



35

THE INDIAN LAW REPORTS

MADRAS SERIES

CONTAINING

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

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JUDGES OF THE HIGH COURT

1933

1ST JANUARY TO 31ST DECEMBER.

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1933

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CERTIORARI—Madras Estates Land Act (I of 1908), Ch. XI—Proceedings of Board of Revenue under—Writ of certiorari in respect of—Issue by High Court of—Jurisdiction—Grounds—Irregularity of procedure if and when one of—Sec. 172 of Madras Estates Land Act—Revision of record by Board itself—Jurisdiction—Irregularity of procedure or—Writ of certiorari in respect of—Sec. 173 (3) (d) of Madras Estates Land Act—Rent settled under ss 168 to 171—Correctness of—Civil suit impugning—Maintainability of—Sec. 171—Appeal under—Hearing of parties in—Failure—Effect—Record of rights under Chapter XI of Madras Estates Land Act—Lands included in, whether pinnai or not—Failure to enquire into question of—Writ of certiorari in respect of. The High Court has power, in proper cases to issue a writ of certiorari in respect of proceedings of the Board of Revenue under Chapter XI of the Madras Estates Land Act. *Per RAMESAM J.*—An executive body can sometimes discharge a judicial function and an executive act may also partake of a judicial character. As regards the functions of the Revenue Officer under Chapter XI of the Madras Estates Land Act, though the main purpose is to carry out an executive act, namely, the preparation of the record of rights including settlement of rent, parts of them undoubtedly are of a judicial character so as to make those functions acts of a tribunal. The determination of those portions of the record in a judicial manner is ancillary and necessary for the main executive work of preparing the record of rights including settlement of rents. *Per PAKENHAM WALSH J.*—The settlement of rents, whether in the first instance by the Revenue Officer or finally by the Board of Revenue, is an act deciding disputes between the parties and also imposing liabilities and it is therefore liable to be interfered with by a writ of certiorari. Every action of an executive officer under Chapter XI of the Madras Estates Land Act is not however, liable to be interfered with in certiorari. *Held by RAMESAM AND PAKENHAM WALSH JJ.*—The High Court will not issue a writ of certiorari on the ground of an irregularity of procedure on the part of the Board of Revenue, unless it is satisfied that that irregularity has led to some substantial injury. *Per RAMESAM J.*—The phrase “direct the revision” in section 172 of the Madras Estates Land Act cannot enable the Board to proceed to revise the record itself but can only mean that it should direct the revision by some other officer. The “some other officer” revision by whom is to be directed can only be the Revenue Officer who made the original settlement. It cannot mean the confirming authority under section 170 or the superior revenue authority which hears appeals relating to objections made under section 169. Where the Board of Revenue, after dismissing an appeal under section 171 of the Madras Estates Land Act, took up the matter of its own motion and passed an order reducing the rate of rent by three annas in the rupee throughout, *held* that there was an irregularity of procedure on the part of the Board of Revenue. *Per PAKENHAM WALSH J.*—The Board of Revenue does not exceed its jurisdiction when under section 172 it revises the record of rights itself instead of sending back the record of rights to the Revenue Officer for revision. *Held by RAMESAM AND PAKENHAM WALSH JJ.*—Where the Board of Revenue, after dismissing an appeal under section 171 of the Madras Estates Land Act, took up the matter of

its own motion under section 172 and passed an order reducing the rate of rent by three annas in the rupee throughout, *held* that, even if the Board of Revenue had no power under section 172 to revise the record itself and could only send it to the Revenue Officer for revision, no substantial injury could result from the irregularity in the procedure and therefore a writ of certiorari ought not to be issued. The Board will order the revision on certain lines and the Settlement Officer will have no choice except to follow the directions laid down by the Board. Consequently for all practical purposes the record will be made in accordance with the directions of the Board. Therefore the difference between revising the record itself and ordering its revision is largely formal. *Per RAMESAM J.*—*Quare* whether a new rate of rent fixed by the Revenue Officer under section 168 or 169, or the amendment made by the confirming authority under section 170, or by the Board, if any, under section 171, of the Madras Estates Land Act, can be questioned before the Civil Court in a suit brought under section 173 (3) (d) of the Act. *Per PAKENHAM WALSH J.*—*Semle*, a suit cannot be brought in the Civil Court under section 173 (3) (d) on the ground that the rent settled under sections 168 to 171, was not correct. The words “rent lawfully payable at the time the record is being prepared” in section 165 (e) of the Act cannot possibly mean the fair rent subsequently to be settled by the Revenue Officer. *Held by RAMESAM AND PAKENHAM WALSH JJ.*—Disposing of an appeal by the Board under section 171 of the Madras Estates Land Act without hearing the parties is not *ultra vires* or bad for illegal exercise of jurisdiction. All pinnai lands are excluded from the Madras Estates Land Act and no record of rights under Chapter XI of the Act can be made with regard to them. When a question arises as to whether certain lands are pinnai or not the Board of Revenue must adjudicate upon it, and, if the lands are found to be pinnai, they ought to be excluded from the record of rights. Failure to enquire into the question is failure to exercise jurisdiction vested under Chapter XI of the Act which justifies the issue of a writ of certiorari. It is no adjudication merely to say conditionally that pinnai lands should be exempted.

Zamindarini of Mandasa v. Ryots of Mandasa Zamindari ... (1933)
I.L.R. 56 Mad. 579

CIVIL COURTS ACT (MADRAS) (III OF 1873), SEC. 14:—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXI, R. 63 ... 716

CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 47—Execution of decree—Sale in, of property attached before judgment—Application for—Right to intervene in—Purchaser of some property under decree in another suit filed after attachment before judgment, purchase, however, being prior to application for sale, has—Intervenor's decree and purchase attached by applicant for sale as being fraudulent and collusive and benami—Executing Court if bound to decide question or can refer applicant to a regular suit.] The appellant, who had attached before judgment the immovable property of his judgment-debtor, filed, after obtaining a decree in his suit, an execution petition for the purpose of bringing the attached property to sale. The respondent was a purchaser of the same property from one M, who had in the meantime, but subsequent to the attachment before judgment, filed a suit against the same judgment-debtor and purchased the property in execution of the decree therein. The respondent intervened in the execution petition filed by the appellant and filed an execution application asserting his right to the property and resisting the execution of the appellant's decree. The appellant urged that the decree obtained by M was fraudulent and collusive, that the respondent was a benamiar for the judgment-debtor and that in point of fact the property in question continued to be in the possession of the latter. The Court below allowed the respondent to intervene in the execution petition filed by the appellant, but without deciding the question raised by the appellant referred him to a regular suit for the purpose of getting rid of the decree obtained by M and the sale

held in pursuance of it. *Held* that the respondent was the representative of the judgment-debtor and that, as the question was one relating to the execution of the appellant's decree, the respondent had properly been allowed to intervene under section 47 of the Code of Civil Procedure in the appellant's execution petition. *Held further* that the Court below ought to have decided the question raised by the appellant in execution under section 47 and ought not to have referred him to a regular suit for the purpose. Paragraphs one and two of section 47 should be read together and under them, when once it is held that resort to section 47 is the proper remedy, the Court has no option but is bound to decide the question in execution under that section.

Seetharaman Chettiyar v. Chidambaram Chettiyar. (1933) I.L.R. 56 Mad. 447

CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 47—"Suit in"—Meaning of:—See HINDU RELIGIOUS ENDOWMENTS ACT (MADRAS) (II OF 1927), SEC. 70 ... 712

... SEC. 47:—Actual contest in execution between judgment-debtor and auction-purchaser—Decree-holder and judgment-debtor adversely affected—Second appeal:—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXI, R. 92 ... 808

... SEC. 54—Applicability of—*Portion of undivided estate—Partition of—Decree for, if falls within sec. 54.* Section 54 of the Code of Civil Procedure refers to the partition of an estate assessed to the payment of revenue and not necessarily to the partition of such an estate accompanied by apportionment of the revenue. Where the plaintiff and the defendant are entitled to a portion of an undivided estate, a decree directing that that portion should be divided into two equal halves does not fall within the terms of section 54. A share of an estate is not equivalent to a share of a portion of an estate; when the decree relates to the separate possession of a share of a portion, that decree does not fall within the terms of section 54.

Srinivasathathachar v. Srinivasathathachar ... (1933) I.L.R. 56 Mad. 443

... SEC. 64:—See INSOLVENCY. (P.C.) 405

... SEC. 65—History of:—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908) O. XXI, R. 92 ... 808

... SEC. 110—Subject-matter of appeal—Value of—Post-plaint interest if included in—Plaintiff's appeal—Defendant's appeal—Distinction.] A plaintiff cannot insist upon the award of post-plaint interest as something to which he possesses a legal right. The award of such interest and the rate at which it is to be awarded are both left to the discretion of the Court under section 34 of the Code of Civil Procedure. Such interest cannot, therefore, in any strict legal sense, be deemed to be part of the plaintiff's claim against the defendant, or part of "the subject-matter in dispute on appeal to His Majesty in Council" within the meaning of section 110 of the Code of Civil Procedure. If the plaintiff's suit is dismissed by the High Court on appeal, the maximum value to be attached to his appeal to the Privy Council is the value of his suit as stated in the plaint and accepted by the trial Court; and it can make no difference whether that Court allow the claim in whole or in part or dismissed it altogether. Interest accruing subsequent to the institution of the suit cannot be included in ascertaining the "amount or value of the subject-matter in dispute on appeal to His Majesty in Council." Difference in this respect between the positions of a plaintiff and of a defendant pointed out.

Venkatathirisami v. Appaswami ... (1933) I.L.R. 56 Mad. 886

CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 115:—See COURT FEE ... 744

... SEC. 141:—See MORTGAGE SUIT ... 310

... SEC. 145—Policy underlying—*Sureties not personally liable—Applicability of section to such cases—Appealability of orders of Court against such sureties.* Section 145 of the Code of Civil Procedure, 1908, applies only to cases where sureties have made themselves personally liable. But even where sureties have not made themselves personally liable, the Courts possess a general power in regard to executing orders made against sureties, and, in such cases, having regard to the decision of the Privy Council in *Raj Raghubar Singh v. Jai Indra Bahadur Singh*, (1919) I.L.R. 42 All. 158 (P.C.), and the policy underlying section 145 the sureties' remedy by way of appeal subsists.

Ayyaswami Ayyar v. Sivakki Ammal ... (1933) I.L.R. 56 Mad. 909

... SEC. 145, CL. (c)—*Judgment-debtor paying decree amount in Court—Surety bond filed in suit under orders of Court thereafter—Principal committing default—Order for execution against surety—Maintainability of, under sec. 145, cl. (c).* In a suit on a mortgage bond a decree was passed and the judgment-debtor deposited the decree amount in Court. On an application by the guardian of the minor plaintiff to withdraw the amount from Court, the Court ordered that the amount may be withdrawn and, after deducting the expenses, the remaining amount should be invested in Government promissory notes and deposited in Court and the same should remain in Court till the plaintiff attained his majority. Security was demanded for the due performance of the above-mentioned conditions by the guardian. A surety bond was executed and the amount was allowed to be withdrawn by the guardian who committed default. On an application taken out by the plaintiff after he attained majority for an order directing the surety to deposit the said sum in Court, *held*, that section 145 of the Code of Civil Procedure applied and an order for execution could be made against the surety. *Kurugodappa v. Soogamma*, (1917) I.L.R. 41 Mad. 40, distinguished.

Sankara Mahadeva Setty v. Sanyasayya ... (1933) I.L.R. 56 Mad. (F.B.) 687

... O. IX:—See MORTGAGE SUIT. 310

... O. XXI, R. 2—*Adjustment of decree—Promise by judgment-debtor to do something at future date—Acceptance by decree-holder of, as immediate adjustment in satisfaction of decree—Legal adjustment of decree if.* A transaction which extinguishes a decree as such in whole or in part is an adjustment of the decree within the meaning of rule 2 of Order XXI of the Code of Civil Procedure. A promise to do something in future is legal consideration, and there is no legal impediment in the way of a decree-holder accepting a mere promise that the judgment-debtor will do something at some future date as a legal and immediate adjustment in satisfaction of his decree. Where the decree-holder accepts such a promise, there is a new contract amounting to a legal adjustment of the decree on the basis of which the judgment-debtor is entitled to apply to the Court to enter up satisfaction of the decree. *Lachman Das v. Baba Ramanath Kalikamlivala*, (1921) I.L.R. 44 All. 258, explained. *Ramakrishna Kadirvelusami v. Eastern Development Corporation, Ltd., London*, (1917) 43 I.C. 537, distinguished. *Muthu Vaithilinga Mudaliar v. Subbaraya Chettiar*, (1930) M.W.N. 137, considered.

Ramanarasu v. Venkata Reddi ... (1933) I.L.R. 56 Mad. 198—

... O. XXI, BR. 2 AND 15—*Uncertified adjustment—Plea of—Applicability of bar to—Decree-holder and third person, such as a purchaser from judgment-debtor—Transaction pleaded*

as an adjustment being between—Joint decree-holders—Application for execution by one of—Plea of uncertified adjustment by other decree-holders—Entertainment of—Power of Court as to.] The bar under rule 2 of Order XXI of the Code of Civil Procedure to a plea by the judgment-debtor of an uncertified adjustment applies as much to a case where the transaction pleaded as an adjustment is between the decree-holder and a third person, such as a purchaser from the judgment-debtor, as to a case where such transaction is between the decree-holder and the judgment-debtor himself. The judgment-debtor himself cannot plead an uncertified adjustment even under rule 15 of Order XXI of the Code. But, as the Court has, under that rule, to find sufficient cause for allowing the decree to be executed by one of several joint decree-holders it is entitled to hear what the other decree-holders have to say, and, if they say that the application of their fellow decree-holder is a fraud, nothing in rule 2 of Order XXI or any other provision of law prevents the Court from disallowing execution.

Gurusamy Goundan v. Sivanmalai Goundan ... (1933) I.L.R. 56 Mad. 316

CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXI, RR. 18 AND 20—

Mortgage decree and money decree—Set-off of one against the other—Permissibility—Conditions.] The mere fact that the decrees in which the set-off is sought are mortgage decrees, or one of the two decrees is a mortgage decree, does not by itself amount to an objection to the set-off claimed. A mortgagee against whom a money decree has been obtained by his mortgagor can claim to set-off that decree against a decree for sale obtained by him against his mortgagor on foot of his mortgage in a case in which, under the decree for sale, the mortgagor is liable for all the deficiency that may remain after the sale. The position will be different if, under the decree for sale, the mortgagor is not liable for the deficiency. In such a case it cannot be said that there is any decree for money against the mortgagor.

Venkata Reddi v. Doraiswami Pillai ... (1933) I.L.R. 56 Mad. 339

..., O. XXI, r. 63—*Suit under—Subject-matter—Suit land and not the amount of debt—Proper method of valuation—Court Fees Act (VII of 1870), sec. 7 (v)—Value for purposes of jurisdiction—Madras Civil Courts Act (III of 1873), sec. 14—Not confined to suits mentioned in sec. 3 of the Suits Valuation Act (VII of 1887).*] In a suit brought under Order XXI, rule 63, of the Code of Civil Procedure by an unsuccessful claimant for a declaration that the suit land was not liable to be attached in execution of a decree obtained against his vendor by a third party, held, that, even assuming that in such a suit the subject-matter was the suit land and not the amount of the debt for which it was attached in execution, the value of the land for the purposes of jurisdiction was not its market value but its value computed according to section 7 (v) of the Court Fees Act. There is nothing in the Suits Valuation Act which prevents the application of section 14 of the Madras Civil Courts Act which declares that when the subject-matter of a suit is land the proper method of valuing it for purposes of jurisdiction is under section 7 (v) of the Court Fees Act. Section 14 of the Madras Civil Courts Act is not confined to suits mentioned in section 3 of the Suits Valuation Act.

Arumuga v. Venkatachala Pillai ... (1933) I.L.R. 56 Mad. 716

..., O. XXI, r. 89—*See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXI, R. 92* ... 808

..., O. XXI, R. 90—*See LIMITATION ACT, (INDIAN) (IX OF 1908), SEC. 18* ... 784

..., O. XXI, R. 90—*Material irregularity—Sale proclamations inaccurate and misleading, though superfluous—Affixing of—Material irregularity if—Substantial loss by reason of irregularity—Direct evidence of—Necessity—Execution sale—Conduct of—Spreading over sale for a long period and continuing it from day to day*

during that period—Termination of sale—Fixing of date for—Impropiety of—Court-hours—Continuance of sale beyond—Order for continuing sale until a particular day does not mean.] In a case in which two estates comprising a number of villages were ordered to be sold in two lots, i.e., each estate in one lot, a proper proclamation, stating that each estate would be sold as a whole in one lot, was duly published in accordance with law; it was put up in the Court-house, in the Collector's office and in the proper place in each of the two estates. Proclamations of sale were however also affixed in every village in the two estates, but what was described in each of those proclamation as the subject of the sale was the particular village in which that copy was affixed and not the lot of which that village was a part. Held that the affixing in the villages of such inaccurate and misleading, though superfluous, proclamations was a material irregularity within rule 90 of Order XXI of the Code of Civil Procedure. Under rule 90 of Order XXI of the Code, as it now stands, the absence of direct evidence, that is the evidence of some witness coming before the Court and saying that an irregularity in the conduct or publication of a sale has caused substantial loss, will not necessarily prevent a reasonable inference being drawn that by such an irregularity substantial loss has been caused to the judgment-debtor. A Court-auction ought not to be spread over a long period and continued from day to day during that period. *Per VENKATASUBBA RAO J.*—It is wrong to fix a date for the termination of a Court-auction. *Per REILLY J.*—An order of Court that a sale shall be continued until a particular day means that it shall be stopped at the end of Court-hours on that day and not that it should be continued beyond the Court-hours on that day.

Sivaskandaraju v. Ramachandra Deo ... (1933) I.L.R. 56 Mad. 356

CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXI, R. 92—Confirmation of sale—Duty of Court—Subsisting decree—Necessity of—Sec. 47, Civil Procedure Code—Second Appeal—Contest between auction-purchaser and judgment-debtor—Sec. 65 and O. XXI, r. 94, Civil Procedure Code.] Under Order XXI, rule 92 of the Code of Civil Procedure, where an application is made under rules 89, 90 or 91 to set aside a valid sale, the Court is bound to confirm the sale and cannot refuse to do so on the ground that there was no subsisting decree at the time of the confirmation or on any other ground; for the language of the rule is imperative. History of section 65 and Order XXI rule 94, discussed. A person who impeaches the validity of a sale cannot file an application under Order XXI, rule 89. The deposit of the decree amount under clause (b) of Order XXI, rule 89 of the Code of Civil Procedure is obligatory even in a case in which the decree, in pursuance of which the sale sought to be set aside was held, has been set aside prior to the date of the application. A second appeal lies where the question is one relating to execution and is one in which the decree-holder and judgment-debtor are adversely interested through the actual contest is between the auction-purchaser and the judgment-debtor.

Sorimuthu Pillai v. Mathukrishna Pillai ... (1933) I.L.R. 56 Mad. 808

..., O. XXI, R. 95—*History of—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXI, R. 92* ... 808

..., O. XXII, R. 1—*Plaintiff—Mortgagee from—Representative character of, for being allowed to continue suit and appeal.] Under Order XXII, rule 10, of the Code of Civil Procedure, a mortgagee from the plaintiff of his interests in a suit can come on the record as his representative and be allowed to continue the suit and appeal. Maharaja Sir Manindra Chandra Nandi v. Ram Lal Bhagat, (1922) I.L.R. 1 Pat. 581 (P.C.), distinguished.*

Sreeramamurthi v. Jayarajalakshmiamma ... (1933) I.L.R. 56 Mad. 469

..., O. XXIII, R. 1—*Landlord against tenant—Ejectment suit by—Withdrawal without leave of Court owing to absence of notice to quit—Subsequent suit after giving requisite notice—Maintainability of—“Subject-matter”—Meaning of.] Where an ejectment*

suit by a landlord against a tenant was, owing to the absence of the requisite notice to quit, withdrawn without obtaining leave of the Court to institute a fresh suit in respect of the subject-matter of the said suit and a subsequent suit was filed by the landlord after giving the necessary notice, held that the subsequent suit was not barred under Order XXIII, rule 1 of the Code of Civil Procedure. The words "subject-matter" in the said rule mean "the series of acts or transactions alleged to exist giving rise to the relief claimed." *Rakhmabai v. Mahadeo Narayan*, (1917) I.L.R. 42 Bom. 165, followed.

Ohenchuram Naidu v. Baharuddin Sahib ... (1933) I.L.R. 56 Mad. 163

CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXXII, r. 7—*Applicability to execution proceedings.* Order XXXII, rule 7 of the first Schedule of the Code of Civil Procedure (Act V of 1908) applies to execution proceedings.

Muthalakkammal v. Narappa Reddiar ... (1933) I.L.R. 56 Mad. (F.B.) 430

... O. XXXVII, r. 2:—*See NEGOTIABLE INSTRUMENT* ... 398

... O. XL, r. 1—*Receiver—Appointment of, on application by simple mortgagee who had lost personal remedy against mortgagor—Letters Patent (Madras), cl. 15, if controlled by sec. 104 of the Code of Civil Procedure.* Even in a case where no personal relief subsists against the mortgagor and his properties, the Court has jurisdiction to order the appointment of a receiver in the suit of a simple mortgagee. Section 104 of the Code of Civil Procedure does not control clause 15 of the Letters Patent and as such an appeal lies from the judgment of a single Judge of the High Court in an appeal preferred under Order XLIII, rule 1, clause (s) of the Code of Civil Procedure. Case law on both the above points reviewed.

Paramasivam Pillai v. Ramaswami Ohettiar... (1933) I.L.R. 56 Mad. 915

... O. XLIV, r. 1, PROVISOR—*Leave to appeal in forma pauperis—Grant of—Condition—Security for costs—Order for, against pauper appellant—Grounds for making.* The proviso to Order XLIV, rule 1, of the Code of Civil Procedure is mandatory, and, unless, upon a perusal of the application, the judgment and the decree appealed from, the Court is satisfied that the decree appealed from is contrary to law or otherwise erroneous or unjust, it is bound to dismiss the application. Neither the fact that the appeal raises a substantial question of law nor the fact that *prima facie* the appellant has a good case or an arguable point is a ground for granting leave to appeal *in forma pauperis*. *Chennamma, In re*, (1929) I.L.R. 53 Mad. 245, dissented from. The grounds on which leave to appeal *in forma pauperis* is granted should be briefly stated. In considering whether security for costs should be ordered in a case in which leave to appeal *in forma pauperis* has been granted, it is permissible for the Court to peruse the judgment which is being appealed against and to see whether there are circumstances which would justify an order for security for costs.

Narayana Rao v. Veerayya ... (1933) I.L.R. 56 Mad. 323

COMPANY—Allotment of shares in—Contract for—Communication to shareholder of allotment—Necessity—Entry of his name in company's register—Sufficiency of—Interest Act (XXXII of 1839), sec. 1—Amount deposited by shareholder for allotment of shares—Recovery by him of, on non-allotment—Interest on amount—Right to, only from date of demand. An application for shares in a company is an offer and like any other offer must not only be accepted but the acceptance must be communicated to the person making the offer. A shareholder to whom the fact that an allotment of shares has been made has not been communicated is not bound by any contract. The mere entry of his name in the company's register is not sufficient for this purpose. A sum of money payable by a company to a shareholder in respect of the amount deposited by him with it for the allotment to him of certain shares in the company, which shares were in fact never allotted, is not

"a debt or sum certain payable at a certain time by virtue of a written instrument" within the meaning of section 1 of the Interest Act (XXXII of 1839). The sum is payable "otherwise" (i.e., as money had and received) and interest thereon is therefore recoverable only from the date of demand.

Bellary Electric Supply Co., Ltd. v. Kunniram Rowwoothmal ... (1933) I.L.R. 56 Mad. 391

COMPANY—Main objects of—Illegal purpose—Winding up—Lottery—Definition of.] The objects of a company as disclosed in its Memorandum of Association were unobjectionable and one of the objects was to raise donation-funds to carry out charitable objects. By its Articles of Association certain objects were introduced which had the effect of making the company conduct a lottery or keep an office for the purpose of drawing a lottery or publish proposals relating to the drawing of such a lottery, the two latter being offences punishable under section 294-A of the Indian Penal Code. Held, that the company should be wound up since its main object was an illegal purpose. The company should not be allowed to carry on its business even after removing the obnoxious features from its objects as by such a removal the substratum of the company would go. A lottery is "a distribution of prizes by lot or chance." Distinction between a "lottery" and a "wagering contract" pointed out. *Narayana Ayyangar v. Vallachami Ambalam*, (1927) I.L.R. 50 Mad. 696 (F.B.), explained.

Universal Mutual Aid and Poor Houses Association, Limited v. Thoppa Naidu ... (1933) I.L.R. 56 Mad. 26

CONTRACT—Sale of goods—Delivery by instalments—Contract goods mixed up with defective goods in regard to one instalment—Buyer's right on—repudiation of whole contract by him—Subsequent complaint with regard to defective goods—Buyer's right of—Seller not accepting repudiation but keeping contract alive—Liability of seller in case of.] Where, under a contract for the sale of bales of cotton by instalments, the seller tenders to the buyer in respect of one of the instalments bales according to the contract mixed with defective bales, the buyer is entitled to reject not only the defective bales, but the whole instalment. Where the buyer does not state that he rejects the instalment because good bales were mixed with bad bales, but prefers to repudiate the whole contract, and the time in which the seller might replace the defective bales has expired and there can be no further question of replacement, the buyer cannot thereafter for the first time complain that some of the bales were defective. Where, under a contract for the sale of goods by instalments, the buyer improperly rejects one instalment and repudiates the whole contract, the seller is entitled to accept the repudiation of the contract and to sue the buyer regarding the remaining instalment or instalments at once. If, without doing so, he elects to keep the contract alive as regards the remaining instalment or instalments, he thereby preserves the mutual obligations of the parties intact. One of these obligations is that he should tender the remaining instalment or instalments; and, if he does not do so, he cannot claim to retain the buyer's earnest money on account of that instalment or those instalments.

Ramier v. Ramudu Ayyar ... (1933) I.L.R. 56 Mad. 304

... *Sale of ready goods in a bonded warehouse—Contract silent as to who should pay duty—Increase of duty between date of sale and delivery—Liability of buyer to pay—Indian Tariff Act (VIII of 1894), sec. 10—"Article duty-paid"—Meaning of—Sea Customs Act (VIII of 1875), sec. 37—Duty paid on goods intended for home consumption—Goods allowed to remain in bonded warehouse—Increase of duty before delivery taken—Liability to pay increased duty under sec. 37.]* In the case of a sale of ready goods in a bonded warehouse, the seller is entitled, in the absence of a contract to the contrary fixing the liability as between the seller and buyer to pay the duty on the said goods, to refuse to give delivery of the said goods if the increase of duty on the said goods between the date of sale and delivery is not paid by the buyer. The words "article duty-paid" in section 10 of

the Indian Tariff Act, 1894, mean "article in respect of which the liability to pay duty is on the seller and he sells the article duty-free," and do not mean "article in respect of which duty has been paid at the time of the making of the contract". Under section 37 of the Sea Customs Act (VIII of 1878) even if the old duty had been paid by the seller and the goods had been allowed to remain in the bonded warehouse and subsequent to the payment of the old duty a new duty, the increased duty, had been put upon the goods, then that duty would have to be paid if and when the goods were removed from the warehouse, if the purpose for which the goods were removed was home consumption.

Peer Mohammad Essack v. Sukur Ganny ... (1933) I.L.R. 56 Mad. 334

CONTRACT ACT (INDIAN) (IX OF 1872), ss. 102, 103, 172 AND 178—Transfer of Property Act (IV of 1882), sec. 137—Combined effect of—Railways Act (Indian) (IX of 1880), sec. 57—Effect of—Presidency-towns Insolvency Act (III of 1901), sec. 52 (2) (c)—Railway receipt in respect of goods in the control of a carrier transferred to a bank with a letter of lien—Absence of notice by bank to carrier about the security—Effect of, on the question of goods being in the order or disposition of the insolvent.]

The combined effect of sections 102, 103, 172 and 178 of the Indian Contract Act and section 137 of the Transfer of Property Act is to make a pledge by an owner of goods of the railway receipts relating to those goods to have the effect of pledging the goods and no different effect is produced by section 57 of the Indian Railways Act. In a case where the insolvent had transferred the documents of title to goods to a bank and had given a letter of lien declaring that the goods were deposited with them by way of security and the goods were not, at the commencement of insolvency, in any place or warehouse over which the insolvent had control, but in a carrier's railway wagon or goods-shed, the goods could not be said to be "in the possession, order or disposition of the insolvent . . . by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof" within the meaning of section 52 (2) (c) of the Presidency-towns Insolvency Act, even though the bank had not given notice of the security in their favour to the carrier, inasmuch as it was not obligatory on the carrier under section 57 of the Indian Railways Act to deliver the goods without the production of the railway receipts relating to the goods. "True owner" in section 52 of the Presidency-towns Insolvency Act can include a person having a lien or equitable charge, as well as the person having the legal title.

Mercantile Bank of India, Ltd. v. Official Assignee, Madras ... (1933) I.L.R. 56 Mad. 177

CO-OPERATIVE SOCIETIES ACT (II OF 1912)—Madras Co-operative Societies Act (I of 1932)—Co-operative Bank—Vakil of—Dispute between, relating to Vakil's acts as Bank's Vakil—Dispute if one to which either of said Acts applies—Jurisdiction of Registrar of Co-operative Societies to deal with the matter—Vakil also member, director and legal advisor of Bank—Effect—Legal Practitioner member of a Society—Acting by, as Society's Vakil—Propriety of—Practitioner also Legal Advisor of Society—Effect.]

The appellant, a legal practitioner, was a member, a director and the legal advisor of a Co-operative Bank. He was, also the Vakil of the Bank conducting litigation on its behalf. He was, however, not a whole-time Vakil of the Bank receiving as his remuneration a fixed salary but a Vakil appearing in each case for a fee. Held that a dispute between the appellant and the Bank arising out of matters relating to the appellant's acts as the Bank's Vakil was not a dispute to which either the Co-operative Societies Act (II of 1912) or the Madras Co-operative Societies Act (VI of 1932) applied and that the Registrar of Co-operative Societies had therefore no jurisdiction to deal with the matter. The appellant, in his capacity of Vakil to the Bank, was not an officer, agent or servant of the Society and what he did in that capacity was not done in his capacity as a member of the Society at all. The fact that he at the same time occupied the other positions already specified in the Society, however irregular his

conduct might be in occupying them, could not in the least degree affect the question as to the nature of the dispute between him in his capacity of Vakil to the Bank and the Bank. Merely because a legal practitioner is a member of a Society, he is not prevented by any rule of professional etiquette from accepting instructions from the Society of which he is a member. There can be no impropriety in his doing so provided that his engagement is not directly due to his being a member. The appellant's conduct in legally advising the Society and appearing as its Vakil in both capacities for remuneration whilst being a director was most improper.

Krishna Ayyar v. Secretary, Urban Bank, Calicut ... (1933) I.L.R. 56 Mad. 970

COURT-FEE—Order in favour of plaintiff in regard to—Revision against—Competency of, under sec. 115 of Code of Civil Procedure or sec. 107 of Government of India Act—Government not a party to suit—Revision by—Right of.]

Neither under section 115 of the Code of Civil Procedure nor under section 107 of the Government of India Act has the High Court power to interfere in revision with an order in regard to court-fee which is in favour of the plaintiff. *Quaere*—Whether, in view of the fact that Government was not a party to the suit, a revision petition presented by it against an order in regard to court-fee was at all competent.

Secretary of State for India v. Raghunathan ... (1933) I.L.R. 56 Mad. 744

COURT-FEES ACT (VII OF 1870), SEC. 7 (iv-A) AND (v)—Applicability of—Vendor—Setting aside of sale deed and recovery of possession of property covered by it—Suit for—Court-fee payable in.]

In a suit by a vendor to set aside a sale deed and for the recovery of possession of the property covered by the deed, it is enough if the plaintiff pays court-fee under section 7 (iv-A) of the Court Fees Act. He need not also pay court-fee on the relief with regard to possession under section 7 (v) of the Act, because the claim with regard to possession is only ancillary to the main claim which is the setting aside of the sale deed.

Thangachi Ammal v. Moideen Maricar ... (1933) I.L.R. 56 Mad. 401

COURT-FEES ACT (INDIAN) (VII OF 1870 AS AMENDED BY MADRAS ACT V OF 1922), ss. 7 (iv) (c), 7 (iv-A) AND 7 (v)—Applicability of—Decree obtained by defendant against plaintiff—Setting aside of, and recovery of property covered by decree—Suit for—Court-fee payable on plaint in—Proviso to sec. 7 (iv)—Effect of.]

The plaintiff sued for a declaration that a previous decree obtained against him by the first defendant was void, for setting aside that decree, if necessary, and for the recovery of the immovable property covered by the decree. The plaint alleged that the previous suit was brought by the first defendant, while the plaintiff was a minor, that in that suit he was not properly represented because the guardian appointed for him had an interest adverse to his in the suit and that moreover the guardian colluded with the first defendant in that suit and enabled him by suppression of facts fraudulently to obtain a decree. Held that the suit was not a suit for a declaration and consequential relief falling within section 7 (iv) (c), but was a suit for cancellation of the previous decree falling within section 7 (iv-A) of the Court-fees Act. *Per REILLY J.*—The recovery of the property concerned being the main relief claimed in the plaint, the suit comes also within section 7 (v) of the Court-fees Act. The intention of the Legislature is that a suit in which the plaintiff prays for a decree that a previous decree obtained against him is of no effect against him on account of fraud in obtaining it and that, so far as he is concerned, that decree is wiped out however he may choose to word his prayer, comes within the new section 7 (iv-A), if the previous decree was one for recovery of money or property having a money value. The proviso to section 7 (iv) does not lay down that, if the relief sought properly falls within any other provision requiring a higher valuation or charge, that higher charge is not to be made. It merely introduces a downward limit, below which reliefs sought in respect of immovable property consequential on declaratory decrees shall not be valued. If there is a special provision in the Court-fees Act which applies to a

particular case, that special provision must be applied rather than some general classification, in which the suit may also be included, which may be more favourable to the plaintiff. *Per ANANTAKRISHNA AYYAR J.*—The proviso to section 7 (iv) does not operate with reference to section 7 (iv-A).

Venkatasiva Rao v. Satyanarayanamurthy ... (1933) I.L.R. 56 Mad. 212

COURT-FEES ACT (VII OF 1870), SEC. 7 (IV) (C), V AND XI (CC)—*Applicability of—namdar admittedly entitled to melvaram—Ejectment suit by, after due notice, in virtue of his title to kudivaram—Nature of—Court-fee payable on plaint in.* A suit by an inamdar, who is admittedly entitled to the melvaram in the suit lands comprising the inam, asserting his title to the kudivaram therein and claiming the right to reject the defendants after due notice by virtue of his title to the kudivaram, is a suit to obtain a declaratory decree (that he is entitled to the kudivaram) and consequential relief of possession within the meaning of section 7 (iv) (c) of the Court-fees Act and is to be valued accordingly for purposes of court-fee.

Sobhanadri Rao, In re ... (1933) I.L.R. 56 Mad. 314

SEC. 7 (IV) (F)—*Partnership—Accounts of—Appeal relating to—Valuation of, for purposes of court-fee—Appellant's right to give his own valuation—Amount ultimately found due to appellant larger than amount of valuation—Levying of additional court-fee in case of—Procedure for.* In an appeal relating to the accounts of a partnership the appellant, whether plaintiff or defendant, can give his own valuation under section 7 (iv) (f) of the Court Fees Act and pay court-fee on it. If the appellate Court after the hearing and consideration of the appeal comes to a conclusion in favour of the appellant in respect of a far larger amount than what he has paid court-fee for, the proper thing would be to post the case for orders and direct the appellant to pay additional court-fee and not to issue the judgment and decree until he does so.

Venkatanandam, In re ... (1933) I.L.R. 56 Mad. 705

SEC. 7 (V)—*See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXI, R. 63* ... 716

CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), SEC. 144—*Order under—Stay of—High Court's power of—Application under sec. 144 (4) not filed—Effect of—Sec. 541-A—Inherent power under—Landlord's right to evict lessee does not necessarily give jurisdiction under sec. 144.* The High Court has power to stay execution of an order, positive or negative, passed under section 144 of the Code of Criminal Procedure. Failure to apply under section 144 (4) for the rescission or alteration of the order under section 144 is no bar to the filing of a revision petition against it. The jurisdiction conferred by section 144 (4) is neither appellate nor revisional jurisdiction but a special jurisdiction conferred by a special provision of the statute. The fact that under the terms of a lease the lessees are liable to eviction in a Civil Court does not entitle the landlord to an order against the under section 144 unless by no other means can a serious breach of the peace be prevented.

Pitchay v. Atham Sammathi ... (1933) I.L.R. 56 Mad. 149

SEC. 162—*Applicability of—Statements to police during investigation of an offence other than the one for which the accused is under trial.* Where an accused person wishes to cross-examine a prosecution witness with regard to statements made by that witness to the police during the investigation of an offence other than the one for which the accused is under trial, neither section 162 of the Code of Criminal Procedure nor the proviso to that section has any application. A statement made to the police is as good evidence as a statement made to any other person save for certain exceptions to be found in the Indian Evidence Act and in the Code of Criminal Procedure.

Subbayya v. Veeraya ... (1933) I.L.R. 56 Mad. 154

CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), SEC. 162—*Use of statement recorded under—For contradiction only—Omission from such statements of a statement made at the trial is not contradiction of latter statement.* A statement made by a witness to the police in an investigation under section 162 of the Code of Criminal Procedure cannot be used when the witness is under examination in an inquiry under Chapter XVIII, Criminal Procedure Code, in order to show that while giving evidence the witness has made assertions which he did not make when he was examined by the police. Statements recorded under section 162 can be used at a subsequent inquiry or trial for one purpose only, to contradict the witness. An omission from a statement made under that section cannot be said to be a contradiction of a statement made in the witness box. It is not permissible to use such statements to show "development" of the prosecution case.

Ponnusami Chetty, In re ... (1933) I.L.R. 56 Mad. 475

SEC. 162—Chapter VIII—Enquiry under—Scope of—Statements to Police—Admissibility of. The Police when investigating a case under the preventive sections of the Criminal Procedure Code are not acting under section 162 of the Code. An enquiry under Chapter VIII of the Code is not an enquiry into an "offence", and section 162 cannot be used to shut out statements given to the police by persons who are afterwards called as witnesses.

Hari Singh, In re ... (1933) I.L.R. 56 Mad. 987

SEC. 162:—See EVIDENCE ACT (INDIAN) (ACT I OF 1872), SEC. 114 ... 231

SEC. 403—Acquittal—Judgment of—By Magistrate having no territorial jurisdiction—Bar if, to fresh complaint on same facts filed before Magistrate of co-ordinate jurisdiction—Sec. 531—Effect of. A judgment of acquittal passed by a Magistrate cannot, by reason of the provisions of section 531, Criminal Procedure Code, be set aside on the ground of want of territorial jurisdiction, even by the High Court, in the absence of any suggestion that any failure of justice has occurred by reason of the trial having been held in a wrong area. A fortiori such a judgment cannot be ignored by another Magistrate who is not a tribunal superior to the Magistrate who passed the judgment of acquittal. Where the Subdivisional Magistrate of Vellore, who had no territorial jurisdiction to try a case, tried it and acquitted the accused, held, accordingly, that a fresh complaint filed before the Chief Presidency Magistrate of Madras on the same facts was barred by section 403, Criminal Procedure Code. *Emperor v. Doraiswamy Mudali*, (1908) I.L.R. 30 Mad. 94, approved. *Shanker Tulasiram v. Kundlik Anyaba*, (1926) I.L.R. 53 Bom. 69, dissented from.

Rathnavelu, In re ... (1933) I.L.R. 56 Mad. 996

SEC. 476 (1)—Complaint under—Necessity for the Court to record a finding that it is expedient in the interests of justice. The Court making a complaint under section 476 (1) of the Code of Criminal Procedure should record a finding that it is expedient in the interests of justice that an inquiry should be made; and should not leave this to be inferred. *Namberumal Chetti v. Nainiappa Mudali*, (1930) I.L.R. 54 Mad. 331, distinguished.

Chilukuri Ramayya, In re ... (1933) I.L.R. 56 Mad. 157

SEC. 488—Scope of—Ordinary conjugal rights—Whether sec. 488 includes. In a wife's application for maintenance under section 488 of the Criminal Procedure Code, the husband offered maintenance in his house provided she lived in a separate room and did not associate with the other family members. The lower Court upheld the wife's refusal to accept maintenance on such conditions,

and ordered the maintenance prayed for. Objection to such order being taken on revision, *Held*, that section 488 of the Code had nothing to do with ordinary conjugal rights, as "maintenance" means nothing more than appropriate food, clothing and lodging, and that the wife had no sufficient grounds for refusing the offer, as she could not claim to be treated "as a wife" under section 488.

Arunachala v. Anandayammal ... (1933) I.L.R. 56 Mad. 918

CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), sec. 517—*Accused charged alternately for offences of theft or receiving stolen property—Accused acquitted—Property found to be stolen—Order regarding disposal of.* An accused person was charged under section 379, Indian Penal Code, with having committed theft of two bulls, or, alternately, under section 411, Indian Penal Code, with having received stolen properties. The Magistrate, whilst finding that the property had been stolen, acquitted the accused on the ground that he was a *bona fide* purchaser and directed the bulls to be returned to the respective owners. *Held* that the bulls ought to be returned to the accused, there being no special circumstances to depart from the usual rule that where a person accused of theft is acquitted and claims as his own the property seized from him by the police and alleged to have been stolen, it should be restored to him in the absence of special reasons to the contrary.

Karuppanan v. Guruswami ... (1933) I.L.R. 56 Mad. 654

power under:—*See CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898)*, sec. 561-A—Inherent power under:—*See CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898)*, sec. 144 ... 149

CRIMINAL TRIAL—Counter-cases—Proper procedure. No hard and fast rule can be laid down with regard to the procedure to be adopted in the trial of counter cases by Criminal Courts. There is nothing irregular in a Judge trying each case to a conclusion before different assessors and afterwards pronouncing judgment in both so long as he tries the one quite independently of the facts in the other. It is necessary (1) that the trial must be separate, i.e., before different assessors and separate judgments delivered; (2) that the conclusions in each case must be founded on, and only on, the evidence in each case. If the Judge considers himself unable to detach himself from extraneous considerations a transfer may be necessary to deliver the Judge from this embarrassment. *Krishna Pannadi v. Emperor*, (1929) M.W.N. 883; (1929) 58 M.L.J. 352, explained. *Krishnamma v. Emperor*, (1929) M.W.N. 881 and *Kandregula Jaggu Naidu v. Emperor*, (1932) M.W.N. 692, considered.

Mounaguruswami, In re ... (1933) I.L.R. 56 Mad. (F.B.) 159

DECREE—Transmission for execution—Jurisdiction of transferee Court to entertain application for execution—Receipt of copy of decree by it not a condition of. The transfer of a decree to another Court for execution dates from the date when the order of transfer is made, and, when once the order of transfer is made, the Court to which the decree is transferred has jurisdiction to entertain applications for execution even though a copy of the decree has not been received by it.

Ademma v. Venkat Subbayya ... (1933) I.L.R. 56 Mad. 692

ESTATES LAND ACT (MADRAS) (I OF 1908), sec. 24—*Enhancement of rent by private contract—Permissibility—Sec. 112—Suit by ryot under—Muchilika previously executed accepting puttah containing an enhancement—Legality of—Ryot's right to contest, in the suit—Ss. 52 and 53 of the Act—Effect of.* A landholder cannot enhance the rent without a suit, and independently of the Madras Estates Land Act, by agreement with his tenant. Section 24 of that Act is absolute and peremptory, and it leaves no room for enhancement otherwise than as provided for by the Act, as for instance, by private contract. The omission of such contracts from

section 187 cannot affect the plain language of section 24. A ryot who has once given a muchilika accepting a puttah containing an enhancement is not debarred from contesting its legality in a suit filed by him under section 112 of the Act. The expression "contesting the right of sale" in that section is wide enough to allow him to raise all possible pleas, including the plea that a portion of the arrear claimed is an enhancement not as provided by the Act, and therefore an amount which cannot be claimed under the Act. Sections 52 and 53 of the Act do not warrant the view that once there has been an exchange, then for all purposes of distraint, the puttah shall be held to be valid.

Desikachariar v. Rangaswami Pillai ... (1933) I.L.R. 56 Mad. 300

ESTATES LAND ACT (MADRAS) (I OF 1908), sec. 26 (3)—*"The ryot"—"Lawful rate"—Meaning of—Tenants at will of ryoti land in possession thereof paying rent under contract enforceable at law—Grant of such land at rates of rent lower than those paid by—Binding nature of, on successor of grantor.* In 1905 the then landholder, the respondent's predecessor, made a grant of the suit lands to the appellants at rates of rent lower than those paid by the former tenants of those lands. The former tenants were tenants only at will and not having occupancy rights. The rates paid by them were paid under a contract enforceable at law. *Held* that the case was covered by section 26 (3) of the Madras Estates Land Act and that under that section the lower rate of rent paid by the appellants under the grant of 1905 was not binding upon the respondent. The words "the ryot" in section 26 (3) of the Estates Land Act refer to the ryot in possession of the land before the date of the grant who may be an entirely different person to the person to whom the grant was made. The former tenants of the suit lands, even though tenants only at will and not having occupancy rights, were in possession of ryoti land paying rent for that land and they were clearly ryots. The rates of rent paid by them having been paid under a contract enforceable at law they were lawful rates within the meaning of section 26 (3) of the Estates Land Act.

Venkataraman Garu v. Maharajah of Pittapuram ... (1933) I.L.R. 56 Mad. 486

ss. 52 AND 53—*Effect of:—See* ESTATES LAND ACT (MADRAS) (I OF 1908), sec. 24 ... 300

ss. 168 TO 171 AND 173 (3) (d)—*Rent settled under sections 168 to 171—Correctness of—Civil Suit impugning—Maintainability of:—See CERTIORARI* ... 579

sec. 171—*Appeal under—Hearing of parties in—Failure—Effect:—See CERTIORARI* ... 579

sec. 172—*Record of rights—Revision of, by Board itself—Jurisdiction:—See CERTIORARI* ... 579

ESTOPPEL—Mortgage—Right to redeem—Mortgages approbating and reprobating.

In 1912 a mortgagee sued on a simple mortgage, joining as a defendant the assignee of the equity of redemption of an earlier usufructuary mortgage, and praying that in default of payment the property should be sold and applied thereto either subject to the usufructuary mortgage or free from it, as the Court thought fit. A decree was made for sale subject to the usufructuary mortgage. The assignee of the equity, having paid off the decree, sued to redeem the usufructuary mortgage. The mortgagee contended that by the terms of a compromise decree of 1909 redemption could be effected only by execution of the decree, and that under article 181 of the Limitation Act that remedy was barred at the expiration of three years from the date of the decree. *Held* that terms of the compromise decree did not appear to show an intention that the remedy by execution should alone be open to the mortgagee, and that the mortgagee was estopped from contending that it did so, as in the suit of 1912 he had recognized that the right to redeem was

then subsisting, and thereby had obtained payment under the simple mortgage; he could not both approbate and reprobate the existence of the right. Decree of the High Court (1929) I.L.R. 53 Mad. 805, affirmed on a different ground, but without disagreeing with the judgments in the High Court.

Ambu Nair v. Kulu Nair ... (1933) I.L.R. 56 Mad. (P.C.) 737

EVIDENCE ACT (INDIAN) (I OF 1872), SEC. 114—Presumption of murder under—Accused's possession of property of the murdered person—Knowledge of concealment of such property—Failure to give reasonable explanation of possession—Code of Criminal Procedure (Act V of 1898), sec. 162—Use of statements made under—For contradiction only in accordance with sec. 145 of the Indian Evidence Act.] Under section 114 of the Indian Evidence Act the Court is entitled, if it appears reasonable in all the circumstances of the case, to draw an inference that an accused person committed a murder or took part in its commission, from the facts that he is found in possession of property proved to have been in the possession of the murdered person at the time of the murder or is able to point out the place where such property is concealed and admits having concealed it there and that he fails to give any explanation of his possession of the property which can reasonably be accepted. *Rez v. Schama*, [1915] 84 L.J.K.B. 398, and *The Emperor v. Sheikh Neamatulla*, (1913) 17 C.W.N. 1077, referred to. Observations of WALLACE J. and SPENCER J. in *Sogaimuthu Padayachi v. King-Emperor*, (1925) I.L.R. 50 Mad. 274, considered. *Per RILEY J.*—In making presumptions of fact or in drawing inference of fact from evidence a Judge or jury must always have regard to all known facts of the case. Outside the sphere of presumptions of law no Court or Judge can usefully attempt to lay down by general ruling, or even to express a general opinion, what inference may or may not be drawn by other Judges from other facts in other cases. When things, which were on a murdered person's body at the time when he was murdered, are traced to a person accused of the murder and he gives no explanation of his possession of them, those may be important facts for use in making an inference that he took part in the murder. It is not the law that the Judge or jury must be certain that no other explanation of the facts is possible before they find the accused guilty. If the accused person offers an explanation, then it is for the prosecution to show that that explanation is untrue. *Queen-Empress v. Sami*, (1890) I.L.R. 13 Mad. 428, referred to. Statements made by a witness to the police in the course of the investigation of a case can never be used to corroborate the witness's evidence; and, if the written record of what a prosecution witness has said to the police is to be used to contradict him under section 162 of the Code of Criminal Procedure, it must be proved and used in accordance with the provisions of section 145 of the Evidence Act.

Narayana v. King-Emperor ... (1933) I.L.R. 56 Mad. 281

SEC. 145—See EVIDENCE ACT (Indian)
(I OF 1872), SEC. 114 ... 231

ss. 154 AND 142—Witness—Party calling
a—Cross-examination by—Conditions—Discretion of Court—Considerations governing the exercise of—Appellate Court—Powers of, to interfere when trial Court has exercised discretion—Testimony of such witness—Value of.] A Counsel calling a witness put in chief examination questions of a cross-examination nature without obtaining the express permission of the Court for the said purpose. Objection to such a procedure was not then taken by the Counsel appearing on the opposite side. It appeared from the judgment of the trial Court that permission to adopt such a course would have been granted by the Court if permission had been asked for or if objection had been taken to such a course. *Held* that, (1) under section 154 of the Indian Evidence Act before a party calling a witness can cross-examine him, it is not necessary that the witness should first be declared to be

hostile to the party calling him, and the Court has unfettered discretion to allow a Counsel to put questions of a cross-examination nature to his own witness even though he did not show himself hostile to the party calling him, but the Court ought not to exercise its discretion unless during the examination-in-chief something happens which makes it necessary for the facts to be got from that witness by cross-examination; (2) it is necessary before the procedure under section 154 of the Indian Evidence Act can be adopted that leave of the Court should be asked for and obtained or permission given by the Court *suo motu* for the said purpose before such questions are put to a witness though the section may not make such a procedure imperative and the permission contemplated by the section should be signified, if not in words, by some other action of the Court indicating its permission during the cross-examination of the witness by the party calling him; (3) whatever may have been the reasons for the exercise of the discretion by the Court for giving sanction to such a procedure, if it appears that the trial Court had exercised its discretion or would have exercised its discretion and accorded sanction if objection had been taken in time, it ought not to be interfered with by the appellate Court; (4) it is not obligatory on the Court to discard *in toto* the testimony of such a witness and it is open to the Court to accept some portion and discard the rest.

Ammathayarammal v. Official Assignee, Madras ... (1933) I.L.R. 56 Mad. 7

EXECUTION OF DECREE—Hindu widow—Maintenance of—Decree for, charging items of joint family property with maintenance award—Execution of, by attachment and sale of joint family property not charged by decree—Widow's right of, without exhausting remedy against charged property.] A decree for maintenance obtained by a Hindu widow against her husband's coparceners directed the defendants to pay the plaintiff maintenance at a certain rate out of the assets of their joint family and charged some specific items of property with the maintenance awarded. *Held* that, as the decree provided concurrent remedies, the plaintiff could in execution of her decree attach assets of the joint family other than the charged property before exhausting her remedies against the charged property. *Per VENKATASUBBA RAO J.*—If the defendants succeed in showing that the plaintiff's application is *mala fide* and oppressive and not made for a legitimate purpose, the Court may, in the exercise of its discretion, refuse the plaintiff's application and compel her to pursue her remedy against the security.

Srinivasa Ayyar v. Lakshmi Ammal ... (1933) I.L.R. 56 Mad. 343

EXECUTOR—Probate—Application for—Representative character of executor in—Death of executor during pendency of proceedings—Continuation of proceedings after—Right of his sons entitled to benefit under will.] An executor who prays for probate prays in form for something which can be granted to no one else. But the essence of the proceedings is that he seeks to establish a will, not for himself, but as the representative of those who take benefits under it. If he fail in his duty, any of those whom he represents may intervene to carry on the proceedings, having in effect by representation through the executor been a party to the proceedings from the outset. And, if in the course of the proceedings the executor drops out through death, any of those he has represented may similarly carry on the proceedings with the unessential modification that the prayer must then be for letters of administration with the will annexed. Where an executor died during the pendency of an appeal preferred by him against the dismissal of his suit to establish the will, *held*, accordingly, that his sons, who were entitled to a benefit under the will, were entitled to prosecute his appeal.

Rama Naidu v. Rangayya Naidu ... (1933) I.L.R. 56 Mad. 346

FOREIGN ADJUDICATION—Effect on Property in British India:—See INSOLVENCY ... 405

FRAUD—Benami transfer for effecting—Fraud carried out—Party to fraud, if can take advantage of fraud in defence and disclose the real nature of the transfer—Test to be applied—In pari delicto potior est conditio possidenti—Scope of the maxim.] A person who has conveyed property benami to another for the purpose of effecting a fraud on his creditors cannot, when the fraud has been effected, set up the benami character of the transaction by way of defence in a suit by the transferee for possession under the conveyance. The above dictum laid down in *Kamayya v. Mamayya*, (1916) 32 M.L.J. 484, approved on the principle of *stare decisis*.
Kotayya v. Mahalakshamma ... (1933) I.L.R. 56 Mad. 646

GOVERNMENT OF INDIA ACT, SEC. 107:—See COURT-FEE ... 744

HEREDITARY VILLAGE OFFICES ACT (MADRAS) (III OF 1895), SEC. 6 (1)—Provision in—Directory—Mandatory or abolished office—Hereditary right of family of last holder of—Legal right—Infringement of right—Remedy—Suit for declaratory decree—Maintainability of—Ss. 13, 21 and 23—Effect of.] Section 6 (1) of the Madras Hereditary Village-offices Act (III of 1895) recognizes and preserves the hereditary right existing in the family of the last holder of the abolished office, and that right is a legal right. The provision in section 6 (1) that in filling the newly created offices the Collector shall select the persons whom he may consider best qualified from among the families of the last holders of the offices which have been abolished explains why the new offices are made hereditary and shows that, although the old offices are abolished, it is not the intention of the Legislature entirely to destroy the old hereditary rights but rather to preserve them so far as possible in the new offices. *Kanthavadivelu Mudaliyar v. Ramaswami Mudaliyar*, (1927) 54 M.L.J. 357 dissented from. The provision in section 6 (1) that the Collector shall select persons from among the families of the last holders of the abolished offices is mandatory and not merely directory. When the hereditary right preserved by section 6 (1) of the Act is infringed, the persons for whom it is preserved have a right to sue for its vindication by a declaratory decree. The remedy of appeal provided by section 23 of the Act is not the only remedy open to them. The case is one in which an old right is preserved and a new remedy created, but no old remedy is explicitly taken away. Therefore the new remedy of appeal is not exclusive but must be regarded as additional to and not as substituted for existing legal remedies. Section 21 of the Act does not exclude the jurisdiction of the ordinary Civil Courts to entertain a suit brought by a person whose hereditary right preserved by section 6 (1) has been infringed for the vindication of that right. Sections 13 and 21 of the Act deal only with a claim to succeed to the office. When the old office is abolished and cases to exist, the appointment to the new office cannot be said to be by virtue of a claim to succeed.

Ramakrishnayya v. Venkataranga Rao ... (1933) I.L.R. 56 Mad. 134

... ss. 13, 21 AND
 23, EFFECT OF:—See HEREDITARY VILLAGE-OFFICES ACT (MADRAS) (III OF 1895), SEC. 6 (1) ... 134

... ss. 13 AND
 21:—See SURVEY AND BOUNDARIES ACT (MADRAS) (IV OF 1897), SEC. 13 ... 365

... SEC. 23 (1),
 PROVISIO—Hereditary karnam—Suspension of—Collector's order of, on appeal from Revenue Divisional Officer's order of dismissal—Second appeal to Board of Revenue against—Competency of—Dismissal of karnam in revision—Jurisdiction of Board of Revenue—Madras Regulations (I of 1803), sec. 5; (II of 1806) and (VI of 1831)—Effect—Suit by karnam for declaration of invalidity and ultra vires nature of order of Board of Revenue—Maintainability—Consequential relief—Prayer for—Necessity—Specific Relief Act (I of 1877), sec. 42—Exhaustive of declaratory suits if.] The dismissal of

a karnam, who had a hereditary right to the office, by the Revenue Divisional Officer was on appeal modified by the Collector to one of suspension. A second appeal presented by the karnam to the Board of Revenue was entertained by it and it set aside the Collector's order of suspension and restored the original order of dismissal. In a suit filed by the karnam for a declaration that the order of the Board of Revenue was invalid and *ultra vires*, held that the order was passed without jurisdiction and was *ultra vires* and that the suit, though for a mere declaration, was maintainable. In view of the proviso to section 23 (1) of Madras Act III of 1895, the karnam had no right of appeal, and the Board should not have entertained his appeal. It had no authority to dismiss a karnam in revision in circumstances such as those in the present case. Section 5 of Madras Regulation I of 1803 gives to the Board no punitive powers over village officers, and it had no power to dismiss a karnam in revision either under Regulation II of 1806 or under Regulation VI of 1831. In the circumstances of the case the plaintiff must be held to be suing as a person entitled to a legal character and the suit was therefore maintainable. Section 42 of the Specific Relief Act is not exhaustive of declaratory suits.

Secretary of State for India v. Subba Rao ... (1933) I.L.R. 56 Mad. 749

HINDU LAW—Adoption—Widower who had an only wife—Adoption by—Relationship of predeceased wife to the adopted son—Right of adopted son to inherit to the relations of the predeceased wife.] The adopted son of a Hindu whose only wife had died before the adoption becomes the son of that wife so as to inherit as such to the relations in her father's family. *Sundaramma v. Venkatasubba Ayyar*, (1926) I.L.R. 49 Mad. 941, approved.

Sowntharapandian Ayyangar v. Periajeeru Thevan ... (1933) I.L.R. 56 Mad. (F.B.) 759

—Father—Promissory note executed before, but kept alive by an acknowledgment made after, partition by—Son's liability on.] A Hindu son is liable for a debt on a promissory note executed by his father before partition and kept alive by an acknowledgment made by the father after partition. *Peda Venkanna v. Sreenivasa Deekshatulu*, (1917) I.L.R. 41 Mad. 136, distinguished. *Subramania Ayyar v. Sabapathy Ayyar*, (1927) I.L.R. 51 Mad. 361 (F.B.), relied upon.

Munisawmi v. Kutti ... (1933) I.L.R. 56 Mad. 833

—Joint family—Member of—Alienation by—Share on partition to which alienee entitled—Share as at date of alienation or share as at date of suit for partition.] The defendant was an alienee from a brother in a Hindu joint family and by virtue of the alienation the defendant got into possession of a certain parcel of land. The rest of the joint family property was dissipated, and then the plaintiff, the other brother, sued for partition of that parcel. Held that the plaintiff was entitled to take the family property as existing on the date of his suit and to recover one-half from the defendant. A member of a Hindu joint family cannot by way of alienation part with more than he has got. The interest of the alienee fluctuates, subject to the exception recognized by a long series of cases that it does not become extinct on the death of the alienor. When the alienee compels partition his right to the property must be worked out as on the date of the suit for partition and not as from the date of the alienation. Decision of the Full Bench in *Rangasami v. Krishnayyan*, (1890) I.L.R. 14 Mad. 408 (F.B.), preferred to that of the Full Bench in *Chinnu Pillai v. Kalimuthu Chetti*, (1911) I.L.R. 35 Mad. 47 (F.B.). Even if the view in *Chinnu Pillai v. Kalimuthu Chetti*, (1911) I.L.R. 35 Mad. 47 (F.B.), that the share ceases to fluctuate from the date of the alienation is accepted, the hotchpot should not be taken as that which existed on the date of the alienation.

Sathapathiar v. Sivanarayana Pillai ... (1933) I.L.R. 56 Mad. 534

—Widow—Decree for maintenance charging joint family property—Execution against other joint family properties without exhausting remedy against charged property:—See EXECUTION OF DECREES ... 943

HINDU RELIGIOUS ENDOWMENTS ACT (MADRAS) (II OF 1927), SEC. 44—Scope of—Temple service inam—Endowment, not a “charge on the property.” Under section 44 of the Madras Hindu Religious Endowments Act the Court has no power to make an order in respect of services to a temple which are remunerated by a service inam. The phrase “merely a charge on property” in section 44 necessarily connotes a liability to make a payment in some shape or form to the institution, and probably a payment the extent of which is more or less fixed or ascertainable. In the case of an inam land no such payment is in question, nor indeed does there exist any charge to secure it. *Sembla*: a service inam held by a temple servant falls within the definition of “endowment” under section 9 (1) of the Madras Hindu Religious Endowments Act.

Kotayya v. Yellamanda... ... (1933) I.L.R. 56 Mad. 731

... SEC. 70—Order under—Appeal from—Competency of—Notice under section—Service of, on managing or executive trustee—Sufficiency of.] The words “as if a decree had been passed” in section 70 of the Madras Hindu Religious Endowments Act attract to the order the whole procedure in execution and with it the right of appeal. Though section 70 of the Madras Hindu Religious Endowments Act refers to “the trustee” as the person on whom notice is to be served, the true intention is that the institution of which he is trustee shall be served. The question in each case therefore is whether the institution has been properly served. When by assent one of several trustees acts as the managing or executive trustee, notice served on such trustee must be deemed to be proper notice to the institution.

Lakshmindra Tirta Swamiyar v. H.R.E. Board, Madras ... (1933) I.L.R. 56 Mad. 712

... SEC. 84 (2)—Application under—Nature of—Fresh evidence in—Right of parties to adduce.] An application under section 84 (2) of the Madras Hindu Religious Endowments Act is not merely in the nature of an appeal or revision petition, and the Court hearing the application is not restricted to such evidence as the Board may happen to have recorded or even to such evidence supplemented to the extent to which a Court of appeal can supplement the evidence taken by a Court of first instance. The only reasonable interpretation of section 84 (2) is that the application to be made under the sub-section is, so far as the Court is concerned, an application, to which the ordinary procedure of the Court will apply and on which the parties have the right to produce such evidence as they wish.

