When a guardian carrying on a business is taxed under section 10, he or she is taxed not in a representative capacity as guardian but in his or her capacity of a person carrying on a business.

[The words "as it would be leviable upon and recoverable from any such beneficiary, if of full age" in section 40 show that the section does not apply to a case where a guardian carries on a business—CHIEF JUSTICE.]

(1) [1915] A.C. 1011.

(2) [1921] 1 A.C. 65, 71-2.

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Williams v. Singer(1) shows that the person liable for the assessment is neither the trustee nor the beneficiary but the person in control of the income.

[But that case does not touch the question whether in the case of a business carried on by a trustee or a guardian the total income must be put together for purposes of assessment so that a higher rate may be levied—RAMESAM J.]

If the profits are to be charged in the trustee's hands, they are chargeable under section 10 and it would be on the footing on which he would have been assessed if he had been the sole owner of the business, regardless of the existence of equitable interests in the profits.

[Section 10 ought to be read with sections 40 and 41—RAMESAM J.]

The widow is proposed to be taxed in her personal capacity as a person carrying on a business under section 10 and not in her representative capacity as guardian under section 40. [*Hotz Trust v. Commissioner of Income-tax*(2) and *Baker v. Archer Shee*(3) referred to.] The policy of the Income-tax Act is to concern itself not with the question of title but with the question of administration. The uniform rule therefore is to charge the trustee primarily either as a person carrying on a business or otherwise. Under section 10 the person assessed in respect of the profits of a business carried on by a trustee is the trustee himself. It does not make any difference that the trustee is also interested in a portion of the profits of the business carried on by him. The person charged with the tax is not the trustee as such but the trustee as being in receipt of the income. There is no difference between the position of a guardian and that of a trustee for the purposes of the Income-tax Act.

M. Subbaraya Ayyar in reply.—Business is not a unit of assessment under the Income-tax Act. It is so made only by the Excess Profits Act. The contention of the other side that the Act does not concern itself with the ownership of business is not warranted by the provisions of the Act. *In re Neemchand Daga*(4) is authority for the position that it is not necessary under the Income-tax Act in the case of a firm carrying on a

business to assess the firm as such and that a partner may be directly assessed. The present case is a case of co-owners where the entire income vests in the minors and cannot therefore escape taxation. *Hotz Trust v. Commissioner of Income-tax*(1) was not a case in which the entire income would pass to the beneficiaries and hence it was that the trustee was held liable to be taxed. That case is on that ground distinguishable.

[The Calcutta case does not dispute the assessability of the firm as such—CHIEF JUSTICE.]

But the Chief Justice in that case also says that the firm pays on behalf of the partners. That shows that the method of computation of profits is not to treat the profits as a single unit but to take the profits of each of the partners of the firm. Minors if of age could have registered themselves as a firm. Their inability to get themselves registered as a firm by reason of their minority ought not to expose them to a greater burden. Section 40 by using the words "minors if of full age" shows that the method of computation should be the same as if the minors had been directly assessed. [*Whitney v. Inland Revenue Commissioners*(2) and *Birt, Potter and Hughes, Ltd. v. The Commissioners of Inland Revenue*(3) referred to.] Section 3 of our Act also uses the words "income of a person".

[Section 3 also says income of an association. The real question therefore is what is meant by the word "association" in that section—RAMESAM J.]

London County Council v. Attorney-General(4) shows that income-tax is a personal tax; see page 45. The cases cited for the other side are cases in which the entire income did not pass to the beneficiaries. Section 10 is not a charging section. It merely indicates the method of computation of business income. The charging section is really section 3 and under it the person liable to tax is the person who is in receipt of income. A bare trustee is not in receipt of any income. The entire profits are passed on to beneficiaries and the trustee is not, when he is a bare trustee or acts as a mere conduit pipe, in receipt of any income. The cases cited for the other side are cases where the legal estate is vested in trustees and the entire

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(1) [1921] 1 A.C. 65, 71-2.

(3) [1927] A.C. 844, 854.

(2) (1930) I.L.R. 11 Lah. 724, 728.

(4) (1930) I.L.R. 58 Cal. 1204.

(1) (1930) I.L.R. 11 Lah. 724, 728.

(3) [1927] 12 T.O. 976, 990, 992.

(2) [1928] A.O. 37.

(4) [1901] A.O. 26, 35.

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income is not passed on to the beneficiaries. In *Fry v. Shiels' Trustees*(1) stress is laid on the ownership of the business and the case of a bare trustee is stated as probably standing on a different footing. The trustee may be eliminated where the entire income is passed on by him to the beneficiaries; see *Shee v. Baker*(2), per Master of the Rolls. In the present case the widow is not a trustee. She is a mere co-owner managing the business on behalf of other co-owners. She is only their guardian or agent. *Reid's Trustees v. The Commissioners of Inland Revenue*(3) clearly points out the distinction between the position of a bare trustee who passes on the entire income and that of other trustees.

[There was no question in that case of a trustee carrying on a business. The trustee in that case merely collected dividends on securities or investments and passed them on to the beneficiaries—RAMESAM J.]

The carrying on of a business does not affect the measure of liability which is the same as if the minors were *sui juris*. In *Stern v. The Commissioners of Inland Revenue*(4) stress is laid on the right of the beneficiary to a vested interest in the income. When the income becomes vested in the beneficiaries in definite proportions, the beneficiaries become liable in respect of their shares and the guardian cannot be assessed.

Cur. adv. vult.

RAMESAM J. The JUDGMENT of the Court was delivered by RAMESAM J.—The facts out of which this reference by the Commissioner of Income-tax arises may be shortly stated. Mr. J. V. Saldanha, a resident of Mangalore, died in April 1922 leaving behind him a widow and seven children, one of whom died subsequently. At the time of his death he owned coffee plantations in the Mysore State and house properties in Mangalore and was a partner to the extent of a one-third share in a firm of coffee-curers styled A. J. Saldanha & Sons, Mangalore. Under the Indian Succession Act his property descended to his widow and to his children, the

(1) [1914] 6 T.O. 583, 587, 588.

(3) [1927] 14 T.O. 512, 529.

(2) [1927] 1 K.B. 109.

(4) [1930] 15 T.O. 142, 159, 160, 163.

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widow getting one-third share and the children getting equally the remaining two-thirds. They do not constitute a joint family but are tenants in common of the estate which has not been divided by metes and bounds. Mrs. Saldanha was originally assessed by the Income-tax Officer on the basis that the whole of the income accrued to her. She then objected to the assessment and contended that she was the owner of only one-third of the estate and her children were separate owners of shares in the remaining two-thirds and that they might be liable to income-tax on their shares separately but that she was liable to pay income-tax only on her one-third share. This contention was upheld and she was accordingly assessed on her one-third share, the children being assessed separately. This was in October 1928. Later on a notice was issued by the Income-tax Officer in September 1930 calling upon her to submit returns of her income from the business for the two years 1929-30 and 1930-31 as he proposed to revise the assessment. The reason for this notice was a decision of the Lahore High Court in *Hotz Trust v. Commissioner of Income-tax*(1). Though she did not submit returns of her income, the Income-tax Officer, following the decision in *Hotz Trust v. Commissioner of Income-tax*(1) and holding that she is assessable for the total business conducted by her on behalf of herself and her children on the ground that it is all one business, made a further estimate of the income and assessed her accordingly. On appeal the Assistant Income-tax Commissioner agreed with the revised assessment and dismissed her appeal.

In paragraph 4 the Assistant Commissioner observed, in reply to the argument of the appellant that she and

(1) (1930) I.L.R. 11 Lah. 724.

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her children could not be assessed as an association of individuals, that it was not the appellant's children that have been assessed in this case but the appellant individually. There was a review petition to the Commissioner of Income-tax with a prayer that the Commissioner should either cancel the re-assessment or refer the question of law for decision to the High Court. Accordingly the Commissioner of Income-tax referred the following question to the High Court:—

“Whether on the facts of this case, a single assessment should be made on Mrs. Saldanha on (1) the entire income derived from the business carried on by her and (2) the whole of the one-third share of the profits derived by her from the business conducted by her under the style A. J. Saldanha & Sons in partnership with others, or whether separate assessments should be made on her and the other heirs on their respective shares of such income.”

In his letter of reference he expresses the opinion that Mrs. Saldanha and her children constitute at least an association of individuals.

In the argument before us it was contended by the learned Advocate for the assessee that the phrase “association of individuals” in section 3 of the Act refers to unincorporated companies and not to a case of this kind. Secondly it was contended that the minors can each be separately assessed under section 40 of the Act, the tax being levied from the guardian.

Now the argument based on section 40 may first be disposed of. Section 40 and the following sections have been held to be not charging sections but only machinery sections. Section 40 provides that the trustees or guardians shall be assessed in a like manner and to the same extent as the beneficiaries or wards may be assessed. Apart from the fact that these are not charging sections it may also be observed that they are enabling sections, i.e., the Income-tax Officer can take

steps to assess the trustees or guardians as representing their separate beneficiaries or wards as the case may be, if he so chooses. But the sections do not compel the Crown to resort to them. The question in the case before us is not whether the Income-tax Officer can proceed under section 40 or not but, where he has not chosen to proceed under section 40 but proceeded to assess on other basis, section 40 can be relied upon as preventing him from doing so. It is clear that the section cannot be so utilized. In the present case what the Commissioner finds is that there is a coffee-curing business carried on by Mrs. Saldanha. It is true that the fund with which she carries on this business consists partly of her own property and partly of the property of her children. But whatever that may be, on the ground that she carries on one business she is assessed to income-tax under section 10, clause (1). Now it is clear that the existence of section 40 cannot prevent an assessment under section 10, clause (1), if it is otherwise justified. In a case where guardians or trustees do not carry on business but merely receive income on behalf of wards or beneficiaries and there is no question of any business being carried on by guardians or trustees it may be that section 10 will not be available to the Crown and in such a case the incomes of the various minors or beneficiaries cannot be added and each must be separately assessed whether directly or through the guardians or trustees under section 40 of the Act. But the fact that, in a case where the trustees or guardians act as bare trustees or as bare guardians in mere receipt of the incomes, the incomes of the beneficiaries or wards cannot be added does not avail the assessee where a business is carried on with the combined resources. Presumably in the case of a business carried on by jointly utilizing several funds

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the income may not always be regarded as the total of several separate businesses but as something larger than such total because a combination of resources may produce advantages other than a mere arithmetical total of the separate parts, for instance, a trade carried on with a capital of a lakh of rupees is capable of producing much larger profits than merely the sum of the profits of ten separate businesses each carried on with a capital of Rs. 10,000. The Income-tax Commissioner therefore regards the whole of the business carried on in this case as one business and with reference to the contention that the resources belong to several individuals, namely, Mrs. Saldanha and her children, his opinion is that the business belongs to an association of individuals. The learned Advocate for the assessee contended that the word "association" has a technical meaning. It seems to us that "association" merely means a group. When properties of a number of individuals are put together and one business is carried on with the combined resources it is open to the Income-tax Officer to regard it as one business carried on by an association of individuals within the meaning of section 3 of the Act. This is the view taken in *Hotz Trust v. Commissioner of Income-tax*(1). There the business was the business of a hotel in Simla. The original owner died after leaving a trust deed by which the hotel business was to be carried on for the benefit of his children. The children there were tenants in common as in this case but it was held that the whole business can be assessed as one business carried on by the trustees on behalf of the beneficiaries. The learned Judges relied on *Williams v. Singer*(2), where it was pointed out by SANKHY J., as he then was, that section 41 of the English Act, corresponding to section 40

(1) (1930) I.L.R. 11 Lah. 724.

(2) [1920] 7 T.O. 387.

of our Act, is a mere machinery section. This observation was repeated by the Master of the Rolls in appeal. On further appeal, Viscount CAVE observed, with reference to the argument that it was the beneficiary and not the trustee that should be assessed:

"Even apart from these special provisions, I am not prepared to deny that there are many cases in which a trustee in receipt of trust income may be chargeable with the tax upon such income. For instance, a trustee carrying on a trade for the benefit of creditors or beneficiaries . . . appears to come within this category."

If so, a guardian carrying on one business on behalf of her wards appears also to come within the same category. Another decision relied on in that case, namely, *Fry v. Shiels' Trustees*(1), throws also some light on the matter though somewhat indirectly. There a business was being carried on by trustees on behalf of minor beneficiaries. It was held that the business may be regarded as that of the trustees and that the benefit derived by the trustees themselves cannot be deducted in assessing. Now if the business there should be regarded solely as the business of the beneficiaries, then what the trustees derived from it ought to be deducted. But it was held that the business should be treated as that of the trustees because it was they that carried on the business and the deduction should not be allowed. This case leads to the conclusion that where a guardian or trustee carries on a business, though the persons ultimately deriving the benefit of the business may be some wards or beneficiaries, or, as in this case, partly the guardian and partly the minors, the business can be regarded as a business carried on by the trustee or guardian and can be assessed as a single business. This virtually

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(1) [1914] 6 T.O. 583.

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amounts to saying that, where the business is carried on by one person on behalf of a number of individuals, the whole group of individuals on whose behalf the business is carried on can be assessed through the person who carries on the business. It is true that all these considerations will not be available in a case where no business is carried on and the trustees or guardians act as bare trustees or guardians merely receiving the incomes and handing them over to the wards or beneficiaries. But in the present case we have to answer the question referred on the footing that there is a business as the reference was made on that footing. It was suggested before us that as a matter of fact there is no business at all, the produce being merely brought from the estate in Mysore and being sold. But we are dealing with the case on the basis that there is a business. If the assessee desires to raise a point as to whether there is really a business, she must take proper steps for raising it as a question of law. At present the case has to be considered only on the footing that there is a business carried on by one person though it is really on behalf of several.

At first I thought that there was some hardship in this matter because by the mere accident of Mrs. Saldanha's children being minors and by the guardian carrying on business they have to pay income-tax on a larger scale and apparently there is no provision enabling the minors to obtain any refund. But on later consideration it seems to me that the hardship is no more than the hardship in the case of a Hindu joint family. A Hindu joint family consisting of a number of minors carrying on a family business is liable to pay income-tax on the mere accident of all the sharers constituting a joint Hindu family and they cannot obtain a refund on the basis of a scale appropriate to the individual sharers.

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In a case where there is no joint family but still, on account of the minority of sharers, the sharers have all to be looked after by a common guardian and the business is carried on with the properties of the tenants in common put together with the advantages of such conditions the same consequence follows as in the case of a joint family. I do not think that there is greater hardship in this case than in the other. But whatever the hardship may be, it seems to me that section 10 (1) enables the Crown to assess the person carrying on the business when there is only one business carried on by utilizing all the properties.

No order as to costs.

A.S.V.

APPELLATE CRIMINAL—FULL BENCH.

*Before Mr. Justice Reilly, Mr. Justice Anantakrishna Ayyar
and Mr. Justice Sundaram Chetti.*

IN RE SYAMO MAHA PATRO AND ANOTHER (PRISONERS),
ACCUSED.*

1932,
January 29.

*Code of Criminal Procedure (Act V of 1898), sec. 162—
"Statement made by any person" in—Accused's state-
ments if included in—Statement by accused to police
during investigation—Admissibility of—Indian Evidence
Act (I of 1872), sec. 8—Confession—Retracted confes-
sion—Admissibility of—Confession by co-accused at
preliminary enquiry—Use of, at sessions trial against
other accused—Sec. 30 of Evidence Act—Criminal trial—
Charge of main offence and conviction for abetment
thereof—Legal.*

Held by the Full Bench.—The expression "statement made by any person" in section 162 of the Code of Criminal Procedure includes a statement made by a person accused of the offence under investigation.

Per WALLER J. in the Division Bench.—Though statements made by accused persons to the police during the investigation

* Referred Trial No. 173 of 1931.

SYAMO MAHA PATRO, In re. are inadmissible in evidence, evidence of their conduct is admissible under section 8 of the Indian Evidence Act.

A retracted confession can be used under section 30 of the Indian Evidence Act where the Court is satisfied that the confession was made voluntarily in the first instance and that it is true.

A confession made at the preliminary enquiry by one of several accused persons and filed as part of the prosecution evidence at the sessions trial can be used against the others under section 30 of the Evidence Act. It is not evidence, but it can be used to corroborate the other evidence, against the other accused.

Marudamuthu Padayachi, In re (1931) I.L.R. 54 Mad. 788, distinguished.

An accused person charged with the main offence of murder can be convicted of abetment of murder even though he is not separately charged.

Begu v. The King-Emperor, (1925) I.L.R. 6 Lah. 226 (P.C.), followed.

Per KRISHNAN PANDALAI J. in the Division Bench—The rule that a retracted confession ought not to be acted upon without corroboration is not an absolute rule of law but a rule of caution.

Quaere—whether the general admissibility under section 8 of the Evidence Act of statements accompanying and explaining the conduct of a criminal in relation to his crime is subject to the special prohibition imposed by section 162 of the Code of Criminal Procedure against the admission of all statements made by accused persons to the police during the investigation.

TRIAL referred by the Court of the Agency Sessions Judge of the Vizagapatam Agency Division for confirmation of the sentences of death passed upon the said prisoners in Case No. 21 of the Calendar for 1931.

These cases coming on for hearing in the first instance, the Court (WALLER and KRISHNAN PANDALAI JJ.) made the following

ORDER OF REFERENCE TO THE FULL BENCH:—

KRISHNAN PANDALAI J.—We are of opinion that an important question of law of general application, whose decision

cannot be delayed as these are appeals from sentences of death has arisen and that in view of the following state of the authorities it is necessary to decide it by a Full Bench.

The two appellants have been convicted of the murder of a child, Appi, for the sake of the jewels on her person. The evidence against the appellants may be classified in three groups: (i) Evidence that one or the other or both the appellants were seen with or near the child shortly before her disappearance near the tank in which the body was discovered three days later; (ii) Evidence that both the appellants made statements to the police either directly or indirectly through strangers in the presence of the police wherefrom the police discovered that the jewels on the child's body were secreted in the second appellant's house and were able to recover them from there and also to discover the child's body hidden among the elephant grass in a tank called Potria tank; (iii) Evidence of statements made by both the appellants in the committing Magistrate's Court but which were retracted in the Sessions Court. At the present stage of the case we think it would not be right to express any other opinion about the merits except that if item two of the above classes of evidence, to the admissibility of which objection is taken, be excluded it may make a difference to the result of one or both of the appeals.

The objection is that as the statements of the accused above referred to were made to the police during the investigation, they are inadmissible by reason of section 162 of the Code of Criminal Procedure. As a matter of fact they were made on the 10th of September and the investigation had begun on the night of the 7th when the police registered the case as one of a person missing in suspicious circumstances. But the statements were made before the appellants were arrested and when they were therefore not in custody. Counsel for the appellants relies upon a decision of a Bench of this Court in *Sheik Kalesha, In re*(1). That fully supports the appellants' objection and if we follow it the statements must be ruled out. But we are unable to follow that decision. Our opinion in the matter is supported by direct decisions of four other High Courts, e.g., *King-Emperor v. Maung Tha Din*(2), *Jagwa Dhanuk v. King-Emperor*(3), *Azimuddy v. Emperor*(4), *Newaj Ali Molla v. The*

(1) (1931) 62 M.L.J. 71.

(3) (1925) I.L.R. 5 Pat. 63.

(2) (1926) I.L.R. 4 Rarg. 72 (F.B.).

(4) (1926) I.L.R. 54 Cal. 237.

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Emperor(1) and *Rannun v. The Crown*(2). In addition, there is also a decision of a Full Bench of our Court, *Thimmappa v. Thimmappa*(3), where at page 974 it was held that section 27 of the Evidence Act is not affected by section 162 of the Code of Criminal Procedure.

On the point arising on section 162 we are of opinion that the context in which the section occurs shows that the words "statement made by any person" in clause 1 means statements made by witnesses and not by accused persons. The general words "any person" must be read as limited by the context where they follow other sections in which the same words can only mean persons called by the police as being acquainted with the circumstances of the case. See for instance section 160 which enables the police to require the attendance of any person who appears to be acquainted with the circumstances of the case and section 161 which enables the police to examine such persons and oblige them to answer questions. Immediately afterwards follows section 162 which speaks of statements made by any person to a police officer in the course of investigation. This can reasonably mean only the statements of persons acquainted with the circumstances of the case whom the police are empowered to summon and to question and who are bound to answer the questions. Persons accused of the offence cannot be included in that class although in one sense, a peculiar sense, a man guilty of the crime under investigation is the man best acquainted with the facts of the case. This is made quite clear by section 164 which expressly provides for magistrates recording the statements of witnesses during investigation and of confessions made by accused persons at that stage. In brief, to construe section 162 as intended to include statements by accused persons is a forced and unreasonable construction whose only merit, that it is literal, is discounted by the context in which the words occur.

In view of the difference of opinion between ourselves and another Bench of this Court we think that the question should be authoritatively determined. We therefore refer to a Full Bench the following question:—

Does the expression "statement made by any person" in clause 1 of section 162 of the Code of Criminal Procedure

(1) (1929) 33 C.W.N. 287.

(2) (1926) I.L.R. 7 Lah. 84.

(3) (1928) I.L.R. 51 Mad. 967, 974 (F.B.).

include statements by persons accused of the offence under investigation? STAMO MAHA PATRO, In re.

ON THIS REFERENCE—

N. Somasundaram for the first accused.

C. P. Connell for the second accused.

K. N. Ganpati for Public Prosecutor (*L. H. Bewes*) for the Crown.

Our. adv. vult.

OPINION.

REILLY J.—In connection with Referred Trial No. 173 of 1931 the following question has been referred to us, viz.:—

"Does the expression 'statement made by any person' in clause 1 of section 162 of the Code of Criminal Procedure include statements by persons accused of the offence under investigation?"

The reference has been made because objection has been taken at the hearing of the Referred Trial to the admission of evidence that certain statements were made by the accused which the learned Judges, WALLER and KRISHNAN PANDALAI JJ., describe as statements made "to the police directly or indirectly through strangers in the presence of the police" in the course of the police investigation of the case when the accused were not in custody. In *Sheik Kalesha, In re*(1) JACKSON and CORNISH JJ. decided that a statement made by an accused person to the police in the course of their investigation of the case could not be used at the trial for any purpose. In that case the defence wished to use the statement in question for the benefit of the accused, but JACKSON and CORNISH JJ. held that its use was prohibited by section 162 of the Code of Criminal Procedure, as that section applied not only to witnesses

(1) (1931) 62 M.L.J. 71.

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but also to accused persons. In the present case it is the prosecution which wishes to make use of the statements in question, and WALLER and KRISHNAN PANDALAI JJ., differing from the interpretation of section 162 of the Code of Criminal Procedure adopted by JACKSON and CORNISH JJ., are of opinion that the statements are admissible on the ground that the section refers only to statements made by witnesses, not to statements made by accused persons.

Section 162 of the Code of Criminal Procedure runs as follows :—

“(1) No statement made by any person to a police officer in the course of an investigation under this chapter shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made.”

Then follow two provisos with which we are not now concerned, to the first of which the words in parenthesis “save as hereinafter provided” refer. It has not been suggested before us, and indeed it could not be suggested, that, taking the part of the section which I have quoted in its plain, literal meaning, there is any doubt that it includes statements made by accused persons as well as statements made by witnesses. There is no ambiguity about the words used. “No statement made by any person to a police officer” clearly and obviously includes a statement made by an accused person. And there is nothing in the section itself, so far as I can see, to throw any doubt upon that clear and obvious meaning. That, I should have thought, would provide an answer to the question before us. But, if it were necessary or permissible to look at the purpose of the section, so far as it appears in the section itself, in order

to ascertain the meaning of the words in question, the same result would be reached. The purpose is to prevent the admission in evidence at any inquiry or trial of some statements made to the police in the course of the investigation of the case. Admittedly and incontestably those statements include statements made to the police by witnesses (subject to an exception allowing them to be used by the defence in cross-examination under certain conditions). The Legislature has thought fit to exclude statements made to the police by witnesses, to prohibit the use of them either against or for the accused. It appears to me in the highest degree improbable that the Legislature, while thinking it wise to shut out statements made to the police by witnesses, would have allowed statements made by accused persons themselves to the police to remain admissible. No reason has been suggested to us why such a distinction should be drawn in favour of admitting statements made to the police by accused persons. I do not think it necessary to discuss the reason or wisdom of excluding evidence of any statement made to the police. But, if evidence of statements made by witnesses to the police is to be excluded, I can conceive of no reason why it should be regarded by the Legislature as safe or fair to allow evidence of statements made to the police by accused persons to be admitted. Alike in its literal meaning and its apparent purpose the section applies to accused persons as well as to witnesses.

The learned referring Judges have recognized that that is the literal meaning of the section. But they conclude their remarks with the sentence :

“In brief, to construe section 162 as intended to include statements by accused persons is a forced and unreasonable construction whose only merit, that it is literal, is discounted by the context in which the words occur.”

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With very great respect I do not understand how a literal interpretation of the section can be a forced interpretation. But the learned Judges are of opinion that the context shows that the literal interpretation is not the right one. Their view is that section 162 is to be read with sections 160 and 161 and that those sections apply only to witnesses. Section 160 provides that any police officer making an investigation may by order in writing require the attendance before him of any person, living within the limits of his own or any adjoining station, who appears to be acquainted with the circumstances of the case. That provision appears to be intended for use in respect of persons who are not accused persons at the time when their attendance is required, as the police can secure the presence of accused persons in other ways. But I see no sufficient reason to interpret section 161, which provides that a police officer making an investigation may examine orally any person supposed to be acquainted with the facts and circumstances of the case, as applying only to witnesses. In its plain meaning it includes also accused persons. And I know of no other provision under which the police can question an accused person, as it is not disputed they can do. It has been suggested by Mr. Ganpati for the Public Prosecutor that the meaning of section 161 is indicated by its marginal note, which mentions the examination of witnesses only. But we are not entitled to refer to the marginal note for the interpretation of the section, as their Lordships of the Privy Council have pointed out in *Balraj Kunwar v. Jagatpal Singh*(1). In my opinion section 161 includes accused persons. If we go beyond section 162 and look at section 163, I can see no reason to doubt that the latter section

applies to accused persons. The learned referring Judges have also mentioned section 164 as throwing light on the meaning of section 162; but that section appears to me to deal with quite a different matter and to be of no help to us here. If it were necessary to look at the context of section 162 in order to ascertain the meaning of "any person", I do not think that the immediately preceding and succeeding sections, 161 and 163, are themselves not applicable to accused persons or afford any indication that section 162 does not apply to accused persons. If a section, which is clear in itself, may be affected by preceding or succeeding sections, it can only be so when those other sections are themselves capable only of an interpretation which is clearly repugnant to, or startling in juxtaposition with, the section in question. Here there is no ambiguity about section 162 nor any essential reason to doubt its plain meaning, and at the very highest there is no certainty that section 161 applies only to witnesses, while to my mind there is no reason to suppose that section 163 does so. With great respect in my opinion the resort of the learned Judges to the context of section 162 for its interpretation is unjustified and their reading of the context is itself incorrect.

But, as the learned Judges have pointed out, there are a number of cases in which other High Courts have decided that section 162, as it now stands, does not apply to the statements of accused persons. The first of them is *Jagwa Dhanuk v. King-Emperor*(1). In that case the question arose whether a certain statement made by an accused person, which would have been admissible under section 27 of the Evidence Act, was shut out by section 162 of the Code of Criminal Procedure.