Iswarananda Bharathi Swami v. H.R.E. Board, Madras... (1933) I.L.R. 56 Mad. 40

INCOME-TAX ACT (INDIAN) (XI OF 1922), SEC. 2 (1) (a)—Agricultural income—Meaning of—Madras Regulation (XXV of 1802)—Zamindari granted by sanad issued under—Fishery right in tanks and connected supply channels in, water in which used for agricultural purposes—Lease of—Income derived by zamindar from—If agricultural income—Land covered by tanks and channels being agricultural land assessed to land revenue.] The assessee was a zamindar tracing his title to his zamindari to a sanad issued by the Government under the Madras Permanent Settlement Regulation (XXV of 1802). During the year of assessment he derived an income from the lease of the right to fish in a number of tanks and connected supply channels in the zamindari the water in which was used for agricultural purposes. Excepting the right to fish, the lessees had no other rights whatsoever in the water of the tanks and channels nor had they any right over the beds of the tanks and channels. The land on which the tanks were and through which the channels ran was agricultural land and assessed to land revenue in British India. Held that the income derived by the assessee from the lease of the right to fish in the tanks and connected supply channels in the zamindari was not agricultural income within the meaning of section 2 (1) (a), and was therefore not exempt from tax under section 4 (3) (viii) of the Indian Income-tax Act (XI of 1922). Per BEASLEY C.J.—The

income in question is not revenue derived from land which is used for agricultural purposes. “Revenue” in section 2 (1) (a) of the Indian Income-tax Act of 1922 cannot be taken to include all other sources of income derivable in different ways to that by which the rent is derived that is to say, to include all income which is got from anything of value which may be upon land used for agricultural purposes. Section 3 (11) (b) of the Madras Estates Land Act (I of 1903) only extends the procedure prescribed in that Act for the recovery of arrears of land rent to the recovery of sums payable by a ryot on account of fishery rents. Far from helping the assessee that provision only emphasises the difference between the revenue derived from land let for agricultural purposes and that derived from fisheries. Per CORNISH J.—“Agricultural income” in section 2 (1) (a) of the Indian Income-tax Act does not mean income derived from agricultural land. The definition clause in section 2 (1) (a) shows that the income intended is the income derived as rent or revenue from the use of the land for agricultural purposes. Income derived from the use of the land for some purpose which is not agricultural is therefore not “agricultural income.”

Commissioner of Income-tax v. Sevugu Pandia Thevar ... (1933) I.L.R. 56 Mad. 251

INCOME-TAX ACT (INDIAN) (XI OF 1922), SS. 3 AND 10 (2) (iii) AND EXPLANATION—Fund registered under the Indian Companies Act, with capital raised by recurring subscriptions paid periodically by share-holders or subscribers—Nature of—Fund or Mutual Benefit Society—Subscriptions of share-capital—“Guaranteed interest” paid by Fund to subscribers on their subscriptions—Assessability to income-tax of—Styles’ case—Scope of.] A Fund incorporated as a limited company under the Indian Companies Act (VI of 1882) had its capital contributed by “A” and “B” class subscribers at the rate of Re. 1 per mensem per share. The subscribers in “A” class paid their subscriptions for 45 months and those in “B” class for 84 months. As soon as an “A” class subscriber paid Rs. 45 for one share in that manner, his account, in so far as that particular share was concerned, was closed, and he was paid off with a sum of Rs. 50. A “B” class subscriber was paid off at the end of 84 months with Rs. 102-8-0. The amounts of Rs. 5 and Rs. 18-8-0 thus paid out to “A” and “B” class subscribers in excess of their subscriptions to the Fund were called “guaranteed interest”. The rules of the Fund made provision for the receipt of fixed and current deposits from any person, whether a subscriber to the Fund or not, and also for the grant of loans not only to subscribers but also to non-subscribers and to registered Co-operative Societies. In the year of account, however, no fixed deposits had in fact been received and no loans made either to non-subscribers or to Co-operative Societies, and all the transactions of the Fund were with its own members. The members of the Fund subscribed the capital and the subscribed capital was lent to them. A sum of Rs. 68,000 odd was, in the year of account, distributed by the Fund in the shape of “guaranteed interest” to the “A” and “B” class subscribers and the Fund claimed to be entitled to deduct that sum from its total income during the year of account. Held, that the “guaranteed interest” was interest on capital borrowed for the purpose of the Fund’s business within the meaning of section 10 (2) (iii) of the Income-tax Act, that its payment was not in any way dependent on the earning of profits, and that the Fund was entitled to claim a deduction in respect of the sum of Rs. 68,000 odd distributed by it as “guaranteed interest” in the year of account. The Fund, though registered under the Companies Act and subject to its provisions, was not really a company but a Mutual Benefit Society with a fluctuating capital dependent entirely upon the amount subscribed by its members and the repayment of subscriptions plus guaranteed interest to the members. The subscriptions, though called share-capital, were not really so; nor were they capital borrowed for the purpose of the business as that capital is ordinarily understood. That this is so is clearly shown by the explanation to section 10 (2) (iii) of the Income-tax Act in enacting with the Legislature has shown its intention

to recognize an association of persons not having share capital but borrowing and lending from and to themselves for the mutual benefit of themselves. This borrowing is to be deemed to be a borrowing of capital and that being so interest only can be deducted from the profits and gains of the Association under section 10(2) (iii) of the Act if the payment of interest upon it is not in any way dependent upon the earning of profit. *New York Life Insurance Company v. Styles*, (1839) 14 App. Cas. 381, did not govern either the *Mylapore Fund Case*, (1923) I.L.R. 47 Mad. 1 (S.B.), or the *English & Scottish Co-operative Society v. Commissioner of Income-tax, Madras*, (1929) 3 I.T.C. 385, although the observations made by their Lordships in their judgments certainly support the result arrived at in both. *New York Life Insurance Company v. Styles*, (1839) 14 App. Cas. 381, does not also govern the present case.

Commissioner of Income-tax, Madras v. Madura Hindu Permanent Fund, Ltd. ... (1933) I.L.R. 56 Mad. 415

INCOME-TAX ACT (INDIAN) (XI OF 1922), ss. 8 AND 10—Government of India

Notification, dated 25th August 1925, under sec. 60 of the Act—Exemption from income-tax given by—Scope of—Investment in Government Securities—Interest derived by Co-operative Bank from—Applicability of exemption to—Bye-law of Bank making purchase and sale of Government Promissory Notes one of its main objects—Effect.] The exemption from income-tax given by the Notification of the Government of India, dated 25th August 1925, is to the profits made by a Co-operative Bank from its business of a Co-operative Bank. The interest derived by a Co-operative Bank from its money invested in Government Securities cannot be regarded as part of the profits of its business *qua* such Bank and is not exempt from tax. The fact that a bye-law of the Banks makes the purchase and sale of Government Promissory Notes one of its main objects does not alter the position. *Per REASLEY O.J.*—When an assessee is under a section of the Income-tax Act assessable to income-tax, it is for him to show that he has been exempted. *Per CORRISS J.*—The bye-law making the purchase and sale of Government Promissory Notes one of the main objects of the Bank is to empower the Bank to deal in Government Promissory Notes as part of its business. Any profits made by the Bank from the purchase and sale of these securities on its own account or as broker for a constituent would be profits from the business of the Bank and exempt from tax under the notification. But an investment in Government Promissory Notes of money lying idle in the Bank cannot be deemed to be one of the declared objects of the Bank. *Per BARDSWELL J.*—The exemption in the notification is meant as an encouragement to the employment of as much capital as possible for the financing of Co-operative Societies and to extending the scope of co-operation. The investing of money in Government Securities does not further the cause of co-operation.

Madras Provincial Co-operative Bank, Ltd. v. Commissioner of Income-tax. (1933) I.L.R. 56 Mad. 837

SEC. 14 (1)—Hindu joint family—Widow of deceased member of—Maintenance and arrears of maintenance received from surviving member by—Liability to assessment of—Hindu joint family with single male member if and when there can be.] Maintenance and arrears of maintenance received by a widow of a member of a joint Hindu family is exempt from taxation under section 14 (1) and other sections of the Indian Income-tax Act (XI of 1922). There can be a joint family with a single male member provided there are widows of deceased coparceners or other persons entitled to maintenance from him. The single male member in such a case will not himself be exempt from taxation, because he cannot be said to receive the income of the estate as member of an undivided family and he does not receive the income from any other person by reason of his being a member of a joint family. The language of section 14 of the Act is strictly applicable only to widows of deceased coparceners, to disqualified heirs and maidens in the family receiving maintenance.

Vedathanni v. Commissioner of Income-tax, Madras. (1933) I.L.R. 56 Mad. (S.B.) 1

INCOME-TAX ACT (INDIAN) (XI OF 1922), sec. 32—Enhancement of assessment within meaning of—Enhancement of income under one head without enhancing the total income assessable to income-tax not an—Appeal to Commissioner under sec. 32 not competent in case of—“Assessment” in the Act—Meaning of.] The computation of an income under each head set out in the Income-tax Act XI of 1922 is not itself an assessment within the meaning of section 32 of that Act. It is merely computation of an item of income or class or classes of income which go to make the whole and, when the whole has been arrived at, there is an assessment within the meaning of section 32. Where, on an appeal to the Assistant Commissioner, he does not enhance the total income assessable to income-tax but by means of a reduction under one head and an increase under another head allows the Income-tax Officer's total assessment to remain the same or reduces it, there is no enhancement of the assessment within the meaning of, and an appeal does not lie to the Income-tax Commissioner under section 32 of the Act merely by reason of the fact that the Assistant Commissioner has increased the income under one head.

Commissioner of Income-tax v. Namburumal Chetty & Sons ... (1933) I.L.R. 56 Mad. 329

SEC. 60—Notification issued under—If can deal with income-tax or super-tax, alone—Government of India Notification, Finance Department (Central Revenues) No. 21, dated 12th October 1929—Necessity for and object of—If extends to super-tax.] Government of India Notification, Finance Department (Central Revenues) No. 21, dated the 12th October 1929, does not extend to super-tax. Under section 60 of the Income tax Act (XI of 1922) the Government of India can, by notification, deal with income-tax and super-tax; but it does not necessarily follow that the Government of India cannot exempt, reduce in rate or otherwise modify income-tax alone or super-tax alone. The Government of India in issuing a notification under section 60 therefore have power to exclude super-tax. Necessity for the above-mentioned notification and its object explained.

Nachiappa Chettiar v. Commissioner of Income-tax, Madras. (1933) I.L.R. 56 Mad. 679

INJUNCTION—High Court—Power to grant injunction independently of the Code of Civil Procedure—Appeal or revision from case in mofussil Court—Power in.] A mofussil Court cannot grant an injunction otherwise than in accordance with the provisions of Order XXXIX of the Code of Civil Procedure. Under clause 21 of the Letters Patent, the High Court, dealing as appellate or revisional authority with a case coming from a mofussil Court, can only apply such law or equity and rule of good conscience, as would be applied by that mofussil Court; that is, it can only grant an injunction in respect of such a case in accordance with the provisions of Order XXXIX, Civil Procedure Code. It is only while acting in the exercise of its ordinary original civil jurisdiction that the High Court has powers, under its general equity jurisdiction, to grant an injunction independently of the Code of Civil Procedure.

Karuppayya v. Ponnusami ... (1933) I.L.R. 56 Mad. 563

INSOLVENCY—Adjudication by Foreign Court—Secunderabad Court—Effect on property within British India—Attachment in British India—Inchoate right—Private International Law—Code of Civil Procedure (Act V of 1908), sec. 64.] Upon a foreign Court adjudicating a person an insolvent the only property in British India which vests in the Receiver by virtue of private international law is such movable property as the insolvent was free to assign to the Receiver at the date of the adjudication. The District Court at Secunderabad adjudicated persons insolvents under the Provincial Insolvency Act, 1907. Jurisdiction is exercised at Secunderabad, and the above Act was there applied by orders made by the Governor-General in Council by authority of the Foreign Jurisdiction Act, 1890, and the Indian (Foreign Jurisdiction) Order, 1902. The insolvents were holders of a decree of the Madras High Court, which, before the

adjudication, had been attached by that Court in execution proceedings. By section 64 of the Code of Civil Procedure, 1908, any private transfer of the attached decree was made void against claims under the attachment. *Held*, that the District Court at Secunderabad was a foreign Court; accordingly, adjudication operated in British India only under private international law and, having regard to section 64 of the Code, did not affect the rights of the attaching creditor. *Galbraith v. Grimshaw*, [1910] A.C. 508, applied. It was unnecessary to consider whether an attachment creates a lien or charge, or confers title: On that question *Kristnasawmy Mutialiar v. Official Assignee of Madras*, (1903) I.L.R. 26 Mad. 673, and *Frederick Peacock v. Madan Gopal*, (1902) I.L.R. 29 Calo. 428 (F.B.) commented upon. Judgment of the High Court, *Official Receiver of Secunderabad v. Lakshminarayana*, (1930) I.L.R. 54 Mad. 727, reversed.

Anantapadmanabhaswami v. Official Receiver, Secunderabad ... (1933) I.L.R. 56 Mad. (P.O.) 405

INSOLVENCY—*Property held on trust—Fund properly invested in insolvent's business—Charge on assets—Following trust fund—Indian Trusts Act (II of 1882), ss. 63, 66—Presidency-towns Insolvency (Act III of 1909), sec. 52, sub-sec. 1(a).* In 1919 a sum of Rs. 10,000 was left in the hands of a firm of jewellers for investment in their business at a fixed rate of interest in the name of the respondent, to whom the Rs. 10,000 was to be paid on his attaining twenty-one years. In 1925 the members of the firm were adjudicated insolvents under the Presidency-towns Insolvency Act, 1909. By section 52, sub-section 1 (a) of that Act, property held in trust by an insolvent is excluded from the divisible assets. It had been admitted that the transaction of 1919 constituted a trust in favour of the respondent, and it was not alleged that the Rs. 10,000 had not been invested in the business, or that it had been lost, or ceased to exist before the insolvency. *Held*, that the assets of the firm vested in the Official Assignee subject to a charge for the Rs. 10,000 in favour of the respondent. The right of a beneficiary to follow a trust fund does not depend upon whether the fund has been properly or improperly disposed of. *Pennell v. Deffell*, (1853) 43 E.R. 551, and *In re Hallett's Estate*, (1879) 13 Ch.D. 698, applied. Judgment of the High Court, *The Official Assignee of Madras v. Krishnaji Bhat*, (1929) 59 M.L.J. 718, affirmed.

Official Assignee, Madras v. Krishnaji Bhat... (1933) I.L.R. 56 Mad. 570

INSURANCE POLICY—*Construction of—"One year's premium"—Surrender value of policy sufficient to cover—Application of, in payment of instalments of premium due, and no forfeiture of policy in case of—Provision in policy as to—"One year's premium"—Meaning of—Amount paid by assured for the year if to be taken into account in ascertaining.* The material portion of a clause in a policy of insurance ran as follows:—"A policy which has acquired a surrender value sufficient to pay at least one year's premium is not forfeited immediately by non-payment of the premium within the days of grace; such surrender value being automatically applied in payment of instalments of premium and interest thereon to keep the policy in force for so long a term as such surrender value will cover." *Held*, that the expression "one year's premium" in the clause of the policy did not mean a calendar year's premium or a full year's premium in the abstract, without reference to the amount actually due for any particular year. In a case in which the annual premium was Rs. 150-12-0, payable in four quarterly instalments, three instalments amounting to Rs. 113-1-0 were duly paid, and there was a default in the payment of the fourth instalment, which amounted to Rs. 37-11-0. The surrender value of the policy on the date of default was admittedly Rs. 86-3-0. *Held*, that the surrender value was sufficient to pay the year's premium within the meaning of the clause in the policy and that the default in question did not therefore lead to a forfeiture of the policy.

National Indian Life Assurance Company v. Mahadevan ... (1933) I.L.R. 56 Mad. 918

INTEREST ACT (XXXII OF 1839), SEC. 1:—See COMPANY ... 891

IRRIGATION CESS ACT (MADRAS), (VII OF 1865), SEC. 1 (b) AS AMENDED BY AMENDING ACT (V OF 1900)—Water-cess—Liability for—Test—Reservoir—Meaning of—Government village—Lands of, irrigated by channel taking off from natural stream maintained by Government—Surplus water of, flowing into zamindari villages by distribution channels or by drainage from lands of Government village and there stored in small ponds or natural depressions—Liability for cess for use of.] The plaintiffs were the owners of lands situated in a zamindari village, C, which adjoined a Government village, A, the lands of which were irrigated from a channel which took off from a natural stream which was maintained by Government. The surplus water of the lands of village A flowed into village C either by distribution channels or by drainage from the lands of village A and were then stored in what were either small ponds or mere natural depressions. *Held* that the Government was entitled to levy water-cess for the use of that water by the plaintiffs. What has to be decided is not whether the water belongs to Government but whether it comes from a river or stream that belongs to Government. In the present case, as the water came from a channel which admittedly belonged to Government while that channel took off from a stream maintained by Government at a part where the stream flowed through Government land, it might be taken as "belonging to Government" in the sense given to those words in *Secretary of State for India v. Subbarayudu*, (1931) I.L.R. 55 Mad. 288 (P.O.); and the natural ponds and depressions in which the water was stored were reservoirs within the meaning of section 1 (b) of the Irrigation Cess Act. Observations of VENKATASUBBA RAO J. in *Syed Hyder Ali Sahib v. Secretary of State for India in Council*, 8 A. Nos. 1519 and 1520 of 1927, as to the nature of the question arising under the Irrigation Cess Act, approved.

Ayyanna v. Secretary of State for India ... (1933) I.L.R. 56 Mad. 696

LETTERS PATENT (MADRAS), CL. 15—Judgment—Appeal—Appellant deceased in—Legal representative of—Order directing respondent to be brought on record as—Not a judgment and not an appealable order.] An order directing the respondent in an appeal to be brought on the record as the legal representative of the deceased original appellant is not an appealable order, because it is not a judgment which finally settles the rights of parties but has the effect of allowing litigation which is proceeding to further proceed to a final adjudication.

Appaji v. Thailammal ... (1933) I.L.R. 56 Mad. 689

Code of Civil Procedure (Act V of 1908):—**See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XI, R. 1** ... 915

CL. 21:—**See INJUNCTION** ... 563

LIMITATION ACT (INDIAN) (IX OF 1908), SEC. 15—Execution application—Dismissal of, for non-payment of batta—Revival—Conditions.] The dismissal of an execution application for non-payment of batta is proper and final and such an application cannot be revived. In order to entitle an application to be treated as one in continuation of or to revive a former application there should have been no final disposal or there should have been a wrong dismissal on account of some obstacle which then existed but which was subsequently removed. No equitable grounds for the suspension of a cause of action can be added to the provisions of the Indian Limitation Act.

Sundaramma v. Abdul Khadar ... (1933) I.L.R. 56 Mad. (F.B.) 490

sec. 18—**Scope of—Execution sale—Confirmation of—Setting aside of—Application by judgment-debtor under O. XXI, r. 90, and ss. 47 and 151 of Code of Civil Procedure for—Applicability of sec. 18 of Limitation Act to—Fraud alleged not of decree-holder but of auction-purchaser.]** The words of section 18 of the Limitation Act are

sufficiently wide to include any person whose fraud has kept from the knowledge of another person his right to institute a suit or make an application. *Held*, accordingly, that section 18 of the Limitation Act applied to an application put in by a judgment-debtor under Order XXI, rule 20, and sections 47 and 151 of the Code of Civil Procedure to set aside the confirmation of an execution sale even where the fraud alleged was not of the decree-holder but of the auction-purchaser.

Pulla Reddi v. Pattabhirami Reddi ... (1933) I.L.R. 56 Mad. 734

LIMITATION ACT (INDIAN) (IX OF 1908), ss. 19 and 21—"Agent duly authorized in this behalf"—Lunatic—Wife of, not appointed committee or manager of husband's property under Indian Lunacy Act (IV of 1912) but managing his business after he became insane—Not husband's "agent duly authorized in this behalf"—Acknowledgment of husband's debt by her—Fresh starting point of limitation not afforded by.] The wife of a lunatic put in a petition under the Indian Lunacy Act to have her husband declared to be insane and for the appointment of herself as guardian of his person and manager of his property. For the purpose of her petition, she had to set out her husband's assets and liabilities and she included in the latter a debt due under a promissory note executed by her husband. An order was made on her petition appointing her guardian and manager on furnishing security; but she failed to furnish the security ordered and in the meantime her husband died and she was in fact never appointed his guardian and the manager of his property. *Held* that, as the wife had never been appointed committee or manager of her insane husband's property, she did not come within the provisions of section 21 (1) of the Indian Limitation Act and had no authority to acknowledge the promissory note debt on her husband's behalf so as to afford a fresh starting point of limitation for a suit on the promissory note.

Gomati Ammal v. Ava Ammal ... (1933) I.L.R. 56 Mad. 264

ARTS. 116 and 111—Suit based on contract of indemnity—Article applicable—Sale subject to mortgage—Authority to vendee to discharge mortgage—Vendee's default—Suit by mortgagee—Purchase by third party of mortgaged property—Suit by purchaser for damages from vendor and mortgagee—Contract of indemnity—Suit based on—Art. 116—Applicability of—Recovery of damages—Basis of calculation.] Plaintiff mortgaged certain properties to B and subsequently sold to the defendant by a registered sale deed on 28th April 1919 some of the properties included in the mortgage deed. Out of the consideration for the sale a portion was reserved with the defendant to pay off the mortgage in favour of B. As the defendant did not pay B, the latter brought a suit on his mortgage impleading both plaintiff and defendant and recovered the amount due to him by sale of the entire mortgaged properties. The sale took place on 29th October 1926. Plaintiff brought the present suit on 4th December 1926 for recovery of damages suffered by him by reason of the defendant's default in paying off B. *Held*, that the basis of the suit was the contract of indemnity implied in the defendant's agreement in the sale deed to pay off B and could be held to be broken only when the plaintiff actually suffered loss, i.e., on 29th October 1926 when the plaintiff's property was sold; that the suit was governed by article 116 of the Indian Limitation Act and not by article 111; and that it was not barred. *Held* further, that the plaintiff could recover only the loss actually sustained by him, and not the entire amount reserved with the defendant as a portion of it was also to release from the mortgage the property sold to the defendant.

Navamani Nadar v. Vedamanicka Nadar ... (1933) I.L.R. 56 Mad. 724

ART. 117—Foreign judgment—Final judgment of Court of first instance of foreign Court—Appeal thereon to foreign Court—Confirming judgment of Appellate Court—Suit on the foreign judgment in British Indian Court—Starting point of limitation for—"Judgment" in art. 117—Meaning of.] On 9th July 1924 a judgment

and decree were passed by the Court of first instance in Bikanir, a foreign state, where all the provisions of the Code of Civil Procedure are applied and the decisions of the Indian High Courts followed. On 24th March 1925 the said judgment and decree were confirmed on appeal by the High Court of Bikanir. On 12th March 1931 a suit was filed upon this foreign judgment in Madras. *Held* that, the starting point of limitation is the date of the decree of the Appellate Court of Bikanir and not the date of the decree of the Original Court of Bikanir and that, inasmuch as the suit in Madras was filed within six years from the said date, the suit was not barred. *Held* further that judgment in article 117 of the Indian Limitation Act means "decree".

Bajinath v. Vallabhadas ... (1933) I.L.R. 56 Mad. 951

LIMITATION ACT (INDIAN) (IX OF 1908), ART. 181:—See MORTGAGE SUIT ... 520

ART. 182 (2)—Mortgage suit—Final decree—Execution of—Limitation—Starting point—Final decree passed during pendency of appeal from preliminary decree—No appeal filed from final decree—Art. 182 (4)—Amendment of decree after execution of decree has become barred by limitation—Decree not revived by.] "Appeal" in article 182 (2) of Schedule I of the Indian Limitation Act is appeal from the decree or order sought to be executed. Where, during the pendency of an appeal from the preliminary decree in a partition suit, the trial Court passes a final decree in the suit and that decree is not appealed from, limitation for execution of the final decree runs from the date thereof and not from the date of the decree of the appellate Court in the appeal from the preliminary decree. The final decree will no doubt have to be altered in the event of the appeal from the preliminary decree succeeding; but nothing stands in the way of the party concerned applying for the passing of a fresh final decree in accordance with the appellate decree. A decree which has already become barred by limitation cannot be revived for purposes of execution by a subsequent amendment. Hence article 182 (4) is inapplicable to a case where the decree had, prior to the date of its amendment, become barred by limitation.

Ahammad Kutty v. Kottekkat Kuttu ... (1933) I.L.R. 56 Mad. 458

ART. 182 (5)—Judgment-debtor in prison—Subsistence allowance for detention of—Remittance of money-order to Jail Superintendent—Step in aid.] A remittance by money-order to the Jail Superintendent of subsistence allowance necessary for the detention of a judgment-debtor in prison is an application to the Court within the meaning of article 182 (5) of the Indian Limitation Act and is a step in aid of execution.

Rajah of Ramnad v. Kuppuswami Pillai ... (1933) I.L.R. 56 Mad. 320

LUNATIC—Alienation by lunatic found such by inquisition—Invalidity of—Rule as to—Applicability of, to a case arising from the mofussil—Alienation made at a time when lunacy did not exist—Plea of—Permissibility—Order in lunacy—Conclusive nature of.] An alienation by a lunatic who has been found such by inquisition is entirely null and void, and it is not open to the alienee to show that at the time of the alienation the lunacy did not exist. This rule is applicable in India, as well to a case arising from the mofussil as to a case arising under the Indian Lunacy Act. An order in lunacy, although it is not a judgment which is conclusive against the world as one of the judgments enumerated in section 41 of the Evidence Act, is still relevant and binding upon the parties thereto and those who claim under them just like any other judgment of a Civil Court. It is not therefore open to the lunatic to contend that the order finding that he was a lunatic on the date of the order was incorrect and a subsequent alienee from him is in the same circumstances.

Subba Naicker v. Solaippa Naicker ... (1933) I.L.R. 56 Mad. 904

MALABAR LAW—Karnavan—Powers of—Renewal of kanam before expiry of prior demise in a case not governed by the Malabar Tenancy Act (XIV of 1930)—Validity of—Grantor of the prior demise being alive after the expiry of the previous term—Failure to disavow renewal—Effect of.] *A*, a karnavan of an illam, granted a kanam in favour of *B* in June 1910 for a period of twelve years on terms and conditions which were neither improper nor beyond his powers. In April 1919 *A* renewed the kanam in favour of *B* for a period of twelve years, to begin from the expiry of the previous kanam, on the same terms and conditions except for a very slight increase of rent. *A* continued as karnavan till November or December 1922 and did not disavow the renewal. In May 1923, *A*'s successor as karnavan granted a melkanam to *C*, who used *B* for redemption and recovery. The subject-matter of the case was not governed by the Malabar Tenancy Act, 1930. Held, that the kanam of 1919 in favour of *B* was valid against the melkanam of 1923. *Per REILLY and ANANTAKRISHNA AYYAR JJ.*—A kanam for a proper term and on proper conditions granted before the expiry of a current term by a karnavan who remains in office after the expiry of that term without disavowing it is valid, whether the new kanam is granted to a new tenant who is to be put in possession by the karnavan after the expiry of the current term, or as renewal to the sitting tenant, or by a melcharth directing a new tenant to recover possession from him. The grant of illam or tarwad property on kanam is an ordinary incident of the right of management possessed by the karnavan. It is also within his powers to grant a kanam a reasonable time before the expiry of a current term, and what is a reasonable time will vary with the circumstances of each case. If the terms and conditions of a kanam granted by a karnavan are not proper, then the junior members of the illam or tarwad can avoid it. A kanam granted by a karnavan unreasonably long before the expiry of a current term is not void, but voidable. In such a case, if the terms and conditions of the kanam are not improper at the time it takes effect, the junior members of the illam or tarwad cannot avoid it, as it is within the powers of the then karnavan. It is the karnavan of that date alone who has the option of avoiding it. And, if the karnavan who granted the kanam is in office when the previous term expires and does not disavow it, it stands good.

Trivikrama Konuraya v. Sankaranarayana ... (1933) I.L.R. 56 Mad. (F.B.) 92

MALICIOUS PROSECUTION—Suit for damages for—Absence of reasonable and probable cause—Enquiry in respect of—Duty of Civil Court—Judgment of Criminal Court acquitting plaintiff—Effect and value of.] In a suit for damages for malicious prosecution the Civil Court should undertake an independent enquiry before satisfying itself of the absence of reasonable and probable cause, and the judgment of the Criminal Courts acquitting the plaintiff can be used only to establish the fact that an acquittal has taken place as a fact in issue in the civil suit and not to ascertain the grounds upon which the acquittal proceeded or the views of the trying Magistrate upon the evidence. *Mohammad Daud Khan v. Jia Lal*, (1929) 118 I.C. 852, considered. *Gulabchand Gopaldas v. Chunnilal Jagjivandas*, (1907) 9 Bom. L.R. 1184, and *Shubrat v. Shams-ud-din*, (1928) I.L.R. 50 All. 713, followed.

Venkatapathi v. Balappa ... (1933) I.L.R. 56 Mad. 641

MINOR—Contract of sale by a guardian on behalf of, containing a covenant to repurchase if vendee desired to sell—Completed contract or standing offer—Whether mutuality existed when guardian agreed to sell on behalf of minor—Specific performance—Enforceability.] *A* acting as the guardian of a minor, *B*, sold to *C* some land belonging to *B* by a registered sale-deed which contained the following covenant:—"If it happens that you *C* or your heirs have to sell the property to others, then you must sell it to *B* or his heirs for the same price and also for such price as may be determined by arbitrators in respect of any building that may be constructed on the land." In a suit for specific performance of the above agreement

to resell the property brought by *B*, after he attained majority, against *O*'s heirs, held, (1) that it was not merely a standing offer on the part of the vendee but a completed contract, and (2) that, inasmuch as *B* was a minor when the contract was entered into, it was for want of mutuality unenforceable by either party in a suit for specific performance since it was an executory contract, and the fact that such a contract was for the benefit of the minor did not alter the position.

Venkatachalam Pillai v. Sethuram Rao ... (1933) I.L.R. 56 Mad. (F.B.) 433

MORTGAGE—Immovable property and crops that may grow upon it—Mortgage of—Decree for sale on the basis of, authorizing decree-holder to sell mortgaged property—Sale of crops in execution of—Fresh suit for the purpose—Necessity.] Where the decree in a suit to enforce a mortgage of immovable property and the crops that may grow upon it states that the decree-holder may realize his decree by sale of the mortgaged property, the decree-holder is entitled to have the crops sold in execution of the decree and need not bring a separate suit for the purpose. Once a decree for sale of the property has been passed, the distinction that part of the mortgaged property is movable and part is immovable is altogether effaced.

Basivireddi v. Kamaraju ... (1933) I.L.R. 56 Mad. 560

Prior and subsequent mortgages, both being simple mortgages—Suits on foot of, neither mortgagee impleading the other in his suit—Sales in execution of decrees in, and purchases thereof by respective mortgagees themselves—Possession of property purchased—Rights of respective mortgagee-purchasers to—Earlier purchase in prior mortgagee's later suit—Subsequent mortgagee not impleaded in prior mortgagee's suit which has resulted in sale of property—Suit for sale subject to prior mortgage by—Maintainability—Lis pendens in mortgage suits—Rule as to.] The defendant was a prior simple mortgagee of properties *X* and *Y* and the plaintiff a subsequent simple mortgagee of properties *X* and *Z*. The plaintiff sued on foot of his mortgage, without impleading the defendant, obtained a decree and in execution thereof sole property *Z* and realized a part of his debt. Then the defendant sued on foot of his mortgage, without impleading the plaintiff, obtained a decree and in execution thereof purchased properties *X* and *Y* and obtained possession of the same. Thereupon the plaintiff brought property *X* to sale in execution of his decree and purchased it himself. In a suit brought by him against the defendant for unconditional possession of property *X*, held that he was not entitled to such possession and that his suit was liable to be dismissed. The principle that of two purchasers in successive mortgage suits, both mortgages being simple, the earlier purchaser is the one entitled to possession was not only not disapproved but expressly approved by the Full Bench in *Mulla Vittil Seethi v. Achuthan Nair*, (1911) 21 M.L.J. 218 (F.B.). The opinion to the contrary expressed in *Chinnu Pillai v. Venkatasamy Chettiar*, (1915) I.L.R. 40 Mad. 77, dissented from. *Sukhi v. Ghulam Safdar Khan*, (1921) I.L.R. 43 All. 469 (P.C.), is authority for the position that a first mortgagee-purchaser in the position of the defendant is entitled to retain his possession till he is paid off the amount of his mortgage and is not liable, according to the observations in *Chinnu Pillai v. Venkatasamy Chettiar*, (1915) I.L.R. 40 Mad. 77, to be turned out of possession on the ground that the suit on the first mortgage was improperly constituted and to be relegated to a fresh suit. *Venkataramana Reddi v. Rangiah Chetti*, (1921) 41 M.L.J. 399, referred to. *Quære* as to whether and in what circumstances a puisne mortgagee, who has not been impleaded in a prior mortgagee's suit which has resulted in the sale of the property, may maintain a suit for sale subject to the prior mortgage. Difference of opinion, as to the effect on the point of the Full Bench decision in *Mulla Vittil Seethi v. Achuthan Nair*, (1911) 21 M.L.J. 218 (F.B.), between *Venkatagiri v. Sadagopachariar*, (1911) 22 M.L.J. 129, and *Chinnu Pillai v. Venkatasamy Chettiar*, (1915) I.L.R. 40 Mad. 77, pointed out. The rule of *lis pendens* applies only to transfers by the plaintiff or the defendant of their respective interests after the suit including transfers by Court sale

in money decrees against either party. It does not apply to previously existing transfers (including mortgages) or legal proceedings to enforce such transfers by those entitled. On principle the sale in pursuance of a mortgage decree, the mortgage having been executed before the institution of the suit, is not affected by the doctrine of *lis pendens*. Opinion of MUKERJI J. in *Ram Sanehi Lal v. Janki Prasad*, (1931) I.L.R. 53 All. 1023, 1084 to 1070 (F.B.), on the subject of *lis pendens* in mortgage suits approved.

Chinnaswami v. Darmalinga ... (1933) I.L.R. 56 Mad. 115

MORTGAGE—*Puise mortgagee paying off earlier mortgage without knowledge of subsequent mortgage—Presumption.*] When a puise mortgagee pays off an earlier mortgage he must be presumed to intend to keep that mortgage alive against all subsequent mortgages, even though he had no knowledge at the time of payment of the existence of subsequent mortgages.

Krishnamurthy Chettiar v. Sathappa Chettiar ... (1933) I.L.R. 56 Mad. 517

Usufructuary mortgage deed—Personal covenant if contained in—Lease of mortgaged property granted to members of mortgagor's family—Rent arrears due in respect of—Charge created on mortgaged property in respect of—Mortgagee's right to enforce, regardless of time and mode of redemption stipulated for.] The material portion of an usufructuary mortgage deed was as follows:—"As we represented to you that there is some extra income in the property till the term stated here below, you should give us credit to a sum of Rs. 6,625 from the principal amount and you have agreed thereto out of concession to us. Deducting the said sum of Rs. 6,625 on payment (when paid) in one lump sum on the Kalavadhi Vishu Sankramana of Dundubhi year (1922-23) of the balance of Rs. 4,000 as also any arrears of rent that may remain due with your consent from any member of our family who may take the property on rent from you on the responsibility of the property, you shall receive the same and make over the property and documents as also the receipts which you obtain from the creditors. If we fail to pay the aforesaid amount on the date as stated above, thereafter, unless we pay an Kalavadhi Vishu Sankramana of any year, we have no right to ask you to receive the amount and surrender possession during any other time of any year, and from the date of default on the due date until we discharge all rights under this deed, you shall not only enjoy the properties but shall also be entitled to appropriate the income towards the interest due to you on the principal amount and we shall have no right to claim any excess income from you. If you do not consent to allow any arrears of rent against the members of our family, this deed shall be no bar to your right of recovering the same on the responsibility of the said properties. If in addition to the aforesaid sum of Rs. 1,500 left in amanath with you to pay the aforementioned creditors, any excess sum is found due to them and is paid by you, the excess so paid, and if the assessment be enhanced at the time of the survey, the sum so enhanced also, together with interest at either per cent per annum from the respective dates of payment we are liable to pay on the responsibility of the *slidarwar* property (property mortgaged usufructually), and we shall pay at the time of the final discharge of the amounts under this deed (when the accounts in respect of this deed or finally settled) the said sum also." Held that, on the true construction of the mortgage deed, there was no personal covenant to pay the balance of the mortgage money so as to entitle the mortgagee to use for sale of the mortgaged property for the realization of that amount. Held further that, as regards the arrears of rent due in respect of the leases granted to the members of the family, the mortgagee was entitled to enforce the charge created on the mortgaged property in respect of those arrears unfettered by the restrictions contained in the deed as to the time and mode of redemption.

Damodara v. Chandappu Pujary ... (1933) I.L.R. 56 Mad. 802

MORTGAGE—*Several mortgages on the same property—Decrees on the several mortgage bonds in suits in which other mortgagees were not parties—Suit for possession without impleading all parties interested—Priority of purchase—Priority of possession.*] Where immovable property is mortgaged without possession to one person and thereafter a second mortgage without possession is created over the same property by the mortgagor in favour of another person and each of the mortgagees files a separate suit to realize money due on his mortgage without impleading all the other persons interested except the mortgagor and in execution sales different persons became purchasers, when a dispute is raised in execution proceedings or in a separate suit for possession *simpliciter* as to who is entitled to possession, held that, in a case not affected by the doctrine of *lis pendens*, priority of date of purchase of the mortgagor's right to possession, until the rights of parties are worked out in a proper suit to which all persons interested are parties.

Nagendran Chettiar v. Lakshmi Ammal ... (1933) I.L.R. 56 Mad. 847

MORTGAGE SUIT—*Preliminary decree—Appeal from—Withdrawal of—Dismissal with costs—Final decree—Application for—Starting point of limitation for—Indian Limitation Act (IX of 1908), art. 181.*] In a case where an appeal against a preliminary decree in a mortgage suit was filed but was withdrawn and dismissed with costs, an application for final decree made within three years from the date of the order dismissing the appeal was not barred by limitation. *Abdul Majid v. Jawahir Lal*, (1914) I.L.R. 36 All. 350 (P.O.), and *Batuk Nath v. Munni Dei*, (1914) I.L.R. 36 All. 284 (P.O.), distinguished.

Mahapatro v. Magata Patro ... (1933) I.L.R. 56 Mad. 520

Final decree in—Application for—Dismissal of, for non-payment of batta—Effect of—Fresh application for such decree—Maintainability of—Code of Civil Procedure (Act V of 1908), Os. IX and XVII—Applicability of.] The dismissal of an application for a final decree in a mortgage suit on the ground that batta has not been paid cannot be construed to be the dismissal of the suit itself and is no bar to the filing of a fresh application by the plaintiff. An application for a final decree is not an application in execution, and, by force of section 141 of the Code of Civil Procedure, is governed by Orders IX and XVII as though it is a suit. Where, therefore, such an application is dismissed for non-service, the plaintiff may, under rule 4 of Order IX, put in a fresh application.

Sriramulu v. The Firm of Sriramulu ... (1933) I.L.R. 56 Mad. 310

NEGOTIABLE INSTRUMENT—*Promissory note—Minor—Guardian of—Execution by, for necessary purposes—Liability.*] A guardian of a minor cannot impose a liability upon the minor by executing a promissory note on his behalf even for necessary purposes. Distinction between the liability arising from an ordinary debt and that arising from a debt secured by a negotiable instrument pointed out. *Zemindar of Polavaram v. Maharaja of Pittapuram*, (1930) I.L.R. 54 Mad. 143, distinguished. *Meenakshisundaram Chetty v. Ranga Ayyangar*, (1931) 35 L.W. 387, dissented from.

Swaminatha Odayar v. Natesa Iyer ... (1933) I.L.R. 56 Mad. 879

Suit on a, under the summary procedure under O. XXXVII of the Code of Civil Procedure (Act V of 1908)—Instrument silent as to interest—Power of Court to award the statutory rate of interest under sec. 80 of Indian Negotiable Instruments Act (XXVI of 1881).] In a suit on a negotiable instrument under the summary procedure, the Court has power to award the statutory rate of interest, six per cent per annum, when there is no term in the instrument for the payment of interest. The operation of section 80 of the Negotiable Instruments Act is not excluded by Order XXXVII, rule 2 of the Code of Civil Procedure.

Venkatachalapathi Nidhi, Ltd. v. Nanjappa Goundan ... (1933) I.L.R. 56 Mad. 398

NEGOTIABLE INSTRUMENTS ACT (INDIAN) (XXVI OF 1881), SEC. 80:—See	
NEGOTIABLE INSTRUMENT	398

NUISANCE—Owner of premises not in occupation of same—Suit by, for injunction and damages for nuisance without joining the occupier of the premises—Competency of—“Permanent”—Meaning of.] An owner who is not in occupation of a house can file a suit for damages for nuisance without joining the occupier if the nuisance complained of is “permanent” and of such a character as to injuriously affect the reversion. Where the nuisance is caused by machinery installed in certain premises for the purpose of supplying electricity to a city in pursuance of a licence granted by Government for the said purpose, the nuisance is practically a “permanent” one, i.e., one “which will continue indefinitely unless something is done to remove it.”

Alwar Chetty v. Madras Electric Supply Corporation, Ltd. ... (1933)
I.L.R. 56 Mad. 289

PENAL CODE, INDIAN (ACT XLV OF 1860), SEC. 71—Applicability of—Conviction for offences under ss. 147 and 323, Indian Penal Code—Separate sentence for each offence—Legality of.] Where a number of accused persons are convicted for rioting under section 147, Indian Penal Code, and individually for causing hurt under section 323, Indian Penal Code, it is legal to award a separate sentence for each of the offences and section 71, Indian Penal Code, has no application in such a case. The offence of voluntarily causing hurt or of voluntarily causing grievous hurt can be committed without the commission of the offence of rioting, and, in like manner, rioting can be committed without the commission of the other mentioned offences. *Krishna Ayyar v. Emperor*, (1918) 20 Cr. L.J. 145, followed. *Kunnammal Mayan, In re*, (1927) 53 M.L.J. 656, and *Bishna v. Emperor*, (1922) 73 I.C. 517, dissented from.

Sothavalan v. Rama Kone ... (1933) I.L.R. 56 Mad. 481

... ss. 302 AND 201—Two accused charged under—Evidence insufficient to convict both or either under sec. 302—Conviction of both under sec. 201—Legality of.] Where two persons, charged with murder and with causing the disappearance of evidence with the intention of screening the offender from legal punishment under sections 302 and 201 of the Indian Penal Code, are acquitted under section 302 on the ground that the evidence is not sufficient to establish that both of them took such part in causing the death as would justify the conviction of each of them of the offence of murder, they can be convicted under section 201 even though the Court is of opinion that one or other of them, if not both, must have committed the murder. Neither the circumstance that neither of them has been convicted of the main offence nor the fact that the Court is not satisfied that they are innocent of the main offence is a bar to their conviction under section 201. Where it is impossible to say definitely that a person has committed the principal offence, he cannot escape conviction under section 201 merely because he has been charged also with the principal offence, or because there are grounds for suspicion that he might be the principal culprit.

Public Prosecutor v. Venkatamma ... (1933) I.L.R. 56 Mad. 63

PRESIDENCY-TOWNS INSOLVENCY ACT (III OF 1909), SS. 7 AND 36:—See	
PRESIDENCY-TOWNS INSOLVENCY ACT (III OF 1909), SEC. 108	273

... SEC. 52 (c):—See CONTRACT	
ACT (INDIAN) (IX OF 1872), SS. 102, 103, 172 AND 178	177

... SEC. 58—Scope of:—See	
PRESIDENCY-TOWNS INSOLVENCY ACT (III OF 1909), SEC. 108	273

PRESIDENCY-TOWNS INSOLVENCY ACT (III OF 1909), SEC. 108—Administration of estate of deceased under—Ss. 7 and 36 of Act—Inability of Official Assignee to take proceedings under—Sec. 58 of Act—Scope of—Report of Official Assignee—Evidentiary value of, in proceedings taken by Official Assignee under sec. 58 of Act.] A person died in insolvent circumstances. After his death his estate was being administered in insolvency in virtue of proceedings instituted under section 108 of the Presidency-towns Insolvency Act. Under section 36 of the Act, the Official Assignee examined certain persons in order to ascertain whether they had in their possession certain account books and documents of the deceased debtor. They denied being in possession of the same. The Official Assignee then took out an application in the Insolvency Court under section 7 of the Act supported by a report filed by him for an order directing them to bring the said documents into Court or committing them for contempt of Court. They filed affidavits contradicting the case put forward by the Official Assignee. On these materials the Judge sitting in Insolvency made the following order: “Books to be delivered within two weeks.” On appeal from this order, held: (1) The Official Assignee, in cases where he administers an estate under section 108 of the Act, has no power to examine persons under section 36 of the Act and no power to take proceedings under section 7 of the Act, and even if he had the power, he could not, without the consent of those persons, have proceeded with the application, having examined them under section 36 and the possession of the documents, etc., having been denied by them. (2) An application could be made under section 58 of the Act for an Order for delivery up of possession of the documents of a deceased debtor, admittedly his property, the only question being whether or not the respondent to the application is possessed of them. (3) In such proceedings the report of the Official Assignee is not evidence in support of his application.

Valliammal v. Official Assignee, Madras ... (1933) I.L.R. 56 Mad. 273

PRINCIPAL AND SURETY—Discharge of surety—Time given to principal debtor—Effect of—Reservation of right to proceed against surety—Exception in case of—Compromise arrangement between creditor and principal debtor—Time given to principal debtor by—Judicial act—Time given by—Surety if not discharged in case of—Consent order of a judicial act—Surety bond—Compromise if excluded by.] The principle that the granting of time without the consent of the surety to his principal discharges the surety is subject to the exception that, if, though time is granted by the creditor to the principal debtor by agreement with him, nevertheless under that agreement the creditor's right to proceed at once against the surety is reserved, then the surety is not discharged. Even if by agreement there is an explicit release of the principal debtor by his creditor, when that is combined with a reservation of the creditor's right to proceed against the surety, that does not discharge the surety. The effect of such an agreement with such a reservation is that the principal debtor agrees that the liability of the surety shall continue with the corollary that the right of the surety to exact his remedy in turn from the principal debtor also continues. Pending an appeal by the defendant against a decree for possession of a jagir, the plaintiff was allowed to execute the decree on her furnishing security. A security bond was thereupon executed by four sureties, whereby they undertook that the plaintiff would restore the jagir which she had taken delivery of in execution, that she would act according to the decree of the appellate Court, that she would pay whatever amount she was liable to pay in accordance with the appellate decree in connection with the said jagir, and that, if she committed default in so paying, the amount that she was liable to pay might be realized from the property given by the bond as security. The sureties further undertook, in the event of the property given as security not being enough, to discharge personally whatever was eventually decided to be due in connection with the decree to be made in respect of the jagir, if the plaintiff failed to pay it. The appeal was allowed, and the defendant got back the jagir in question by way of restitution. He then applied also by way of restitution for payment of mesne profits. But without any enquiry by the Court he and the plaintiff entered

into an arrangement whereby the profits were fixed at Rs. 20,000 (the amount claimed being Rs. 33,000) and it was agreed that the defendant should receive towards that amount Rs. 9,000 odd standing to the credit of the plaintiff in Court, that the balance of Rs. 10,000 odd should be paid by the plaintiff within a period of two months and that in default the defendant should take execution proceedings against the property offered as security by the sureties. The agreement then went on to say: "All reliefs which the petitioner (defendant) prays for in this petition have been settled by the aforesaid arrangement. One of the sureties, A, was not a party to the above arrangement." An order was made by the Court embodying the said arrangement. On an application by the defendant for the recovery from A of the balance due under the said arrangement and the order based thereon. Held that the consent order gave time to the plaintiff to pay the balance of the amount fixed for mesne profits without any reservation of the defendant's right to proceed against the surety in the meantime and that therefore the surety was discharged. *Per VENKATASUBBA RAO J.*—Whether a compromise as such is or is not excluded by the terms of a surety bond is a question of fact in each case. In the present case a compromise was not excluded by the terms of the security bond, and the surety was bound by the order based on the compromise, although the compromise had been entered into without his knowledge. *Per REILLY J.*—*Quære* whether the rule about a surety being discharged when time is given to his principal debtor does not apply when that is done by a judicial act with the consent of the creditor. Where there is a compromise, which on the face of it is a perfectly lawful compromise, between the creditor and the principal debtor and all that the Court has to do is to accept the compromise and make an order accordingly, the order so made, though with the consent of the creditor, cannot be said to be a "judicial act" in the above sense. The consent order had not the effect of releasing the plaintiff, the principal debtor. The provision that "all reliefs which the petitioner prays for in this petition have been settled by the aforesaid arrangement" cannot be interpreted as meaning that the plaintiff was released.

Anadana Jadaya v. Konammal ... (1933) I.L.R. 56 Mad. 625

PROVINCIAL INSOLVENCY ACT (V OF 1920), SEC. 52—Property "in the possession of the Court" within the meaning of—Immovable property—Decree creating charge on—Sale of property in execution of—Stay of—Interim receiver's right to apply for—Property in such a case not property "in the possession of the Court"—Application under sec. 52 by interim receiver impleaded as party to a suit in execution—Order on—Appeal from—Right of.] Immovable property which a judgment-creditor seeks to bring to sale on the ground that his decree creates a charge on it is not property in the possession of the Court within the meaning of section 52 of the Provincial Insolvency Act. An interim receiver is not, therefore, entitled to apply under that section to have the sale stopped. No appeal lies from an order on an application made under section 52 of the Provincial Insolvency Act by an interim receiver impleaded as a party to a suit in execution. Such an order neither comes within section 47 of the Code of Civil Procedure nor falls within the definition of "decree" in the Code.

Eshirajulu Chettiar v. Official Receiver, East Tanjore ... (1933) I.L.R. 56 Mad. 453

RAILWAYS ACT (INDIAN) (IX OF 1890), SEC. 57—Effect of:—See **CONTRACT ACT (INDIAN) (IX OF 1872), SS. 102, 103, 172 AND 178** ... 177

RECEIVER—Mortgage—Simple mortgage—Suit to enforce—Receiver in—Order appointing—Effect of—Income of property over which receiver appointed—Mortgagor's right in—Money decree against mortgagor—Purchaser in execution of, of right, title and interest of mortgagor in property over which receiver appointed—Right of, to income of property realized by receiver—Leave of appointing Court to execute decree against receiver—Effect of.] The effect of an order appointing a receiver in a suit to enforce a simple

mortgage is to deprive the mortgagor of his right to deal with the income of the property over which the receiver is appointed. The mortgagor cannot defeat the order by assigning the profits to a third party, and a purchaser of the mortgagor's right, title and interest in the property, over which the receiver is appointed, in execution of a money decree obtained by him against the mortgagor is no more entitled than the mortgagor to the income of the property realized by the receiver. The fact that the Court appointing the receiver granted the purchaser leave to execute his decree against the receiver and to implead the receiver as a party to the execution proceedings does not invest the purchaser with any special rights. *Per REILLY J.*—A simple mortgagee in this country cannot by getting a receiver appointed in the course of a suit enlarge his security or enlarge his rights to the prejudice of third parties, who have already acquired rights in the equity of redemption. A receiver appointed in such a case in this country is, like a receiver appointed in other cases, appointed for the protection of the property for the benefit of all the parties to the suit in accordance with their respective rights, as they may eventually be established.

Ponnu Chettiar v. Sambasiva Ayyar ... (1933) I.L.R. 56 Mad. 546

REGISTRATION ACT (INDIAN) (XVI OF 1908), SEC. 49—See **TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 53-A** ... 169

REGULATION (MADRAS) (XXV OF 1802)—See **INCOME-TAX ACT (INDIAN) (XI OF 1922), SEC. 2 (1) (a)** ... 251

REGULATIONS (MADRAS): (I OF 1803), SEC. 5; (II OF 1806) AND (VI OF 1831)—Effect:—See **HEREDITARY VILLAGE OFFICERS ACT (MADRAS) (III OF 1895), SEC. 23 (1)** ... 749

RES JUDICATA—Representative suit—Former suit without permission of Court—Code of Civil Procedure (Act V of 1908), sec. 11, expl. (vi); O. I, r. 8.] In a representative suit instituted under Order I, rule 8, of the Code of Civil Procedure, 1908, the decision in a former suit does not operate as *res judicata* by force of section 11, explanation (vi), unless the former suit was instituted in compliance with the above rule (formerly section 30 of the Code of 1877), namely, by permission of the Court, the Court giving notice as therein prescribed to all persons interested. There is possibly an exception where the former suit having been litigated *bona fide* on behalf of the plaintiff and others with a common right, the omission to comply with the rule has been inadvertent, and no injury therefrom has been sustained by the plaintiff in the second suit. In the present case, as the former suit was instituted in November 1877 without the permission of the Court, and moreover was not instituted or conducted as a representative suit, no *res judicata* arose in the second suit. *Baiju Lal Parbatia v. Bulak Lal Pathak*, (1897) I.L.R. 24 Cal. 385, 390, and *Srinivasa Chariar v. Raghava Chariar*, (1897) I.L.R. 23 Mad. 28, 32, approved. *Gopalacharyulu v. Subbamma*, (1919) I.L.R. 43 Mad. 497, considered. Judgment of the High Court, *Sonachallam Pillai v. Kumaravelu Chettiar*, (1927) I.L.R. 51 Mad. 128 (F.B.), reversed.

Kumaravelu Chettiar v. Ramaswami Ayyar ... (1933) I.L.R. 56 Mad. (P.C.) 657

—Insolvency proceedings—Applicability to—Provincial Insolvency Act (V of 1920), sec. 54—Official Receiver's petition under—Dismissal of—Fresh petition under section in respect of same sale by a creditor—Maintainability of.] The doctrine of *res judicata* is applicable to proceedings in insolvency. Held, accordingly, that the dismissal of a petition under section 54 of the Provincial Insolvency Act by the Official Receiver in respect of a sale by the insolvent on the ground that the sale did not amount to a fraudulent preference was a bar to a subsequent petition under the same section by a creditor of the estate of the insolvent in respect of the same sale.

Rangappa v. Rangappa ... (1933) I.L.R. 56 Mad. 395

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SEA CUSTOMS ACT (VIII OF 1878), SEC. 37 :—See CONTRACT	334

SECURITY BOND—Enforcement of—Mode of—Temporary injunction in favour of plaintiff pending disposal of suit—Security bond executed by plaintiff to count on condition of, for amount exceeding Rs. 1,000 undertaking, in event of dismissal of suit eventually, to make good loss caused to defendants by reason of injunction—Enforcement of—Code of Criminal Procedure (Act V of 1908), ss. 47, 95, 145 and 151—Applicability and effect of—Suit to enforce bond—Necessity.] Pending a suit for a declaration of title to certain immovable properties and for a permanent injunction restraining, *inter alia*, the appellants, who were in possession of the properties, from cutting or removing trees on them or from interfering in any way with the plaintiff's management of the same, a temporary injunction was granted to the plaintiff restraining the appellants from cutting and removing the trees on the suit properties on condition of his giving security to the extent of Rs. 15,000. A registered security bond was executed by means of which the plaintiff gave an undertaking to the Court to make good to the appellants whatever loss was sustained by them on account of the injunction order in case the suit was eventually decided against him and further agreed that, in case he did not make good the loss, the properties mentioned in the security bond were to be liable for the amount of the loss suffered by the appellants and he also make himself personally liable. The suit was eventually dismissed with costs and the question arose as to the mode in which the appellants were entitled to enforce the security bond. Held (1) that, as the security bond did not propose to bind the plaintiff to any individual officer or person but merely bound the plaintiff to the Court, the appellants were not entitled to sue upon the security bond; (2) that an application under section 95 of the Code of Civil Procedure was incompetent as the security bond was for a larger amount than Rs. 1,000; (3) that section 145 of the case was inapplicable as the appellants and the plaintiff were parties to the suit; (4) that, on the assumption that section 47 of the Code of Civil Procedure was inapplicable to the case, the appellants having no remedy either under that section or under section 145 and no remedy by suit, the case came within section 151 of the Code of Civil Procedure and the claim could properly be dealt with under that section.

Kunhi Moidin v. Koman Nair (1933) I.L.R. 56 Mad. 989

SPECIFIC PERFORMANCE—Decree for—Enforcement of—Defendant's right of—Vendor and purchaser—Purchaser—Suit for specific performance by, against vendor and subsequent alienees from him with notice—Decree in—Enforcement by vendor of, against will of subsequent alienees—Specific Relief Act (I of 1877), sec. 35 (c).] The decree in a suit for specific performance of a contract to sell immovable property brought by a purchaser against his vendor and alienees from him of different portions of the property with notice of the contract provided, *inter alia*, that the plaintiff was to deposit a certain amount in Court within a specified period, that on deposit the vendor on his behalf and on behalf of his sons and of the subsequent alienees from him was to execute and register a conveyance in respect of their respective properties, the deed of conveyance being joint or several according as the plaintiff desired, and that the plaintiff was to get possession of the properties with mesne profits as from the date of deposit of the money. The plaintiff made no attempt to carry the decree into effect. The vendor presented a petition praying for a final order in conformity with the preliminary decree already passed in the suit. He expressed his willingness to perform his part of the contract, and applied that the plaintiff should be directed to bring the purchase-money into Court. The subsequent alienees from the vendor did not join him in making that application. The vendor urged that the Court should execute the conveyance on their behalf and that the plaintiff should be called on to bring in the full price. Held that, in the circumstances of the case, the vendor was not entitled to the relief prayed for by him and the only remedy open to him was to have the contract rescinded. The vendor could not enforce the decree as regards his share only. He could not compel the subsequent alienees from him against their consent to join in the conveyance. However the equities

might stand between them and the plaintiff, it would be repugnant to all principles of equity that the vendor should enforce the decree against their interests and without their consent, thereby depriving them of the title which he had himself conveyed to them. *Per VENKATASUBBA RAO J.*—A decree for specific performance operates in favour of both parties and the defendant therefore can also enforce specific performance.

Akshayalingam Pillai v. Arayambalammal ... (1933) I.L.R. 56 Mad. 796

SPECIFIC RELIEF ACT (I OF 1877), SEC. 35 (c) :—See SPECIFIC PERFORMANCE ...	796
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SEC. 42 :—See HEREDITARY VILLAGE-OFFICES	
ACT (MADRAS) (III OF 1895), SEC. 23 (1)	749

SUITS VALUATION ACT (VII OF 1887), SEC. 3 :—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXI, R. 63	716
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SURVEY AND BOUNDARIES ACT (MADRAS) (IV OF 1897), SEC. 13—Boundary dispute within meaning of the Act—Zamindari—Land situated in, whether part of ryoti land of zamindari or inam land not included in it—Dispute as to—Survey Officer's decision as to—Conclusive under sec. 13 of Act, if party affected by decision does not file a suit within one year to set it aside—Jurisdiction of Survey Officer—Title and possession—Jurisdiction on matters of—Adverse possession—Interruption of—Survey Officer's decision if has effect of—Madras Hereditary Village Offices Act (III of 1895), ss. 13 and 21—Holder of office—Ejectment of trespasser on inam land forming part of emoluments of office—Suit for—Ss. 13 and 21 not a bar to.] In the course of the survey of a zamindari a dispute arose whether a survey field situated in a village within the ambit of the zamindari should be demarcated as an inam or as part of the ryoti (jeroyati) land of the zamindari, the zamindar claiming the land as ryoti land and the inamdar as his mirasi inam. The Survey Officer demarcated the land as mirasi inam and his decision was, in an appeal preferred by the zamindar under section 12 of the Madras Survey and Boundaries Act (IV of 1897), affirmed by the Assistant Superintendent of Survey. The zamindar did not file a suit within a year to get that decision set aside. In a suit subsequently brought by the inamdar against the zamindar, Held (on a reference under Clause 36 of the Letters Patent, a difference of opinion between WALLER and KRISHNAN PANDALAI J.J.) by WALLACE J. (concurring with WALLER J.) that the dispute before the Survey Officer was a boundary dispute within the meaning of the Survey and Boundaries Act of 1897, that the Survey Officer had jurisdiction to decide that dispute, and that, as the zamindar did not file a suit within a year to get that decision set aside, it was conclusive under section 13 of the Survey and Boundaries Act as to the land being Government service inam and not part of the zamindari. Held, further by WALLACE J. (concurring with WALLER J.) that a decision by a Survey Officer does making a break in existing possession so as to render ineffective, for purposes of limitation, any adverse possession running at its date. *Azhagaperumal Pillai v. Rasa Pillai*, (1931) 35 L.W. 388; 62 M.L.J. 399, dissented from. *Per WALLACE J.*—What the Survey Officer had to decide and had jurisdiction to decide was how the boundary of the zamindari was to run, whether it should exclude or include the land in question, and his decision was that the inam being Government property must be excluded from the estate, demarcated out of the estate. Such a dispute can properly be called a boundary dispute, because, unless controversies of that kind are settled, boundary of the zamindari cannot be properly demarcated. There can be a boundary dispute within the meaning of the Act even though the boundary of the disputed portion is not itself in dispute. *Per WALLER J.*—Strictly speaking, there was no dispute about the dimensions of the survey number itself, but there was a dispute about the boundary and extent of the ryot land of the zamindari—that is to say, whether it did or did not include the field in question—and that was a boundary dispute within the meaning of the Act. *Per KRISHNAN PANDALAI J.*—Whether there is or is not in any particular case a real dispute about a boundary is to be determined

on the facts of the dispute itself. When two people dispute title to an ascertained and definite piece of land or to subordinate interests therein the dispute cannot in any proper sense be described as a boundary dispute though as a result of the disputed title being settled the boundaries of the property of one or other of the disputants may be accordingly shifted. The dispute in the present case was not about the physical boundaries or dimensions of the land but about the tenure or the quality of estate possessed by the parties in the land, which was part of the zamindari. *Per WALLACE J.*—The decisions of a Survey Officer in a boundary dispute are not limited to the mere abstract question of what are the physical boundaries in dispute but are decisions on matters of title and possession and are conclusive on those matters. *Per KRISHNAN PANDALAI J.*—If from a particular boundary being conclusively established the right of either party to the intervening space necessarily follows, that will be held concluded not because of the Act but because of the force of logic. The Act itself confers no conclusiveness upon anything else but boundaries, and says nothing about the right to the property or about its possession. A Survey Officer's decision as to boundary although conclusive as to the boundary, does not have the legal effect of terminating the possession of the party who was in possession or of destroying its legal effect if it had already conferred a title upon the possessor or breaking the running of possession in favour of the person in whose favour the boundary is ordered. *Ashagaperumal Pillai v. Rasa Pillai*, (1931) 35 L.W. 388; 62 M.L.J. 399, followed. *Per WALLER and KRISHNAN PANDALAI JJ.*—A suit by the holder of an office to eject persons who are alleged to have trespassed on some inam land, which forms part of the emoluments of the office, is not barred by sections 13 and 21 of the Madras Hereditary Village Offices Act (III of 1895). *Per WALLER J.*—*Quaere* whether a suit by the holder of an office to recover the emoluments attached to it is taken by section 21 of the Madras Hereditary Village Offices Act out of the jurisdiction of the ordinary Courts. The language of section 13 of the Act is inapplicable to a suit by an actual holder of an office to recover the emoluments thereof. Such a person comes into Court as the holder of the office and not as a person claiming to be entitled to it.

Ramanurthi v. Gajapatiraju ... (1933) I.L.R. 56 Mad. 365

TARIFF ACT (INDIAN) (VIII OF 1894), SEC. 10—"Article duty-paid"—Meaning of:—*See CONTRACT* ... 334

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 52—*Lis pendens* in mortgage suits—Rule as to:—*See MORTGAGE* ... 115

SEC. 53-A—*If retrospective*—*Transfer of Property (Amendment) Act, XX of 1929—Registration Act (Indian) (XVI of 1908), sec. 49 as amended by sec. 10 (3) of the Transfer of Property (Amendment) Supplementary Act (XXI of 1929)—Right to remove sand from land—If, an interest in immovable property—Covenant in an unregistered agreement in respect of a matter collateral to the agreement—Admissibility to prove covenant.* A written agreement, dated 4th August 1927, and entered into between S and K who were respectively styled lessor and lessee in the said document, provided, *inter alia*, as follows:—(1) That the lessor has received from the lessee a certain amount as compensation, (2) that the lessee shall be at liberty to remove sand or earth from the plots above mentioned to a specific depth, and level the plots after removal, (3) that the land should be vacated on or before 1st October 1928 after the removal of sand. The agreement was not registered. A suit was filed by S against K for damages for breach of the covenant to level the land after removing sand or earth therefrom as provided in the agreement. Held that, (i) the agreement was for transfer of an interest in immovable property, (ii) section 53-A of the Transfer of Property Act which was introduced by the Transfer of Property (Amendment) Act (XX of 1929) and section 49 of the Indian Registration Act as amended by section 10 (3) of the Transfer of Property (Amendment) Supplementary Act (XXI of 1929) are not retrospective, (iii) inasmuch as

damages are claimed in respect of breach of a covenant which was an arrangement collateral to the agreement and which did not affect the land within the meaning of section 49 of the Indian Registration Act, the agreement was admissible in evidence for the said purpose.

Kanjees and Mooljee Brothers v. Shanmugam Pillai ... (1933) I.L.R. 56 Mad. 169

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 137:—*See CONTRACT ACT (INDIAN) (IX OF 1872), ss. 102, 103, 172 AND 178* ... 177

TRUSTS ACT (INDIAN) (II OF 1882), ss. 11, 41—*Trust deed—Minor beneficiary with vested or contingent interest under—Court—Inherent power of.* When there arises an emergency or a state of circumstances which it may reasonably be supposed was not foreseen or anticipated by the author of the trust and is unprovided for in the trust instrument, and which renders it desirable and perhaps even essential, in the interests of the beneficiaries, that certain acts should be done by the trustees which they themselves have no power to do, and to which the consent of all the beneficiaries cannot be obtained by reason of some not being *sui juris* or not in existence, the Court will exercise its general administrative jurisdiction by sanctioning, on behalf of all parties interested, those acts being done by the trustees. When an advance under the abovementioned circumstances was sought out of the estate for the benefit of a minor who is a beneficiary with a vested or contingent interest, the Court exercised its extraordinary jurisdiction and granted a reasonable amount.

Rajagopala Gramani v. Bagiammal ... (1933) I.L.R. 56 Mad. 508

... ss. 63 AND 66:—*See INSOLVENCY* ... 570

WAGERING CONTRACT—Distinction between, and lottery:—*See COMPANY* ... 26

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THE
INDIAN LAW REPORTS
(MADRAS SERIES).

SPECIAL BENCH.

*Before Sir Owen Beasley, Kt., Chief Justice,
Mr. Justice Ramesam and Mr. Justice Cornish.*

VEDATHANNI, PETITIONER,

v.

1932,
May 11.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
RESPONDENT.*

Indian Income-tax Act (XI of 1922), sec. 14 (1)—Hindu joint family—Widow of deceased member of—Maintenance and arrears of maintenance received from surviving member by—Liability to assessment of—Hindu joint family with single male member if and when there can be.

Maintenance and arrears of maintenance received by a widow of a member of a joint Hindu family is exempt from taxation under section 14 (1) and other sections of the Indian Income-tax Act (XI of 1922).

There can be a joint family with a single male member provided there are widows of deceased coparceners or other persons entitled to maintenance from him. The single male member in such a case will not himself be exempt from taxation, because he cannot be said to receive the income of the estate as member of an undivided family and he does not receive the income from any other person by reason of his being a member of a joint family.

The language of section 14 of the Act is strictly applicable only to widows of deceased coparceners, to disqualified heirs and maidens in the family receiving maintenance.

* Original Petition No. 114 of 1931.

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REFERENCE to the High Court under section 66 (2) of the Indian Income-tax Act (XI of 1922) in the matter of Vedathanni of Vadapathimangalam, Tanjore Circle, Kalappal.

T. V. Muthukrishna Ayyar (N. Muttuswami Ayyar with him) for assessee.—The widow of a member of a joint Hindu family is a member of the joint family; see Gour's Hindu Code, Third Edn., page 638, section 115; Mayne's Hindu Law, Ninth Edn., paragraphs 269–70; and West and Buhler's Hindu Law, Fourth Edn., pages 604, 607 and 627. As to what the right to maintenance of a female member originally was, see West and Buhler, pages 604, 607, 627 and 2317. By marriage a female becomes a member of the family of her husband; see *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo*(1). A female becoming a member of a joint family by marriage acquires an interest in joint family property; see Sarkar's Hindu Law, Fifth Edn., pages 273 and 304. A wife becomes a co-owner with her husband on marriage; see Sarkar, page 455; and Sir Thomas Strange's Hindu Law, Third Edn., page 198. [*Raja Lakshmi Devi Amma v. Naganna Naidu*(2) was also referred to.] Maintenance and arrears of maintenance received by the widow from the surviving male member is therefore exempt from taxation under section 14 (1) of the Income-tax Act.

M. Patanjali Sastri for Commissioner of Income-tax.—Section 14 (1) assumes the continued existence of a joint family up to the date of the assessment. The widow of a deceased member gets her maintenance from family property in the hands of the surviving member by right of her husband having been joint with the surviving member at the time of the former's death. She is not a member of the joint family at the date of the assessment. There being only one surviving member, the family cannot be said to be a joint family within the meaning of section 14 (1) of the Act. The widow does not receive maintenance as being a member of a joint Hindu family at the time of her receipt of maintenance. She receives it only on the basis of her having been a member at the time of her husband's death

(1) (1878) I.L.R. 1 Mad. 69, 81 (P.C.). (2) (1924) 21 L.W. 461, 468.

[You say there must be two male members at least to constitute a joint Hindu family—CORNISH J.]

Yes.

[If your argument that the maintenance received by the widow is taxable in her hands is correct, the result will be that the amount received by her is taxed twice over, once in the hands of the surviving member or members of the joint family, and again in the widow's hands—CHIEF JUSTICE.]

The amount might have been paid out of the corpus of the estate. If, on the other hand, it was paid out of the income of the estate received by the surviving member in the year of account, the amount will be taxed twice over. There is also no provision in the Act entitling the surviving member to get a deduction or refund.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by

RAMESAM J.—The first question referred to us by the Income-tax Commissioner is: RAMESAM J.

Whether maintenance and arrears of maintenance received by a widow of a member of a joint undivided Hindu family is not exempt from taxation under section 14 (1) and other sections of the Act.

The facts of the case may be briefly stated. The Vadapathimangalam family in the East Tanjore District consisted of two brothers up to 1912, Somasundara and Ramalinga. Ramalinga died in December 1912 leaving a widow. She is the assessee in this case and the reference to us was made at her instance. Somasundara died in January 1925 leaving two widows. In July 1925 an adoption was made to him. The adopted son, a minor, is now the sole male member of the family and holds the estate. Ramalinga's widow sued him for maintenance with arrears. The Subordinate Judge of Negapatam gave her a decree for maintenance at the rate of Rs. 6,000 per annum and for arrears amounting to Rs. 69,000. There was an appeal to the High Court. On appeal, the decree was confirmed by our brothers CURGENVEN and SUNDARAM CHETTI JJ. We

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are informed that leave to appeal to the Privy Council has been granted, but it is not necessary that this reference should wait till the Privy Council appeal is disposed of.

On the first question referred to us, the Commissioner stated his view as follows :—

“It has been represented to me that at one time the rights of a son's wife or widow amounted to membership of the family with an interest in the family property. But modern judicial decisions have, I understand, modified the law as laid down in the Smriti texts. The effect of those decisions is that the petitioner cannot be said, on the facts of this case, to be a member of a Hindu undivided family. Nor can it be said that she received the maintenance allowance as a member of a Hindu undivided family for the widow of a deceased coparcener in an undivided family would be entitled to receive maintenance from the surviving members of the family although such members become divided subsequently to her husband's death.”

The Commissioner has not referred to any actual decisions. So far as the Hindu law is concerned, there is little scope for any doubt. As to text-books, it is enough to refer to Strange's Hindu Law, Third Edn., Vol. I, page 171, where widows entitled to maintenance are referred to as dependent members of a family; Mayne's Hindu Law, Ninth Edn., section 270, second paragraph; G. C. Sarkar's Hindu Law, Sixth Edn., page 294, where female members of a joint family are enumerated inclusive of widows of male members; and Mulla's Hindu Law, Seventh Edn., page 549. It is enough to refer to the decision of the Privy Council in *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo*(1). But this point does not require any elaboration as it is practically conceded by the learned Advocate appearing for the Commissioner. But he contended that where the family has been

(1) (1876) 1 L.R. 1 Mad. 68, 81 (P.C.).

reduced to a single male member, though there are a number of widows of deceased coparceners and other persons entitled to maintenance from him, there is no joint family. This is not the question referred to us by the Commissioner who assumes that there is an undivided Hindu family in the case. But even this contention, I do not think, is tenable. The passage already referred to from Mulla's Hindu law, relying on *Surendra Nandan alias Gyanendra Nandan Das v. Sailaja Kant Das Mahapatra*(1) and the Privy Council decision in *Bachoo v. Mankorebai*(2), shows that there can be a joint family with a single member provided there are other members entitled to maintenance from the estate. It is unnecessary for us to express any opinion in this case on

(1) cases where there is a single male member and there are no widows of deceased coparceners entitled to maintenance;

(2) cases where the surviving male members effect a partition between themselves while continuing to pay maintenance to widows of deceased coparceners.

So far as the case before us is concerned, undoubtedly there is a joint family and also the petitioner in this case is entitled to maintenance as the widow of a deceased coparcener, and receives it as member of an undivided Hindu family.

The only further question that arises is, whether there is anything in the Income-tax Act which produces anomalous results if we adopt the above construction. Far from there being any anomaly we find the result is consonant with justice and the purposes of the Act. The object and scope of section 14 is to prevent the Crown from taxing twice over. If there is any section in

(1) (1891) 1 L.R. 18 Calc. 385.

(2) (1907) 1 L.R. 31 Bom. 373 (P.O.).

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the Act which enables the holder of the estate in making his return to deduct the amounts of maintenance paid by him to the widows of deceased coparceners, then the effect of the above construction would be to prevent the Crown from taxing the income even once. But it is admitted before us that there is no such provision in the Act. If widows are not exempted by reason of the above construction, the Crown would undoubtedly be taxing twice over. Our construction makes the result consistent with the equities of the case.

Another contention referred to before us by the learned Advocate is that the sole male member now holding the joint family property would himself be exempt from any taxation. I am unable to agree with this suggestion. He cannot be said to receive the income of the estate as a member of an undivided family. He receives his income by reason of business or investment or from some other source. He does not receive the income from any other person by reason of his being a member of a joint family. The language of the section is strictly applicable only to widows of deceased coparceners, to disqualified heirs and maidens in the family receiving maintenance. This contention therefore is not tenable. I say nothing in this case about super-tax from a Hindu joint family.

The result is that the first question should be answered in favour of the petitioner. If this is answered, the other two questions do not arise.

My Lord the CHIEF JUSTICE and CORNISH J. agree.

The petitioner will have her costs of this petition, viz., Rs. 250.

Her deposit of Rs. 100 will be returned to her.

A.S.V.

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Cornish.*

AMMATHAYARAMMAL (SECOND DEFENDANT),
APPELLANT,

v.

THE OFFICIAL ASSIGNEE, MADRAS (PLAINTIFF),
RESPONDENT.*

1932,
March 3.

*Indian Evidence Act (I of 1872), ss. 154 and 142—Witness—
Party calling a—Cross-examination by—Conditions—Discretion of Court—Considerations governing the exercise of—Appellate Court—Powers of, to interfere when trial Court has exercised discretion—Testimony of such witness—Value of.*

A Counsel calling a witness put in chief examination questions of a cross-examination nature without obtaining the express permission of the Court for the said purpose. Objection to such a procedure was not then taken by the Counsel appearing on the opposite side. It appeared from the judgment of the trial Court that permission to adopt such a course would have been granted by the Court if permission had been asked for or if objection had been taken to such a course.

Held that (1) under section 154 of the Indian Evidence Act before a party calling a witness can cross-examine him, it is not necessary that the witness should first be declared to be hostile to the party calling him, and the Court has unfettered discretion to allow a Counsel to put questions of a cross-examination nature to his own witness even though he did not show himself hostile to the party calling him, but the Court ought not to exercise its discretion unless during the examination-in-chief something happens which makes it necessary for the facts to be got from that witness by cross-examination; (2) it is necessary before the procedure under section 154 of

* Original Side Appeal No. 47 of 1930.

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the Indian Evidence Act can be adopted that leave of the Court should be asked for and obtained or permission given by the Court *suo motu* for the said purpose before such questions are put to a witness though the section may not make such a procedure imperative and the permission contemplated by the section should be signified, if not in words, by some other action of the Court indicating its permission during the cross-examination of the witness by the party calling him; (3) whatever may have been the reasons for the exercise of the discretion by the Court for giving sanction to such a procedure, if it appears that the trial Court had exercised its discretion or would have exercised its discretion and accorded sanction if objection had been taken in time, it ought not to be interfered with by the appellate Court; (4) it is not obligatory on the Court to discard *in toto* the testimony of such a witness and it is open to the Court to accept some portion and discard the rest.

APPEAL from the judgment of WALLER J. and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 395 of 1929.

T. R. Venkatarama Sastri and K. Narasimha Ayyar for appellant.

Nugent Grant and V. Varadaraja Mudaliyar for respondent.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—The first defendant in the suit under appeal is an insolvent and the second defendant is his wife. The Official Assignee claimed in the suit a declaration that three houses, the title deeds of which stand in the name of the insolvent's wife, the second defendant, were in reality the property of the insolvent who paid for them. The defendants on the other hand contended that the insolvent's wife was the actual buyer and that all the money required came from her pocket with the exception of one-sixth of the price of one of the houses.

It is not necessary at this stage to go into any of the facts of the case because an objection has been taken, which we are dealing with as a preliminary objection, to certain procedure adopted at the trial. The Official Assignee called the insolvent, the first defendant in the suit, in support of his case. Whilst he was under examination-in-chief, Mr. Grant who appeared for the Official Assignee put a number of questions to the witness of a cross-examination nature. Objection is taken that Mr. Grant cross-examined his own witness. This, it is contended by the appellant, he was not entitled to do unless (1) the witness first showed himself to be hostile and (2) leave of the Court to put such questions to him had been obtained. It is objected, first, that the witness did not show himself by his demeanour to be hostile and, secondly, if he did, the consent of the Court to cross-examine him was never obtained. There is nothing on the record of evidence to show that any submission was ever made to the trial Judge that the witness was hostile and that leave was sought to cross-examine him. Mr. Grant quite fairly says that he has no recollection of ever having made any such submission. It is equally clear that no objection to the procedure adopted by the learned Counsel for the Official Assignee was taken by his opponent. From the concluding passage in the learned trial Judge's judgment it would appear that Mr. Srinivasa Ayyangar, who appeared for the defendants, in the course of his argument condemned the procedure already referred to. The learned trial Judge deals with Mr. Srinivasa Ayyangar's argument on this point and states as follows:—

"I am aware that, as between two ordinary litigants, such a method of procedure has been strongly condemned by the Judicial Committee. The Official Assignee stands in a

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different and frequently a very embarrassing position. He represents the estate of the insolvent who is usually colluding with transferees against his creditors. The insolvent, in such a case, has to be made a party. The Official Assignee must examine him as a witness, for there are certain things that only he can speak to, but it would be absurd to treat him as having been put forward as a witness of truth, by all of whose statements the Official Assignee is bound. In this case the insolvent had to be examined to admit the correctness of his banking account and the fact that all the money for the houses came out of it. Beyond that, everything he wanted to say was in favour of his wife and I can see nothing improper in allowing the Official Assignee to cross-examine him in order to show that his evidence, in other respects, was not to be accepted and to elicit admissions from him that were inconsistent with his support of his wife."

What, in my view, is to be understood by these observations is (i) that no objection was taken to Mr. Grant cross-examining his own witness by Mr. Srinivasa Ayyangar while the witness was in the witness box and (ii) that the trial Judge did not interfere but allowed the cross-examination to go on. What is quite clear is that, if Mr. Srinivasa Ayyangar had objected to this procedure or Mr. Grant had asked for permission to adopt it, WALLER J. would have disallowed the objection and allowed Mr. Grant to cross-examine the witness for the reasons he has stated.

Three questions arise here: (1) Before the party calling the witness can cross-examine him, is it necessary that the witness should first of all be declared to be hostile or can such questions be allowed by the Court to be asked even though the witness does not show himself to be hostile? (2) Is it necessary that, before they are asked, the leave of the Court should be asked for and obtained? (3) What is the effect of such an examination of the witness on the testimony of that witness; should the whole of his evidence be

discarded or is it open to the Court to accept some of it and discard the rest?

The meaning of section 154 of the Indian Evidence Act has to be considered. That provides:

"The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party."

For the respondent, the Official Assignee, it is argued that that section gives the Court an unfettered discretion and that the exercise of that discretion is not therefore dependent upon the hostile demeanour of the witness; and furthermore it is argued that it is not necessary that the leave of the Court to put such questions to the witness should be obtained because the words used are "the Court may . . . permit" It is argued that this permission need not be expressed in words and that, if no objection is raised by the opposite side and the Court does not interfere with the cross-examination, the permission of the Court is to be implied. It is further argued that the effect of a party cross-examining his own witness is not to cause general discredit to be cast upon the witness and that it is open to the Court to attach such weight to the evidence of the witness so dealt with as it thinks right.

With regard to the first question raised, it must be observed that, in practically all the cases cited, the witness had been shown to be a hostile witness so that no question arose as to the limits of the Court's discretion. There are, however, two cases which actually do consider this question and one of them is a decision by which we are bound. That is the decision of the Privy Council in *Baikuntha Nath Chatteraj v. Prasannamoyi Debya*(1). The judgment of the Judicial

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Committee was delivered by Sir LAWRENCE JENKINS and on page 701 he says:

"Nagendra Nath Ghose does not support the proponent's case, for in his examination-in-chief he declared that he did not know whether Mandakini executed any will, and that it was to a blank paper that he put his signature at the request of Ram Lal Gosain.

An application was therefore made to the District Judge to declare the witness hostile and to allow the proponent to cross-examine him.

This is a position for which provision is made by section 154 of the Evidence Act, which says nothing as to declaring a witness hostile but provides that the Court may *in its discretion* permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

One of the Appeal Court's adverse comments on the trial Judge's conduct of the case is that the cross-examination of this witness was improperly disallowed. No such objection was made in the grounds of appeal to the High Court, and it would seem as though this comment must have been made without the Court's attention being drawn to that portion of the order sheet in which the District Judge remarks, as the record of the deposition indicates, that the witness was virtually cross-examined, though the Judge in fact did not think he had turned hostile."

It is this case which supports the following view expressed on page 1014 of the Ninth Edn. of "Woodroffe and Ameer Ali on Evidence":

"It can, therefore, be hardly said in this state of the authorities (especially in India where the words of sections 154, 155 are alone to be considered) that it is a settled rule that it is only when a witness manifestly shows a hostile personal feeling by his conduct and demeanour that the Court ought to allow his cross-examination and impeachment. The testimony of a witness, if adverse, is only the more dangerous if he shows no hostile disposition; and if he be astute as well as treacherous, he will take care to conceal his true sentiments from the Court."

The other case is *Praphullakumar Sarkar v. Emperor*(1). This was a decision of a Full Bench of five Judges. The facts of the case are that one of the prosecution witnesses was declared hostile and permission was given to the Public Prosecutor to cross-examine him. In his charge to the jury, the Judge said:

"Maniruddin has deposed in favour of the defence story. This witness has been declared 'hostile' and cross-examined by the prosecution. His evidence has, therefore, to be excluded from your consideration."

I shall refer to this case again when I come to deal with the question whether such testimony has to be excluded from the consideration of the Court. I have referred to this case, however, because of the observations of the Full Bench upon the meaning of section 154 of the Evidence Act. On page 1424, RANKIN C.J. says:

"Now it is true that in *Coles v. Coles*(2), and it may be in other cases, a hostile witness has been described as a witness who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the Court. This is not a very good definition of a hostile witness and the Indian Evidence Act is most careful in section 154 not to restrict the right of "cross-examination" even by committing itself to the word 'hostile'."

On page 1433, BUCKLAND J. says:

"As a practical matter, therefore, section 154 refers exclusively to cross-examination of a witness by the party calling him. We are not asked to state the circumstances in which the Court may exercise its discretion in favour of the party seeking to cross-examine, and indeed it would be impossible to formulate any comprehensive rule. One observation, however, is permissible. The object of calling a witness is to elicit the facts and if the facts to be elicited are such as ought to be elicited from a witness, and if this cannot be elicited without cross-examining him, it would be difficult to say that the discretion was wrongly exercised."

(1) (1931) I.L.R. 58 Calo. 1404, 1424, 1433 (F.B.). (2) (1863) L.R. 1 P. & D. 70.

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In this case the judgment of the Judicial Committee in *Baikuntha Nath Chatteraj v. Prasannamoyi Debiya*(1) is not referred to but the same view of the scope of section 154 of the Evidence Act is taken both by RANKIN C.J. and BUCKLAND J.

In England the law is different upon the point. The Common Law Procedure Act of 1854 settled what had been the subject of varying decisions for many years by providing that

"a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or by the leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony, but before such last-mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such a statement."

In England, therefore, the exercise of the discretion of the Court is conditional on the adverse demeanour of the witness, whereas section 154 of the Indian Evidence Act gives an unqualified discretion to the Judge apart from any question of the hostility or otherwise of the witness. In the opinion of the referring Judges in *Praphullakumar Sarkar v. Emperor*(2), the reason why the Court in India is given a much wider discretion than in England is in all probability to avoid the conflict which had existed in England over the words "hostile" and "adverse". The first question raised must, in my view, be answered in the negative.

I now turn to the consideration of the question as to whether permission of the Court must be asked for. Upon this point there is an entire absence of authority which is not at all surprising. Instances where the

procedure apparently adopted in this case, namely, the cross-examination of the party's own witness without the leave of the Court being obtained and without objection made by the opposite party and without the express approval of the Court, must indeed be rare. In every case to which reference has been made upon the questions under consideration, so far as I am able to see, the leave of the Court to cross-examine the witness had either been granted or refused. In the case under appeal it would seem that the learned trial Judge assumed from the very nature of the position in which the insolvent stood towards the Official Assignee that the witness was bound to be hostile, a perfectly reasonable assumption, but it is extremely doubtful whether the law in England allows a party to cross-examine a witness for that reason only, and indeed there are decisions to the contrary, such as, *Price v. Manning*(1). In that case it was held that a party to an action who calls an opponent as a witness has no right to cross-examine him, however hostile he may be, without the leave of the Judge and that, whether the witness is a litigant or not, it is a matter of discretion in the Judge whether he shows himself so hostile as to justify his cross-examination by the party calling him. In this case, COTTON, FRY and LOPES L.JJ. in effect overruled the decision of BEST C.J. in *Clarke v. Saffery*(2), where BEST C.J. said:

"There is no fixed rule which binds the counsel calling a witness to a particular mode of examining him. If a witness, by his conduct in the box, shows himself decidedly adverse, it is always in the discretion of the Judge to allow a cross-examination; but if a witness called stands in a situation which of necessity makes him adverse to the party calling him, as is the case here, the counsel may, as a matter of right, cross-examine him."

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(1) (1922) 44 M.L.J. 699 (P.C.). (2) (1931) I.L.R. 53 Calc. 1404 (F.B.).

(1) (1889) 42 Ch.D. 372.

(2) (1824) 171 E.R. 666; 27 R.R. 736.

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Reported on page 737 of 27 Revised Reports there is the case of *Bastin v. Carew*(1), where a similar objection was taken, and a cross-examination of an adverse witness allowed. ABBOT C.J. said :

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"I mean to decide this, and no further. That in each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted, in order best to answer the purpose of justice."

Price v. Manning(2), at any rate, states that the rule is that it is a matter of discretion of the presiding Judge whether the witness has shown himself so hostile as to justify his cross-examination by the party calling him. This decision and section 22 of the Common Law Procedure Act of 1854 seem to me to show that, even where a party puts his opponent into the witness-box, the Court will only exercise its discretion and allow him to be cross-examined if he shows himself to be hostile. Although section 154 of the Indian Evidence Act gives the Court an unfettered discretion, in my opinion, it ought not to exercise its discretion unless during the examination-in-chief of the witness something happens which makes it necessary for the facts to be got from the witness by means of cross-examination. That section does not, in my opinion, entitle any party, for instance, to say "I propose to call my opponent and cross-examine him" and the Court to allow such cross-examination without anything more. It seems to me that the scheme of the section is that something more than the mere position in which the witness stands to the party calling him is required before the Court can exercise its discretion. In my opinion, therefore, it is necessary before the procedure of section 154 can be adopted either for the permission of the Court to be obtained or for it to be given by the Court without its being sought. In this case, as already stated, it must

(1) (1824) 171 E.R. 967; 27 R.R. 737.

(2) (1889) 42 Ch.D. 372.

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be taken that no such permission was sought nor was it in words given. But Mr. Grant argues that all that the section requires is tacit permission and that, if the Court does not interfere, it must be taken to have assented to that procedure. He contrasts the word "permit" in section 154 with the word "consent" in section 155. His contention is that the two words are used in a different sense and that the consent of the Court required in the latter section must be given as a result of a request made to it, whereas the use of the word "permit" in the former section shows that even a tacit consent is intended. There is much force in this argument because the use of the word "permit" in one section and the word "consent" in the next section make it probable that it was not intended that these words were to have the same meaning. "Consent" seems to me to imply that it is to be given in consequence of a request made, whereas "permission" need not necessarily follow a request. This, however, does not entirely solve the difficulty because we have still to consider whether it is necessary for the Court to express its permission in words. In my view, it is intended by section 154 that such a permission should be signified, if not in words, by some other action of the Court indicating its permission during the cross-examination of the witness by the party calling him. But there is another section of the Indian Evidence Act to be considered in this connection and that is section 142. It is contended by Mr. Grant that, quite apart from section 154, section 142 allows a cross-examination by a party of his own witness during that witness's examination-in-chief without the permission of the Court, if no objection is taken to it by the adverse party. That section is as follows:—

"Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a

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re-examination, except with the permission of the Court. The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved."

In my view, this section is intended to provide for cases different to those contemplated by section 154. Section 142 refers merely to leading questions; section 154 refers to questions which might be put in cross-examination by the adverse party. A question put in a leading form is not necessarily tantamount to cross-examination whereas most questions in cross-examination are leading questions. The distinction between the object of these two sections, to my mind, is that section 154 provides for the cross-examination of the witness by the adverse party for the purpose of contradicting answers given by the witness or to test the witness's veracity or to drag the truth from him. Section 142, to my mind, clearly does not deal with such a case. It merely deals with leading questions as defined by section 141, viz., questions suggesting the answer which the person putting them wishes or expects to receive. It cannot be imagined that the Legislature had in view any questions to which it is obvious objection must be taken by the adverse party. I do not think that section 142 assists the respondent's argument. In my opinion, the procedure adopted in this case was not warranted by section 154 of the Evidence Act because WALLER J. did not signify his permission at any time during the cross-examination, and because I do not think that section 154 means tacit permission. But it is clear that, had permission been formally asked for, he would have granted it, and, as no objection was taken to that procedure by the appellant's Counsel and was only taken after all the evidence had been given during the course of the argument, it is now too late to allow this objection which, had it been taken during the cross-examination, would have been overruled by the learned trial Judge.

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I have now to consider whether the whole of the evidence of the witness has to be rejected or not. Reliance is placed by the appellant on *Faulkner v. Brine*(1). The headnote of that case is as follows:—

"The defendant's Counsel stating, after calling and examining a witness, that he had given another and materially different account of the transaction to the defendant's attorney, the Judge allowed the witness to be asked if they were so, and to be dealt with as adverse, under the Common Law Procedure Act, 1854, section 23, but only with a view to discredit him generally, and this it will not do if it is not utterly inconsistent with his sworn evidence."

The case was tried by Lord CAMPBELL C.J. who allowed the question to be put stating:

"It must be understood that it must be done to discredit the witness altogether, and not merely to get rid of part of his testimony. If that which is suggested shall be elicited it will show that he is not trustworthy at all."

In *Alexander v. Gibson*(2) Lord ELLENBOROUGH says:

"If a witness is called on the part of the plaintiff, who swears what is palpably false, it would be extremely hard if the plaintiff's case should for that reason be sacrificed. But I know of no rule of law by which the truth is on such an occasion to be shut out and justice is to be perverted. In *Lowe v. Joliffe*(3), which turned on the validity of a will, all the attesting witnesses swore to the insanity of the testator when the will was executed; but they were contradicted by other evidence and the will was established. The party is not to set up so much of a witness's testimony as makes for him, and to reject or disprove such part as is of a contrary tendency. But if a witness is called, and gives evidence against the party calling him, I think he may be contradicted by other witnesses on the same side, and that in this manner his evidence may be entirely repudiated."

Alexander v. Gibson(2) was referred to in *Panchanan Gogai v. Emperor*(4) to support the position that, where

(1) (1858) 1 F. & F. 254; 175 E.R. 715.

(2) (1811) 2 Camp. 555; 170 E.R. 1250.

(3) (1762) 1 Black. W. 365; 98 E.R. 204.

(4) (1930) I.L.R. 57 Calo. 1266.

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a witness turns hostile and is cross-examined by the party calling him, the evidence of such a witness cannot in part be relied upon and the rest of it discarded or rejected. It is there pointed out that *Alexander v. Gibson*(1) has been followed ever since 1811 and that in only one case, *Bradley v. Ricardo*(2), it was not followed. But in *Bradley v. Ricardo*(2), however, it was held that where a party, being surprised by a statement of his own witness, calls other witnesses to contradict him as to a particular fact, the whole of the testimony of the contradicted witness is not, therefore, to be repudiated by the Judge, and *Alexander v. Gibson*(1) was referred to. The case was heard in the Common Pleas by TINDAL C.J., GASELEE, BOSANQUET and ALDERSON JJ. whose judgments are very fully set out by the referring Judges in their Order of Reference to the Full Bench in *Praphullakumar Sarkar v. Emperor*(3). TINDAL C.J. stated :

“The general rule is, that a party shall not be permitted to blast the character of a witness called in support of his case by adducing general evidence to his discredit; but I have never heard it said that, when surprised by a statement contrary to fact, he may not call another witness to show how the fact really is.”

In the opinion of GASELEE J., *Alexander v. Gibson*(1) went too far and he disagreed with Lord ELLENBOROUGH. BOSANQUET J. stated that the practice had always been contrary to that adopted in *Alexander v. Gibson*(1), and ALDERSON J. dissented from Lord ELLENBOROUGH and also stated that the case of *Lowe v. Joliffe*(4), referred to by Lord ELLENBOROUGH in his judgment, established the contrary of the proposition for which it

(1) (1811) 2 Camp. 555; 170 E.R. 1250.

(2) (1831) 8 Bing. 57; 131 E.R. 321.

(3) (1931) I.L.R. 58 Cal. 1404, 1427, 1428 (F.B.).

(4) (1762) 1 Black. W. 365; 96 E.R. 204.

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was cited. I do not think that *Alexander v. Gibson*(1) or *Faulkner v. Brine*(2) can be relied upon by the appellant. With regard to the latter case, as RANKIN C.J. points out in *Praphullakumar Sarkar v. Emperor*(3), at pages 1427 and 1428, Lord CAMPBELL is not reported to have told the jury that, because he had allowed the questions to be put, the defendant could not rely at all upon the evidence of the witness nor that the cross-examination of a hostile witness by permission of the Court must always be cross-examination to destroy the general credit of the witness, but that his observation was a common sense observation for the benefit of the jury and as a warning to Counsel of the risk he ran. In *Praphullakumar Sarkar v. Emperor*(3) this question has been very fully dealt with by a Full Bench of five Judges of that Court. I have already referred to this case for another purpose. It was there held that the fact that a witness is dealt with under section 154 of the Indian Evidence Act, even when under that section he is cross-examined as to credit, in no way warrants a direction to the jury that they are bound in law to place no reliance on his evidence or that the party who called and cross-examined him, or any other party, can take no advantage from any part of his evidence, and that there is no rule of law that, if a jury thinks that a witness has been discredited on one point, they may not give credit to him on another. I entirely agree with the decision in this case and with the reasoning in the judgments of RANKIN C.J. and BUCKLAND J. It is in all cases a question for the jury or for the Judge in a civil case to decide what weight is to be given to the testimony of a witness so dealt with and I cannot accede

(1) (1811) 2 Camp. 555; 170 E.R. 1

(2) (1858) 1 F. & F. 254; 175 E.R. 715.

(3) (1931) I.L.R. 58 Cal. 1404, 1427, 1428 (F.B.).

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to the contention put forward by the appellant that a different principle is to be applied in such matters when the testimony is being considered by a Judge alone. In one case the jury are the judges of fact and in the other the Judge alone is and it is for the jury in the one case and the Judge in the other to attach such weight as is right to that evidence. In my opinion, therefore, WALLER J. was entitled to accept or reject such parts of the evidence of the first defendant as he did, although I do not agree with the procedure allowed by WALLER J. in this case. Whatever may be the reasons for the exercise of its discretion by the Court under section 154, first of all to obtain the sanction of the Court to cross-examine the witness is in accordance with the general practice, and that practice, in my opinion, ought always to be followed although section 154 may not make such procedure imperative; but when the Court has exercised its discretion it ought not to be interfered with by the appellate Court.

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CORNISH J.—I am of the same opinion. The learned trial Judge says at the close of his judgment that he allowed the witness to be cross-examined, and he gives as his reason that the witness was endeavouring by his evidence to help the case of his wife, the opposite party. In other words, the learned Judge appears to have thought that the witness had shown himself to be adverse to the party who called him. But nowhere does it appear that permission to cross-examine the witness on that ground was actually given. There is no doubt that the correct procedure, when a party is desirous of cross-examining his own witness, is for him to formally ask for and obtain the Court's permission. The expediency at least of this course is clear; for, unless the Court is given the opportunity of considering whether on the material before it the cross-examination

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should be permitted, how is it to exercise a discretion? And a cross-examination which has taken place without it appearing that the Court had considered whether it should be permitted would be altogether irregular. Mr. Grant has contrasted the word "permit" in section 154 with the word "consent" in section 155, and contended that permission means no more than sufferance, so that, it would be sufficient if the Court signified its permission by acquiescence. I do not think it could as a matter of course be assumed simply because it appeared from the record that a witness's examination-in-chief has developed into cross-examination without objection from the Court or opposite party that the Court had exercised its discretion in permitting the cross-examination. It must somehow be shown that the Court did in fact exercise its discretion in the matter: in the present case it appears so from the judgment.

A considerable argument was addressed to us on the scope of section 154. The section differs from the corresponding provision in the English Act, 28 and 29 Vict., c. 18, which makes it a condition for leave to cross-examine that "the witness in the opinion of the Judge prove adverse". As pointed out by their Lordships of the Judicial Committee in *Baikuntha Nath Chatteraj v. Prasannamoyi Debya* (1) section 154 says nothing about a witness being hostile. It seems to me undesirable, as well as unnecessary, to attempt to define the limits within which the Court's discretion can be exercised under section 154 when the section itself imposes none. But this much may be said with reference to the particular case before us; that a party who chooses to call his opponent as a witness, or who

(1) (1922) 44 M.L.J. 699 (P.O.).

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may by force of circumstances be compelled to take this course, as apparently the Official Assignee was here, in order to prove his case, does not on that account become entitled to treat his witness as hostile and to cross-examine him. The Court must in its discretion determine whether cross-examination of the witness shall be permitted. That was the rule laid down by the Court of Appeal in *Price v. Manning*(1) and it is equally applicable to section 154; see *Luchiram Motilal Boid v. Radha Charan Poddar*(2).

The cross-examination of the first defendant having been permitted by the Court, there remains the question how far his credit is affected. Mr. Venkatarama Sastri's argument, that the cross-examination must be taken to discredit generally the evidence of the witness for the plaintiff, the Official Assignee, is founded upon the observations of Lord CAMPBELL in *Faulkner v. Brine*(3) which have been interpreted in two cases in the Calcutta High Court, *Khijiruddin Sonar v. Emperor*(4) and *Panchanan Gogai v. Emperor*(5), as authority for the proposition for which the learned Advocate has contended. This is not the view accepted in *Emperor v. Jehangir Cama* (6) and in *Sohrai Sao v. King-Emperor*(7), and moreover in *Praphullakumar Sarkar v. Emperor*(8) RANKIN C.J. expressed the opinion that Lord CAMPBELL's words should not be understood as meaning that the cross-examination of a witness as adverse must always destroy the general credit of the witness. This consequence, it is to be observed, does not flow from calling another witness to contradict what the witness

has said; vide *Bradley v. Ricardo*(1). In that case it was said by BOSANQUET J.:

"A party is often compelled to call an adverse witness; and if he, on cross-examination or otherwise, makes statements inconsistent with fact, another witness may be called to contradict him: and there is no instance of a Judge having been called upon in such a case to strike out the rest of his evidence."

There seems to me no reason why different considerations should govern the case of a witness cross-examined by the party who has called him. It is not an implication that a party when he cross-examines a witness thereby intends to discredit his evidence *in toto*; the cross-examination may be directed only to overthrowing certain parts of his evidence; and a Court or a jury is not bound to entirely disbelieve a witness because a portion of his testimony has been discredited in cross-examination. In my opinion, therefore, the cross-examination of the first defendant is not to be taken as a total repudiation of his evidence by the Official Assignee who called him as a witness.

[The original side appeal coming on for further hearing, their Lordships agreed with the trial Judge and held that the transactions were *benami* and set aside the same and dismissed the appeal with costs, certifying for two Counsel.]

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(1) (1831) 8 Bing. 57; 131 E.R. 321.

(1) (1889) 42 Ch. D. 372.

(2) (1921) I.L.R. 49 Calo. 93.

(3) (1858) 1 F. & F. 254; 175 E.R. 715.

(4) (1925) I.L.R. 53 Calo. 372.

(5) (1930) I.L.R. 57 Calo. 1266.

(6) (1927) 29 Bom. L.R. 996, 1005. (7) (1929) I.L.R. 9 Pat. 474, 484.

(8) (1931) I.L.R. 58 Calo. 1404, 1427 (F.B.).

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APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Cornish.*

1932,
March 9.

THE UNIVERSAL MUTUAL AID AND POOR HOUSES
ASSOCIATION, LIMITED, MADRAS (RESPONDENT),
APPELLANT,

v.

A. D. THOPPA NAIDU AND SIX OTHERS (PETITIONERS),
RESPONDENTS.*

*Company—Main objects of—Illegal purpose—Winding up—
Lottery—Definition of.*

The objects of a company as disclosed in its Memorandum of Association were unobjectionable and one of the objects was to raise donation funds to carry out charitable objects. By its Articles of Association certain objects were introduced which had the effect of making the company conduct a lottery or keep an office for the purpose of drawing a lottery or publish proposals relating to the drawing of such a lottery, the two latter being offences punishable under section 294-A of the Indian Penal Code.

Held, that the company should be wound up since its main object was an illegal purpose. The company should not be allowed to carry on its business even after removing the obnoxious features from its objects as by such a removal the substratum of the company would go.

A lottery is "a distribution of prizes by lot or chance". Distinction between a "lottery" and a "wagering contract" pointed out.

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

APPEAL from the judgment of STONE J., dated 1st February 1932, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Original Petition No. 111 of 1931.

* Original Side Appeal No. 8 of 1932.

T. R. Venkatarama Sastri and V. Viswanadha Sastri
for appellant.

Ch. Raghava Rao, T. V. Ramanathan and K. R.
Srinivasaraghava Ayyangar for respondents.

Cur. adv. vult.

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JUDGMENT.

BEASLEY C.J.—This is an appeal from a judgment BEASLEY C.J. of STONE J. ordering the winding up of the appellant company. The learned trial Judge has found that the company was formed for an illegal purpose, the purpose being an offence under section 294-A of the Indian Penal Code, that is to say, conducting a lottery or keeping an office for the purpose of drawing a lottery or publishing proposals relating to the drawing in such lottery. No exception can be taken to the Memorandum of Association of the company where the objects of the company are quite unobjectionable. Had the affairs of the appellant company been conducted strictly in accordance with those objects, no complaint whatever could have been made against it. It is argued on behalf of the respondents that the Articles of Association disclose purposes far beyond those appearing in the Memorandum of Association. It is contended that the Articles disclose that the object of the company was to conduct a lottery. The appellants, on the other hand, contend that the object of the company was to benefit charity and that there was nothing illegal in the conduct of the company. Reference must be made at this stage to the Memorandum of Association. There we find that, amongst other objects, one object is to raise general donation funds to carry out charitable objects. Of the special donation fund raised, not less than 30 per cent is to be invested entirely and permanently in Government securities and not more than

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70 per cent on the security of immovable property. Of the interest from the before-mentioned investments, not less than 75 per cent is to be utilized in granting personal loans to the donors and in paying relief bonuses to their heirs. At the extraordinary general meetings of the company held on the 25th November and the 17th December 1930, in lieu of certain existing Articles certain new Articles were incorporated after sanction by the shareholders. The important Articles are Articles 16, 17, 18, 19, 20 and 21. Under these Articles a donation certificate is to be granted to a person for each sum of Rs. 100 he pays either in a lump payment or by instalments as a contribution to the Poor Houses Special Donation Fund of the Association; and one lakh of such certificates is to form one series. Out of the interest accruing on the 70 per cent of the fund invested on security of immovable property, not less than 75 per cent is to be utilized every year in granting loans ranging from Rs. 1,000 to Rs. 10,000 to 200 donation certificate-holders on their personal security without interest and relief bonuses to the heirs of 200 donation certificate-holders who die before getting the loan of Rs. 1,000 or more for every complete series. The names of the donors that are to get such loans are to be determined only by means of drawings. A donation certificate is to cease to exist when once it is drawn, or, if an advance of Rs. 500 is made to any heir of a donation certificate-holder, all rights to claim any benefits in respect of the same certificate are extinguished. The scheme is one under which anybody who takes a donation certificate of Rs. 100 becomes entitled to a loan of Rs. 1,000 free of interest and anyone who takes certificates of Rs. 1,000 becomes entitled to a loan of Rs. 10,000 free of interest if he is lucky enough to get his certificate drawn in any of the annual

drawings. A person can take a certificate in each and all of the series. But only 200 donation certificates are to be drawn each year. Similarly Rs. 500 is to be paid to the heirs of a deceased donation certificate-holder but there are only to be 200 of such payments in each year; and the heirs of those deceased donation certificate-holders who have got loans are not to be paid the relief bonus. Subsequently, the Articles were still further altered and, in lieu of interest-free loans, cash bonuses were substituted. Instead of a donation certificate-holder getting loans of from Rs. 1,000 to Rs. 10,000 according to the number of certificates held, he was to get a cash bonus ranging from Rs. 500 to Rs. 5,000, that is to say, a half of the loan amounts.

The question to be considered is whether this scheme is a lottery or not. A lottery is not defined in the Indian Penal Code and we must, therefore, look elsewhere for a definition. One definition of lottery is found in Webster's Dictionary, viz., "a distribution of prizes by lot or chance". In the present case is there anything which is determined by lot or chance? It is contended by the respondents that there is in the case of the loans because the loan is dependent upon whether a certificate is drawn or not and the benefit is therefore dependent upon chance. It clearly is dependent upon chance. Here the drawing is the chance and it cannot seriously be contended that the certificate-holder is dependent for his benefit upon anything else than chance. Suppose a certificate-holder has only one certificate. If he is lucky, he may get his benefit during the first year itself; if he is not lucky, he may not get it, we are told, for at least sixty years. He may hold twelve certificates, in which case, he has twelve chances in every yearly drawing and under the cash-bonus scheme he may be entitled to a cash bonus

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from Rs. 6,000 to Rs. 1,20,000 if all of them are drawn. The question is whether this necessarily leads to the conclusion that the scheme is a lottery and, in considering the question, English decisions upon the point may be more usefully considered, since there is no definition of a lottery in the Indian Penal Code. One of these is *Sykes v. Beadon*(1). In that case there was a Government securities trust or combination of more than twenty persons formed on the principle of investing the subscriptions of the members and dividing the capital fund and profits among themselves by means of certificates convertible by annual drawings by lot into preference dividend bonds bearing interest with a bonus. In the opinion of JESSEL M.R., this was a lottery and therefore illegal under the Lottery Acts. On page 190 JESSEL M.R. says:

"The holders of certificates are persons who subscribe money to be invested in funds which are to be divided amongst them by lot, and divided unequally. That is, the persons who get the benefit of the drawings get a bond bearing interest and a bonus which gives them different advantages from the persons whose certificates are not drawn, and it depends upon chance which gets the greater or the lesser advantage. It is, therefore, a subscription by a number of persons to a fund for the purpose of dividing that fund by chance and unequally."

Another case is *Taylor v. Smetten*(2). In that case Taylor sold packets each containing a pound of tea at 2s. 6d. a packet. In each packet was a coupon entitling the purchaser to a prize and the prizes varied in character and value. It was held that this constituted a lottery. It was conceded that the tea was worth the money paid for it, but, what the purchaser did was, he bought the tea coupled with the chance of getting something of value by way of a prize but without the least idea what that prize might be. In making his

(1) (1879) 11 Ch.D. 170, 190.

(2) (1883) 11 Q.B.D. 207.

purchase he exercised no choice. What he bought, he bought without any option or action of his own will but as the result of mere chance or accident. Another case is the Premium Bonds case; *Re International Securities Corporation, Limited*(1). It is a case very similar to this. The learned trial Judge in the course of his judgment refers to an Australian case; *Mutual Loan Agency, Ltd. v. A.-G.* According to the precis in the English and Empire Digest, Vol. 25, at pages 453 and 454*—there is unfortunately no report available in Madras—the facts were very similar to those in the present case. The summary is set out in the judgment of the trial Court and it is therefore not necessary to repeat it here. In that case, on the facts it was held that that was a distribution of prizes by lot or chance and therefore a lottery.

It was argued that there was no difference between a lottery and a wager. This argument was necessary because the appellants at first relied very strongly upon the decision of a Full Bench of this Court of which I was a member, viz., *Narayana Ayyangar v. Vellachami Ambalam*(2), a chit fund case. It was there held that the promotion of a chit fund, wherein the number of subscribers is determined beforehand and in which

(1) [1909] 99 L.T. 581.

(2) (1927) I.L.R. 50 Mad. 696, 697 (F.B.).

* [L—Ballot loans].—A limited Co., with power to raise a small capital, conducted drawings for what were called "ballot loans." The funds to be applied towards the loans were raised by subscription from the general public and each subscriber obtained a "share warrant," which conferred no interest in the Co., but entitled the holder to participate in the ballots. The ballots were drawn in the ordinary way, and the drawers of winning numbers won the right to loans of sums varying from £5 to £1,000, without interest for 50 years, subject to a deduction of 10 per cent for expenses, and if no security was given for the repayment of the loan, to a further deduction of 20 per cent. This latter sum was allowed to accumulate in the hands of the Co., or invested to provide a fund for the repayment of the subscription during the 50 years to subscribers who presented their share warrants:—*Held*: this was a distribution of prizes by lot or chance, and therefore a lottery—*Mutual Loan Agency, Ltd. v. A.-G.* (1909) 9 C.L.R. 73.—*Aus.*

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every subscriber is entitled by its rules to get from the promoters of the fund the whole of the capital subscribed for by him either before or at the closing of the fund at a fixed time, is not a wagering contract within section 30 of the Indian Contract Act even though some of the subscribers become by the rules entitled to get much more than they paid and such persons are determined by the drawings of lots. The headnote also states that this was not an offence within section 294-A of the Indian Penal Code, and it is this no doubt that has caused this case to be thought to support the appellant. The facts are set out at page 697 as follows:—

“In this case the defendants were the promoters of the chit fund in question. According to the rules framed by them for the fund they proposed to work the chit as soon as 500 people became subscribers, each agreeing to subscribe Re. 1 a month. The rules further provided that the chit was to run for fifty months and at the end of each month Rs. 50 was to be given by the defendants to the person who was determined by the casting of lots out of the 500. Any person whose name was so drawn by lot either in the first month or in any of the succeeding forty-nine months got Rs. 50 and he was thenceforward relieved from paying the further monthly instalments. After the fiftieth lot was cast the chit fund was to be closed and all the remaining 450 people were to be given by the defendants each Rs. 50. Under such rules the plaintiffs who subscribed for two chits subscribed Rs. 36 for 18 months at the rate of Rs. 2 a month. As the defendants refused to run the chit fund after the eighteenth month the plaintiffs brought this suit for Rs. 36 and interest. The defendants pleaded that the chit fund was a lottery, that the transaction between the parties amounted to a wagering contract and that it was therefore unenforceable. Upholding the defendants' plea the Munsif dismissed the suit. Hence this Revision Petition.”

In his Order of Reference to the Full Bench, WALLER J. stated that the two questions which arose were (1) whether the fund was a lottery and (2) if it was, whether the subscriptions were recoverable. When

the case came before the Full Bench, as it was then constituted, a finding was called for as to whether an offence as defined by section 294-A of the Indian Penal Code was committed when the transaction was formed. The District Munsif found as follows:—

“The plea was raised by the defendants. The onus is on them. Nothing is placed before me by them wherefrom I could determine how the chit fund was organized and advertised and whether any one who liked could join by merely paying subscriptions, points considered to be essential for a satisfactory solution of the question whether the chit fund was a lottery. As observed in the order of remand, the rules of the fund as given in the printed book filed with the plaint are not sufficient to make this clear. In spite of facilities having been afforded to defendants, they have not chosen to appear before me and let in evidence though I waited till this day. I must therefore answer the question in the negative.”

When the case was further considered, as there was the finding that no offence under section 294-A, Indian Penal Code, had been committed, we proceeded to consider the only other point, viz., whether this amounted to a wagering contract. Throughout the judgment of the Full Bench there is a discussion of that aspect of the case and that only. It is quite clear that there was no decision by the Full Bench that the chit fund in question was not a lottery. Thus it was that at a late stage in the argument when the real effect of the Full Bench decision became apparent it was contended on behalf of the appellant that wagering was the same thing as keeping a lottery. In my view, the two are not the same. In *Carlill v. Carbolic Smoke Ball Company*(1) HAWKINS J. defines a wager thus:

“A wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of

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(1) [1892] 2 Q.B. 484, 490.

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money or other stake, neither of the contracting parties having any other interest in that contract than the sum of stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract."

In *Hampden v. Walsh*(1) a wager was described as a contract by *A* to pay money to *B* on the happening of a given event in consideration of *B* paying money to him on the event not happening. In *Thacker v. Hardy*(2) COTTON L.J. says:

"The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way *A* will lose, but if it turns out the other way he will win."

In *Ellesmere (Earl) v. Wallace*(3) RUSSELL L.J. held that there cannot be more than two parties or two sides to a bet and that there may be a multipartite agreement to contribute to a sweepstake, which may be illegal as a lottery, if the winner is determined by chance, but not if the winner is determined by skill. In the present case none of the parties are betting against each other. There are no two sides unless the subscribers on the one hand and the company on the other can be said to be sides. The scheme under consideration seems to me to have none of the elements of a wager but to possess all of those of a lottery as defined. It was also argued for the appellant that it was essential to a lottery that there should be a money prize. This is clearly not necessary as the case of *Taylor v. Smetten*(4) shows. Nor can it affect the question that the subscriber receives the whole of the amount subscribed by him back again on some future date. What constitutes a lottery is that some gain is to come to the subscriber

(1) (1876) 1 Q.B.D. 189, 192.
(3) [1929] 2 Ch. 1.

(2) (1875) 4 Q.B.D. 685.
(4) (1883) 11 Q.B.D. 207.

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dependent upon pure chance, any element of skill being absent. In my view, the learned trial Judge was right in holding that the conduct of the appellant company was illegal under section 294-A of the Indian Penal Code. It was further contended that, as the company was formed for the purpose of benefiting charities and the lottery was merely an annexe to the original business, no offence can be held to have been committed. This, in my view, is clearly wrong. Section 294-A of the Indian Penal Code is sufficiently wide in its terms to negative any such contention as this, and, moreover, there is an English case which shows the contrary, namely, *Leng (Sir W. C.) & Co. ("Sheffield Telegraph") v. Sillitoe*(1), the Football Coupon case. There a newspaper company was convicted of carrying on a ready money football betting business contrary to the Ready Money Football Betting Act of 1920. It was found as a fact by the Justices that, on the date specified in the charge, some persons bought the newspaper solely, and that other persons bought it partly, to obtain the coupon and so to acquire the chance or possibility of winning a prize. Lord HEWART C.J. says at page 373:

"What is necessary for a conviction under the Act is that the defendant should be shown to be carrying on a ready money football betting business within the definition in section 2 of the Act. In my opinion, it is quite immaterial that a person who is charged with carrying on such a business can show that he is also carrying on another business, however well established and well known it may be. If he annexes to an existing business a business which comes within the Statute he is liable to the penalties provided by section 1. And, to appreciate the relation between the printer or publisher and his clients, it is not necessary to make a guess or to strike an average. What has to be examined is the nature of the

(1) [1929] 1 K.B. 366, 373.

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transaction which takes place between the printer or publisher and the individual purchaser of the thing published."

In the present case, from the handbook published by the company, it is quite clear that the public are invited to purchase the certificates because of the chance there is of securing valuable prizes. Although some of the objects of the company may be philanthropic, it seems clear that the main object of the company was to conduct a lottery. No argument upon the facts that the illegal business was merely annexed to the real business can prevail nor could it, even if those facts were proved, in law prevail. It is further contended that no order for the compulsory winding up of the company ought to be made because it is still possible for the company to conduct itself so as only to carry out the original purposes for which it was formed and that the objectionable features of it can be removed. It seems to me, however, that by the removal of its obnoxious features the substratum of the company goes. Under these circumstances, the learned trial Judge was quite right in ordering it to be compulsorily wound up. This appeal must, therefore, be dismissed with costs.

CORNISH J. CORNISH J.—I am of the same opinion. I think it is impossible to regard the scheme of interest-free loans or the cash-bonus scheme which supplanted it as any thing but a lottery. According to the scheme as adumbrated in the Articles of Association and in the prospectus issued by the company a donation of Rs. 100 to a fund called the Poor Houses Special Donation Fund gives a donor a certificate and the chance of that certificate winning one of the 200 prizes ranging in amount from Rs. 500 to Rs. 10,000 at the annual drawing of certificates for these cash bonuses. The Articles and the prospectus expressly provide that the prize winners, as also the amount of the prize won by each, shall be

determined only by means of drawings. The scheme purports to ensure a certificate-holder receiving at least Rs. 500 in respect of his certificate, for the arrangement is that, if the certificate is not drawn for a prize in the holder's life-time, his heirs will receive on his death a payment of Rs. 500, called a death relief bonus. But the winning of the other cash bonuses is purely a matter of chance dependent on the luck of the draw. And this feature, in my judgment, entirely distinguishes the case from *Wallingford v. Mutual Society*(1) where the fact that the apportionment of loans to members of a benefit society was regulated by lot was held not to bring the arrangement within the Lottery Acts. The lot merely decides the order in which the loans were to be made to the members of the society, and the loans were not in the nature of prizes dependent on the chance of the draw.

There is no definition of "lottery" in the Indian Penal Code; so that the word, as it occurs in section 294-A, Indian Penal Code, must bear its ordinary meaning, which is, a distribution of prizes by lot or chance without the use of skill; see *Re International Securities Corporation, Limited*(2) and *Ellesmere (Earl) v. Wallace*(3). An absolutely gratuitous distribution of chances none of which had been paid for by the participants would not, in the opinion of DARLING J. in *Willis v. Young and Stenbridge*(4), amount to a lottery. But that is not the case here. It is true that the prize money was provided from the interest received from investments made by the company of the money subscribed by the certificate-holders. But the money was subscribed with the knowledge and with the object that it was to be invested and that a specified proportion of the

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(1) (1880) 5 App. Cas. 685.

(3) [1929] 2 Ch. 1, 52.

(2) [1909] 99 L.T. 581.

(4) [1907] 1 K.B. 448.

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interest derived from the investments was to be distributed amongst the subscribers in cash prizes according to the luck of the draw. That was the great inducement held out in the company's prospectus to subscribe and become a certificate-holder. The prospectus at page 34, in describing the advantages of taking certificates, says:

"The maximum amount of cash bonus one can get in respect of each certificate in the drawings is Rs. 10,000. That is to say, if a person holds two certificates in each of the 12 series, he will be entitled to a cash bonus up to Rs. 2,40,000 at Rs. 10,000 for each certificate in case all of them come up first in the drawings."

In fact, the subscribers embarked their money in the company for the purpose of participating in chances of drawing these big money prizes. In my judgment the cash-bonus scheme was clearly a lottery.

The learned Advocate for the appellant laid great stress on the Full Bench ruling in *Narayana Ayyangar v. Vellachami Ambalam*(1) in aid of his contention that there was no substantial difference between a chit fund scheme and the present scheme. The Full Bench, however, did not rule that a chit fund was not a lottery. There was no occasion for it so to decide in view of the finding, called for from the lower Court, that the necessary elements of an offence under section 294-A, Indian Penal Code, were absent. The decision was confined to the question whether the subscribers to the chit fund could enforce the contract against the promoter; and it was held that they could, because the contract was not a wagering, and consequently a void, contract. But a lottery does not mean the same thing as a wagering contract, and RAMESAM J., who delivered the judgment of the Full Bench, was careful to point this out in criticising the use of the word "lottery" by

(1) (1927) 1 L.R. 50 Mad. 698 (F.B.).

SPENNER J. in *Veeranan Ambalam v. Ayyachi Ambalam*(1) to signify a wagering contract. The distinction between the two will be found further illustrated in *Stoddart v. Sagar*(2) and in RUSSELL L.J.'s judgment in *Ellesmere (Earl) v. Wallace*(3).

It remains to be considered what should be done with the company. It is clear from the Articles and the prospectus that the company is conducting this lottery as an important integral part of its business. According to the prospectus, the sum to be annually expendible in providing cash bonuses does not fall far short of the amount to be allocated to the charitable undertakings of the company. But a lottery *per se* is not illegal in British India. An Act (V of 1844), entitled "An Act for suppressing all lotteries not authorised by Government", declared unauthorised lotteries to be common nuisances. But it was repealed by Act XXVII of 1870 which amended the Indian Penal Code by introducing section 294-A. The illegal aspects of a lottery, therefore, have to be found in section 294-A and consist in the keeping of any office or place for the purpose of drawing any lottery not authorised by Government or in publishing such lottery. There can, I think, be no doubt that the company, in keeping an office, as it does, for the conduct of this lottery, and in publishing in its Articles and prospectus the scheme of the lottery, is acting in contravention of section 294-A. The business—at least a very substantial part of it—which it is carrying on is consequently an illegal business; and, such being the position, the case of *Re International Securities Corporation, Limited*(4) is good authority for ordering the compulsory winding up of the company.

G.R.

(1) (1925) 49 M.L.J. 791.
(3) [1929] 2 Ch. 1.

(2) [1895] 2 Q.B. 474.
(4) [1909] 99 L.T. 581.

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APPELLATE CIVIL.

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

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H.R.E. BOARD, MADRAS (RESPONDENT), RESPONDENT.*

Madras Hindu Religious Endowments Act (II of 1927), sec. 84 (2)
—Application under—Nature of—Fresh evidence in—Right
of parties to adduce.

An application under section 84 (2) of the Madras Hindu Religious Endowments Act is not merely in the nature of an appeal or revision petition, and the Court hearing the application is not restricted to such evidence as the Board may happen to have recorded or even to such evidence supplemented to the extent to which a Court of appeal can supplement the evidence taken by a Court of first instance. The only reasonable interpretation of section 84 (2) is that the application to be made under the sub-section is, so far as the Court is concerned, an application, to which the ordinary procedure of the Court will apply and on which the parties have the right to produce such evidence as they wish.

PETITION under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court of South Kanara, dated 4th April 1930, and made in Original Petition No. 56 of 1928.

B. Sitarama Rao for petitioner.

Government Pleader (P. Venkataramana Rao) for respondent.

Cur. adv. vult.

JUDGMENT.

ANANTAKRISHNA AYYAR J.—This case raises a question of importance. A question was raised before the

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Board of Commissioners for the Hindu Religious Endowments, Madras, whether the building in which the petitioner resides and in which the worship of the deity Sri Gopalakrishna Devaru is performed was an institution to which the Madras Hindu Religious Endowments Act applies. The Religious Endowments Board by its order, dated 27th April 1927, decided that the institution was a math within the meaning of the Act after giving notice to the petitioner and holding an enquiry. The petitioner filed a plaint in the District Court of South Kanara on 17th April 1928 for a declaration that the building in question is not a math within the meaning of the Act, nor an institution to which the Act would apply. He also filed an application (Original Petition No. 56 of 1928) to the District Court of South Kanara to modify or set aside the decision passed by the Board, and that application was filed within one year from the 27th April 1927. The Original Suit (No. 4 of 1929) as well as the Original Petition (No. 56 of 1928) was posted for hearing on the same date in the District Court. The suit was dismissed by the District Court on the preliminary ground that it was barred by the provisions of section 84 (2) of the Act and that the petitioner's remedy was by means of an application to the Court under that section. Pending disposal of the appeal preferred to the High Court against the decision in Original Suit No. 4 of 1929, the hearing of the Original Petition (No. 56 of 1928) was adjourned. The High Court dismissed the appeal on 4th March 1931, holding that when, by an Act of the Legislature, powers are given to any person for a public purpose from which the individual may receive injury, and when the mode of redressing the injury is also pointed out by the statute, as has been done by section 84 (2) of the Act, viz., by an

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application to the District Court, a suit for the said purpose is not maintainable. When the suit was pending before the District Court, a commission had been issued to examine a witness, the warrant of commission being headed as issued both in Original Suit No. 4 of 1929 and Original Petition No. 56 of 1928. When the petitioner applied for extension of time for the return of the warrant, the Court passed the following order on 4th April 1930 :—

“ The application for a commission was made in the suit. The suit has been dismissed. In a petition under section 84, I will not take additional evidence regarding it as an application for revision or as an appeal. Therefore the order for recording petitioner's evidence on commission is revoked.”

The present civil revision petition is against that order of the learned District Judge.