(1) (1925) I.L.R. 5 Pat. 63.

(1) (1904) I.L.R. 26 All. 898 (P.C.).

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MULLICK J., with whom JWALA PRASAD J. agreed, expressed the opinion that section 162 did not prohibit the admission of statements made by accused persons to the police, provided they were not confessions. He first referred to an inference from section 161, which he appears to have regarded as applying only to witnesses, a view with which I am unable to agree. He next stated that, if section 162 shut out statements made by accused persons to the police, sections 27 and 28 of the Evidence Act must be considered to have been implicitly repealed. With great respect I do not understand the reference to section 28 of the Evidence Act, and the argument from section 27 is easily answered by the application of the principle that general provisions do not derogate from special provisions. Lastly he argued that to apply section 162 to statements made by accused persons would seriously prejudice them by shutting out evidence that they had made exculpatory statements to the police at an early stage. In reply to this last argument I think it is enough to say that the learned Judge in his anxiety to prevent evidence of statements which may be of help to the accused from being shut out has forgotten how often statements made by the accused to the police may tell most seriously against them, which is the reason why the prosecution wishes to use the statements of the accused in the present case.

In *Rannun v. The Crown*(1) again the question arose whether a statement made by the accused, which would have been admissible under section 27 of the Evidence Act, was shut out by the later provisions of section 162 of the Code of Criminal Procedure. The learned Judges were of opinion that, if section 162 applies to accused

persons, section 27 of the Evidence Act would be virtually repealed and that could not have been the intention of the Legislature. They referred to the canon of interpretation that a general statute must not be construed as implicitly repealing a special one. But, though they professed to apply that canon, with the greatest respect I must point out that they arrived at a result contrary to it. Their syllogism appears to be as follows:—Special provisions are not repealed by contrary general provisions which verbally cover their ground; section 27 of the Evidence Act is a special provision, and section 162 of the Code of Criminal Procedure in its plain meaning is a contrary general provision including the field of section 27 of the Evidence Act; therefore not, as we should expect, section 27 of the Evidence Act remains as an exception to section 162 of the Code of Criminal Procedure—but section 162 of the Code of Criminal Procedure is not a general provision which covers the field of section 27 of the Evidence Act. The method by which the learned Judges arrived at the conclusion that section 162 of the Code of Criminal Procedure does not apply to accused persons appears to me, if I may say so with all respect, clearly fallacious.

Next there is a discussion of the question by a Full Bench of five Judges in *King-Emperor v. Maung Tha Din*(1). There the question before the Full Bench was whether section 162 of the Code of Criminal Procedure applies to oral as well as written statements. All the learned Judges were of opinion that it applied to both kinds of statements, as was decided by a Full Bench of this Court in *Thimmappa v. Thimmappa*(2). But in the course of *King-Emperor v. Maung Tha Din*(1) RUTLEDGE C.J. raised another question, viz. whether section 162,

(1) (1928) I.L.R. 4 Rang. 72 (F.B.). (2) (1928) I.L.R. 51 Mad. 967 (F.B.).

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REILLY J. as it now stands, has in effect repealed section 27 of the Evidence Act. Four of the learned Judges answered that question in the negative, and in each case the reason of their answer was that section 162 of the Code of Criminal Procedure does not apply or rarely applies to accused persons. The learned Chief Justice was of opinion that sections 160, 161 and 162 of the Code of Criminal Procedure should be read together and that sections 160 and 161 did not apply to accused persons. He quoted four cases as deciding that to be so of both sections 160 and 161. But it will be found on examination that the first three of these cases, *Queen Empress v. Saminada*(1), *Queen Empress v. Lakshmi Gadu*(2) and *Emperor v. Ratan*(3), do not refer to section 161, but only to section 160, and that in the fourth case, *Queen-Empress v. Jadub Das*(4), though the learned Judges remarked that it was improper of the police officer to examine two accused persons as if under section 161 in certain circumstances, they did not say that section 161 does not apply to accused persons. So far therefore as the learned Chief Justice based his opinion on authority, it appears to have been based on a misconception. CHARI and MAUNG BA JJ. agreed with the Chief Justice. DUCKWORTH J. remarked on the grouping and wording of sections 160, 161 and 162 and expressed the opinion that they could refer to an accused person only "in the rare instance in which the accused when at first not suspected in a case may have been examined by the police as a witness". We have an example of that "rare instance", which is perhaps not so rare as the learned Judge thought, in the first examination of accused 1 in the present case. HEALD J. held that

(1) (1888) I.L.R. 7 Mad. 274 (F.B.).
(2) (1886) 2 Weir 121. (3) (1902) 4 Bom. L.R. 844.
(4) (1899) I.L.R. 27 Cal. 295.

section 162 applies to accused persons and repeals SYAMO MAHA PATRO, *In re.*
REILLY J. section 27 of the Evidence Act, so far as section 27 refers to information by statements.

It will be noticed that in these cases in the Patna, Lahore and Rangoon High Courts the interpretation of section 162 of the Code of Criminal Procedure was of interest mainly in regard to its effect on section 27 of the Evidence Act. In *Azimuddy v. Emperor*(1) a question arose directly whether the Sessions Judge was right in admitting in evidence statements outside the scope of section 27 of the Evidence Act which had been made by two of the accused to the police and were represented to have been made in the course of investigation. RANKIN J., with whom DUVAL J. agreed, held that the decisions in *Jagwa Dhanuk v. King-Emperor*(2), *Rannun v. The Crown*(3) and *King-Emperor v. Maung Tha Din*(4) were right, that section 162 of the Code of Criminal Procedure does not apply to accused persons and that statements made by an accused person to the police may be proved against him, if not inadmissible under the Evidence Act. There is no doubt about the conclusions of the learned Judge; but with great respect I may perhaps say that I find it difficult to follow his reasoning. He first mentions that in the Calcutta High Court it is settled that section 161 of the Code of Criminal Procedure does not apply to accused persons, quoting as authority for that statement *Queen-Empress v. Jadub Das*(5), in which that point was not decided. I infer that there are other Calcutta cases to the effect mentioned. Next he remarks that both the context of section 162 and its contents point in the same direction, with which I am unable to agree. The next sentence is "any person" means

(1) (1926) I.L.R. 54 Cal. 237. (2) (1925) I.L.R. 5 Pat. 63.
(3) (1926) I.L.R. 7 Lah. 84. (4) (1926) I.L.R. 4 Rang. 72 (F.B.).
(5) (1899) I.L.R. 27 Cal. 295.

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quivis ex populo", which certainly points in the opposite direction. Then the learned Judge proceeds:

"It is unreasonable, in view of the special law applicable to the statements of accused persons to the police, to refuse to apply the well-established rule *generalia specialibus non derogant*. A contrary view involves an implied but complete repeal of section 27 of the Evidence Act."

That passage implies that the learned Judge is of opinion that section 162 applies to accused persons, as otherwise there is no need to apply the rule to save the special provision of section 27 of the Evidence Act from the general provision of section 162 of the Code of Criminal Procedure. But the final argument is again the other way, viz. that section 162, having been amended in the interests of accused persons, cannot be held "to deprive an accused of what so often is the mainstay of a good defence, the right to show that the moment he was challenged he gave the explanation on which he now relies." This is the same argument as has been used by MULLICK J. in *Jagwa Dhanuk v. King-Emperor*(1). RANKIN J. is sure that the section is intended to benefit accused persons; he recognises that it deprives them of the right to prove that their witnesses made corroborative statements to the police; but he cannot believe that their own statements to the police, which may be helpful to them, have been shut out, forgetting that his interpretation exposes them to the risk of most damaging statements made by them to the police being proved against them, as would be the result in this case. If it were justifiable to let the balance of benefit or risk to the accused affect our interpretation of the section, I have no doubt that it would be better for the accused to read the sentence in its plain meaning.

(1) (1925) I.L.R. 5 Pat. 68.

As in four High Courts it has been decided that section 162 of the Code of Criminal Procedure does not apply to accused persons, I have thought it proper to examine those decisions in detail. With the greatest respect I cannot agree with the reasoning in any of them. In our own Court the balance of authority is the other way. In *Venkatasubbiah v. King-Emperor*(1) WALLACE and MADHAVAN NAIR JJ. held that section 162 did not apply to oral statements. One of their reasons for that view was that, if the section applied to statements made by accused persons and embraced oral statements, it would repeal section 27 of the Evidence Act. In *Thimmappa v. Thimmappa*(2) a Full Bench, consisting of RAMESAM, WALLER and JACKSON JJ., overruled that decision in respect of oral statements and decided that section 162 applies to oral as well as written statements. But RAMESAM J. in delivering the leading opinion said that they must deal with WALLACE J.'s argument in respect of section 27 of the Evidence Act. He accepted the view that section 162 of the Code of Criminal Procedure applies to statements made by accused persons but explained that section 27 of the Evidence Act is an exception to that general rule against the proof of statements made to the police by accused persons on the principle that a general rule is affected by a special rule, not a special rule by a general rule. He said: "I am of opinion that section 27 is not affected by section 162 of the Code of Criminal Procedure but that section 162 is affected by section 27 of the Evidence Act." Though the question referred to the Full Bench was not whether section 162 of the Code of Criminal Procedure applies to statements made by accused

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(1) (1924) I.L.R. 48 Mad. 640.

(2) (1928) I.L.R. 51 Mad. 987, 973, 974 (F.B.).

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(1) (1931) 62 M.L.J. 71.

that statements made by accused persons to the police in the course of an investigation cannot be proved does not affect the special exception to that rule remaining by force of section 27 of the Evidence Act. Statements admissible under that section can still be proved; but all other statements of accused persons made to the police in the course of an investigation are shut out. Mr. Ganpati has suggested that it is an anomaly that under section 27 of the Evidence Act statements made to the police by an accused person when in custody relating to a fact discovered thereby may be proved but a similar statement made when the accused person is not in custody cannot be proved. That is an anomaly which perhaps the Legislature may consider; but in my opinion it should not influence our interpretation of section 162 of the Code of Criminal Procedure.

My answer to the question referred to us is that the expression "statement made by any person" in section 162 of the Code of Criminal Procedure includes a statement made by a person accused of the offence under investigation.

ANANTAKRISHNA AYYAR J.—The question referred to the Full Bench is:

"Does the expression 'statement made by any person' in clause (1) of section 162 of the Code of Criminal Procedure include statements made by persons accused of the offence under investigation?"

I agree with my learned brother REILLY J. and would answer the question referred to us in the affirmative.

In the first place, the words "any person" occurring in section 162 of the Code of Criminal Procedure are very wide, and, according to the ordinary interpretation of those words, would include an accused person.

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Those words occur in sections 160 and 161 also, and it was admitted before us that there are no other specific provisions in the Code of Criminal Procedure which would authorize a police officer making an investigation to question the accused, if the words "any person" occurring in those sections did not include an accused person also.

The decision of the Full Bench of this Court in *Thimmappa v. Thimmappa*(1) proceeds, in my opinion, on the view that the words "any person" in section 162 include the accused also: see page 973 of the report. Though the exact question now before us was not before the Full Bench in *Thimmappa v. Thimmappa*(1), yet the Full Bench thought it necessary to answer the question raised by WALLACE J. in *Venkatasubbiah v. King-Emperor*(2), and for that purpose had to consider the scope of section 162 of the Code of Criminal Procedure and section 27 of the Indian Evidence Act. The very basis of the argument of RAMESAM J. that section 27 of the Indian Evidence Act is a special provision, whereas section 162 of the Code of Criminal Procedure is a general provision, proceeds on the ground that the words "any person" in section 162 include the accused person also, as, otherwise, the whole discussion on this point would be irrelevant.

If the statements made by independent persons before the police could not be used as evidence except as specially provided for in section 162, there is no reason why statements made by an accused person to the police under the same circumstances should be treated in a different way; the circumstance that the statement is made by an accused person and to the

(1) (1928) I.L.R. 51 Mad. 967, 973 (F.B.). (2) (1924) I.L.R. 48 Mad. 640.

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police would probably make it the less admissible in evidence than the statement made by an independent person. In any case, there is no sufficient ground to treat the statement made by an accused person as admissible in evidence when a similar statement made by an independent person would not be so admissible. No doubt these are considerations to be taken into account only when the wording of the section is ambiguous.

If an accused does not come within the scope of section 162, the provision that the signature of an independent person shall not be taken to the statement made by him would not apply to the case of an accused, whose signature to the statement made by him might be taken by the police as there is no law prohibiting the same.

In the Code of 1882, in section 162 there was a clause to the following effect:—"Nothing in the section shall be deemed to affect the provisions of section 27 of the Indian Evidence Act, 1872." The words "any person" occurred in that section also. The inference is that those words included an accused also, as otherwise there is no necessity to have a saving clause like the one in section 162, with reference to section 27 of the Indian Evidence Act.

The marginal notes to sections 160 and 161 which refer to witnesses cannot be referred to for the purpose of construing the section. The Privy Council in *Balraj Kunwar v. Jagatpal Singh*(1) observed at page 406 as follows:—

"It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake, and it has been exploded long ago. There seems to

(1) (1904) I.L.R. 26 All. 393 (P.O.).

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be no reason for giving the marginal notes in an Indian Statute any greater authority than the marginal notes in an English Act of Parliament."

It may be that by shutting out the statements made by the accused to the police in some cases, some materials in favour of the accused and useful for his defence might be shut out; but it is equally possible that the statements shut out are really against the accused, and the same being shut out might ultimately work to the benefit of the accused. But these are considerations for the Legislature to resolve upon and not for the Courts, when the language of an Act is clear.

When the words of a statute are clear, it is not open to the Courts to disregard the same, whatever might be the results in particular cases: see *Allkins v. Jupe*(1), where there are some useful remarks about the Courts' duty to follow the plain provisions of a statute irrespective of results in particular cases. At page 385 GROVE J. observed as follows:—

"Whenever a statute is free from ambiguity, it is contrary to the duty of Judges in effect to repeal it by exercising their own judgment as to whether a particular state of facts falls within the mischief aimed at by the Legislature . . . (contra) when a statute is difficult to be interpreted."

As observed in *Secretary of State for India v. Shib Narain Hajra*(2):

"(When the language of a statute) is not ambiguous, in interpreting the plain words of a positive enactment, any suggestion of hardship is out of place."

Further, the word used is "any" person. It is mentioned in Stroud's Judicial Dictionary, Volume I, page 92:

"'Any' is a word which excludes limitation or qualification [per FRY L.J., *Duck v. Bates*(3)]; 'as wide as possible' [per CHITTY J., *Beckett v. Sutton*(4)]. A remarkable instance

(1) (1877) L.R. 2 C.P.D. 375, 385.

(8) (1883) 12 Q.B.D. 79.

(2) (1918) 1 L.R. 46 Calo. 199, 206.

(4) (1882) 51 L.J. Ch. 488.

of this wide generality is furnished in *Re Farquhar*, wherein STAMO MAHA PATRO, In re. ANANTA-KRISHNA AYYAR J. the words 'any soldier', etc., in section 11, Wills Act, 1837, were construed as including minors, so that soldiers and seamen, within that section, can make Nuncupative Wills though underage."

Section 27 of the Indian Evidence Act is a special provision, whereas section 162 of the Code of Criminal Procedure is general, and nothing that we say here would in any way affect the operation of section 27 of the Evidence Act when the conditions mentioned therein are fulfilled.

The actual decision of the other High Courts, except the decision in *Azimuddy v. Emperor*(1), is to the effect that section 27 of the Indian Evidence Act is not repealed by section 162 of the Code of Criminal Procedure, a conclusion with which I respectfully agree. The decision in *Azimuddy v. Emperor*(1), while purporting to follow the other decisions, proceeds much beyond the same, when the learned Judges held in *Azimuddy v. Emperor*(1) that the words "any person" in section 162 of the Code of Criminal Procedure do not include the accused.

The reference to witnesses in the proviso to section 162 does not, in my opinion, necessitate the inference that the words "any person" in that section do not include the accused. The policy of the Legislature was to restrict the use to be made of statements made to the police, and the proviso enacts that such statements could be used only when the persons who made the statements are examined as prosecution witnesses and, even then, only to the extent mentioned in the proviso. In all other cases, such statements could not be used as evidence whether in favour of or against the accused or prosecution, except when they come under some other

(1) (1926) I.L.R. 54 Calo. 237.

specific provision of law. Unless the Legislature modifies the provisions of section 162, I think the Courts are bound to give effect to the plain words of the same.

For these reasons, I would answer the question referred to the Full Bench in the affirmative.

SUNDARAM
CHETTI J.

SUNDARAM CHETTI J.—I agree with the judgment of my learned brother REILLY J., and wish to state briefly the reasons which weighed with me in coming to the same conclusion. The question referred by the learned Judges of the Division Bench is as follows:—

“Does the expression ‘statement made by any person’ in clause (1) of section 162 of the Code of Criminal Procedure include statements by persons accused of the offence under investigation?”

The answer to this question has to be arrived at on a consideration of (1) the plain and natural meaning of the words in the expression, (2) the sense in which the expression should necessarily be understood, having regard to the context in which the section occurs in the Code, and (3) the case law bearing on this point.

Section 162 is in Chapter XIV of the Code which deals with information to the police and their powers to investigate cognizable offences. This section declares that *no statement made by any person to a police officer in the course of an investigation under the said chapter shall be used for any purpose at any inquiry or trial in respect of the offence except for the limited purpose and in the manner specified in the proviso.* What is the plain and natural meaning of the words “any person”? The word “any” is wide and general, and, as such, the expression ‘any person’ should include not only a witness but also a person suspected or accused of an offence who happens to make a statement to the police in the course of an investigation.

A police officer engaged in an investigation of a cognizable offence can question a person who appears to be acquainted with the facts and circumstances of the case, and may reduce to writing any statement made by that person. Even if that person should be one suspected or accused of the offence, he can be questioned and his statement recorded by a police officer for the purpose of investigation under the aforesaid chapter. Section 162 deals with a statement made by any person to a police officer in the course of an investigation. The expression “any person” is comprehensive enough to include a person treated as a witness and also an accused person if regard be had to the plain meaning of those words. That the Legislature used the words “any person” in the plain and ordinary sense, and not in a special or restricted sense, is indicated by the corresponding section 162 of the Code of 1882 (Act X of 1882), with a proviso added, viz.: “Nothing in the section shall be deemed to affect the provisions of section 27 of the Indian Evidence Act, 1872.”

Section 27 of the Evidence Act refers only to information received from an accused person, that is, statement made by a person accused of an offence. If the Legislature used the words “any person” in section 162 to denote a witness and not an accused person, there would be no need whatever for inserting the said proviso in order to keep alive the provisions of section 27 of the Evidence Act. Unless the Legislature used the words “any person” in section 162 in the ordinary sense, so as to include all persons, be they witnesses or persons accused of the offence, such a proviso would be out of place and meaningless. With this proviso there is no difficulty whatever in understanding “any person” occurring in section 162 of the

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Code of 1882 as inclusive of an accused. If the same words "any person" are used in section 162 of the present Code also, are they not to be understood in the same sense? If not, why? It is true that the proviso referred to above is omitted in section 162 of the present Code. The exact reason for the omission is not clear. It is urged by the learned Public Prosecutor that the same words "any person" may have been used in a restricted sense so as not to include an accused person, and, therefore, the proviso has been omitted. This is a plausible explanation, but other explanations are not unavailable, which are equally plausible. If a change was really meant to be made in section 162 of the present Code as stated by the Public Prosecutor, the easiest course would be the substitution of the words "any witness" for the words "any person". It may be that the Legislature thought that the retention of the words "any person" in section 162 of the present Code, conveying the same meaning as in the Code of 1882, even in the absence of such a proviso, would not by implication abrogate section 27 of the Evidence Act, inasmuch as that section makes a statement made by an accused admissible in evidence, not unconditionally, but only under two special conditions specified therein. Section 162 seems to be a general rule for the exclusion of statements made by any person to the police, and, in view of the principle that a special rule is not impliedly affected by the general rule, section 27 of the Evidence Act being such a special rule or an exception to the general rule, the Legislature may have omitted the said proviso as being unnecessary. I do not think that by the mere omission of that proviso in section 162 of the present Code, the Legislature should be taken to have employed the same words "any person" in a different sense or those

words have now lost the meaning which they had in section 162 of the Code of 1882.

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Another aspect for consideration of this question is what the learned Judges in their referring judgment have laid stress on. The view taken by them is that general words, however wide and comprehensive they may be in their literal sense, should be construed in the light of the context indicative of their meaning and scope. Let us take the sections which immediately precede and succeed section 162. Section 160 enables the police officer to require, by order in writing, the attendance before him of any person, within the limits of his own or any adjoining station, who appears to be acquainted with the circumstances of the case. Section 161 enables a police officer to examine orally any person supposed to be acquainted with the facts and circumstances of the case. Then comes section 162, which says, that no statement made by any person to a police officer shall, if reduced to writing, be signed by the person making it. The section further prohibits the use of such statements in evidence at the trial, subject to an exception. Sections 163 and 164, which follow section 162, deal with statements made by any person, which obviously include statements by witnesses as also any statements or confessions by accused persons. There is no doubt as to the sense in which the words "any person" are used in section 163, and we may safely take them to include an accused person also. Are we to take the words "any person" in section 162 as limited to witnesses only by virtue of sections 160 and 161 which precede it? It is true that the marginal notes to these sections mention "witnesses". But the wording of the sections is wide and general and cannot be taken to mean witnesses only and not persons suspected or accused of an offence. Moreover,

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the scope of section 161 seems to be wider than that of section 160. The power of the police officer to examine orally any person under section 161 is not limited to the case of persons whose attendance before him he may require by an order in writing under section 160. Any person (whether a witness or an accused) whom he cannot under section 160 summon to appear before him, may still be examined by him orally under section 161 if he can have access to such a man in any other way. In construing a section, the marginal notes should not be looked into, and cannot be a criterion for determining the meaning and scope of the section. This principle has been clearly laid down by their Lordships of the Privy Council in *Balraj Kunwar v. Jagatpal Singh*(1) in the following passage:—

“It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake, and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian Statute any greater authority than the marginal notes in an English Act of Parliament.”

That being so, the use of the word “witnesses” in the marginal notes of sections 160 and 161 should not be a guide for construing the wording of the sections themselves. Reference was made to *Queen-Empress v. Saminada*(2) in support of the contention that section 160 does not apply to an accused person. The exact point that was decided in that case is that this section does not empower a police officer to summon an accused person to appear and answer the complaint made against him. There is nothing in this ruling to indicate that a police officer even without having recourse to the procedure prescribed under section 160 cannot examine

orally an accused person under section 161. It seems to me that the expression “any person” in section 161 does not exclude a person suspected or accused of an offence. There is nothing repugnant in supposing such a person to be acquainted with the facts and circumstances of the case. Thus it may be safely taken that even from the standpoint of context, the expression “any person” contained in section 162 includes an accused person also, and is not confined to witnesses only.

Coming now to the decisions bearing on this point, it is clear that there is a conflict of judicial opinion. In the Full Bench decision of this High Court in *Thimmappa v. Thimmappa*(1), though this point was not directly the subject of reference, it was considered incidentally. The Full Bench held that even oral statements made to the police, not reduced to writing, come within the purview of section 162, and would be inadmissible in evidence (except for the limited purpose specified in the proviso). Having come to that opinion, the allied question, as regards the effect of this section on section 27 of the Evidence Act had to be considered. The observations of RAMESAM J. on pages 973 and 974 are to the effect that, though oral statements made by an accused person to the police officer are covered by section 162 and come under the general rule of exclusion contained in it, the special rule as to the admissibility of such statements provided for in section 27 of the Evidence Act is not affected. If section 162 of the Code were viewed as not including statements made by accused persons at all, there would be no need for explaining why section 27 of the Evidence Act must be treated as an exception to the rule

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(1) (1904) I.L.R. 28 All. 393, 406 (P.C.). (2) (1883) I.L.R. 7 Mad. 274 (F.B.).

(1) (1928) I.L.R. 51 Mad. 967 (F.B.).

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in section 162 of the Code. There is also the distinct pronouncement of two learned Judges of this Court in *Sheik Kalesha, In re*(1), wherein this question was discussed, referring to the decisions of Patna, Lahore, Rangoon and Calcutta High Courts which have taken a different view. The learned Judges who have made the reference to this Full Bench express dissent from the view taken in *Sheik Kalesha, In re*(1). But there is consensus of judicial opinion as regards the effect of section 162 of the Code on section 27 of the Evidence Act. That opinion is that section 27 remains unaffected and cannot be taken to have been impliedly abrogated by section 162 of the Code.

I do not propose to refer to the various lines of reasoning adopted by Judges in the several cases. I shall, however, notice an important consideration which seems to have weighed with RANKIN J. in arriving at the decision that section 162 of the Code does not apply to statements made to the police by accused persons: *Azimuddy v. Emperor*(2). After adverting to the policy of the Legislature in amending section 162 in the interests of the accused, but with some abridgment of the privileges, the learned Judge proceeds to state that an accused person should not be denied the rights of proving a statement made by him to the police unless there is express and compelling language in section 162 to make the rule of exclusion from evidence contained in it applicable to a statement by the accused also. Such a construction seems to have been placed in order to safeguard the interests of an accused, for, otherwise, any exculpatory statement made by him to the police, which, if proved at the trial, would considerably help him in his defence, may be excluded

(1) (1931) 62 M.L.J. 71.

(2) (1926) I.L.R. 54 Cal. 237.

from evidence altogether. But it is also possible that a statement made to the police by an accused may at least be an indirectly incriminating one and falling short of a confession. The prosecution may be interested in proving it. If it should be held that a statement made by an accused person to the police is not covered by section 162, it would be open to the prosecution also to get such an incriminating statement admitted in evidence by proving the same. If I may say so with respect, the learned Judge in the Calcutta case seems to have overlooked this result. I agree with respect with the observations of JACKSON J. in *Sheik Kalesha, In re*(1) as to the interpretation of the language of section 162.

My answer, therefore, to the question referred to us, is in the affirmative.

These cases came on for hearing after the expression of opinion by the Full Bench on the point referred to it and the Court (WALLER and KRISHNAN PANDALAI JJ.) delivered the following

JUDGMENT.

WALLER J.—The Full Bench have answered the question referred to them in the affirmative and we are bound by their answer. They hold that the words “any person” in section 162 of the Code of Criminal Procedure must be literally construed.

To turn to the facts of the case: The appellants have been convicted and sentenced to death for the murder of a little girl called Appi. She left her parents' house at about 5 p.m. on 7th September wearing certain jewellery but did not return. She was searched for without success and her father then reported her

(1) (1931) 62 M.L.J. 71.