On behalf of the petitioner it was argued that the learned District Judge failed to exercise his jurisdiction in the matter by declining to take evidence, and that he erred in regarding the proceeding before him as an application for revision or as an appeal. It was contended that the proceeding before the District Court was an original proceeding in which the Court had to decide judicially on the rights of the parties, and that the Court was bound to allow evidence which the parties wished to let in to be recorded, following the procedure prescribed by the Code of Civil Procedure in disposing of suits and original petitions (applications). Reliance was also placed on the observations made by the Full Bench in *Damodaran v. H.R.E. Board, Madras*(1), at page 269, to the effect that “ these applications are analogous to a regular suit filed by an unsuccessful claimant ” and also on *Punnasseri Nambi v. Commissioners, H.R.E. Board*(2), in which it was held

(1) (1929) I.L.B. 53 Mad. 266 (F.B.).

(2) (1931) I.L.B. 55 Mad. 201.

that the District Court had no jurisdiction under section 84 (2) of the Act to direct a remand and rehearing of the case by the Board.

On behalf of the Board, the learned Government Pleader argued that, when a dispute arises as to whether an institution is a math or a temple as defined in the Act, the Board inquires into the matter, records evidence and then passes its decision, and that the only remedy available to any person affected by such decision is to apply to the District Court to modify or set aside such decision, and that the jurisdiction of the District Court is confined to allow evidence to be taken when there is a lacuna or defect in the evidence recorded or when the Board had erroneously excluded evidence or declined to allow evidence to be adduced or when the Court wants additional evidence to enable it to dispose of the matter. He strongly opposed the view suggested by the petitioner that the proceedings are to be taken *de novo* in the District Court, ignoring the proceedings taken before the Board. He submitted that the proceedings before the Court under section 84 (2) of the Act are not in the nature of “ an original petition”, nor of “ an original suit”, in which the Court would be bound to confine its decision to the evidence adduced therein, and he stated that, though the Court would have jurisdiction to supplement the evidence that was before the Board in proper cases, the proceeding before the Court was in essence one by way of appeal against the decision passed by the Board. He emphasised the use of the word “ decision ” in section 84, and drew attention to the circumstance that the aggrieved party's remedy was by an “ application ” to the Court, and not by way of “ suit.” He pointed out that, while some sections of the Act provide for a “ suit ” being filed in the District Court, some

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other sections provide for an "application" being filed. He maintained that the Board was a statutory body, that rules and by-laws had been framed for the conduct of proceedings before the Board, that witnesses were examined and evidence taken by the Board, and that it was only after consideration of the whole evidence that the Board passed its "decision" to the effect that the institution in question is a math, and that it is opposed to the whole scheme of the Act to ignore all these proceedings and say that the aggrieved party is entitled to begin a fresh proceeding in the District Court and start investigation from the very beginning, and practically—in the generality of cases—adduce the same evidence that was adduced before the Board. Whether viewed as an appeal or revision,—he contended that the petitioner had no unrestricted right to let in evidence, and that the District Judge's order was right.

Mr. B. Sitarama Row—the learned Advocate who appeared for the petitioner—as well as the learned Government Pleader who appeared for the respondent, invited us to certain provisions of the Land Acquisition Act and of the Provincial Insolvency Act with reference to the powers of the Court on applications made to it under certain sections of those Acts; we thought that we were not likely to derive material help in deciding the present matter by reference to those provisions in the other Acts; and we are of the opinion that the question before us should be decided by reference to the provisions contained in the Madras Hindu Religious Endowments Act.

On going through the material sections of the Act to which our attention was drawn, we find that the Legislature has given the Board the right to decide in the first instance whether a particular institution is a

math or a temple within the meaning of the Act. It is very rarely that the Legislature invests a claimant himself with the right to decide the question in dispute between himself and another. We are not now concerned with the policy of the Legislature. The Legislature has, however, provided for the decision in the first instance by the Board itself on the question whether an institution which is claimed by the Board as a math or a temple coming within the definition of the Act is such when the same is disputed by the other party. The question now before us is as to the exact nature of the proceedings which the aggrieved party is entitled to take in the District Court under section 84 of the Act with reference to the decision of the Board. It was argued on behalf of the petitioner that the so-called "decision" is one by the Board in its own favour holding that the institution comes within its jurisdiction and powers, and that it is impossible to assume that the Legislature made the Board a Judge of its own claims as against a party who contests the same, and that all that the Act provides for is an investigation by the Board of the nature of the institution with a view to deciding whether the Board should withdraw from the matter or not, and that any inquiry made by the Board in such a matter could not be said to be in any way a judicial inquiry by a judicial tribunal. It was argued that the so-called decision is really in the nature of an executive order,—and, in any event, a summary order,—and that the aggrieved party is entitled to have his rights inquired into and decided by a Civil Court in the ordinary manner.

The matter is an important one, and some of the provisions of the Act are difficult to construe. But, after the best consideration I have been able to give to

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this case, I have come to the conclusion that the contention raised by the petitioner should be upheld.

It was pressed upon us by the learned Government Pleader on behalf of the respondent that the only remedy open to the petitioner is "to apply to the Court to modify or set aside the decision of the Board" as "the order of the Board" is declared to be "final subject to the result of such application". The ordinary right of suit which a party possesses when his legal rights are interfered with is not available to a person in the position of the petitioner, since the Act contains special provisions as to the mode of obtaining relief when a person's rights are interfered with under the Act. It was so decided in a suit between the present parties by the High Court; see *Iswarananda Bharathi Swami v. Commissioners, H.R.E. Board*(1). Emphasis is laid on the use of the words "apply" and "application" in section 84, and it was argued that the proper construction of the section is that the aggrieved party is given the right to apply to the Court to exercise powers in the nature of an "appeal" or "revision", as contra-distinguished from the right of "suit". *Prima facie*, this argument is entitled to weight as ordinarily there is a distinction between an "application" and a "suit"; in fact the Act uses the word "suit" in several sections—, 55 (4), 57 (3), 57 (4), 63 (4), 65, 67 (5) and 73—, and the word "application" in some other sections—44, 62, 70 (2), 76 (2), 77 (2), 78 and 84 (2). But an examination of some of the relevant sections of the Act discloses that the Legislature has not clearly kept the distinction in view throughout this Act regarding the use of the word "application".

(1) (1931) I.L.R. 54 Mad. 928.

Turning to section 53 (3) of the Act, we find the following:—

"A trustee suspended . . . under this section may within three months of the date of the communication of the order of suspension, removal or dismissal, appeal to the Board against such order; provided that a hereditary trustee may, in lieu of appealing to the Board, apply within the same period to the Court to modify or cancel the order of the Committee."

In the same sentence we see the words "appeal" and "apply" used,—"appeal" to the Board—and "apply" to the Court. If by the term "apply" it was intended that the application is by way of appeal, why should the Legislature not use the word "appeal" in connection with the Court also; why not say, in lieu of appealing to the Board he may appeal to the Court. This is rather significant. Again, in connection with the Board, it is mentioned in the Act that the trustee may appeal to the Board, and nothing is mentioned regarding the reliefs that may be granted by the Board on appeal. One can understand that position. *Prima facie*, and in the absence of anything to the contrary in the enactment creating the right of appeal, the appellate tribunal has got the same powers as the tribunal whose orders are complained against, and the appellate tribunal could confirm, modify, reverse, or pass other orders as it should think fit. The appellate tribunal may reverse the order appealed against and remand the proceeding for fresh disposal. All these powers could be ordinarily exercised when a right of appeal is conferred on a tribunal. But the Legislature has in section 53 (3) enacted that a hereditary trustee may, in lieu of "appealing" to the "Board", "apply" within the same period to the Court to modify or cancel the order of the Committee. Why were the words "modify or cancel" used in connection with the application to the Court, if by the term "application"

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the Legislature really meant an "appeal"? The use of these words in connection with the application to the Court in such cases under section 84 of the Act formed the basis of the recent decision of this Court in *Punnasseri Nambi v. Commissioners, H.R.E. Board*(1). There, the learned Judges, WALLACE and MADHAVAN NAIR JJ., observed as follows:—

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 the section are only to modify or set aside the decision of the Board, and of course to dismiss the application. If the section had meant that the Court was the appellate authority with all the normal powers of an appellate Court, we expect that to have been stated." The use of the word "appeal" with reference to the Board, and "apply" with reference to the Court, coupled with the provision that the Court could modify or cancel the order, is *prima facie* a strong indication that the Legislature did not in this section intend to use the two words to connote the same idea.

No doubt the word "suit" is used in some sections in connection with the aggrieved party's right to resort to Court; the aggrieved party is given the right "to institute a suit in Court to modify or set aside particular orders", or he may "appeal to the Board against such orders"; see sections 55(4) and 67(4). The word "suit" is used in other sections also as already mentioned. The circumstance that, under section 84, the aggrieved party is given the right "to apply" to Court—and not the right "to institute a suit"—is undoubtedly a very important one; but is it conclusive?

We find there is a provision to the following effect in some of the sections of the Act—"the order of the

Court, when such application is made, shall be final"; see sections 76 (3) and 53 (4). On the other hand, we find no such qualifying words either in section 77 or in section 84, and the omission of these words in those two sections seems to be rather significant. Applications by way of originating summons could be made by trustees to the Court for advice and directions in particular matters; see sections 34 and 36 of the Indian Trusts Act, for example. It is a question for consideration whether, in some of the provisions of the Madras Hindu Religious Endowments Act, the word "application" was not used in that sense,—the Court's order being in such cases final and not open to appeal,—and whether when in some other sections the word "application" is used, omitting at the same time the words "the order of the Court shall be final", the Legislature did not really mean simply that the aggrieved party may move the Court, i.e., take appropriate proceedings in Court with a view to have particular orders modified or set aside or cancelled,—not caring to describe the exact technical legal nomenclature of the proceeding to be taken in Court.

It is rather curious that the Legislature has chosen to use two different expressions in connection with an aggrieved person's remedy in the District Court. We have seen that, in sections 76 and 53, the Legislature has said that "the order of the Court when such application is made shall be final". In sections 77 and 84, on the other hand, the Legislature has said that, "subject to the result of such application to the Court, the order or decision of the Board shall be final". In sections 55, 57, 64 and 67, we find the following:—"Subject to the result of such suit, the order shall be final." The question suggests itself whether there is any, and, if so, what difference between saying that "the order of the

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Court when such application is made shall be final", and saying "subject to the result of such application to the Court, the order shall be final." When the Legislature stated that "subject to the result of such suit, the order shall be final", it may be taken that it is the ultimate and final result of the suit by the final appellate authority that was evidently meant. Does the use of the words "subject to the result of such application" in sections 77 and 84 suggest any such wider meaning? It is not necessary at present to pursue this line of discussion.

In this connection, I may refer to the circumstance (though by no means a conclusive one) that in Schedule II, column 3, of the Act, the court-fee payable on an application contemplated by section 84 (2) is "the fee leviable on a plaint under article 17, Schedule II of the Madras Court Fees Act." Thus, the court-fee payable on such a proceeding is that payable on a plaint. This circumstance is not, of course, conclusive.

The learned Government Pleader emphasised the use of the word "decision" of the Board in section 84, and argued that it is the decision of a judicial tribunal, and that the Legislature obviously meant that, though the decision may be called in question by way of appeal to the Court, it should not be ignored and all proceedings preceding it thrown away, as would be the case if the Court had to begin everything *de novo*, according to the contention raised by the petitioner. But I do not think that the use of the word "decision" in section 84 would by itself be conclusive that it is the opinion arrived at by a judicial tribunal in a judicial manner. The word "decision" occurs also in section 56 (4) of the Act; but it cannot be said that the word "decision" used in section 56 imports all the above.

It was then contended that the Board inquires into the matter carefully, records evidence, and hears Counsel on behalf of the parties interested. While it speaks very well of the Board that that public body takes every reasonable care that its conclusions are arrived at after careful inquiry and consideration, it could not be said that the decision of the Board regarding the matters like the one now before us is the decision of a judicial tribunal arrived at in a judicial manner. The question before the Board was whether the institution in question was a math within the definition of the Act it being contended on the other side that it was not. The Board would have no jurisdiction over the institution in question unless it be a math. Therefore, in a case where the Board claims that it is a math, and is in the position of a claimant, while the other party disputes the same, the Board has to decide whether its contentions have been proved. Thus in one sense the Board is to judge on its own claims. It is true that the duty of the Court is only to interpret the statute and give effect to the same, and not to question the policy of the statute. But, in considering the effect of an order passed by the Board when the terms of the statute are not clear, it is, I think, legitimate to start with the assumption that, in the absence of a clear provision to the contrary, orders passed by the Board upholding its own claims could have been meant only to be tentative and subject to be agitated before the Civil Courts in the usual way. Several other sections to which our attention was drawn deal with matters where the position of the Board is materially different. Our attention has not been drawn to any specific provision of the Act which clothes orders like the one in question with the characteristics and binding nature of a Civil Court's

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adjudication. The Board is nowhere expressly styled a judicial body, no section expressly gives it the right to administer oath, nor does any section expressly throw upon it the obligation to decide judicially on the rights of parties as a Civil Court. The Local Government is, no doubt, given power under section 71(e) of the Act to make rules with reference to the powers of the President and Commissioners of the Board to make inquiries, and to compel the production of documents. The Local Government may or may not make such rules, and, in making such rules, may restrict the powers of the Board, with reference to those matters, in any way they like. Some of the rules framed by the Local Government were read to us; one of the rules is to the effect that it shall not be necessary to take down the evidence of the witnesses in writing at length, but, as the examination of each witness proceeds, a memorandum of the substance of what each witness deposes shall be written and signed by the presiding Commissioner or by the Commissioner, as the case may be, and shall form part of the record. A Civil Court sitting as an appellate tribunal in such matters may find it extremely difficult to properly appreciate the evidence so recorded in such cases. The Board is entitled under section 19 to make by-laws, among others, as "to the manner in which their decision shall be ascertained otherwise than at meetings." The arrangement by which a decision is arrived at by members of a Board by circulation of papers may have something to recommend it, if considered as an executive or administrative body. But it is ordinarily unknown to the judicial tribunal system, under which personal discussion among members of the tribunal and open argument in public Court by parties or Counsel are given very great importance. A decision

arrived at by the Board after full inquiry would no doubt be entitled to great consideration, but we do not think that its decision in the present case could be said to be the decision of a judicial tribunal, or that the Legislature, treating it like that, has provided only for an appeal to the Civil Court under section 84 of the Act. It may here be noted that, excepting the President, the other Commissioners of the Board need not necessarily be persons having legal qualifications; see section 12 of the Act. Under the Act the Commissioners are not bound to note the points for decision, the findings thereon, nor the reasons for the same.

As already mentioned, the dispute relates to the very existence of a math in the present case. The Board asserts its existence, whereas the other party denies it. In such a matter, in the absence of clear indication to the contrary in the Act, we should not be justified in holding that the Civil Court which has been given jurisdiction in the matter could only proceed on the materials which were before the Board. The absence in section 84 of the words "the order of the Court shall be final," which find a place in sections 76 and 53 of the Act, seems to indicate that the Legislature pursued a different policy with reference to section 84, evidently having regard to the importance of the nature of the dispute between the parties. It is curious that these words do not find a place in section 77 of the Act, which deals with the determination by the Board as to what portion of the endowment of property belongs to the religious portion of the institution and what portion to the secular portion of the institution, in a case where property has been given to an institution which is partly of a religious and partly of a secular character. There also, the Board has to

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practically decide as between its claims and the claims of another, and so the matter seems to have been dealt with in exactly the same way as in section 84.

It was further argued for the petitioner that a right of suit in the District Court is given by the Act to aggrieved parties in respect of comparatively less important matters, the suggestion being that the right of suit (in effect) in respect of such a vital question, viz., whether an institution in question is a math or not, is not likely to have been withheld. It was also mentioned that the period of *one year* allowed to aggrieved parties to apply to the District Court would rather indicate that the real nature of the proceedings is not "appeal", as ordinarily understood, the suggestion being that, in respect of appeals properly so-called, a comparatively shorter period is fixed by the Act in other cases, and that such a long period of one year is not likely to be allowed if the proceedings were considered to be "appeal" proceedings, as ordinarily understood. It seems to me that these considerations by themselves would not be conclusive, in the absence of other clear indications in the Act itself.

No doubt, some of the considerations mentioned above are not of great significance; but, having regard to general principles and also to the indications derived from the other portions of the Act, I am inclined to think that the jurisdiction of the District Court in disposing of the matter that comes before it under section 84 of the Act is not confined to the jurisdiction of the Court of appeal in the matter of allowing evidence to be adduced. The decision of the learned Judges in *Punnasseri Nambi v. Commissioners, H.R.E. Board*(1), in so far as it goes, supports this view.

(1) (1931) I.L.R. 55 Mad. 201.

Further, I think that there are some observations in the judgment of the Full Bench of this Court in *Damodaran v. H.R.E. Board, Madras*(1) which would directly help us in the decision of the matter before us. The question before the Full Bench was as to the exact amount of court-fee payable on an application made under section 84 (2) of the Act. At page 269, it was observed:

"These applications are analogous to a regular suit filed by an unsuccessful claimant. They are not really suits for any declaratory decrees. The observations of the Privy Council in the case reported in *Phul Kumari v. Ghanshyam Misra*(2) may be considered in dealing with a matter like the present."

Thus, the Full Bench, while holding that they are not really suits for any declaratory decrees, in which case court-fee is to be calculated in a different way, was of opinion that an application under section 84 (2) is "analogous to a regular suit." This opinion of the Full Bench is relevant to the present case, and is of great help to us. If they are analogous to a "regular suit," they could not ordinarily be analogous to "an appeal" or "revision." The Court's powers in respect of taking evidence in proceedings before it are governed by the provisions of the Code of Civil Procedure. In this connection the observations of the House of Lords in *National Telephone Company, Limited v. Postmaster-General*(3) are useful; there, at page 562, Lord PARKER observed as follows:—

"Where by statute matters are referred to the determination of a Court of record with no further provision, the necessary implication is, I think, that the Court will determine the matters, as a Court. Its jurisdiction is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same."

See also *Parthasaradhi Naidu v. Koteswara Rao*(4).

(1) (1929) I.L.R. 53 Mad. 266 (F.B.). (2) (1907) I.L.R. 35 Cal. 202 (P.C.).

(3) [1913] A.O. 546.

(4) (1923) I.L.R. 47 Mad. 369, 373 (F.B.).

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It might be asked why the words "to modify" or "set aside" such decision occur in section 84, if a right to question the decision of the Board in the ordinary way in the Civil Court is given to the aggrieved party. If an explanation has to be suggested for the use of the words in the section, it may be said that the words were probably used to make it clear that it is not obligatory on the Civil Court to simply set aside the order of the Board for irregularity, etc., if it should come to the conclusion that a modification of the order passed by the Board would represent the real rights of the parties. Compare article 13 of the first Schedule of the Limitation Act with article 14 of the said Schedule. Suits to alter or set aside a summary decision or order of a Civil Court not established by Letters Patent are well known to law, and the court-fee due on such suits is provided for by article 17 of the Court Fees Act, Schedule II.

Finally, it may be noted that, under section 53 (3) of the Act, a hereditary trustee may, in lieu of appealing to the Board, apply to the Court to modify or cancel the order of the Committee. What is the exact nature of the jurisdiction of the Court when dealing with the order of the Committee (it is not an order of the Board)? Is the Committee also a judicial body? One need not pursue the matter further.

Statutes which limit common law rights must be expressed in clear and unambiguous language; and an illustration given is the case of a statute which detracts from rights of ownership or that which takes away the jurisdiction of the High Court; see Halsbury's Laws of England, Vol. XXVII, pages 150 and 151. The decisions of the Privy Council in *Ravi Veeraraghavulu v. Venkata Narasimha Naidu Bahadur*(1) and *Secretary of*

(1) (1914) I.L.R. 37 Mad. 443 (P.O.).

State for India v. Chellikani Rama Rao(1) and of the House of Lords in *National Telephone Company, Limited v. Postmaster-General*(2) are not directly useful in solving the exact question before us at this stage of the proceedings. A passage from the judgment of the Privy Council in *Secretary of State for India v. Chellikani Rama Rao*(1) may, however, be cited:

"The claim was the assertion of a legal right to the possession of and property in land; and if the ordinary Courts of the country are seized of a dispute of that character, it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation."

Section 84 of the Act does not state that the jurisdiction of the Court is by way of appeal from the decision of the Hindu Religious Endowments Board, in the same way as it has described, in other sections of the Act, that the nature of the jurisdiction of the Board is by way of appeal from the orders passed by the Committee. We cannot therefore uphold the contention that the jurisdiction of the District Court is restricted to that of an appellate tribunal. In a popular sense, it might be said that what the District Court does in such matters is, in a way, similar to an appeal against the decision passed by the Board. Under Act XXVIII of 1860 "an appeal by way of regular suit" before the District Court against the decision of the Survey Officer was provided for; see *Kamaraju v. The Secretary of State for India*(3). It is only in such a sense that the District Court's jurisdiction could be said to be that of an appellate tribunal; but we are concerned here with the question whether the District Court, in proceedings under section 84 of the Act, has got only the powers of a Court of appeal as provided by the Code

(1) (1916) I.L.R. 39 Mad. 617 (P.O.). (2) [1913] A.C. 546.
(3) (1888) I.L.R. 11 Mad. 309, 310 (F.B.).

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of Civil Procedure. As the Legislature has not specifically mentioned that the jurisdiction is by way of appeal from the decision of the Board, but has given the right to the aggrieved party to apply to the District Court to alter or set aside the order, I feel that I am not justified in cutting down the rights of the aggrieved party in his proceedings before the District Court in the absence of any specific provision in the Act to the contrary.

The use of the words “apply” and “application” is not, in my opinion, conclusive in favour of the respondent’s contention. In Wharton’s Law Lexicon, the meaning of the word “application” is given as follows:—“A request, a motion to a Court or Judge, the disposal of a thing”; see page 67.

It was observed in *International Financial Society v. City of Moscow Gas Company*(1) that the word “application” is not inapplicable to the hearing of a suit as well as to an interlocutory proceeding. THESIGER L.J. observed at page 246 as follows:—

“The words used in the rule, ‘refusal of an application’, are certainly not happily chosen to express the dismissal of a bill. But at the same time it seems to me that they are wide enough to include it, and that they are equally wide enough while they become appropriate to the refusal of relief applied for in a statement of claim, which is the form of procedure to which this rule is primarily applicable.”

The question in that case turned on the construction of Order LVIII, rule 15, of the rules of the Supreme Court. The argument of the appellant’s Counsel (see page 243) was this:—

“‘An application’ as the word is used in the rule and as it is commonly understood,—is made by motion or summons, and, when it is refused, no formal order need be drawn up at all. The decision of the Court on the hearing of the cause is always called in the rules a ‘Judgment’.”

(1) (1877) L.R. 7 Ch. D. 241.

In meeting that argument, JAMES L.J. observed at page 243 as follows:—

“It is impossible, as it seems to me, to read the word ‘application’ in any limited sense as an application for an interlocutory order, because it is quite obvious that the rule applies to other than interlocutory orders.”

Similarly, BAGGALLAY L.J. observed at page 246:—

“It has been suggested that the word ‘application’, as used in the above sentence, has a limited meaning, and that it does not include a motion for decree at the hearing. I can see no ground whatever, in the ordinary grammatical construction of the rule, to give it so limited a meaning, and certainly, if we refer to other portions of the Order and the several rules under the Orders, we shall find the word ‘application’ and the word ‘apply’ constantly used with reference to every class of application.”

Very valuable rights of property are in question. The District Court is given jurisdiction in the matter. The provisions of the Act are not clear that the jurisdiction of the District Court under section 84 (2) is only that of a Court of appeal or revision. Nor is it clear that the decision of the Board on a matter like this is that of a judicial tribunal, as ordinarily understood, arrived at in the usual judicial manner of Courts. The use of the word “decision” in section 84 is not conclusive having regard to its use in section 56 of the Act. Nothing of a conclusive nature could be inferred from the use of the words “apply” and “application” in section 84. Those words do not seem to have been used in any technical sense in that section, having regard to the use of those words in some other sections of the Act. If the term “suit” had been used in section 84, the matter would have been conclusive in favour of the petitioner’s contention. The omission of the words—“the order of the Court shall be final”—from sections 77 and 84 of the Act, while they are used in some other sections of the Act [see sections 53 (4) and 76 (3)]

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with reference to orders passed by the Court on applications, would seem to indicate that the nature of the orders passed by the Court under these two sections is different from the nature of orders passed by the Court under the other sections of the Act. The court-fee payable in respect of an application under section 84, is, under Schedule II of the Act, that payable on a plaint under article 17 of Schedule II of the Court Fees Act. A Bench of this Court has held that the District Court, in proceedings under section 84, has no jurisdiction to remand the proceedings to the Board for fresh inquiry. The observations in the Full Bench judgment of this Court in *Damodaran v. H.R.E. Board, Madras*(1) indicate that the proceedings under section 84 are "analogous to a regular suit." The use of two different words "appeal" and "apply" in section 53 of the Act would *prima facie* indicate that they were used to connote two different ideas and not one and the same, the aggrieved person is to "appeal" to the Board, but "apply" to the Court.

On the other hand, the use of two different expressions—"institute a suit" and "apply to the Court"—by the Legislature in various sections of the Act would seem *prima facie* to indicate in the contrary direction. I am not now directly concerned with the question whether an appeal lies against the decision passed by the District Court in such a matter, nor as regards the exact nature of such an appeal. Even in the matter of disposing of original applications which involve disputes about valuable legal rights, when they are properly filed in the District Court, that Court has jurisdiction to take evidence and hear arguments before giving its decision; and I am unable to see why it should be

(1) (1929) I.L.R. 53 Mad. 266 (F.B.).

different in the case of proceedings taken in Court under section 84, in the absence of any clear provision to the contrary in the Hindu Religious Endowments Act.

The provisions of the Act, in my opinion, are not clear in this matter; having regard to the considerations mentioned above, could it be said that the application made to the Court under section 84 is by way of "appeal" or "revision" within the meaning of the Code of Civil Procedure? On the whole, I think that the learned District Judge was in error in regarding the application before him as "an application for revision or as an appeal." His order will accordingly be set aside, and he will be directed to pass fresh orders on the application to take evidence on commission.

Costs of this revision petition will be costs in the cause and should be provided for by the District Judge when passing a final decision on the proceedings pending before him.

REILLY J.—I agree. I may add that in my opinion the contention of the Board that an application under section 84 (2) of the Act is only in the nature of an appeal or revision petition, which must be disposed of on evidence taken by the Board, is obviously untenable unless the decision of the Board under section 84 (1) is the decision of a judicial tribunal reached by procedure appropriate to a Court of law. It may be noticed that only one of the members of the Board need be a person of any legal training or experience. And the Legislature has not thought fit to prescribe the procedure of the Board in arriving at its decision. There need be no pleadings on record. Evidence need not be given on oath, and none need be recorded. No reason need be given for the decision. No pleader need be heard. The proceedings need not be conducted in public. The

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Local Government by rules and the Board itself by by-laws have provided for some of these things; but they need not have done so. In my opinion it is impossible to suppose that the Legislature in giving any person affected recourse to the Court against such a decision of such a tribunal intended to restrict the Court to such evidence as the Board might happen to have recorded or even to such evidence supplemented to the extent to which a Court of appeal can supplement the evidence taken by a Court of first instance. In my opinion the only reasonable interpretation of section 84 (2) is that the application to be made under the subsection is, so far as the Court is concerned, an application, to which the ordinary procedure of the Court will apply and on which the parties have the right to produce such evidence as they wish. Not only are the ordinary powers of the Court and the ordinary rights of parties applying to a Court for relief not taken away explicitly: if they did not exist, the remedy provided by the Legislature might well be illusory.

A.S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Curgennven.

[ON A DIFFERENCE OF OPINION BETWEEN WALLER AND KRISHNAN
PANDALAI JJ.]

THE PUBLIC PROSECUTOR, APPELLANT,

v.

MITTA VENKATAMMA AND ANOTHER (ACCUSED 1 AND 2),
RESPONDENTS.*

*Indian Penal Code (Act XLV of 1860), ss. 302 and 201—Two
accused charged under—Evidence insufficient to convict
both or either under sec. 302—Conviction of both under
sec. 201—Legality of.*

Where two persons, charged with murder and with causing the disappearance of evidence with the intention of screening the offender from legal punishment under sections 302 and 201 of the Indian Penal Code, are acquitted under section 302 on the ground that the evidence is not sufficient to establish that both of them took such part in causing the death as would justify the conviction of each of them of the offence of murder, they can be convicted under section 201 even though the Court is of opinion that one or other of them, if not both, must have committed the murder. Neither the circumstance that neither of them has been convicted of the main offence nor the fact that the Court is not satisfied that they are innocent of the main offence is a bar to their conviction under section 201.

Where it is impossible to say definitely that a person has committed the principal offence, he cannot escape conviction under section 201 merely because he has been charged also with the principal offence, or because there are grounds for suspicion that he might be the principal culprit.

APPEAL under section 417 of the Code of Criminal Procedure, 1898, against the acquittal under section 302, Indian Penal Code, of the accused by the Sessions Judge of the Cuddapah Division in Sessions Case No. 16

* Criminal Appeal No. 29 of 1932 and Criminal Revision Case No. 763 of 1931.

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of 1931 on his file and for enhancement of the sentences passed under section 201, Indian Penal Code, on the accused in the said Sessions Case No. 16 of 1931.

The case was first heard by WALLER and KRISHNAN PANDALAI JJ., who delivered the following judgments :—

WALLER J.—The respondents in this criminal revision case and appeal were charged with the murder of a little boy named Ramudu. They were charged also with an offence under section 201, Indian Penal Code. Three of the assessors found them not guilty on both charges. The fourth thought that the first respondent was guilty of murder and the second of abetment and that both had committed the offence under section 201, Indian Penal Code. The Sessions Judge was of opinion that the boy had been murdered and that one or other of the respondents had murdered him. As he was unable to decide which had murdered him, he acquitted both of murder, but convicted them under section 201, Indian Penal Code. On the first respondent he passed what was, under the circumstances, the surprisingly lenient sentence of four years' rigorous imprisonment. That passed on the second was still more surprising—imprisonment till the rising of the Court—although there was really no ground for distinguishing between the two. The parents of the boy, not unnaturally, filed a revision petition asking that the acquittals on the charge of murder should be set aside or that, at the least, the sentences should be enhanced. The Public Prosecutor subsequently preferred an appeal with the same objects in view.

The facts are, on the whole, simple and clear enough. The murdered boy was the son of prosecution witnesses 1 and 23, who lived next door to Kondiah, the husband of the second and son-in-law of the first respondent. Kondiah was an elderly man and his wife middle-aged and they had had only one child, a daughter now aged about 18. He had, it is said, taken a great fancy to Ramudu and was proposing to adopt him, a proposal to which his wife and her mother objected. On 2nd and 3rd April he was away from home, leaving the respondents alone in the house. On the evening of 2nd, Ramudu disappeared. A search was made for him, but without success and his father offered a reward of Rs. 50 to anyone who could find him. This led to no result and he gave information to the police the next day.

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In the meantime, something curious had happened. He had sent P.W. 19 to consult a certain astrologer and P.W. 19 had come back with the information that the "woman of the northern house" (in which the respondents lived) had killed the boy and that his body would be found on Saturday the 4th. On that day Kondiah returned and, according to a statement made by the second respondent to P.W. 20, noticed an unpleasant smell in the house and was told that it must be due to a dead bandicoot. The next day (5th) he had a meal and went out. The women must by then have been desperate; the body of the boy was certain to be found if they kept it any longer in the house and so they were driven to desperate measures. It is not easy to dispose of a corpse even in a village; in the heart of a town like Proddatur it is a matter of extreme difficulty. What they did was to take the boy's body from the place where it had been concealed, to carry it up the stairs to the roof and thence to throw it on to the adjacent roof of P.W. 1's house. By a strange and, for them, most unfortunate, coincidence, they happened to be observed by P.W. 11, who saw the boy's body being thrown out of a basket by the 1st respondent, the 2nd respondent attempting, at the time, to screen her with a cloth. Possibly he did not see quite as much as he says he did, but he had doubtless heard of the astrologer's prophecy and put two and two together; for he at once ran to P.W. 1's house shouting in order to give information. His cry had attracted the attention of P.W. 3, who looked up to the roof and saw the respondents there. On reaching P.W. 1's house, P.W. 2 gave information to P.W. 22, who passed it on to P.W. 1. The latter sent his peon (P.W. 8) to the police to give information and the information he gave was recorded in Exhibit III. Much, naturally, is made of the fact that the respondents are not mentioned by name in Exhibit III, but I do not think that the omission is very significant. P.W. 8 was not himself an eye-witness and it is not unlikely that, in his agitated state of mind, P.W. 1 forgot or did not think it necessary to name the respondents to him. The Head Constable, who recorded Exhibit III, went to the house at once and there was told their names. On the roof he found the dead body of the boy in an advanced stage of decomposition. Mr. Grant suggests that it must have been thrown on the roof after the murder and decomposed there. If that had been done, discovery must have been made much sooner, as the body would have attracted

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the birds of the air in a very short time. I infer then that it must have been thrown where it was found very shortly before it was found. Some time later, the Inspector (P.W. 11) came and examined Kondiah's house. In the kitchen, he found a trough full of sand—where waterpots were usually kept—from which a very offensive smell came. In the sand, there was a hole, in which the boy's body had evidently been buried. In another room he saw a basket which also smelt most offensive and in the bath-room he found a woman's cloth, from which emanated the same odour. He followed the smell up the staircase and saw drops of serous fluid on the stairs. From his evidence, it seems quite clear that the boy's body had been buried for some time in the trough and that it had recently been removed from it and taken to the roof. No suspicion of any sort attaches to Kondiah and the only people who could have buried the body and removed it to the roof were the women of the house. This must have been done by them shortly before the discovery and there is therefore material corroboration of P.W. 11's story.

After the discovery, a crowd of men collected, among whom was K. Subbayya Chetty (P.W. 20), who seems to be a prominent and influential resident of Proddatur. In his presence, Kondiah asked his wife to tell the truth and she made a long statement, the effect of which was to place the entire blame on her mother and to exculpate herself completely. Her mother it was who did everything—killed the boy, buried his body and carried it up to the roof. The Sessions Judge declined to allow the statement to be put in evidence, as he thought that P.W. 20 was a person in authority, which he was not, that the statement was a confession, which, as regards the charge of murder, it was not, and that it had been made as the result of some sort of inducement, whether by way of threat or promise does not appear, which it does not seem to have been. Afterwards, the 2nd respondent was sent by the police to the Magistrate to be examined under section 164 of the Code of Criminal Procedure and she was so examined and told then much the same story as she had told to P.W. 20. The Sessions Judge describes this as a peculiar episode. I can myself see nothing peculiar about it. The police were then investigating a charge of murder and not a charge under section 201, Indian Penal Code. They were aware that the 2nd respondent was attributing the murder to her mother and

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desired to have her evidence, as a witness, recorded. She was examined, therefore, as a witness and not as an accused person, who was expected to make a confession. The Sessions Judge excluded her statement from evidence on the ground that it was inadmissible because the Magistrate had not gone through the formalities required by section 164 of the Code of Criminal Procedure in respect of the recording of confessions.

Now what did these two excluded statements amount to? What the 2nd respondent, P.W. 20, the police and the Magistrate were thinking about at the time was the murder and nothing else. An offence under section 201, Indian Penal Code, was in the contemplation of no one. That being so, it was the 2nd respondent's object not to confess to anything, but to repudiate the murder and to fasten it on some one else, which she proceeded to do—so that, on the whole, neither of these statements was or was intended to be a confession, properly so described. It is true, of course, that her legal duty was, under section 44 of the Code of Criminal Procedure, to give information of the murder and that her omission to do so was an offence under section 202, Indian Penal Code. Further, her illegal omission might be construed as intended to aid her mother's offence under section 201 within the meaning of section 107, Indian Penal Code. But all this was, at the moment, rather beside the point. She was not aware that she was admitting anything criminal nor did she intend to do so. I interpret her statement to P.W. 20 as a denial of complicity in the murder rather than as a confession of guilt under sections 201 and 202. Even if it be construed as a confession, I do not agree that it should have been rejected as evidence against her; for P.W. 20 was not a person in authority and there is no satisfactory evidence of improper pressure. As regards the statement made to the Magistrate, it must be remembered that she was then thought and thought herself to be a witness. And it is, at the least, a very arguable question whether a statement made by a witness, into which he introduces some matter that incriminates himself, must be excluded from evidence merely because the formalities prescribed by section 164 of the Code of Criminal Procedure in regard to confessions have not been carried out. After all, it would be expecting something super-human of a Magistrate to require him to warn a person not to say something which no one had any reason to suppose he was going to say. Apart from that, the Sessions Judge has overlooked

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section 29 of the Evidence Act, which says that no confession, which is otherwise admissible, becomes inadmissible merely because the maker of it has not been warned that he need not make it and that it might be used against him. On the whole, I think that both of the statements—even if they were confessions—were not inadmissible in evidence as against the 2nd respondent. The proper way, however, of dealing with them is, in my opinion, to treat them as worthless, as being no more than efforts by an accomplice to shift the whole guilt on to another person. And that is the way in which I propose to treat them; in fact, to ignore them altogether.

What then remains? There is, first of all, the motive, which has been proved and affects both of the respondents equally. There is next the fact that, when P.W. 1 questioned them about the missing boy, they replied that he had not been to the house; and that was at a time when he was dead and both of them must have known that he was dead. There are further the facts that they were alone in the house at the time that the boy was buried and must have been killed in the house, that the body could be tracked up the stairs and that it had evidently been carried up there in the basket found by the Inspector in the house. Finally, there is the evidence of P.W. 11, which I see no reason to disbelieve, that one of them threw the body on to P.W. 1's roof, while the other tried to screen her and also that of P.W. 3 who saw them both on the roof after he heard P.W. 2's cry. As against the 1st respondent, in addition, it has been proved that she pointed out to the police the place where the dead boy's shirt was found.

What inference can be drawn from these facts? The first is that the boy was murdered. On the question of who murdered him, the Sessions Judge thought that it must be one or other of the respondents, but, as he could not decide between them, he acquitted them both. I do not think myself that that was the right conclusion. The proper inference seems to me to be that they must have been acting in concert throughout. They were alone together in the house. Both shared in the motive and I cannot believe that either would have run the risk of killing the boy and hiding his body in the kitchen, without the knowledge and connivance of the other. Both of them lied to P.W. 1 when he asked about the boy. Both of them kept silence for two days and then, when the position became desperate, acted together in disposing of the

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body. Probably only one of them actually committed the murder—it does not matter which of them it was—but I do not doubt that the other connived at it. I would therefore set aside the acquittals, convict both of murder and sentence them each to transportation for life. As regards the offence under section 201, it having been found that both of them were privy to the murder, it is not necessary to fall back on that section, which applies to persons other than the principal offenders. The view of the Judge that, though he could not decide which of the respondents committed the murder, they could both be found guilty under section 201, is, to my mind, quite illogical. If he could not decide which was the offender, how could he find which concealed the body in order to screen the offender?

KRISHNAN PANDALAI J.—I shall deal with the criminal appeal first. The facts are fully stated in the judgment of the lower Court and that of my learned brother which I have had the advantage of reading. The question in the appeal is whether there is sufficient evidence on which either or both of the respondents can be convicted of murder. After giving the matter my earnest consideration I much regret that I am unable to agree with my learned brother that the acquittal of the respondents on the charge of murder was wrong. I agree with the lower Court and my learned brother that the evidence leaves no room for doubt that the boy Ramudu was murdered in the house, where the respondents and Chinna Kondiah, the husband of the second respondent, live, some time after he was missed on the afternoon of the 2nd April 1931. I agree also that there is no room to suspect the complicity of Chinna Kondiah in this crime as he appears to have been absent from the house on the 2nd and returned only on the 4th. The child would appear (there is really no evidence about it except the statement of the second respondent which will be referred to later) to have been drowned in a water trough and his body buried in a sand trough. On the 4th Chinna Kondiah returned and complained of offensive smell in the house. He was told that it might be a dead bandicoot. The next day he went out after his morning meal and before he came back the two respondents are proved to have carried the dead body of Ramudu, which was the cause of the smell and which was in a highly decomposed condition, upstairs in a basket and to have thrown it on the neighbouring terrace of P.W. 1, the first respondent carrying the basket and the second respondent

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screening it with a cloth. The police came. Chinna Kondiah also came back and the second respondent, being taxed with the murder by her husband and the people who gathered, made a statement to P.W. 20 exculpating herself from all responsibility for the murder and accusing the first respondent. The police apparently accepted this version and placed her before the Magistrate where she substantially repeated as a witness under section 164 what she had told P.W. 20. On the 6th, on information given by the first respondent, a shirt, which was on the body of Ramudu, was recovered from a heap of groundnuts.

Before considering whether the charge of murder can be brought home upon the above facts to either or both the respondents, I shall refer to the two statements of the second respondent abovementioned which have been excluded from consideration by the learned Sessions Judge. As to the statement made to P.W. 20, Mr. Grant has admitted that the rejection was wrong. I agree with that view. The ground on which it was rejected is that it was made to a person in authority in circumstances making it inadmissible under section 24 of the Evidence Act. I cannot agree with the lower Court either that P.W. 20 was a person in authority in the sense in which it is used in section 24 or that the statement to him was caused by any inducement, threat or promise. It may be added that the statement spoken to by P.W. 20 contained no confession implicating the maker in the murder which was the subject of P.W. 20's question, that all that it contains is a narration of facts from which it may be inferred that after the murder the second respondent was privy to the concealment of the body in the sand trough by her mother. It is not necessary to elaborate this point because the exclusion of this statement by the learned Judge was admittedly wrong.

The next statement whose admissibility is in question is the statement made on oath by the second respondent on the 5th April before the Magistrate under section 164. The Public Prosecutor did not press that this document should be used in evidence and therefore it is not necessary to consider the matter at length. The learned Judge excluded it on the ground that it is a confession and that it is inadmissible because the safeguards provided by section 164 for the recording of confessions have not been complied with. At the time when it was made, it was not made by a person accused of any offence

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but by one who was put forward as a witness and who purported to speak as a witness about a crime committed by another person. It is substantially the same though a fuller statement than that spoken to by P.W. 20. It contains no admission of guilt by the speaker on the charge then under investigation, namely, murder, but it contains a narration of facts from which it is possible to infer that the speaker was privy to the offence of causing disappearance of evidence of murder. It is obvious that even if it is treated as a confession as to disappearance of evidence, it is of no value as against the first respondent on the charge of murder. The only question is whether it can be received as evidence against the second respondent herself on the charge under section 201. I do not wish to express any decided opinion on this because the statement made to P.W. 20, which is substantially the same, is admissible. But I may point out that the question is really not governed by the rules relating to recording of confessions and their safeguards provided either in section 164 of the Code of Criminal Procedure or section 29 of the Evidence Act. Both those sections deal with persons who are accused at the time of making the statement and not with persons who are regarded as witnesses. In the case of persons accused of an offence, the Magistrate before recording their confession has to observe the safeguards mentioned in section 164. Section 29 of the Evidence Act also deals with such persons. The present question, however, is whether inferences of guilt which may be drawn from statements made by a person when he is examined as a witness may be used against him when he is tried as an offender. The only provision relating to this of which I am aware is the proviso to section 132 of the Evidence Act which says that no answer, which a witness is compelled to give, shall be proved against him in any criminal proceeding except a prosecution for perjury. I do not see why this should not apply to examination of witnesses under section 164; but I do not wish to pursue this matter as the Public Prosecutor did not press for the admission of this statement and the question was not fully argued in view of the fact that the statement made to P.W. 20 was held to be admissible. I therefore have put this statement under section 164 out of consideration.

The question is whether on the remaining evidence a conviction for murder can be sustained against either or both of the respondents. It is undoubtedly a case of suspicion of a

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very strong character against both the respondents; but to sustain a conviction suspicion will not do. For, where there is nothing to show which of several persons is guilty of a crime and there is nothing to show that they all participated in it, the only judicial conclusion possible is to acquit them all. This question is discussed by the learned Judge at the end of paragraph 25 of his judgment. He says: "Though it is proved that either the first accused or the second accused must have killed the boy I cannot say that both operated in the murder, the only element of doubt being who killed and who aided. As it is not possible to say for certain that both operated and we have to see which did the act, I have to say that, though either must have done so, the quantum of proof is not such as to justify me in saying which of them did so." As far as I know, this is good law and good sense. Mr. Grant referred to a passage from Stephen's Introduction to the Evidence Act which lays down the same thing, Woodroffe and Ameer Ali, 9th Edition, page 30. In the Evidence Act the matter is dealt with in the definition of the word "proved." A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act on the supposition that it exists.

From the facts it is clear that it was possible for either of the respondents without the assistance of the other to kill the child. Keeping its head under water for a minute would suffocate it. There is nothing as far as I can see in the evidence to support the conclusion that both the respondents acted in concert in killing the child or had decided to put an end to the child before it was killed. All that we know is that both of them disliked the proposed adoption of the boy by Chinna Kondiah. But it is one thing to disapprove of a proposed adoption and quite another thing to murder the proposed adoptee on that account. The subsequent conduct of the appellants in disposing of the body is fully explicable on the ground that they are mother and daughter and that, if either of them had committed the murder, the other would readily help her to keep the murder a secret and escape detection. It would, in my opinion, therefore be wrong from the respondents' disapprobation of the adoption and their acting together in disposing of the body to infer that they had acted in concert in killing the child. The first respondent is

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aged 60 and the second 40. The second respondent's accusation of her mother certainly cannot be considered as against the mother, and reading the evidence as a whole I cannot escape the feeling that "the lady doth protest too much, methinks". If against her mother her statement is inadmissible, against herself it is worthless except to the extent already mentioned. In the absence of anything but suspicion on which I can found the conclusion that both the respondents acted in concert to kill the child, I cannot find that the act of one of them can be fastened on the other and, as there is nothing to show which of the two respondents killed the child, the only conclusion to which I can come is that neither of the respondents can be held guilty of murder. Horrified as I am at the brutal and devilish cruelty of one of these women, I would dismiss the appeal.

Coming to the revision petition, in the view taken by my learned brother on the question of the appeal, it was not necessary for him to deal with the revision petition which seeks to enhance the sentence passed by the lower Court under section 201. Certainly on the finding arrived at by the learned Judge in paragraph 27 of his judgment, the sentence passed by him on the second respondent was farcically lenient. He awarded four years to the first respondent and simple imprisonment till the rising of the Court to the second. If he had passed the same sentence on the second respondent as he did on the first, probably nothing more would have been heard of this case. His ground for this lenient sentence is that nothing is alleged or proved against the second respondent except that she held a green cloth as a screen when the first accused began her march on the terrace to hide the trace of the crime of murder. This is not correct. Mr. Grant, as he was entitled to do on a notice to enhance the sentence, argued that the second respondent was not guilty at all and he urged that she had taken no part in any act which is necessary to constitute the offence and that she had not caused any evidence of the crime to disappear with the intention of screening an offender from punishment. As regards this, it is sufficient to refer to her statement to P.W. 20, in which she said: "I asked my mother what is in the water trough. My mother told me that she threw Ramudu into it. Do not cry out. She said that she did so and that I should not expose her as she was my mother. She said that she would set right the matter and come, and

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asked me to be outside and take part in the search for the boy by his people. They were searching for Ramudu outside. I also was searching, saying 'Where is Ramudu?' Then I went into my house again. I saw the body of Ramudu placed near the water trough on the slab floor by my mother. My mother asked me to go outside because, if both were inside, they would be suspected, and to be crying along with others. She said that she would set right everything. A little later I went in. I saw the body kept near the said trough. My mother dug a pit in the sand trough. My mother asked me to go out saying that she would follow me. I was outside. My mother then came out a little later and told me that she set right everything." It is clear from this statement of the second respondent herself that she was present when the body was buried in the sand trough and that, both immediately before and after, she was acting in concert with and helping her mother in secreting the body by playing her part outside the house, pretending to be looking for the boy and crying as if she was sorry for his disappearance. On the evidence there is no doubt that both the respondents took part in burying the body and so causing disappearance of evidence of the offence and there can be no doubt of the intention to screen the offender from punishment. But it is suggested that it is illogical to punish both the respondents under section 201 because one of them must have been the murderer and it is not legal to punish the person guilty of murder of the offence of causing disappearance of evidence of the offence and hence it is suggested that, as it is not possible to say which of the two respondents was guilty of the murder, it is not possible to say which of them is punishable for causing disappearance of evidence. The fallacy underlying this reasoning is that it ignores that, when it is held that neither of the respondents can be convicted of the principal offence of murder, it follows that neither of them is legally guilty of the principal offence. Therefore when the respondents are held guilty under section 201 neither of them is a person guilty of the offence of murder.

I therefore think that both the respondents were properly convicted under section 201. As for the sentences, having regard to the first respondent's age, it seems hardly necessary to enhance her sentence beyond the four years already awarded; but, as regards the second respondent, I would enhance her sentence to seven years' rigorous imprisonment.

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WALLER J.—I have now had the advantage of reading my learned brother's judgment, but regret to say that I remain of the opinion that the line of reasoning, which leads to the acquittal of the respondents on the charge of murder, must lead to their acquittal on the charge under section 201, Indian Penal Code, also. If they can both be convicted on the latter charge, as a result of their acquittal on the former, it seems to follow that they were screening some third party, who was the real murderer. That, however, is no one's finding. The finding is that one or other of them committed the murder, but that both must be acquitted, because it is impossible to decide which of them actually committed it. On those assumptions, I do not see how the finding in regard to the charge under section 201, Indian Penal Code, can be different. It must, in my opinion, be that one or other of the women committed that offence, but, it being impossible to say which of them did so, both must be acquitted.

As regards the charge of murder, the assumption, which seems to me unjustifiable, underlying the Sessions Judge's conclusion is that only one of the women could have committed the murder. That may be to a certain extent—that is to say, literally—correct; for it does not take two women to kill a child of three, but why should it be assumed that the other could not have been privy to it? One may be guilty of a murder without physical participation in it. Let me put the case in this way. Suppose that the first respondent had been the only accused in the case and that the second had been away from home on three critical days. Leave all the circumstantial evidence as to motive, opportunity and conduct as it is. Would the Sessions Judge have hesitated to convict the first respondent of murder? I imagine not. And similarly, if the second respondent had been the only accused. What makes the difference, where both are charged together on exactly the same evidence of motive, opportunity and conduct, which is equally applicable to both? I shall be told that, in the cases stated, there can be no difficulty, as only one of the women could have committed the murder. That is quite correct, but why carry that assumption into our present case, where both of the women are charged and the evidence against both is equally strong? When only one person is charged and she is the only person that could have committed the crime, one assumes without difficulty that she committed it. When

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two are charged with the crime and they are the only persons that could have committed it, I can see no reason why the assumption should be not that both committed it, but that only one did so. The case, quoted by Mr. Grant, which is stated in Stephen's Introduction to the Evidence Act, seems to me to be beside the point. It begins: "Let the question be whether A did a certain act; the circumstances are such that the act must have been done by somebody, but it can only have been done by A or B. If A and B are equally likely to have done the act, the matter cannot be carried any further." That may be perfectly correct when only A is being charged with and tried for the act, but what if B is being tried jointly with him on the evidence of circumstances which incriminate both equally? In that case, there seems no reason why the Court should seek to differentiate between them or assume that the act could have been done by only one of them.

I would, as I have already said, convict both of the respondents of murder and acquit them on the other charge. If, on the other hand, their acquittal of murder is right on the ground stated, they should, in my opinion, be acquitted on the other charge on the same ground. As my learned brother disagrees with me on both points, the case will have to go before a third Judge.

Mr. Ethiraj has now drawn my attention to the decision in *Chinna Gangappa, In re*(1) which lays down that there is nothing in the language of section 201, Indian Penal Code, that prevents the principal offender being convicted under that section. With great respect, it seems to me that the illustration to the section indicates very clearly that it applies only to persons other than the principal offenders.

The appeal and the criminal revision petition then came on for hearing under section 429 of the Code of Criminal Procedure (Act V of 1898) before CURGENVEN J.

Public Prosecutor (L. H. Bewes) for appellant.

Nugent Grant, C. V. Nagaraja Sastri and Krishnayya Chetti for accused.

V. L. Ethiraj and B. Ananda Bai for petitioners.

Cur. adv. vult.

(1) (1930) I.L.R. 54 Mad. 68.

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CURGENVEN J.—This case comes before me owing to a difference of opinion between WALLER and KRISHNAN PANDALAI JJ. The facts have been stated fully in the judgment of the learned Sessions Judge and briefly but sufficiently in that of WALLER J. On Thursday the 2nd April 1931 a male child aged three entered or was decoyed into the house of which the two respondents, who are mother and daughter, are inmates, and there murdered. The motive for the crime was undoubtedly a wish of the husband of the second respondent, Kondiah, to adopt the boy, which for easily understood reasons would be objectionable to the two women. They were tried on charges both of murder and of causing the disappearance of evidence with the intention of screening the offender from legal punishment, under sections 302 and 201, Indian Penal Code. As regards the former charge the learned Sessions Judge found that the child must have been killed either by both the women together or by one of the two; but he was of opinion that the evidence did not exclude the possibility that one might have committed the murder without the assistance of the other, so that in his view it was not possible to convict either of that offence. He convicted them both under section 201, Indian Penal Code, and sentenced the first respondent to four years' rigorous imprisonment, imposing upon the second respondent the nominal sentence of simple imprisonment until the rising of the Court. The Public Prosecutor has appealed against the order of acquittal under section 302, Indian Penal Code, and for enhancement of the sentences passed under section 201, Indian Penal Code. There is also a criminal revision petition presented by the parents of the child, praying for similar modifications in the orders passed.

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When the case came before the Criminal Bench of this Court, WALLER J., after summarising the facts, drew the inference from them that both the respondents must have been acting in concert throughout. He relied upon the considerations that both shared in the motive and were alone together in the house and he was unable to believe that either would have run the risk of killing the boy and hiding his body without the knowledge and connivance of the other. It had also been proved that both of them had subsequently made false statements when asked if they had seen the child and had acted together in disposing of the body. The learned Judge concludes with the observation: "Probably only one of them actually committed the murder—it does not matter which of them it was—but I do not doubt that the other connived at it." The view taken by KRISHNAN PANDALAI J. agreed with that of the Sessions Judge, that the evidence was insufficient to show in the case of either of the respondents that she actually participated in the crime. It was clear from the facts, as indeed was conceded by WALLER J., that it was possible for either of the respondents to kill the child without the assistance of the other, and although both may have had a motive to do away with it, that circumstance did not show that both had in fact participated in the act. The subsequent conduct of the respondents in disposing of the body was in KRISHNAN PANDALAI J.'s view fully explicable on the ground that they are mother and daughter and that if either of them had committed the murder the other would readily help her to keep it a secret to escape detection.

Unless we are to gather the facts from a statement made by the second respondent, there is nothing beyond circumstantial evidence to show in what manner the death of the child was caused. The second respondent's

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statement certainly cannot be used against the first respondent and I think that WALLER J. has adopted the best course in ignoring it altogether. The evidence shows that the child was last seen in the street outside the house at about 6 p.m. on the Thursday. There is nothing to show how it was induced to enter the house. We can only presume that the murder was committed that evening from the state of decomposition in which the body was subsequently found and from the improbability that the child would be kept alive in the house for any length of time. Even apart from the second respondent's statement there seems good ground to suppose that it was drowned and that it was subsequently buried for the time being in a trough of sand used as a stand for pots in the kitchen. From there it was taken, almost certainly on the Sunday morning, carried upstairs on to the terraced roof of the house and thrown on to the adjoining roof, which belongs to the house occupied by the child's parents. I shall have to refer later more specifically to the evidence relating to the disposal of the body and it is sufficient to say here that both the respondents are shown by the evidence to have taken part in the operation. So far as the charge of murder is concerned these are in substance the facts upon which a decision has to be based. There is no proof direct or circumstantial to connect either of the women in particular with the physical act of murder, and in fact the prosecution has not even shown that they were both in the house at the time when it was committed. The case is admittedly not one giving rise to any presumption that two persons must have joined in the act itself, and in fact WALLER J. has conceded that probably only one of them committed it. That being so, I am unable to say that the evidence is sufficient to establish that both the women

took such part in causing the death as would justify the conviction of each of them of the offence of murder, and it need scarcely be said that no other offence can be in question. The facts proved appear to me compatible with the theory that either may have killed the child without the assistance of the other and I think that the subsequent conduct of both the women is explicable otherwise than on the supposition that they both did take part. I agree accordingly with KRISHNAN PANDALAI J. that, so far as they relate to the acquittal on the charge of murder, the appeal and the criminal revision petition must be dismissed.

The learned Judges have also differed upon the sustainability of a conviction under section 201, Indian Penal Code, although they are agreed in accepting the evidence upon which the charge is supported. It is of course open to the respondents upon this reference to show that that evidence should not be believed.

[His Lordship then dealt with the evidence in the case and came to the conclusion that it effectually established that both the respondents took part in disposing of the body, and proceeded:]

There then remains the point, as to which WALLER and KRISHNAN PANDALAI J.J. are in disagreement, whether the respondents should have been convicted under section 201, Indian Penal Code, of causing the disappearance of evidence of the offence with the intention of screening the offender from legal punishment, it being clear that one or other of them, if not both, committed the murder. Upon this point there are undoubtedly differences of judicial opinion. There is in the first place a difference of opinion upon the question whether, where a person has himself committed the offence, he can be convicted of causing the evidence of it to disappear. That the section would not include the special case of the offender

himself was held in an early case of the Bombay High Court, *Reg v. Kashinath Dinakar*(1). The course of judicial opinion upon this question has received consideration in a very recent case of this Court, decided by WALLACE and JACKSON JJ., *Chinna Gangappa, In re*(2), and these learned Judges have given their reasons for holding that sections 201 to 203, Indian Penal Code, are applicable to a person who is guilty of the main offence, though they add that in practice Courts will not convict an accused both of the main offence and under these sections. The grounds of that decision have been criticised before me, but I consider that, sitting as a single Judge, I am bound by it. I do not for my part however find it necessary to carry the argument quite so far as to include a person who is guilty,—that is to say, who has been judicially proved guilty,—of the main offence. Cases in which such proof has been or could be given rarely or never give occasion for the application of sections 201 to 203, Indian Penal Code. The sort of cases in which necessity for the application of the sections arises is where the evidence falls short of proof though it may have created a more or less strong suspicion, and the accused has been acquitted. Special instances, but I think special instances only, of this class are those (like the present) where it is clear that the primary offence must have been committed by one or more of a relatively small number of persons whom, or some of whom, it is sought to prosecute under one or other of these sections. Although it may be true that the conviction of all such persons of the secondary offence must involve the conviction of at least one who has committed the primary offence, I do not think that that circumstance affords a

(1) (1871) 8 Bom. H.C.R. (Cr.) 126. (2) (1930) I.L.R. 54 Mad. 68.

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good judicial ground for refusing to convict. We have to consider the case of each accused separately and if, say, he has been acquitted of murder, the prosecution is entitled to ask the Court to presume that he is not guilty of that offence; and if he wishes to escape conviction under section 201 it lies upon him to rebut that presumption by showing (which of course he will not usually do) that he was a principal and not a mere accessory. The Court is not bound to refrain from convicting unless and until it is satisfied that the accused is innocent of the main offence. I do not think that mere suspicion, however strong, can form the basis of a rule of law, and if suspicion is to form the test where is the line to be drawn? If the rule is to apply to each of two persons, is it to apply to each of twenty, to each of a hundred, to all the occupants of a village? It is easy to imagine cases which would reduce the principle to an absurdity.

The case which has been cited as authority against accepting this line of reasoning is *Torap Ali v. Queen-Empress*(1). There too the evidence for the prosecution pointed conclusively to one or other of two persons as being the actual murderer, but it was impossible upon the evidence to show which of them had caused the death. They were accordingly acquitted on the charge of murder and originally convicted under section 201, Indian Penal Code. This conviction was set aside on the ground that the section referred to persons other than the actual criminals, who, by their causing the evidence to disappear, assist the principals to escape the consequences of their offence. A perusal of the judgment in this case shows that it is based purely upon the application of this principle, relying upon some earlier

(1) (1895) I.L.R. 22 Cal. 638.

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cases, of which *Reg v. Kashinath Dinkar*(1), already referred to, is one. The further question is not considered, whether where each or all of the accused have been acquitted, there is room for the application of the principle. It has been pointed out to me that the report shows that the Deputy Legal Remembrancer did not argue the case on behalf of the Crown, though I do not think that it would now be said that the case for a different view was in fact unanswerable. It deserves notice that the question whether the offence of which evidence had been caused to disappear was committed by the accused themselves was definitely answered in the affirmative in *Reg v. Kashinath Dinkar*(1), and that that decision went purely upon the footing that the section would not apply to the actual criminals. The same is true of the other authorities upon which the learned Judges rely, and, since therefore the question as to the judicial effect of an acquittal of all the accused on the main charge was not even considered in *Torap Ali v. Queen-Empress*(2), I do not think that it really affords much, if any, authority upon this point. Cases directly in point are *Teprinessa v. Emperor*(3) and *Rup Narain Kurmi v. King-Emperor*(4). These decisions have held that, where it is impossible to say definitely that a person has committed the principal offence, he cannot escape conviction under section 201 merely because he has been charged also with the principal offence, or because there are grounds for suspicion that he might be the principal culprit. I may refer to the judgment of FAZL ALI J. in the last cited case for a full discussion of the question. I respectfully agree with the views expressed by that learned Judge, which are also the conclusions of KRISHNAN PANDALAI J. in the

(1) (1871) 8 Bom. H.O.R. (Cr.) 126. (2) (1895) I.L.R. 22 Cal. 638.
(3) (1918) I.L.R. 46 Cal. 427. (4) (1930) I.L.R. 10 Pat. 140.

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present case. Nor do I think that it can be contended that the principle loses its application where a single trial embraces charges both under section 302 and section 201, Indian Penal Code. An instance of such a case is afforded by the Privy Council judgment in *Begu v. The King-Emperor*(1), where their Lordships held that even without a further charge the conviction of persons acquitted under section 302 of an offence under section 201 was warranted by section 237 of the Code of Criminal Procedure. I conclude accordingly that there was no legal impediment to the conviction of the respondents under section 201.

As regards the first respondent, I do not find sufficient reason to enhance the sentence of four years' rigorous imprisonment passed upon her. The sentence passed upon the second respondent is utterly inadequate. There do not appear grounds for distinguishing in this respect between the two cases. I enhance the sentence passed on her to one of rigorous imprisonment for four years. To this extent the appeal and revision petition are allowed, and otherwise dismissed.

K.N.G.

(1) (1925) I.L.R. 6 Lah. 226 (P.O.).

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APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Cornish.*

PONNAMMA (PLAINTIFF), APPELLANT,

v.

MARAMPUDI KOTAMMA AND TWO OTHERS
(DEFENDANTS), RESPONDENTS.*

1932,
April 18.

*Indian Arbitration Act (IX of 1899)—Inapplicability of, to
parol submissions to arbitration.*

The Arbitration Act (IX of 1899) is not a comprehensive Act and it is only intended to deal with cases where there has been a written agreement to submit the differences to arbitration in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency-town. The Act leaves untouched the right of persons to have the differences between them settled in an informal manner by parol submission to arbitration.

Rukhanbai v. Adamji, (1908) I.L.R. 33 Bom. 69, dissented from.

APPEAL against the decree of the Court of the City Civil Judge, Madras, dated 16th October 1928, in Original Suit No. 323 of 1923.