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disappearance to the police. The Sub-Inspector made enquiries on 8th and 9th and got certain information about the movements of the appellants, with the result that he questioned the first appellant on 10th. The latter told him something which, on the ruling of the Full Bench, must be excluded from evidence and then took him to the house of the second appellant. He also made a statement, which must be excluded for the same reason, and then gave up some jewellery, which has been identified as that which Appi had been wearing when she disappeared. Afterwards, both of the appellants led the police to a tank where the first appellant pointed out some long grass in which the dead body of Appi was found. Now, though the statements made by the appellants are inadmissible, evidence of their conduct is certainly admissible under section 8 of the Evidence Act. I accept that evidence as true and find it proved that the first appellant took the Sub-Inspector to the second appellant's house, that the second appellant gave up the murdered girl's jewels and that the first appellant pointed out the place where her body was found. It was only after the discovery of the body that they were formally arrested, a circumstance which has, on the Madras view of the law, rendered inadmissible the statements made by them, even though they led to the discovery of material facts. In addition to proof of conduct there is also evidence that the appellant has been seen either near or with the girl on the evening of the 7th close to the tank where her body was found and that the first was seen that evening with his cloth wet and muddy feet, although the day was a dry one. I see no reason, on the whole, to discredit the evidence as to the movements of the appellants that evening. That of P.W. 6 seems to have been in the hands of the police on 8th September and was probably

the cause of the first appellant being suspected and sent for by the police. The other witnesses, no doubt, did not give information till 10th but it is explained that they were away from the village and did not know what had happened till then. In addition, the story told by P.W. 10 is of some importance as he saw the first appellant running along the street at about 7 that night.

So far there is a strong circumstantial case against the appellants, but that is not all. When they were examined by the Committing Magistrate, they strengthened the case against themselves. The first appellant admitted that he and the second appellant planned to kill the girl and took her to the scene of the murder. He then went on to deny that he was present at the actual commission of the murder and ended up by saying "That day we came across the girl and caught her." As I read the whole statement, it seems to me tantamount to a confession, not merely of abetment, but of actual participation. Like so many other murderers, he is ready to admit everything but the actual commission of the crime. Like them, he leads the Court up to the scene of the murder, with everything ready set for the performance, and then pleads that he went away and someone else did what both had planned. The second appellant retaliated with a full confession implicating both himself and the first appellant in the murder. Both of these confessions were withdrawn in the Sessions Court. The first appellant denied having made the statement attributed to him, which was, of course, false. The second appellant did not deny his confession, but alleged that he was intimidated into making it. The customary arguments are put forward—that retracted confessions are worthless as evidence and that a retracted confession cannot be used under

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section 30 of the Evidence Act, unless it is corroborated by other evidence. Confessions do not become worthless as evidence merely because they have been retracted. The question always is whether the confession was made voluntarily in the first instance and whether it is true. In the case of the first appellant's confession, it seems to have been made voluntarily and to be true, so far as it goes. It certainly was made and he does not allege that he was coerced into making it. It cannot, perhaps, be used against the other appellant, as it falls short, in terms, of being a full confession of guilt. As regards the confession made by the second appellant, it was made to a Magistrate in Court and I see no reason to suppose that it was not made voluntarily. He knew that there was already very strong evidence against him and had just heard the first appellant accusing him of having committed the murder single-handed. He retaliated, I infer, by telling the whole truth and implicating the first appellant further than he had implicated himself. To his retraction I attach no importance. Accused persons usually do retract their confessions as the scaffold looms nearer. His confession, undoubtedly, can be used against the first appellant under section 30 of the Evidence Act. It is not evidence, as the section itself indicates, but can be used to corroborate the other evidence against the first appellant, of which there is plenty. We have been referred to *Marudamuthu Padayachi, In re*(1) with regard to the interpretation of that section. What that case lays down is that confessions made at the actual trial cannot be used under the section. Here the confessions were made at the preliminary enquiry and were filed as part of the prosecution evidence at the trial itself.

(1) (1931) I.L.R. 54 Mad. 788.

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Another complication is suggested—that the first appellant's confession amounts to no more than a confession of abetment and that he cannot be convicted of abetment without a separate charge. The answer is twofold. In the first place, I read the confession as essentially one of guilt as a principal. Taking it into account together with the circumstantial evidence against the first appellant, I do not doubt that he actually participated in the murder. The suggested complication therefore does not exist. In the next place, it is impossible to accept such a contention in the face of the decision of the Judicial Committee in *Begu v. The King-Emperor*(1). In the result, I think that the appellants have been rightly convicted and sentenced and would dismiss the appeals.

As regards the legal position created by the ruling of the Full Bench, it seems to me that it cannot be left as it is. It is obviously undesirable that, in matters of procedure, the High Courts of India should not speak with one voice. The Legislature should, I venture to suggest, intervene at once and make its intention clear. Here we have an important point of procedure, on which there is an acute difference of opinion, which may very well involve different consequences for accused persons, according to the part of India in which they have the good or ill fortune to be tried. A man may be hanged in Bengal, because a statement made by him to the police is there held to be admissible in evidence against him, who would have been acquitted in Madras, where the statement is ruled out as inadmissible. In Bengal, again, an accused man is allowed to prove that, at the earliest possible opportunity, he protested his innocence. That might, in a

(1) (1925) I.L.R. 6 Lah. 226 (P.C.).

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case that was hanging in the balance, just turn the scale in his favour. In Madras, on the other hand, he cannot prove what he said and might be convicted in consequence. Nor is that the only anomaly. A is charged with having murdered B and is arrested on that charge at midday. All the Courts are agreed that, if he says to a police officer at 12-5 p.m.: "I buried B's body under the floor of my kitchen" and the body is there found as a result of his information, his statement can be proved against him under section 27 of the Evidence Act. But let him make the same statement at 11-55 a.m. and controversy begins. Over a great part of India, this last statement can be proved against him. In Madras it cannot, for two reasons—that section 162 of the Code of Criminal Procedure excludes it and that section 27 of the Evidence Act limits the exception to cases where the statement has been made while the maker is in the custody of the police. If the Legislature really intended to differentiate between statements made before and after arrest, admitting proof of the latter and forbidding proof of the former, I cannot imagine what principle or policy underlies the distinction. The Legislature is clearly very suspicious of police pressure; yet, under the conditions required by section 27 of the Evidence Act, it allows even part of a confession made to a police officer—which is otherwise absolutely excluded by section 25—to be proved, although the maker of it was actually in the custody of the police at the time. Why should it be understood to have intended to exclude an exactly similar statement made by him at a time, when he was not under arrest and therefore less amenable to police pressure? To that question, I can myself give no answer that sounds reasonable. If either statement is the more open to a suspicion of undue influence, it

would seem to be that made when the accused person was in police custody, but it is held to be admissible in evidence, while the less objectionable statement is excluded.

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I have since read my learned brother's observations in regard to section 8 of the Evidence Act. They are, of course, open to the same criticism that the general admissibility under that section of statements accompanying and explaining the conduct of a criminal in relation to his crime is subject to the special prohibition imposed by section 162 of the Code of Criminal Procedure against the admission of all statements made by accused persons to the police during investigations. It is to be regretted that the Legislature, when it sets out to alter an evidentiary provision in the Code of Criminal Procedure omits to consider the effect of the alteration on material sections of the Evidence Act. As we pointed out the other day, when section 164 of the Code of Criminal Procedure was altered so as to make it absolutely obligatory on magistrates to warn a confessing accused that he was not bound to confess and that his confession might be used against him, with the result that Courts have been holding since then that confessions are inadmissible in evidence in cases where the warning has been omitted, section 29 of the Evidence Act still says that the omission is not a bar to the admissibility of confessions which are otherwise admissible. In the Criminal Procedure Code of 1882, section 162 contained a clause saving both dying declarations under section 32 and statements under section 27 of the Evidence Act. So that the section seemed then to apply to the statements of accused persons as much as to those of witnesses. In the next Code, when the section was altered and enlarged, section 32 remained in the saving clause, but section 27

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disappeared. For what reason? It is possible to argue, from the fact that the saving of statements of persons, who would, if they had lived, have been witnesses, was left in and the saving of statements made by accused persons was left out, that the Legislature intended to exclude the statements of accused persons from section 162. Otherwise, why should it not have kept section 27 in the saving clause? It would, I think, be far better if the Legislature made its intention clear in both Acts, instead of leaving the Courts to themselves to work out the problem and to decide from a comparison of both Acts which is the general provision in one and which the special in the other that overrides it.

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KRISHNAN PANDALAI J.—I wish to add a few words on the bearing, as I conceive it, of the opinion expressed by the Full Bench on the inadmissibility by reason of section 162 of the Code of Criminal Procedure of statements by accused persons, before they are arrested, to the police during investigation accompanying and explaining acts other than statements which acts are themselves relevant under section 8 of the Evidence Act.

At the argument before us before the reference two points on the admissibility of such statements were raised: (1) raised by the appellants' Advocate on behalf of the accused that such statements are inadmissible by virtue of section 162 of the Code of Criminal Procedure and (2) raised for the Crown that, though section 162 be held to cover statements by accused in a grammatical sense, the section was not intended to make inadmissible what is admissible by such sections as sections 27 and 8 of the Evidence Act. Of these, it was the first question that was the one which was referred to the Full Bench and the opinion of the Full Bench, which

I respectfully adopt, is that the terms of section 162 are wide enough to include statements by accused persons. This however, in my opinion, does not fully dispose of the second point raised in the case,—namely, to what extent that view must be held to affect section 8 of the Evidence Act which makes statements admissible as explaining conduct. All the members of the Full Bench have dealt with the effect of their view of section 162 on section 27 of the Evidence Act, and they all say that that section is not affected thereby. They regard the latter section as an exception to the general rule laid down by section 162 and hold that statements admissible under section 27 are still admissible. But none of the learned Judges has dealt with the case of statements admissible under section 8 when made by parties so far as they explain their conduct which is relevant under that section. I should be reluctant to attribute to their Lordships any view on a matter which is not discussed by them and should prefer to say that they have left it open whether statements explaining conduct admissible under section 8 are not another class of exceptions to the general rule under section 162. There is, as far as I have studied the judgments, only one sentence in them which can mean that there are no other exceptions to section 162 when applied to accused persons except section 27 of the Evidence Act. It occurs in the judgment of REILLY J. where he says:

“Statements admissible under that section (section 27) can still be proved; but all other statements of accused persons made to the police in the course of investigation are shut out.”

There is no similar view expressed in either of the two other judgments and it therefore cannot be taken to be the view of the Full Bench.

The second of the two questions therefore which arose as to the admissibility of these statements is, in

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my opinion, still open. Had it been necessary to decide it, I should say without hesitation that, although section 162 of the Code of Criminal Procedure be read as including statements by accused persons, it could never have been intended to abrogate and repeal by implication section 8 of the Evidence Act and statements explaining conduct which are admissible under that section. All the Courts recognize that section 27 of the Evidence Act is not in any way affected by section 162 of the Code of Criminal Procedure. The view approved by the Full Bench is that the former is to be regarded as an exception to the latter and therefore saved according to a well recognized rule of interpretation. Are we then to say that section 8 of the Evidence Act, so far as it applies to accused persons, has been abrogated by section 162 or that section 162 so far as it applies to accused persons is an exception to the general rule under section 8 of the Evidence Act and therefore prevails over it? To my mind, whether you regard section 162 as a general rule to which section 27 of the Evidence Act is an exception or as a special rule applicable to accused persons and therefore itself an exception to the general rule under section 8 of the Evidence Act, it is impossible to believe that the Legislature in framing section 162 of the Code of Criminal Procedure intended by a side wind to repeal or modify the effect of a general statute of such great importance as the Evidence Act, and a general provision in it of such obvious use to the administration of justice as section 8 thereof. The result of so applying section 162 would be to produce startling, if not absurd, results. If a thief is arrested and then points out the place where he has hidden stolen property after making a statement about it, the statement, even though it amounts to a confession, is admissible under section 27

of the Evidence Act so far as it relates distinctly to the recovery of the property, and this is so on the interpretation of section 162 now placed on it. But, if he was not arrested and even if the statement does not amount to a confession, it cannot be received in evidence although it furnishes the only explanation for the man's conduct both of which would under section 8 be admissible. A construction which leads to such anomaly might be imperative if it were unavoidable on the language of the statute. But the Court will if possible adopt the construction which avoids such a result and it seems to me that, now that section 162 has been authoritatively held to apply to statements by accused persons, the reasonable construction is to recognize that statements admissible under section 8 as explaining conduct which is itself admissible from another class of exceptions like those which fall under section 27. I however do not think it necessary in view of the other evidence in the case to decide this point against the appellants or to use the statements which form the subject-matter of the reference in the way above indicated. I put them aside and omit them from consideration.

The question then is whether there is sufficient other evidence against the appellants.

[His Lordship then dealt with the evidence against the appellants and came to the conclusion that both of them were rightly convicted of murder.]

As regards sentence, only one sentence is possible in such a case—death. I agree that the convictions and sentences should be confirmed and the appeals dismissed.

K.N.G.

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APPELLATE CIVIL.

Before Sir Owen Beasley Kt., Chief Justice,
and Mr. Justice Cornish.

1932,
March 7.

KUMARASWAMI MUDALI, MINOR, BY NEXT FRIEND
GANAPATHI MUDALI (PLAINTIFF), PETITIONER,

v.

MUNIRATHNA MUDALI (DEFENDANT), RESPONDENT.*

*Madras Hereditary Village-Offices Act (III of 1895), sec. 23—
Second appeal to Board of Revenue under—Hearing of
parties in—Not necessary—Rule 16 of Standing Order
No. 172 of Board of Revenue (paragraph 11)—Ultra
vires if—Sec. 3 of Act—Office specified in—Claim to—
Decision of Board of Revenue on—High Court's juris-
diction to revise, excluded by sec. 21 of Act.*

The Board of Revenue, having jurisdiction to decide a second appeal to it under section 23 of the Madras Hereditary Village-Offices Act, has jurisdiction to decide it without giving the parties an opportunity of being heard.

Rule 16 of Standing Order No. 172 of the Board of Revenue (paragraph 11) is not *ultra vires*. Section 18 of the Madras Hereditary Village-Offices Act by expressly providing for parties or Counsel to be heard in cases of reference makes the procedure not allowing the parties to be heard on second appeals to the Board of Revenue quite consistent with the provisions of the Act.

The High Court has no jurisdiction to revise a decision of the Board of Revenue on a claim to one of the offices specified in section 3 of the Madras Hereditary Village-Offices Act. Its jurisdiction to do so is expressly excluded by section 21 of that Act.

PETITION under section 115 of Act (V of 1908) and section 107 of the Government of India Act praying the

* Civil Revision Petition No. 608 of 1927 and Civil Miscellaneous Petition No. 3228 of 1927.

High Court to revise the order of the Board of Revenue, Madras, dated the 30th March 1927, and made in Miscellaneous No. 863 of 1927 (Suit Appeal No. 2 of 1926 on the file of the Court of the District Collector of North Arcot—Revenue Suit No. 1 of 1925 on the file of the Court of the Deputy Collector of Ranipet). Civil Miscellaneous Petition No. 3228 of 1927.—Petition praying that, in the circumstances stated in the affidavit filed with Civil Miscellaneous Petition No. 1703 of 1927 and in the memorandum of grounds in Civil Revision Petition No. 608 of 1927 on the file of the High Court, the High Court will be pleased to issue a writ of *certiorari* to bring in and quash and set aside the judgment and proceedings of the Board of Revenue, Madras, in Miscellaneous No. 863 of 1927, dated 30th March 1927.

L. A. Govindaraghava Ayyar and P. S. Ramachandra Ayyar for petitioner.

The Government Pleader (P. Venkataramana Rao),
C. S. Venkatachariar and T. K. Srinivasa Thathachariar
for respondent.

JUDGMENT.

BEASLEY C.J.—This is an application for the issue of *BEASLEY C.J.* a writ of *certiorari*. There is also a civil revision petition. Both arise out of an order made by the Board of Revenue in a second appeal to it under section 23 of the Madras Hereditary Village-Offices Act. The petitioner in a suit before the Revenue Divisional Officer got himself registered as a village officer. An appeal under the Act was taken to the District Collector who confirmed the Revenue Divisional Officer's order and there was a second appeal to the Board of Revenue. The Board of Revenue allowed the appeal. The petitioner argues that he is entitled to a writ of *certiorari*

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or to have the order of the Revenue Board revised here on a civil revision petition. A preliminary objection is taken both to the petition for a writ of *certiorari* and the civil revision petition. With regard to the issue of a writ of *certiorari*, it has been laid down by this Court, following the decisions of English Courts, that a writ of *certiorari* will only issue where it is shown that the Court, whose order is sought to be made the subject of the writ, has acted either without jurisdiction or in excess of it. It is clear also that, even if either of these essentials is present, the issue of the writ is purely discretionary in the High Court. We have got to consider here, first of all, what is the want of jurisdiction or excess of it alleged by the petitioner. It is stated—and it is a fact—that the Board of Revenue came to a decision and made its order in the second appeal without hearing the petitioner. It is said that, in doing so, the Board acted in excess of its jurisdiction. This contention has to be examined in the light of the Act itself and of the rules made both under the Act and in consequence of the Act. By section 23 of the Act, in such cases as the present, an appeal is given from the District Collector to the Board of Revenue. Certain rules are made by the Board of Revenue with the approval of Government under section 20 of the Act, and, amongst others, are rules for the holding of enquiries under sections 6, 7 and 8 and the hearing of appeals under section 23. It is with the hearing of the appeal under section 23 that we are concerned here. Those rules commence at No. 11 and provide for the service of notice upon the parties to the suit and the appeal and also for the hearing of the parties on an appeal to the District Collector. Although the rules proceed to lay down the procedure to be adopted on a second appeal to the Board of Revenue, they are silent

with regard to the hearing of the parties to the appeal. Hence it is argued on behalf of the Board that, whilst the rules provide for the hearing of the parties both in the suit stage of the case and in its first appellate stage, when it reaches the stage of a second appeal, that provision is expressly omitted. The matter is, however, made more certain by rule 16 (under Standing Order No. 172, paragraph 11), which is not a rule made under section 20 of the Act. That is as follows:—

“The Board will not hear either petitioners or their Counsel in person except as provided by section 18 (2) of Madras Act III of 1895 or by sections 190 and 205 of Madras Act I of 1908.”

Section 18 (1) deals with the reference in certain cases of questions of law by the Collector to the Board of Revenue; and sub-section (2) of the same section provides the procedure and states that the Board of Revenue shall, if any of the parties so request, hear him or his agent and shall decide the point referred. Here there is in the Act an express provision for the hearing of the parties when the case is considered by the Board of Revenue on a reference and it seems to me that this shows that an exception is made to the case which comes up to the Board on second appeal. In my view it is only in cases of reference of points of law to the Board of Revenue that it is bound, on the request of the parties, to hear them. It is, however, argued on behalf of the petitioner that rule 16 is *ultra vires* because it goes beyond anything in the Act and it is contrary to law and justice that, in the absence of a party, his rights should be injuriously affected. For the reasons which I have already stated, I am of the opinion that rule 16 is certainly not inconsistent with the sections dealing with this matter in the Act. It seems to me that section 18 by expressly providing for parties' Counsel to be heard in cases of reference makes

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the procedure not allowing the parties to be heard on second appeals to the Board of Revenue quite consistent. It is, therefore, clear that the Board of Revenue in making its order in the absence of the petitioner was not acting in excess of its jurisdiction. That being so, this is certainly not a case for the issue of a writ of *certiorari*. Upon this point there is a case in this High Court, viz., a decision of AYLING Offg. C.J. and ODGERS J. in *In re Chinnayya Gounder*(1). The case deals with the question of the right of the High Court to interfere with the orders of the Board of Revenue made under the Madras Hereditary Village-Offices Act under either section 115 of the Code of Civil Procedure or section 107 of the Government of India Act. Dealing with section 107 of the Government of India Act, AYLING Offg. C.J. says:—

“Appellate jurisdiction no doubt includes the power to interfere in revision and is not confined to cases in which the law allows a regular appeal. As stated by SUBRAMANIA AYYAR J. in *Chappan v. Moidin Kutti*(2), the two things required to constitute appellate jurisdiction are the existence of the relation of superior and inferior Court and the power on the part of the former to review the decisions of the latter. I accept this definition but I cannot see here either the relation or the power. It cannot be assumed that every officer exercising statutory powers in this Presidency stands to this Court in the relation of an inferior Court to a superior, or that we have the power to review his decisions. Madras Act III of 1895 is a self-contained Act which, as set out in its preamble, purports to provide ‘for the succession to certain hereditary village-offices in the Presidency of Madras; for the hearing and disposal of claims to such offices or the emoluments annexed thereto; for the appointment of persons to hold such offices and the control of the holders thereof; and for certain other purposes’.”

It is difficult to see how in such a case as this it can be argued that a Revenue Court is a Court which

(1) (1921) 41 M.L.J. 577.

(2) (1898) I.L.R. 22 Mad. 68 (F.B.).

stands in relation to the High Court as an inferior Court to a superior Court, when reference is made to section 21 of the Act which says:

“No Civil Court shall have authority to take into consideration or decide any claim to succeed to any of the offices specified in section 3 or any question as to the rate or amount of the emoluments of any such office”

This is one of the offices specified in section 3, and, if a civil revision petition lies, then the High Court will be taking into consideration a claim to one of the offices specified in that section. That is expressly barred by section 21 of the Act. However, it is argued that, the Act being a purely local one, it cannot by its legislation take away the powers which the High Court possesses under its charter. It is quite true that a local Act cannot take away any of the powers which the High Court possesses but it is perfectly clear that the High Court never did possess the power of interference in such matters as this. That also is pointed out in *In re Chinnayya Gounder*(1), already referred to. At page 580, AYLING Offg. C.J. says:

“It has been suggested that if this be so, Act III of 1895 purported to take away powers which the High Court possessed prior to its enactment and to that extent is *ultra vires*; but I can discover no basis for this. Prior to its enactment the position of hereditary village officers was governed by Regulation VI of 1831; and this Regulation is, if possible, even more explicit than the Act now in force in placing such village officers as the petitioner under the exclusive control of the Revenue authorities.”

The preamble to that Regulation is as follows:—

“And whereas effectually to prevent the appropriation of such emoluments to purposes other than those for which they were originally designed, it is requisite to declare that all such emoluments are inalienable by mortgage, sale, gift or otherwise; to provide that no claim to such offices, or to any

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of the emoluments annexed thereto, shall be cognizable by the ordinary Courts of judicature."

That, in my view, makes it perfectly clear that the High Court never did have any power of interference with the Revenue Courts in such matters as this. For these reasons, the petition for the issue of a writ of *certiorari* and the civil revision petition must be dismissed with costs (two sets).

CORNISH J.

CORNISH J.—I am of the same opinion. The question is whether the Board, which clearly had jurisdiction to decide the appeal, had jurisdiction to decide it without giving the petitioner an opportunity of being heard. The answer to that question depends upon whether rule 16 of Standing Order 172 of the Board of Revenue (paragraph 11) is *ultra vires*. That rule is not described as a rule made under section 20 (2) of the Act, but it is obviously made with reference to the Act and to the powers given by section 20, and must, I think, be taken to be a rule made in regard to the hearing of appeals under section 23. Section 20 requires that the rule so made shall not be inconsistent with the provisions of the Act. The test, then, whether this rule is *ultra vires* is whether it is inconsistent with anything provided in the Act. It is only necessary to look at section 18 of the Act, which is the one section in the Act expressly providing for the procedure in matters coming before the Board, to see how completely consistent with it the rule is. Section 18 (2) makes a special provision for allowing the parties or their agents to be heard on a reference to the Board of a point of law under section 18 (1) if any of the parties so request. In my view, it is quite consistent that the right of being heard in person or by Counsel should be limited by rule to the only occasion on which this right is given by the Act.

With regard to the civil revision petition which has been argued before us, in my judgment, the jurisdiction of the High Court to revise the decision of the Board on the petitioner's claim is expressly excluded by section 21 of the Act. This is not a case of a provincial Act purporting to take away from the High Court a right to supervise Courts of inferior jurisdiction, for, as was held in *In re Uhinayya Gounder*(1), the power of control given to Collectors over village officers was never subject to the High Court's superintendence. I agree that both the petitions should be dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Madhavan Nair.

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APPELLANT,

1932,
March 8.

v.

THE OFFICIAL ASSIGNEE OF MADRAS
(RESPONDENT), RESPONDENT.*

Indian Contract Act (IX of 1872), ss. 126 and 141—Joint-debtors—When sureties as amongst themselves.

In the absence of a custom or contract to the contrary between joint-debtors who are jointly and severally liable to a creditor, each is not a surety to the other as defined by section 126 of the Indian Contract Act nor do they occupy a position analogous to that of surety strictly so-called so as to attract the provisions of section 141 of the Indian Contract Act.

APPEAL from the judgment of WALLER J. in the exercise of Insolvency Jurisdiction of the High Court in

(1) (1921) 41 M.L.J. 577.

* Original Side Appeal No. 98 of 1929.

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Application No. 366 of 1929 in Insolvency Petition No. 278 of 1925.

K. S. Krishnaswami Ayyangar for appellant.

O. T. G. Nambiyar for respondent.

Cur. ad. vult.

JUDGMENT.

RAMESAM J.—The facts out of which this appeal arises may be stated as follows. Two Chetties, R. M. M. S. T. Vyravan Chettiar who is the appellant before us and M. A. R. N. Ramanadhan Chettiar carrying on business under the vilasam of M.A.R.N., were in the habit of borrowing from the banks in Madras on joint promissory notes and utilizing the amounts in equal shares. There were two such promissory notes with which we are concerned. On each occasion the amount borrowed was Rs. 50,000. The total amount borrowed being one lakh, each debtor took Rs. 50,000 for his own purpose. The dates of the two notes are 8th July 1924 and 22nd April 1925. On the 3rd August 1925 M.A.R.N. was declared insolvent. It is admitted that the insolvent paid interest on his share of the debt on the 8th July 1924, 8th October 1924 and 8th January 1925. He had certain shares in the Indian Bank from whom those debts were borrowed, and, under Article 19 of the Articles of Association of the Indian Bank, the bank had a lien on the shares. After the insolvency of Ramanadhan Chetty, the bank demanded the appellant for payment and he paid the whole debt. In respect of the moiety of the insolvent's debt he now claims to be subrogated to the benefit of the lien which the Indian Bank had over the shares, and this is claimed under section 141 of the Contract Act. The Official Assignee representing the insolvent claims that the shares had

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vested in him free of any such lien. The matter came on before our brother WALLER J. and he found that no specific agreement as was alleged by the appellant to the effect that each debtor was to be surety for the other in respect of his moiety of the debt was made out. He therefore dismissed the application. This appeal is filed against his order.

We entirely agree with the learned Judge that the evidence does not make out any specific agreement between the parties to the effect that, though as between the Indian Bank and the debtors they were jointly and severally liable, as between themselves each should be regarded as a surety for the other in respect of his moiety of the debt. Under the Indian Contract Act the contract of guarantee is confined to cases where the guarantor agrees with the creditor to discharge the liability of a third person in case of his default. Cases where on the face of the contract two persons are both jointly and severally liable do not fall within the definition. In other words, the contract of guarantee as defined in section 126 of the Indian Contract Act is confined to cases of suretyship strictly so-called. In *Duncan, Fox, & Co. v. North and South Wales Bank*(1) Lord SELBORNE L.C. distinguishes between three kinds of cases at page 11. The first case there mentioned is the only case covered by the Indian Contract Act. The second and third cases there enumerated are cases of suretyship loosely described as such. The second case is a case where there is an agreement between the principal and the surety only, the creditor being a stranger to it. The third case is a case where, without any contract of suretyship, there is a primary and a secondary liability of two persons for

(1) (1880) 6 App. Cas. 1, 11.