K. Rajah Ayyar for *K. Bashyam Ayyangar*, *N. K. Mohanarangam Pillai* and *P. V. Padmanabhan* for appellant.

B. Manavala Chowdhri for respondents.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—In the trial Court the plaintiff claimed ^{BEASLEY C.J.} a declaration that she was entitled to the plaint schedule

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BEASLEY C.J. property and for delivery of possession of it and other reliefs. The defendants set up, amongst other defences, the defence that, disputes having arisen between the parties in or about February 1928 with regard to the suit property, the matter was referred by them to a caste panchayat which made an award in favour of the defendants holding that the property belonged exclusively to them, and pleaded that the plaintiff was bound by that award. The award of the panchayat having been proved at the trial through the leading headman of the caste panchayat, the learned City Civil Judge held that the plaintiff could not raise the same question in the suit, having voluntarily submitted her case to arbitration and obtained an award. The plaintiff appeals.

It is argued here that there was no written submission to arbitration and that, therefore, the arbitration was not valid or binding upon the parties to it. It is conceded by Mr. Rajah Ayyar for the appellant that, if the arbitration had been in the mofussil, his client would have been bound by the award and that her suit in respect of the same matter arbitrated upon would not be maintainable. But his contention is that the arbitration in question was one to which the Indian Arbitration Act (IX of 1899) applies. That Act requires that there should be a written submission to arbitration. It is common ground that the provisions of the Indian Arbitration Act only apply to the Presidency-towns. That is made clear by section 2 of the Act. If, therefore, the Act applies to a private arbitration such as this, then it is clear that a written submission to arbitration is required. It is contended by Mr. Rajah Ayyar that the Act applies to every arbitration held in Madras. On the other hand, it is contended by the respondents that the Act applies only to arbitrations started by a written submission to arbitration before a suit is filed

and without the intervention of the Court and that in all other cases the Civil Procedure Code applies. In support of his argument Mr. Rajah Ayyar referred to *Rukhanbai v. Adamji*(1). There the parties to an arbitration suit consented to it being referred to the Commissioner to take the usual accounts and to determine their respective shares. On appearing before the Assistant Commissioner the parties came to an understanding that the matter in dispute should be left to be decided by the Assistant Commissioner in a summary manner without going into formal evidence beyond the accounts, objections and surcharges filed before him. There was no written submission to arbitration. BEAMAN J. held that the Indian Arbitration Act applied to such an arbitration; that, as there had been no written submission to arbitration as provided by section 4 of the Act, there had been no legal and valid reference to arbitration and the Assistant Commissioner's award had no legal foundation and could therefore have no legal consequences; and that, as there had been no reference to arbitration and no award, there could be no adjustment to give effect to under section 375 of the Civil Procedure Code, which was what the plaintiff applied for. In my view, the Indian Arbitration Act is not a comprehensive Act and does not include all arbitrations and therefore the view taken by BEAMAN J. in *Rukhanbai v. Adamji*(1) is not the correct one. It is very probable that the Indian Arbitration Act was designed to suit the convenience of the commercial community in the Presidency-towns and in order to enable them to decide disputes between themselves without the intervention of the Court, and the Act therefore provides for the procedure to be adopted in such cases. It is quite clear that the Act is only

(1) (1908) I.L.R. 33 Bom. 69.

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BEASLEY, C.J. intended to deal with cases where there has been a written agreement to submit the differences to arbitration. The Act throughout refers to submissions and a submission is defined in section 4 (b) as

“a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.”

After such a written submission the procedure provides for the intervention of the Court which in the Presidency-towns means the High Court. Courts here have always recognized such informal arbitrations as here and the second Schedule to the Code of Civil Procedure by paragraph 20 provides for arbitrations without the intervention of the Court. It is conceded that that paragraph refers to arbitrations whether there has been a written submission to arbitration or not; and it is difficult to see why such arbitrations in the Presidency-towns should be required to originate in a written submission whereas in the mofussil no such written submission is required; and there is abundant authority in support of the principle that an award under such circumstances in the mofussil can be relied upon as a defence in a suit relating to the subject-matter dealt with by it—vide *Muhammad Newaz Khan v. Alam Khan*(1)—and indeed it is not disputed by Mr. Rajah Ayyar. Why should there be any distinction between those cases and informal arbitrations in the Presidency-towns? The Indian Arbitration Act is almost word for word the English Arbitration Act and under the English Arbitration Act such an award is not invalid. In the twelfth edition of Russell on “Arbitration and Award” it is stated at page 336:

“A parol submission is generally perfectly valid but it is not a submission to which the Arbitration Act applies.”

(1) (1891) I.L.R. 18 Calo. 414 (P.C.).

In the footnote to paragraph 1071 of Vol. I (second edition) of Halsbury's Laws of England dealing with references by consent out of Court it is stated: PONNAMMA
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“The provisions of the Arbitration Act, 1889, are for the most part inapplicable where the submission is oral; see section 27 which defines a submission for the purposes of the Act as a ‘written agreement’. Consequently where the submission is oral, the arbitration is governed by the common law.”

In *Muhammad Newaz Khan v. Alam Khan*(1) already referred to, *A* and *B* had referred certain matters in dispute between them to *X*. *X* made his award in favour of *A*. *A* made an application under section 525 of the Code of Civil Procedure, 1882, to file the award but it was dismissed. *B* then filed a suit to recover the properties which had formed the subject-matter of the dispute. *A* set up the award in answer to the claim. The Judicial Committee held that the award was a good and valid one and binding upon *B*. Their Lordships observed that, though the application under section 525 was refused, that merely left the award to have its ordinary legal validity, that it could not be successfully contended that an award is not valid because the party in whose favour it was had never applied to have it filed in Court and that the refusal to file the award or of an application made to do so could not have the effect that the award can never be relied upon in any suit relating to the subject-matter dealt with by it. The Indian Arbitration Act does not make such awards invalid. It merely deals, in my view, with a particular class of arbitration; and there are no words to be found in the Act rendering other arbitrations invalid. I am satisfied that the law with regard to arbitrations is the same here as in England and that the Indian Arbitration Act applies by section 4 (b) only to arbitrations where there has been a written submission to arbitration in

(1) (1891) I.L.R. 18 Calo. 414 (P.C.).

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KOTAMMA. the same way as the corresponding section in the English Act, namely, section 27, applies to such arbitrations. Both the Acts leave untouched the right of persons to agree to have the differences between them settled in an informal manner. In my view, the learned City Civil Judge was quite right in holding that the Indian Arbitration Act did not apply to the arbitration in question and that the award of the panchayatdars successfully barred subsequent action being taken. For these reasons, this appeal must be dismissed with costs.

CORNISH J. CORNISH J. —I agree. It was conceded in the lower Court that the respondents' plea that the suit is barred by an award upon the very subject-matter in dispute between the parties would be a good defence, if the award was valid. But the contention is that the award is not valid because the arbitration, being one governed by the Arbitration Act, was not upon a submission in writing as required by the Act. The consequence of the definition of "submission" in section 4 of the Act is that the Act applies only to arbitrations upon written submissions. Where there has been such a submission the award is enforceable in the manner prescribed by section 15. Where the award is made upon an oral submission it is not enforceable in the manner prescribed by the Act. But it does not follow that an award is invalid and unenforceable because it cannot be enforced by the methods laid down in the Act. Paragraph 21 of the second Schedule to the Code of Civil Procedure, equally with section 15 of the Act, requires that the award shall be filed in Court as a condition to enforcement. But their Lordships of the Judicial Committee held in *Muhammad Nawaz Khan v. Alam Khan*(1) that the validity of an award does not depend upon its having been filed in Court. The

(1) (1891) I.L.R. 18 Cal. 414 (P.C.).

Arbitration Act does not say that an award upon an oral submission to arbitration of a matter which might have been the subject-matter of a suit institutable in a Presidency-town shall be invalid and inoperative. Apart from the procedure in the Act and in the second Schedule to the Code of Civil Procedure for enforcing awards, an award is enforceable by suit; and a suit will be the only means of enforcing an award when it cannot be filed in Court and enforced as a decree. This is the remedy available when an award, being upon an oral reference, is one to which the English Arbitration Act does not apply (see Redman on Arbitration, fourth edition, page 312) and there is no reason why the position should not be the same when for a like cause the Indian Arbitration Act is inapplicable to an award. In my judgment, the view held by BEAMAN J. in *Rukhanbai v. Adamji*(1) that an award which is not made upon a written submission in an arbitration to which the Act applies has no legal foundation or consequence, is not warranted by anything contained in the Act. In the absence of any other ground being shown for impugning the validity of the award I think the lower Court rightly held that it barred the appellant's suit.

G.R.

(1) (1908) I.L.R. 33 Bom. 69.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Jackson, Mr. Justice Reilly and
Mr. Justice Anantakrishna Ayyar.*

1932,
March 17.

TRIVIKRAMA KONURAYA (FIRST DEFENDANT),
APPELLANT,

v.

SANKARANARAYANA VAZHUNNAVAR.
AND SIX OTHERS (PLAINTIFF AND DEFENDANTS TWO TO
SIX AND *nil*), RESPONDENTS.*

*Malabar Law—Karnavan—Powers of—Renewal of kanam
before expiry of prior demise in a case not governed by
the Malabar Tenancy Act (XIV of 1930)—Validity of—
Grantor of the prior demise being alive after the expiry
of the previous term—Failure to disavow renewal—
Effect of.*

A, a karnavan of an illam, granted a kanam in favour of B in June 1910 for a period of twelve years on terms and conditions which were neither improper nor beyond his powers. In April 1919 A renewed the kanam in favour of B for a period of twelve years, to begin from the expiry of the previous kanam, on the same terms and conditions except for a very slight increase of rent. A continued as karnavan till November or December 1922 and did not disavow the renewal. In May 1923, A's successor as karnavan granted a melkanam to C, who sued B for redemption and recovery. The subject-matter of the case was not governed by the Malabar Tenancy Act, 1930.

Held, that the kanam of 1919 in favour of B was valid against the melkanam of 1923.

Per REILLY and ANANTAKRISHNA AYYAR JJ.—A kanam for a proper term and on proper conditions granted before the expiry of a current term by a karnavan who remains in office after the expiry of that term without disavowing it is valid, whether the new kanam is granted to a new tenant who is to be put in possession by the karnavan after the expiry of the

* Second Appeal No. 1189 of 1928.

current term, or as a renewal to the sitting tenant, or by a melcharth directing a new tenant to recover possession from him. The grant of illam or tarwad property on kanam is an ordinary incident of the right of management possessed by the karnavan. It is also within his powers to grant a kanam a reasonable time before the expiry of a current term, and what is a reasonable time will vary with the circumstances of each case. If the terms and conditions of a kanam granted by a karnavan are not proper, then the junior members of the illam or tarwad can avoid it. A kanam granted by a karnavan unreasonably long before the expiry of a current term is not void, but voidable. In such a case, if the terms and conditions of the kanam are not improper at the time it takes effect, the junior members of the illam or tarwad cannot avoid it, as it is within the powers of the then karnavan. It is the karnavan of that date alone who has the option of avoiding it. And, if the karnavan who granted the kanam is in office when the previous term expires and does not disavow it, it stands good.

APPEAL against the decree of the Court of the Subordinate Judge of South Kanara in Appeal Suit No. 272 of 1927 (Appeal Suit No. 3 of 1927, District Court, South Kanara) preferred against the decree of the Court of the District Munsif of Kasargod in Original Suit No. 420 of 1925.

O. T. G. Nambiar and A. Achutan Nambiar for appellant.

P. Govinda Menon for respondents.

Cur. adv. vult.

JUDGMENT.

JACKSON J.—I have had the advantage of reading the judgments which are about to be delivered and will confine myself to saying that on the facts of the present case I think that the karnavan may be presumed to have ratified the kanam which he prematurely granted.

Inasmuch as the defendant never clearly raised the point on which he has succeeded till second appeal,

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we think that the parties must bear their own costs throughout.

ANANTAKRISHNA AYYAR J.—The suit properties belong in jenm to the Thazhakkat Mana of which the sixth defendant is the karnavan. The then karnavan of the mana demised the suit properties on kanam to the first defendant's karnavan (Raman) under Exhibit II, dated 6th June 1910 (it was a renewal of a prior kanam). The same karnavan executed in favour of the said Raman Exhibit III on 20th April 1919 by which Raman was authorised to hold the properties for a period of twelve years from 6th June 1922, the date on which the period of twelve years under Exhibit II would expire. The karnavan who executed Exhibit III died in Vrichikam 1098 (November-December 1922). The sixth defendant who then became the karnavan of the mana granted the melkanam deed, Exhibit A, to the plaintiff on 28th May 1923. The plaintiff instituted the original suit in 1925 for redemption of the demise of 1910 (Exhibit II). Defendants two to five were tenants in possession under the first defendant, and neither they nor the sixth defendant, the karnavan of the janmi's mana, contested the suit. The plea of the contesting first defendant was that the renewal evidenced by Exhibit III was valid and binding on the sixth defendant and on the plaintiff. Both the lower Courts held against that contention of the first defendant and granted a decree for redemption in favour of the plaintiff. The first defendant has preferred this second appeal.

This second appeal was referred to this Bench owing to the conflict of decisions in Second Appeal No. 774 of 1917 and *Kunhammad v. Kunhunni*(1).

(1) (1920) I.L.R. 43 Mad. 715.

It may be mentioned at the outset that the demise under Exhibit III is not of a right to hold the properties for a period of twelve years from its date. It is not a case where a kanamdar surrenders the unexpired portion of the term under the prior kanam under which he is holding and the janmi accepting the same grants a kanam to have operation for a period of twelve years from that date (date of renewal) in which case different considerations would apply. A perusal of Exhibit III makes it clear that the grantee under it (Raman) did not give up any portion of the term under Exhibit II, but the grantee is to have the full period of twelve years under Exhibit II which would expire on 6th June 1922, and also twelve years under Exhibit III from 6th June 1922 to 6th June 1934.

The plaintiff's contention is that Exhibit III, which was executed three years and one and a half months before the expiry of the period of the prior kanam under Exhibit II, is invalid, whereas the first defendant's plea before us is that, as the karnavan who granted Exhibit III was alive on 6th June 1922 (the date when the term under Exhibit II expired) but died only about five months later, Exhibit III is binding on the sixth defendant, the next karnavan.

The learned Subordinate Judge disposed of the question as follows :—

"It is clear law that Exhibit III which was a renewal granted more than three years before the expiry of the prior demise is invalid unless the first defendant is able to prove that this renewal was absolutely necessary for the family purposes of the Tazhakkat Mana. . . . The first defendant and his witnesses have not been able to make a convincing case that there was any necessity for the illam to grant this melkanam before time. I agree with the lower Court that the necessity for the grant of this melkanam has not been proved, and that the renewal by Exhibit III is therefore invalid."

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It was argued before us that in Second Appeal No. 774 of 1917 a Bench of this Court consisting of PHILLIPS and KRISHNAN JJ. held as follows:—

“The grant of the melcharth four years too soon might well be a ground for declaring it not to be binding on the grantor's successor, if the grantor died before the period of the prior kanam had expired as held in *Cheria Chirikandan v. Krishnan Nambiar*(1), but in this case the grantor died after the prior kanam had expired and was thus in a position to grant the melcharth, provided that the grant was not of such a nature as to improperly prejudice the successor. We cannot therefore hold that the plaint melcharth is invalid as improperly prejudicing the successor.”

On the other hand, we were referred to *Moidin Kutti v. Kunhi Koyan*(2), where the learned Judges, AYLING and HANNAY JJ., held:

“This transaction is not binding on the successor of the karnavan who executed it whether the latter did or did not survive the expiry of the prior kanam.”

The finding as regards the melcharth in question in that case was this:

“The karnavans and managers of Malabar tarwads have no power to grant melcharth in respect of tarwad properties except for pressing family necessities, and there was no tarwad necessity for the execution of melcharth, Exhibit B, which was intended by the third defendant's mother simply to accommodate her insolvent son.”

The headnote of the report seems to be too wide when it states that

“in the absence of necessity, a melcharth given before the expiry of the prior lease will not bind the succeeding karnavan whether the grantor was or was not alive at the time the prior lease expired.”

In *Kunhammad v. Kunhunni*(3) SADASIVA AYYAR J. observed:

“A karnavan's ordinary legal right is that of management over the tarwad affairs and properties, and, in my

(1) (1912) 27 M.L.J. 690.

(2) (1914) 27 M.L.J. 691, 692.

(3) (1920) I.L.R. 43 Mad. 715.

opinion, it is difficult to hold that four years before a lease expired it is the proper thing or an ordinary incident of management to grant a second lease to begin on the expiry of the former lease. That was the principle on which *Cheria Chirikandan v. Krishnan Nambiar*(1) was based. It is only where prior necessity or justification can be urged to invoke what can be called the extraordinary powers of dealing with the property (which is being held by tenants under a lease which has not expired) that such an action can be held valid against the tarwad. It is also significant that this contention that necessity need not be shown where the karnavan continues in power at the expiry of the first lease seems not to have been argued before the lower appellate Court but was raised for the first time in the second appeal memorandum.”

The learned Judge expressed dissent from the decision in Second Appeal No. 774 of 1917. In the same case SPENCER J. remarked:

“In the present case where no explanation has been offered for anticipating the time of renewal of the lease by four years, it is difficult to see how the fifth defendant's conduct can be justified.”

See *Kunhammad v. Kunhunni*(2). It may be remarked that in the case in *Kunhammad v. Kunhunni*(2) the property had been leased to the defendant in 1891, that the twelve years term would expire in 1903, that in 1899 the karnavan granted a fresh lease in favour of the old tenant, and that in 1903 there was a kanam granted by the same karnavan in favour of the assignees of the old tenant and also a porankadam in 1905. The plaintiff succeeded the previous karnavan in 1907, and the suit was filed in 1911 on the basis of the lease granted in 1891. It would seem that the karnavan who granted the lease in 1899 himself did not stand by the same when the term of the prior lease expired in 1903, for we find that the same karnavan granted a kanam in 1903 to the

(1) (1912) 27 M.L.J. 690.

(2) (1920) I.L.R. 43 Mad. 715, 719.

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representatives in interests of the old tenants who accepted the kanam.

However, there are the observations of the learned Judge, SADASIVA AYYAR J., quoted above, in which the learned Judge dissented from the decision of the learned Judges in Second Appeal No. 774 of 1917. SADASIVA AYYAR J. purported to follow the decision in *Cheria Chirikandan v. Krishnan Nambiar*(1), a decision of SUNDARA AYYAR and SADASIVA AYYAR JJ., where it is observed :

“ Here, the karnavan, two years in advance of the expiration of the prior lease, executed a melcharth in plaintiff's favour. No justification has been pleaded for such an act. It is not alleged that there was any necessity for doing so, or that the tarwad derived any benefit from the transaction.”

On a reference to the printed papers in that case, *Cheria Chirikandan v. Krishnan Nambiar*(1), it appears that the karnavan who granted the melcharth died after the melcharth and before the expiry of the term of the prior demise. The observations made by the learned Judges should be taken in conjunction with that circumstance. It may also be stated that in Second Appeal No. 837 of 1914 WALLIS C.J. and AYLING J. observed as follows:—

“ We do not think that the learned Judges who decided *Cheria Chirikandan v. Krishnan Nambiar*(1) intended to lay down that a subsequent karnavan could not accept and act on a melcharth granted by his predecessor before the end of the existing term. All that was laid down, as we understand, was that such an attempt to fetter the discretion of the subsequent karnavan was not binding on him. In the present case we think that the next karnavan affirmed the transaction by the acceptance of an enhanced rent after succeeding to the office.”

It may be taken for granted that generally it is within the ordinary powers of the karnavan of a Malabar tarwad to demise properties on kanam, and also to grant

renewals of such properties to enure for a period of twelve years from the date of renewal. This right on the part of the karnavan is attributed to the power of management of the tarwad properties which in law is vested in him. A term of twelve years has been held to be proper in such cases having regard to the conditions and customs of Malabar. Any demise by which a term for a longer period than twelve years is granted would *prima facie* not be considered as coming within the karnavan's ordinary powers ; nor would the raising of a ludicrously large amount, though nominally charged as “ kanam ” on the properties, be held to be binding on the tarwad, if the amount was raised in reality as a debt, so as merely to have cash at the disposal of the karnavan, rather than as a kanam as ordinarily understood, since he could not bind the tarwad by raising new mortgage-debts by simply calling them “ kanam ”, in the absence of other justifying circumstances. The right of a karnavan to grant kanam demises would also be limited to particular kinds of tarwad properties which he has to manage, and would not ordinarily extend to his granting on kanam, for example, the tarwad house in which the members are living, and such a kanam demise would not be held binding on the tarwad simply because it is only a demise for a term of twelve years. Even with reference to properties under his management, there may be particular circumstances which may disentitle the karnavan to grant kanam demises in respect of particular properties. Speaking generally it may be said that the grant of tarwad properties on kanam is an ordinary incident appertaining to the right of management possessed by the karnavan. A karnavan, therefore, having the right to manage the tarwad affairs (and having the corresponding obligation to manage the tarwad properties), is entitled in his

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discretion to decide which properties to demise on kanam and which demises to renew, other terms and conditions relating to renewal fee, fixing of porappad, etc., not being objectionable. The karnavan is *prima facie* the best person to decide when to grant a kanam and when to grant a renewal. To say that a karnavan could settle the matter and execute the deeds only after the expiry of the term of the prior demise is to say that he should be deprived of reasonable forethought, circumspection and previous consideration of the question. It may not, in many cases, be possible to find a new tenant at the spur of the moment. One should not forget that in Malabar a kanamdar would be entitled to compensation for improvements effected by him, and he could not be redeemed or ejected before the amount of such compensation is paid to him. The tarwad may not have funds for the purpose, and the new kanamdar (melcharthdar) or lessee, should be one not only able to properly cultivate the land but also able to pay off the kanam and value of improvements due to the old kanamdar or lessee, as the case may be. If an owner is entitled to make proper arrangements reasonably in advance with reference to management of his property, *prima facie*, the karnavan who represents the owner should have the same rights. To say that the karnavan could grant a melcharth or renewal one week before the expiry of the prior demise but could never do the same one year before is to lay down a rigid artificial rule on a matter the solution of which will largely depend upon circumstances. It would therefore seem that to make the validity of the renewal or melcharth depend solely on the point of time that intervened between the same and the expiry of the period of the prior demise is attacking the problem from a wrong end.

"The karnavan is not a mere trustee of the tarwad"—*Vasudevan v. Sankaran*(1).

"A karnavan is not a trustee"—*Kenath Puthen Vittel Tavazhi v. Narayanan*(2).

"The powers of the karnavan are essentially powers of management"—*Raman Menon v. Raman Menon*(3).

"The members of a tarwad have the right to prevent the karnavan from wasting or improperly alienating the tarwad property"—*Vasudevan v. Sankaran*(1) and *Manavadan v. Sredevi*(4).

"An alienation made by a Hindu widow under circumstances which would not bind the reversioner is not void; it is only voidable at the instance of the reversioner"—*Modhu Sudan Singh v. Rooke*(5) and *Bijoy Gopal Mukerji v. Krishna Mahishi Debi*(6).

"An alienation made by a karnavan in similar circumstances would also be only voidable and not void"—*Abdulla Koya v. Eacharan Nair*(7) and *Pilakatan Chettiotan v. Vazhakarambath Moidin*(8).

The distinction is important, since a void transaction could not be ratified by the persons affected, whereas a voidable transaction could be so ratified by the persons prejudicially affected by the same.

Melcharth or renewal in advance and by way of anticipation would be open to objection by the other members of the tarwad if it is proved that, having regard to the circumstances, the particular transactions were prejudicial to the interests of the tarwad and that the karnavan was sacrificing or really prejudicing the interests of the tarwad in those cases by the sole desire

(1) (1897) I.L.R. 20 Mad. 129, 133, 141 (F.B.).

(2) (1904) I.L.R. 28 Mad. 182, 195 (F.B.).

(3) (1900) I.L.R. 24 Mad. 73, 80 (P.C.).

(4) (1928) I.L.R. 50 Mad. 431, 437. (5) (1897) I.L.R. 25 Cal. 1 (P.C.).

(6) (1907) I.L.R. 34 Cal. 329 (P.C.). (7) (1917) 35 M.L.J. 405.

(8) (1916) 34 I.C. 755.

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to raise money for misappropriation or with ulterior motives. Just as the other terms of a demise (whether melcharth or renewal) could be proved to be seriously prejudicial to the interests of the tarwad having regard to the circumstances, the entering into such a transaction prematurely may also be complained of by the other members of the tarwad. As observed by PHILLIPS and DEVADOSS JJ.,

"it is undoubtedly important to bear in mind the impossibility to predict some years in advance what the state of affairs will be when the original kanam expires and what incidents should be imposed in order to make the demise beneficial to the tarwad."

See *Koppassa Menon v. Kalliani Ammal*(1). Nor should the consideration be ignored that

"if a karnavan grants a melcharth or renewal before the expiry of the term of the kanam, he is practically fettering the discretion of the person who may hold the office at the time of the expiry of the kanam."—

Vatavatta Nair v. Kenath Puthen Vittil Kuppassan Menon(2) (ABDUR RAHIM and SESHAGIRI AYYAR JJ.). But none of these considerations would, in my opinion, be conclusive by themselves to justify such melcharth and renewal documents being set aside, irrespective of all other considerations. An alienation by a karnavan could be questioned by the other members of the tarwad where the same is not for necessary or justifiable purposes. A lease is an alienation; but, when granted in the ordinary course of management, it would be binding on the tarwad unless it be shown that in any particular case, having regard to its terms, etc., the same is not binding on the tarwad. A melcharth or renewal before the expiry of the term of the prior demise could of course be shown to be not binding upon

the tarwad in particular cases. The terms thereof may be prejudicial to the interests of the tarwad, the karnavan of the tarwad might have granted the demise at a time when his private personal interests were the only motive for granting the same—the tarwad interests, pointing in the other direction, being sacrificed—and the demisee also being a party to the same. But when no other objection is taken to such a demise except that it was granted some time prior to the expiry of the term of the prior demise, without showing anything else to the prejudice of the tarwad, I am unable to see how that one circumstance should be taken to be conclusive against the validity of the demise, when the karnavan who granted the same was alive and in management when the term of the prior demise expired and was quite satisfied with the same.

It may be stated for what it is worth that the porappad in the renewal—Exhibit III—in question in the present case is five seers of paddy more than that stipulated in Exhibit II; but that by the way is only a nominal addition to the porappad and is not very material otherwise and should not be taken in any way to conclude the matter, since it is well known that such nominal additions to the porappad are made with a view to give the demise *prima facie* an apparent basis and justification to make it binding on the tarwad.

It could not be, and in fact was not, disputed that it would be a very proper thing for a karnavan to make arrangements reasonably in advance with reference to the letting of property—say a week—before the actual expiry of the term of an outstanding lease; such arrangement, if otherwise proper, could not be characterised as improper simply because the karnavan who made the same happened to be dead by the time the term of the prior lease expired. In such a case, it

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(1) (1923) 45 M.L.J. 258, 261.

(2) (1918) 36 M.L.J. 630, 633.

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could not be held that the circumstance that the karnavan did not survive the date of expiry of the prior lease would, *ipso facto*, invalidate the melcharth granted by him. The melcharth is binding on the karnavan who granted the same unless it has been disaffirmed by him on behalf of the tarwad (assuming that he could do so); the circumstance that the karnavan survived the date of the expiry of the prior lease without disaffirming the same is very important in the consideration of the question.

As the transaction entered into by him is *prima facie* binding upon him, the argument that, after the expiry of the term of the prior lease, he (the executant) should indicate, by some formal act of his, that he proposes to stand by the same, is too technical, even if there is any force in it. When the question of its binding nature is raised subsequent to the executant's death by the succeeding karnavan, the circumstance that the executant-karnavan was alive when the term of the prior demise expired and could have on that date executed a document in similar terms, against which nothing could be urged, is a very material point for consideration, in the absence of other circumstances. Ordinarily a document being binding on the executant thereof, no further act of his would be necessary to affirm it; it is only when he wishes to disaffirm it (in cases where he could do so) that he should indicate, by an overt act, his disavowal. Further, any slight act of his which is inconsistent with his disavowal of the document would be taken as affirmation of the document by him, even in cases where such subsequent affirmation is necessary.

A deed of further assurance could be directed to be executed in proper cases, when the same is deemed necessary and proper to complete and give full effect to

the original agreement and intention of the parties to a transaction.

Even if the melcharth or renewal in such cases be treated only as an agreement to grant a proper demise or renewal, then, if the karnavan who executed the same and entered into the said agreement be alive at the date of expiry of the term of the prior demise, the question whether a suit for specific performance of such an agreement would be successful in any particular case will have a relevancy in cases like the one before us. In cases where the specific performance of the agreement would be decreed by the Courts, having regard to the terms and conditions of the melcharth or renewal, then, there is no sufficient reason, in my opinion, why the already existing instrument (melcharth or renewal)—duly executed and registered—should not be taken to be sufficient for the purpose intended. In the case before us, as already mentioned, the renewal in question is not alleged to be open to any other objection, and my remarks are intended to cover only such cases.

I do not however propose to base my judgment on the above line of reasoning in the present case, as here the karnavan was alive at the time of expiry of the prior term and all persons interested were quite satisfied with the arrangement already made.

I am not suggesting that the executant-karnavan could never himself disaffirm such a melcharth after the date of the expiry of the term of the prior lease—I assume that he could do so on proper grounds.

In the case before us, the finding of the lower appellate Court—in the passage extracted already—is that “this renewal was not absolutely necessary for the purpose of the mana, and the necessity for the grant of this melkanam has not been proved and that the

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renewal of Exhibit III is therefore invalid and is unsustainable". The terms and conditions of the renewal, Exhibit III, have not been called in question as in any way prejudicial to the mana, nor has it been suggested on behalf of the mana that the previous karnavan should have redeemed the kanam and reduced the properties to actual possession for direct cultivation by the mana. The finding is based on the sole circumstance that the renewal was granted before the expiry of the term of the prior demise. No other circumstances have been proved, nor has any evidence been adduced that the tarwad in fact was prejudiced by this anticipatory renewal. Any such suggestion is *prima facie* rebutted by the circumstance that the same karnavan was alive for about five months after the expiry of the term of the prior lease.

It is on the observations made by the learned Judges in *Cheria Chirikandan v. Krishnan Nambiar*(1) that reliance was placed in the subsequent case, *Kunhammad v. Kunhunni*(2). A reference to the printed papers in the case, *Cheria Chirikandan v. Krishnan Nambiar*(1), has disclosed the fact that the karnavan who executed the document in question had died prior to the expiry of the term of the prior demise. Therefore the decision, *Cheria Chirikandan v. Krishnan Nambiar*(1), does not really apply to the case before us. The headnote of the case, *Moidin Kutti v. Kunhi Koyan*(3), goes, in my opinion, further than the actual decision, having regard to the findings arrived at by the lower Court in that case and the observations in the judgment of the High Court. In *Kunhammad v. Kunhunni*(2) the karnavan who granted the premature renewal of the lease himself granted a kanam to the

(1) (1912) 27 M.L.J. 690.

(2) (1920) I.L.R. 43 Mad. 715.

(3) (1914) 27 M.L.J. 691.

same lessees in the very year in which the term of the prior demise expired and the lessee accepted the same—all this would *prima facie* be inconsistent with the renewed lease being taken to be valid and in force though on the merits the kanam was found by the Court to be not binding on the tarwad. There are no doubt the observations of the learned Judge, SADASIVA AYYAR J., in the case of *Kunhammad v. Kunhunni*(1), which support the respondents' contention. On the other hand, we have got the decision of PHILLIPS and KRISHNAN JJ. in Second Appeal No. 774 of 1917 which supports the appellant's contention.

As already mentioned, such melcharths and renewals are not void but only voidable at the instance of the tarwad; see *Abdulla Koya v. Eacharan Nair*(2) and *Pilakkatan Chettiotan v. Vazhakurambath Moidin*(3). OLDFIELD and PHILLIPS JJ., in *Abdulla Koya v. Eacharan Nair*(2), made the following observations with reference to the cases, *Cheria Chirikandan v. Krishnan Nambiar*(4), *Raman Nambiar v. Raman Nambiar*(5) and *Moidin Kutti v. Kunhi Koyan*(6):

"These cases are however only authority for holding that a melcharth granted by a karnavan before the expiry of the previous term will not bind his successor and not that such melcharths are necessarily invalid *ab initio*."

It was stated that it has been ascertained by a reference to the printed papers that the karnavans who granted the melcharth or renewal were not alive when the terms of the prior demises expired in the cases of *Cheria Chirikandan v. Krishnan Nambiar*(4) and *Raman Nambiar v. Raman Nambiar*(5). That was evidently so also in Second Appeal No. 877 of 1911, where

(1) (1920) I.L.R. 43 Mad. 715.

(3) (1918) 34 I.C. 755.

(6) (1914) 27 M.L.J. 175.

(2) (1917) 35 M.L.J. 405.

(4) (1912) 27 M.L.J. 690.

(5) (1914) 27 M.L.J. 691.

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SUNDARA AYYAR and SADASIYA AYYAR JJ. followed their decision in *Cheria Chirikandan v. Krishnan Nambiar*(1).

I should note that AYLING J. was a party to the decision in Second Appeal No. 837 of 1914, where the Court (WALLIS C.J. and AYLING J.) observed that

“all that was laid down in *Cheria Chirikandan v. Krishnan Nambiar*(1), as we understand, was that such an attempt to fetter the discretion of the subsequent karnavan was not binding on him.”

This was the view taken of the decisions in *Cheria Chirikandan v. Krishnan Nambiar*(1) and *Moidin Kutti v. Kunhi Koyan*(2) by OLDFIELD and PHILLIPS JJ. In *Abdulla Koya v. Eacharan Nair*(3) the learned Judges observed that

“these cases are, however, only authority for holding that a melcharth granted by a karnavan before the expiry of the previous term will not bind his successor.”

The lower appellate Court in the present case has, in my opinion, misdirected itself on the law governing the consideration of the question involved in the case.

For the reasons already mentioned, I am of opinion that the finding of the learned Subordinate Judge in the present case cannot be accepted.

It may be remarked that, having regard to the provisions of the Malabar Tenancy Act (XIV of 1930), the main incident attached to a melcharth that the melcharthdar could obtain possession from the prior demisee has been taken away by the Legislature, which has also granted fixity of tenure and right of renewal to tenants in possession, under circumstances detailed in the Act. Though a melcharth would still give a melcharthdar some other rights vested in the jenmi, the unrestricted right to obtain possession from the old tenant has been taken away from the melcharthdar since

(1) (1912) 27 M.L.J. 680.

(2) (1914) 27 M.L.J. 691.

(3) (1917) 35 M.L.J. 405.

the tenant has been given right to obtain renewal, etc., by the provisions of the Act. The question that has been discussed in this case is therefore not of very much practical importance in cases governed by the Malabar Tenancy Act.

The result therefore is that the second appeal is allowed and the suit dismissed, but without costs in the circumstances.

REILLY J.—I agree that this appeal must be allowed. This case relates to a renewed kanam of 1919 and a melkanam of 1923 granted by successive karnavans of a Nambudri illam in the south part of South Kanara. It is not disputed that the law to be applied, so far as it varies from the general law of the Presidency, is the law which was applicable in such matters to karnavans of illams and tarwads in Malabar before the Malabar Tenancy Act, 1930, came into force and which, so far as illams are concerned, is still applicable in South Kanara. For the purpose of this case it will be convenient to speak of that law as Malabar Law, putting the effect of the Malabar Tenancy Act upon it out of consideration.

In June 1910 Nilakandhan Tirumumpu, karnavan of an illam, by Exhibit II renewed in favour of first defendant an expired kanam on conditions which it has not been suggested were in any way improper or beyond his powers. The term of that kanam would expire in June 1922; but in April 1919 he granted by Exhibit III another renewal on the same conditions except a very slight increase of rent. Nilakandhan Tirumumpu lived and continued to be karnavan of his illam until November or December 1922; that is for five or six months after the expiry of the term of Exhibit II, the kanam deed of 1910. In May 1923 his successor as karnavan, Narayana Tirumumpu, sixth defendant,

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granted to the plaintiff by Exhibit A a melkanam, on which the plaintiff has sued for redemption and recovery from first defendant. The question now for decision is whether Exhibit III prevails over Exhibit A. Both the Subordinate Judge and the District Munsif have found Exhibit III "invalid" because, though its term and conditions are otherwise proper and such as a karnavan might fix within the scope of his powers, it was granted by Nilakandhan Tirumumpu long before the term of Exhibit II had expired, both treating as of no relevancy or effect the facts that he lived and remained karnavan for several months after the term of Exhibit II and during those months might have granted to first defendant a valid renewal on the same conditions as in Exhibit III and that renewal no one could have disputed. The question raised is whether a kanam for a proper term and on proper conditions granted long before the expiry of a current term by a karnavan who remains in office after expiry of that term is of no effect. A similar question may be asked in respect of a lease, and the answer to the two questions will depend on the same considerations, and those considerations will apply whether the kanam or lease is granted to a new tenant, who is to be put in possession by the karnavan after the expiry of the current term, or as a renewal to the sitting tenant or by a melcharth directing a new tenant to recover from him.

As has been pointed out, there has been some conflict and confusion in the decisions, reported and unreported, on this question. If I may say so with great respect, the confusion appears to me to have been due to an occasional tendency to forget that, although the law of Malabar and South Kanara varies from the law in force in the rest of this Presidency in many important respects, outside the field of those

variations the general principles of law applicable elsewhere apply also in Malabar and South Kanara. If we remember that, I think the answer to the question before us will be simple and obvious.

A janmi, who is the absolute owner of land and in law has no one but himself to consider in dealing with it, can validly grant a lease of it or a kanam over it for any term and on any conditions he likes and can do so at any period before the expiry of a current term. But the karnavan of a janmi illam or tarwad has limited powers. When land of his illam or tarwad is vacant or the term of a lease or kanam has expired, he can within the scope of his ordinary powers grant a lease or kanam for not more than the customary term and on conditions which are reasonable in the interests of his illam or tarwad; and such a lease or kanam no member of his illam or tarwad can dispute. But, if in such circumstances without tarwad necessity or benefit he grants a lease or kanam in excess of those powers, his act will not bind the members of his illam or tarwad against their will: they can avoid it. That however does not mean that it is void from its inception. Like an alienation made by the manager of an ordinary Hindu joint family or by a Hindu father or by a guardian or by a limited owner in excess of his powers it is voidable at the option of the persons whose rights are infringed. But, as in those cases, if the members whose rights have been infringed by the karnavan exceeding his powers do not wish to exercise their option to avoid his act, then what he has done as karnavan in their names and as their representative stands good.

Now let us suppose that the lease or kanam granted is for not more than the customary term and its conditions are proper in the interests of the illam or tarwad

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but it is granted before the expiry of a current term. Sometimes it is suggested that to grant a lease or kanam a day or a week or a month before the expiry of a current term is beyond the karnavan's powers. That, as my brother ANANTAKRISHNA AYYAR has indicated, is absurd. A prudent karnavan, who wishes to do his duty in protecting the interests of his illam or tarwad, like any other businesslike landlord must look reasonably far ahead in such matters, and it may often be proper for him to grant a renewal or a melcharth or a lease or kanam to a new tenant a reasonable time before the expiry of a current term. If he waited until that term had actually expired, opportunity might have slipped by to the serious detriment of his illam or tarwad. To lay down that in such a matter a karnavan would exceed his powers, if he did what reasonable and prudent landlords do every day and what a manager of a joint family or a trustee or a guardian would be rightly blamed for failing to do, would be wholly unreasonable. If it is urged that the words of some decisions go so far as that, we may be sure that the learned Judges did not intend their words to be interpreted literally in that way. If it is within the powers of a karnavan to grant a lease or kanam for a proper term and on proper conditions after the expiry of a previous term, it must also be within his power to grant a similar lease or kanam a reasonable time before the expiry of a current term; and the length of time which is reasonable will vary with the circumstances of the case.

But is it within his power to grant such a lease or kanam unreasonably long before the expiry of a current term, earlier than a reasonable man who has others to consider besides himself would tie his hands? It has been decided in *Cheria Chirikandan v. Krishnan*

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Nambiar(1) and other cases that in the absence of necessity or benefit that is beyond his powers. The reason given in *Cheria Chirikandan v. Krishnan Nambiar*(1) is that he cannot be allowed in that way to fetter the discretion of the karnavan who may be in office when the current term expires. But that is only one aspect of the matter. A karnavan cannot, any more than another man, see far into the future and so cannot tell long beforehand what will be the proper conditions in the interests of his illam or tarwad for a lease or kanam to take effect on the expiry of a current term. But, if a karnavan goes beyond his powers and without necessity or benefit grants a new lease or kanam, by renewal, melcharth or otherwise, long before the expiry of a current term, as in other cases in which professing to act on behalf of his illam or tarwad he makes a grant in excess of his powers, his act is not void but voidable. At whose option is it voidable? We have supposed that the lease or kanam, though granted prematurely and so beyond the powers of the grantor, is for a proper term and on conditions which, as events turn out, are proper at the expiry of the current term. Obviously the junior members of the illam or tarwad cannot avoid such a lease or kanam, as it is within the powers of their karnavan at the time it takes effect. It is the karnavan alone who has the option of avoiding it. If the karnavan who granted the lease or kanam prematurely is dead or no longer in office when the previous term expires, then it is his successor in office at that time who has the option of avoiding it. But, if the karnavan who granted the lease or kanam prematurely is still in office when the previous term expires, no one but he has the option to

(1) (1912) 27 M.L.J. 690.

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avoid his grant. If he chooses himself to disavow it, he will lay himself open to a suit by his lessee or kanamdar, with what possible result it is unnecessary now to consider. But, if he does not disavow it, his voidable grant, which no one else can avoid, stands good.

If we apply this simple and obvious result to the present case, it is clear that first defendant must succeed. Nilakandhan Tirumumpu as karnavan granted to him a premature and voidable renewal in 1919. When the previous term expired and the voidable renewal was to take effect in 1922, as it is not suggested that its conditions were at that date in any way improper or unsuitable, Nilakandhan Tirumumpu, who was still in office as karnavan, was the only person who could avoid it. He did not do so; and therefore it stands good, and the plaintiff's suit must fail.

I agree that in the circumstances each party should bear his own costs throughout.

G.B.

APPELLATE CIVIL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

CHINNASWAMI PADAYACHI (DEFENDANT), APPELLANT,

v.

DARMALINGA PADAYACHI (PLAINTIFF), RESPONDENT.*

1932,
March 21.

Mortgage—Prior and subsequent mortgages, both being simple mortgages—Suits on foot of, neither mortgagee impleading the other in his suit—Sales in execution of decrees in, and purchases thereof by respective mortgagees themselves—Possession of property purchased—Rights of respective mortgagee-purchasers to—Earlier purchase in prior mortgagee's later suit—Subsequent mortgagee not impleaded in prior mortgagee's suit which has resulted in sale of property—Suit for sale subject to prior mortgage by—Maintainability—Lis pendens in mortgage suits—Rule as to.

The defendant was a prior simple mortgagee of properties X and Y and the plaintiff a subsequent simple mortgagee of properties X and Z. The plaintiff sued on foot of his mortgage, without impleading the defendant, obtained a decree and in execution thereof sold property Z and realised a part of his debt. Then the defendant sued on foot of his mortgage, without impleading the plaintiff, obtained a decree and in execution thereof purchased properties X and Y and obtained possession of the same. Thereupon the plaintiff brought property X to sale in execution of his decree and purchased it himself. In a suit brought by him against the defendant for unconditional possession of property X,

held that he was not entitled to such possession and that his suit was liable to be dismissed.

The principle that of two purchasers in successive mortgage suits, both mortgages being simple, the earlier purchaser is the one entitled to possession was not only not disapproved but expressly approved by the Full Bench in *Mulla Pittil Seethi v. Achuthan Nair*, (1911) 21 M.L.J. 213 (F.B.).

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The opinion to the contrary expressed in *Chinnu Pillai v. Venkatasamy Chettiar*, (1915) I.L.R. 40 Mad. 77, dissented from.

Sukhi v. Ghulam Safdar Khan, (1921) I.L.R. 43 All. 469 (P.C.), is authority for the position that a first mortgagee-purchaser in the position of the defendant is entitled to retain his possession till he is paid off the amount of his mortgage and is not liable, according to the observations in *Chinnu Pillai v. Venkatasamy Chettiar*, (1915) I.L.R. 40 Mad. 77, to be turned out of possession on the ground that the suit on the first mortgage was improperly constituted and to be relegated to a fresh suit.

Venkataramana Reddi v. Rangiah Chetti, (1921) 41 M.L.J. 399, referred to.

Quære as to whether and in what circumstances a puisne mortgagee, who has not been impleaded in a prior mortgagee's suit which has resulted in the sale of the property, may maintain a suit for sale subject to the prior mortgage.

Difference of opinion, as to the effect on the point of the Full Bench decision in *Mulla Vittil Seethi v. Achuthan Nair*, (1911) 21 M.L.J. 213 (F.B.), between *Venkatagiri v. Saunugopachariar*, (1911) 22 M.L.J. 129, and *Chinnu Pillai v. Venkatasamy Chettiar*, (1915) I.L.R. 40 Mad. 77, pointed out.

The rule of *lis pendens* applies only to transfers by the plaintiff or the defendant of their respective interests after the suit including transfers by Court sale in money decrees against either party. It does not apply to previously existing transfers (including mortgages) or legal proceedings to enforce such transfers by those entitled. On principle the sale in pursuance of a mortgage decree, the mortgage having been executed before the institution of the suit, is not affected by the doctrine of *lis pendens*.

Opinion of MUKERJI J. in *Ram Sanahi Lal v. Janki Prasad*, (1931) I.L.R. 53 All. 1023, 1064 to 1070 (F.B.), on the subject of *lis pendens* in mortgage suits approved.

APPEAL against the decree of the Court of the Subordinate Judge of Cuddalore in Appeal Suit No. 195 of 1926 (Appeal Suit No. 307 of 1925, District Court of South Arcot), preferred against the decree of the Court

of the District Munsif of Cuddalore in Original Suit No. 527 of 1924.

N. S. Srinivasa Ayyar for appellant.

M. S. Vaidianatha Ayyar for respondent.

Cur. adv. vult.

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JUDGMENT.

KRISHNAN PANDALAI J.—The defendant appeals from a decree awarding the plaintiff possession of 1 acre and 32 cents of land comprised in A schedule with mesne profits. The dispute is between rival purchasers of the same property in mortgage suits brought by the first and second (simple) mortgagees, without impleading each other. The following are the material facts. Chakrapani, the owner of properties in A and B schedules, mortgaged them to the defendant on 21st July 1905. On 4th November 1905 he mortgaged A schedule properties together with 19 cents of other land to one Ponnusami. The second mortgagee's heirs sued the mortgagor in Original Suit No. 601 of 1914. By Order XXXIV, rule 1, they were not required to join the first mortgagee in their suit and he was not joined accordingly, though they must have known that there was a first mortgage on the A-schedule property as it was registered. The 19 cents of land which was not included in the first mortgage was sold first and a part of the debt was realized. The decree-holders seem not to have taken any further steps to execute the decree for a considerable time against the A schedule property owing probably to the fact it was subject to a prior mortgage. In this state of affairs the defendant brought his suit on the first mortgage, Original Suit No. 274 of 1917, without impleading the second mortgagee and obtained a decree and in execution bought the properties in A and B schedules himself on 21st October 1918

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and obtained possession in January 1919. The plaintiff obtained a transfer of the decree in Original Suit No. 601 of 1914 from Ponnusami's heirs and brought the A schedule property again to sale and purchased it himself in January 1924. As he could not get possession he brought this suit in 1924. Thus the A schedule property is the only property common to both mortgages and in respect of it the plaintiff is a second mortgagee-purchaser who purchased in a suit first instituted, the purchase being later than that of the defendant; and the defendant is a first mortgagee-purchaser who purchased in a later instituted suit, the purchase being earlier than that of the plaintiff.

The plaintiff prayed for unconditional possession of the A schedule property or in the alternative for permission to redeem the A and B schedule properties on payment of the first mortgage debt. The defendant offered to redeem the plaintiff's second mortgage and, if the Court should hold that the plaintiff is entitled to retain the property on redeeming the first mortgage, he claimed the value of improvements effected on the A schedule property. As both parties wanted to keep their purchase and for that purpose were willing to redeem each other, the real question was which of them had the better title to the land and on what terms, if any, he should redeem the other. The second issue sufficiently covered this point and the third issue raised the question of defendant's improvements.

At the trial the plaintiff, no doubt on advice, gave up the prayer for alternative relief, i.e., possession on condition of redeeming the defendant's first mortgage debt and, as the Munsif says, elected to proceed to trial on the footing that he is entitled to unconditional possession of the property. The second issue which

raised the question whether the plaintiff or the defendant was entitled to redeem the other and keep the property was thus dropped and with it the third issue was also dropped. The only issue left was whether the plaintiff was entitled to unconditional possession.

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Both the lower Courts have answered this question in the affirmative on the authority mainly of *Chinnu Pillai v. Venkatasamy Chettiar*(1). The Munsif held that the plaintiff has *for the present* become entitled to the property in A schedule *subject of course* to the mortgage in favour of the defendant, if any. The meaning and effect of this is that the defendant is not entitled to use his mortgage as a shield to protect his possession and that, though the plaintiff as second mortgagee has only rights to the property subject to the first mortgage, the latter must enforce such rights as he may still have by another suit and in the meanwhile give up possession. The learned Subordinate Judge, relying on certain passages in *Chinnu Pillai v. Venkatasamy Chettiar*(1), took the same view. He concluded that the only right which the defendant as first mortgagee has now got is to again sue on his mortgage impleading the plaintiff and that he is not entitled to keep possession as against him. As any further suit on the first mortgage of 1905 would be time barred after twelve years thereafter, the result of the above decision is that the first mortgagee is totally deprived of all rights under his mortgage, notwithstanding their formal because futile reservation. And this for the single reason that he did not in his suit implead the second mortgagee.

In view of the numerous decisions of this Court on similar facts, *Venkatanarasammah v. Ramiah*(2),

(1) (1915) I.L.R. 40 Mad. 77. (2) (1879) I.L.R. 2 Mad. 108.

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Muhammad Usan Rowthan v. Abdulla(1), Akatti Moidin Kutty v. Chirayil Ambu(2) and Kutti Chettiar v. Subramania Chettiar(3), as to the preferential title between competing purchasers in different mortgage suits, I should have had no difficulty in deciding this case if it were not that opposite opinions have been expressed by two Benches of this Court as to the soundness of some of the above decisions by reason of the Full Bench decision in *Mulla Vittil Seethi v. Achuthan Nair(4)* which laid down four general propositions as established by the decisions. In *Venkatagiri v. Sadagopachariar(5)* a Bench, consisting of MUNRO and SANKARAN NAIR JJ., considered that the Full Bench decision left untouched the principle of the above cases that the first purchaser is on a question of preferential title entitled to hold his possession against subsequent purchasers and the principle established by other cases that the right of puisne mortgagees who have been excluded from suits on prior mortgages is just what it would have been if they had been included, i.e., to redeem the prior mortgage and then either to proceed to sale for the amount due on both mortgages or, if the property has already been sold in their own suit, to hold it unless the purchaser in the prior mortgagee's suit, if he is the earlier purchaser and wants to keep his purchase, pays off both mortgages. In *Chinnu Pillai v. Venkatasamy Chettiar(6)* another Bench, consisting of COUTTS TROTTER and SRINIVASA AYYANGAR JJ., dissented from *Venkatagiri v. Sadagopachariar(5)* and considered that the Full Bench decision must be taken to have disapproved of *Venkatanarasammah v. Ramiah(7)*, *Muhammad Usan*

(1) (1900) I.L.R. 24 Mad. 171.

(2) (1902) I.L.R. 26 Mad. 486.

(3) (1909) I.L.R. 32 Mad. 485.

(4) (1911) 21 M.L.J. 213 (F.B.).

(5) (1911) 22 M.L.J. 129.

(6) (1915) I.L.R. 40 Mad. 77.

(7) (1879) I.L.R. 2 Mad. 108.

Rowthan v. Abdulla(1) and Akatti Moidin Kutty v. Chirayil Ambu(2) and that these decisions must not be followed and laid down seven rules to determine the rights of two simple mortgagees suing separately each on his own mortgage. The remarks at pages 86 and 87 of SRINIVASA AYYANGAR J.'s judgment are those relied on by the lower Courts for their decision. I do not propose to enter, more than is necessary to decide this case, into the general aspects of this controversy about the right of puisne mortgagees who have not been impleaded in the prior mortgagee's suit to bring suits for sale subject to prior encumbrances.

In *Mulla Vittil Seethi v. Achuthan Nair(3)* and *Chinnu Pillai v. Venkatasamy Chettiar(4)* the contest was between a mortgagee on one side and a purchaser on a prior mortgage on the other. In *Mulla Vittil Seethi v. Achuthan Nair(3)* the purchaser on a prior simple mortgage sued a subsequent usufructuary mortgagee for possession on default of the latter redeeming the prior mortgage. The opinion of the Full Bench was that the usufructuary mortgagee could not be turned out of possession by a purchaser in a suit to which he was not a party. The language of the reasoning and of the four propositions established was quite general and not limited to the facts of the case.

In *Chinnu Pillai v. Venkatasamy Chettiar(4)* a third simple mortgagee sued the purchaser in a suit on a second simple mortgage who had paid off a first simple mortgage, for sale. The actual decree of the lower Courts which was confirmed by the High Court was for sale free of all encumbrances, unless the defendant (purchaser) redeemed the plaintiff (second mortgagee). But the discussion and opinions were not limited to the

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(1) (1900) I.L.R. 24 Mad. 171.

(2) (1902) I.L.R. 26 Mad. 486.

(3) (1911) 21 M.L.J. 213 (F.B.).

(4) (1915) I.L.R. 40 Mad. 77.

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facts and in fact the judgment of SRINIVASA AYYANGAR J. is mostly devoted to a criticism of the observations in *Venkatagiri v. Sadagopachariar*(1) and the cases relied on in it. That case, *Venkatagiri v. Sadagopachariar*(1), however, was not between mortgagees or between a mortgagee and a purchaser but like the present case a claim for undisturbed possession by an earlier first mortgagee-purchaser who had got possession against a later second mortgagee-purchaser. It was held that the plaintiff as earlier purchaser who had been put into possession could not be disturbed by the later second mortgagee-purchaser whose only right was to redeem the prior mortgage and then to sell the property for the amount of both first and second mortgages.

Though the language employed in these three decisions and the criticism of the earlier by the later was perhaps unavoidably more general than the facts of each case necessarily demanded, each case is authority only for what it actually decides. As SADASIVA AYYAR J. said in *Venkataramana Reddi v. Rangiah Chetti*(2):

"They (the Vakils) naturally took full advantage of the general and broad expressions in favour of their respective contentions found in the numerous cases quoted by them on the legal questions involved. Even learned Judges (if I may say so with respect) have been naturally unable to lay down the rules of law governing these questions in judgments pronounced by them in particular cases with all the necessary qualifications and limitations which would have to be applied to those rules if additional facts and circumstances of a special nature besides those appearing in the particular cases in which the decisions were given were involved therein."

The present case is exactly similar in principle to *Venkatanarasammah v. Ramiah*(3), *Muhammad Usan Rowthan v. Abdulla*(4), *Akatti Moidin Kutty v. Chirayil*

(1) (1911) 22 M.L.J. 129.
(3) (1879) 1.L.R. 2 Mad. 108.

(2) (1921) 41 M.L.J. 399, 408.
(4) (1900) 1.L.R. 24 Mad. 171.

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Ambu(1), *Kutti Chettiar v. Subramania Chettiar*(2) and *Venkatagiri v. Sadagopachariar*(3). In all these cases the contest was for possession between rival purchasers of the mortgaged property in two successive mortgage suits from each of which the other mortgagee was excluded. In all of them the earlier purchaser was held entitled to the property whether he purchased in the prior mortgagee's or puisne mortgagee's suit. In *Venkatanarasammah v. Ramiah*(4), *Muhammad Usan Rowthan v. Abdulla*(5), *Kutti Chettiar v. Subramania Chettiar*(2) and *Venkatagiri v. Sadagopachariar*(3) the purchase in the prior mortgagee's suit was earlier. In *Akatti Moidin Kutty v. Chirayil Ambu*(1) the purchase in the puisne mortgagee's suit was earlier. In *Muhammad Usan Rowthan v. Abdulla*(5) and *Venkatagiri v. Sadagopachariar*(3), though the earlier mortgagee-purchaser had been nominally impleaded in the suit in the later mortgage, the purchase in the latter suit was subject to the rights of the prior mortgagee which were not determined in that suit and hence the contest between the purchasers in the third suit. In the majority of cases even in the third suit the rights after purchase on the footing of the rival mortgages were not determined but the question determined was confined to who had the better title by purchase. Only in one case, *Muhammad Usan Rowthan v. Abdulla*(5), was it held that, though the earlier purchaser had the better title, he could hold the property only on default of the later purchaser redeeming the earlier mortgage. In the other cases it was found that the form of the suit which was in ejectment precluded the real dispute between the parties being determined, i.e., as to the order of mutual redemption

(1) (1902) 1.L.R. 26 Mad. 486.

(2) (1909) 1.L.R. 32 Mad. 485.

(3) (1911) 22 M.L.J. 129.

(4) (1879) 1.L.R. 2 Mad. 108.

(5) (1900) 1.L.R. 24 Mad. 171.

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of the mortgages and the consequence of default. The present is another instance in which, though the suit as originally framed might have been used to determine the rights of the parties on their several mortgages, the form has been deliberately so limited by the plaintiff as to make it impossible to decide anything beyond the question whether the plaintiff is entitled to unconditional possession.

Having regard to the question before the Full Bench and the language employed by the learned Judges with regard to the above decisions, I am unable to agree with the opinion expressed in *Chinnu Pillai v. Venkatasamy Chettiar*(1) that *Venkatanarasammah v. Ramiah*(2) and *Muhammad Usan Rowthan v. Abdulla*(3) and similar cases were disapproved by the Full Bench and ought not to be followed. In fact the Full Bench judgment at pages 230, 231, expressly refers to and approves of the principle of *Venkatanarasammah v. Ramiah*(2) that the mortgagee who became first entitled to possession was awarded it against the other. Similarly at page 233 the judgment refers with approval to *Muhammad Usan Rowthan v. Abdulla*(3) pointing out that the first mortgagee being the first purchaser in possession could not be turned out in execution by the second mortgagee who had merely bought subject to the rights of the first purchaser. Referring to SHEPHERD J.'s judgment in that case the Full Bench say that "the observation that the right of redemption and no other was all that remained to the second mortgagee in the circumstances of the case was perfectly right" and that no general proposition to that effect was laid down. The learned Judges of the Full Bench could not have forgotten that the question referred to them was not which of two

(1) (1915) I.L.R. 40 Mad. 77.

(2) (1879) I.L.R. 3 Mad. 108.

(3) (1900) I.L.R. 24 Mad. 171.

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rival purchasers under simple mortgage decrees was entitled to possession but whether a puisne mortgagee in possession under a usufructuary mortgage could be turned out of possession or be compelled to redeem a purchaser in a simple first mortgagee's suit to which he was not a party. The principle that of two purchasers in successive mortgage suits, both mortgages being simple, the earlier purchaser is the one entitled to possession was therefore not only not disapproved but expressly approved by the Full Bench.

In this view I am not called upon to enter into any lengthy discussion whether and in what circumstances a puisne mortgagee, who has not been impleaded in a prior mortgagee's decree which has resulted in the sale of the property, may maintain a suit for sale subject to the prior mortgage as if it had not been sued upon. That is not the question in this case. But the discussion in *Venkatajiri v. Sadagopachariar*(1) and *Chinnu Pillai v. Venkatasamy Chettiar*(2) reveals a difference of opinion on the effect of the Full Bench decision in this question. The former case favours the view that such a suit by the puisne mortgagee is possible only till the first mortgagee has obtained his own decree for sale, the only result of the puisne mortgagee not being impleaded in the prior mortgagee's suit being to put him in the same position as he would have been if so impleaded, i.e., to give him an opportunity to redeem the prior mortgage. But the latter case would appear to take the view that in such circumstances the puisne mortgagee has not merely the right to redeem but also the right to sell subject to the prior mortgage. This view is based on the principle that as against the puisne

(1) (1911) 22 M.L.J. 129.

(2) (1915) I.L.R. 40 Mad. 77.

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mortgagee the prior mortgagee's suit being an improperly constituted suit has no legal effect whatever and may be treated as non-existent. If so, the purchaser in the first mortgagee's suit got no title whatever against the puisne mortgagee and the only course open to the first mortgagee is to sue again. That this is not necessary and that the purchase is good at least to the extent of enabling the purchaser to redeem the puisne mortgagee in the character of the ultimate owner of the equity of redemption is stated at page 86 where it is said that

"if he (second defendant in the case who was the purchaser in the prior mortgagee's suit) wants to keep the property as purchaser he can only do so by redeeming the plaintiffs."

The same result follows from the seventh proposition (page 92) where the purchaser in the first mortgagee's suit is described as the ultimate owner of the equity of redemption. The main thesis is however maintained at pages 86 and 87 that the later purchaser in the second mortgagee's suit is entitled to possession of the property from the previous purchaser in the first mortgagee's suit for the reason that the latter suit was not properly constituted whereas the former suit was. But what about the rights of the earlier purchaser as first mortgagee? The answer is that in the second mortgagee's later suit for sale he may, if he is unwilling to redeem the second mortgage, get the balance of the sale-proceeds after satisfying the second mortgage. That is to say, he becomes postponed to the second mortgagee who thus gets the advantage of becoming first mortgagee as a result of the improperly constituted suit brought by the original first mortgagee. It is difficult to see why the first mortgagee's suit which is not to affect the second mortgagee in any way should have the result of conferring a substantial advantage on him. And it is equally

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difficult to understand how, if the sale in the first mortgagee's suit can, notwithstanding its improper constitution, convey to the purchaser the equity of redemption subject to the second mortgage, and if the purchaser at that sale may still as plaintiff bring a suit as first mortgagee, impleading, of course, the purchaser in the second mortgagee's suit, he cannot successfully defend the possession already obtained in exercise of that mortgage right. Starting from the principle that the first mortgagee's suit being improperly constituted should have no legal effect whatever against the second mortgagee, the result is arrived at somewhat inconsistently that while, on the one hand, the purchaser becomes the ultimate owner of the equity of redemption who is as such entitled to redeem the second mortgage, on the other, he retains the character of the first mortgagee sufficiently to enable him to sue again on that mortgage but not sufficiently to retain his priority in the sale-proceeds in case of a sale by the second mortgagee or to keep the possession which he has already got against the purchaser in that sale.

I am not satisfied that this is the result of the Full Bench case, nor am I satisfied that the cases beginning with *Venkatanarasammah v. Ramiah*(1) are overruled thereby. If they are to be followed the suit must be dismissed.

The questions involved in contests between rival purchasers in successive mortgage suits in which the other mortgagees were excluded were again elaborately considered by the Full Bench of the Allahabad High Court in *Ram Sanehi Lal v. Janki Prasad*(2). There were two simple mortgages of 1911 and 1912. The second mortgagee sued the mortgagor first in March 1922 without joining the first mortgagee and then the

(1) (1879) I.L.R. 2 Mad. 108.