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one and the same debt, the debt as between the two being of one of those persons only, and not equally of both. After eliminating the cases of suretyship strictly so-called, the noble Lord discusses, at page 12, how far the person secondarily liable as surety is entitled to be subrogated to the rights of the creditor in the second and third cases. He refers to Lord ELDON's dictum in *Yonge v. Reynell*(1) and finally winds up by saying that even in the second and third cases the surety has some right to be placed in the shoes of the creditor where he paid the amount. The learned Advocate for the appellant strongly relied upon this dictum and also the case of *Rouse v. Bradford Banking Company*(2). But in this case there was an express agreement between the parties. He also referred to Rowlatt on Principal and Surety, second edn., page 7. But the passage at page 7 relies on the case, *Duncan, Fox, & Co. v. North and South Wales Bank*(3), and does not carry the statement of the law beyond it. To make this passage applicable, the case must be one where the debt must be wholly of one and not equally of both. The whole foundation for the equitable doctrine of the English Courts of Equity is the argument of Sir Samuel Romilly in *Craythorne v. Swinburne*(4). That was a case of contract of guarantee in the strictest sense of the term. So also the cases of *Yonge v. Reynell*(1) and *Wythes v. Labouchere*(5). Mr. Krishnaswami Ayyangar relied on Sheldon on Subrogation, second edn., section 169. But that section does not very much help the appellant. The opening sentence shows that even in some States in America (Georgia, Albana and Vermont) the right of

(1) (1852) 9 Hare. 809; 89 R.R. 689.

(3) (1880) 6 App. Cas. 1, 11.

(2) [1894] A.C. 586.

(4) (1807) 14 Ves. 160; 9 R.R. 264.

(5) (1859) 8 De G. & J. 598; 121 R.R. 238.

subrogation among the parties jointly bound as principals is denied, though in other States such right of subrogation seems to have been recognized. There is no case in England where the Courts have gone to this length. On the other hand, the statement of the law in *Duncan, Fox, & Co. v. North and South Wales Bank*(1) makes it subject to the limitation that the debt should not be equally of both. The case of *Goverdhandas Goculdas Tejpal v. The Bank of Bengal*(2) is also a case of contract of suretyship strictly so-called. The only point held there was that unless the surety pays down the whole money he is not entitled to the transfer of the security. We are not prepared to extend the legal position as laid down in English cases on the mere authority of the cases cited in Sheldon. The appeal fails and is therefore dismissed with costs.

MADHAVAN NAIR J.—The facts of this appeal are very simple. The appellant, Vyraavan Chetty, and another who became an insolvent on the 3rd August 1925, borrowed from the Indian Bank on two occasions, 8th February 1924 and 22nd August 1925, a sum of Rs. 1,00,000, the loan on each occasion being Rs. 50,000. The amount was borrowed under two promissory notes signed by both of them. On the face of the notes the liability of the executants is joint and several. It is admitted that each of the promisors took for himself on each occasion half of the amount borrowed, so that each owed the bank Rs. 50,000. The insolvent owned 153 shares of the Indian Bank. Under Article 19 of the Articles of Association, the bank had a lien over these shares for the amounts due to it from the insolvent. The Indian Bank realised from the appellant the entire amount due to it from both the promisors. The

(1) (1880) 6 App. Cas. 1, 11.

(2) (1890) I.L.R. 15 Bom. 48.

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entire money due to the bank from himself and the insolvent having been paid off by him, the appellant contends that he is a surety for the insolvent for the amount due from him, and that he is entitled under section 141 of the Indian Contract Act to the benefit of the security held by the bank against the principal debtor, the insolvent, i.e., in other words, he is entitled to have a charge on the insolvent's shares in the bank and the dividends accruing therefrom. The claim was opposed by the Official Assignee.

In the application in support of this claim the appellant relied on two specific agreements of suretyship—one agreement each time the money was borrowed—alleged to have been entered into between himself and the insolvent. In his evidence he set up a general “custom” amongst the Nattukottai Chetties that in such borrowing transactions each borrower becomes a surety for the amount taken by the other. The learned Judge held neither the “agreements” set up nor the “custom” was proved and so dismissed the petition.

On the evidence it is not seriously contended that the learned Judge's conclusions are incorrect. The evidence does not establish the agreements of guarantee set up nor does it support the alleged custom. Sections 140 and 141 of the Indian Contract Act regulate as against the principal debtor the rights of a surety who performs or otherwise discharges the liabilities of the principal debtor. These sections are as follows:—

Section 140.—

“Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.”

Section 141.—

“A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.”

Section 140 lays down a general principle of which the most important practical application is to be found in section 141; see Pollock and Mulla, Indian Contract Act, sixth edn., page 497. Under section 141 a surety is entitled to the benefit of every security which the creditor has against the principal debtor. This was the section relied on by the appellant before WALLER J. If this section applies there can be no doubt that the appellant is entitled to claim a charge on the shares of the bank held by it (the creditor) as a security against the insolvent. Having regard to the finding of the learned Judge and our opinion that the agreements set up by the appellant have not been proved, what is now urged is, not that section 141 of the Contract Act is directly applicable, but that the general principle of equity underlying that section would apply to the appellant who, though he is not a surety strictly speaking, occupies a position analogous to that of a surety; and since he has admittedly discharged the liability of the insolvent by paying the creditor his portion of the debt, viz., Rs. 50,000, he is in equity entitled to the benefit of the security held by the bank (the creditor) against the insolvent. This argument is sought to be supported by the decision in the well-known case of *Duncan, Fox, & Co. v. North and South Wales Bank*(1). It is doubtful if this argument was put before the

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learned Judge but it is stated that the case was quoted before him. The question is purely one of law. It was held in that case :

"The acceptor of a bill of exchange knows that, by his acceptance, he does an act which will make him liable to indemnify any indorser of it who may afterwards pay it. The indorser is a surety for the payment to the holder, and, having paid it, is entitled to the benefit of any securities to cover it deposited with the holder by the acceptor. He is so entitled whether at the time of his endorsement he knew, or did not know, of the deposit of those securities. The surety's right in this respect in no way depends on contract, but is the result of the equity of indemnification attendant on the suretyship."

The facts of the case were these: R. & Sons offered a bill of exchange for a portion of the price due from them for a cargo of corn purchased from D. & Co. D. & Co. declined to take the bill of exchange. They were customers to North and South Wales Bank. One of the partners of R. & Sons had deposited with this bank the title-deeds of two of his own freehold properties and these were held by the bank as securities for what the bank might advance in the way of discounts. R. & Sons told D. & Co. that if they would inquire of the bankers they would find it would be all right with their bill. The bank manager refused to discount the bill without the endorsement of D. & Co. but said that he believed D. & Co. would incur no more than a nominal liability by making the endorsement, placing the amount to the credit of D. & Co. R. & Sons later on stopped payment of the bill when it became due and the bill was dishonoured. D. & Co. then became acquainted with the fact that securities had been deposited with the bankers by R. & Sons to cover advances on their bills and brought an action against the bank to have the benefit, so far as they would go, of the securities deposited with them, claiming to be sureties to the bankers for what was due upon the bill.

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It was held that D. & Co. were sureties on their bill and that as such they were entitled to the benefit of these securities (see the head-note). In examining the principles and authorities applicable to the question to be decided, the Lord Chancellor distinguished between three kinds of cases: (1.) Those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2.) Those in which there is a similar agreement between the principal and the surety only, to which the creditor is a stranger; and (3.) Those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being, as between the two, *that of one of those persons only, and not equally of both* (the italics are mine) so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid. In all these three kinds of cases it was pointed out by their Lordships that the person who discharges the liability due to the creditor would be entitled to the benefit of the security held by the creditor; though a case of suretyship strictly speaking would fall only under class (1.) as a contract of guarantee is confined to agreements where the "surety" agrees with the creditor that he would discharge the liability of the "principal debtor" in case of his default (see section 126 of the Indian Contract Act). Obviously classes (2.) and (3.) are not cases of suretyship strictly so-called. Their Lordships observed that the case before them did not fall within the first or second class as admittedly there was no agreement either between R. & Sons and D. & Co. constituting the relation of principal and surety to which the bank was a party, or a similar agreement between the two, to which the bank

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was a stranger, and that the case fell within the third class in which though there is, strictly speaking, no contract of suretyship

"there is a primary and secondary liability of two persons for one and the same debt, by virtue of which, if it is paid by the person who is not primarily liable, he has a right to reimbursement or indemnity from the other."

It was for this reason that D. & Co. were held to have the rights of sureties though they were, strictly speaking, not sureties on the bill. In the case before us no contract between the appellant and the insolvent constituting the former a surety for the latter to which the bank was a party has been pleaded and the specific contracts of suretyship pleaded have not been substantiated. The appellant, therefore, argues that, though he is not strictly speaking a surety, he falls within the third class enumerated above and that he occupies in equity a position analogous to that of a surety as mentioned therein as he has discharged the liability of the insolvent to the bank. If he does, then he is, by extension of the principle applicable to the case of sureties strictly so-called, entitled to the benefit of the security held by the Indian Bank. To fall within class (3.) mentioned above and to assimilate his position with that of a surety strictly so-called, a person who discharges the liability to the creditor should be only secondarily but not primarily liable to the creditor. This was the position of D. & Co. in *Duncan, Fox, & Co. v. North and South Wales Bank*(1). Having regard to the facts of the present case, it cannot be said that this is the position of the appellant with respect to his liability on the promissory notes. As already pointed out, the liability on the promissory notes of the appellant and the insolvent is joint and several. There is only one debt

(1) (1880) 6 App. Cas. 1, 11.

in the present case, a debt which is equally a debt of both the parties. The Indian Bank can recover the entire amount either from the appellant or from the insolvent. Thus there is no question of one person being primarily liable for the debt and the other only secondarily liable. In these circumstances the principle of the decision in *Duncan, Fox, & Co. v. North and South Wales Bank*(1) has no application to the present case, and on the strength of that decision the appellant cannot claim that his position is analogous to that of a surety and that, therefore, he is entitled to the benefit of the security held by the creditor.

Various other cases were cited by the appellant's learned Counsel, but all of them are distinguishable. In the case of *Rouse v. Bradford Banking Company*(2) there was an express agreement between the parties. The case of *Craythorne v. Swinburne*(3) is one of co-sureties and the cases of *Yonge v. Reynell*(4) and *Wythes v. Labouchere*(5) are all cases of strict suretyships. The case of *Goverdhandas Goculdas Taejpal v. The Bank of Bengal*(6) is also a case of a contract of suretyship. Reference was made to a passage in Sheldon on Subrogation, second edn., chapter 4, section 169, which shows that the right of subrogation between joint-debtors exists in some States in America but the existence of such rights is denied in some other States. However, no English decision has been cited in support of the contention that such right exists in England. In my opinion, persons who are jointly and severally liable on promissory notes are not sureties under section 126 of the Indian Contract Act, nor do such persons occupy a position analogous to that of a surety strictly so-called

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(1) (1880) 6 App. Cas. 1. (2) [1894] A.C. 586.
(3) (1807) 14 Ves. 160; 9 R.R. 264. (4) (1852) 9 Hare. 809; 89 R.R. 689.
(5) (1859) 8 De G. & J. 593; 121 R.R. 288. (6) (1890) 1 L.R. 15 Bom. 48.

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so as to attract the provisions of section 141 of the Contract Act.

For the above reasons, I must hold that the appellant is not entitled to the benefit of the security held by the Indian Bank against the insolvent. I would therefore dismiss this appeal with costs.

Attorney for appellant—*N. T. Shamanna*.

Attorneys for respondent—*Moresby and Thomas*.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Krishnan Pandurai.

1932,
March 15.

P. P. V. P. L. CHOCKALINGAM CHETTIAR AND ANOTHER
(RESPONDENT AND HIS LEGAL REPRESENTATIVE), PETITIONER,

v.

K. P. S. A. R. PALANIAPPA CHETTIAR (PETITIONER),
RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 24 (1) (a)—“Competent to try”—Meaning of—District Munsif’s small cause jurisdiction—Suit beyond, and within Subordinate Judge’s small cause jurisdiction—Transfer to District Munsif of—Competency of Munsif to try suit—Provincial Small Cause Courts Act (IX of 1887), sec. 16.

A suit, which was within the small cause jurisdiction of the Subordinate Judge of Devakotta and beyond the small cause jurisdiction of the District Munsif of Devakotta, was transferred by the District Judge of Ramnad to the file of the District Munsif of Devakotta.

Held that the District Munsif was “competent to try” the suit within the meaning of section 24 (1) (a) of the Code of Civil Procedure.

“Competent to try” in section 24 (1) (a) of the Code must be understood to mean “of jurisdiction competent to try”; and section 24 of the Code must be understood to constitute an

* Civil Revision Petition No. 430 of 1930.

enactment saving, in special circumstances, the provision of section 16 of the Provincial Small Cause Courts Act.

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 District Court of Ramnad at Madura dated 20th December 1929 and made in Original Petition No. 183 of 1929.

K. S. Desikan for petitioner.

M. Murugappa Chettiar for respondent.

Cur. adv. vult.

JUDGMENT.

JACKSON J.—A suit valued at Rs. 768 was within the small cause jurisdiction of the Subordinate Judge of Devakotta. The District Munsif of Devakotta was trying a connected suit within his original side jurisdiction. For convenience of parties the small cause suit was transferred by the District Judge of Ramnad to the file of the District Munsif. The petitioner moves this Court to declare, in revision, that the District Judge acted without jurisdiction.

The short point is whether a District Munsif is “competent to try” a small cause suit beyond his small cause jurisdiction and within the small cause jurisdiction of the Subordinate Judge. Because, if he is not “competent to try”, the District Court could not have transferred the suit to him under section 24 (1) (a), Civil Procedure Code.

Ordinarily a District Munsif would be competent to try a suit valued at Rs. 768; but if his munsifi is included in the jurisdiction of a Subordinate Judge who has been given small cause powers up to Rs. 1,000, then under section 16, Act IX of 1887, (save as provided by any enactment for the time being in force), he shall not try such a suit, which will be triable only by the Subordinate Judge. Then the question arises, is a

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Munsif whose hands are tied by section 16 "competent" to try the suit?

I think there can be no doubt that he is competent, but that particular class of suit is taken from him by special enactment; and, as section 16 expressly provides, if the special enactment is negatived by some other enactment, then the Munsif can exercise his competence. The matter has been elucidated in a parallel problem arising out of the same term "a Court competent to try" in section 11, Civil Procedure Code. It was argued in *Raja Simhadri Appa Row v. Ramachandrudu*(1) that the District Munsif of Gudivada could never by force of section 16 of the Provincial Small Cause Courts Act take a suit of small cause valuation on to his original side; and therefore a suit which he had decided on the original side could not be treated as *res judicata* when he was trying a small cause suit between the same parties, because the original side Court "was not competent to try" the subsequent suit in the Small Cause Court.

The Bench negatived this argument holding that the circumstance of the original jurisdiction being barred does not make the ordinary Civil Court a Court which is not a Court of jurisdiction competent to try the present suit.

The same language may be applied to section 24 (1) (a), Civil Procedure Code. The Court has jurisdiction to try, and is competent to try, though there is the circumstance, or accident, that that particular class of suit is removed from its purview.

It is clear that when section 24 has been canvassed on other grounds this question has suggested no difficulty to the Courts. Thus in *Sankararama v. Padmanabha*(2), when the Subordinate Judge of Tuticorin had

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small cause jurisdiction covering the munsifi of Sri-vaikuntam, and a suit was transferred to the Munsif of Srivaikuntam who had not got small cause powers up to the necessary value, this Court has held (page 27) "that both Courts were competent to dispose of the suits cannot be doubted" and the District Court "had power to transfer the suit." (Page 31.)

Again in *Sukha v. Raghunath Das*(1) it is held that the District Court has power to transfer the small cause suit to a Court which is not invested with small cause powers.

This is directly traversed in *Murugesu Mudaliar v. Venkata Kesavalu Chetty*(2). No doubt it is there left open whether *Sukha v. Raghunath Das*(1) had gone to this extent, but the passage quoted above from page 219 puts it beyond doubt, and it must be decided whether the Allahabad or the Madras case is right.

The ruling upon which the Madras case chiefly relies, *Bagiammal, In re*(3), is hardly in point because the City Civil Court by virtue of section 3 of the Madras City Civil Court Act (VII of 1892) is quite incompetent to try suits cognizable by the Small Cause Court. There is no precisely similar enactment in regard to District Munsifs, who are competent to try suits of small cause valuation provided that section 16 of the Provincial Small Cause Courts Act does not apply.

An unreported case cited in *Murugesu Mudaliar v. Venkata Kesavalu Chetty*(2) hardly carries the matter further, for there this Court was exercising its own discretion under section 24, Civil Procedure Code, and nobody suggests that a Court is bound to transfer.

Section 24 clearly contemplates the transfer by a District Court of a suit from a Court of Small Causes. If it is to be said that a small cause suit can only be

(1) (1902) I.L.R. 27 Mad. 63.

(2) (1912) I.L.R. 38 Mad. 25, 27.

(1) (1916) I.L.R. 39 All. 214, 219.

(2) (1929) 56 M.L.J. 649, 653.

(3) (1917) 32 M.L.J. 258.

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transferred to a Court having small cause jurisdiction, because otherwise section 16 of the Small Cause Courts Act will be offended, then sub-clause 4 of section 24 becomes meaningless. If the Court of transfer is itself always to be a Small Cause Court there can be no question of deeming.

But there is no difficulty if "competent to try" is understood as in *Raja Simhadri Appa Row v. Ramachandrudu*(1) to mean "of jurisdiction competent to try". Section 24 must then be understood to constitute an enactment saving, in special circumstances, the provision of section 16 of the Small Cause Courts Act.

Of course it is a question of convenience. When a District Munsif is trying an original suit of Rs. 1,400 value, and a connected suit of Rs. 700 value is before the Subordinate Judge in his small cause jurisdiction, it would be inconvenient to insist on two separate trials because of a hard and fast rule against concurrent jurisdiction. Therefore section 16, Small Cause Courts Act, is made elastic by section 24, Civil Procedure Code. Whenever to avoid rigidity a certain discretion is given to the Courts ingenious persons can imagine that discretion being carried to staggering lengths, and in the case law which has clustered round section 24 words like "disastrous" and "curious" will be found. But it is hardly the business of Courts to save the Legislature from itself, and, at any rate in this matter, it is sufficient to point out the clear meaning of the section.

Therefore it cannot be said that the learned Judge acted with any irregularity and the petition is dismissed with costs.

KRISHNAN
PANDALAI J.

KRISHNAN PANDALAI J.—I agree that the petition should be dismissed. Perhaps I may add that the

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difficulties felt in working sub-clause 4 of section 24 of the Code of Civil Procedure are of two kinds. First, where a small cause suit is transferred to a Court which is not invested with any small cause jurisdiction, the latter Court is to be deemed for the purpose of the transferred suit to be a Court of small causes. This, it appears to me, is the proper meaning and effect of that clause. But it has been thought that it means that, where a suit is transferred to a Court which, as all Munsifs' Courts are in this Presidency, is already invested with small cause jurisdiction up to a certain limit (Rs. 100 or Rs. 300), that Court should try the transferred suit as a small cause suit though of higher value than its small cause jurisdiction and that as a consequence there should be no appeal from such a decree; though, if it were not a transferred case, there would have been an appeal. To this latter difficulty, if it is really a greater one than the first difficulty above-mentioned, I would venture to suggest that on a proper construction of sub-clause 4 it does not deal with transfers to a Court already invested with small cause powers. The word "deemed" seems to indicate that it deals only with transfers to a Court without such powers. Therefore, where a suit is transferred to a Small Cause Court, there is nothing in the sub-section which requires that suits of higher value when transferred should be tried as small cause suits or that there shall be no appeal therefrom. This point however does not arise in the present petition which only raises the question of the power of transfer to a Court which has small cause jurisdiction of a suit of higher value than such jurisdiction. I agree that the main part of the section clearly authorises such transfer.

A.S.V.

APPELLATE CIVIL.

*Before Sir Owen Beasley Kt., Chief Justice,
and Mr. Justice Cornish.*

1932,
March 2.

P. VENKATACHALAM AND ANOTHER (PLAINTIFFS),
APPELLANTS,

v.

RAJAGOPAL NAIDU AND ANOTHER (DEPENDANTS),
RESPONDENTS.*

*Trade name—Passing off action—Manufactured article having
a descriptive name—Passing off in respect of—Secondary
meaning—Proof of.*

In a passing off action, when the alleged passing off is in respect of a manufactured article having a descriptive name, the plaintiff, before the question of passing off is considered, has to prove that the name has acquired a secondary meaning and has come to mean the article manufactured by himself and not by other manufacturers.

APPEAL from the judgment of WALLER J., dated the 2nd day of December 1930, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 65 of 1929.

V. V. Srinivasa Ayyangar and B. Ananda Bai for appellants.

K. Krishnaswami Ayyangar and G. A. Pais for respondents.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J. BEASLEY C.J.—The suit under appeal was brought by the receivers of P. Venkatachalam's condiment business to restrain the defendants from selling the curry powder manufactured by them, called the "Madras

* Original Side Appeal No. 8 of 1931.

Curry Powder", in packages designed and labelled so as to resemble those of the plaintiffs. The second defendant in the suit is the minor son of the late P. S. Loganatham, a grandson of the original P. Venkatachalam, who died about a year ago. It is conceded that the defendants did not sell or offer for sale any of their curry powder in Madras. The acts complained of were committed in England where, it must be observed, there is an action pending against a firm called Colinson & Co. claiming the same reliefs as here and for the same alleged reasons. WALLER J. did not decide the case on the merits but held on the admitted facts that he had no jurisdiction to try the suit. That point was not raised in the written statement nor was there any issue taken upon it. WALLER J. found that the passing off complained of, if done, was not done by the defendants in Madras but by their agents in England and that the passing off, the passers off, and the evidence, were all in England. He accordingly dismissed the suit with costs. From his judgment it seems that he has found that the passers off in England were the agents of the defendants and also that the defendants did not give their agents any authority to sell the curry powder got up in the manner complained of by the plaintiffs.

I do not propose to say anything with regard to the question of jurisdiction or the findings with regard to the agency or the want of authority in the agents because it seems to me quite clear that this case must fail upon another point. It is sufficient to say with regard to jurisdiction that, whilst it is true that a Court can issue an injunction against persons within its jurisdiction restraining them from doing acts outside the jurisdiction, it will not do so unless that remedy is likely to be an effective one. In this case it is argued by the respondents that, as the defendants have no

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property here, the remedy could not be an effective one. Upon this point it is not necessary to give an opinion. In my view, the appellants' case fails because the evidence falls far short of proving that they had in England the exclusive right to sell the "Madras Curry Powder". It may well be that the "Madras Curry Powder" manufactured by them had obtained considerable reputation in England. But it does not follow, therefore, that other manufacturers of Madras Curry Powder had not obtained for themselves a similar reputation. What is claimed by the appellants is that they have acquired a right to the exclusive use of the name "Madras Curry Powder" with regard to the goods manufactured in their business. That is what is claimed in the plaint and that is the first issue framed; and that the appellants must succeed in proving before the question of the passing off can be considered. It was strenuously contended on behalf of the appellants that all that the Court had to consider was the question of the alleged passing off. That is not so because the first issue must, first of all, be found in favour of the plaintiffs. In *S. Chivers & Sons v. S. Chivers & Co., Ltd.*(1) FARWELL J., as he then was, stated that there were two questions which had to be answered, viz., whether the plaintiffs had established that "Chivers' Jellies" or "Chivers' Table Jellies" had acquired a secondary meaning and had come to mean jellies made by the plaintiffs and whether the defendants had so described their jellies as to be likely to mislead the purchaser into believing that the jellies were the jellies of the plaintiffs. These questions FARWELL J. took from the questions left to the jury by COLLINS L.J. in *Reddaway v. Banham*(2). The plaintiffs in that case

(1) [1900] 17 B.P.C. 420.

(2) [1896] A.C. 199; 13 B.P.C. 218.

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sought to restrain the defendants from selling Chivers' Table Jellies, a description under which the plaintiffs sold jellies manufactured by themselves. The plaintiffs' suit failed. FARWELL J., in discussing the evidence, refers particularly to the evidence of two witnesses. One of them said:

"If a customer asked me for Chivers' Jellies I should sell what I had in stock; if I had both I should ask him which he required."

The other witness said:

"If asked for Chivers' Jellies I should give the defendants'; if I had both, I should ask which was wanted."

I refer to this evidence because of the answers given by the plaintiffs' first witness in this case, whose evidence I will deal with later on. On the authority of this case, it is necessary for the appellants to prove that the "Madras Curry Powder" which is merely descriptive of the kind of powder and the place of its manufacture has acquired a secondary meaning and has come to mean curry powder manufactured by themselves and not by other manufacturers. Another case upon this point is *Havana Cigar and Tobacco Factories, Ltd. v. Oddenino*(1). For many years the brand name "La Corona" or "Corona" had been used by the plaintiffs and their predecessors. It was not disputed that, when used as brand, those words indicated cigars of the plaintiffs' manufacture. Many years before, the plaintiffs introduced a new size name "Coronas". Cigars of the "Corona brand" and "Coronas", or "Corona" size were known as "La Corona Coronas" or "Corona Coronas". This size name was adopted by other manufacturers and had for many years been used as a size name. The defendant, in complying with a request for "some cigars—Coronas", supplied cigars of

(1) [1924] 1 Ch. 179.

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the Partagas brand and Coronas size. The defendant claimed the right, in response to a request for a "Corona cigar" or any similar request so phrased as not to indicate whether the word "Corona" was used to refer to brand or to size, to supply a cigar of any brand provided it was of the Corona size. In an action brought by the plaintiffs claiming an injunction to restrain the defendant from selling, or supplying, or offering or exposing for sale, or passing off, or inducing or enabling others to pass off, cigars not of the plaintiffs' manufacture as or for the plaintiffs' "La Corona" brand of cigars by the use of any words consisting of or containing the word "Corona" as a brand name, and from selling or supplying, in response to orders for "Corona" cigars, cigars not of the plaintiffs' manufacture, it was held that the word "a Corona cigar", being on the evidence proved to be ambiguous in meaning, the defendant, if he exercised the right which he claimed, would, in the majority of cases of a request for "a Corona cigar", be passing off goods not manufactured by the plaintiffs as goods of their manufacture. It was argued on behalf of the defendant in the action, who was the appellant in the Court of Appeal, that the respondents, the plaintiffs, had to prove that the word "Corona" in the trade denoted exclusively goods of their manufacture. At page 195 WARRINGTON L.J. says:

"As to the authorities I have little to say, for, as I have already stated, they are not directly in point. In *Reddaway v. Banham*(1) and in *Cellular Clothing Co. v. Maxton and Murray*(2) the question was whether a name originally descriptive had obtained a secondary meaning as denoting exclusively the plaintiffs' goods. This question does not arise in the present case, for it is not disputed that the word 'Corona' used as a brand name denotes exclusively the plaintiffs' goods."

(1) [1896] A.C. 189; 13 E.P.C. 218.

(2) [1899] A.C. 326; 15 E.P.C. 531.

In *Wotherspoon v. Currie*(1) Lord WESTBURY says:

"I take it to be clear from the evidence that, long antecedently to the operations of the respondent, the word 'Glenfield' had acquired a secondary signification or meaning in connexion with a particular manufacture—in short, it had become the trade denomination of the starch made by the appellants."