(2) (1931) I.L.R. 53 All. 1023 (F.B.).

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first mortgagee sued the mortgagor in August 1923 without joining the second. One J.P. purchased the property first in January 1925 in the second mortgagee's suit but did not get actual possession. Then the first mortgagee purchased the property in his own suit in November 1925 and got possession. J.P. sued the first mortgagee-purchaser for possession. On a reference to a Full Bench, four out of five Judges held :

1. If the purchaser in the first mortgagee's suit is suing as plaintiff—
 - A. (a) he can sue again for money if his suit is not barred ;
 - (b) he cannot sue for money if it is barred.
 - B. (a) If he was the earlier purchaser he can redeem the second mortgage and get possession even if a suit on the prior mortgage is barred.
 - (b) If he was the later purchaser he cannot even redeem.
2. If the purchaser in the second mortgagee's suit is suing as plaintiff—
 - (a) If the plaintiff was the earlier purchaser he must redeem the prior mortgage and the defendant cannot compel the plaintiff to be redeemed.
 - (b) If the plaintiff was the later purchaser he must first redeem the prior mortgage but the defendant can then compel the plaintiff to be redeemed in respect of the second mortgage.

It will be observed that according to this view the only case in which the first mortgagee-purchaser will be without remedy either to sue again for money or to compel the second mortgagee to redeem him is when a second suit for money has become barred and at the same time as purchaser he is later than the second

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mortgagee and not having possession is compelled to sue for it. In all other cases, the first mortgagee may have one or other of three remedies: (1) either a second suit for money, or (2) recovery of possession from the later purchaser, or (3) retention of possession as against even an earlier purchaser till he is redeemed. The other learned Judge gave his opinion separately but, except on two points, viz., as to *lis pendens* and as to the right of the second mortgagee to sue again for sale subject to the first mortgage, he concurred with his colleagues. He agreed that the auction purchaser in execution of a prior mortgagee's decree without impleading the subsequent mortgagee acquires the right of the mortgagor including the right of possession. He also agreed that it is the first purchaser who gets the property without regard to the priority of the mortgage in enforcement of which the property is sold. Thus all the five judges concurred in the principle of the earlier Madras decisions that the title to the property belongs to the earlier purchaser though the suit in which that purchase took place was improperly constituted in the sense that the subsequent mortgagee was not therein impleaded. The difference of opinion was only on the question whether the excluded second mortgagee is affected by the earlier proceedings to the extent that he is thereafter bound to redeem the earlier mortgage and can no longer sue for sale subject to the earlier mortgage. The majority in Allahabad approve the view taken in *Venkatagiri v. Sadagopachariar*(1) and *Venkataramana Iyer v. Gompertz*(2) on this matter, while MUKERJI J. took the view favoured in *Chinnu Pillai v. Venkatasamy Chettiar*(3).

(1) (1911) 22 M.L.J. 129.

(2) (1908) I.L.R. 31 Mad. 425.

(3) (1915) I.L.R. 40 Mad. 77.

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Quite apart from the title derived from the sale the right of the first mortgagee-purchaser to use his mortgage as a shield has recently been upheld by the Judicial Committee in *Sukhi v. Ghulam Safdar Khan*(1), and by this Court in *Venkataramana Reddi v. Rangiah Chetti*(2). In the former case there were two simple mortgages in 1874 and 1875 to K.R. and a third mortgage by conditional sale in 1883 to G.S. In 1886 K.R. brought a suit on the first two mortgages without making G.S. a party and bought the property himself. After K.R.'s death Sukhi, his widow, gave the property to J.R. and N.R. who in 1902 executed a fourth mortgage to her for securing an annuity. In 1909 G.S. sued J.R. and N.R. on his mortgage without joining Sukhi and got a decree for foreclosure on payment to them of the mortgages of 1874 and 1875. In 1914 Sukhi sued G.S., K.R. and N.R. on the mortgage of 1902. From the above dates and facts it is seen that Sukhi, the plaintiff, occupied the position of fourth mortgagee. But her mortgagors were representatives in interest of K.R., the first and second mortgagee-purchaser in the suit of 1886 in which the third mortgagee was not a party. Her security therefore included the right of K.R. by that purchase which included the right of the first and second mortgagees. The defendant G.S. was the third mortgagee who had foreclosed J.R. and N.R. as ultimate owner of the equity of redemption but without impleading the fourth mortgagee-plaintiff.

The plaintiff claimed as mortgagee from J.R. and N.R. the security of their rights to the first and second mortgages. Though G.S. had in his own suit paid this amount and it had been taken away by J.R. and N.R.,

(1) (1921) I.L.R. 43 All. 469 (P.C.).

(2) (1921) 41 M.L.J. 399.

the Privy Council held that that payment could not bind the plaintiff who was not impleaded. It was therefore ordered that G.S. should, in the first instance, pay the amount of the first and second mortgages to Sukhi, that, in case he did so, the plaintiff should pay to G.S. the amount of his third mortgage of 1883 and if she did so she could have the usual mortgage decree for the entire sum of all the mortgages including her own. As to the principle on which the payment of the first and second mortgages which were forty years old at the time of the suit was ordered, the Privy Council said that an owner of a property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage is entitled at the suit of a subsequent mortgagee who is not bound by the sale or the decree on which it proceeded to set up the first mortgage as a shield. Applied to this case it shows that the defendant, the first mortgagee-purchaser, is entitled to retain his possession till he is paid off the amount of that mortgage and is not liable, according to the observations in *Chinnu Pillai v. Venkatasamy Chettiar*(1), to be turned out of possession on the ground that the suit on the first mortgage was improperly constituted and to be relegated to a fresh suit long ago barred by limitation. The same view as to using a mortgage as a shield was taken in *Venkataramana Reddi v. Rangiah Chetti*(2).

The only difference between the Privy Council case and the present is that there the purchase on the first two mortgages was before the suit on the third mortgage whereas in the present case the defendant's purchase was after execution had begun on the decree on the second mortgage. It was therefore argued on

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(1) (1915) I.L.R. 40 Mad. 77.

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the strength of some remarks in *Chinnu Pillai v. Venkatasamy Chettiar*(1) that the Court sale in the defendant's suit was vitiated by *lis pendens*. At page 87 it is stated that, if a first mortgagee who has first obtained a decree without joining the second mortgagee purchases the property in execution after the second mortgagee has brought his suit on his own mortgage, such purchase would be affected by *lis pendens* and that such a purchaser would have to give up possession to the later purchaser in the second mortgagee's suit. At page 92 the same idea of the proceedings in an earlier mortgage suit becoming affected by *lis pendens* by reason of the institution of a subsequent mortgage suit is repeated in the fifth and seventh propositions. The seventh proposition contains a repetition of the statement in page 87 and the fifth proposition is the converse case of the purchaser in a second mortgagee's suit being affected by *lis pendens* by reason of a subsequent suit by the first mortgagor making the second mortgagee and mortgagor parties. I confess to great difficulty in correctly describing the ground of these remarks (whether they are right or not) to be *lis pendens*. With the greatest respect, I understand by *lis pendens* the rule by which by reason of a suit being pending about the rights to some property, subsequent dealings by the parties with that property so as to prejudicially affect the determination of those rights in that suit are invalidated. The proceedings in earlier instituted suits cannot be affected by *lis pendens* by suits subsequently instituted. If earlier proceedings are affected or rendered ineffective by subsequent proceedings the reason must be not *lis pendens* but something else. Not only so, but I find difficulty in

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understanding how a mortgage suit brought by a first mortgagee can be affected by *lis pendens* because some one else who does not claim from him, i.e., another mortgagee, has already sued to enforce his own rights. Both have rights against the same property not derived from each other but from the same owner. In my view the opinion expressed by MUKERJI J. in *Ram Sanehi Lal v. Janki Prasad*(1) on the subject of *lis pendens* in mortgage suits is correct. It is that the rule only applies to transfers by the plaintiff or defendant of their respective interests after the suit including transfers by Court sale in money decrees against either party. But it does not apply to previously existing transfers (including mortgages) or legal proceedings to enforce such transfers by those entitled. On principle the sale in pursuance of a mortgage decree, the mortgage having been executed before the institution of the suit, is not affected by the doctrine of *lis pendens*; compare per MITRA J. in *Har Pershad Lal v. Dalmardan Singh*(2), *Venkatrama Ayyar v. Rangiyam Chetty*(3) and *Abdul Muhamad Rowther v. Seethalakshmi Ammal*(4). No other authority has been adduced for invalidating the defendant's purchase on the ground of *lis pendens*.

For the above reasons the decrees of the lower Courts are reversed and the suit dismissed with costs throughout.

WALLER J.—I agree and have nothing to add. We have been asked to reconsider the order as to costs, on the ground that the plaintiff and the Courts below were right in relying on the decision in *Chinnu Pillai v. Venkatasamy Chettiar*(5). We see no reason to do so. The trouble was started by the plaintiff himself in the

(1) (1931) I.L.R. 53 All. 1023, 1034 to 1070 (F.B.).

(2) (1905) I.L.R. 32 Cal. 891.

(3) (1923) 46 M.L.J. 258.

(4) (1930) 33 L.W. 109.

(5) (1915) I.L.R. 40 Mad. 77.

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first Court. He has in this Court been given every opportunity of settling but has not taken advantage of it. We are asked further to say that, in our view, a further suit will not be barred by Order II, rule 2, of the Code of Civil Procedure. On that point we decline to express any opinion.

A.S.V.

APPELLATE CIVIL.

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

1932,
March 17.

NARLA RAMAKRISHNAYYA (DEPENDANT-RESPONDENT),
APPELLANT,

v.

MYNENI VENKATARANGA RAO AND ANOTHER (LEGAL
REPRESENTATIVES OF FIRST PLAINTIFF—APPELLANTS
TWO AND THREE), RESPONDENTS.*

*Madras Hereditary Village-offices Act (III of 1895), sec. 6 (1)
—Provision in—Directory—Mandatory or—Abolished
office—Hereditary right of family of last holder of—Legal
right—Infringement of right—Remedy—Suit for declara-
tory decree—Maintainability of—Secs. 13, 21 and 23—
Effect of.*

Section 6 (1) of the Madras Hereditary Village-offices Act (III of 1895) recognises and preserves the hereditary right existing in the family of the last holder of the abolished office, and that right is a legal right.

The provision in section 6 (1) that in filling the newly created offices the Collector shall select the persons whom he may consider best qualified from among the families of the last holders of the offices which have been abolished explains why the new offices are made hereditary and shows that, although the old offices are abolished, it is not the intention of the

* Letters Patent Appeal No. 14 of 1930.

Legislature entirely to destroy the old hereditary rights but rather to preserve them so far as possible in the new offices.

Kanthavadivelu Mudaliar v. Ramaswami Mudaliar, (1927) 54 M.L.J. 357, dissented from.

The provision in section 6 (1) that the Collector shall select persons from among the families of the last holders of the abolished offices is mandatory and not merely directory.

When the hereditary right preserved by section 6 (1) of the Act is infringed, the persons for whom it is preserved have a right to sue for its vindication by a declaratory decree. The remedy of appeal provided by section 23 of the Act is not the only remedy open to them.

The case is one in which an old right is preserved and a new remedy created, but no old remedy is explicitly taken away. Therefore the new remedy of appeal is not exclusive but must be regarded as additional to and not as substituted for existing legal remedies.

Section 21 of the Act does not exclude the jurisdiction of the ordinary Civil Courts to entertain a suit brought by a person whose hereditary right preserved by section 6 (1) has been infringed for the vindication of that right.

Sections 13 and 21 of the Act deal only with a claim to succeed to the office. When the old office is abolished and ceases to exist, the appointment to the new office cannot be said to be by virtue of a claim to succeed.

APPEAL under clause 15 of the Letters Patent against the judgment of KUMARASWAMI SASTRI J., dated 9th December 1929 and passed in Second Appeal No. 1379 of 1926 preferred against the decree of the Court of the Subordinate Judge of Bapatla in Appeal Suit No. 266 of 1925 preferred against the decree of the Court of the District Munsif of Repalle at Tenali in Original Suit No. 307 of 1923.

G. Lakshman for appellant.

S. Varadachari and *V. Pattabirama Sastri* for respondents.

Cur. adv. vult.

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ANANTAKRISHNA AYYAR J.—This is an appeal against the judgment of KUMARASWAMI SASTRI J. in Second Appeal No. 1379 of 1926. The original suit which gave rise to this second appeal was instituted by two members of the Myneni family for a declaration that the last holder of the office of the village munsif of Dhulipudy was Myneni Bhushiah *alias* Nagabhushanam, that the plaintiffs are the only surviving members of the last male holder's family from whom on revision a selection should be made of the person best qualified for the office and that the appointment of the defendant (a member of the Narla family) as the permanent village munsif of Dhulipudy is illegal, and for some other reliefs. Both the District Munsif and the Subordinate Judge held that the Civil Courts have jurisdiction to try this suit, and the learned Judge of this Court was also of the same opinion. The first point raised by Mr. G. Lakshman, the learned Advocate for the appellant, is that the Civil Courts have no jurisdiction in the matter. To appreciate the arguments advanced by the learned Advocate for the appellant it is necessary to state a few more facts. The village establishments in Guntur District were revised once in 1900 and again in 1912. The revenue village of Dhulipudy was split into two revenue villages in 1900—Dhulipudy and Karankupalem. In 1912, these two villages were split up into three revenue villages of Dhulipudy, Karankupalem and Addankipalam. As observed by the Collector in disposing of an appeal filed before him by the present plaintiffs in a suit instituted under Madras Act III of 1895, and also by the lower Courts in the present suit, there were a number of changes in the appointments that were made at the time of these two revisions of the village

establishments which led to a lot of confusion as seen from various orders which were passed by the Revenue authorities which are not easily reconcilable. The final appointment to the village of Dhulipudi was of the defendant—a member of the Narla family. That led to the present suit.

It is convenient at this stage to refer to some of the relevant provisions of Madras Act III of 1895. Under section 6 of the Act,

“the Board of Revenue may . . . divide any village into two or more villages, and thereupon all hereditary village offices in the villages or portions of the villages or village divided shall cease to exist and new offices, which shall also be hereditary, shall be created for the new village or villages. In choosing persons to fill such new offices, the Collector shall select the persons whom he may consider the best qualified from among the families of the last holders of the offices which have been abolished.”

A right of suit before the Collector is given under section 13 of the Act in respect of the offices for recovery of emoluments of such offices and for registry as heir; jurisdiction of the Civil Courts is barred under section 21 in respect of certain matters. Section 23 deals with appeals against orders passed by the Collector under section 6 of the Act and from decrees and orders passed under section 13. Section 20 provides for the framing of rules not inconsistent with the Act, in regard, among others, to the holding of inquiries under section 6 and the hearing of appeals under section 23.

The first question raised before us is whether a right of suit in the Civil Court is available to the plaintiffs for the reliefs, mentioned already, claimed by them.

It is admitted that the office of the village munsif of the village of Dhulipudi was hereditary before 1900, and continued to be so at the time of the revisions in 1900 and 1912. The plaintiffs contend that the family

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of the last holder of the office is Myneni, and that, under the last clause of section 6 (1) of the Act,

“in choosing the persons to fill the new offices, the Collector shall select the persons whom he may consider the best qualified from among the families of the last holders of the offices which have been abolished.”

For the purpose of this argument, we must assume that the family of the last holder of the office is Myneni and that the plaintiffs are properly qualified for the office, it being admitted that the defendant belongs to a different family—Narla family. The scheme of the section seems to be that, at the time of such revision and when a village is divided, the old hereditary village office should cease to exist, and new offices should be created for the new villages. It is specifically declared that in such cases the new offices shall also be hereditary. The dispute turns on the exact meaning to be given to the last sentence in section 6 (1). For the appellant, it was argued that it only means that the Collector should also consider whether there are any persons in the family of the last holder of the office who have got the requisite qualifications, but that the Collector's discretion in selecting the best candidate from among all the persons available is not in any way hampered by the section. The contention was that the reference to the family of the last holder was only a sort of suggestion to the Collector in making the selection, and that it was in no sense a mandatory provision. I am unable to agree with this view. The office of the village munsif has been hereditary generally in the Presidency from very early times. That hereditary right is valued very much. The Legislature has in section 6 recognized these facts. It is specifically provided that, though the old hereditary village offices shall cease to exist in such cases, the new offices shall also be hereditary. It is in recognition of the important nature of these hereditary offices, and

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the great value attached to the same by the persons interested, that the Legislature has specifically stated that, in choosing persons to fill such new offices, “the Collector shall select the persons whom he may consider the best qualified from the families of the last holders of the offices which have been abolished”. The use of the word “shall” is very significant. In Craies on Statute Law, third edition, page 204, it is stated as follows:—

“It should be observed that the word ‘shall’ is now avoided in statutes except where it creates a duty.”

In my opinion the hereditary right is a legal right and the same has been preserved by the Act; the present is therefore a case where in respect of an existing right some remedy has been provided for by the Act. Under section 23, there is a right of appeal provided from an order passed under section 6; but that does not take away the right of recourse to Civil Courts when the legal right is infringed. It is a well understood principle of law that, when a statute does not for the first time create a right in favour of a person but only provides for a new mode of enforcing the pre-existing legal right, then, in the absence of any clear indication in the statute to the contrary, the right of suit in the Civil Court to enforce the right is not taken away from him. The new remedy is taken to be an additional remedy. Here, the inquiry under section 6 is admittedly of an administrative character, and the appeal from an order passed under section 6 is also of the same character. In fact, the appellant asks us to construe the last sentence of section 6 (1) as only a piece of administrative instruction to the Revenue Officers to whom power is given under section 6 to pass orders relating to the matter. It is difficult to hold that, by providing for such administrative orders, the Legislature intended to take

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away the right of suit to enforce the pre-existing hereditary right. In this connection, I may also mention that section 6 is not the natural place where one would expect any administrative advice or instructions to be enacted; such advice and instructions would be more appropriate in respect of rules to be framed under section 20 of the Act.

If the Act had provided for a suit in the Revenue Court under section 13 of the Act in respect of such a matter, then, having regard to the provisions of section 21, it might, at least plausibly, be contended that the right of suit in the Civil Court has been taken away; but, having regard to the scope of sections 13 and 21 (to be noticed later on), no suit is maintainable under section 13 of the Act in circumstances like the present.

In my opinion, it is not from the mere fact that an obligation has been cast on the Collector by section 6 (1) in making the selection that "we spell out a right" in the family. Hereditary rights were well known to law as administered in this Presidency. The Legislature enacted that the new offices to be created for the new villages by that very Act should also be hereditary. As I read the section, what has been done by the Legislature is this—hereditary rights existing in the family of the last holder have been recognized and preserved by the Legislature by section 6. In my view, it is not a case of any right being "created" for the first time in the family, but the case is one of recognition and preservation by the Legislature of a pre-existing legal right existing in the family. The law is familiar with (a) rights vested in an individual; (b) rights vested in a family; and (c) rights vested in the public. The present is a case of a "right vested in a family"—which was a well-known right before the Act—being recognized and

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provided for by the Legislature. If the Legislature intended that such pre-existing rights should cease once for all and be no longer entitled to any sort of legal recognition or enforcement, it would surely have chosen other words than those that exist in the section to express its intention. It is a principle of law that existing legal rights should not be intended to be interfered with or taken away, except to the extent to which it is reasonably clear under the terms of a statute that they have been. A provision like the one contained in the last sentence of section 6 (1) of Madras Act III of 1895 finds a place also in Madras Act II of 1894, section 15; and, under that Act, learned Judges of this Court have held that the last holder's family has got a legal right of suit in the Civil Court when the hereditary right is infringed by the Revenue Officials in the matter of making appointments in such cases; see *Krishnaswami Naidu v. Akkulammal*(1), *Kodandaramayya v. Ramalingayya*(2) and *Alagiasundaram Pillay v. Midnapore Zamindari Co., Ltd.*(3) (per ODGERS J.) See also per WALLACE J. in *Subba Rao v. The Secretary of State*(4). In those decisions learned Judges of this Court have held that Civil Courts have jurisdiction to entertain suits in cases similar in principle to the present, and that necessary declarations could be granted to the family of the last holder. If the right possessed by the family be not a legal right, it is difficult to support the decisions mentioned above by those learned Judges. As remarked already, it is difficult to say that the obligation cast on the Collector by section 6 is not mandatory. If not mandatory, the provision should be treated as only in the nature of an administrative instruction, and to be really directory only; but it is

(1) (1918) 9 L.W. 80.

(2) (1920) 12 L.W. 663.

(3) (1919) 51 I.C. 818; 12 L.W. 767.

(4) (1929) 58 M.L.J. 698.

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impossible *prima facie* to understand that the Legislature intended to do any such thing in the main enacting section of the Act, which admittedly deals with important legal rights, and that it enacted a clause with the use of the word "shall" intending thereby only to give some sort of administrative advice to the authority which it empowered to make such appointments. Such a suggestion is, in my opinion, most unlikely, having regard to the wording of the enactment and to the circumstance that the same clause occurs both in the Act of 1894 and in the Act of 1895. As already remarked, different language would have been employed if the provision was not intended to be mandatory in its character, and any administrative instructions would naturally be dealt with under section 20 which makes provision for rules to be framed by the Board of Revenue.

I may remark that in *Alagiasundaram Pillay v. Midnapore Zamindari Co., Ltd.*(1) BAKEWELL J. made the following remarks towards the end of his judgment:—

"For the same reason I am of opinion that the ruling of NAPIER J. in the case already cited, *Krishnaswami Naidu v. Akkulammal*(2), does not apply, because the plaintiffs claim a personal right and not as members of the public. I do not understand that ruling to apply to an appointment outside the family of the last holder, in which case the member of the family might sue on behalf of himself and all other members of the family, because their joint right to be considered had been infringed."

For these reasons, and speaking with all respect, I think that the decision in *Kanthavadivelu Mudaliar v. Ramaswami Mudaliar*(3) has not properly taken into consideration the wording of section 6 and the inference following from the same and would also seem to be in

(1) (1919) 54 I.C. 816; 12 L.W. 767.

(2) (1918) 9 L.W. 90.

(3) (1927) 54 M.L.J. 357.

reality inconsistent with the decisions of various learned Judges in the cases mentioned above, and I would accordingly respectfully dissent from the same.

The second point raised is that, even if it should be held that the plaintiffs have a legal right, the same is not available to be enforced in the Civil Courts having regard to the provisions of section 21 of the Act. It has been decided by SADASIVA AYYAR J. in *Krishnaswami Naidu v. Akkulammal*(1), by AYLING and COUTTS TROTTER JJ. in *Kodandaramayya v. Ramalingayya*(2), by ODGERS J. in *Alagiasundaram Pillay v. Midnapore Zamindari Co., Ltd.*(3) and by MILLER J. in *Kesiram Narasimhalu v. Narasimhalu Pantulu*(4) that section 21 of the Act takes away the jurisdiction of the Civil Courts only in cases in which jurisdiction is conferred on the Revenue Courts by section 13 of the Act. Sections 13 and 21 deal only with a claim to *succeed* to the office. So far as the case before us now is concerned, when the old office is abolished and ceases to exist, the appointment to the new office could not be said to be by virtue of a claim to *succeed*. This was the view of SADASIVA AYYAR J. and ODGERS J. in the cases mentioned, and is the view taken by KUMARASWAMI SASTRI J. in second appeal in the present case; and, with respect, I agree with those learned Judges in that view. As observed by AYLING and COUTTS TROTTER JJ. in *Kodandaramayya v. Ramalingayya*(2),

"that a suit should be in a Civil Court regarding a newly-created village office and its emoluments, whereas it would not be in the case of an older office, is anomalous and may be the result of oversight in drafting; but we cannot see that it involves any injustice or real inconvenience; and, however it may be, it seems to be the only proper interpretation of the two Acts."

(1) (1918) 9 L.W. 90.

(2) (1920) 12 L.W. 663.

(3) (1919) 54 I.C. 816; 12 L.W. 767.

(4) (1907) I.L.R. 30 Mad. 128.

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It may be mentioned for what it is worth that, though the Act was amended in 1930 in respect of some other matters, the Legislature did not make any amendments to sections 6, 13, or 21 as it might be expected to do having regard to the difference of opinion that prevailed in this Court about the construction of section 13 of the Act (since BAKEWELL J. had taken a contrary view) if the Legislature thought that its intention had been misunderstood by Courts.

On the merits, I think the learned Judge, KUMARASWAMI SASTRI J., is clearly right in his opinion that the family of the last holder is Myneni. As remarked by the learned Judge, Exhibit C is practically conclusive on the question. It may be observed that the Collector on appeal in fact decided that Myneni family was the family of the last holder. It would appear that, by reason of some other proceedings, the Board of Revenue came to a contrary conclusion. But the Collector's decision on appeal in such cases is final, and it has not been made clear in this case how the Board of Revenue happened to interfere with that decision of the Collector. In fact, when the Board of Revenue was subsequently approached to interfere with a later order passed by the Collector on appeal relating to the appointment of the present defendant to the office, the Board held that it had no jurisdiction to interfere with an order passed by the Collector on appeal in such a matter; see Exhibit P-2. The plaintiffs before filing the present suit had also filed a suit under section 13 of Madras Act III of 1895 before the Deputy Collector, Tenali Division. Having failed to obtain relief from the Deputy Collector, the plaintiffs appealed to the District Collector (Exhibit Q-3) who held that "any suit for a newly-created office will, if maintainable at all, lie only to the ordinary Civil Courts." In the present case, it is

clear that the last holder's family was Myneni family, and therefore the appointment of the defendant as the permanent village munsif of Dhulipudi is illegal. The declaration granted by the learned Judge to that effect will stand, but not the other declarations. With this modification, the letters patent appeal is dismissed with costs.

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REILLY J.—Section 6 (1) of the Madras Hereditary Village-offices Act provides that on the grouping, amalgamation or division of villages all hereditary village offices of certain classes in the villages so affected shall cease to exist and new hereditary offices shall be created for the new villages formed as the result of the grouping, amalgamation or division. The sub-section then lays down that in filling the new offices so created the Collector shall select the persons whom he may consider best qualified from among the families of the last holders of the offices which have been abolished. It will be seen that the sub-section provides for very serious matters—the abolition of hereditary offices and the creation of new hereditary offices in their stead. Between the old and the new offices a link is maintained: the Collector must fill the new offices with the persons whom he considers best qualified from among the families of the last holders of the old offices. It is a very serious thing indeed for Legislature to destroy a private right, and still more a hereditary right; and we must be very sure before we attribute that meaning to a provision in a statute. It is a serious and unusual thing for the Legislature to create new hereditary offices. Here we find a provision for the abolition in the public interest of highly-prized hereditary offices, and in the very same sub-section of the Act we find provision for the creation of new hereditary offices in their stead. Then in the same sub-section

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words are introduced showing that it is the intention of the Legislature that the new offices shall be filled by men selected from the families which held the abolished offices. Surely that provision explains why the new offices are made hereditary and shows that, although the old offices are abolished, it is not the intention of the Legislature entirely to destroy the old hereditary rights but rather to preserve them so far as possible in the new offices. That is certainly a possible way of interpreting the intention of the Legislature in making the sub-section, and, remembering that very clear words are required entirely to destroy a private right, if we approach the sub-section in the right way in my opinion it is clear that that is the proper interpretation. With great respect I am unable to agree with *Kanthavadivelu Mudaliar v. Ramaswami Mudaliar* (1) in which the fact that the abolition of the old offices need not carry with it, and is apparently not intended to carry with it, the entire abolition of the old hereditary rights appears to have been overlooked. I agree with my learned brother that sub-section 6 (1) of the Act preserves certain legal rights in the families of the holders of the abolished offices.

That view is confirmed by the language of the sub-section regarding the Collector's duty in the matter. It lays down that the Collector shall select persons from among the families of the last holders of the abolished offices. I cannot agree with the contention for the defendant that those words are merely directory, not mandatory. That is against the plain meaning of the words themselves, which fits in with the apparent intention of the sub-section. There is no suggestion that the Collector shall choose persons from those

families, if he thinks fit: there is a plain order that he shall do so. And, as my learned brother has pointed out, if a mere direction was to be issued to the Collector how he was to use his discretion, section 6 is not the place where such a direction would naturally appear.

If there is a right preserved in the families of the last holders of the abolished offices, by what remedy is that right to be vindicated when infringed? For the defendant it is contended that a new remedy of appeal is provided by section 23 of the Act and that that is the only remedy. But here we have not a new right and a remedy created simultaneously by statute, in which case the ordinary interpretation will be that the remedy created is the only remedy available. Here we have an old right preserved and a new remedy created; but no old remedy is explicitly taken away. In those circumstances the new remedy of appeal is not exclusive; it must be regarded as additional to and not as substituted for existing legal remedies. On general principles, if the hereditary right preserved by section 6 (1) of the Act is infringed, the persons for whom it is preserved have still a right to sue for its vindication by a declaratory decree.

It is contended for the defendant that at any rate the jurisdiction of the ordinary Civil Courts is excluded by the Act. The excluding provision is in section 21; but that must be strictly construed, as must all provisions shutting out the jurisdiction of the ordinary Courts, and no reasonable interpretation of it will go so far as to shut out from the jurisdiction of the ordinary Courts such a matter as is the subject of this suit, *Muvvulu Seetham Naidu v. Doddi Rami Naidu*(1)

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and *Kodandaramayya v. Ramalingayya*(1). I agree that the ordinary Civil Court has jurisdiction in this case.

On the question who was the last holder of the office of village munsif of Dhulipudi within the meaning of section 6 (1) of the Act I agree that Exhibit C is conclusive.

In my opinion the plaintiffs are entitled to a declaration that the appointment of the defendant as permanent village munsif of Dhulipudi is illegal. But I do not understand how the findings of fact that Myneni Bhushiah was the last holder of the office or that the plaintiffs are the only surviving members of the last holder's family, from whom a selection should be made, can properly be made parts of the declaratory decree in their favour. I would modify the declaration made by the learned Judge by striking out all except the declaration that the appointment of the defendant is illegal.

A.S.V.

(1) (1920) 12 L.W. 683.

APPELLATE CRIMINAL.

Before Mr. Justice Pakenham Walsh.

PITCHAI (RESPONDENT IN CRL. R.C. No. 285 OF 1932),
PETITIONER,

1932,
April 27.

v.

M. M. C. MUHAMMAD ATHAM SAMMATTI AND
THIRTEEN OTHERS, RESPONDENTS.*

Code of Criminal Procedure (Act V of 1898), sec. 144—Order under—Stay of—High Court's power of—Application under sec. 144 (4) not filed—Effect of—Sec. 561-A—Inherent power under—Landlord's right to evict lessee does not necessarily give jurisdiction under sec. 144.

The High Court has power to stay execution of an order, positive or negative, passed under section 144 of the Code of Criminal Procedure.

Failure to apply under section 144 (4) for the rescission or alteration of the order under section 144 is no bar to the filing of a revision petition against it. The jurisdiction conferred by section 144 (4) is neither appellate nor revisional jurisdiction but a special jurisdiction conferred by a special provision of the statute.

The fact that under the terms of a lease the lessees are liable to eviction in a Civil Court does not entitle the landlord to an order against them under section 144 unless by no other means can a serious breach of the peace be prevented.

PETITION praying that the High Court may be pleased to issue an order vacating the order of the High Court dated 19th April 1932 and made in Criminal Miscellaneous Petition No. 270 of 1932 directing the suspension of the order of the Subdivisional Magistrate of Ramnad in Miscellaneous Case No. 20 of 1932.

K. S. Jayarama Ayyar and *G. Gopalaswami* for petitioner.

B. Sitarama Rao for respondents.

* Criminal Miscellaneous Petition No. 295 of 1932.

JUDGMENT.

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This is an application to this Court to vacate the order, dated 19th April 1932, in Criminal Miscellaneous Petition No. 270 of 1932 by which the order of the Subdivisional Magistrate of Ramnad under section 144 of the Code of Criminal Procedure was suspended in its operation—the first ground taken is that this Court had no power to suspend the order. The argument adopted is that powers of revision are exercised under section 435 (1) of the Code of Criminal Procedure which only applies to suspension of execution of imprisonment or fine or under section 439 of the Code of Criminal Procedure. Mr. Jayarama Ayyar has taken me through various sections of the Code mentioned in section 439—sections 423, 426, 427, 428 and 338—none of which he argues applies to this case, and I agree. Now there are certainly sections of the Code such as section 188 under which execution of orders passed therein can be suspended, but they do not fall under any of the sections mentioned in section 439 of the Code of Criminal Procedure. No doubt section 520 specially provides for stay of execution under sections 517, 518 and 519. Mr. Jayarama Ayyar argued that such orders as are positive and not negative would come under section 426 and he even argues that a positive order under section 144 would fall under it. That section begins with the words, “Pending any appeal by a convicted person”. These words govern the whole section. It therefore follows, in my opinion, that where there is no appeal pending by a convicted person the section cannot come into force; and it cannot be invoked. It seems therefore obvious that since there are orders execution of which can be stayed by this Court which do not fall under section 439 read with section 426 they are dealt with either under section 561-A in the exercise of its inherent powers or

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under section 107 of the Government of India Act. Thus there is no section (apart from section 561-A) in the Code of Criminal Procedure which enables the High Court to stay criminal proceedings. It is not correct to say that therefore any power of stay which cannot be found within the four corners of the Code cannot be exercised if we assume, as Mr. Jayarama Ayyar does, that section 561-A cannot be invoked. In this connexion *Chockalingam Ambalam v. Emperor*(1) may be referred to. I have been shown no case where it has been held that this Court has no power of stay of execution of an order, positive or negative, passed under section 144. *Marudayya Thevar v. Shanmugasundara Thevar*(2) was quoted. This was under section 145 and it related to the appointment of a receiver. I am doubtful whether the analogy as to the power of the Court to appoint a receiver under section 145 can be carried so far as to prohibit the Court staying execution of an order under section 144. If that reasoning is carried further, it will equally prevent the Court staying positive orders under section 144, which Mr. Jayarama Ayyar at the end of his argument admitted the Court could do.

The second argument is that no revision petition lies to this Court as the parties could have gone to the District Magistrate under section 144 who has power to rescind or alter an order under section 144 (4). It is argued that these powers of the District Magistrate are appellate powers and therefore under section 439 (5) no appeal having been made to him no revision petition to this Court can be entertained. Several cases have been quoted on the analogy of the old section 195 (7) but I do not think they have any bearing on this case, for the simple reason that that section did not empower

(1) (1927) M.W.N. 716.

(2) (1925) 49 M.L.J. 593.

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the Court to revise or change an order passed by itself which section 144 (4) does, and all the cases quoted proceed on the footing that the appellate or revising Court is superior to the Court whose order is sought to be appealed against or revised. The peculiarity of section 144 (4) is that it enables the magistrate who passed the order to rescind or alter it. His power therefore of a superior magistrate when he proceeds to do the same thing must be similar in its essence. It appears to me, therefore, that nothing can be gathered from cases which discuss whether revisional and appellate powers are the same or different things. Here we are dealing with a peculiar section, namely section 144 (4), conferring a jurisdiction upon a magistrate which, whether even if it can be called appellate or revisional, cannot be so called in the ordinary sense of those words, namely, of a superior Court dealing with an inferior one. There is one direct decision on the point, and it is the only one which has been quoted to me, namely, *Saturhan Das v. Makhan Das* (1). It was there held that the jurisdiction conferred by section 144 (4) of the Code of Criminal Procedure upon a magistrate to rescind or alter an order made under the section by himself or any magistrate subordinate to him or by his predecessor in office is neither appellate nor revisional jurisdiction; it is a special jurisdiction conferred by a special provision of the statute. Therefore in my opinion this argument that a revision petition cannot be filed to this Court must be rejected. I should not, however, be understood as in any way encouraging direct applications to this Court when there is some magistrate who can alter or rescind the order, but this criminal revision petition has already been admitted in

(1) (1921) 72 I.O. 171.

this Court, and I am not prepared to hold that it could not be filed here.

On the merits of the present petition I propose to say very little because the main question as to whether the agreement between the present petitioner and the counter-petitioners is a lease or a licence is one which will more properly come up in deciding the criminal revision petition itself. But it seems to me perfectly clear that the view which the learned Magistrate took in passing the order was that this was an ordinary lease and that since the parties under the lease had to vacate as they did not pay their rent within the specified time the petitioner before him was entitled to have an order under section 144, excluding the counter-petitioners before him from the site. A few sentences of the order may be quoted:

"The principal contention of the counter-petitioners is that the clause in the rajinama that the defaulters should forfeit the lease is not intended to operate but is only introduced *in terrorem* and that it is not valid in law even otherwise."

Then he says:

"In a nutshell their case is that even though they have violated the condition of the rajinama with regard to the payment of the dues to the proprietor of the lands the lease is subsisting and that they have every right to be on the lands in question."

He proceeds then to say:

"The terms of the rajinama are quite clear that in default of payment of the dues to the proprietor of the lands even after the expiry of the one month's days of grace, with interest thereon at twelve per cent per annum, the counter-petitioners shall forfeit their subsequent right of the fishing lease on the lands."

It may be noted that in the compromise petition liberty to build houses, etc., was granted and the petitioners could remove them at the end of the lease. Nowhere in the order so far as I can see does the learned

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Magistrate appear for a moment to regard the compromise as a licence and not as a lease. If he viewed it as a lease, he was not correct in passing the order evicting the petitioners from it, even though liable to eviction in a Civil Court unless by no other means could a serious breach of the peace be prevented. It was for the landlord, in the view taken by the lower Court, to evict them by civil process. It was for that reason, apart altogether from the question as to what the compromise really meant, that I considered this order was *prima facie* wrong and should be suspended. After reading the affidavits on both sides I do not see sufficient reason to vacate my order dated 19th April 1932, but I wish to make it clear that I am in no way deciding the question whether the agreement is a licence or a lease.

K.N.G.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson and Mr. Justice Mockett.

1932,
July 25.

KOVURU SUBBAYYA AND TWO OTHERS (ACCUSED),
PETITIONERS,

v.

PETA VEERAYA (COMPLAINANT), RESPONDENT.*

Code of Criminal Procedure (Act V of 1898), sec. 162—Applicability of—Statements to police during investigation of an offence other than the one for which the accused is under trial.

Where an accused person wishes to cross-examine a prosecution witness with regard to statements made by that witness to the police during the investigation of an offence other than the

* Criminal Revision Case No. 214 of 1932.

one for which the accused is under trial, neither section 162 of the Code of Criminal Procedure nor the proviso to that section has any application. A statement made to the police is as good evidence as a statement made to any other person save for certain exceptions to be found in the Indian Evidence Act and in the Code of Criminal 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 Second-class Magistrate of Ponnuru (Guntur district), dated 21st January 1932, and made in Calendar Case No. 315 of 1931.

P. Satyanarayana Rao for petitioners.

K. Kottayya for respondent.

K. N. Ganpati for Public Prosecutor (*L. H. Bewes*) for the Crown.

The JUDGMENT of the Court was delivered by JACKSON J.—The point raised in this revision case is whether on behalf of the accused in an assault case the complainant can be cross-examined by confronting him with a statement which the complainant made to the police when they were investigating a theft case, a case different from the case of assault. (This case of assault was not under investigation by the police.)

A statement made to the police is as good evidence as a statement made to any other person save for certain exceptions to be found in the Evidence Act and in the Code of Criminal Procedure.

In section 162 of the Code of Criminal Procedure it is laid down that a statement made to the police in the course of an investigation of an offence cannot be used as evidence at any trial in respect of that offence, with the proviso that such a statement may be used by the accused to contradict a prosecution witness.

But when the statement has not been made in the course of investigating the offence in respect of which

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the trial is held neither the main part of section 162 nor the proviso has any application.

If in an investigation of theft *A* says to the police that *B* and *C* beat him, that statement can be proved when *D* and *E* are being tried for assault, the trial in no way being in respect of the investigated theft. Though of course if in any way the assault had been under investigation by the police the statutory bar would apply.

The Magistrate did wrong therefore to shut out this evidence. His mistake is apparently reading section 162 as "disallowing all statements to police officers," as though there were a full stop after "for any purpose". But these words are clearly qualified by (for any purpose) "at any trial in respect of any offence under investigation at the time when such statement was made."

If it is sought to use the statement at a trial in respect of some offence which was not being investigated when the statement was made, there is no statutory bar whatsoever to its use. And of course the proviso only applies to such trials in which there is a statutory bar.

The petition must be allowed and the Magistrate is ordered to proceed as directed herein.

K.N.G.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson and Mr. Justice Mockett.

IN RE CHILUKURI RAMAYYA (ACCUSED-PETITIONER),
PETITIONER.*

1932,
July 26.

*Code of Criminal Procedure (Act V of 1898), sec. 476 (1)—
Complaint under—Necessity for the Court to record a
finding that it is expedient in the interests of justice.*

The Court making a complaint under section 476 (1) of the Code of Criminal Procedure should record a finding that it is expedient in the interests of justice that an inquiry should be made; and should not leave this to be inferred.

Namberumal Chetti v. Nainiappa Mudali, (1930) I.L.R. 54 Mad. 331, distinguished.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate of Kistna in Criminal Miscellaneous Petition No. 13 of 1932 presented to set aside the order of the Court of the Subdivisional Magistrate of Gudivada in Criminal Miscellaneous Petition No. 12 of 1931.

K. Kameswara Rao and C. Krishnachandra Mouleswar for petitioner.

K. N. Ganpati for Public Prosecutor (*L. H. Bewes*) for the Crown.

The JUDGMENT of the Court was delivered by JACKSON J.—The Subdivisional Magistrate of Gudivada passed an order purporting to be under sections 195 (1) (b) and 476 of the Code of Criminal Procedure that the present petitioner should be prosecuted for perjury under section 193, Indian Penal Code. He accordingly forwarded the records to the District Magistrate, Kistna, for taking action against the petitioner under the above

* Criminal Revision Case No. 480 of 1932.

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JACKSON J.

section. It is hardly the procedure contemplated in the Code as revised in 1923 and the Subdivisional Magistrate ought to have complained under section 476, a point which was taken up on appeal to the District Magistrate who found that the Subdivisional Magistrate's proceedings were practically a complaint and that the petitioner had not been in any way prejudiced. The point which is now taken in revision against the District Magistrate's order is not quite the same. It is now complained that the Subdivisional Magistrate erred in not recording a precise finding that it was expedient in the interests of justice that an enquiry should be made into the offence. It might be possible to argue, when the Subdivisional Magistrate records in these terms : "Further I find that he perjured himself on an important fact touching the issue in question regarding possession. I therefore consider etc.", that he was in effect giving his opinion that a prosecution was expedient in the interests of justice. But considering the clear language of the Code we are not disposed to admit any argument of that sort. The Code lays down so as to leave no room for any doubt that the Court should record a finding that it is expedient in the interests of justice that an inquiry should be made and therefore Courts will be well advised always to make a record to that effect if that is their opinion; because most regrettable delays and waste of time sometimes arise by putting the superior Courts to the task of discovering whether they mean something which they have not written. We therefore allow the petition and remit these proceedings to the Subdivisional Magistrate of Gudivada for such action as he deems necessary in the light of the above remarks. If he wishes to regularise the complaint at this stage there is no legal objection to his doing so.

In regard to the case law on the subject it may be noted that our opinion is affirmed by two Judges of this Court in *Chaduvula Munuswami Naidu v. Emperor*(1), *Yerneni Satyanarayana, In re*(2); and also in *Surendra Nath Jana v. Kumeda Charan Misra*(3). The ruling in *Namberumal Chetti v. Nainiappa Mudali*(4) was based on the special wording of the order then in question. The learned Judges there observed that the order was very detailed and comprehensive.

K.N.G.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Stone and Mr. Justice Burn.

IN RE M. MOUNAGURUSWAMI AND FIFTEEN OTHERS
(ACCUSED), PETITIONERS.*

1932,
November
24.

* *Criminal trial—Counter cases—Proper procedure.*

No hard and fast rule can be laid down with regard to the procedure to be adopted in the trial of counter cases by Criminal Courts. There is nothing irregular in a Judge trying each case to a conclusion before different assessors and afterwards pronouncing judgment in both so long as he tries the one quite independently of the facts in the other. It is necessary (1) that the trial must be separate, i.e., before different assessors and separate judgments delivered and (2) that the conclusions in each case must be founded on, and only on, the evidence in each case.

If the Judge considers himself unable to detach himself from extraneous considerations a transfer may be necessary to deliver the Judge from this embarrassment.

Krishna Pannadi v. Emperor, (1929) M.W.N. 883; (1929) 58 M.L.J. 352, explained. *Krishtamma v. Emperor*, (1929)

(1) A.I.R. 1928 Mad. 783.

(2) (1928) 28 L.W. 774.

(3) (1930) 51 C.L.J. 208.

(4) (1930) I.L.R. 54 Mad. 331.

* Criminal Miscellaneous Petition No. 1014 of 1932.

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GURUSWAMI,
In re.

M.W.N. 881, and *Kandregula Jaggu Naidu v. Emperor*, (1932) M.W.N. 692, considered.

PETITION praying that the High Court may be pleased to issue an order directing the transfer of Sessions Case No. 100 of 1932 from the file of the Court of Session, Madura Division, to the file of any other Court of Session.

Nugent Grant (amicus curiae) for petitioner.

Public Prosecutor (L. H. Bewes) [amicus curiae] for the Crown.

Our. adv. vult.

JUDGMENT.

BEASLEY C.J. BEASLEY C.J.—This transfer petition was directed by me to be placed before this Full Bench not because of any difficulty which arises in the petition which is not opposed but because it is a favourable opportunity for resolving difficulties with regard to procedure which have arisen on account of conflicting opinions expressed by this High Court.

One of these is *Krishna Pannadi v. Emperor*(1), a decision of JACKSON J., and another is *Kandregula Jaggu Naidu v. Emperor*(2), a decision of REILLY and KRISHNAN PANDALAI JJ. Some difficulty has probably been created also by *Krishtamma v. Emperor*(3), a decision of WALLER and CORNISH JJ. These cases lay down the procedure to be adopted at the trial of cases and counter cases, the two former by Sessions Judges and the latter by Magistrates. In *Krishna Pannadi v. Emperor*(1) JACKSON J. stated:

“There is no clear law as regards the procedure in counter cases, a defect which the Legislature ought to remedy. It is a generally recognized rule that such cases should be tried

in quick succession by the same Judge who should not pronounce judgment till the hearing of both cases is finished. This precludes the danger of an accused being convicted before his whole case is before the Court, and also prevents there being conflicting judgments upon similar facts.”

JACKSON J. then points out that there is obvious difficulty in the adoption of this rule as it seems to infringe the fundamental principle that the Court must not import any facts into a case which are not to be found on the record. He then proceeds to state his view that the only way in which such a procedure can be justified is by setting up a fiction that the case and the counter case are really one and suggests that this fiction should be made a reality by statute. This judgment has been severely criticised in *Kandregula Jaggu Naidu v. Emperor*(1) but I am bound to say that I think that most of the criticism is due to a misunderstanding of JACKSON J.'s judgment because on page 696 REILLY J. says:

“I understand JACKSON J.'s opinion to have been that not only should the same Assistant Sessions Judge have heard both cases to the end and have had the evidence of both of them in his mind before he pronounced judgment in either but also that he should have tried both cases with the aid of the same assessors. * * * That is how the learned Sessions Judge of Vizagapatam has understood JACKSON J.'s directions and it is that procedure he has followed.”

I do not understand JACKSON J. to have meant that both cases should be tried with the aid of the same assessors. What he does say is that both cases should be tried in quick succession by the same Judge who should not pronounce judgment until the hearing of both cases is finished. If that is what JACKSON J. meant then there is really no difference between the procedure JACKSON J. has in mind and that indicated by REILLY

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(1) (1929) M.W.N. 883; (1929) 58 M.L.J. 352.

(2) (1932) M.W.N. 692.

(3) (1929) M.W.N. 881.

(1) (1932) M.W.N. 692.

MOUNA-
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and KRISHNAN PANDALAI JJ. It seems to me that all the three are agreed upon the desirability of the Judge withholding judgment until he has heard both the case and the counter case but, since JACKSON J. states that this procedure may allow the facts in the one case to impress or influence the Judge in the other case, it is as well to observe that if the Judge withholds his judgment until he has heard both cases for the purpose of considering the cases as if they were one case, then that would be an irregular procedure; and the suggestion made by JACKSON J. that a fiction should be set up that the case and the counter case are really one and should be made a reality by statute seems to me to be one which it would be very difficult to adopt. WALLER and CORNISH JJ., who were dealing with the procedure in the magistrates' Courts, are of the opinion that "no Court can grasp the real facts unless it tries both cases." If by that it is meant that the fundamental principle that the Court must not have regard in one case to the facts in another is not to be observed then that view cannot be supported. Possibly if the Judge reserves judgment in both cases in order that he may consider both for the purpose of arriving at the truth, he is likely to reach a more satisfactory result than by trying each case without reference to any of the facts in the other. But since this procedure is irregular, it cannot receive our support. No hard and fast rule can be laid down. It is sufficient to say that there can be nothing irregular in a Judge trying each case to a conclusion before different assessors and afterwards pronouncing judgment in both so long as he tries the one quite independently of the facts in the other. Should the Judge, however, feel that he is likely to be embarrassed by the adoption of this procedure, he will no doubt get a transfer of the counter case to the file of

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another Sessions Judge. What must be made clear is: (1) that the trial must be separate, i.e., before different assessors and separate judgments delivered, (2) that the conclusions in each case must be founded on, and only on, the evidence in each case and (3) that if the Judge considers himself unable to detach himself from extraneous considerations a transfer may be necessary to deliver the Judge from this embarrassment.

We are much obliged to Mr. Nugent Grant and Mr. Bewes for their great assistance to us as *amici curiae*.

STONE J.—I agree.

BURN J.—I agree.

K.N.G.

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Cornish.*

B. CHENCHURAM NAIDU (PLAINTIFF), APPELLANT,

v.

MUHAMED BAHAVUDDIN SAHIB (DEFENDANT),
RESPONDENT.*

1932,
April 26.

*Code of Civil Procedure (Act V of 1908), O. XXIII, r. 1—
Landlord against tenant—Ejectment suit by—Withdrawal
without leave of Court owing to absence of notice to quit—
Subsequent suit after giving requisite notice—Maintain-
ability of—"Subject-matter"—Meaning of.*

Where an ejectment suit by a landlord against a tenant was, owing to the absence of the requisite notice to quit, withdrawn without obtaining leave of the Court to institute a fresh suit in respect of the subject-matter of the said suit and a

* City Civil Court Appeal No. 14 of 1929.

CHENCHURAM NAIDU v. BAHAYUDDIN SAHIB. subsequent suit was filed by the landlord after giving the necessary notice,

held that the subsequent suit was not barred under Order XXIII, rule 1 of the Code of Civil Procedure. The words "subject-matter" in the said rule mean "the series of acts or transactions alleged to exist giving rise to the relief claimed."

Rakhmabai v. Mahadeo Narayan, (1917) I.L.R. 42 Bom. 155, followed.

APPEAL against the decree of the Court of the City Civil Judge, Madras, in Original Suit No. 376 of 1928.

K. Krishnaswami Ayyangar, *R. Sri Ramachari* and *P. V. Venugopala Ayyar* for appellant.

Raffiuddin Ahmed for respondent.

The JUDGMENT of the Court was delivered by

BEASLEY C.J.—This was a suit in ejectment. The plaintiff, the appellant here, claimed to be the owner of the suit land and entitled to eject the defendant from the superstructure on it. The learned City Civil Judge dismissed the appellant's suit. A suit had been filed in 1924 in the same Court, Original Suit No. 422 of 1924, by the appellant against another person as the first defendant and the respondent here as the second defendant to eject them. The suit was withdrawn as against the respondent here by the appellant but at the time when he withdrew the suit he did not ask for liberty to file a fresh suit against the respondent. The learned City Civil Judge held that that was a statutory bar to the filing of the suit under appeal against the respondent. Upon that ground he dismissed the suit. He also went into the merits of the case and held that the appellant failed to prove his title and upon that ground also he dismissed the suit.

The first thing we have got to consider here is whether the appellant was prevented from filing the suit under appeal against the respondent by reason of

the fact that he withdrew his claim against the respondent in the previous suit without reserving his right to file this suit. That was a suit in which there were two defendants. The first defendant was a tenant paying rent to the plaintiff and the respondent was also made a party to the suit. The respondent put in a written statement in which he put the plaintiff to proof of his title and alleged that he had not been given a written notice to quit, which was a fact. During the hearing of the case, the appellant withdrew his suit against the respondent, thus exonerating him, and proceeded with his suit against the first defendant. The learned City Civil Judge who tried that suit gives an account of what took place in his judgment as follows:—

"Plaintiff has now exonerated second defendant. The suit against him is accordingly withdrawn, but liberty to litigate his right, if any, in respect of the suit house is reserved to him."

A separate order was passed subsequently, some days afterwards, and it runs as follows:—

"Plaintiff exonerates second defendant. Suit against second defendant is withdrawn. No costs. Second defendant's right to litigate his claim in this house, if any, is reserved to him."

The learned trial Judge has construed those orders as reserving liberty to the second defendant to litigate his claim and, indeed, that is what the latter of the two orders distinctly says. We have had the advantage also of the statement of Mr. Raffiuddin, who appeared on behalf of the second defendant in that suit and represents the respondent here, who has told us that he asked that this reservation of the second defendant's right should be made and it is quite obvious that it was as a result of that request that the order, to which reference has already been made, was made. We accept what Mr. Raffiuddin has told us, and, although

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it does appear to us to have been quite unnecessary to make any reservation of the second defendant's right, however, we are satisfied that that right was reserved at the express request of Mr. Rafiuddin, so that the learned trial Judge's interpretation of those orders is perfectly correct and, therefore, there was no reservation of liberty to the appellant, the plaintiff in the suit, to file another suit against the respondent. But was such leave necessary? The question here is whether the suit under appeal was a suit for the same "subject-matter" as the previous suit. That of course was a suit to eject the respondent and this suit also claims the same relief against the respondent. But it does not necessarily follow that, because in an ejectment suit the claim is the same, the statutory bar under Order XXIII, rule 1, is raised against the appellant. It is argued before us that the reason why the second defendant was exonerated in the earlier suit was because no written notice to quit had been given to him. On the other side it is argued that it was because of the point raised with regard to the appellant's title. It is argued that it was because he was unable to prove his title that he exonerated the respondent. One answer to that is that he proceeded with his suit against the first defendant and it was equally important to him to prove his title against the first defendant. If he had no title, he could not succeed against the first defendant any more than he could against the second defendant. It seems to us to be much more probable that the appellant did not proceed against the respondent here, the second defendant, because he had not given him notice to quit. It was no good going on with the suit against the respondent and succeeding in proving his title if the claim was bound to fail by reason of the defect that he had not given him written notice. What has to be

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considered here is, what is the meaning of "subject-matter", and we derive great assistance upon this point from *Rakhmabai v. Mahadeo Narayan*(1) which seems to us to be directly in point. That was a suit brought by the plaintiff to eject the defendant. Finding however that there was no sufficient notice to quit, he withdrew the suit without obtaining the leave of the Court. Subsequently the plaintiff having given a formal notice to quit brought a fresh suit for ejectment. The defendant contended that the withdrawal of the former suit without permission operated as a bar to the second suit under Order XXIII, rule 1 of the Civil Procedure Code of 1908. It was held that the withdrawal did not operate as a bar, as the previous suit was not a suit for the same "subject-matter" as the second suit, within the meaning of Order XXIII, rule 1 of the Civil Procedure Code of 1908, and that "subject-matter" means

"the series of acts or transactions alleged to exist giving rise to the relief claimed".

SCOTT C.J., at pages 158 and 159, says :

"The question is whether the previous suit was a suit for the same subject-matter within the meaning of Order XXIII, rule 1. We are of opinion that 'subject-matter' means, to use the words of Order I, rule 1, 'the series of acts or transactions alleged to exist giving rise to the relief claimed'. Obviously the first series of acts or transactions which formed the basis of the first suit was incomplete, or the plaintiff would have been able to prosecute his suit to decree. It was incomplete because there was no notice to quit. The second series of acts or transactions is complete because the notice to quit has been given, and therefore, the two suits are not in respect of the same subject-matter. . . .

In the first suit between the present parties there was no cause of action because notice had not been given. In the present suit there is a cause of action because notice has been given. Therefore, the causes of action are not the same."

(1) (1917) I.L.R. 42 Bom. 155.

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With those observations we entirely agree. To hold otherwise would be to place a defendant, against whom an ejectment suit is launched without previously giving him the required written notice and against whom the suit is withdrawn for that reason, in an impregnable position. Never thereafter would the owner of the property be able to eject him from his premises. In fact the tenant would become the owner of the property. That never could have been the intention of Order XXIII, rule 1. We therefore hold that, although the learned trial Judge was right in his interpretation of his own orders, he was wrong in holding that the suit was barred by reason of the provisions of Order XXIII, rule 1. [His Lordship considered the other findings of the trial Judge and concluded as follows :—]

We are quite satisfied that the suit property was Sundaram Naidu's and it follows that by reason of his sale the appellant became the owner of the property and was therefore entitled to sue in ejectment.

Under these circumstances, this appeal must be allowed with costs throughout. The further question with regard to valuation will be dealt with in the trial Court.

G.R.

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Cornish.*

SHANJEE AND MOOLJEE BROTHERS (DEFENDANTS),
APPELLANTS,

1932,
April 28.

v.

T. SHANMUGAM PILLAI (PLAINTIFF), RESPONDENT.*

Transfer of Property Act (IV of 1882), sec. 53-A—If respective—Transfer of Property (Amendment) Act (XX of 1929)—Indian Registration Act (XVI of 1908), sec. 4 amended by sec. 10 (3) of the Transfer of Property (Amendment) Supplementary Act (XXI of 1929)—Right to remove sand from land—If, an interest in immovable property—Covenant in an unregistered agreement in respect of matter collateral to the agreement—Admissibility to prove covenant.

A written agreement, dated 4th August 1927 and entered into between S and K who were respectively styled lessor and lessee in the said document, provided, *inter alia*, as follows :— (1) that the lessor has received from the lessee a certain amount as compensation, (2) that the lessee shall be at liberty to remove sand or earth from the plots above-mentioned (to a specific depth) and level the plots after removal, (3) that the land should be vacated on or before 1st October 1928 after the removal of sand. The agreement was not registered. A suit was filed by S against K for damages for breach of the covenant to level the land after removing sand or earth therefrom as provided in the agreement.

Held that, (i) the agreement was for transfer of an interest in immovable property, (ii) section 53-A of the Transfer of Property Act which was introduced by the Transfer of Property (Amendment) Act (XX of 1929) and section 49 of the Indian Registration Act as amended by section 10 (3) of the Transfer of Property (Amendment) Supplementary Act (XXI of 1929)

* Original Side Appeal No. 11 of 1932.

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are not retrospective, (iii) inasmuch as damages are claimed in respect of breach of a covenant which was an arrangement collateral to the agreement and which did not affect the land within the meaning of section 49 of the Indian Registration Act, the agreement was admissible in evidence for the said purpose.

APPEAL from the judgment of STONE J. dated 19th January 1932 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 39 of 1931.

Vere Mockett and G. Rajagopalan for appellants.

T. M. Krishnaswami Ayyar and S. G. Satagopa Mudaliar for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by

CORNISH J. CORNISH J.—The defendants are the appellants. They were sued for damages for breach of a covenant to level plaintiff's land after removing earth and sand therefrom. The plaint alleged an agreement dated 25th June 1927. The defendants in their written statement denied this agreement. But they alleged an unregistered agreement in writing dated 4th August 1927 under which, and in consideration of a rent of Rs. 500, they took on lease the suit lands subject to the covenants contained in the agreement; and they further pleaded that "all conditions and covenants binding on the part of the defendants were duly performed and that the lands were properly levelled".

The learned trial Judge has found that the written agreement dated 4th August contained the contract between the parties. Having so found, the learned Judge, rightly in our judgment, held that the agreement was for the transfer of an interest in immovable property. The terms of the agreement were that in payment of compensation (in point of fact a sum of Rs. 500) the defendants were given liberty to remove

sand and earth from the plaintiff's plots of land to depths varying from 2 feet to 8 feet, and were to level the plots after removal. There was also the stipulation that the land was to be vacated on or before 1st October 1928. Although the parties are described in the document as lessor and lessee, the agreement was not, in our view, one of lease. Further, the agreement gave more than a mere licence, and it was not an agreement for the sale of earth and sand as chattels. In our view it was an agreement for the sale of an interest in immovable property. A number of cases, which are not all easily reconcilable, have been cited to us on the question as to what constitutes an agreement for the transfer of an interest in land. In *Marshall v. Green*(1) a sale of growing timber, to be taken away as soon as possible, was held not to be a contract for the sale of an interest in land. BERT J. in that case laid down the following test:

"If they (the things sold) are not *fructus industriales*, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining; then part of the subject-matter of the contract is the interest in land, and the case is within the section (i.e. section 4 of the Statute of Frauds). But if the thing, not being *fructus industriales*, is to be delivered immediately, . . . then the buyer is to derive no benefit from the land, and consequently the contract is not for an interest in the land, but relates solely to the thing sold itself. Here the trees were timber-trees, and the purchaser was to take them immediately; therefore, applying the test last mentioned, the contract was not within the 4th section."

It was obviously with this authority before him that COLLINS C.J., in the Full Bench case of this Court, *Seeni Chettiar v. Santhanathan Chettiar*(2), stated that it

(1) (1875) L.R. 1 C.P.D. 35, 42. (2) (1896) I.L.R. 20 Mad. 58 (F.B.).

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had long been settled that an agreement for the sale of growing timber, not made with a view to immediate severance from the soil and delivery as chattels, was a contract for the sale of an interest in land. *Marshall v. Green*(1) was discussed and criticised by CHITTY J. in *Lavery v. Pursell*(2) and the learned Judge points out that the decision turned on this,—that the Court considered that, as the timber was to be cut down as soon as possible and was immediately cut down, the thing sold was a chattel. In *Lavery v. Pursell*(2) the contract was for the sale of a house as building materials, and it was held to be a sale of an interest in land; and CHITTY J. finds his conclusion thus :

“ I think that the contract does purport to confer on the purchaser the right to be there for the purpose of taking down and removing the materials, and does give him either a complete or a qualified possession ; but still a possession of the soil itself—of the land, tenements and hereditaments ; certainly of the whole of the house. That being so, if the question was free from authority, I should have thought that this case fell within the statute.”

The learned Judge then proceeds to show that *Marshall v. Green*(1) was not an authority to the contrary. That reasoning and the conclusion appear to us to be exactly applicable to the agreement with which we are here concerned. Furthermore, the present case is really indistinguishable from *Morgan v. Russell & Sons*(3) where it was held that an agreement to sell all the slag and cinders forming part of the soil on certain premises was a contract to grant an interest in land.