In *Powell v. The Birmingham Vinegar Brewery Co.*(2) the plaintiffs had manufactured for years and sold under the name of "Yorkshire Relish" a sauce made according to a secret recipe. The term "Yorkshire Relish" had come to mean that particular manufacture. I quote this case merely in order to show that that element had to be present. *North Cheshire and Manchester Brewery Company v. Manchester Brewery Company*(3), *Massam v. Thorley's Oattle Food Company*(4) and *Reddaway v. Banham*(5) may also be referred to. In the latter case, belting made of camel hair yarn had been known in the markets of the world for many years. It had been sold under a variety of names. But there was ample evidence to justify the finding that amongst those who were the purchasers of such goods the words "camel hair" were not applied to belting made of that material in general and that, in short, it did not mean in the market belting made of a particular material but belting made by a particular manufacturer. In *Cellular Clothing Company v. Maxton and Murray*(6), Lord SHAND in the course of his judgment, speaking of *Reddaway's case*(5), says as follows:—

"Of that case I shall only say, that it no doubt shows it is possible where a descriptive name has been used to prove that so general, I should rather say so universal, has been the use of it as to give it a secondary meaning and so to confer on the person who has so used it a right to its exclusive use or, at all events to such a use that others employing it must qualify their

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(1) (1872) L.R. 5 H.L. 503, 521.

(3) [1899] A.C. 83.

(5) [1896] A.C. 194; 13 E.P.C. 218.

(2) [1896] 2 Ch. 54.

(4) (1880) 14 Ch. D. 748.

(6) [1899] A.C. 326; 15 E.P.C. 531.

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use by some distinguishing characteristic. But I confess I have always thought, and I still think, that it should be made almost impossible for anyone to obtain the exclusive right to the use of a word or term which is in ordinary use in our language and which is descriptive only and, indeed, were it not for the decision in *Reddaway's case* (1), I should say this should be made altogether impossible."

Even in cases where the plaintiff is able to prove that in a certain locality his goods have been sold under a particular name and it could therefore be held that in that particular place by its universal use the word has acquired a secondary signification, Lord SHAND in the before-mentioned case is of the opinion that that would not entitle the plaintiff to have an injunction in every part of the country. These cases are sufficient to show that in order to succeed in the suit the appellants must at least succeed on the first issue.

I will now proceed to examine the oral evidence in this case which is very brief. P.W. 1 is one of the joint receivers appointed by this Court of the condiment business of the late P. Venkatachalam. Whilst in England he purchased a number of packets of the "Madras Curry Powder", the object being of course to ascertain whether some other manufacturer or manufacturers were selling curry powder so described in England. At the time of making the purchases he asked for the "Madras Curry Powder" and from some dealers he obtained the appellants' curry powder and from others that manufactured by the respondents. He produced a number of such packages containing curry powder in Court. He first of all stated that of his own knowledge the curry powder manufactured by the appellants was known in England as Venk's powder or Venkat's powder or the "Madras Curry Powder" and

(1) [1896] A.C. 199 ; 13 R.P.C. 218.

that when the name of the "Madras Curry Powder" was mentioned it was understood to be the powder manufactured by the appellants. The criticism with regard to this evidence is that it is purely hearsay evidence. Neither is it the evidence of a person engaged in the trade, such as a retail dealer, nor can it be said that the witness is possessed of any expert knowledge about the matter. In his examination-in-chief the following questions and answers appear :

"Q. When you asked for Madras Curry Powder, what were you given ?

A. Either this or that.

Q. Can you explain how it came about that when you asked for Madras Curry Powder they gave either ?

A. Probably because it carried the name of Madras Curry Powder or because it has some connection with Venkatachalam."

In cross-examination there are the following questions and answers :

"Q. Likewise you went to retail shops and asked for one of this sort and one of the other sort ?

A. In the retail shops I asked for Madras Curry Powder. It is only from Selfidge that I asked that, so that the Court might know about it.

Q. What did you ask for in retail shops ?

A. I simply asked for Madras Curry Powder. Then either this one or that one was offered.

Q. They treated both alike as having had a reputation as Madras Curry Powder ?

A. I do not know whether they treated both as having the same reputation.

Q. In response to your asking for the Madras Curry Powder, the shopman gave you one of this and one of that and asked you to choose ?

A. They will give this or that.

Q. And you bought both ?

A. In some places both and in some places only defendants' powder."

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These answers seem to me to completely destroy the appellants' case. It seems to me that it is impossible for the appellants to claim that in England "Madras Curry Powder" has come to be understood as the curry powder exclusively manufactured by the appellants. The other witnesses really carry the case no further. There is no evidence here of any retail dealers to support the plaintiffs' case. No doubt it would be expensive and inconvenient to get such evidence, but, if it existed, it could and should have been got. It may be that in the litigation in England the plaintiffs can get such evidence and prove that the "Madras Curry Powder" manufactured by them has come to be regarded in England as exclusively their manufacture. If the plaintiffs do that, then the Court will proceed to consider the question of passing off. On the evidence, in my view, the appellants' case must fail. Therefore, on the merits, this appeal must be dismissed with costs. The receivers may pay the costs and take their own costs out of the estate.

CORNISH J.—I agree.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Madhavan Nair.

CHIVUKULA VENKATASUBBAMMA (FIRST DEFENDANT),
APPELLANT,

1932,
March 8.

v.

GOLLAPUDI RAMANADHAYYA AND TWELVE OTHERS
(PLAINTIFF AND DEFENDANTS TWO TO THIRTEEN), RESPONDENTS.*

Partition—Suit for—Defendant asking for his share to be separated and given in—Power of Court to do so—Indian Stamp Act (II of 1899)—Partition decree stamped as an instrument of partition under—Non-liability of defendant to pay court-fee in such suit.

If, in a suit for partition, a defendant asks for his share to be given, the Court can order his share to be separated and given, and the right of the Crown to some revenue on the claim of the defendant is satisfied by the direction in the Indian Stamp Act that the decree as finally drawn up should be stamped as an instrument of partition and except that stamp duty no other duty as court-fee is payable by the defendant in such a suit.

APPEALS against the decree of the Court of the Additional Subordinate Judge of Bapatla in Original Suit No. 2 of 1925.

B. Somayya for appellant.

M. Patanjali Sastri and *Kasthuri Seshagiri Rao* for first respondent.

V. S. Narasimhachar for second to eighth and tenth to thirteenth respondents.

Other respondents were unrepresented.

Our. adv. vult.

JUDGMENT.

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RAMESAM J.

RAMESAM J.—These are two cross-appeals against the decree in Original Suit No. 2 of 1925 on the file of the Additional Subordinate Judge's Court of Bapatla. The plaintiff in the suit was one Gollapudi Ramanadhayya, a retired Pleader of the District Court of Guntur. The suit is filed for partition of certain properties into two equal shares and for recovery of possession of one share with profits. There were four items of property which were the subject of the suit. They originally belonged to one P. Subramaniam who was the adoptive father of Mangayya, the deceased husband of the second defendant. Subramaniam executed a deed of usufructuary mortgage, dated 21st September 1878, in favour of one Chimpiri for 50 years. Chimpiri assigned the mortgage bond by a document dated 27th July 1885, Exhibit A, to one Krishnayya who assigned his interest by sale deed, dated 19th July 1908, Exhibit G, in favour of the plaintiff and Mangayya, the son of the original mortgagor. The plaintiff's case was that Mangayya in Exhibit G was only a benamidar for the first defendant and the first defendant is therefore entitled to a half-share of the mortgaged properties and the plaintiff to the other half and that afterwards the equity of redemption in items 1 and 2 of the mortgaged properties was purchased by the plaintiff himself and in the case of items 3 and 4 by the husband of the first defendant under sale deeds, Exhibits C and I, dated 10th December 1900 and 17th December 1900 respectively. The Subordinate Judge gave a decree for partition of the suit properties and for delivery of a half-share to the plaintiff. He also found that Mangayya in Exhibit G was not a benamidar for the first defendant. Appeal No. 467 of 1925 was filed by the second defendant against the decree in favour of the plaintiff. In the appeal the

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only point raised related to Exhibit C. The second defendant contended that the sale deed, Exhibit C, was benami for the second defendant and this being found against the second defendant, the point is repeated in the appeal. Appeal No. 67 of 1926 was filed by the first defendant in respect of the finding that Mangayya in Exhibit G was not a benamidar for the first defendant. Taking up Appeal No. 467 of 1925 first, we see no reason to differ from the conclusion of the lower Court.

[His Lordship gave reasons for the above conclusion and proceeded:]

We find that Exhibit C is supported by consideration. Appeal No. 467 of 1925 therefore fails and must be dismissed with costs.

We now come to Appeal No. 67 of 1926. This appeal was not pressed by the appellant and is withdrawn. It is therefore dismissed with costs of the second respondent. But an important question arises in regard to this appeal. The plaintiff filed a memorandum of objections in relation to the mesne profits against the second defendant and her tenants. This memorandum of objections was filed in Appeal No. 67 of 1926 and not in Appeal No. 467 of 1925. The reason that the plaintiff urges is that the tenants were not parties in Appeal No. 467 of 1925 and as he desired to have a decree for mesne profits both against the second defendant and her tenants he could file the memorandum of objections only in Appeal No. 67 of 1926. To get rid of this memorandum of objections the second defendant now contends that Appeal No. 67 of 1926 does not lie as it was only against a finding, and as the appeal does not validly lie there can be no valid memorandum of objections in it. In reply it is urged by the plaintiff and by the first defendant that, the suit itself being one for partition,

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each sharer was in the position of a plaintiff. The first defendant could have asked for a decree for her half-share and as this was refused by the lower Court an appeal lies. To the argument so stated, the second defendant objects that no court-fee was paid by the first defendant in the Court below. The result of accepting the second defendant's argument would be that, as no court-fee was paid by the first defendant in support of her claim for a decree for a half-share, there is no valid claim in the Court below and therefore no valid appeal in this Court. The question therefore resolves itself into this, namely, when in a suit for partition one of the sharers asks for a decree for his share he should have paid court-fee to make his claim effective. If there is a valid appeal in this Court, the withdrawal of the appeal by the appellant does not prevent the hearing of the memorandum of objections under Order XLI, rule 22, clause 4, Civil Procedure Code. But if the appeal itself was not validly filed, then the memorandum of objections could not be heard. In *Shivmurteppa v. Virappa*(1) it was observed at page 130 :

"It is the right of every defendant in a partition suit to ask to have his own share divided off and given to him, and the fact that the partition suit has been brought by a purchaser cannot alter or annul that right."

With reference to an objection raised by the Subordinate Judge that the defendant will get his share without any costs to him in court-fees, it was observed :

"A defendant claiming a share on partition is, *qua* that claim, in the position of a plaintiff and could be called on to pay court-fees on the value of his claim."

But that judgment does not make it clear when the court-fee can be demanded. That case arose before the present Stamp Act (II of 1899) was passed. The Act had been passed a month before the judgment of

(1) (1899) I.L.R. 24 Bom. 128, 130.

the High Court was delivered. But as no reference was made to the Act, the remarks of the High Court must have been made apart from the Stamp Act. In *Nawab Mir Sadrudin v. Nawab Nurudin*(1) the question was incidentally gone into by JENKINS C.J., afterwards a member of the Judicial Committee of the Privy Council. There the question arose in the stage of the execution after the passing of a decree. The learned Judge held that the order requiring the decree-holder to pay court-fees is erroneous when there is no such condition in the decree. In *Hemchandra Mahto v. Prem Mahto*(2) the question was elaborately examined by MULLICK Ag. C.J. and KULWANT SAHAY J. (Patna). It was there held that the defendant is merely to ask for his share and it is then open to the Court to order the defendant's share also to be separated, that the right of the Crown to some revenue on the claim of the defendant is satisfied by the direction in the Stamp Act that the decree as finally drawn up should be stamped as an instrument of partition, and that except that stamp duty no other duty as court-fee is payable by the defendants in such a suit. We agree with the reasoning of KULWANT SAHAY J. in this judgment. The learned Advocate for the second defendant relied on the analogy of an administration suit and the decision in *Shashi Bhushan Bose v. Manindra Chandra Nandy*(3). But, in our opinion, this has nothing to do with the matter and does not touch the reasoning in *Hemchandra Mahto v. Prem Mahto*(2). The first of the two sentences from *Shivmurteppa v. Virappa*(4) already quoted by me was quoted with approval in *Tukaram Mahadu v. Ramchandra Mahadu*(5). But nothing is said about court-fees. In *Ramaswami*

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(1) (1904) I.L.R. 29 Bom. 79. (2) (1925) 90 I.C. 739.
(3) (1916) I.L.R. 44 Cal. 890. (4) (1899) I.L.R. 24 Bom. 128, 130.
(5) (1925) I.L.R. 49 Bom. 672, 683.

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Aiyar v. Rangaswami Aiyar(1) it was held in an administration action that the Court is not entitled to demand, from the creditors of the deceased, court-fees on the value of their claim and that section 11 of the Court Fees Act should not be applied by analogy. We do not agree with the decision in *Peda Nagabhushanam v. Pitchayya*(2) in so far as it lays down that court-fees are to be paid. That decision might be distinguished on the ground that the decree provided that each of the defendants must pay the necessary court-fee before getting his share. We prefer the reasoning in the Patna decision already referred to. We are therefore of opinion that Appeal No. 67 of 1926 was validly filed and the withdrawal of the appeal by the appellant cannot affect the memorandum of objections. The memorandum of objections has therefore to be considered and disposed of.

It relates to (i) the plaintiff's claim for mesne profits for an extra year and (ii) the difference between the rate awarded by the Subordinate Judge and the rate now claimed. The Subordinate Judge has awarded mesne profits only for three years. By the time the suit was filed, namely, 19th February 1923, mesne profits for four years had accrued due to the plaintiff, the Maghabaula Amavasya of the four years all falling within three years prior to the plaint. The plaintiff claims for each year Rs. 330-7-6 instead of Rs. 300 awarded by the Court below. Without going into further details we may at once say that the learned Advocate for the respondent has rightly conceded these matters. Therefore it is enough to say that these two items are allowed in favour of the plaintiff.

The next item in the memorandum of objections relates to the plaintiff's claim for the subsequent profits.

(1) (1931) I.L.R. 55 Mad. 26.

(2) (1917) 6 L.W. 448.

The Subordinate Judge left this for enquiry. But it appears that the various lease deeds filed in the case cover the subsequent years also, certainly up to March 1928, when the usufructuary mortgage expired. Therefore there is no need for further enquiry. Here again we may observe that the learned Advocate for the respondent has rightly conceded and therefore we hold that the plaintiff is entitled to mesne profits up to March 1928. Therefore the plaintiff is entitled to subsequent profits at Rs. 344-8-0 per annum for five more years. According to the definition in the Civil Procedure Code mesne profits include interest. It is also so held in *Grish Chunder Lahiri v. Shoshi Shikhareswar Roy*(1) and *Pankunni Menon v. Raman Menon*(2). But we think in this case it is enough to award interest at the rate of four per cent per annum from the date of accrual up to the date of payment.

[His Lordship discussed matters not necessary for this report and concluded as follows :—]

We do not therefore make any order as to costs of the memorandum of objections.

MADHAVAN NAIR J.—I agree and have nothing to add.

G.R.

(1) (1900) I.L.R. 27 Cal. 951 (P.O.).

(2) (1931) I.L.R. 54 Mad. 955 (F.B.).

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APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Madhavan Nair.

1932,
March 3.

S. K. M. R. M. SOMASUNDARAM CHETTIAR
AND FOUR OTHERS (APPELLANTS), PETITIONERS,

v.

RM. AR. AR. RM. ARUNACHALAM CHETTIAR AND
TWO OTHERS (RESPONDENTS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XLIV, r. 1, proviso—Leave to appeal in forma pauperis—Grant of—Respondent's right to be heard at stage of—Notice with respect to inquiry relating to pauperism of appellant—Respondent served with—Appendix G, Form No. 11, of the Code—Applicability and effect of—O. XXXIII, rr. 5 and 7 of the Code—Inapplicable to pauper appeals—Ex-parte order granting leave to appeal in forma pauperis—Respondent not bound by—Forms appended to the Code—Meaning of sections and rules in the Code not to be extended by.

The respondent may, as a matter of indulgence, be, but is not entitled as of right to be, heard on the question whether the decree of the Court below is "contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust", as provided for in the proviso to rule 1 of Order XLIV of the Code of Civil Procedure.

Form No. 11 in Appendix G to the Code should not be interpreted in a way which will modify the proviso to rule 1 of Order XLIV. That Form refers to cases where notice is given to the respondent with respect to the inquiry relating to the pauperism of the appellant and in such cases the respondent may argue that the appellant is not a pauper. But he has no right to take advantage of that opportunity to argue that the appeal should not be admitted.

An *ex-parte* order granting leave to appeal in *forma pauperis* is not binding on the respondent and does not preclude him

* Civil Miscellaneous Petition No. 5134 of 1931.

from arguing at a later stage that there is no substance in the appeal.

Rules 5 and 7 of Order XXXIII of the Code are inapplicable to pauper appeals.

Per RAMESAM J.—The Forms appended to the Code should not be allowed to extend the meaning of the sections and the rules in the Code.

APPLICATION under Order XLIV, rules 1 and 2, of Act (V of 1908) to be allowed to appeal in *forma pauperis* against the decree of the Court of the Subordinate Judge of Devakottah in Original Suit No. 98 of 1928.

T. L. Venkatarama Ayyar for petitioners.

M. Patanjali Sastri and *T. K. Sundararajan* for respondents.

Cur. adv. vult.

ORDER.

RAMESAM J.—This is an application for leave to appeal in *forma pauperis* against the decree of the Sub-Court of Devakottah in an original suit. This petition originally came on before our brother JACKSON J. who called for a report from the Sub-Court on the pauperism of the appellants who are defendants in the original suit. The report was in their favour. The matter next came on before our brother WALLACE J. when it was claimed by the learned Advocate for the respondents that he should be first heard before the petition was disposed of. Having regard to the practice of this Court not to hear the respondent at this stage, the learned Judge referred the matter for disposal before a Bench of two Judges. This is how it comes on before us.

Undoubtedly the practice of this Court has been for at least the last thirty-two years, during which period I have been in touch with it, not to hear the respondent on the question whether the decree of the Court below is

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“contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust”, as provided for in the proviso to Order XLIV, rule 1. I do not mean to say that a practice ought to be adhered to merely because it is long standing, even though we now find it to be erroneous; but I think it may be said that a long-standing practice is *prima facie* proof that it is really correct; for otherwise some learned Advocate of this Court would have objected to it and would have claimed to be heard. Anyhow, we have now to consider the question on the merits.

The learned Advocate for the respondents relied upon two decisions, *Tilak v. Akhil*(1) and *Basant Kuar v. Chandulal*(2). In the first of these cases a Full Bench of the Patna High Court dissented from an earlier decision of DAWSON MILLER C.J. and another learned Judge and disapproving the practice of that Court came to the conclusion that the respondent was entitled to be heard as of right before leave was granted. In the second case the Lahore High Court had previously come to the same conclusion at a time when the Patna High Court followed the opposite practice. In what follows, the arguments in these two cases will be noticed among others. In the first place, it must be observed that Order XLIV, rule 2, provides for an inquiry into the pauperism of the applicant and also provides that, if the applicant was allowed to sue or appeal as a pauper, such further inquiry is unnecessary. Accordingly the practice of this Court has been to give notice to the respondent in cases where the appellant had not already been found to be a pauper so as to give him an opportunity to show that the applicant is not a pauper. Order XLIV does

(1) A.I.R. 1931 Pat. 183 (F.B.).

(2) A.I.R. 1929 Lah. 514.

not provide for a notice to be given to the respondent in all cases. The proviso to rule 1 says:

“The Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think”

On the face of it this suggests that the Court should come to its conclusion about the erroneous nature of the lower Court's decree on a perusal of the application and the judgment and decree appealed against. At this stage even the rest of the record ought not to be seen; vide *Veerappa Chetty v. Ma Tin*(1). If it was intended by the Legislature that the Court should issue a notice to the respondent before granting leave, this proviso would have expressly referred to it. It would have run: “Upon a perusal thereof and of the judgment and decree appealed from, and upon hearing the respondent after notice, etc.”, or some words to that effect. *Prima facie*, therefore, a notice to the respondent is not contemplated by the rule, and it cannot be said that at least in those cases where notice has gone in respect of the pauperism the respondent has a claim to be heard. This will introduce an anomaly that in one set of cases the respondent has got a right to be heard before leave is granted and in another set he has no such right, the difference merely arising out of the fact that the applicant has or has not been previously found to be a pauper. To avoid this anomaly the learned Advocate for the respondents contends that the respondent is entitled to be heard in all cases, and in support of this proposition he relies on Form No. 11 in Appendix G to the Code of Civil Procedure. In the Form the notice is thus described:

“Notice is hereby given to you that if you desire to show cause why the applicant should not be allowed to appeal as a pauper, etc.”

(1) A.I.R. 1925 Rang. 250.

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It seems to me that the Form appended to the Code should not be allowed to extend the meaning of the sections and the rules in the Code. The Form has to be construed with reference to Order XLIV, rule 1, and not that Order XLIV, rule 1, should be construed with reference to the Form. In my opinion, Form No. 11 only refers to cases where notice is given with reference to rules 1 and 2 and the respondent is given an opportunity; and, as the notice is given only with reference to pauperism, the Form itself only gives an opportunity to the respondent to show that the applicant is not a pauper. It has nothing to do with the question mentioned in the proviso.

The learned Advocate next argued that in the first part of rule 1 all provisions applicable to suits by paupers are extended to appeals "in so far as those provisions are applicable"; and that Order XXXIII which is applicable to pauper suits shows that a pauper application should be rejected if the allegations in the plaint do not show a cause of action. Rule 7, clause (2), which refers us to rule 5, shows that, if the plaintiff's allegations do not show a cause of action, the pauper application should be rejected. But, reading rules 7 and 5, it is clear that the provisions of these rules are not directly applicable to pauper appeals. They are applicable only if the language of these rules can be altered. In my opinion, these rules are not applicable to appeals and, because these rules are not applicable and the appellate Court cannot address itself to the question whether the plaint shows a cause of action, the Legislature proceeded to enact a provision analogous in the proviso, viz., that the appellate Court should address itself to the question whether the lower Court's decision is erroneous or unjust. The insertion of the proviso is practically an additional argument that rules

5 and 7 are inapplicable to appeals. The applicability of rules 5 and 7 is one of the main grounds for the conclusion of the Patna High Court. But, for the reasons mentioned above, I am unable to agree with the decision of that Court.

It is true that both in the case of pauper suits and pauper appeals the Legislature thought it necessary to impose some limitation on the right of suit or appeal *in forma pauperis* for the protection of the litigant opposed to the pauper from frivolous suits or appeals. Such protection in the case of suits appears in Order XXXIII, rule 5. This rule not being applicable to appeals, analogous protection in the case of appeals is mentioned in the proviso. Once the proviso is there, I do not think we can fall back upon Order XXXIII, rules 5 and 7. The proviso being complete by itself, we cannot import into it the idea that apart from the rule the respondent is as a matter of general principle entitled to notice before leave is given. It is true that an order passed without notice to the respondent ought not to be binding upon him; but nobody says that leave once having been given the order granting leave is conclusive that the judgment appealed against is erroneous or contrary to law; and at the actual hearing of the appeal the respondent would have an opportunity of showing that the decree appealed against is in accordance with law and is not erroneous or unjust. So that, I do not agree with the Lahore High Court in thinking that if leave is granted it amounts to an order binding on the respondent without his having been heard. Mr. Patanjali Sastri relied on the analogy of the decision in *Krishnasami Panikondar v. Ramasami Chettiar*(1), where the Privy Council

(1) (1917) I.L.R. 41 Mad. 412 (P.C.).

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observed that, before excusing the delay in the filing of appeals, notice should always go to the respondent in the first instance. That relates to an entirely different matter and I do not see any analogy between the two proceedings. At the end of the period prescribed for filing an appeal the respondent gets a vested right in the judgment and that right ought not to be lightly disturbed and therefore notice ought to go to him before the delay is excused. But apart from that consideration the real ground for the observation of the Privy Council was that there should be no uncertainty about the question of the delay in filing the appeal until the final hearing of the appeal and until heavy costs are incurred.

I do not mean to say that if the Court is inclined to hear the respondent before making the order it may not hear him. I do not suggest that there is anything illegal if the Court hears the respondent. All that I intend to lay down is that the respondent is not entitled to be heard as a matter of right and the Court is not bound to hear him. In my opinion the present practice is salutary and the opposite practice will either lead to double expenditure of time or to injustice. Above all, this conclusion of mine is supported not only by the plain language of the proviso which uses the word "perusal" but also by two decisions of our Court; vide *Parasuramudu v. Ramanna*(1) and *In re Chennamma*(2). In this particular case we think leave to appeal as a pauper ought to be granted. I accordingly give leave.

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MADHAVAN NAIR J.—I entirely agree. The question is whether the long-established practice of this Court not to hear the respondent when leave is granted to the appellant to file his appeal *in forma pauperis* is in

(1) (1925) 49 M.L.J. 353.

(2) (1929) I.L.R. 53 Mad. 245.

consonance with the provisions of the Code of Civil Procedure relating to pauper appeals. The respondent has come before us in response to the notice issued to him in connection with the inquiry into the pauperism of the appellant. He now contends that at this stage he is entitled as of right to be heard on the question whether the decree of the lower Court is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust.

The answer to the point raised by the respondent is, in my opinion, to be found in the proviso to rule 1 of Order XLIV, which relates to the procedure on the application made by a pauper for the admission of his appeal. The proviso runs thus:

"Provided that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust."

Prima facie there is nothing in this proviso to show that the respondent should be heard before the admission of the appeal filed by a pauper. It states that the Court shall *peruse* the application and the judgment and the decree appealed from and shall reject the application unless it sees reason to think that the "decree is contrary to law . . . unjust". It is clear from this that the Code enjoins upon the Court to make up its mind by itself regarding the admission or rejection of the appeal without any help from outside, i.e., without hearing the respondent. It shall *peruse* the application and the judgment and the decree appealed from and then decide the question. Of course the Court as a matter of indulgence may, if the respondent is present, allow him to help it in making up its mind, but I do not think the respondent can at this stage insist that he should be heard. If the

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Legislature thought that the respondent should be heard it might well have embodied a provision to that effect in this proviso.

Two main grounds are urged by the respondent in support of his contention that he has a right to be heard before leave is granted to the appellant. First, he relies on Form No. 11 in Appendix G to the Code of Civil Procedure which describes the notice of appeal *in forma pauperis* under Order XLIV, rules 1 and 2. The notice is in these terms :

"Notice is hereby given to you that if you desire to show cause why the applicant should not be allowed to appeal as a pauper an opportunity will be given to you of doing so on the aforementioned date."

In my opinion this Form should not be interpreted in a way which will modify the provision of the Code already referred to which is very explicit. As pointed out by my learned brother this Form refers to cases where notice is given to the respondent with respect to the inquiry relating to the pauperism of the appellant and in such cases the respondent may argue that the applicant is not a pauper. It should be remembered that the respondent has no right to receive notice in all cases. I do not think that, because notice is issued to the respondent in connection with the inquiry into the pauperism of the appellant, he has a right to take advantage of this opportunity to argue that the appeal should not be admitted. If this privilege is accorded to him then the scope of the proviso to rule 1 of Order XLIV is considerably extended.

The next argument of the respondent has reference to rule 1 of Order XLIV. This rule states that pauper appeals are

" . . . subject, in all matters, including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable."

Order XXXIII contains the provisions relating to suits by paupers. Rule 5 of this Order specifies the various grounds on which a Court shall reject an application to sue as a pauper one of which is where the allegations in the suit do not show a cause of action. If the petition is not rejected then the Court shall fix a day of which notice will be given to the Government Pleader and the opposite party for receiving evidence as to the pauperism of the applicant (see rule 6). On the day so fixed, after taking the evidence produced before it, sub-rule 2 of rule 7 says that

"the Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in rule 5."

Under these provisions it is clear that when the pauperism of the applicant is enquired into the respondent has a right to be heard on the question whether the applicant is or is not subject to any of the prohibitions contained in rule 5. It has been held by the Patna High Court in *Tilak v. Akhil*(1) that by force of Order XLIV, rule 1, rules 5 and 7 of Order XXXIII are applicable to pauper appeals, and, as under these rules the respondent is as a matter of right entitled to be heard, so he has a right to be heard when leave to appeal *in forma pauperis* is granted to the appellant. This decision is strongly relied on by the respondent in support of his contention. It seems to me that having regard to the language of rules 5 and 7 the provisions of those rules cannot be applied to pauper appeals. Further, special provision with regard to the procedure to be adopted for the admission of pauper appeals is enacted in the proviso to rule 1 of Order XLIV.

(1) A.I.R. 1931 Pat. 183 (F.B.).

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This shows clearly that the Legislature never intended that rules 5 and 7 of Order XXXIII should be applied to pauper appeals. A procedure for the admission of pauper appeals complete in itself having been provided for in the proviso to rule 1, there is no need to refer to other provisions of the Code to supplement that procedure. For these reasons I am, with great respect, not inclined to accept the reasoning in *Tilak v. Akhil*(1). The fact that the appellant is allowed to appeal *in forma pauperis* does not mean that the respondent is precluded from arguing at a later stage that there is no substance in the appeal and that it should be dismissed.

Lastly, it was urged, having regard to the decision of the Privy Council in *Krishnasami Panikondar v. Ramasami Chettiar*(2), that, as in the case of the successful party in a time-barred appeal who has obtained the "valuable right" of a final decree in his favour by mere effluxion of time, the respondent here has also acquired "the valuable right" of a final decree in his favour on account of the "pauperism" of the appellant, and that therefore as in the other case the respondent in this case also should be heard at the time when the appeal is admitted. It is clear to my mind that the two cases are not at all similar and that the observations of the Privy Council in *Krishnasami Panikondar v. Ramasami Chettiar*(2) have no bearing on the question before us which in my opinion should be decided with reference to the special rules provided for the purpose in the Code itself.

The view that I have taken of the proviso to rule 1 of Order XLIV is supported by two decisions of this Court. In *Parasuramudu v. Ramanna*(3) SRINIVASA

(1) A.I.R. 1931 Pat. 183 (F.B.). (2) (1917) I.L.R. 41 Mad. 412 (P.C.).
(3) (1925) 49 M.L.J. 353.

AYYANGAR J. expressed the opinion that that he was not satisfied that "he (the respondent) has got any *locus standi* to appear at this stage and require to be heard

" In *In re Chennamma*(1) it was held :

" Order XLIV, rule 1, of the Civil Procedure Code does not contemplate that, before granting leave to appeal *in forma pauperis*, the Court should arrive at a definite and final conclusion that the decree complained against is contrary to law or otherwise erroneous or unjust; it is enough if the applicant shows that he has *prima facie* a good case, and if he does so, leave to appeal should be granted."

(See the headnote.) This decision shows by implication that the respondent has not under Order XLIV, rule 1, a right to be heard, for, if he has such a right, the Court would be in a position to arrive at a definite and final conclusion on the question whether the decree complained against is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust, which, according to this decision, is not contemplated by the rule.

For the above reasons I would overrule the respondent's arguments that he has a right to be heard at this stage.

I agree with my learned brother that in this case leave to appeal as a pauper should be granted.

A.S.V.

(1) (1929) I.L.R. 53 Mad. 245.

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APPELLATE CIVIL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

1932,
March 1.

R. FOULKES AND ANOTHER (PLAINTIFFS—RESPONDENTS),
APPELLANTS,

v.

KANDASAMI PILLAI *alias* KARUPPIAH PILLAI
(DEFENDANT—APPELLANT), RESPONDENT.*

Madras Estates Land Act (I of 1908), ss. 52 and 53—Valid patta continuing in force by reason of sec. 53—Effect of—Suit under sec. 77 for determination of proper rent—Rent mentioned in previous patta if conclusive in—Landholder's right to show proper rate of rent in—Enhancement of rent—Suit for—Suit for reverting to varam rent when is not.

The view that the effect of section 52 (3) of the Madras Estates Land Act is that, where a patta and a muchilika have been exchanged between a landholder and a ryot, the former cannot in any subsequent year demand rent other than what is mentioned in the patta except after getting a fresh patta and muchilika accepted, exchanged or decreed mentioning the new rent claimed, is incorrect.

The consequence of a valid patta continuing in force by reason of section 53 of the Madras Estates Land Act is only that the landholder cannot distrain the ryot's movables or sell his holding except for the amount mentioned in the patta. Nowhere in the Act is it stated that in suits for rent under section 77 for the purpose of determining the proper rent the rent mentioned in the previous patta is conclusive and that the only way for demanding a different amount, except under certain sections, such as, sections 25, 30, 42 and 45, is to have previously exchanged a fresh patta and muchilika. The only effect of there being a patta which remains in force by virtue of section 52 (3) so far as suits for rent are concerned is that, except in special cases falling under sections 25, 30, 42 and 45 which require the

* Letters Patent Appeals Nos. 26, 43 to 50, 54 to 56 and 58 to 68 of 1930.

order of the Collector for determination of rent, the rent mentioned in the patta will, under sections 27 and 28, be presumed to be the proper rent until the contrary is shown. In other words, except in those excepted cases, it is open to the landholder without tendering or exchanging or getting decreed a fresh patta to show to the Court in which the suit for rent is filed that he is legally entitled to a different amount or rate of rent from that mentioned in the old patta.

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

A suit by the landholder for reverting to what has been proved to be the proper rent of the village, namely, varam rents, is not a suit for enhancement in the proper sense of the term.

APPEALS preferred under Clause 15 of the Letters Patent against the judgment of ANANTAKRISHNA AYYAR J., dated 19th December 1929 in Second Appeals Nos. 540, 543 to 550, 554 to 556 and 558 to 568 of 1928 preferred against the decrees of the District Court of Ramnad at Madura in Appeal Suits Nos. 327, 329 to 334, 336, 337, 341 to 343, 346 to 355 and 544 of 1924 preferred against the decrees of the Court of the Special Deputy Collector of Manamadura in Summary Suits Nos. 737, 739 to 743, 745, 748, 749, 753 to 755, 759 to 768 and 770 of 1922.

T. Rangachariar and *A. Srirangachariar* for appellants.

B. Sitarama Rao and *S. R. Muthuswami Ayyar* for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by KRISHNAN PANDALAI J.—These letters patent appeals are from the decisions of our learned colleague, ANANTAKRISHNA AYYAR J., in second appeals brought from a batch of suits brought in 1922 by the present appellants (plaintiffs) under section 77 of the Madras Estates Land Act for rent for faslis 1323, 1329 and 1330 against various ryots of a village called Puliur in the Sivaganga

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Zamindari of which the appellants (plaintiffs) are now by transfers, to which it is not necessary to refer, entitled to the melvaram and in which the respondents (defendants) are ryots. The suits were for nine-sixteenths of the rents due on each holding, to which share of rents the plaintiffs had become entitled by the said transfers; as to the other seven-seventeenths, at the time of these suits there was a question between the plaintiffs and one Mayandi who had held the right to that share of rent under a farm lease executed by the predecessors-in-title of the plaintiffs, and that question had not been fully settled although we were informed that it was subsequently settled. [Part of the judgment is omitted as not necessary for this report.]

The second point was an entirely new point which had not been taken in either of the Courts below and turned upon the effect of section 52 (3) of the Madras Estates Land Act. The contention was that, the plaintiffs having till fasli 1327 tendered pattas on the basis of the rates of rent in Exhibit H, those rates continued to be in force until fresh pattas and muchilikas were accepted, exchanged or decreed. It was admitted that the plaintiffs had tendered pattas till fasli 1327 as urged by the ryots. The learned Judge, while recognizing that this point had not been taken in either of the Courts below, allowed it to be taken as it was a point of law depending on admitted facts. On it he decided in favour of the ryots holding that the effect of section 52 (3) is that, where pattas and muchilikas are exchanged for any revenue year, the landholder cannot bring a suit for rent other than the rent mentioned in the pattas for any subsequent year unless and until he has exchanged or obtained decrees for fresh patta at the new rate. The consequence of this opinion was that the plaintiffs (landholders) were entitled to rents only at

the rate mentioned in Exhibit H. The learned Judge accordingly modified the decree to that extent. [Part of the judgment is omitted as not necessary for this report.]

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The result was that the decrees were modified to the extent required by the learned Judge's opinion on points 4 and 2.

In these appeals under the Letters Patent the plaintiffs (appellants) urge that the learned Judge's view as to the second point, i.e., the effect of section 52 (3) is wrong, and the respondents have filed a memorandum of objections urging again the points 1 and 3 mentioned above.

For the sake of convenience we will at once dispose of the points 1 and 3 urged by the respondents. [Part of the judgment is omitted as not necessary for this report.]

The real and substantial point in the appeals is that raised by the appellants on the effect of section 52 (3) on these suits. Our first observation on this is that, in allowing this contention to be raised at the stage in which the cases were before him, the learned Judge lost sight of the fact that the plaintiffs were thereby being called upon to meet an objection in the year 1929 which, if it had been raised in the suits when they were brought in 1922, might have been adequately remedied, at least as regards the years subsequent to those for which rents are now being claimed. But as it is, if the point taken before the Judge prevails, as we are speaking in 1932, the plaintiffs have for ever lost without any hope of recovery their chance of realizing the proper rent for at least ten years after the suits and this on account of allowing the ryots to take an objection at the last stage which they ought to have taken at first. Speaking for ourselves we would have

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felt justified in declining to allow the contention which the learned Judge permitted. But, as he has permitted it, we must examine it.

In short the learned Judge's view as to the effect of section 52 (3) is that, where a patta and a muchilika have been exchanged between a landholder and a ryot, the former cannot in any subsequent year demand rent other than what is mentioned in the patta *except* after getting a fresh patta and muchilika *accepted*, exchanged or decreed mentioning the new rent claimed. We are of opinion that this view is incorrect and that the learned Judge has given a meaning to the words "shall remain in force" which they were not intended to bear when in a suit for rent facts are proved which show that the old rent should no longer remain in force.

It is well known that under section 7 of the Madras Rent Recovery Act, VIII of 1865, no terms of the tenancy including rent could be enforced unless pattas and muchilikas had been exchanged for the year for which the rent was claimed. This led to great inconvenience. One of the changes brought about by the Madras Estates Land Act was to alter this. Sections 52 and 53 are the sections by which the alteration was brought about. Section 52, speaking broadly, deals with the time or period during which a patta and a muchilika once exchanged may remain in force. It deals with nothing more. Its provisions are that, although pattas and muchilikas may be for more than one year, neither party can be compelled to tender or accept a patta for more than one year. The demand for a patta or a muchilika is to be made within the year for which it is intended. Pattas and muchilikas remain in force till the beginning of the next year during which a fresh patta and muchilika are accepted

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exchanged or decreed. But, if in the second year no fresh patta and muchilika are brought into effect, the previous year's patta runs on and remains in force until the commencement of the year next after that in which a fresh patta is tendered, accepted, exchanged or decreed. In other words, if a patta has been allowed to run on for two years and in the third year a fresh patta and muchilika are exchanged, that patta will come into force only at the beginning of the fourth year. These are the provisions designed to do away with the old requisite for a fresh patta during every year when rent was to be sued for. Section 52 says nothing about the effect and consequences of the patta remaining in force. Section 53 to a certain extent deals with this. It says that, unless a patta and muchilika have been exchanged for the period or unless there is a previous patta and a muchilika continuing in force under the provisions of section 52, no landholder can proceed against a ryot for rent by distraint and sale of his movable property or by sale of his holding under Chapter VI. Sub-section 2 says that even for those limited purposes the patta which is tendered may be partially good even though some of its provisions are not valid, so as to enable the landholder to recover rent by distraint and sale of movable property and of the holding to the extent to which the rent is due; *Raghunatha Row Sahib v. Vellamoonji Goundan*(1). Reading these sections together, it seems to us that the consequence of a valid patta continuing in force by reason of section 53 is only that the landholder cannot distrain the ryot's movables or sell his holding except for the amount mentioned in the patta. Nowhere in the Act is it stated that in suits for rent

(1) (1914) I.L.R. 38 Mad. 1140.

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under section 77 for the purpose of determining the proper rent the rent mentioned in the previous patta is conclusive and that the only way for demanding a different amount, except under certain sections, such as 25, 30, 42 and 45, is to have previously exchanged a fresh patta and muchilika. In our opinion the only effect of there being a patta which remains in force by virtue of section 52 (3) so far as suits for rent are concerned is that, except in special cases falling under sections 25, 30, 42 and 45 which require the order of the Collector for determination of rent, the rent mentioned in the patta will under sections 27 and 28 be presumed to be the proper rent until the contrary is shown. In other words, except in those excepted cases, it is open to the landholder without tendering or exchanging or getting decreed a fresh patta to show to the Court in which the suit for rent is filed that he is legally entitled to a different amount or rate of rent from that mentioned in the old patta.

In *Sri Rajah Satrucherla Veerabadhra v. Ganta Kurmi Naidu*(1) it was decided that section 53 has dispensed with the tender of a patta as a condition for suits for enforcing the terms of the tenancy except by distraint or sale of the holding. The present are suits for reverting to what has been proved to be the proper rent of the village, namely, varam rents. All the Courts have held that the plaintiffs are so entitled and it is obvious that this is not a suit for enhancement in the proper sense of the term. In *Muthiah Chettiar v. Periyar Kone*(2) it was held that a landlord is entitled to revert to the varam rent if it was the accepted mode and no implied agreement to the contrary could be inferred from payment of money rent varying in amount

(1) (1912) M.W.N. 441.

(2) (1920) M.W.N. 15.

from year to year for a number of years. In *Varada Reddi v. Srinivasa Mudaliar*(1) it was held that the landholder is entitled to revert to the varam system unless the ryots establish a contract to the contrary and that evidence of payment of money rent under short-term pattas which contain clauses to revert to the varam system at the end of the period is not sufficient evidence of a contract to the contrary. It is thus clear that the ryots have no answer in these cases to the plaintiffs' claim to revert to the varam rents and, so far as sections 27 and 28 are concerned, the Courts have held that the plaintiffs have proved the contrary by proof of their right to revert to the varam system.

In *Narayana Patrudu v. Veerabadra Raju*(2) it was held that under section 77 of the Act in cases not falling within sections 25, 30 or 45 of the Act suits for recovery of unascertained rent will lie and the Court must ascertain the amount as there is no previous proceeding provided by the Act for the ascertainment of rent in such cases. To the same effect is the decision in *Mallayya v. Narayanagajapathiraju*(3). In *Sreenivasa Ayyangar v. Abdul Rahim Sahib*(4) a landholder sued for increased rent on the ground of increased area discovered on re-survey, and it was held that the increased rate could not be claimed because section 42 expressly provides for the order of the Collector in such cases. Some remarks of NAPIER J. of a wider application which have been relied on by the respondents in this case were expressly dissented from in *Solai Pillai v. Vedaji Baskara Tirumala Rao Sahib*(5), and we think that that dissent was justified.

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(1) (1923) 45 M.L.J. 199.
(3) (1924) 21 L.W. 42.

(2) (1927) I.L.R. 51 Mad. 228.
(4) (1917) 6 L.W. 108.

(5) (1925) 23 L.W. 625.

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The above decisions and considerations do not appear to have been drawn to the learned Judge's attention. He, however, refers to and relies upon the decision of the Privy Council in *Radhakrishna Ayyar v. Sundaraswamier*(1) on appeal from this High Court in *Radhakrishna Ayyar v. Swaminatha Ayyar*(2). He draws the inference from the language of their Lordships in that case that the policy underlying the Madras Estates Land Act is to require that only such rents shall be decreed as are mentioned in a previously existing patta which remains in force under section 52. We think that neither the facts of the case nor the language used by their Lordships is capable of this inference. In that case, which also was a case of rent payable in kind, there had been pattas and muchilikas enforced under the orders of the Revenue Court when the Madras Rent Recovery Act was in force. The eighth clause in those pattas enabled the landholder, if the ryots had removed the harvest without paying the landholder's share or giving him an opportunity of inspecting it, to demand rent at a particular rate in kind. It appeared that for several years the ryots had got into the habit of removing the harvest and the landholder had winked at it and accepted rent at a lower rate than that fixed by the above clause. After the Madras Estates Land Act came into force the landholder had tendered pattas with the above clause which were rejected by the ryots. Then suits were brought for rent at the rate mentioned in clause 8. The principal question was whether pattas decreed by the Revenue Courts under the Madras Rent Recovery Act came within the description of pattas decreed in section 52 (3) of the Madras Estates Land Act so as to constitute

(1) (1922) I.L.R. 45 Mad. 475 (P.C.).

(2) (1916) 6 L.W. 16.

them pattas remaining in force until fresh pattas are accepted, exchanged or decreed. While the landholder contended that pattas decreed under the old Act are as binding as those decreed under the new Act, the ryots contended that the matter was not *res judicata* because the jurisdiction of the two kinds of Courts was different. It was on this point that the decision turned. If the landholder's contention was adopted, as it was by the High Court and the Privy Council, he was entitled to enforce clause 8. If not, the question would have to be tried afresh what was to happen if the ryots removed the harvest without paying the usual rent. In these circumstances this Court held that, though the general doctrine of *res judicata* is not in question, there is no reason for restricting the scope of the general reference to muchilikas decreed in section 52 (3) to those decreed by any particular description of Court. Therefore the pattas decreed under the old Act remained in force under the new Act and with them the disputed clause 8. This view was upheld by the Privy Council. Their Lordships begin the discussion of this point at page 481 by pointing out that the dispute had to be determined on the terms of the Madras Estates Land Act and this in view of the ryots' contention that for a period of 20 years the rates mentioned in clause 8 had not been demanded. Their Lordships held this was not sufficient to derogate from the landholder's right to enforce clause 8 if it was otherwise found binding. Their Lordships then consider the argument based on *res judicata* and state, confirming the view of the High Court and indeed quoting it with approval, that it was not a case of *res judicata* in the proper sense but of construction of section 52 (3) of the Madras Estates Land Act where it is said that muchilikas decreed in any revenue year remain in force until fresh ones are

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exchanged or decreed. They held that muchilikas decreed under the old Act were included within this expression and that decided the point. But it is pertinent to remark that they go on to observe:

"It stands to reason and it is in accordance with sections 27 and 28 that the old rent thus decreed shall continue until reduced or enhanced by special applications under the statute. No such applications have been made."

Their Lordships here recognise that the terms of the previous pattas including therein the rents mentioned remain in force until they are shown to be inapplicable by reference to sections 27 and 28 which raise the presumption that till those rents are shown to be inapplicable they should be presumed to be fair. It is in our opinion wrong to construe this language of their Lordships as if they were exhaustively enumerating the modes of showing how the old rents have become inapplicable and laying down that enhancement and reduction are the only two methods. That was not the question their Lordships were considering and they cannot be held to have decided what was not necessary to decide,—in what ways the old rent may have become no longer applicable to the period in question which are neither enhancement nor reduction of rent. For instance a favourable rate of rent granted by a deceased landholder may have ceased to be operative by reason of section 26 (3) after his death, or, as in this case, the lessee of rents in a varapathu village having during his lease accepted money rents from the ryots, the lease may have expired and then the proprietor being restored to his rights may be entitled to rent in kind. Their Lordships could not have decided that these are not grounds under sections 27 and 28 for showing that the rents as mentioned in old pattas are no longer applicable. We think therefore that this decision affords no

support to the learned Judge's view on the question before us.

We accordingly set aside the decision of the learned Judge on this point. The result is that the decree of the learned Judge will be modified by awarding the plaintiffs the rent as sued for in the several cases in accordance with the above opinion. In other respects the learned Judge's decree is confirmed. The appellants have substantially won throughout. The learned Judge's reason for not awarding either party costs is that the defendants sprung upon the plaintiffs a point in the second appellate Court on which they won. This ground being now shown to be erroneous there is no reason for not maintaining the usual order as to costs which was passed by the District Judge. We confirm the order passed by the District Judge as to costs of the first and the first appellate Court. The respondents must pay the appellants their costs both in this and in the second appellate Court. The memorandum of objections is dismissed without costs.

Vakil's fees in the twenty-three appeals and letters patent appeals are fixed at Rs. 230 in each payable equally by each of the defendants in the twenty-three cases.

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APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

1932,
February 19, THE RAJAH OF KALAHASTI (JUDGMENT-DEBTOR), APPELLANT,

v.

P. JAGANNADHA RAYANIMGAR AND ANOTHER (DECREE-HOLDER AND HIS LEGAL REPRESENTATIVE), RESPONDENTS.*

Limitation Act (IX of 1908), arts. 177 and 181—Execution proceeding—Order made in—Appeal against—Legal representative of deceased respondent in—Application to bring on record—Limitation—Code of Civil Procedure (Act V of 1908), O. XXII—Rules of abatement in—Applicability of.

The rules of abatement in Order XXII of the Code of Civil Procedure apply to appeals against orders made in execution proceedings as to other appeals. An appeal against an order made in execution proceedings is not itself a proceeding in execution of a decree or order within the meaning of rule 12 of Order XXII of the Code.

Held, accordingly, that an application to bring on record the legal representative of a deceased respondent in an appeal against an order made in execution proceedings is governed by article 177, not by article 181, of Schedule I of the Limitation Act.

APPEALS preferred against the orders of the District Court of Chittoor, dated the 27th day of July 1927 and made in Execution Petition No. 12 of 1922 in Original Suit No. 283 of 1907 on the file of the Court of the District Munsif of Tirupati, in Execution Petition No. 13 of 1922 in Original Suit No. 25 of 1905, on the file of the District Court of North Arcot, in Execution Petition No. 14 of 1922 in Original Suit No. 42 of 1910, on the file of the Court of the Subordinate Judge of North Arcot, and in Execution Petition No. 16 of 1922 in

* Appeals against Orders Nos. 62 to 64 and 67 of 1928.

Original Suit No. 22 of 1908, on the file of the District Court of North Arcot respectively.

L. A. Govindaraghava Ayyar and A. Ramachandra Ayyar for appellant.

P. Venkataramana Rao and V. S. Narasimhachariar for respondents.

JUDGMENT.

REILLY J.—These four appeals are against orders for rateable distribution of the proceeds of a sale in Execution Petition No. 41 of 1916 on the file of the District Court. The appellant is the judgment-debtor. In Appeals 62, 64 and 67 of 1928 an objection has been raised by the decree-holder's representative that these appeals have abated. The decree-holder died in June 1930; and no application to bring his legal representative on record as respondent in these appeals was made until January of this year. To that objection the judgment-debtor replies that there is no rule of abatement in appeals against orders made in execution proceedings. It is not disputed that, in order that the judgment-debtor may proceed with these appeals, he must bring on record some representative of the decree-holder. But it is contended for him that, as the ordinary rule of abatement does not apply, he has a right to bring the legal representative on record at any time within three years under article 181 of the Limitation Act.

The rules regarding abatement as a penalty for not bringing the legal representative of a deceased party on record are to be found in Order XXII of the Code of Civil Procedure. But it is contended for the judgment-debtor that the rules in that Order do not apply to such appeals as these, because they are appeals against orders made in execution proceedings. The answer to

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the question whether that contention is correct depends upon the interpretation of rule 12 of that Order. The penalty of abatement in suits is imposed by rules 3 and 4 of Order XXII. If the representative of a deceased plaintiff or defendant, where the suit cannot go on without such a representative being brought on record, is not brought on within the time fixed by the Limitation Act, i.e. 90 days, the suit abates. Those rules do not directly apply to appeals; but sections 107 and 108 of the Code lay down that, subject to such conditions and limitations as may be prescribed, that is prescribed in Schedule I of the Code, an appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein. In the application of that principle to appeals in the matters covered by Order XXII of the Code rule 11 of that Order provides:

"So far as may be, the word 'plaintiff' shall be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an appeal."

The result of those provisions so far is clearly that the rules of abatement laid down in Order XXII for suits apply to appeals, and, if the matter ended there, it would be clear that they apply to all appeals. But it is contended that rule 12 of Order XXII has the effect of shutting out one class of appeals from these rules of abatement, namely appeals against orders in execution proceedings. Literally I do not think it can be contended that rule 12 has that effect. The words of rule 12 are: "Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order." Literally it does not appear to me, reading the words in their plain, grammatical sense, that an appeal against an order made in execution proceedings is itself a

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proceeding in execution of a decree or order. However it has been brought to our notice that there are decisions that rule 12 should be read in that extended sense. In *Mir Khan v. Sharfu*(1) a single Judge of the Lahore High Court directly decided that to be so, though it may be remarked that he gave no reason for his decision. In *Hakim Syed Muhammad Taki v. Rai Fateh Bahadur Singh*(2) the question came before a Full Bench, and there the majority of the Judges decided that an appeal against an order made in execution proceedings fell within rule 12 of Order XXII, and therefore the rules of abatement contained in that Order did not apply to such an appeal. The reason given by the two learned Judges who formed the majority of the Bench was that an appeal against such an order made in execution proceedings is itself a continuation of the execution proceedings, and therefore the rule excluding execution proceedings must apply also to such appeals. With great respect it appears to me that to say that an appeal against such an order is a continuation of execution proceedings is not a sufficient answer to the question. The question is, not whether such an appeal is a continuation of execution proceedings, but whether such an appeal is a proceeding in execution within the meaning of rule 12 of the Order. An appeal against a decree in an original suit is in a sense a continuation of the suit; but it is not the suit itself, nor is it a proceeding in the suit to which the rules of procedure for the suit necessarily apply. A proceeding in execution is a continuation of the suit; but it is not the suit itself, nor do the rules of procedure applicable to suits necessarily apply to execution proceedings. The third Judge of the Full

(1) (1923) 74 I.C. 577.

(2) (1929) I.L.B. 9 Pat. 372 (F.B.).