The agreement then, purporting to create an interest in immovable property, and being unregistered, the question is whether section 49 of the Indian Registration Act does not prevent the plaintiff from proving the

(1) (1875) L.R. 1 C.P.D. 35, 42. (2) (1888) 39 Ch.D. 508, 515.
(3) [1909] 1 K.B. 357.

terms of the agreement. The learned trial Judge has held that the equity of part-performance established by section 53-A of the Transfer of Property Act enables the plaintiff to enforce his rights under the agreement, notwithstanding that it has not been registered as required by law. It is unnecessary to consider the argument which has been addressed to us on the subject, whether the learned Judge put a right construction on the section, because, in our judgment, the section has no application to an agreement to transfer immovable property which, as in the present case, was made prior to 1st April 1930, the date on which section 53-A is expressed as coming into force. The Transfer of Property (Amendment) Act (XX of 1929), which introduced section 53-A into the Transfer of Property Act, says that the Act, viz., the amending Act, shall come into force on 1st April 1930, and the language of section 53-A itself does not indicate an intention that it should come into force on any other date. But it has been contended, in view of the provisions in section 63 of the Act, that certain specified sections (which do not include section 53-A) shall not affect the terms and incidents of transfers of property made prior to 1st April 1930, and that the inference is that section 53-A was intended to have retrospective effect on transfers of property. Their Lordships of the Judicial Committee, in *Young v. Adams*(1), have stated that retrospective effect ought not to be given to a statute unless an intention to that effect is expressed in plain and unambiguous language. Judged by that test, the Transfer of Property (Amendment) Act (XX of 1929), in our opinion, fails to disclose an intention that section 53-A was to have a retrospective effect. In support of the contention reference has been made to Act XXI of 1929, which is entitled “ An Act to supplement the Transfer

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(1) [1898] A.C. 469.

purporting or operating to create, declare, assign, limit or extinguish a right, title or interest in immovable property; *Saraswatamma v. Paddayya*(1). To that extent, therefore, the unregistered document would not be receivable as evidence of its terms. The question is whether the covenant that defendants would level plaintiff's land after removing the sand to the same level as adjacent plots operates to create or declare a right, title or interest in or to immovable property. The covenant certainly operates to create a right in the plaintiff to have something done to his land, and an obligation on the defendants to do it. But we think that the right and obligation so imposed cannot be described in the ordinary sense of the words as "a right, title or interest to immovable property". If this be the correct view, then the document is admissible to prove the terms of the covenant. The learned Counsel for the defendants has, however, contended, upon the authority of *Sambayya v. Gangayya*(2), that the covenant is inseparable from the agreement and must stand or fall with it. But in that case the covenant was by the lessee to purchase the premises at the end of the term; it was clearly an agreement to create an interest in land. On the other hand, it is well settled that an unregistered document is admissible as evidence of a personal covenant or of a collateral transaction which does not require registration. It is to be observed that the covenant in question is not a repairing covenant. It did not require the defendants to restore the land after excavating the sand; but they were required to level the land to the level of adjoining lands so as to make it similarly cultivable. In our judgment the covenant was an arrangement collateral to the agreement, and one which did not affect the land within the meaning of section 49.

(1) (1922) I.L.R. 43 Mad. 349.

(2) (1890) I.L.R. 13 Mad. 308.

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of Property (Amendment) Act (XX of 1929)." This Act is likewise expressed to come into force on 1st April 1930. It does not amend the Transfer of Property (Amendment) Act (XX of 1929) but it amends section 49 of the Registration Act by enabling an unregistered document to be received as evidence of part-performance of a contract for the purposes of section 53-A of the Transfer of Property Act. The Act to supplement the Transfer of Property (Amendment) Act XX of 1929 (Act XXI of 1929) is supplementary of the Transfer of Property (Amendment) Act (XX of 1929) and its provisions must be construed accordingly. And if, as we think, section 53-A is applicable only to transfers of immovable property made after 1st April 1930, it must follow that the operation of the amendment made by Act XXI to section 49 of the Registration Act should be similarly restricted.

Now, if the plaintiff cannot rely on section 53-A, the equity of part-performance cannot help him. Although in *Mahomed Musa v. Aghore Kumar Ganguli*(1) their Lordships of the Judicial Committee laid down that the equitable doctrine of part-performance was applicable in India, their Lordships in the later case of *Ariff v. Jadunath Majumdar*(2) held that the equity could not override the provisions of a statutory enactment. It is clear, therefore, upon this authority that the agreement of the 4th August, being a document which required registration, is prevented by section 49 of the Indian Registration Act (the amendment of this section by Act XXI of 1929 not being effective for the purpose of this case) from being received as evidence of any transaction affecting the property, and that no equitable doctrine can nullify the operation of the section. The words "transaction affecting such property" in section 49 have been held to mean transaction

(1) (1914) I.L.R. 42 Cal. 801 (P.C.). (2) (1930) I.L.R. 58 Cal. 1235 (P.C.).

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There remains to be briefly noticed the contention that the defendants had admitted the terms of the covenant in their written statement. They admitted that the August agreement contained covenants, and they averred that they had fulfilled the covenants. But nowhere do they admit the terms of the covenant; they were not discoverable anywhere in the pleadings, and, curiously enough, the plaint makes no mention of the August agreement.

The result of our judgment is that, although our reasons are different, our conclusion is the same as that reached by the learned trial Judge. Accordingly, the appeal fails and must be dismissed with costs. The learned Judge has assessed the plaintiff's damages at Rs. 3,000 for defendants' breach of their covenant to level his land. The plaintiff claimed Rs. 6,000. The only evidence given in the case on this subject was the plaintiff's who said that he thought the cost of levelling the land would be Rs. 5,000. The learned Judge made a personal inspection of the land, but it was under water at the time so that the occasion was not favourable for testing the plaintiff's estimate of damage. Mr. Mockett has told us that defendants had witnesses to give evidence upon the question of damages, but that they were not called because the arguments were confined to the questions of law. In the circumstances, we think that defendants should have the opportunity of calling these witnesses and that the case should go back to the learned Judge for this purpose.

The question of costs at the trial will abide the result of the further enquiry by the trial Court into the question of what damages (if any) are payable by the defendants. There will be no refund of the court-fee paid on the memorandum of appeal herein.

Attorney for appellants: *N. T. Shamanna.*

G.B.

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Stone.*

THE MERCANTILE BANK OF INDIA, LTD.
(RESPONDENTS), APPELLANTS,

1932,
March 30.

v.

THE OFFICIAL ASSIGNEE OF MADRAS
(PETITIONER), RESPONDENT.*

*Indian Contract Act (IX of 1872), ss. 102, 103, 172 and 178—
Transfer of Property Act (IV of 1882), sec. 137—Combined
effect of—Indian Railways Act (IX of 1890), sec. 57—Effect
of—Presidency-towns Insolvency Act (III of 1909), sec. 52
(2) (c)—Railway receipt in respect of goods in the control of
a carrier transferred to a bank with a letter of lien—
Absence of notice by bank to carrier about the security—
Effect of, on the question of goods being in the order or
disposition of the insolvent.*

The combined effect of sections 102, 103, 172 and 178 of the Indian Contract Act and section 137 of the Transfer of Property Act is to make a pledge by an owner of goods of the railway receipts relating to those goods to have the effect of pledging the goods and no different effect is produced by section 57 of the Indian Railways Act.

In a case where the insolvent had transferred the documents of title to goods to a bank and had given a letter of lien declaring that the goods were deposited with them by way of security and the goods were not, at the commencement of insolvency, in any place or warehouse over which the insolvent had control but in a carrier's railway waggon or goods-shed, the goods could not be said to be "in the possession, order or disposition of the insolvent . . . by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof" within the meaning of section 52 (2) (c) of the Presidency-towns Insolvency Act, even though the bank had not given notice of the security in their favour

* Original Side Appeal No. 67 of 1930.

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to the carrier, inasmuch as it was not obligatory on the carrier under section 57 of the Indian Railways Act to deliver the goods without the production of the railway receipts relating to the goods.

"True owner" in section 52 of the Presidency-towns Insolvency Act can include a person having a lien or equitable charge, as well as the person having the legal title.

APPEAL from the judgment of WALLER J. passed in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 406 of 1929 in Insolvency Petition No. 62 of 1929.

Nugent Grant and Vere Mockett for appellants.

Advocate-General (Sir A. Krishnaswami Ayyar) and *O. T. G. Nambiar* for respondent.

Our. adv. vult.

JUDGMENT.

STONE J.

STONE J.—The facts in this case are simple and can be stated as follows:—

The appellants, whom I shall hereafter refer to as the bank, lent one C.K.N., now an insolvent, money by various loans. These loans were arranged in order to finance the purchase by C.K.N. of groundnuts.

C.K.N. was a large buyer of groundnuts. He purchased on credit. Sometimes he received delivery in the various centres in the mufassal; sometimes he received delivery in Madras. In the former case he was the consignor and the consignee; in the latter case he was the consignee mentioned in the various railway receipts relating to these various consignments during their transit by rail. Transit was by a carrier hereafter referred to as the Port Trust. The immediate destination in all cases was the Port Trust godowns at Madras. The goods were first placed in Port Trust godowns to await orders. The goods in question were there or *en route* at the time of the act of bankruptcy.

That was the course of business pursued by C.K.N., his sellers, and his carriers in relation to the purchase, transport and delivery of these goods.

As regards C.K.N. and the bank, the following are the material acts done: C.K.N. having obtained railway receipts in respect of these goods bought on credit took or sent the railway receipt in respect of any particular consignment to the bank to arrange a loan. Before a loan was granted the borrower was required (1) to endorse and assign the railway receipt, (2) to sign and give a letter of lien (see documents page 49) and (3) to make and deliver a promissory note. The letter of lien is a document whereby the borrower

"acknowledges to have deposited with the bank the property hereunder-mentioned as a collateral security for the due payment of"

the promissory note. There are many other terms, the general purpose of which is to enable the bank to make up the security if there appear to be a deficiency, to hold in respect of charges or expenses, to sell and appropriate, or if necessary, to obtain such further documents as may be found necessary to vest in the bank the property to enable the bank to sell and to prevent the borrower from doing anything to revoke or avoid any authority given or to be given to enable the bank to sell. The "hereunder-mentioned property" is shown in the schedule. The schedule mentions bags of groundnuts and refers to the number of the loan, particulars of which appear in the loan register. The precise bags of groundnuts can be identified from the information given in the schedule or the loan register through the railway receipt.

The railway receipt is by the bank stamped with the bank stamp and endorsed on behalf of the bank by the manager. It is handed to the bank's head godown-keeper and by him entered with particulars in a book.

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In the past, many of these railway receipts had been handed by him to the godown-keeper employed by the bank who worked at the Port Trust's outside godowns (i.e., the godowns bearing the bank's board) and by him handed to C.K.N.'s representative to enable him to obtain, on paying freight, the goods which, up to then, were in the Port Trust's inside godowns. It is unnecessary to complicate this narrative with a reference to the various frauds which were thereby committed, the goods, title to which is in dispute in this case, being at all material times (i.e., up to the date when the act of bankruptcy occurred, viz., 7th February 1929) either in course of transit by rail, or in the Port Trust's inside godown awaiting orders as to delivery.

As to the course of business between the bank and the Port Trust, the Port Trust were aware of the bank's board on the outside godown but were not given actual notice by the bank, until after the adjudication, of either the lien created by the letter of lien or the pledge created by the assignment by way of security of the railway receipts. At that stage the bank notified the Port Trust but the Port Trust declined delivery to the bank pending communication with the Official Assignee. The Official Assignee claimed the goods. Subsequently under order of Court the goods were sold by the bank for the account of whosoever may be found entitled. The question in substance is: "Who is entitled, the Official Assignee or the bank?" The learned trial Judge, on the issues as framed, has held that the Official Assignee is entitled. From that decision this appeal is brought.

In considering the law involved in the determination of the above questions it is very desirable to make it clear that the issues and consequently the judgment appealed from do not raise directly a question as to the effect of the letter of lien.

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It is conceded however by the Advocate-General that (apart from the order and disposition clause) if either (1) the letter of lien creates a charge on these goods or (2) the railway receipt by endorsement transfers not merely a title to receive but constructive possession of the goods, then the Official Assignee's title is postponed to that of the bank, the bank having in the first case a charge for the amounts advanced against these goods and in the second case a pledge of the goods for the amount advanced. But it is urged that (i) a railway receipt, unlike a bill of lading, though a document of title, is a document giving title to receive but not giving constructive possession and possession being a necessary ingredient of the transaction of pledge, there being no possession there is no perfected pledge; or (ii) granted a perfected pledge, the goods have remained in the order or disposition of the insolvent so as to pass to the Official Assignee under the reputed ownership section of the Presidency-towns Insolvency Act, section 52 (2) (c). The argument addressed to us hardly glances at the effect of the letter of lien.

On the other hand it is urged that the railway receipt has, by statute, been assimilated for this purpose to a bill of lading; alternatively, has been treated by the custom of merchants in Madras as equivalent to a document passing possession of the goods by delivery of the document itself. It is also urged that, in the circumstances here present, granted that the bank is to be deemed the true owner of these goods for the purpose of section 52, they have not so acted as to make the insolvent the reputed owner. No argument has been addressed to us dealing with the consequences flowing from the fact that these goods are the subject-matter of letters of lien.

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As to custom, this is a question of fact, and as there was some evidence on which the learned Judge could find as he did, his finding cannot be disturbed.

The most difficult question is as to the consequences which in law flow, in India, from the endorsement and delivery, by way of security for a loan, of a railway receipt. If, for this purpose, a railway receipt constructively passes possession, then it is not contested that the insolvent pledged his goods; if, on the other hand, the railway receipt passes the title to receive goods *in futuro* on presentation of the railway receipt and a pledge of document of title does not (save in the case of bills of lading) operate as a pledge of the goods, then it is conceded there was no pledge of the goods. This still leaves outstanding the question whether there was a pledge of the railway receipts and if so what effect in law that has. Issue I, it is to be observed, relates to the transfer, the delivery and the pledging of railway receipts and mentions nothing about goods.

The material statutory provisions are as follows:—

By section 137 of the Transfer of Property Act a railway receipt is declared to be included in the expression “mercantile document of title to goods”. That section is part of a chapter which relates, and the section relates, to contracts, and accordingly by section 4 of the Transfer of Property Act it is made part of the Indian Contract Act.

By section 178 of the Indian Contract Act applicable (it has since been substantially amended so as to be brought in line with the English Factors Act and Sale of Goods Act) it is provided that (the words that create difficulty are italicised)

“a person who is in possession of any goods, or of any bill of lading . . . order for delivery, or any other document of title to goods, may make a valid *pledge* of such goods, or documents: provided that the pawnee acts in good

faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly.

Provided also that such goods or documents *have not been obtained from their lawful owner*, or from any person in lawful custody of them, by means of an offence or fraud.”

It is to be observed that this provision occurs in that part of the Contract Act which is headed “Bailments of Pledges” and that by section 172 “the *bailment of goods*” as security for payment of a debt or performance of a promise is called “pledge”.

So in the part which by transposition of terms is purporting to deal with bailments of goods (whatever that may be) we have a provision which speaks of “a valid bailment of goods, of such goods or documents”.

This, of course, is an impossible reading. The question is: (1) Is the expression “may make a valid pledge of such goods or documents” to be construed without reference to section 172; or (2) are the words “of such goods or documents” to be deleted as redundant; or (3) should the expression be read as follows: “may make a valid pledge by the pledging of such goods or documents”? If the last alternative be chosen, then a pledge of the described documents has the same effect as pledging goods, because “a valid pledge” means “a valid bailment of goods”. If the second alternative be chosen, one is left in doubt how one may make the valid pledge, but one would have to assume the addition of the words “by pledging such goods or documents” and so arrive at the same meaning as in the third alternative. If the first alternative be chosen one has to consider what the effect is of pledging a document as distinct from pledging goods.

Next, what is meant by “person”?

This term can hardly be restricted to “mercantile agent”. Can it in view of the words italicised in the

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proviso be restricted to mean "a person other than the owner"?

In construing this difficult Act I think it is well to bear in mind the so-called golden rule for the interpretations of statutes. It is thus stated in Maxwell, sixth edn. at page 4:

"In construing statutes the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to absurdity, or some repugnancy or inconsistency with the rest of the (statute)."

Thus Lord WENSLEYDALE in *Grey and others v. Pearson*(1) and Lord ELLENBOROUGH in *Doe v. Jessop*(2) described it as "a rule of common sense as strong as can be". Lord CRANWORTH in *Gundry v. Pinnier*(3) called it the cardinal rule and JERVIS C.J. in *Mattison v. Hart and another*(4) described it as the golden rule. Applying that rule to section 178 one asks first: Does the phrase "person not in possession of goods" include (giving the words their ordinary meaning) the owner of the goods not in possession of goods? The answer is: It does. Next, does that result in repugnancy or inconsistency with the rest of the instrument? Looking at section 103, where the owner is expressly mentioned as a person having power to pledge (i.e., make a bailment of goods) by pledging documents of title, the answer is that it does not. Looking at section 108 one sees a difference but neither a repugnancy nor an inconsistency. On the contrary the Legislature when enacting the provisions of section 108 expressly excludes the owner from rights "X" (relating to sale); when enacting section 178 includes the owner in the class having rights "Y" (relating to pledge). That is not inconsistent or repugnant. The argument founded on a supposed

(1) (1857) 6 H.L.C. 61, 106.

(2) (1810) 12 East 288, 293; 104 E.R. 113.

(3) (1852) 1 De G.M. & G. 502.

(4) (1854) 14 O.B. 357.

carelessness must be rejected; as must that founded on the supposition that India must necessarily follow, at a respectful distance, England in its legislative advances. Even if the result of the construction were absurd that is no reason to depart from clear and unequivocal language capable of only one meaning; see Maxwell at page 6 *op. cit.* The words in the proviso assist neither construction. They are neutral. Whether "person" includes owner or not, it clearly includes persons who are not owners and accordingly provision has to be made for them, and some classes of such persons have to be excluded. The provisos describe such excluded classes. The proviso relates, it should be observed, to pledges of goods as well as to pledges of documents.

The duty of a Court is not to draft laws so that they may be just or reasonable or consonant to accepted principle. Its duty is to expound the laws as they stand giving to all words used the meaning they have either according to common usage or, if defined, according to the meaning given therein in the Act in question or in the Interpretation Act. It is of course in the last degree unfortunate that an Act should be drafted and then that definitions should be added which result in most curious results but, however curious the results, a Judge must give effect to them. The Legislature must use the pruning knife if it is to be used at all.

In deference to the argument addressed to us based upon other parts of the same Act and the state of the law as it stood when this Act of 1872 was passed, those arguments are now examined.

If exception 1 of section 108 is referred to, it will be seen that, when dealing with the contract of sale, persons in possession of these documents of title may give a better title than they have. Here the Act says when any person is, by consent of the owner, in possession, etc. It

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is urged that as in section 108 the inclusion of the words "by consent of the owner" excludes the owner from the class covered by the word "person" so in section 178 it was the intention of the Legislature to exclude "owner" from the term "person". I know, however, of no such rule of construction. It presupposes carelessness on the part of the Legislature. The fact that owner is thus excluded from "person" in section 108 suggests that it was not intended to exclude him in section 178; otherwise what could be easier than to use the same language in both cases? Where one finds words included in one section and excluded in another, one must assume either carelessness or intention and unless the latter results in an impossible position (and who is to say this position is impossible?) the Legislature must be assumed to be using its language intentionally.

Then there is section 103. This speaks of the assigning of a "bill of lading or other instrument of title to any goods by the buyer by way of pledge". In such a case, the unpaid vendor cannot stop except on satisfying the pledgee. Unless one is to use the word "pledge" here in one sense and in section 172 in another, this section means that one may make a bailment of goods by pledging instruments of title. In *Ramdas Vithaldas v. S. Ameerchand & Co.*(1) the Judicial Committee treated the effect of this section read with section 102 as enabling a pledge of the goods to be effected by pledging not only bills of lading (which in English Law operate, unlike all other documents of title, to pass constructive possession of goods) but also "instruments of title". Their Lordships also held that "instruments of title" and "documents of title" are terms having, for the purpose of this Act, similar meanings. For similar reasons, it may

be concluded that the "mercantile documents of title" referred to in section 137 of the Transfer of Property Act are documents which are included in the wider expression "documents of title" and that "documents of title" or "instruments of title" include railway receipts.

Now if under the provisions of section 103 the pledging of a railway receipt effects a pledging of the goods, is it not desirable so to construe section 178, if the rules of construction so permit, as to enable that section to be so read as to provide also for the pledging of goods by the pledging of documents of title? Otherwise, of course, very curious results flow. In this case, this results; if here the unpaid vendor of the goods had exercised his power to stop, a power which arises on insolvency by section 99, he could have defeated the Official Assignee but he would have had to pay off the bank; but if he does not exercise this power then (because section 178 and not section 103 applies, and we are for the sake of the analysis assuming a different effect of pledging documents under section 178 from that which flows as from section 103) the pledge is only of the document, the goods are not pledged, the possession of the goods, as distinct from the documents, does not pass, and the Official Assignee can claim as against the bank. This appears to result in the impossible position that the bank's position is entirely altered according as to whether an independent third party does or does not exercise a power against the Official Assignee, improving if he does exercise the power and declining if he does not.

This difficulty immediately disappears if one choose the third alternative reading of section 178 above referred to. As no other reading appears necessarily to follow from the language used, this reading appears to be the one most consonant to the other provisions of the Act.

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At Common Law a pledge of goods could only be effected by parting with the possession actually or constructively of the goods. By the Law Merchant, bills of lading but no other documents of title were treated as equivalent for this purpose to goods. The transfer of a delivery order operated only as a token of authority to take possession and not as a transfer of possession; see *M' Ewan v. Smith*(1). This position was altered by the Factors Act which eventually enabled a restricted class of agents, but not the principal, to pledge goods by pledging documents of title to goods. This entirely changed the effect of a pledge of a document of title when, but only when, the pledgor was a mercantile agent. The law in England did not reach even this stage until the Factors Act of 1877. The Indian Contract Act, on the other hand, was passed in 1872 and the law previously applicable was that enacted by the Indian Factors Act of 1844, the provisions of which are textually the same as the English Factors Act of 1842. This gave to the owner no such power to pledge goods by pledging documents. Therefore an owner cannot pledge goods by pledging documents unless delivery of the documents operates as constructive possession of the goods and this is so only in the case of bills of lading. That appears to be the argument based on the history of this legislation.

Thus if the word "person" includes "owner" and if the section is read as above construed, it results in this; that in 1872 the Indian Legislature went far beyond the position arrived at in England even to-day, for it made pledges of documents the same as pledges of goods not only when the document was pledged by a "mercantile agent" but where it was pledged by anybody (subject to the provisos) including the owner.

(1) (1849) 2 H.L.C. 309.

Although this may seem improbable, it is not impossible and whether "person" does or does not include owner it certainly includes a wider class than the class of mercantile agents so that some extension of the English position on any reading must be involved. This being so, no reason is seen for giving to a word which appears to be unambiguous a meaning other than its ordinary meaning. That "person" in such a collocation includes "owner" *prima facie* appears to be clear.

But there is, in my opinion, a conclusive consideration to be derived from section 103. This section, as the Judicial Committee in the above-cited case have held, enables goods to be pledged by pledging documents of title. But the pledgor there referred to is left in no doubt. It is the buyer of the goods. That is to say, the owner may under section 103 pledge goods by pledging documents. Why then is it necessary to do violence to the use of words by excluding him from the class of persons who may pledge goods by pledging documents when one is considering section 178?

If, as is urged by the Advocate-General, section 178 relates to (a) the pledging of goods and (b) the pledging of documents, then as also urged by him no provision such as is contained in section 3 of the English Factors Act is contained in the Indian Contract Act and so a pledge of a document of title has no other effect than pledging the document. For the reasons above assigned, I do not think that section 178 should be so construed, i.e., it should not be construed so as to distinguish between a pledge of goods and a pledge of documents. It is purporting to deal with pledges and pledges are defined as bailments of goods.

I am therefore of the opinion that here there was a pledge of railway receipts and such pledge had the effect of pledging the goods. Alternatively, if I am wrong in regarding a pledge of a railway receipt as a

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pledge of the goods, there was in my opinion a good pledge of a railway receipt as a document and the effect of that was to give to the pledgees as against either the insolvent or the Official Assignee the rights to receive from the carrier those goods. There being no notice, assuming the alternative opinion is the correct one, had the Port Trust parted with actual possession to a third party, or had a third party lawfully seized the goods as in the Scotch case of *Inglis v. Robertson*(1) it might be that owing to the bank's failure to notify the person having custody of the existence of the pledge the bank would have no remedy either against the carrier or the person obtaining possession. No such question however here arises, in my opinion.

It is necessary before parting with this branch of the case to advert to the practice of the Port Trust of delivering against indemnity bonds to persons without production of the railway receipts. This power is said to be derived from section 57 of the Railways Act. It is said that such a power shows that a railway receipt is not a document of title capable of passing possession when pledged. I do not think so. The effect of so delivering is that the Port Trust if held liable have their remedy over against the person giving the indemnity. That is to say, they have a right, derived from the indemnity bond, to claim to be indemnified. Indemnity only arises where the person to be indemnified suffers a loss. The loss arises because such person is made liable. Having been made liable and having suffered loss, the carrier proceeds on the indemnity bond. If the person giving it is insolvent, that is the carrier's misfortune.

Further the fact that it was considered necessary to give this statutory right to the carrier to refuse delivery suggests that apart from such statutory

(1) [1898] A.C. 616.

power he would have been bound to deliver and this appears to be so when one regards a railway receipt as a document of title passing constructive possession (as a bill of lading) or a document of title giving the right to receive (as a delivery order).

The next question that arises is; assuming that there was a pledge of the goods and that accordingly constructive possession had passed to the bank, were the goods in the order and disposition of the bankrupt?

The material dates and facts are as follows:—The goods in question were despatched in various parcels from various places between 13th January and 4th February; the act of bankruptcy occurred upon the 7th February. At that date some of the goods were on rail, some were in the Port Trust's inside godown, i.e., freight charges had not been paid and the carrier was either carrying them or holding them in warehouse pending delivery. Such warehouse was the railway goods-shed or godown. The dates on which the various parcels arrived at the Port Trust godowns are shown at page 41 of the documents. In the case of items Nos. 7, 10, 12, 13, 14, 16, 17, 18, 23, 24 and 25 the goods had arrived on or before the 7th February. In all the other cases, the goods arrived on or after 7th February, i.e., were in transit at the time of the act of bankruptcy.

The learned trial Judge has expressed the opinion that in the circumstances here present the goods were in the order and disposition of the insolvents with the bank's consent. He adds: "It has always been held that the absence of notice by the true owner of his title to the bailee is evidence of such consent."

Now, of course, the reputed ownership clause is generally resorted to where the possession is in the insolvent and the ownership in a third person. Here the custody is in a carrier, the constructive possession

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is in the bank, and the ownership in the insolvent. "True owner" for the purpose of section 52 can have a very special meaning and can include a person having a lien, or an equitable charge, as well as a person having the legal title. But is the section applicable where, as here, not only are the documents of title transferred but the insolvent has given a letter declaring that the goods are deposited with the bank by way of security and where the goods are not in any place or warehouse over which the insolvent has control but in a carrier's railway waggon or goods-shed?

A case which in my opinion is similar to this came before the Courts in England in 1905. In that case, *In re Young, Hamilton & Co., Carter, Ex parte*(1) (and on appeal at page 772), the bank advanced moneys to traders for the purchase, preparation and shipment of goods to the East. The course of business was for the traders to send the goods to bleachers who bleached them and sent them to packers to be packed for shipment. The bank was handed bleachers' receipts. Prior to the act of bankruptcy the bank gave notice to the bleachers and to traders claiming the goods. Here no notice was given to the Port Trust. Whether that makes all the difference on this point I shall consider. The first question was whether the letter of lien amounted to a bill of sale. No such question arises here.

The next question was, assuming the letter of lien was not void, were the goods in the actual possession of the bleachers in the order and disposition of the bankrupts as being held by their bailees (the bleachers) with the consent of the "true owner" (the bank as persons having a charge created by the letter of lien)? BIGHAM J. at pages 389 and 390 observes:

"It was said that the goods were in the order and disposition of the bankrupts at the commencement of the

(1) [1905] 2 K.B. 331, 389, 390.

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bankruptcy. That is a question of fact, and there can be no doubt as to the answer to be given to it. The goods were no doubt the goods of the bank in the sense that they had a charge on them; but the bank never consented to the goods being in the order and disposition of the bankrupts in their trade or business, and certainly did not do so under such circumstances that the bankrupts became the reputed owners of the goods."

In re Watson & Co. Atkin Brothers, Ex parte(1) was followed. That case decided, what I believe has never since been doubted, that whether the clause applies depends upon the circumstances of the case and whether those circumstances necessarily lead to the inference of ownership. The inference of ownership must, not might, arise. See at pages 756 and 757.

On appeal in *In re Hamilton Young & Co., Carter, Ex parte*(2), at page 788, VAUGHAN WILLIAMS L.J. does not put the matter on the ground of notice at all, and with respect, I think, for a very good reason. He considers the documents, the letter of lien and the bleachers' receipts. He points out that the goods as from the moment of the giving of the letters of lien (not from the date of the notice) were subject to a good lien on the part of the bank. Coupled with the receipts he came to the conclusion (though I find page 788 somewhat difficult to follow unless there is a misprint) that the bank had possession and control. See as to this, COZENS HARDY L.J. at page 790. The test there applied at page 785 and at page 790 was, "Would the bank have been entitled to an injunction restraining the traders if the traders had attempted to take the goods out of the control of the bank by dealing with them for a purpose other than that contemplated, viz., preparing, packing and shipping?"

The answer being yes, it followed that the bank had control.

(1) [1904] 2 K.B. 753, 756, 757.

(2) [1905] 2 K.B. 72.

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The question, there, was of course whether the letter of lien coupled with the bleachers' certificate were documents "used in the ordinary course of business as proof of the possession or control of goods" within the meaning of the Bills of Sales Act. But if that is so, how can it be said that in the circumstances here present, with a pledge and a letter of lien, with the goods on rail or in a carrier's warehouse, that the goods were in either the possession, order or disposition of the insolvent? And even if that were so, what is the evidence that it was with the consent of the true owner unless consent is to be assumed necessarily to follow from absence of notice to the carrier of the assignment of railway receipt or of the granting of letter of lien? In my opinion the appellants here are in the same case as the plaintiffs in *C. Simeons & Co. v. Durand's Trustee*(1). They did not by their conduct in any way induce a belief that these goods were in the possession, order or disposition of the bankrupt under such circumstances that he was the reputed owner thereof. I do not apprehend that the learned trial Judge made a finding of fact to the contrary but rather that he arrived at his conclusion because the bank had not notified the Port Trust that the bank held the railway receipts and that "it had always been held" that absence of notice proved consent to the goods being in the order or disposition of the bankrupt as reputed owner. This appears to be a finding of law and with great respect I think it goes too far. Absence of notice is one circumstance. It is a circumstance that might make all the difference if, apart from notice, the possession remains in the insolvent, but here whether one regards the pledge or the lien, possession had constructively passed to the bank. It might make a difference if the order or disposition

(1) [1928] 2 K.B. 66.

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remained in the insolvent; if, without the railway receipt, he could demand delivery of these goods. Section 57 of the Railways Act gives a right to the carrier; it gives no right to the consignee. Without these railway receipts, had the carrier so chosen, the consignee was powerless to touch the goods. Whether or not delivery under general indemnity bonds is authorized by section 57, there is no evidence that the bank either knew of such practice in general or that C.K.N. was on the general indemnity list. The bank had no reason to imagine that delivery would be made to any one in the absence of the railway receipts. The previous course of business had been, so far as the bank knew, that delivery was made on railway receipt to any outside godown bearing the bank's name. If a *bona fide* person had demanded these goods from the Port Trust and the Port Trust, not having notice of any other claims, had delivered without production of the railway receipt, then the absence of notice would probably be a matter of great importance when considering the liability of the Port Trust or the title as against the bank of the person to whom delivery had been made, but I cannot think it concludes the question as to whether the goods are in the possession, order or disposition of the insolvent by the consent of the true owner under such circumstances that he is the reputed owner thereof.

Again, the absence of notice might be a critical matter in a contest between a pledgee or a lienor and the Official Assignee where the pledge or lien to be made effective required a third party in custody of the goods to alter his position from that of a bailee possessing on behalf of the insolvent to that of a bailee possessing on behalf of the pledgee or lienor because, until that change in possession had occurred, the pledge

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or lien might be deemed imperfect. Where, however, as here, the pledges of the documents are as though they were pledges of goods, the pledge is perfect and there is constructive transfer of possession from the pledgor to the pledgee apart from notice. And even though I may be wrong in attributing this effect to the pledging of a document of title and such a pledge of a document of title does not operate as constructive possession of the goods, yet in this case one cannot ignore in this connexion the letter of lien. In my view, as between the insolvent and the bank, as from the moment any good letter of lien was completed and handed to the bank, from that moment the bank is to be deemed in any contest between the bank and C.K.N. or C.K.N.'s representative in title as having possession of the goods, the subject-matter of the letter of lien. Were it otherwise, one would not be giving effect to the plain words of the letter which are to the effect that the goods in question are deposited with the bank by way of security. It is true that they are not deposited actually upon the bank's premises but I think the clear intention of the parties is that as from that moment those particular goods are to be deemed to be held by either the insolvent or any bailee from the insolvent not for the insolvent but for the bank and the insolvent's possession or the possession of a bailee from the insolvent is to be deemed in any contest between the bank and the insolvent or his representative in interest as the possession of the bank. It might well be that the absence of notice of this arrangement come to between the bank and the insolvent would enable a third party who has in the absence of such notice altered his position for the worse to raise a plea of estoppel based on the absence of such notice. It might well be that a bailee who in the eye of the law would be deemed a bailee for

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the insolvent would be able to defend himself against a claim founded in a wrongful delivery to a person other than the bank on the ground that the bank had not notified him of that lien. In all such contests as these, absence of notice might be critical but I do not think that absence of notice to the carrier in itself renders the conclusion inevitable that the goods were in the order or disposition of the insolvent as reputed owner with the consent of the true owner. I think any member of the public finding that the documents of title to receive these goods were not with the insolvent would arrive at the conclusion that the goods were not in his order and disposition. I am clearly of the opinion that they would not be compelled to come to the conclusion that they were in the insolvent's order and disposition simply because on enquiry of the carrier the carrier informed them that no notice of any assignment or other dealing with the railway receipts had been received. Very different considerations would arise if the circumstances were that the goods had been delivered to outside godowns whence the insolvent could remove them without the railway receipt. In such a case notice to the warehouse-keeper might in some circumstances, I think, be necessary to prevent the goods being in the order and disposition. That however is a question to be decided when it arises. It does not, in my opinion, arise in this case.

In my view accordingly the appeal succeeds with costs here and below.

BEASLEY C.J.—I agree

Attorneys for appellants: *King and Partridge.*

Attorneys for respondent: *Moresby and Thomas.*

G.R.

APPELLATE CIVIL.

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

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MATTA VENKATA REDDI AND THERE OTHERS (JUDGMENT-
DEBTOR, PURCHASER AND NIL—PETITIONER AND NIL),
RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXI, r. 2—Adjustment of decree—Promise by judgment-debtor to do something at future date—Acceptance by decree-holder of, as immediate adjustment in satisfaction of decree—Legal adjustment of decree if.

A transaction which extinguishes a decree as such in whole or in part is an adjustment of the decree within the meaning of rule 2 of Order XXI of the Code of Civil Procedure.

A promise to do something in future is legal consideration, and there is no legal impediment in the way of a decree-holder accepting a mere promise that the judgment-debtor will do something at some future date as a legal and immediate adjustment in satisfaction of his decree. Where the decree-holder accepts such a promise, there is a new contract amounting to a legal adjustment of the decree on the basis of which the judgment-debtor is entitled to apply to the Court to enter up satisfaction of the decree.

Lachman Das v. Baba Ramnath Kalikamlwala, (1921) I.L.R. 44 All. 258, explained.

Ramakrishna Kadirvelusami v. Eastern Development Corporation, Ltd., London, (1917) 43 I.C. 537, distinguished.

Muthu Vaithilinga Mudaliar v. Subbaraya Chettiar, (1930) M.W.N. 137, considered.

APPEAL against the order of the District Court of Kistna at Masulipatam in Appeal Suit No. 60 of 1927, preferred against the order of the Court of the Principal

* Appeal against Appellate Order No. 13 of 1928.

Subordinate Judge of Bezwada in Execution Application No. 2198 of 1926 in Execution Petition No. 53 of 1926 in Original Suit No. 24 of 1922.

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G. Lakshman for appellant.

Government Pleader (P. Venkataramana Rao) for respondents.

JUDGMENT.

REILLY J.—In Original Suit No. 24 of 1922 on the file of the Subordinate Judge of Bezwada the appellant before us obtained a decree for sale on a mortgage against one Venkata Reddi for something over Rs. 3,500. In Original Suit No. 25 of 1922 he obtained a decree on another mortgage deed executed in his favour by Venkata Reddi's brother, Rami Reddi. In Original Suit No. 25 of 1922 he brought the property to sale and himself purchased it for Rs. 1,750 less than what was due on Rami Reddi's mortgage, and for the Rs. 1,750 he obtained a personal decree against Rami Reddi. After that he brought the property covered by Venkata Reddi's mortgage to sale in execution. That sale was held on the 25th October 1926. A man called Saiyed Murtuza Sahib was the successful bidder at that auction, and he deposited in Court on that occasion Rs. 952-8-0 as 25 per cent of the amount of his bid. A few days after that sale it is admitted that the decree-holder, Venkata Reddi, and Saiyed Murtuza entered into an agreement, which is embodied in Exhibit A, dated the 3rd November 1926. According to Exhibit A the land put up for sale in execution of the decree against Venkata Reddi, for which Saiyed Murtuza had been the successful bidder, was to be transferred to the decree-holder with the crops on it except the crops on two fields, and the amount paid by Saiyed Murtuza into Court, Rs. 952-8-0, was to be got

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back from the Court and paid to the decree-holder; to part of the land which the decree-holder had bought in execution of his decree against Rami Reddi, Venkata Reddi was to give up a claim which it appears he had put forward; four other items of land were to be transferred to Venkata Reddi or, if he chose, in respect of one of them Rs. 1,000 was to be paid to the decree-holder; the other consideration on his side was the amount of his decree against Venkata Reddi and the balance of his decree against Rami Reddi. It will be seen that the agreement embodied in Exhibit A covers several matters beyond the scope of the decree against Venkata Reddi in Original Suit No. 24 of 1922. On the 9th November 1926 Venkata Reddi presented a petition to the Subordinate Judge, in which he alleged that the decree against him in Original Suit No. 24 of 1922 had been adjusted in this way to the satisfaction of the decree-holder and prayed that satisfaction of the decree might be recorded. That petition it appears was posted to the 4th December 1926, and on that day it was dismissed for default, because, as Venkata Reddi explains, though he was in the Court-house, he was not in the Court-room when he was called. On that very day he put in another petition, Execution Application No. 2198 of 1926, to the same effect, and that is the petition with which we are concerned. The decree-holder, when he got notice of that petition, alleged that he had been induced by fraud to execute Exhibit A, Venkata Reddi's object being to keep possession of the land concerned in Original Suit No. 24 of 1922 and to reap the crops upon it. He denied that there had been any satisfaction of his decree, and he contended that at any rate Exhibit A was not admissible in evidence because it was unregistered. The Subordinate Judge after taking evidence found that there had been no

adjustment of the decree in Original Suit No. 24 of 1922 and also found that Exhibit A was inadmissible in evidence because it was unregistered. Venkata Reddi preferred an appeal to the District Judge, who found that Exhibit A was admissible in evidence in consequence of the amendment of the law by Act II of 1927 and also found as a fact that there had been adjustment of the decree to the satisfaction of the decree-holder, and therefore he ordered satisfaction to be recorded. Against that decision the decree-holder has brought the present second appeal.

It is not denied, and it has not been denied at any stage, that the decree-holder executed Exhibit A on the date it bears. The allegation that he was induced to do so by fraud has not been pressed before us nor apparently before the District Judge. It is not denied that it was intended by the decree-holder, when he executed Exhibit A, that the terms of Exhibit A should supersede the decree which he had obtained against Venkata Reddi. It is contended however that on the date of Exhibit A there was no actual adjustment in satisfaction of the decree, but that Exhibit A was only an agreement that the decree-holder would be satisfied, if certain things were done in accordance with Exhibit A, which have not been done. And it is contended for the decree-holder before us that there can be no adjustment of a decree within the meaning of rule 2 of Order XXI of the Code by a mere promise to do something when that promise has not yet been carried out. In this case it is admitted that the promises contained in Exhibit A have not been carried out. It has been found that the land has not been put into the possession of the decree-holder, as was intended. It has been found, and it is admitted, that the documents of transfer, which were to be executed by the parties, have not been executed.

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Therefore it is represented that all we have in this case on the side of Venkata Reddi is a promise to do things, which he has not done, and that it is contended could not be accepted by the decree-holder as an adjustment within the rule. The words of rule 2 of Order XXI are:

"Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder . . ."

Mr. Lakshman for the decree-holder contends in effect that a decree can be adjusted to the satisfaction of the decree-holder by something being paid by the judgment-debtor to the decree-holder or by some property being transferred by the judgment-debtor to the decree-holder or, as I understand him, by something being given up by the judgment-debtor to the decree-holder, but that an adjustment cannot be made to the satisfaction of the decree-holder within the meaning of the rule by a mere promise that the judgment-debtor will do something at some future date, though that promise may be a legally enforceable contract. That seems to me to be an exceedingly difficult proposition to establish. It is admitted that a decree-holder who has a decree for the payment of Rs. 1,000 in his favour may accept in adjustment of that decree to his satisfaction an immediate payment of Rs. 100; but it is contended that a decree-holder in whose favour there is a decree for the payment of Rs. 100 cannot legally accept in adjustment of that decree to his satisfaction a promise that the judgment-debtor will pay to him at some future date Rs. 1,000. The argument must go so far as that he cannot accept such a promise in whatever form it is either in a bond with sureties or in a mortgage deed. I cannot see any basis for such a contention, but it is alleged that there is authority to be found

in *Lachman Das v. Baba Ramnath Kalikamliwala*(1). The headnote of that case in the report perhaps seems to suggest something of that sort. There it is stated:

"The judgment-debtor filed a petition alleging that the question of the execution of the decree had been settled out of Court by means of an agreement between the parties, under which the judgment-debtor was to make a present payment to the decree-holder and further to convey to him certain items of immovable property. The decree-holder denied that any such adjustment as alleged had taken place, and the judgment-debtor was unable to show that any part of the alleged agreement, which, according to his own account of it, was to be performed by him, had been so performed. Held that such an agreement as alleged could not be set up by the judgment-debtor under rule 2 of Order XXI of the Code of Civil Procedure as a bar to execution."

But I think when we examine that case with care, we shall find that it is no authority for any proposition so wide. In Piggot J.'s judgment at page 252 will be found a statement

"that agreement was to the effect that the decree-holder would accept satisfaction of his decree in a modified form and would abandon the execution proceedings which were being taken, as soon as four specified conditions had been fulfilled by the judgment-debtor",

and it was found that none of them had been fulfilled. That was not a case therefore where it was found that the decree-holder had agreed to accept as immediate satisfaction a promise that something would be done in future by the judgment-debtor but a case where the decree-holder had agreed that, if at some future date the judgment-debtor did something, then he at that future date would accept satisfaction. The case so examined is no authority for the proposition that a promise to do something at a future date cannot be accepted by a decree-holder as a legal and immediate

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adjustment in satisfaction of his decree. WALSH J. in that case made a quotation with approval which appears to come from *Ramakrishna Kadirvelusami v. Eastern Development Corporation, Ltd., London(1)*, a decision of SESHAGIRI AYYAR and BAKEWELL JJ. in this Court. The words of that judgment on which WALSH J. relied—I quote them as they actually appear in *Ramakrishna Kadirvelusami v. Eastern Development Corporation, Ltd., London(1)*, not with the slight variation with which WALSH J. quoted them—are:

“An inchoate contract would not give the judgment-debtor a right to plead against execution that this contract should be completed and that he should then be permitted to plead that the transferee was only his *alias* and has no *locus standi*.”

That an inchoate agreement cannot be pleaded as an adjustment within the meaning of rule 2 of Order XXI I should have thought need hardly be stated, as it certainly cannot be disputed. I understand an inchoate agreement to be an agreement not yet concluded by the parties, an agreement which is still in the stage of negotiation; and it is perfectly obvious that a judgment-debtor cannot claim that the decree against him has been adjusted to the satisfaction of the decree-holder while the matter is still in the stage of negotiation. However Mr. Lakshmanan also relies upon a decision of CURGENVEN J. in *Muthu Vaithilinga Mudaliar v. Subbaraya Chettiar(2)*. There the learned Judge understands *Ramakrishna Kadirvelusami v. Eastern Development Corporation, Ltd., London(1)* to mean that,

“so long as an agreement remains executory and has not been fully executed, it cannot amount to an adjustment under Order XXI, rule 2.”

I think that is not what was laid down in *Ramakrishna Kadirvelusami v. Eastern Development Corpo-*

ration, Ltd., London(1), and, although the learned Judge adopted that as a proposition of law, with great respect I cannot agree with it.

In *Lodd Govindass v. Ramdoss(2)* SADASIVA AYYAR J. said that

“an adjustment referred to in Order XXI, rule 2, of the Code of Civil Procedure is a transaction which extinguishes the decree as such in whole or in part”.

Why should not a decree be extinguished by a new contract that the judgment-debtor will do something in future, if the decree-holder is willing to take such a contract instead of the decree which he has in his hand? A promise to do something in future is legal consideration, and, if a decree-holder thinks it is to his advantage instead of using his decree, the weapon which he has in his hand, to accept in its stead a promise that the judgment-debtor will do something in future, or if quite apart from any question of advantage, he chooses to accept such a promise, what is there in law to prevent him from doing so? And why should not that be a legal adjustment? It may well be said that, if a judgment-debtor comes into Court and alleges that the decree-holder has given up the weapon available in his hand, the decree which he can execute, and in its place has accepted a promise that the judgment-debtor will do something at a future date and if that is disputed, then the evidence that the decree-holder has done such a thing should be carefully scrutinized. It may very well be a foolish thing for a decree-holder to do; it may be unreasonably generous; it may be likely to give him a great deal of trouble in future. But, if it is proved that he has done so, that he has accepted a new contract in place of his decree as immediate satisfaction of that decree at the time of his acceptance, there is no legal

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impediment in the way of his doing so and there is no justification for the Court refusing to find on proper evidence that he has done so.

In the present case the learned District Judge has differed from the Subordinate Judge and has found as a fact that the decree-holder on the 3rd November 1926, when he executed Exhibit A, did accept as an immediate adjustment and satisfaction of his decree a new contract between the parties. Unfortunately the learned District Judge has not discussed the evidence on this subject. The part of his judgment which deals with this matter is far briefer than it should have been; but he has arrived at a finding of fact, and, if we examine the evidence in this case, I do not think we can say that there is no evidence to support that finding of fact. In the circumstances it appears that there were some reasons for the decree-holder entering into a new arrangement with Venkata Reddi instead of pressing on with the execution of his decree.

[His Lordship then discussed the evidence on the point and proceeded as follows:—]

There is a finding of fact, with evidence to support it, that he did accept an immediate adjustment in satisfaction of his decree on that date. With that finding there is no sufficient reason for us to interfere, and, that being so, in my opinion this appeal fails and should be dismissed with costs.

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ANANTAKRISHNA AYYAR J.—In execution of a decree for money obtained on a mortgage executed by the defendant in favour of the plaintiff the mortgaged properties were advertised for sale. A third person bid at the auction and deposited the necessary 25 per cent of the purchase money. At that stage, the decree-holder-mortgagee, the mortgagor—the defendant—and the auction purchaser,—all the three together entered

into an agreement, and, relying on that agreement, the defendant-mortgagor filed an application in the lower Court for recording adjustment of the decree alleging that the adjustment was evidenced by that agreement. The mortgagee contended that there was no consideration for that agreement, and also raised other pleas. The learned Subordinate Judge found that the agreement between the parties had not been carried out by the defendant, and for that reason dismissed the application for recording satisfaction. On appeal, the learned District Judge came to the conclusion that there was a completed contract between the parties, and directed that the adjustment should be recorded. The decree-holder-mortgagee has preferred the present civil miscellaneous second appeal.

I may state at once that I must accept in this second appeal the finding of the learned District Judge that there was a completed contract between the parties. The wording of the agreement entered into by the parties lends support to the finding, as also the evidence of the decree-holder given in these proceedings. The main argument advanced by the learned Advocate for the decree-holder-appellant before us was that the defendant-mortgagor had not really carried out what he had to perform under the terms of this agreement, and that the agreement only evidenced a promise on his part to do something in future and that such a promise would not be a ground for the Court recording satisfaction of the decree. I find myself unable to accept that contention. On the analogy of section 62 of the Indian Contract Act, "if the parties to a contract agree to substitute a new contract for the old, the contract originally entered into between the parties need not be performed." If the decree-holder entered into a fresh contract with the judgment-debtor with

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RAMANARASU reference to the satisfaction of the decree, then, unless there be anything illegal with reference to the new contract, the new contract would surely be a ground for the judgment-debtor applying to the Court to enter up satisfaction of the decree. No doubt if the substance of the new contract be to vary the terms of the decree, or to allow execution in a manner different from that directed by the decree, then, having regard to the provisions of section 47, etc., of the Code of Civil Procedure and the scheme of the Code as pointed out by the Privy Council in *Kotagiri Venkata Subbamma Rao v. Vellanki Venkatarama Rao*(1), the Court would not accept that new contract as a satisfaction of the decree when in essence it purports to vary the terms of the decree with a view to enable the parties to carry out in execution something contrary to the provisions of the decree. But, when the new contract is not open to any such objection and is otherwise legal, I fail to understand why the same should not be a ground for the defendant asking the Court to enter up satisfaction of the decree. No doubt if the contract between the parties was that it is only the actual carrying out of the terms of the contract that should be the consideration for entering satisfaction of the decree, then, unless those terms be carried out, it may not be open to the judgment-debtor to apply to the Court successfully to have the adjustment recorded. But the contention that, even though there was a completed contract between the parties, yet, if the contract be to do something in future and was really of an executory nature, then the defendant could not apply to record the adjustment is, I think, not supported by any provision of law to which our attention was drawn in

(1) (1900) I L.R. 24 Mad. 1 (P.C.).

this case. What the exact meaning of the expression "adjustment of a decree" as used in Order XXI, rule 2, is, has been explained by SADASIVA AYYAR J. in *Lodd Govindass v. Ramdoss*(1). The learned Judge there stated that

"any transaction which extinguishes the decree as such in whole or in part and results in a satisfaction of the whole or a portion of the decree in respect of the particular relief or reliefs granted by the decree"

is an adjustment of the decree. That opinion of the learned Judge was followed in *Azizur Rahman Choudhury v. Aliraja Choudhury*(2). The learned Advocate for the appellant, however, argued that the decision in *Lachman Das v. Baba Ramnath Kalikamlivala*(3) is against this view. As my learned brother has pointed out in his judgment just now delivered, the headnote to the report of that case would seem to go beyond the terms of the judgment. That would seem to be a case where the decree-holder agreed to accept particular acts if actually done by the judgment-debtor as satisfaction of the decree which he was entitled to execute. It is the actual performance of particular acts mentioned by the judgment-debtor that was considered to be the real gist of the contract between the parties, which would enable the judgment-debtor to apply for recording satisfaction of the decree. Having regard to the terms of the judgment of PIGGOT J., I am not obsessed by that decision. On the other hand, as I have already remarked, it is open to the parties to provide for particular acts being done, or particular terms being actually carried out, as the consideration for the decree-holder agreeing to enter satisfaction of the decree. The decision in *Ramakrishna Kadirvelusami v. Eastern Development Corporation, Ltd., London*(4) only lays

(1) (1915) M.W.N. 225.

(3) (1921) I.L.R. 44 All. 258.

(2) (1927) 32 C.W.N. 434.

(4) (1917) 43 I.C. 537.

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down, as far as I am able to understand it, that inchoate agreements could not be taken to be the basis for recording satisfaction of the decree. Unless there be a completed contract between the parties, an inchoate agreement would only be a step, or steps, in the negotiations between the parties which may ultimately end or not in a completed contract. No doubt there are certain observations in *Muthu Vaithilinga Mudaliar v. Subbaraya Chettiar*(1) where the learned Judge, CURGENVEN J., observes that a mere promise may not be enough to enable the judgment-debtor to apply under Order XXI, rule 2; but the learned Judge in his judgment also uses the words "inchoate agreement" and, as I already remarked, there is nothing in law which would enable the judgment-debtor to reply upon an inchoate agreement for recording satisfaction. If, on the other hand, the learned Judge really meant to lay down that a promise, though supported by consideration and otherwise legal, would never be the basis for an application under Order XXI, rule 2, unless the same be actually carried out, then, with all respect, I find myself unable to agree. In the case before me, the terms of the agreement, coupled with the evidence given by the decree-holder himself, make it reasonably clear that the intention of the parties as evidenced by the agreement was that the same should be taken as an adjustment of the decree, since certain things contemplated by the parties could not be carried out except on this view of the agreement. If there is any doubt upon this point as to the meaning of the agreement, the decree-holder's evidence makes the matter reasonably clear. No doubt the agreement entered into by the decree-holder in this case seems to be rather of a complicated nature; and

(1) (1930) M.W.N. 137.

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whether he was well-advised in having entered into this contract in this particular case is not for me to say. There is no finding that there was any fraud practised upon him, or that he was induced to sign the document without knowing the contents of the same. His deposition given in these proceedings makes it clear that he knew what the arrangement was. Being therefore of opinion that in this case there was a legal contract supported by consideration—a completed contract entered into between all the parties interested—by which the decree in question should be taken as satisfied and that the rights of the parties should be worked out on the basis of the new agreement (which further contains a default clause, by which the parties are, in case of any default, allowed recourse to civil or criminal proceedings as may be deemed proper), I think that the defendant was entitled to have the relief prayed for by him in his application under rule 2 of Order XXI granted to him. I agree with my learned brother that this appeal should be dismissed with costs.

A.S.V.

APPELLATE CIVIL.

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

1932,
March 21.

PALURI VENKATASIVA RAO (PLAINTIFF), PETITIONER,

v.

BODAPATI VENKATANARASIMHA SATYA-
NARAYANAMURTY AND SEVEN OTHERS (DEFENDANTS),
RESPONDENTS.*

Court Fees Act (VII of 1870 as amended by Madras Act V of 1922), ss. 7 (iv) (c); 7 (iv-A) and 7 (v)—Applicability of—Decree obtained by defendant against plaintiff—Setting aside of, and recovery of property covered by decree—Suit for—Court-fee payable on plaint in—Proviso to sec. 7 (iv)—Effect of.

The plaintiff sued for a declaration that a previous decree obtained against him by the first defendant was void, for setting aside that decree, if necessary, and for the recovery of the immovable property covered by the decree. The plaint alleged that the previous suit was brought by the first defendant, while the plaintiff was a minor, that in that suit he was not properly represented because the guardian appointed for him had an interest adverse to his in the suit and that moreover the guardian colluded with the first defendant in that suit and enabled him by suppression of facts fraudulently to obtain a decree.

Held that the suit was not a suit for a declaration and consequential relief falling within section 7 (iv) (c), but was a suit for cancellation of the previous decree falling within section 7 (iv-A), of the Court Fees Act.

Per REILLY J.—The recovery of the property concerned being the main relief claimed in the plaint, the suit comes also within section 7 (v) of the Court Fees Act.

The intention of the Legislature is that a suit in which the plaintiff prays for a decree that a previous decree obtained against him is of no effect against him on account of fraud in

* Civil Revision Petition No. 1955 of 1931.

obtaining it and that, so far as he is concerned, that decree is wiped out, however, he may choose to word his prayer, comes within the new section 7 (iv-A), if the previous decree was one for recovery of money or property having a money value.

The proviso to section 7 (iv) does not lay down that, if the relief sought properly falls within any other provision requiring a higher valuation or charge, that higher charge is not to be made. It merely introduces a downward limit, below which reliefs sought in respect of immovable property consequential on declaratory decrees shall not be valued.

If there is a special provision in the Court Fees Act which applies to a particular case, that special provision must be applied rather than some general classification, in which the suit may also be included, which may be more favourable to the plaintiff.

Per ANANTAKRISHNA AYYAR J.—The proviso to section 7 (iv) does not operate with reference to section 7 (iv-A).

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 Court of the Subordinate Judge of Narsapur, dated 18th November 1931 and made in Original Suit No. 11 of 1930.

P. Somasundaram for petitioner.

V. Suryanarayana for first respondent.

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

JUDGMENT.

REILLY J.—This civil revision petition comes before us on the question what is the proper court-fee to be paid on the plaint in the suit concerned. In the plaint the prayers are for a declaration that the decree obtained by defendant 1 in Original Suit No. 302 of 1916 on the file of the Additional District Munsif of Bhimavaram is void, for setting aside that decree, if necessary, and for recovery of the property covered by the decree. The plaintiff valued the suit for court-fee as if it came under

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clause (c) of section 7 (iv) of the Court Fees Act. The defendants objected and said that in its nature this was a suit for the cancellation of the previous decree and that therefore the plaintiff should pay court-fee under section 7 (iv-A) of the Act, i.e. under the new sub-section introduced into the Act for this Presidency in 1922. The Subordinate Judge after hearing arguments on the question came to the conclusion that the suit was really one for possession of the property and therefore that it came under section 7 (v) of the Act and ordered court-fee to be paid accordingly. It happens that the same court-fee is due whether the suit comes under section 7 (v) as one for possession or under section 7 (iv-A) as one for cancellation of the previous decree.

The plaint alleges that the previous suit, Original Suit No. 302 of 1916, was brought by defendant 1, while the plaintiff was a minor, for the recovery of some property, which the plaintiff had inherited through his adoptive father, and that in that suit he was not properly represented because the guardian appointed for him, his adoptive mother, had an interest adverse to his in the suit and moreover she colluded with the present defendant 1 in that suit and enabled him by suppression of facts fraudulently to obtain a decree. Now I do not think it can be seriously disputed, and in the end it has not been disputed before us, that, if this suit is properly described as a suit for setting aside the previous decree, then it is a suit for cancellation of that decree as the word "cancellation" is used in the new section 7 (iv-A) of the Court Fees Act. That sub-section speaks of the cancellation of a decree or other document, which appears to mean the same thing as setting aside a decree or other document. It may be noticed that in article 91 of the Limitation Act "to set aside" and "to cancel" a document are used as synonymous terms. But what

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is contended for the plaintiff here is that his suit is not a suit for setting aside the previous decree, but that it is a suit for a declaration with consequential relief and therefore he can avoid the additional charge which would fall upon him if his suit were a suit for cancellation of a previous decree for the recovery of property under section 7 (iv-A) of the Act. Mr. Somasundaram for the plaintiff relies upon the decision of RAMESAM J. in *Balakrishna Nair v. Vishnu Nambudiri*(1). There the learned Judge said that

"in the case of decrees the proper prayer is not to set the decrees aside but for a declaration that the decrees are not binding on the plaintiffs"; and he added that therefore the suit before him was one for a declaration and consequential relief, and he allowed it to be valued for court-fee under section 7 (iv) (c). On the facts of that case, as the learned Judge understood them, it appears that some minor plaintiffs were suing for a declaration that a decree obtained against their karnavan and against other minor members of their family was not binding on them and for recovery of property sold in execution of that decree. If that was the nature of the suit, then I do not think it can be disputed that the learned Judge was right in saying that the plaintiffs there had to pray for no more than a declaration that the previous decree was not binding on them and the consequential relief of recovery and that it was not appropriate for them to ask that that decree, to which they had not been parties, should be set aside. But undoubtedly the learned Judge's remarks, which I have quoted, are much wider than that, and they imply that in his opinion in this country a plaintiff who wishes to impeach a previous decree, to which he has been a

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party, as not binding on him should pray, not that the decree be set aside, but for a declaration that it is not binding on him. In one sense it may be that it is more appropriate for a plaintiff, who wishes to impeach a decree obtained against him in a previous suit as having been obtained by fraud, to ask for a declaration that that decree is not binding on him than that he should ask that the decree itself should be set aside. There may even seem to be some impropriety in going to an inferior Court, as in some such cases he must, and praying that that inferior Court should set aside the decree of a superior Court. I myself have been inclined to think that, as RAMESAM J. appears to have thought, it is more appropriate in such cases to word the prayer as one for a declaration that the previous decree is not binding on the plaintiff. But is that more than a question of mere propriety and seemliness? In such a second suit, if the plaintiff succeeds, is not the effect and essence of what he obtains exactly the same, whether it is called setting aside the previous decree or declaring that the previous decree is not binding on him? In either case the result of the second decree is that the first decree is no longer binding on him: it is no longer of any avail against him: so far as he is concerned, it is wiped out. If that is so, is it in any way incorrect to speak of setting aside the previous decree, whether that setting aside is done by a Court superior to that which made the first decree or co-ordinate or inferior? In this country the expression "to set aside a decree" as a description of a suit has been used in the Limitation Acts since 1859. That expression is well-known as the description of such suits in England. In *Flower v. Lloyd*(1) two of the Lords Justices explicitly point

(1) (1877) L.R. 6 Ch.D. 297.

out that, if a decree or a judgment is to be impeached for fraud, the proper way to do it is by an action for setting aside the decree or judgment. That I think it must be admitted is recognized as the ordinary and proper description of such a suit in England. In this country their Lordships of the Privy Council have spoken of a suit to get rid of a previous decree obtained against the plaintiff by fraud as a suit to set aside the previous decree in *Radha Raman Shaha v. Pran Nath Roy*(1) and *Khagendra Nath Mahata v. Pran Nath Roy*(2); and we find the expression "setting aside a decree" obtained by fraud as early as the judgment of PRACOCK C.J. in 1866 in *Nilmoney Bonick v. Poddo Lochun Chuckerbutty*(3). It may be noticed that, even when a suit is brought to set aside a previous decree and is so described by the plaintiff, if he succeeds, the relief which he obtains is not necessarily a decree in so many words setting aside the previous decree. As SRINIVASA AYYANGAR J. pointed out in *Arimachellam v. Sabapathy*(4), various reliefs may be given in such a suit appropriate to the circumstances of the case. In *Manohar Lal v. Jadunath Singh*(5) their Lordships of the Privy Council decided that in such a suit, when the result was that the previous decree was found not good against one of the parties to it but it was not necessary or proper to disturb it as against the other parties to it, the proper decree to make was that the previous decree was not binding on the particular plaintiff concerned, not that the previous decree should be set aside altogether. But, whether the prayer is that the previous decree should be set aside or that it should be declared not binding on the plaintiff in the

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(1) (1901) I.L.R. 28 Cal. 475 (P.C.). (2) (1902) I.L.R. 29 Cal. 395 (P.C.).
(3) (1866) 5 W.R. 20. (4) (1917) I.L.R. 41 Mad. 213.
(5) (1906) I.L.R. 28 All. 585 (P.C.).

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second suit, and whether the result of the second suit is that the whole decree is set aside or it is more appropriate in the particular circumstances to make a declaration merely that the previous decree is not binding upon the plaintiff in the second suit, the nature of the suit is really the same. The suit is to get rid of the effect of the first decree, so far as the plaintiff in the second suit is concerned, and you cannot alter the nature of the suit or its eventual effect by wording the plaint as one for a declaration that the previous decree is not binding on the plaintiff in the second suit or by praying that the previous decree be set aside.