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Bench, DAS J., came to the conclusion that rule 12 of Order XXII did not apply to appeals against orders made in execution proceedings, but that such appeals were subject to the same rules in regard to abatement as any other appeals; and with that opinion I respectfully agree. He pointed out that in the scheme of the Code we find procedure provided for original suits in Part 1: in Part 2 we find procedure provided for execution proceedings: in another part of the Code, far removed, namely, Part 7, we find procedure laid down for appeals and not laid down for one class of appeals or some classes of appeals only but for all appeals. It has to be admitted that in no part of the Code other than Order XXII do we find any indication that appeals against orders made in execution proceedings are to be treated as a separate class of appeals, to which any separate and different rule of procedure applies from that which applies to other appeals. It happens that in this Court for the convenience of our work we call appeals against orders made in execution proceedings by a different name from appeals against decrees made in original suits, and they are usually allotted to a separate Bench for disposal. But that does not show that there is any essential difference in the nature of the appeals; nor do we apply any different procedure to them at any stage. In the mufussal there is not even this difference of nomenclature in regard to such appeals; appeals against orders made in execution proceedings and appeals against decrees made in original suits are all classified as one class of appeals and are registered under rules issued by this Court in one register and are treated in exactly the same way.

In this Court there has been no direct decision of a Bench on the question now raised. But in *Sundayee*

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Ammal v. Krishnan Chetti(1), where it was decided that the legal representative of a deceased appellant can be brought on record in an appeal against an order made in execution proceedings for the purpose of continuing the appeal, the learned Judges remarked in regard to *Palaniappa Chettiar v. Valliammai Achi*(2), where it was decided that legal representatives could not be brought on record in original execution proceedings—a decision which has now been overruled by the Full Bench in *Venkatachalam Chetti v. Ramaswamy Servai*(3)—that that case

“did not relate to the case of an appeal against an order in execution, and there are obvious difficulties, e.g. questions of limitation, the maintainability of successive applications, etc., which will arise if the ruling is applied to cases of appeal. We are not prepared to extend the application of the ruling to the present case and see no reason why the ordinary procedure relating to appeals when an appellant dies should not apply.” These last words, which I have quoted, show that the learned Judges were clearly of opinion that there was no difference between appeals against orders made in execution and other appeals in this respect, which we are now considering. And perhaps more important than that is the long-continued practice of this Court. It cannot be denied that until recent years, when we are told there has been some occasional variation in the matter, it has long been the practice of this Court to apply the rules of abatement to appeals against orders made in execution proceedings in exactly the same way as to other appeals. That shows that, although the question whether the rules of abatement apply to appeals against orders made in execution proceedings has not been the subject of any reported decision, a long succession of Judges have acted on the view that

(1) (1928) I.L.R. 51 Mad. 858.

(2) (1936) I.L.R. 50 Mad. 1.

(3) (1931) I.L.R. 55 Mad. 352 (F.B.).

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rule 12 of Order XXII does not apply to such appeals. If we were to accept the judgment-debtor's contention that rule 12 excludes such appeals from the ordinary rules of abatement, then we should be making a very serious departure from the general practice of this Court.

No reason has been suggested in the arguments before us why any such distinction as is alleged should be made between appeals against orders in execution proceedings and other appeals in this matter. There are obviously good reasons why the rules of abatement should not apply to execution proceedings in the original or executing Court. It is unnecessary, if the decree-holder does not bring a legal representative promptly on the record in an execution proceeding, that he should be penalised for not doing so. The fact that he does not do so does not inconvenience the Court and is not likely to inconvenience anybody but himself. And it may be noticed that it would be useless in a great majority of cases to enforce any such rule of abatement in relation to execution petitions. If the Court were to say that, because the decree-holder had not brought a legal representative of a deceased judgment-debtor on record within a short period, his execution petition would abate and be dismissed, he could put in a new execution petition on the following day. On the other hand to enforce abatement in execution petitions might often have very harmful effects. The decree-holder who found that other decree-holders were competing with him for rateable distribution might find it convenient to allow his execution petition to abate in order that by that manoeuvre he might get rid of the competition of the other decree-holders. Those are some among the reasons which will occur to anyone why the rules of abatement are obviously

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inappropriate to execution petitions. But, when we turn to appeals against orders made in execution, why should not the ordinary rules of abatement apply to them as much as to any other appeals? It is just as inconvenient to the Court that an appeal against an order in an execution proceeding should be kept pending for years because the appellant does not choose to bring on record the necessary legal representative as it is that any other appeal should be kept pending that way. It is just as unfair and inconvenient to a respondent, who has been successful in the lower Court, or his representative in such an appeal that the appeal should be kept hanging over his head for years as it would be to a party who had been successful in the lower Court in a matter raised in any other kind of appeal. The reasons which make it appropriate that rules of abatement should apply to appeals of any kind appear to me to make it equally appropriate that they should apply to appeals of the kind we are considering, that is appeals against orders made in execution proceedings. Indeed Mr. Govindaraghava Ayyar, who appears for the judgment-debtor in this case, has not been able to suggest any reason why the Legislature should have drawn the distinction which he has suggested, a very important and serious distinction, between appeals against orders in execution proceedings and other appeals. All that he was able to suggest was that this was the result of an implication in rule 12 of Order XXII, which he suggested might have been introduced into that Order by inadvertence. Rule 12 of that Order is not a rule which has been made by any High Court since the Code of 1908 came into force. It is a rule made by the Legislature when the Code was enacted, and I see no reason why we should attribute any carelessness to the Legislature in the matter. I distrust all arguments

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based on allegations that the Legislature has done its work with carelessness. Indeed we are not entitled to listen to any such suggestion unless we are driven to do so by some otherwise insurmountable difficulty in interpretation. For my own part I see no such implication as is suggested in the words of rule 12 of Order XXII.

I may mention that Mr. Narasimhachari for the decree-holder drew our attention to rule 4 of Order XXIII, in which words exactly similar to those of rule 12 of Order XXII appear. Rule 4 of Order XXIII says:

"Nothing in this Order shall apply to any proceedings in execution of a decree or order."

and rule 12 of Order XXII says:

"Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order."

The words "proceedings in execution of a decree or order" occur in both these rules in successive Orders of the Code. I do not think it can be denied that there are some provisions in Order XXIII, which apply to all appeals, to appeals against orders made in execution proceedings as much as to other appeals. The very first provision in Order XXIII is that a plaintiff may withdraw his suit. That undoubtedly applies to an appellant. But, if we were to give rule 4 of Order XXIII, the same interpretation as is suggested for rule 12 of Order XXII in regard to the words "any proceeding in execution of a decree or order", that provision regarding withdrawal would be shut out from all appeals against orders in execution. That comparison of the two rules in successive Orders may not lead us to any conclusive result; but it is at least interesting that the Legislature should have used the same expression in those two rules, and the judgment-debtor's contention in this case could not be upheld unless we supposed that that expression had been used in two different ways in the two Orders, which to my mind is very unlikely.

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In my opinion there is no doubt that the rules of abatement in Order XXII of the Code apply to appeals against orders made in execution proceedings as to other appeals. If this is so, these three appeals (Civil Miscellaneous Appeals Nos. 62, 64 and 67 of 1928) abated long ago. But applications have been made at a very late stage that the abatement may be set aside and that the delay in applying to set it aside may be excused. The grounds suggested for excusing the delay are that the party and his advisers were in doubt about the application of the rules of abatement to such appeals. There was some reason to think they did not apply, as it had been so decided by a Full Bench in *Hakim Syed Muhammad Taki v. Rai Fateh Bahadur Singh*(1). And some confusion had arisen on the question of bringing in legal representatives in matters arising from execution generally in consequence of the decision in *Palaniappa Chettiar v. Valliammai Achi*(2), which has now been overruled. It has also been mentioned to us that in Civil Miscellaneous Petition No. 3223 of 1923 (19 L.W. 43, short notes) WALLER J. decided that the rules of abatement were not applicable to appeals against orders made in execution. Unfortunately no report of that case is available to us, and we are informed that the records of the case have been destroyed. But that too might have had some effect on the course adopted by the judgment-debtor in this case in inducing him to think that it was unnecessary to bring the decree-holder's representative on record within the usual time. In the circumstances I think we may excuse the delay in making the application to set aside the abatement of these appeals and set

(1) (1929) I.L.R. 9 Pat. 372 (F.B.).

(2) (1926) I.L.R. 50 Mad. 1.

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aside the abatement accordingly and bring the decree-holder's representative on record.

[Part of the judgment is omitted as not necessary for this report.]

In my opinion therefore Civil Miscellaneous Appeals Nos. 62 and 67 of 1928 should be dismissed with costs; but Civil Miscellaneous Appeals Nos. 63 and 64 of 1928, relating to Execution Petitions Nos. 13 and 14 of 1922 respectively, should be remanded to the District Judge for fresh disposal. In Civil Miscellaneous Appeals Nos. 63 and 64 of 1928, as the judgment-debtor did not raise the question of limitation originally before the District Judge and in fact did not raise it until nearly three years after the petitions were filed, and as he has delayed the hearing of these appeals by the course he has taken in failing to bring the legal representative of the decree-holder on record, and as he has received indulgence from this Court in that matter, in my opinion he should pay the costs of both these appeals to the respondent in any event.

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ANANTAKRISHNA AYYAR J.—I agree. These miscellaneous appeals have been preferred by the Rajah of Kalahasti against the orders passed by the District Court of Chittoor by which the learned District Judge allowed the decree-holders, who are respondents in these appeals and who had obtained decrees for money in various suits against the late Rajah of Kalahasti, to share in the sale proceeds of certain properties belonging to the deceased judgment-debtor when the said properties were sold in execution of a decree for money obtained against the same judgment-debtor by the Mahant of Tirupati. The main contention of the appellant before us was that the execution petitions filed by the decree-holders—respondents—were barred by limitation, and that they were not entitled to a

rateable distribution of the sale proceeds in the District Court.

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The decree-holder in three of these connected appeals (Civil Miscellaneous Appeals Nos. 62, 64 and 67 of 1928) died in June 1930, and applications to bring the legal representatives of the deceased decree-holder on record were made only in January of this year,—that is long after the expiry of ninety days from the date of the death. On behalf of the legal representatives of the deceased decree-holder an objection was raised that these appeals have abated under the provisions of Order XXII, Civil Procedure Code, as no applications to bring the legal representatives on record in these appeals were filed within ninety days from the date of the death of the decree-holder, under article 177 of the first Schedule of the Limitation Act.

On behalf of the appellant, it was argued that, as the present appeals related to proceedings in execution of decrees, Order XXII, Civil Procedure Code, was inapplicable to such proceedings, that no question of abatement arose in the cases, that the appellant had a period of three years under article 181 of the Limitation Act within which he could apply to have the legal representatives of the deceased decree-holder brought on record, and that as the present applications were filed within that period the appeals should be heard on the merits. Reliance was also placed by the learned Advocate for the appellant on the recent decision of a Full Bench of this Court in *Venkatachalam Chetti v. Ramaswamy Servai*(1), and on Order XXII, rule 12, Civil Procedure Code.

The question was elaborately discussed before us, and I have come to the conclusion that the appellant's contention that article 181 applies to these cases is

(1) (1931) I.L.R. 55 Mad. 352 (F.B.).

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untenable, and I think that the provisions relating to abatement of appeals in cases where legal representatives of deceased parties are not brought on record within proper time apply to appeals preferred against decisions passed in execution of decrees. The decisions in *Venkatalakshamma v. Seshagiri Rao*(1), *Ramanathan Chettiar v. Ramanathan Chettiar*(2), *Sundayee Ammal v. Krishnan Chetti*(3) and *Venkatachalam Chetti v. Ramaswamy Servai*(4) are all distinguishable from the present case. In all those cases, the judgment-debtor or the decree-holder died when the execution petitions were pending in the executing Court; and, having regard to the provisions of rule 12 of Order XXII—which enacts that “nothing in rules 3, 4 and 8 (of Order XXII) shall apply to proceedings in execution of a decree or order”—it was in effect held that the rules relating to abatement of suits if legal representatives of a deceased party to the suit had not been brought on record within the prescribed period did not apply to proceedings in execution of a decree pending in such Courts. None of these cases related to the death of a party pending an appeal. The various inconveniences and difficulties which would accrue if the principle of abatement relating to suits were held applicable to such execution petitions were pointed out in those judgments, and it was also pointed out that the uniform practice of the Courts was also in favour of not applying such principle to such execution petitions. Order XXII, rule 12, Civil Procedure Code, is only a statutory recognition of the said practice.

Mr. Govindaraghava Ayyar, the learned Advocate for the appellant, however argued that, after the enactment of rule 12 of Order XXII in the present Code

(1) (1930) 60 M.L.J. 628.

(3) (1928) I.L.R. 51 Mad. 858.

(2) (1928) I.L.R. 30 L.W. 895.

(4) (1931) I.L.R. 55 Mad. 352 (F.B.).

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of Civil Procedure, it must be taken that the principle of abatement would not apply at all to proceedings in execution of a decree or order, and he argued that the present appeals were also proceedings in execution of a decree or order within the meaning of rule 12. He contended that the proceedings retained the character of proceedings in execution of a decree though they were carried to an appellate Court and that they did not lose that characteristic simply because they were pending in an appellate Court. He submitted that, as an appeal is only a continuation of the suit, the present appeals are only continuation of the proceedings in execution of the decrees, and he strongly relied on the decision of the Full Bench in *Hakim Syed Muhammad Taki v. Rai Fateh Bahadur Singh*(1).

I am unable to agree with those contentions. Of course we are bound to give effect to the provisions of rule 12 of Order XXII, Civil Procedure Code. But, in my opinion, the wording of that rule is against the appellant's contention. As already remarked, rule 12 enacts that “nothing in rules 3, 4 and 8 (of Order XXII) shall apply to proceedings in execution of a decree or order.” Are the proceedings in appeal before us “proceedings in execution of a decree or order” within the meaning of rule 12? I think not. I think that the expression “proceedings in execution of a decree” has a recognized and definite meaning as used in the Code of Civil Procedure. The scheme of the Code of Civil Procedure is to treat separately of suits, execution proceedings and appeals; Part 1 of the Code deals with “suits” in general; Part 2 with “execution” and Part 7 with “appeals”. A survey of the contents of the first Schedule attached to the Code of Civil Procedure also confirms this view. Order XXI

(1) (1929) I.L.R. 9 Pat. 372 (F.B.).

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relates to "execution of decrees and orders". The contention of the appellant is opposed to the literal and grammatical construction of rule 12. Rules 3, 4 and 8 of Order XXII relate only to the death of a plaintiff or a defendant pending a suit and to the insolvency of a plaintiff pending a suit. Those provisions are made inapplicable to proceedings in execution of a decree or order. The other rules of Order XXII, Civil Procedure Code, are not made inapplicable. Rule 11 implies that the provisions of the Order are applicable to appeals, since it proceeds to enact how the rules laid down by the Order are to be applied to appeals. Rule 11 enacts:

"In the application of this Order to appeals, so far as may be, the word 'plaintiff' shall be held to include an 'appellant'; the word 'defendant' a 'respondent'; and the word 'suit' an 'appeal'."

Rule 11 therefore *prima facie* applies to all appeals, and appeals from orders relating the execution of decrees are not exempted from the operation of Order XXII.

It was argued that an appeal is only a continuation of a suit, and that similarly an appeal from an order relating to execution is only a continuation of execution proceedings. Though in one sense it may be so, that is not the sense in which the Legislature has treated the matter in the Code of Civil Procedure. If an appeal is a continuation of a suit for all purposes of the Code of Civil Procedure, what is the necessity for enacting sections 107 (2) and 108? The scheme of the Code is clear that,

"subject to such conditions and limitations as may be prescribed, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein."

(section 107). See also section 108. The circumstance that, having regard to various considerations, the principle of abatement provided for by rules 3 and 4 of Order XXII has been made inapplicable to proceedings in execution of decrees does not, therefore, *prima facie* affect any question which has to be decided with reference to an appeal. An appeal may be against a decree passed in a suit, against an order passed in execution, or against an order from which an appeal is specifically provided for. When any question arises with reference to an appeal, the provisions of law relating to hearing and disposal of appeals have to be looked into for guidance and followed. The question at that stage is not how the matter has come before the appellate Court, but as to what the powers and duties of an appellate Court are with reference to an appeal properly brought for its adjudication.

Reference was made by the learned Advocate for the respondent to rule 4 of Order XXIII where it is enacted that nothing in Order XXIII shall apply to any "proceedings in execution of a decree or order", the words used being the same as in rule 12 of Order XXII. The learned Advocate for the appellant sought to make out that none of the provisions of Order XXIII would apply to an appeal against an order in execution of a decree. I am not satisfied that he has made good his contention. In my opinion, the inference, if any, to be drawn by the reference to Order XXIII is rather in favour of the view I am inclined to take regarding the procedure to be followed in such appeals.

As already mentioned, the inconveniences and difficulties in the way of applying the principle of abatement to execution proceedings in the executing Court do not exist with reference to appeals from orders relating to execution. The decree-holder's rights and

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privileges in the matter of filing and prosecuting execution petitions are quite different when his rights have been adjudicated upon by one Court but are pending before a Court of appeal. Considerations of convenience also seem to point to the same inference as is suggested by the wordings of the provisions of the Code. Unless the law is clear on the point to the contrary, it would *prima facie* be unreasonable to allow an appeal to be pending in an appellate Court for three years simply because one of the parties to the appeal is dead, and it is not a sufficient answer to be told that the appeal is from an order relating to execution of a decree. If anything, appeals from such orders should be disposed of as early as possible and more speedily than appeals from decrees in suits. If in appeals from suits legal representatives of deceased parties have to be brought on record within ninety days, why should a longer period be provided for such purpose in case of appeals from orders passed in execution of decrees? As far as I am able to gather, the practice of this Court (at any rate till very recently) has always been to apply the principle of abatement to all appeals, including appeals preferred against orders in execution of decrees. With reference to death of parties in an "original petition" pending investigation in the first Court, sections 141 and 146 have been applied in the matter of bringing legal representatives of deceased parties on record, and the principle of abatement has been applied to such cases; see *Rameshar Singh v. Bisheshar Singh*(1) (a case that arose under the corresponding provision of section 647 of the Code of 1882), but it is not necessary to pursue this aspect of the matter further at present.

(1) (1885) I.L.R. 7 All. 734, 737.

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The only decisions relating to appeals, to which our attention was drawn, in which the question is discussed, are *Sundayee Ammal v. Krishnan Chetti*(1) and *Hakim Syed Muhammad Taki v. Rai Fateh Bahadur Singh*(2).

In *Sundayee Ammal v. Krishnan Chetti*(1) the learned Judges, WALLACE and TIRUVENKATACHARIAR JJ., had a case where, in a letters patent appeal against an order in execution of a decree of a subordinate Court, the legal representative of the deceased appellant applied to be brought on record. The learned Judges held that the rule in *Palaniappa Chettiar v. Valliammai Achi*(3) did not apply to such a case, and made the following observations:—

"The rule in *Palaniappa Chettiar v. Valliammai Achi*(3) did not relate to the case of an appeal against an order in execution, and there are obvious difficulties, e.g., questions of limitation, the maintainability of successive applications, etc., which will arise if the ruling is applied to cases of appeal. We are not prepared to extend the application of the ruling to the present case, and see no reason why the ordinary procedure relating to appeals when an appellant dies should not apply." Those observations directly apply to the present case. The question arose in an appeal from an order passed in execution of a decree, and the learned Judges held that

"the ordinary procedure relating to appeals when an appellant dies should apply to an appeal from an order passed in execution of a decree."

With respect, I entirely agree.

The decision in *Hakim Syed Muhammad Taki v. Rai Fateh Bahadur Singh*(2) was by a Bench of three learned Judges. DAS J. was of opinion that the words "proceedings in execution" occurring in rule 12 did not include proceedings in an appellate Court though the

(1) (1928) I.L.R. 51 Mad. 858. (2) (1929) I.L.R. 9 Pat. 372 (F.B.).
(3) (1926) I.L.R. 50 Mad. 1.

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appeal was from an order passed in execution of a decree. KULWANT SAHAY J. was of a different opinion, and MAOPHERSON J. agreed with KULWANT SAHAY J. For the reasons given by the learned Judge, Das J., and for the other reasons mentioned above, I think that there is no reason to differ from the statement of the law made in *Sundayee Ammal v. Krishnan Chetti*(1), more especially as that is in accordance with the practice followed in this Court (as I understand it) at any rate till very recently.

The words used in Order XXII, rule 12, and in Order XXIII, rule 4, are clear and specific. In these circumstances, as observed by Lord HALSBURY L.C. in *Commissioners for Special Purposes of Income-Tax v. Pemsel*(2):

"I do not think it is competent to any Court to proceed upon the assumption that the Legislature has made a mistake. Whatever the real fact may be, I think a Court of law is bound to proceed upon the assumption that the Legislature is an ideal person that does not make mistakes. It must be assumed that it has intended what it has said, and I think any other view of the mode in which one must approach the interpretation of a Statute would give authority for an interpretation of the language of an Act of Parliament which would be attended with the most serious consequence."

In my opinion, the appellant's contention on this point should be overruled and three of these appeals should be held to have abated in the circumstances.

[Part of the judgment is omitted as not necessary for this report.]

Civil Miscellaneous Appeals Nos. 63 and 64 of 1928 are therefore allowed and the execution petitions in these two cases are remanded to the lower Court for fresh disposal, after giving the decree-holder an opportunity of showing, by reference to prior proceedings, that they

(1) (1928) I.L.R. 51 Mad. 858.

(2) [1891] A.C. 531, 540.

were not barred by limitation when they were filed in Court. In the circumstances, the appellant must pay the costs of the respondent in these appeals. The costs in the lower Court will be provided for by the District Judge when fresh orders are passed.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

SHANMUGASUNDARA MUDALIAR AND TWO OTHERS
(RESPONDENTS—PLAINTIFFS THREE TO FIVE), APPELLANTS,

1932,
March 28.

v.

S. RATNAVELU MUDALIAR (PETITIONER—FIRST
DEFENDANT), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 144—Restitution under—Meaning and object of—Execution of decree—Stay by appellate Court of, pending defendant's appeal therefrom—Amount deposited in Court as a condition of, for withdrawal by decree-holder on furnishing security—Failure of decree-holder to furnish security and to withdraw amount from Court—Reversal of decree in appeal—Restitution on—Interest on amount deposited in Court—Defendant's right to.

The restitution mentioned in section 144 of the Code of Civil Procedure is the restoration to the injured party of what he has lost, not primarily the deprivation of the other party of what he has wrongfully gained. The section is directed to the benefit of the wronged party and its object is, so far as possible, to put him back into the position in which he would have been but for the wrong decree or order, which is afterwards reversed.

Pending an appeal against a decree for money, the defendant-appellant applied for stay of execution of that decree. The

* Appeal against Order No. 464 of 1928.

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plaintiff-respondent opposed that stay application, and eventually an order was made on the stay petition that execution would be stayed if the defendant paid into Court Rs. 3,500, a portion of the decree amount, and gave security for the remainder of the decree, and that, if the Rs. 3,500 was paid into Court in accordance with the order, the plaintiff should be allowed to draw it only on giving security for that amount. The defendant paid that Rs. 3,500 into Court and gave security for the remainder of the decree, and thereupon execution of the decree was stayed pending the appeal against that decree. The plaintiff however did not give security for the Rs. 3,500 and did not withdraw it from Court. The defendant succeeded in his appeal; and after his success he applied to the Court below, in which the Rs. 3,500 had been deposited by him, for restitution.

Held that the defendant was entitled to interest upon the Rs. 3,500 as part of the restitution due to him under section 144 of the Code.

Per REILLY J.—The payment of the Rs. 3,500 into Court pursuant to the order on the stay petition was not a voluntary payment.

APPEAL preferred against the order of the Court of the Subordinate Judge of Chingleput, dated 13th November 1928, and made in Execution Petition No. 76 of 1928 in Original Suit No. 5 of 1922.

N. S. Srinivasa Ayyar and *G. Jagadisa Ayyar* for appellants.

Respondent not represented.

JUDGMENT.

REILLY J.

REILLY J.—In Original Suit No. 5 of 1922 on the file of the Subordinate Judge of Chingleput the appellants as trustees of a certain temple obtained a decree for money against defendant 1 and others. Defendant 1 among others appealed to this Court against that decree in Appeal No. 218 of 1925. Pending that appeal, defendant 1 applied for stay of execution of the Subordinate Judge's decree, the amount of which we are told by the

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date of his appeal with interest had come to about Rs. 7,000. The appellants opposed that stay application, and eventually an order was made by JACKSON J. on the stay petition that execution would be stayed if defendant 1 paid into Court Rs. 3,500 and gave security for the remainder of the decree and that, if the Rs. 3,500 was paid into Court in accordance with the order, then the present appellants should be allowed to draw it only on giving security for that amount. Defendant 1 paid that Rs. 3,500 into Court and gave security for the remainder of the decree, and thereupon execution of the decree against him and the other defendants was stayed pending the appeal against that decree to this Court. But, although defendant 1 paid that Rs. 3,500 into Court, it appears that the present appellants never gave security for the amount, and so they never withdrew it from Court. The appeal of defendant 1 and others against the Subordinate Judge's decree for money was successful so far as defendant 1 and some of the other defendants were concerned; and after his success defendant 1 applied to the Subordinate Judge, in whose Court the Rs. 3,500 had been deposited by him, for restitution. He claimed the Rs. 3,500 with interest upon it. The Subordinate Judge made an order that the Rs. 3,500 should be paid back to him and that the present appellants should pay interest at 6 per cent on that amount as part of the restitution to be made to defendant 1. The present appeal is against that order so far as it directs the present appellants to pay interest on the Rs. 3,500 to defendant 1.

It is urged for the appellants, first, that they never compelled defendant 1 to pay that amount into Court and, secondly, that they never got any benefit out of it, as they never withdrew the amount from Court; and for both those reasons it is contended that, although

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defendant 1 is entitled to get back the Rs. 3,500, he is not entitled to any interest as part of the restitution now due to him. I cannot agree with the suggestion that the payment of the Rs. 3,500 into the Subordinate Judge's Court by defendant 1 was a voluntary payment. It is true that the appellants by the time defendant 1 came to this Court for an order for stay of execution had not taken any proceedings to execute their decree. But there was a decree for money standing against defendant 1, which he knew might be executed at any moment against him, and he was quite within his rights in coming to this Court and asking that, pending his appeal against that decree, execution might be stayed. When the present appellants got notice of that application, they did not consent to the decree being stayed on security under rule 5 of Order XLI, and they were quite within their rights in not consenting. Nor did they disclaim any intention of executing their decree. On the contrary they asserted their right and intention to execute it. JACKSON J. stayed execution of that decree on certain terms: he made an order that, if there was to be any stay at all, Rs. 3,500 must be paid into the Subordinate Judge's Court. That order was obviously intended for the benefit of the present appellants and must have been made at their instance. It certainly would never have been made, if they had disclaimed a desire for any such order. In the circumstances I think it is impossible to say that defendant 1 made the deposit of Rs. 3,500 in the Subordinate Judge's Court as a voluntary payment. Defendant 1 had to pay that amount because a decree, which the appellants were prepared to execute and declared that they intended to execute, had been wrongly made against him, as events have turned out, and for the time from the date he made that payment until the disposal of the appeal against the

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decree he was deprived of that money. Having been deprived of his money as the result of a decree, which the appellants insisted on executing, but which turns out to be wrong, he is clearly entitled to restitution.

Mr. Srinivasa Ayyar, who appears for the appellants here, does not deny that restitution in such cases, if it is to be complete, must often include not only the actual money which has been deposited but interest thereon, and that is provided by section 144 of the Code of Civil Procedure. But he contends that, when we are trying to ascertain what is the exact restitution which should be made in such a case, whether it should be the money deposited alone or the money with the addition of interest upon it, the test to be applied is, not the injury which has been done to the judgment-debtor who has had to pay the amount under a mistaken decree, but the benefit which has been obtained by the other party, or at least that no interest should be ordered where, although the judgment-debtor has suffered an injury in consequence of such compulsory payment, the decree-holder has not derived any benefit from it. It appears to me that that is not the way to apply the principle of restitution, which is recognised in the Code. The provision in the Code is to be found in section 144, which lays down that

"in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed."

Now, reading that provision in its ordinary plain meaning, the restitution mentioned appears to me to be on its face the restoration to the injured party of what he has lost, not primarily the deprivation of the other party of what he has wrongfully gained. It is the party

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entitled to restitution who can apply to the Court and claim the help of the Court in the matter; it is for his benefit that the provision is introduced. The restitution must be such as will put the parties in the position which they would have occupied but for the wrong decree. The party who is to be assisted by Court must be put into the position which he would have occupied but for the wrong decree. Is it an answer to that provision to say that it cannot be given effect to because the other party happened to gain no benefit by the wrong decree or order which had been made? I can see nothing in the section to lead us to suppose that it can be defeated in that way. And, if we go further into the section, we find the words:

"For this purpose the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal."

Take damages. Can it be suggested that the measure of damages in such cases is, not what the wronged party has suffered, but what the other party has gained? Take compensation. Is the wronged party to be deprived of compensation merely because the other party has made no actual profit out of the mistaken decree or order, which is afterwards reversed? I think, if we read the section in its natural way, it will be found to be directed to the benefit of the wronged party and its object to be, so far as possible, to put him back into the position in which he would have been but for the wrong decree or order, which is afterwards reversed. Surely that is how the matter should be treated. The Court unfortunately by a mistaken decree has done a wrong to the judgment-debtor. When the Court has done a wrong, it is the Court's duty, so far as possible, to put it right. The Court is not directly interested in depriving the other party of a benefit

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which he may have got from a mistaken order or decree. It is the wrong that has been done which the Court should wish to put right. The actual benefit which may have been gained by the other party may often be almost impossible to estimate; but that is not the matter in which the Court is interested. If we look at *Rodger v. The Comptoir D'Escompte de Paris*(1), in which this matter was discussed by Lord CAIRNS, I think it will be seen that it is the wrong which has been done by the mistaken order or decree with which the Court is primarily concerned and which the Court must always wish to rectify, not the incidental advantage which the other party may have been fortunate enough to get. That principle has been applied in a case somewhat like this, *Dalu Ram v. Ramanand*(2). There the plaintiff was made to pay interest as part of the restitution of the money deposited by the defendant towards the decree, not only from the date when the plaintiff drew that money from Court, but from a much earlier date, when the defendant had deposited it in Court, although it was represented that between those two dates the plaintiff had got no benefit whatever from the money.

But it happens that in this case the present appellants are not at all in a strong position for urging that they got no benefit from defendant 1's deposit of Rs. 3,500. It is urged for them that they got no benefit from that because for some reason they found it inconvenient to give security and draw that money. Can we properly say that they got no benefit from the money simply because they did not choose, or were even unable, to give security? We know that they did not give it; but the moment they chose to give

(1) (1871) L.R. 8 P.C. 465.

(2) A.I.R. 1929 Pat. 598.

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security or were able to give security they could take the money out of Court. And, as part of the decree amount due to them was in Court ready for them to put their hands upon it the moment they succeeded in the appeal, if they did succeed in it, that was clearly a benefit to them, as was recognised in *Hirabhai Dahyabhai v. Maneklal Ranchhod*(1). In my opinion, if we had to decide this case on the basis whether the appellants had got any benefit by the deposit of the Rs. 3,500, I think we should have to find that they had derived at least some benefit from that deposit. But in my opinion that is not the proper test. The proper test is whether defendant 1 has been injured or deprived of his legal right in respect of that Rs. 3,500, which he had to deposit in consequence of the wrong decree obtained against him by the appellants. In my opinion he was injured by having to make that deposit, and he cannot be properly compensated for that injury by the mere return of the Rs. 3,500. If he is to be compensated, if he is to get restitution within the meaning of section 144 of the Code, he is entitled to get interest also.

In my opinion the order of the learned Subordinate Judge is right, and this appeal should be dismissed.

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ANANTAKRISHNA AYYAR J.—I agree. In Original Suit No. 5 of 1922 on the file of the Subordinate Judge's Court, Chingleput, the appellants before us obtained a decree for money against the first defendant and others. They were apparently anxious to execute the decree, and the first defendant on preferring an appeal to this Court against the decree in Original Suit No. 5 of 1922 applied for stay of execution of the lower Court's decree. The application was

(1) (1925) 87 I.C. 718.

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contested by the decree-holders, the present appellants. The decree-holders were anxious to be allowed to execute the whole of the decree. The first defendant was anxious that execution of the whole of the decree should be stayed, evidently on his furnishing security for the decree amount, which was about Rs. 7,000. The application for stay of execution of the decree appealed from came on for hearing before a learned Judge of this Court, and the learned Judge having regard to the circumstances of the case directed that so far as a moiety of the amount of the decree was concerned the first defendant should have stay of execution on his furnishing security for the amount of that moiety, but as regards the other moiety the learned Judge directed that the first defendant should pay that portion of the decree amount into Court, the decree-holders being allowed to draw the same out of Court on their furnishing security to the satisfaction of the lower Court. These facts are clear from the affidavits and order passed in connection with the application for stay of execution pending the appeal. Now what happened subsequently was this. The decree-holders did not trouble themselves about the execution of the decree any further, so the amount of Rs. 3,500 deposited by the first defendant into the lower Court remained in the lower Court without being drawn out by the decree-holders on furnishing security. The appeal was eventually successful so far as the first defendant was concerned. The present appeal arises out of a petition, Execution Petition No. 76 of 1928, filed by the first defendant in the lower Court under section 144 of the Code of Civil Procedure praying that the decree-holders may be directed to pay interest in respect of the amount of the moiety of the decree which the first defendant had deposited in the lower Court, from

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the date of his deposit to the date of the judgment of the High Court on appeal in his favour. The decree-holders objected to the Court decreeing any interest in the circumstances, their argument being that they had in fact derived no benefit out of the decree amount deposited in the lower Court, and that consequently they should not be directed to pay any interest in respect of that amount. The learned Subordinate Judge overruled that contention and directed that the decree-holders should pay interest on the amount deposited in Court for the period mentioned by him. The plaintiffs—decree-holders—are the appellants before us.

Before us it was contended by the learned Advocate for the appellants that, on a proper construction of section 144, Civil Procedure Code, all that the Court could direct the unsuccessful decree-holders to do was to restore any benefit that they might have derived by virtue of the decree that was subsequently reversed by the appellate Court. In support of that argument the learned Advocate drew our attention to some reported decisions. In my view, that is not the proper standpoint from which this case is to be looked at, in order to arrive at a correct decision on the point before us. The principle of restitution is based upon the legal maxim that the act of the Court should injure none; *Actus curiae neminem gravabit*. That this is the principle is made clear by the judgment of Lord CAIRNS in *Rodger v. The Comptoir D'Escompte de Paris*(1) where the principles that ought to govern Courts in directing restitution in such cases are discussed. I do not propose to read all the passages, though very many of them would be relevant to the point before me. The

following are among the relevant passages occurring in that judgment:—

“It is contended, on the part of the respondents here, that the principal sum being restored to the present petitioners, they have no right to recover from them any interest. It is obvious that, if that is so, injury, and very grave injury, will be done to the petitioners. They will by reason of an act of the Court have paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed. So far, therefore, as principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners, and that the perfect judicial determination, which it must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them, with interest, during the time that the money has been withheld.”;

(see pages 475 and 476). Now, as I read those passages, it seems to me that it is the injury which has been caused to a party who has been ultimately successful as the final result of the litigation that the Courts seek to remedy by virtue of proceedings taken in restitution. Such a party is to be placed, so far as it may be done, in the same position which he would have occupied had not the injury been done to him. If that is the principle, then, I think, the answer to the question before me is quite clear. The first defendant was, as a result of the proceedings taken by the appellants in pursuance of a decree, which was ultimately reversed, directed to put into Court a certain sum of money. If that decision had not been passed, the first defendant would not have been deprived of the use of the money, and the injury

(1) (1871) L.R. 3 P.C. 465.

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done to him therefore could be remedied only by paying him back not only the principal amount of that money but also some compensation for the deprivation of the use of the money from date of deposit to date of judgment of the High Court reversing the lower Court's decree. The wording of section 144 also makes this point clear. The section is not drafted merely with a view of depriving the decree-holder in the prior litigation of any benefit which he has actually in fact derived from the decree, but the section is drafted with a view to benefit, by way of restitution or otherwise, the party who had been injured by an act of Court, found to be ultimately erroneous. The section says:

"In so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed."

I therefore decline to accept the contention raised before us by the learned Advocate for the appellants that we should view the case from the standpoint of the benefit that the appellants actually derived from the decree they obtained in the first Court. The learned Advocate emphasised the words "so far as may be" occurring in the section. As I understand the section, those words have no relevancy so far as the point now before us is concerned. It may happen that in very many cases restitution, as ordinarily understood, is impossible. Property may have been sold and purchased by *bona fide* strangers, and in some cases it might be impossible to restore *in specie* the property of which the defendant might have been deprived. In such and similar cases, justice requires that the injured party should be restored, if not to the very thing of which

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he was deprived, at least to as much of its equivalent as can be given to him in the place of the thing the restoration of which has become impossible. The subsequent words of the section, namely, "the Court may make any order . . . for payment of interest, damages, etc." make it clear that it is the injury that the first defendant suffered that has to be compensated for in a case like the present. The learned Advocate for the appellants referred us to some cases which he stated were inconsistent with the view that I am inclined to adopt in this case. On a careful perusal of the cases to which our attention was drawn, it is clear that those cases do not establish the proposition he contends for. I must remark that in properly understanding the expressions used by learned Judges in particular cases we must not forget to inquire what exactly was the relief that a party was actually claiming before the Court in such proceedings. If as a matter of fact a person in the position of the first defendant claimed only interest from the time when the decree-holder actually drew the money out of Court, and was content with claiming the same only, and did not claim compensation from the time when he parted with the money, then the remarks occurring in judgments dealing with such contentions should be understood only with reference to the prayer actually contained in the petition before the Court. As far I am able to see, the passages in the judgments referred to us do not lay down that a person in the position of the first defendant would not be entitled to anything more than the benefit which the decree-holder actually got by virtue of the prior decree. On the other hand, our attention was drawn to two cases, *Dalu Ram v. Ramanand*(1) and

(1) A.I.B. 1929 Pat. 593.

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Hirabhai Dahyabhai v. Maneklal Ranchhod(1), both of which support the position contended for by the first defendant. In *Hirabhai Dahyabhai v. Maneklal Ranchhod*(1) the money was in Court for some time. The decree-holder had no benefit in the sense that he was able to make interest out of that money, as during the period in question the money was lying idle in Court; yet the learned Judges decided that the decree-holder was bound to pay interest for the period during which the money was lying in Court. To use the words of the judgment: "The decree-holder has had the advantage of the money lying in Court until the appeal was heard and that would be a sufficient advantage to enable first defendant to succeed." In the other case, *Dalu Ram v. Ramanand*(2), the decree-holder was directed to withdraw the money from Court after furnishing security, and, in that respect, that case is very similar to the one before us. The learned Judges decided that even in such a case the decree-holder was bound to pay interest to the defendant on the amount for the period during which the money was lying idle without the decree-holder having furnished security. If the test is the injury done to the defendant, then the circumstance that the decree-holder considered it to his benefit in any particular case not to actually draw the money out of Court but to have it ready in Court would not make any difference, and I am not at all satisfied that it will not be to the benefit of the decree-holder to have an order in his favour that the money is to lie in Court and that he can draw it at any time on furnishing security. In this particular case, that it was a benefit to the decree-holders to have money ready in Court is clear to me from another circumstance. Evidently the

(1) (1925) 87 I.C. 713.

(2) A.I.R. 1929 Pat. 593.

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first defendant wanted to have stay of execution in respect of the whole decree. The learned Judge was inclined to grant stay on the first defendant furnishing security in respect of a moiety of the decree amount. The order passed by the learned Judge with reference to the other moiety is, in my view, entirely due to the request made by the decree-holders that money may be directed to be paid into Court and that they should be allowed to draw the same on furnishing security. If such a thing was not to their benefit, I am unable to understand why they wanted such orders to be made with reference to that moiety of the decree amount. Therefore the question of benefit to the decree-holder is, in my view, entirely immaterial and irrelevant for the purposes of the present case; and, even otherwise, in the present case I am clear that there was an order which was (as already stated) to the benefit of the decree-holders; and, consequently, having got a benefit, it does not lie in their mouths to say that are not liable or responsible for having deprived the first defendant of the use of the money during the period. In addition to the case of *Rodger v. The Comptoir D'Escompte de Paris*(1), I wish to refer to the observations of PEACOCK C.J. in *Hurro Chunder Roy Chowdhry v. Sooradhonee Debia*(2):

"It is the legal effect of a decree of reversal that the party against whom the decree was given is to have restitution of all that he has been deprived of under it. . . . A Court of Appeal does not necessarily enter into the question, whether a decree, which it is about to reverse, has been executed or not. The decree of reversal necessarily carries with it the right to restitution of all that has been taken under the erroneous decree, in the same manner as an ordinary decree carries with it a right to have it executed; and I should have considered that a decree of reversal necessarily authorized the lower Court

(1) (1871) L.R. 3 P.C. 465.

(2) (1868) Beng. L.R. Supp. Vol. 985, 992 (F.B.).

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to cause restitution to be made of all that the party, against whom the erroneous decree had been enforced, had been deprived by reason of its having been enforced."

(See also the further observations at page 993). I wish also to refer to the observations of MOOKERJEE J. in *Ashutosh v. Upendra*(1), where the learned Judge, after referring to the decision in *Rodger v. The Comptoir D'Escompte de Paris*(2), emphasises the correct principle underlying the whole discussion, namely, that it is the legal injury that is done to the person in the position of the defendant that is sought to be remedied in such cases. See also a later Privy Council decision in *Jai Berham v. Kedar Nath Marwari*(3).

I think it is enough for our purpose to be guided strictly by the provisions of section 144 of the Code of Civil Procedure; and, having regard to its wording, I think that the first defendant is entitled to the benefit he claims in the present case, namely, interest as for the use of the money of which he has been deprived, for the period during which that money was not available to him, he having been directed to part with that money by a decree that has been ultimately reversed as erroneous.

I agree that the appeal must be dismissed but without costs as nobody appears for the respondent. In order to make matters clear, I should add that the first defendant claimed restitution with interest at twelve per cent and the learned Subordinate Judge was, in my opinion, right in having allowed him only interest at six per cent.

A.S.V.

(1) (1916) 24 C.L.J. 467, 474.

(2) (1871) L.R. 3 P.C. 465.

(3) (1922) I.L.R. 2 Pat. 10 (P.C.).

APPELLATE CRIMINAL.

Before Mr. Justice Pakenham Walsh.

IN RE MARINA NARASANNA AND TWO OTHERS,
PETITIONERS.*

1932,
March 9.

Code of Criminal Procedure (Act V of 1898), sec. 386—Hindu joint family—Member of—Right, title and interest in joint family movable property of—Attachment of, under sec. 386—Mode of—Seizure—Mode laid down in O. XXI, r. 47, Civil Procedure Code, or—Claim to property so attached by other members of family of convicted person on ground that it is their separate property—Onus of proof in case of.

Under section 386 of the Code of Criminal Procedure the right, title and interest of a convicted person in joint family properties can be attached for the recovery of the fine imposed on him. The proper mode of attachment in such a case is not by way of seizure. The Crown has no right to anything more in joint movable property than the delinquent himself had, and it cannot deprive the co-owners, by seizing property, of their right of possession in it. The correct course is that laid down in rule 47 of Order XXI of the Code of Civil Procedure. If necessary, either a receiver can be appointed for the delinquent's share, or a prohibitory order can be issued against him. His interest in the property can then be brought to sale.

Where property is attached under section 386 of the Code of Criminal Procedure on the footing that it is joint family property of the convicted person and of others and a claim is made to the same by the latter on the ground that it is their separate property, the onus of proof lies on them in the same way as it does upon claimants to attached property under the Code of Civil Procedure.

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 Joint Magistrate

* Criminal Revision Case No. 156 of 1932.

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In re. of Rajahmundry in Miscellaneous Case No. 8 of 1932
(Calendar Case No. 18 of 1932).

K. S. Jayarama Ayyar for A. Lakshmayya for
petitioners.

Public Prosecutor (L. H. Bewes) for the Crown.

Cur. adv. vult.

JUDGMENT.

This is a revision petition against the order of the Joint Magistrate of Rajahmundry in the matter of a claim put forward to certain properties seized under section 386 of the Code of Criminal Procedure. The accused's family originally consisted of seven brothers, one of whom is dead leaving children. One out of the six surviving brothers, the accused, was convicted and sentenced to a fine of Rs. 1,000. The police seized and carried away certain movable properties. The brothers put in a claim. They alleged that the properties in C and D schedules were the separate properties of two of the brothers, that those in E schedule were the separate properties of the mother and that those in B schedule were joint family properties. As regards the E schedule properties the lower Court found that the mother was no party to the proceedings and as none of the petitioners held a power of attorney for her they had no *locus standi* to complain of the proceedings as regards the said properties. As regards the properties in schedules C and D which were claimed to be the separate properties of the petitioners, the lower Court observed that no evidence in support of this allegation was produced and that the family being admittedly a joint one, the presumption is that these properties also were joint family properties. On this point an affidavit has been put in wherein it is stated: "Then the learned Magistrate posted the case for arguments on the question

whether assuming the property is joint family property the seizure is or is not valid. Arguments were heard on this question on 12th February 1932 on the distinct understanding that evidence would be received on the question that the properties were the separate properties of the other members of the joint family after the decision on the preliminary point and the lower Court posted the case to 17th February 1932 for orders. On 17th February 1932 orders were pronounced giving decision on all the points thereby depriving the petitioners of an opportunity to produce evidence to show that the properties were the separate property of the married brothers whose wives were given these properties by their parents." It is quite natural that arguments should have been heard on the preliminary point assuming that the properties were joint family properties, so that, if it were held that the Court had no power to proceed against joint family properties, evidence as to the properties being the separate properties of the claimants would become unnecessary. But it is difficult to believe that the lower Court, having found that the Court could attach the right, title and interest of the convicted person in the joint properties, would have failed to receive evidence tendered that certain of the properties were not joint but separate properties of the claimants. However, in the view I am going to take on the matter, this will not assume much importance. There is no doubt, and it is not disputed on the other side, that, since the decision in *Secretary of State for India v. Rangasamy Ayyangar*(1), the right, title and interest of a convicted person in the joint family properties can be attached. That decision, no doubt, was under section 88 of the

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(1) (1916) I.L.R. 39 Mad. 231 (F.B.).

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Code of Criminal Procedure but it has not been argued that the principle does not apply to section 386 also. The real question in issue is whether such joint property can be attached by way of seizure. On this point the learned Joint Magistrate correctly observes that there is no direct authority. But he does not appear to me in his subsequent arguments to distinguish clearly between the method of attachment by seizure and attachment by prohibitory order or appointment of a receiver or to consider whether attachment by seizure is permissible in cases of this sort. Section 386 of the old Code of 1882 ran :

"Whenever an offender is sentenced to pay a fine the Court passing the sentence may, in its discretion, issue a warrant for the levy of the amount by distress and sale of any movable property belonging to the offender, although the sentence directs that, in default of payment of the fine, the offender shall be imprisoned."

In the new Code the section has been amended. The word "distress" has disappeared. It provides two ways for the Court to take action—either way may be employed against movable property, but against immovable property only the second way—vide section 386 (1) (a) and (b). We are not concerned with section 386 (1) (b) because it is not under that section that action was taken. Section 386 (1) says that the Court can issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender. It is pointed out for the petitioner that while in the old Code the warrant under section 386 runs :

"This is to authorize and require you to *make distress by seizure of any movable property*",

the warrant in the amended Code runs :

"This is to authorize and require you to *attach any movable property*";

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and it is argued that the word "seizure" has been deliberately omitted. The definition of "distress" in Stroud's Judicial Dictionary has been quoted :

"A distress is one of the most ancient and effectual remedies for the recovery of rent. It is the taking, without legal process, cattle or goods as a pledge to compel the satisfaction of a demand, the performance of a duty, or the redress of an injury. The act of taking, the thing taken, and the remedy generally, having been called a 'distress'; an inaccuracy which the older text-writers usually avoided."

I do not think this definition is particularly useful here, for admittedly even under the old Code this distress was by a process of law. In the Concise Oxford Dictionary "distress warrant" is described as warrant authorizing distraint. The learned Joint Magistrate has relied on section 88 and it has also been relied on before me. It is clearly, I think, permissible to look to section 88 which lays down in some ways a more express procedure. We find in the amended Code, subsection (3) runs :

"If the property ordered to be attached is a debt or other moveable property, the attachment under this section shall be made—

- (a) by seizure ; or
- (b) by the appointment of a receiver ; or
- (c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf ; or
- (d) by all or any two of such methods, as the Court thinks fit."

Here there are three distinct methods of attachment of which seizure is only one. The provisos which follow, 6A and so forth, are modelled on the provisions for deciding claims to attached property made by third parties under the Civil Procedure Code. It is, therefore, I think, quite proper to look to the Civil Procedure Code for assistance in this matter. Section 60 of the Civil Procedure Code defines "property liable to

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attachment and sale", and among such property is "moveable property belonging to the judgment-debtor over which he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by any other person in trust for him or on his behalf." Of course there is no question that a share in movable property belonging to a joint family is property liable to be attached under this section. Order XXI, rule 47, states :

"Where the property to be attached consists of the share or interest of the judgment-debtor in moveable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way."

On this Mulla remarks in his commentary :

"This rule is new. It provides for the attachment of a share or interest in moveable property belonging to the judgment-debtor and others in co-ownership. Such a share or interest is obviously incapable of actual seizure, and provision has therefore been made for the issue to the judgment-debtor of a notice prohibiting him from transferring his share or interest in any way."

It is therefore clear that the proper mode of attachment under the Civil Procedure Code of the judgment-debtor's share in joint property is by way of prohibitory notice ; and it is difficult to understand why any different principle should be applied when making an attachment under section 386 of the Code of Criminal Procedure, when in the analogous section 28 the procedure for claims is practically in terms of the Civil Procedure Code. There is an interesting discussion in *Alagammal v. Sadasiva Padayachi*(1) as to the difference between attachment by a Civil Court and that

by a Criminal Court ; but what was in issue in that case was whether, when property of an absconder had been attached under section 88, the Government held it merely as his agent or had itself an interest in it. The learned Judges remark :

"We are clearly of opinion that the possession of the Government is not merely that of an attaching decree-holder which was the view taken by the learned District Munsif. We are also clear that the possession of the Government is not that of an agent of the absconder."

What was held in that case was that the effect of section 88 is to create an interest in the property and to entitle the Government to be in possession of the property and that the Government was a necessary party to the prior suit. This possession by Government only means, I think, the possession which the absconder would have had in the property. In *Jugomohun Bukshee v. Roy Mothooranath Chowdry*(1), which was a case under the Bengal Regulation corresponding to section 88 of the Code of Criminal Procedure, it was held that there could be no confiscation of property other than that of the delinquent. That was no doubt a case of confiscation, but it would seem to follow on the same principle that there can be no seizure of any interest in the property other than that of the delinquent. It has been pointed out also that section 514 (3) of the Code of Criminal Procedure, which deals with a warrant for attachment to realize a security, states that the warrant

"shall authorize the attachment and sale of any movable property."

But, on the other hand, it is pointed out for the Crown that the Form prescribed for this warrant, No. 52, runs :

"This is to authorize and require you to attach by seizure movable property belonging to the said . . ."

(1) (1907) 11 M.L.A. 222, 228.

(1) A.I.R. 1930 Mad. 1017.

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While I do not think it is safe to rely too much on Forms in the appendix which are merely in the nature of general directions, I think there is considerable force in the argument that the Form under section 386 has been deliberately altered apparently to correspond with the change in the wording of the section. On general principles also I consider that the Crown has no right to anything more in joint movable property than the delinquent himself had, and it cannot deprive the co-owners, by seizing property, of their right of possession in it. The correct course is, I take it, that laid down in Order XXI, rule 47 of the Code of Civil Procedure. If necessary, either a receiver can be appointed for the delinquent's share, or a prohibitory order can be issued against him. His interest in the property can then be brought to sale. I would therefore hold that the attachment of the property in this case by way of seizure is wrong and that it should be proceeded against as laid down in the Civil Procedure Code, Order XXI, rule 47. The properties seized including E schedule properties should be meanwhile returned to the petitioners with a prohibitory order on the convicted accused.

As regards the onus of proof, the lower Court has fallen into a natural error in making the presumption that the property is joint. After the ruling of the Privy Council in *Annamalai Chetty v. Subramanian Chetty*(1), it is clear that the burden of proving in an action for partition of joint family property that any particular item of property is joint primarily rests upon the plaintiff. However, I should hold in the present case that, as the procedure which has been laid down in section 88 must be followed in the absence of any special rules framed by Government under section 386 (2), the

(1) (1928) 56 M.L.J. 435, 440 (P.C.).

onus in such a case should be regarded as lying in the same way as it does upon claimants to attached property under the Civil Procedure Code. That is to say, the mere fact of attachment throws the onus upon the claimants so that in the result the lower Court was correct in throwing the onus of proof on the claimants. They should, however, be allowed to adduce evidence as to the separate possession of schedules C and D property and on that evidence the Court will pass final orders. The order as regards schedule E properties is upheld in so far as the decision that they are joint family properties is concerned.

K.N.G.

APPELLATE CRIMINAL.

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

[IN THE MATTER OF THIRUVENGADASWAMI, A MINOR.]

RAMAMMAL, PETITIONER,

v.

VIJAYARAGHAVALU AND ANOTHER, RESPONDENTS.*

Code of Criminal Procedure (Act V of 1898), sec. 491—Habeas Corpus proceedings—Power of the High Court to award costs.

The High Court has no power to award costs in proceedings under section 491 of the Code of Criminal Procedure. Costs are a creature of statute or statutory rules.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be

* Criminal Miscellaneous Petition No. 471 of 1928.

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pleased to issue a writ of *Habeas Corpus* to the respondents therein to produce the body of the petitioner's unmarried minor son Thiruvengadaswami in Court and also to issue an injunction restraining the said respondents from celebrating the marriage of the said minor on the 24th June 1928 or on any other day pending the petition.

K. S. Desikan for petitioner.

V. V. Srinivasa Ayyangar and *C. Sarangaraja Ayyangar* for respondents.

The JUDGMENT of the Court was delivered by

COUTTS
TROTTER C.J.

COUTTS TROTTER C.J.—This petition is withdrawn. We very much regret to come to the conclusion that we have no power to grant costs *proprio motu*. In some ways perhaps it is to be regretted that we have not, because a lot of these applications are so thoroughly frivolous—I do not say anything about this one—that I think the losers ought to be penalized for vexatious proceedings. However, costs are a creature of statute or statutory rules and, in the absence of either in this case, we must hold that we have no jurisdiction to award costs.

K.N.G.