Now, before the amendment of the Court Fees Act so far as this Presidency is concerned by the introduction of the new sub-section 7 (iv-A), it cannot be denied that, even if such a suit as we are discussing had been described by the plaintiff as one for setting aside a previous decree, for court-fee purposes it would have to be treated as a suit for a declaratory decree. There was nowhere else in the Court Fees Act for such a suit to come in. If consequential relief was prayed for, then it came under section 7 (iv) (c); if consequential relief was not prayed for, then it came under article 17 of Schedule II. There was no separate provision in the Court Fees Act for a suit to set aside or cancel a previous decree. But now the Legislature has introduced the new sub-section 7 (iv-A). That covers certain suits for cancellation of decrees and, as I think we must interpret it, certain suits for setting aside decrees, however described. It covers suits for cancellation of decrees for money or other property having a money value. Thus suits for cancellation of, or setting aside, such previous decrees, which before would have had to come in as suits for declaratory decrees, now have their special place in the Act. The

result is that for suits for cancellation of, or setting aside, decrees which have been made for the recovery of money or for the recovery of property having a money value you have to pay court-fee under the new sub-section. If they come within that description, they are out out of the general class in which they previously came—suits for declaratory decrees—and have their special place. We are only concerned in this case with the question of court-fee. Whether verbally it is more strictly appropriate to call such suits suits for declarations that the previous decrees are not binding on the plaintiffs is purely academic so far as court-fees are concerned. The intention of the Legislature appears to be that a suit in which the plaintiff prays for a decree that a previous decree obtained against him is of no effect against him on account of fraud in obtaining it and that, so far as he is concerned, that decree is wiped out, however he may choose to word his prayer, comes within the new section 7 (iv-A), if the previous decree was one for recovery of money or property having a money value. That appears to me to cover the present case.

But it has been pointed out to us by Mr. Suryanarayana for first defendant and also on behalf of the Government Pleader that in this case the plaintiff has prayed for recovery of possession and, that being so, quite apart from all other discussion, his suit comes under section 7 (v), as the Subordinate Judge has found. In *Chinnammal v. Madarsa Rowther*(1) it was said by BODDAM and BHASHYAM AYYANGAR JJ. that, if in a suit for a declaration and consequential relief the relief prayed for came within other provisions of the Court Fees Act than section 7 (iv) (c), for instance

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(1) (1903) I.L.R. 27 Mad. 480.

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within section 7 (v), then the mode of valuing the relief was regulated by the Legislature itself in those provisions. As Mr. Somasundaram has urged, that remark was made *obiter*. But in *Rajagopala v. Vijayaraghavalu*(1) we have a case very similar to the present one. There the plaintiffs sued for a declaration that a certain decree had no legal effect against them and for possession of some property which had been sold in execution of that decree. *OLDFIELD* and *TYABJI JJ.* pointed out that the District Judge in that case was clearly mistaken in his statement that section 7 (iv) (c) regulated the valuation of the whole suit, since part of the relief claimed related to possession, which had to be dealt with in accordance with section 7 (v) notwithstanding that a declaration also was asked for, and they referred to *Chinnammal v. Madarsa Rowther*(2) as an authority for that view. Then in *Arunachalam Chetty v. Rangasawmy Pillai*(3) the question of the court-fee to be paid on a declaratory suit came before a Full Bench, and the very first sentence of the opinion of the Full Bench is :

"A suit in which the plaintiff in terms prays for a declaratory decree and consequential relief *prima facie* comes within clause 4, sub-clause (c) of section 7 of the Court Fees Act but, if at the same time it comes within any of the other classes of suits specified in the section, it must be treated as a suit of that description and dealt with accordingly."

That is a very important statement set out at the very opening of the opinion of the Full Bench. Mr. Somasundaram very properly admits that, if a suit is really and in essence a suit for possession, the plaintiff cannot avoid paying court-fee as for possession merely by praying for some unnecessary or entirely incidental

(1) (1914) I.L.R. 38 Mad. 1184.

(2) (1903) I.L.R. 27 Mad. 480.

(3) (1914) I.L.R. 38 Mad. 922 (F.B.).

declaration in his plaint. But he contends that the principle set out by the Full Bench, which I have quoted, is not now applicable. Apart from the authority of the Full Bench in that case, which I have quoted, it seems to me clear that in such an Act as the Court Fees Act, if there is a special provision which applies to a particular case, then that special provision must be applied by us rather than some general classification, in which the suit may also be included, which may be more favourable to the plaintiff. But Mr. Somasundaram has suggested that another amendment to the Court Fees Act has been made for this Presidency, which affects the question, i.e. the proviso introduced in 1922 towards the end of section 7 (iv), which runs :

"Provided that in suits coming under sub-clause (c), in cases where the relief sought is with reference to any immovable property, such valuation shall not be less than half the value of the immovable property calculated in the manner provided for by paragraph (v) of this section."

Now a suit for possession is undoubtedly a suit with reference to immovable property; but what the new proviso says is, not that all suits with reference to immovable property shall be charged in the way set out in it, but that suits in which relief is sought with reference to immovable property shall be valued at not less than half the value of the immovable property calculated in the way set out. That does not appear to me to lay down that, if the relief sought properly falls within any other provision requiring a higher valuation or charge, that higher charge is not to be made. The proviso merely introduces a downward limit, below which reliefs sought in respect of immovable property consequential on declaratory decrees shall not be valued. In my opinion therefore, as the plaintiff in

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this case sues for the recovery of the property concerned and that cannot be regarded as a mere incident to his plaint but is the main relief, the Subordinate Judge was right in saying that the suit came within section 7 (v) of the Court Fees Act. So far as I can see, the suit falls within both section 7 (v) and section 7 (iv-A). As the valuation and the court-fee charged are the same under either of those sub-sections, that has no effect upon the court-fee to be paid by the plaintiff.

In my opinion the scale of valuation adopted by the learned Subordinate Judge is right, and this petition should be dismissed with costs—one set—to be divided between first defendant and the Government Pleader. For payment of the additional court-fee five weeks from this date may be allowed.

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ANANTAKRISHNA AYYAR J.—I agree. I referred this civil revision petition for the decision of a Bench having regard to the observations of RAMESAM J. in *Balakrishna Nair v. Vishnu Nambudiri*(1).

The plaintiff instituted Original Suit No. 11 of 1930 on the file of the Sub-Court of Narsapur for a declaration that a decree obtained against him, while he was a minor represented by his mother as guardian, by the present first defendant in Original Suit No. 302 of 1916 on the file of the Additional District Munsif of Bhimavaram, was not valid and binding upon him and for recovery of possession of the properties covered by that decree. The first defendant, who is the only contesting defendant in the suit (the other defendants being, it is said, tenants under the plaintiff at the time of the prior suit, Original Suit No. 302 of 1916), raised an objection as regards the amount of court-fee payable

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on the plaint in the present case. The plaintiff's contention was that the suit was one for a declaratory decree, that it came under section 7 (iv) (c) of the Court Fees Act and that he was not bound to value the relief at anything more than one-half of the value of the properties covered by the plaint. On the side of the first defendant it was contended that the suit must be taken to be substantially a suit to set aside a former decree and that the court-fee payable on such a plaint is that provided for by section 7 (iv-A) of the Court Fees Act. The learned Subordinate Judge held that the suit should be treated as one for possession of the properties and should be valued under section 7 (v) of the Court Fees Act, and accordingly directed the plaintiff to pay the deficient court-fee on that basis. The plaintiff has presented this civil revision petition against the order passed by the Subordinate Judge.

The first question that arises for consideration in this case is whether the suit is one for a declaration, or whether it is a suit for cancellation of a decree. Prior to the enactment of the Madras Court Fees Act V of 1922, a suit for setting aside or cancelling a decree was held to come under section 7 (iv) (c) for purposes of court-fee. In 1922 the Legislature added a new clause—section 7 (iv-A)—which enacts that in a suit for cancellation of a decree for money or other property having a money value or other document securing money or other property having such value, the valuation should be according to the value of the subject-matter of the suit, and such value shall be, if the whole decree is sought to be cancelled, the amount or value of the property for which the decree was passed, and, if a portion of the decree is sought to be cancelled, such part of the amount or value of the property. It should be noticed that the words used in the new clause are

(1) (1930) M.W.N. 509.

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“in a suit for cancellation of a decree for money or other property”. I may clear the ground by stating that the learned Advocate for the petitioner—Mr. Soma-sundaram—did not contend before us that there was any difference between “cancellation of a decree” and “setting aside a decree”, and I think the learned Advocate was right. But his main contention was that in such a suit the relief in substance is a declaration that the prior decree is not binding upon the plaintiff; and he argued that the plaint in such a suit should be treated as one asking for a declaratory decree and coming under section 7 (iv) (c). He also relied on the observations of RAMESAM J. in *Balakrishna Nair v. Vishnu Nambudiri*(1). In that case the learned Judge observed at page 510 as follows:—

“Here all that is sought to be got over are decrees and in the case of decrees the proper prayer is not to set aside decrees but one for a declaration that the decrees are not binding on the plaintiffs. The suit is therefore for a declaration and consequential relief.”

It was argued by the learned Advocate for the petitioner that that judgment is authority for the proposition that a plaint, whose substantial object is that the decree in the prior suit should be held to be not binding upon the plaintiff any longer, should be taken to be only a suit for a declaratory decree, and that there is really no such thing as a suit to cancel or set aside a decree; and the learned Advocate strongly relied upon the observations of RAMESAM J. in the case cited. The basis for that argument is that the law knows of no such thing as a suit to set aside a decree; but such a contention is, in my opinion, entirely unsustainable. It has been held in England from very early times, and also in India, that a suit to set aside a decree

(1) (1930) M.W.N. 509.

or judgment is a well-known form of action; see the question discussed with reference to the law in England in Story's Equity Pleadings, paragraphs 421, 426 and 428. The question is also discussed in Seton on Decrees, Vol. I, page 189, Daniel's Chancery Practice, Vol. II, page 1332, and Halsbury's Laws of England, Vol. XIII, page 352, paragraph 490. See also *Flower v. Lloyd*(1). It is there stated that in cases where it is alleged that a previous decree was obtained by fraud as against the present plaintiff the suit is one to set aside the prior decree and judgment. The same language has been used in decisions in India also. The decision in *Abdul Huq Chowdhury v. Abdul Hafez*(2) traces such practice in India to 1866, *Nilmoney Bonick v. Poddoo Lochun Chuckerbutty*(3), where a judgment of PEACOCK C.J. is reported. See also *Krishnabhupati v. Ramamurti*(4) and *Arunachellam v. Sabapathy*(5). In fact the Privy Council decisions in *Radha Raman Shaha v. Pran Nath Roy*(6) and *Khagendra Nath Mahata v. Pran Nath Roy*(7) make the matter absolutely clear so far as the Indian Courts are concerned. In *Jalandhar Thakur v. Jharula Das*(8) the Privy Council refer to a suit brought to set aside a decree. A suit to set aside a decree being then a form of action well known to both the English Law and the Indian Law, it cannot be said that the Legislature in enacting section 7 (iv-A) of the Court Fees Act in 1922 provided for court-fee payable in respect of a class of suits not known to law.

Then it was argued that in substance such a suit must be treated for court-fee purposes as a suit for a declaratory decree, and RAMESAM J.'s decision above

(1) (1877) L.R. 6 Ch.D. 297.

(3) (1886) 5 W.R. 20.

(5) (1917) I.L.R. 41 Mad. 213.

(2) (1910) 11 O.L.J. 638.

(4) (1892) I.L.R. 16 Mad. 198.

(6) (1901) I.L.R. 28 Cal. 475 (P.C.).

(7) (1902) I.L.R. 29 Cal. 395 (P.C.).
(8) (1914) I.L.R. 42 Cal. 244, 249 (P.C.).

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referred to was pressed upon us. Reading the judgment of the learned Judge, I understand the learned Judge to have made this observation with reference to a suit where the relief prayed for was that a decree obtained in a prior suit was not binding upon the plaintiffs. In the words of the learned Judge,

"the suit was brought by certain minor members of a Malabar tarwad for a declaration that a certain decree against the karnavan and other minor members represented by the karnavan as the guardian was not binding upon them."

Reading the judgment of the learned Judge, I understand that the plaintiffs in the subsequent suit were not parties to the prior decree. The use of the word "other" by the learned Judge is rather significant. If the present plaintiff was not a party to the prior suit and decree, then it could not, in my opinion, be contended that the second suit filed by him should be one to set aside or cancel the prior decree. In the case of a document executed by a person, if he wants any relief with reference to it on the ground of fraud, he must have the document cancelled or set aside before he can claim such relief, being himself a party to the same; but a person who is not party to any such document is not bound to have it set aside or cancelled. In fact not being a party to the document, he cannot have it "set aside". All that he can pray for is a declaration that he is not affected in any way by that document. Similarly in the case of a decree. A decree will have full force and binding effect between the parties to the same until it is set aside by the persons who were parties to the same; but persons who were not parties to the decree can only sue for a declaration in respect of their rights in relation to the decree. In this view, so far as the present case is concerned, the decision of the learned Judge in *Balakrishna Nair v. Vishnu Nambudiri*(1) does

(1) (1930) M.W.N. 509.

not, in my opinion, support the contention of the present petitioner.

Prior to the enactment of Madras Act V of 1922 a suit to set aside a decree was held to come under section 7 (iv) (c) of the Court Fees Act. The Legislature subsequently enacted section 7 (iv-A) which specifically provides for suits for cancellation of decrees for money or property having a money value. *Prima facie*, after 1922 a suit to cancel a decree (which is the same as a suit to set aside a decree) would no longer be governed by section 7 (iv) (c). Otherwise no meaning can be attached to the new provision contained in section 7 (iv-A). The learned Advocate for the petitioner argued that the form of relief that would be awarded to a plaintiff in such cases would be by way of a declaration, and in support of that argument he drew our attention to the decision of the Privy Council in *Manohar Lal v. Jadunath Singh*(1). In my view, that is not the proper way of looking into the question. Whenever a party to a prior decree wants relief to the effect that he is no longer bound by the prior decree he should ask for the setting aside of the prior decree. What further and other connected appropriate reliefs would be granted by the Court in such cases as the result of the setting aside of the prior decree would depend upon the circumstances of each case. In a case where others also were parties to the prior decree and they in no way claimed rights under the present plaintiff, then, *prima facie*, the prior decree would be declared to be not binding so far as the present plaintiff is concerned if the Court found that the prior decree was vitiated by fraud and accordingly proposed to give the plaintiff the appropriate relief in the circumstances. In other cases, injunction might

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(1) (1908) I.L.R. 28 All. 585 (P.O.).

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be properly granted to the plaintiff as a result of setting aside the prior decree. The question relating to further reliefs to be granted in a suit which is substantially one to set aside the decree has been considered by K. SRINIVASA AYYANGAR J. in *Arunachellam v. Sabapathy*(1) and also by MOOKERJEE J. in *Abdul Huq Chowdhury v. Abdul Hafez*(2). But that does not in any way alter the real nature of the plaint in the subsequent suit. I am not therefore inclined to agree with the learned Advocate's contention that the present suit should be treated only as a suit for a declaratory decree and as coming under section 7 (iv) (c).

Then it was argued that the lower Court was not right in having directed the plaintiff to pay court-fee calculated in accordance with the provision of section 7 (v). There are two answers to this contention. In the first place, so far as the case before us is concerned, it does not really matter whether the case comes under section 7 (iv-A) or section 7 (v). The valuation would be the same in either case and the amount of court-fee payable also would be the same. Even where the suit was one for a declaratory decree and also for possession, it has been held by this Court that suits for possession having been specifically provided for by section 7 (v), the suit has to be valued accordingly and court-fee paid under the provisions of that sub-section. This question has been discussed in *Chinnammal v. Madarsa Rowther*(3) and *Rajugopala v. Vijayaraghavalu*(4), and is practically concluded by the first paragraph of the opinion given by the Full Bench in *Arunachalam Chetty v. Rangasawmy Pillai*(5). But the learned Advocate also argued that there was an amendment made in 1922 by

(1) (1917) I.L.R. 41 Mad. 213, 218.

(2) (1910) 11 C.L.J. 636, 638.

(3) (1903) I.L.R. 27 Mad. 480.

(4) (1914) I.L.R. 38 Mad. 1184.

(5) (1914) I.L.R. 38 Mad. 922 (F.B.).

which a proviso was added to section 7 (iv) to the following effect:—

"Provided that in suits coming under sub-clause (c), where the relief sought is with reference to any immovable property, such valuation shall not be less than half the value of the immovable property calculated in the manner provided for by paragraph (v) of this section";

and he suggested that, as the present is a case where relief with reference to immovable property is asked for, the plaintiff is entitled to value the relief in accordance with that proviso. I have already held that this case does not come under section 7 (iv) (c). Section 7 (iv-A) is quite different from section 7 (iv) either (a), (b) or (c), and the proviso has been added only to section 7 (iv). Section 7 (iv-A) is a quite different provision of law, and the proviso does not operate with reference to section 7 (iv-A). That is one answer to the contention of the learned Advocate. The second answer is, that section 7 (iv-A) enacts that a suit in such cases should be valued when the whole decree is sought to be cancelled according to the amount or value of the property for which the decree was passed. The section does not describe the mode in which that value is to be calculated. But that would only bring in a doubt as to whether the value should be the market-value or the statutory value fixed by the Court Fees Act. In *Venkatanarasimha Raju v. Chandrayya*(1) KRISHNAN and ONGERS JJ. held that in such cases it is not the market-value but the statutory value that has to be adopted where statutory value has been fixed by the Act. Adopting that value so far as this case is concerned the plaintiff is not in any way a gainer.

Lastly, it was argued that the construction that I am disposed to adopt would lead to hardship. I am

(1) (1926) 53 M.L.J. 267.

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not able to see exactly how. In a suit to set aside a decree and to recover possession of property, so far as possession of the property is concerned, the plaintiff has to be valued at ten or fifteen times the revenue, as provided for by section 7 (v). That would in many cases be very much less than the amount or the market-value of the property comprised in the decree, and I am not able to see how exactly the plaintiff would ordinarily be put to greater difficulty or pecuniary loss by reason of the view I am inclined to take. But, whatever it is, the point is reasonably clear to my mind; we have got to give effect to the new provision of law section 7 (iv-A)—enacted in 1922; and, unless we are able to say that the law knows of no such thing as a suit to cancel or set aside a decree, we have got to give effect to that provision of law. Suits to set aside decrees have been known to the Indian Limitation Act from 1859 to 1908 (see article 95 of the present Limitation Act and the corresponding provisions in the earlier Acts). For the reasons I have given, the suit before us should be taken to be one to cancel or set aside a decree and as such would come under section 7 (iv-A) of the Court Fees Act, and the lower Court was right in this case in directing the plaintiff to pay the deficient court-fee fixed by it, and that is the correct court-fee payable—whether the present case comes under section 7 (v) or 7 (iv-A) of the Court Fees Act.

I agree that this civil revision petition should be dismissed with costs.

A.S.V.

APPELLATE CRIMINAL.

Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Reilly.

KALLAM NARAYANA (FIRST ACCUSED), APPELLANT,

v.

KING-EMPEROR, RESPONDENT.*

1932,
April 25.

Indian Evidence Act (I of 1872), sec. 114—Presumption of murder under—Accused's possession of property of the murdered person—Knowledge of concealment of such property—Failure to give reasonable explanation of possession—Code of Criminal Procedure (Act V of 1898), sec. 162—Use of statements made under—For contradiction only in accordance with sec. 145 of the Indian Evidence Act.

Under section 114 of the Indian Evidence Act the Court is entitled, if it appears reasonable in all the circumstances of the case, to draw an inference that an accused person committed a murder or took part in its commission, from the facts that he is found in possession of property proved to have been in the possession of the murdered person at the time of the murder or is able to point out the place where such property is concealed and admits having concealed it there and that he fails to give any explanation of his possession of the property which can reasonably be accepted.

Rex v. Schama, [1915] 84 L.J. K.B. 396, and *The Emperor v. Sheikh Neamatulla*, (1913) 17 C.W.N. 1077, referred to.

Observations of WALLACE J. and SPENCER J. in *Sogaimuthu Padayachi v. King-Emperor*, (1925) I.L.R. 50 Mad. 274, considered.

Per REILLY J.—In making presumptions of fact or in drawing inferences of fact from evidence a Judge or jury must always have regard to all known facts of the case. Outside the sphere of presumptions of law no Court or Judge can usefully attempt to lay down by general ruling, or even to express a general opinion, what inferences may or may not be drawn by other Judges from other facts in other cases.

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When things, which were on a murdered person's body at the time when he was murdered, are traced to a person accused of the murder and he gives no explanation of his possession of them, those may be important facts for use in making an inference that he took part in the murder. It is not the law that the Judge or jury must be certain that no other explanation of the facts is possible before they find the accused guilty. If the accused person offers an explanation, then it is for the prosecution to show that that explanation is untrue.

Queen-Empress v. Sami, (1890) I.L.R. 13 Mad. 426, referred to.

Statements made by a witness to the police in the course of the investigation of a case can never be used to corroborate the witness's evidence; and, if the written record of what a prosecution witness has said to the police is to be used to contradict him under section 162 of the Code of Criminal Procedure, it must be proved and used in accordance with the provisions of section 145 of the Evidence Act.

APPEAL against the order of the Additional Sessions Judge of the Court of Session of the Guntur Division in Case No. 58 of the Calendar for 1931.

S. Vepa for appellant.

Parakat Govinda Menon for Public Prosecutor (*L. H. Bewes*) for the Crown.

Our. adv. vult.

JUDGMENT.

REILLY J.

REILLY J.—Accused 1 in this case, the appellant before us, a boy of 16, has been convicted of murdering Ambama, a girl of 12—14, at Amaravathi on 30th September 1931. Accused 2 in the case, who was charged with the same offence, was acquitted.

There is undisputed evidence that Ambama, who lived at Amaravathi with her mother, P.W. 1, was at her mother's house soon after dark on the evening of 30th September: she then went to the adjoining house, where P.W. 3 lives: about evening-mealtime she was

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missing: her mother and relations searched for her all night but did not find her: early the next morning her dead body was found in a ruined and deserted fort at Amaravathi: death had been due to strangulation, part of her sari having been tied tightly round her neck with four knots: there were 3 incised wounds, described by P.W. 10, the Sub-Assistant Surgeon, who examined the body, as "muscle-deep", one above the navel, one on the left side of her abdomen and one on the back of her left wrist: there were also indications that she had been raped: a pair of silver anklets, two pairs of gold-plated copper bangles and a gold bead necklace, worth in all Rs. 45—50, which Ambama had been wearing on the previous evening and was in the habit of wearing, were missing from the body. P.Ws. 2 and 4 have given some evidence against the appellant, which the learned Sessions Judge regards as quite untrustworthy and which it is not suggested for the Public Prosecutor we should treat as of any value. P.W. 5, a lamp-lighter, has given evidence that, while he was lighting lamps on the evening of 30th September, he saw Ambama going alone through the bazaar towards a temple, by which he appears to mean the temple close to the ruined fort, where her body was found next day. P.W. 3 says that about sunset on the evening of 30th September Ambama came to her house to play, as she used to do, and that, while they and others were playing, Ambama went away saying that the appellant was calling her.

The evidence against the appellant is that on the morning of 4th October, after he had been arrested, he said in the presence of the Inspector of Police, P.W. 7, the Sub-Inspector, P.W. 15, the Village Magistrate, P.W. 8, and P.W. 9, an Assistant Karnam, that he and accused 2 had hidden Ambama's ornaments in the fort

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and that he would show them: what he said was recorded in Exhibit B, which was signed by P.Ws. 8 and 9 and others: then they all went to the fort, and at a spot about 25 feet from the place where the body had been found the appellant removed some tiles and took out the earth, in which they had been buried, a pair of silver anklets and two pairs of gold-plated bangles, which have been identified as those Ambama had been wearing. The recovery of these things is recorded in a later part of Exhibit B, which is again signed by P.Ws. 8, 9 and others and at this place also by the Sub-Inspector. The evidence of what the appellant said and did on that occasion has not been recorded in the witnesses' depositions in the Sessions Court as fully and explicitly as it should have been. But what I have mentioned is the effect of their depositions and of Exhibit B. That the appellant said and did what I have mentioned is not now disputed; nor is it disputed that the anklets and bangles then produced by him, M.Os. 1 and 2, are the anklets and bangles which Ambama was wearing on the evening of 30th September. And of neither his production of the ornaments nor his statement that he and accused 2 hid them has the appellant ever offered any explanation. At the trial he merely denied them.

It has been contended for the appellant that evidence of his statement that he and accused 2 hid the ornaments in the fort is not admissible. But that part of his statement distinctly relates to the discovery of the ornaments and is admissible under section 27 of the Evidence Act—cf. *Queen-Empress v. Nānā*(1) and the opinions of all the Judges in *Sogaimuthu Padayachi v. King-Emperor*(2). What is much more

(1) (1889) I.L.R. 14 Bom. 260 (F.B.). (2) (1925) I.L.R. 50 Mad. 274.

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seriously contended is that the production of the ornaments by the appellant and his statement that he and accused 2 had hidden them provide no ground for inference that he murdered, or took part in the murder of, Ambama. It is suggested that from the appellant's possession and hiding of the ornaments no more serious inference should be drawn than that he stole the ornaments. Mr. Vepa for the appellant has relied on the opinion of WALLACE J. in *Sogaimuthu Padayachi v. King-Emperor*(1), with whom, when the difference between WALLACE J. and DEVADOSS J. was referred to him, SPENCER J. agreed. In that case there was evidence that the Pandarasannadhi of a mutt had been murdered and that some jewels, currency notes, etc. belonging to the murdered man or to his mutt were produced by the accused after making statements admissible under section 27 of the Evidence Act that they had buried them. The accused offered no explanation how they came to be in possession of the things; but WALLACE J. refused to draw an inference that they had taken part in the murder. I gather from the report that the things recovered were buried by the accused at a considerable distance from the mutt, where the murder was committed. It appears that none of the things was on the person of the murdered man at the time he was killed, that there was no evidence that they were in the mutt at the time of the murder, that there was no evidence that they were missing when the murder was discovered and that there was evidence that, after the murder was discovered and before the loss of these things was discovered, the jewel-room of the mutt, in which they had been kept, was raided by people of the crowd who came to

(1) (1925) I.L.R. 50 Mad. 274.

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the mutt after the murder was discovered. With respect it appears to me clear that WALLACE J. was right in that case in refusing to draw from the production of the jewels and notes by the accused and their admissions that they had buried them an inference that they had taken part in the murder of the Pandarasannadhi.

Mr. Vepa however relies, not on the actual decision in that case, but on passages in the judgments of WALLACE J. and SPENCER J. In WALLACE J.'s judgment he says :

"In such a case I am confident that neither law nor justice justifies the hanging of a man simply because he does not plead guilty to being a thief or a receiver of stolen property. The Court has to be satisfied, not merely that the thief could not have come into possession of the property unless murder has been committed, but also that he could not have come into possession of the property unless he himself has taken part in the murder or was privy to it."

SPENCER J. expressed agreement with the first of those sentences and also said :

"When the charge is that the accused committed murder or theft in a building or both, is it legitimate to presume that the accused are guilty of the more serious offence of murder because they are unable or unwilling to explain their possession of stolen property? I think the answer must be that, if there is other evidence to connect the accused with the death of the murdered man, a jury, or in this country a Judge, may find upon circumstantial evidence that he is the murderer. But, when the unexplained possession of the stolen property is the only circumstance appearing in the evidence against an accused charged with murder and theft, the accused cannot be convicted of murder unless the Court is satisfied that possession of the property could not have been transferred from the deceased to the accused except by the former being murdered."

With great respect these general statements do not appear to me to have been necessary for the disposal of the case in which they were made. But it must be

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remembered that the first sentence quoted from WALLACE J.'s judgment begins with the words "In such a case", meaning such as the one with which he was dealing; and I do not think it was fair to the learned Judge to quote the rest of the sentence, as SPENCER J. did, omitting those very important qualifying words. But with the greatest respect I do not understand why the sentence even with those qualifying words appears in the judgment. I do not understand why any reference to the nature of the punishment which may follow should be brought into a discussion of the inference of fact to be drawn from certain evidence. And, as for convicting a man of murder in such a case or in any case "simply because he does not plead guilty to being a thief or a receiver of stolen property," no one can seriously suppose that any such question ever arose. And the statement that

"the Court has to be satisfied not merely that the thief could not have come into possession of the property unless murder has been committed but also that he could not have come into possession of the property unless he himself has taken part in the murder or was privy to it",

whether intended to apply generally or only to the case with which the learned Judge was then dealing, was I venture to think a serious overstatement. When it is the duty of a Judge or a jury to draw from evidence a reasonable inference, it is not their duty to find that there was no conceivable possibility other than the conclusion which they reach. It is not possible for reasonable men to conduct the affairs of life or to make judicial decisions on questions of fact with mathematical certainty. And again with the greatest respect SPENCER J.'s remark as to what can be done "when the unexplained possession of stolen property is the only circumstance appearing against an accused charged with murder and theft" does not appear to

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me to be helpful apart from the fact that it is inconsistent with the latter part of the same sentence. We are here dealing with inferences of fact and presumptions of fact within the principle of section 114 of the Evidence Act. It is often instructive to observe what inference other Judges have thought proper to draw from certain evidence or what assumptions or presumptions of fact they have thought fit to make in certain circumstances. But outside the sphere of presumptions of law it appears to me a waste of words and effort for any Judge or any Court to attempt to lay down by general ruling, or even to express general opinions, what inferences may or may not be drawn by other Judges from other facts in other cases. That is a matter which ANANTAKRISHNA AYYAR J. and I had to discuss recently in *Sri Raja Bommadevara Chayadrumma v. Venkataswamy*(1). There is one general rule which must never be forgotten, namely, that in making presumptions of fact or in drawing inferences of fact from evidence a Judge or a jury must always have regard to all the known facts of the case. And that they must do because they are required to decide on all questions of fact as reasonable men. To attempt to isolate a particular fact or group of facts from surrounding circumstances and to discuss the logical inference may be useful mental exercise; but it appears to me wholly out of place in a judicial decision.

What are the facts proved in this case? The girl Ambama was murdered in the ruined and deserted fort at some time between lamp-lighting time on the evening of 30th September and the early morning of 1st October: she was also raped: ornaments of considerable value, which she habitually wore and which she was

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wearing on the evening of 30th September, were missing from her body when it was discovered the next morning, though there were then on the body some trinkets of small value: the appellant, as he admitted on 4th October, with accused 2 buried all the missing ornaments but one at a spot in the fort only a few yards from the place where the girl was murdered, and from that spot he produced those ornaments: he made that admission when he was under arrest for the murder of the girl to the officers who were investigating the murder: neither then nor at any other time has he given any explanation admissible in evidence of his connection with the ornaments. Of the surrounding circumstances we may infer from the evidence that Ambama might go about the town by herself without exciting surprise, that her mother, when she was missing, thought it possible that she had gone off to watch a theatrical performance, and that she went away from P.W. 3's house on the evening of 30th September in the middle of a game, saying that accused 1 was calling her, which did not excite any protest from P.W. 3. What is the reasonable inference to be drawn from the proved facts? It has been suggested that before it can properly be inferred from these facts that the appellant took part in the murder of Ambama all other possible explanations of his part in burying the ornaments must be shown to be untrue or very improbable and that the fact that he was at one time in possession of these ornaments shows at the utmost that he took part in stealing them: possession of stolen property it is urged may be evidence of theft but not of a more serious offence. These arguments I think involve confusion of thought. The evidence that an accused person was in possession of stolen property soon after it was stolen is most commonly of use in theft cases. But the possession

(1) (1931) 62 M.L.J. 511.

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by itself is never sufficient evidence that the possessor was the thief. In such cases it is the possession of the stolen property soon after the theft combined with the failure of the possessor to give any reasonable explanation of his possession which enables the Judge or jury to draw an inference that he was the thief, if after considering all the circumstances, so far as they are known, they think that inference reasonable. There may be many conceivable explanations why the accused person was in possession of stolen property. He might have been induced by the real thief innocently to take care of the stolen things; he might have been compelled to do so under a threat of violence; he might have seen the real thief drop them or he might have found them lying on the ground, and in either case he might have intended to misappropriate them or merely to keep them until he ascertained who was their owner; he might have himself stolen them from the original thief or have robbed or murdered the original thief in order to get possession of them. There may be a hundred possible explanations other than that he himself was the original thief. But it is not for the Judge or jury to invent or imagine such explanations. It is for the accused person to give his explanation, if he has one. If he gives no explanation, then it is for the Judge or jury as reasonable men to draw an inference from the proved facts after considering all the circumstances. And on the way to that inference they may raise such presumptions of fact as appear to them reasonable, presumptions which arise from their experience of the world and of life, the course of human conduct and human nature. Such presumptions they will often reach by unconscious reasoning, and they will be based not on facts proved by evidence in the case but on facts of general knowledge. In essence

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such presumptions also are inferences of fact. It is not the law that the Judge or jury must be certain that no other explanation of the facts is possible before they find the accused person guilty. But, if their inference is that he is guilty, it must be a reasonable inference reached with due regard to all the circumstances and with such care and assurance as a reasonable man would think necessary before he drew an important inference in his own most serious affairs, and all the facts proved must be clearly in their minds, including the very important fact that the accused person has offered no explanation of his possession of the stolen things. The Judge or jury must be satisfied that there is no reasonable doubt that the accused person was the thief, and in that sense they must be satisfied that the only explanation of the facts reasonably to be accepted is that he was the thief. It is not required that they should be satisfied that no other conceivable explanation is consistent with the facts. If the accused person offers a reasonable explanation then, as pointed out by the Court of Criminal Appeal in *Rex v. Schama*(1), it is for the prosecution to show that that explanation is untrue. But, if the accused offers no explanation, it is not for the Judge or jury to invent one. One of the facts before them, which it is their duty to take into account, is the fact that he has offered no explanation.

The possession of stolen things and the failure to explain that possession may be relevant and important facts in cases other than those of simple theft. When the theft has been committed in the course of, or in connection with, house-breaking, they may often be important facts for use in making an inference that

(1) [1915] 84 L.J. K.B. 396.

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the accused person took part in the house-breaking. And, when things, which were on a murdered person's body at the time when he was murdered, are traced to a person accused of the murder and he gives no explanation of his possession of them, those may be important facts for use in making an inference that he took part in the murder—cf. *Queen-Empress v. Sami*(1), *The Public Prosecutor v. Chirreddi Munayya*(2) and *The Emperor v. Sheikh Neamatullah*(3). In the present case it is possible to suggest many conceivable explanations how the appellant came to join with accused 2 in burying Ambama's ornaments. It is not inconceivable that they took the ornaments from her while she was alive and that some one else afterwards murdered her. It is not inconceivable that they found her lying dead and then removed her ornaments. It is not inconceivable that accused 2 murdered her and afterwards forced the appellant to assist him in burying the ornaments. It is possible to imagine many other explanations of what the appellant has admitted that he did. But it is not for us to invent those explanations. During all the time which has elapsed since the appellant made his admission on 4th October he has never offered any such explanation. We have no right, and the learned Sessions Judge had no right, to indulge in speculation. We must return to the question what in the circumstances is the reasonable inference from the facts proved, the murder of Ambama in the ruined and deserted fort, the removal of her valuable ornaments on the night of her murder, the burial of all but one of those ornaments in the fort a few yards from the scene of the murder, the appellant's production of those ornaments, his admission while he was under arrest for the murder of

(1) (1890) I.L.R. 13 Mad. 426.

(2) (1911) 21 M.L.J. 1071.

(3) (1913) 17 C.W.N. 1077.

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Ambama to the officers who he knew were investigating that murder that he and accused 2 had buried the ornaments there and his failure to offer any explanation why he did so. The learned Sessions Judge and three of the four assessors drew the inference that the appellant took part in the murder of Ambama. In my opinion that was a reasonable inference, which in the circumstances they were entitled to make. In my opinion there is no sufficient reason to doubt that that was the right inference to make.

Mr. Vepa has urged that this case is complicated by the fact that what the appellant admitted was that he and accused 2 buried the ornaments and that, even if the appellant took part in burying them, we are left in uncertainty whether he or accused 2 actually committed the murder. He urges also that, as the appellant is a boy of 16 and accused 2 is a young man of 23, it is more likely that accused 2 was the murderer than the appellant. He has invited our attention to *Public Prosecutor v. Venkatamma*(1), to show that, where there is a doubt which of two persons committed a murder, neither can be convicted of it. In that case two women, a mother and daughter, were charged with the murder of a little boy. There was evidence, which all the learned Judges accepted as sufficient, to prove that the boy was murdered in the house where both the women lived when no one but the women was there and therefore that the boy was murdered by one or other of the women or by both. There was also evidence that the two women joined in disposing of the body. On a difference of opinion between WALLER J. and KRISHNAN PANDALAI J., CUBGENVEN J. agreed with KRISHNAN PANDALAI J. that it was not proved that both the women took part in the murder, that one or other of

(1) (1932) I.L.R. 58 Mad. 63.

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them must have been guilty of murder, but it was not clear which, and that therefore both must be acquitted of murder, though both should be convicted of causing evidence to disappear. I do not think that case is of help to us. Their relation to each other might well induce either the mother or daughter to help the other in disposing of the body if the other had committed the murder. I gather from the report that only the daughter admitted taking any part in disposing of the body and she attributed the murder to her mother and denied having had anything to do with it, a denial which neither KRISHNAN PANDALAI J. nor CUGGENVEN J. was satisfied was untrue. In this case the position is quite different. The appellant has admitted that he and accused 2 buried Ambama's ornaments. He has offered no explanation why he joined accused 2 in doing so. He is of a different caste from accused 2, and no explanation can be inferred from any circumstance in the case why he should join accused 2 in burying the ornaments where they were found if he had not taken part in the murder. Mr. Vepa is right in laying stress on the difference in age between the two accused, from which it may reasonably be inferred that the appellant was not the leader. But it cannot be said that his statement that he acted with accused 2 in burying the ornaments in the absence of any further explanation leaves a reasonable doubt that accused 2 alone may have committed the murder and may afterwards have compelled or induced the appellant to assist him in the simple matter of burying the ornaments.

Mr. Vepa has raised one other contention for the appellant—that he was not properly examined by the Sessions Judge in accordance with the provisions of section 342 of the Code of Criminal Procedure. That section provides that, after the prosecution witnesses

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have been examined, the Judge shall question the accused generally on the case for the purpose of enabling him to explain any circumstances appearing in the evidence against him. Before the Committing Magistrate the appellant had merely said that he knew nothing about the murder. The Sessions Judge asked him whether the record of his statement before the Committing Magistrate was correct, which the appellant said it was, and apart from asking whether the appellant intended to examine defence witnesses the only other question put by the Sessions Judge was "Do you wish to say anything more now?" Mr. Vepa urges that it was incumbent on the Sessions Judge to draw the appellant's attention to his production of the ornaments and his admission that he had joined in burying them and to give him an opportunity of explaining those facts then if he wished to do so. I agree that the Sessions Judge might have put more explicit questions to the appellant. Indeed I think many Sessions Judges fail to carry out properly the duty imposed on them by section 342 of the Code, especially when the accused are undefended. But it is a very difficult duty and a duty which has to be performed with the greatest caution so that without the slightest flavour of cross-examination, without asking anything which may lead the accused to incriminate himself, the important points against him may be brought to his notice and he may have an opportunity of explaining them. The task is such a difficult one that, when the accused is represented by Counsel, it is often in his interest that the Judge should formally comply with the section by asking a general question and then leave the accused's Counsel to offer explanations on his behalf in the way most favourable and least dangerous to him. In the present case the appellant has nothing to complain of in this

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respect. He was represented by Counsel, who no doubt put forward the appellant's case in the manner which appeared to him best. And beside that, when the appellant was asked by the Sessions Judge whether he wished to say anything more than he had said before the Committing Magistrate, he took the opportunity to deny that he ever showed Ambama's ornaments to the police and that they were ever in his possession and added that he did not know who had given them to the police. It will be seen therefore that the appellant on that occasion gave the answer he wished to give to the question about the ornaments which Mr. Vepa complains was not asked. In the circumstances the appellant was not prejudiced in any way by the method of his examination by the Sessions Judge.

In my opinion the conviction of the appellant was right: his conviction and sentence should be confirmed and his appeal dismissed.

In conclusion there are two matters which I think call for some remark. First, the learned Sessions Judge allowed questions to be put to the Sub-Inspector, P.W. 15, and put a number of questions himself to that witness, which were inadmissible. Statements made by a witness to the police in the course of the investigation of a case can never be used to corroborate the witness's evidence; and, if the written record of what a prosecution witness has said to the police is to be used to contradict him under section 162 of the Code of Criminal Procedure, it must be proved and used in accordance with the provisions of section 145 of the Evidence Act. The learned Sessions Judge should be careful not to transgress the provisions of section 162 of the Code of Criminal Procedure in future. Secondly, the learned Sessions Judge in his anxiety to do justice to the case has written a very careful and very elaborate judgment;

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but it is far too long and contains a number of repetitions. I should be the last to encourage Sessions Judges to write short and perfunctory judgments in serious cases. The judgment in such a case should set out the effect of the evidence fully, the accused's case, the attacks which are made upon the evidence by either side, the Judge's own criticisms of it and the reasons for his conclusions. But in this case the learned Sessions Judge has written much more than was necessary. The whole oral evidence in the case occupies only seventeen printed pages. The judgment covers nineteen closely printed pages, each of which contains about twice as many words as a page of evidence. In writing such a judgment the learned Sessions Judge has given unnecessary trouble to himself and unnecessary work to those who have to read his judgment.

BEASLEY C.J.—I entirely agree and only desire to make a few observations with regard to *Sogaimuthu Padayachi v. King-Emperor*(1). On the facts of that case I quite agree with WALLACE J. and with SPENCER J., to whom the case was referred on a disagreement between DEVADOSS and WALLACE JJ., that it was not right to draw the inference that the accused had taken part in the offence of murder merely from the production of the jewels by the accused and their admissions that they had buried them for which matters no explanation was given by the accused; but with the general observations of SPENCER J. and WALLACE J., with regard to whether it is open to the Court to draw such inference in cases where the charge against the accused is not one of theft or of receiving stolen property, I find myself in disagreement with those learned Judges. WALLACE J. has stated that the Court has to be satisfied not merely that the thief could not have come into

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possession of the property unless murder has been committed but also that he could not have come into possession of the property unless he himself has taken part in the murder or was privy to it. SPENCER J. has stated that, when the unexplained possession of the stolen property is the only circumstance appearing in the evidence against an accused charged with murder and theft, the accused cannot be convicted of murder unless the Court is satisfied that possession of the property could not have been transferred from the deceased to the accused except by the former being murdered. WALLACE J. qualifies his statement by the use of the words "in such a case"; but SPENCER J.'s observations have no such important qualification. In my view, it is not correct to say that the Court is not entitled to draw the inference that the accused committed a murder or was present when it was committed when the accused is found in possession of property proved to have been in the possession of the murdered person at the time of the murder or is able to point out the place or places where such property is concealed and admits having concealed such property and fails to give any explanation for the possession of those goods or their disposal or such an explanation as can reasonably be accepted. Section 114 of the Indian Evidence Act allows the Court to draw inferences of fact and presumptions of fact. That section provides:

"The Court may presume the existence of any facts which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

This section, therefore, entitles the Court to draw any reasonable inference or presumption of fact. It is a matter of common procedure to utilise evidence of this kind and the presumption such as this in connection not

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only with theft and the receipt of stolen goods but with more aggravated offences. I propose to refer to two cases only. One of which deals very clearly with the presumption in the case of the offence of receiving stolen property and the other with the presumption in a case of murder. The former is an English case, viz., *Rex v. Schama*(1). The appellants there were charged with the offence of receiving stolen goods well knowing the same to have been stolen. The evidence for the prosecution established that the appellants were in possession of goods recently stolen and the Judge in directing the jury said:

"It is the duty of the prosecution to prove the case against the prisoners. The burden of proof is on them up to a point, that is to say, they have to prove that the goods were stolen, and the stolen goods were in the hands of these people; but then the prisoners have to give an account of how the goods came into their possession."

and

"As I said from the beginning the prosecution have to prove that these men were dealing with stolen goods. That they have done. The prisoners are then put to explain how it came that they were dealing with these stolen goods, and to give an explanation which will satisfy twelve reasonable men." It was held by the Court of Criminal Appeal that this was misdirection and that the true position was that, in the absence of any explanation by the accused of the way in which the goods came into his possession, which might reasonably be true, the jury might convict the prisoner but that, if an explanation were given which the jury thought might reasonably be true, although they were not convinced of its truth, the prisoner was entitled to be acquitted inasmuch as the Crown would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt

(1) [1915] 84 L.J. K.B. 396.

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of the guilt of the accused. The other case is *The Emperor v. Sheikh Neamatulla*(1). There it was held by JENKINS C.J. and SHARFUDDIN J. that, where in a case of murder blood-stained ornaments were found in the room occupied by the accused and the evidence established that those articles belonged to the deceased, and in the Sessions Judge's charge to the jury there was no direction pointing out that the possession in the case, if believed, was a fact from which the Court might presume not merely theft or receipt of stolen property but also murder with which the accused was charged, that was a serious omission detracting materially from the value of the verdict and opinion of the jurors. JENKINS C.J. points out in the course of his judgment that it is clear that the inferences and presumptions in criminal cases which are provided for in section 114 of the Indian Evidence Act arise not only in connection with cases of theft and receipt of stolen goods but also in connection with other offences. I have thought it necessary to make these observations which are entirely in agreement with those which have fallen from my learned brother because *Sogaimuthu Padayachi v. King-Emperor*(2) is constantly quoted in this High Court as an authority for the principle that criminal Courts in the absence of any explanation by the accused can only draw an inference that the accused committed the murder where no other inference is possible. It was not necessary in *Sogaimuthu Padayachi v. King-Emperor*(2) to lay down any such general principle and for that reason it cannot be accepted as a decision upon this point; and, for the reasons I have already given, I do not agree with the opinions of the learned Judges in this question in that case.

K.N.G.

(1) (1913) 17 C.W.N. 1077.

(2) (1925) I.L.R. 50 Mad. 274.

INCOME-TAX REFERENCE.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Anantakrishna Ayyar and Mr. Justice Cornish.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
PETITIONER,

1932,
May 11.

v.

V. T. S. SEVUGU PANDIA THEVAR, RESPONDENT.*

Indian Income-tax Act (XI of 1922), sec. 2 (1) (a)—Agricultural income—Meaning of—Madras Regulation (XXV of 1802)—Zamindari granted by sanad issued under—Fishery right in tanks and connected supply channels in, water in which used for agricultural purposes—Lease of—Income derived by zamindar from—If agricultural income—Land covered by tanks and channels being agricultural land assessed to land revenue.

The assessee was a zamindar tracing his title to his zamindari to a sanad issued by the Government under the Madras Permanent Settlement Regulation (XXV of 1802). During the year of assessment he derived an income from the lease of the right to fish in a number of tanks and connected supply channels in the zamindari the water in which was used for agricultural purposes. Excepting the right to fish, the lessees had no other rights whatsoever in the water of the tanks and channels nor had they any right over the beds of the tanks and channels. The land on which the tanks were and through which the channels ran was agricultural land and assessed to land revenue in British India.

Held that the income derived by the assessee from the lease of the right to fish in the tanks and connected supply channels in the zamindari was not agricultural income within the meaning of section 2 (1) (a), and was therefore not exempt from tax under section 4 (3) (viii), of the Indian Income-tax Act (XI of 1922).

Per BEASLEY C.J.—The income in question is not revenue derived from land which is used for agricultural purposes.

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"Revenue" in section 2 (1) (a) of the Indian Income-tax Act of 1922 cannot be taken to include all other sources of income derivable in different ways to that by which the rent is derived, that is to say, to include all income which is got from anything of value which may be upon land used for agricultural purposes.

Section 3 (11) (b) of the Madras Estates Land Act (I of 1908) only extends the procedure prescribed in that Act for the recovery of arrears of land rent to the recovery of sums payable by a ryot on account of fishery rents. Far from helping the assessee that provision only emphasises the difference between the revenue derived from land let for agricultural purposes and that derived from fisheries.

Per CORNISH J.—"Agricultural income" in section 2 (1) (a) of the Indian Income-tax Act does not mean income derived from agricultural land. The definition clause in section 2 (1) (a) shows that the income intended is the income derived as rent or revenue from the use of the land for agricultural purposes. Income derived from the use of the land for some purpose which is not agricultural is therefore not "agricultural income".

REFERENCE to the High Court under section 66 (2) of the Indian Income-tax Act (XI of 1922) in the matter of Sevugu Pandia Thevar.

S. Srinivasa Ayyangar (A. Swaminatha Ayyar with him) for assessee.—Three conditions only are necessary for exemption under section 2 (1) (a) of the Act: (i) land must be land used for agricultural purposes; (ii) income must be derived from it; and (iii) it must be assessed to revenue. Under the clause it is enough if the income is derived from land used for agricultural purposes; it is not necessary that the income should be derived by agriculture. To hold that the income must be got by agriculture is really to add to the conditions prescribed by the Act. Clause (b) of section 2 (1) deals comprehensively with income derived by agriculture; and clause (a) deals with other kinds of income derived from land which is used for agricultural purposes. Clause (a) is not a reduplication of clause (b). The view of the Commissioner is to make clause (a) altogether useless and unnecessary. It is not purely agricultural income that is intended to be exempted by the Act. Certain other incomes are also included.

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Revenue as distinguished from rent used in the clause shows that other sources of income than rents from tenants were intended to be included. As to the meaning of the word revenue see Wharton's Law Lexicon. Income from fisheries is derived from land and, in such a case, if the land itself is assessed, the income derived from fisheries from such land cannot be assessed. My argument is confined to irrigation tanks and tanks intended for irrigation. There is no difference in law between land uncovered by water and land covered by water for assessment and such-like purposes; see *Hori Das Mal v. Mahomed Jaki*(1) and *Annakumaru Pillai v. Muthupayal*(2). The Act does not say "solely or exclusively used for agricultural purposes or when used for agricultural purposes". The dominant intention must be to use the land for agricultural purposes. Where land is substantially used for agricultural purposes, the fact that there is a by-income or by-product from such land does not make such incidental income any the less an agricultural income for the purposes of the Act. It is possible to read the provision in the Income-tax Act in consonance with the land permanent settlement. Fishery income is land revenue; see Fifth Report, Vol. II, page 321. Fishery is profit of the soil; see Halsbury's Laws of England, Vol. XIV, page 572, and *Chesterfield (Lord) v. Harris*(3). Section 3 (11) (b) of the Madras Estates Land Act specially makes rent include pasturage fee and income from fishery because the definition of rent in that Act is payment for use of land for agricultural purposes. There has been no incompatibility between the custom of fishing and of using the tanks for purposes of irrigation. The majority decision in *Emperor v. Probhat Chandra Barua*(4) was on the basis that the items of income were assessable if not taken into account at the time of the settlement; see *Probhat Chandra Barua v. King-Emperor*(5).

M. Patanjali Sastri for Commissioner of Income-tax.—Section 2 (1) (b) covers cases where the assessee actually derives income by agriculture, that is, by the process of cultivating and tilling the soil. Clause (a) of section 2 (1) provides for cases in which land is not used by the owner himself for agricultural purposes, e.g., cases where he lets out land for

(1) (1885) I.L.R. 11 Calc. 434 (F.B.). (2) (1904) I.L.R. 27 Mad. 551.

(3) [1908] 2 Ch. 397, 430.

(4) (1927) I.L.R. 54 Calc. 863 (F.B.).

(5) (1930) I.L.R. 58 Calc. 430, 443 (P.C.).

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purposes of agriculture and derives income therefrom. That is evidently why the words "rent or revenue" are used in clause (a) and the word "income" is used in clause (b). The reasonable construction of section 2 (1) (a) is to read the words "rent or revenue . . . agricultural purposes" as a whole. The words "or revenue" might have been intended to cover cases of Government's share of the produce of land, e.g., in cases of jaghir grants (see Sundaram's Income-tax Act, latest edition, page 179), or cases such as income derived by the owner in the shape of fees derived from licence of toddy shops or licence fee for the taking of manure leaves in topes in particular portions of the year. The word "revenue" by itself has a much wider meaning and may include income got by the sale of fish. But the section limits the word "income" by the words that follow. Revenue derived from sale of fish is not revenue derived from land, much less revenue derived from land used for purposes of agriculture; see *Maharajadhiraj of Darbhanga v. Commissioner of Income-tax*(1). Fishery is not agricultural income; see *Emperor v. Probhat Chandra Barua*(2). Agricultural income means not merely income from land used for purposes of agriculture but income from the user of land for agricultural purposes. And that is the construction to be put upon the words in section 2 (1) (a). Income from *mela* on land used for agricultural purposes is not agricultural income; see *Umed Rasul Shaha Fakir v. Anath Bandhu Chowdhuri*(3). Income from quarry in agricultural land is not agricultural income; see *In the Matter of Shib Lal, Ganga Ram*(4). Again the water in the tank alone is used for agricultural purposes. The bed of the tank is not used for agricultural purposes. Therefore even if the income can be said to be derived from the land, it is not income from land which is used for agricultural purposes. Halsbury, Vol. XIV, page 572, quoted for the assessee, does not touch the question. [*The Queen v. The Metropolitan Board of Works*(5) referred to]. Even if fishery falls within section 2 (1) (a), it will be repugnant to the subject or context to hold that income from fishery is agricultural income.

S. Srinivasa Ayyangar in reply.—The words "repugnant to the subject or context" have reference to the use of the

(1) (1924) I.L.R. 3 Pat. 470, 485.

(2) (1924) I.L.R. 51 Cal. 504, 528.

(3) (1901) I.L.R. 28 Cal. 637.

(4) (1927) I.L.R. 50 All. 98.

(5) (1863) 3 B. & S. 710; 122 E.R. 266.

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words "agricultural income" in other places in the Act. These words cannot control the meaning of the words "agricultural income" in the definition section itself. To hold otherwise would be opposed to all canons of construction. The words "rent or revenue . . . agricultural purposes" in section 2 (1) (a) cannot be read as rent or revenue derived from agricultural user of land. *Maharajadhiraj of Darbhanga v. Commissioner of Income-tax*(1) tried to read the words in that way and it is wrong. The Act does not say that land must be cultivated. All that it says is that land must be used for agricultural purposes. The process of agriculture need not be carried on in regard to tank-bed. The tank is used for agricultural purposes and that is enough to satisfy the condition laid down in the section. An irrigation tank is used for agricultural purposes. A tank is water standing on land used for agricultural purposes. The water cannot be separated from the land. The zamindars are required to maintain irrigation tanks and, so long as the irrigation system of the country requires them to do so, the irrigation tanks must be deemed to be used for agricultural purposes, i.e., the water in the tank and the land in which the water is collected. Fish is profit of land and therefore "revenue" within the meaning of section 2 (1) (a). The word "revenue" ought not to be confined to income from a jaghir. Murray's Oxford Dictionary and Wharton's Law Lexicon show that the word is used in a much wider sense. Income derived by a jaghirdar is agricultural income under section 2 (1) (b) if the jaghirdar cultivates the land himself, and under section 2 (1) (a) if he rents it out to others. As regards fee derived from licence of toddy shops, in such cases the land is not used for agricultural purposes. Licence fee for taking manure leaves is agricultural income. Quarry cases stand apart because in those cases the lands are not used for purposes of agriculture. *Mela* cases are distinguishable because in such cases the income is not derived from land at all. The predominant user of the land must be agricultural user. In cases of *mela*, race-course, etc., the predominant user of the land cannot be said to be agricultural user. The intention of the Act is not to relieve cultiyators only. The opening words themselves show the contrary. The use of the word "rent" shows that it is the zamindars or landlords

(1) (1924) I.L.R. 3 Pat. 470.

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that are also intended to be protected. Clause (b) is not confined to cultivators; see the words "any kind of income derived" in the clause. The words "receiver of rent in kind" in clause (3) show that clause (b) is not confined to the actual cultivator. The words "income derived from agriculture" include all kinds of income derived from agriculture. The words "in kind" are put in, because the clause deals with paddy and storing of paddy. Both for clauses (a) and (b) of section 2 (1) the condition that land must be used for agricultural purposes is necessary, because if agricultural produce is grown on land not generally used for agricultural purposes, e.g., *gramanattam*, the mere fact that agricultural produce is grown on it is not enough. The zamindar is the owner of the tank and of fish. He has the right to lease fish. The income is derived while the water in the tank is being expressly used for agricultural purposes. Therefore the income derived from the lease of the right to fish in the tank is agricultural income.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J. BEASLEY C.J.—At the request of the petitioner the Commissioner of Income-tax has referred the following question of law to the High Court, viz.:—

"Whether the income from the fisheries is exempt from the assessment from income-tax on the grounds that they are not so assessable under the terms of the sanad granted to the zamindar of Seithur and of sections 1 and 4 of the Madras Regulation XXV of 1802 and on the ground that the said income is agricultural income especially in view of the definition of rent in section 3 (11) (b) of the Madras Estates Land Act."

The facts of the case are that in the assessment made on the petitioner for 1929-30 a sum of Rs. 6,956 was included. This was income derived by the petitioner from the lease of the right to fish in a number of tanks and connected supply channels in the zamindari the water in which is used for agricultural purposes. Excepting the right to fish, the lessees have no other rights whatsoever in the water of the tanks and

channels nor have they any right over the beds of the tanks and channels. The land on which the tanks are and through which the channels run is agricultural land and assessed to land revenue in British India.

It will be seen from the question referred to us that exemption is claimed for the income on two grounds, but Mr. S. Srinivasa Ayyangar for the petitioner stated that he was not prepared to argue that the income was exempt for the former reason stated in the question because he was unable to argue that there was any real difference between the Madras Regulation XXV of 1802 and the Bengal Regulations which were relied upon for a claim to exemption of zamindari income, a claim which was negatived by a Full Bench of the Calcutta High Court in *Emperor v. Probhat Ohandra Barua* (1). On appeal to the Privy Council this decision was affirmed in *Probhat Ohandra Barua v. King-Emperor* (2). Mr. S. Srinivasa Ayyangar accordingly directed his argument to the latter ground for exemption raised in the question referred. It would appear that even this question is determined by the decision of the Privy Council in *Probhat Ohandra Barua v. King-Emperor* (2). One of the questions submitted for the decision of the Calcutta High Court in *Emperor v. Probhat Ohandra Barua* (1) was whether jalkars or rents received from fisheries was agricultural income and therefore exempted from assessment to income-tax by section 4 (3) (viii) of the Act. It was held by the Calcutta High Court that that income was not agricultural income as defined by section 2 (1) so as to be exempt from tax under section 4 (3) (viii) and that decision, as already stated, was affirmed by the Privy Council. But that point does not appear to have been seriously argued because

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(1) (1927) I.L.R. 54 Calo. 863 (F.B.). (2) (1930) I.L.R. 58 Calo. 430 (P.C.).

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Lord RUSSELL of Killowen in delivering the judgment of their Lordships' Board says at page 448:—

"Question I was but faintly argued before the Board. As to it their Lordships need only say that they have not been furnished either with materials or reasons which would justify them in suggesting that any of the 10 specified items could properly be described as agricultural income within the definition of agricultural income contained in section 2 (1) of the Indian Income-tax Act, 1922. Their Lordships, accordingly, agree with the negative answer which has been given to Question I."

It is not clear what the fisheries were from which the income in that case was derived by the zamindar, whether fishery rights were over streams running through the zamindari property or rivers or whether the right to fish was, as in this case, in tanks and channels used for irrigation purposes. All that we know is that it was income derived from fisheries and we are left in doubt as to whether the Privy Council had under consideration the same facts as there are here with regard to fishery rights.

The question for our determination here is whether this is agricultural income. Agricultural income is defined in section 2 of the Act as

"(a) any rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of Government as such."

We are not concerned with any other definition of agricultural income appearing in this section as it is conceded by the petitioner that, if this income is not income as defined in section 2 (1) (a), it is assessable to income-tax. It is argued that land includes the water standing on it and that as the land surrounding the tanks and through which the channels run is agricultural land or land used for agricultural purposes and the

water is used for agricultural purposes, namely, to irrigate the land used for agriculture, the income from the fisheries is income derived from agriculture. It is not suggested by the petitioner that the beds of the tanks and channels are ever used for agricultural purposes. In fact we do not gather that the tanks or the channels are ever dry although I do not for one moment think that that question is of any importance in view of the before-mentioned admission by the petitioner. No authority in support of this argument has been referred to and there does not appear to be any case in which income from fishery rights has been held to be agricultural income. But there are decisions to the contrary. In *Emperor v. Probhat Chandra Barua*(1) it was held by RANKIN and PAGE JJ. that income from fisheries, that is to say, income derived from the rental of fisheries, is not agricultural income or income derived from land used for agricultural purposes. At page 524 RANKIN J. says:

"It remains to consider the assessee's claim to exemption as a claim to come within the provisions of section 2 of the Act. In my opinion, income derived from a fishery is not 'rent or revenue derived from land which is used for agricultural purposes'. Learned Counsel for the assessee has suggested that land used for agricultural purposes becomes at certain seasons flooded, and that in *bhils* and *dobas* thus formed over such land there may be rights of fishing of some value. Any such case will require careful consideration on its own facts. If the argument is that the income in such a case is 'derived from land which is used for agricultural purposes' although it is not derived from any such use, it may be observed that the decision in the *mela* case [*Umed Rasul Shaha Fakir v. Anath Bandhu Chowdhuri*(2)] is some authority the other way."

Again, in the Full Bench case in *Emperor v. Probhat Chandra Barua*(3) it was decided by the Calcutta High

(1) (1924) I.L.R. 51 Calc. 504.

(2) (1901) I.L.R. 28 Calc. 637.

(3) (1927) I.L.R. 54 Calc. 863 (F.B.).

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Court that such income is not agricultural income. It was also so held in *Maharajadhiraj of Darbhanga v. Commissioner of Income-tax*(1) by DAWSON MILLER C.J. and MULLICK J. At page 485 DAWSON MILLER C.J. says:

"The popular conception of agriculture, even if it should include the rearing of livestock and poultry fed on the produce of the land and requiring in certain cases cultivation of the land for grazing purposes or otherwise, seems hardly wide enough to include the rearing of fish in rivers or tanks."

and
"Nor does it seem reasonable to hold that income derived from fishing over land covered by water and which is not used for any agricultural purpose is income derived from agriculture. Fish are not the produce of the land. Their natural element is the water and their cultivation and welfare depend in no sense upon agriculture. It may be that in certain cases the jalkar rights include the right to cultivate the soil of the tank when dry, but the facts of this case do not show that the income sought to be exempted from tax was other than that derived from the right to catch fish."

I am unable to agree with Mr. Srinivasa Ayyangar's contention that this is revenue derived from land which is used for agricultural purposes. The fact that some of the water in the tanks or channels is used for agricultural purposes does not make this income revenue derived from land which is used for agricultural purposes. The land upon which the water is is not being used for agricultural purposes and whilst the water is there cannot be used for agricultural purposes and there is no evidence here to show that the land is ever or has ever been used for agricultural purposes; nor do I think that any assistance to the petitioner is to be derived from the use of the word "revenue" in sub-section (a) to section 2 (1). It is argued that, as both rent and "revenue" are used in that sub-section,

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"revenue" means something different from the rent derived by the landowner from land used for agricultural purposes and must be taken to include all other sources of income derivable in different ways to that by which the rent is derived, that is to say, to include all income which is got from anything of value which may be upon land used for agricultural purposes. It is even contended that, if valuable stones are to be found on the surface of land being used for agricultural purposes, the income derived from the sale of them would be agricultural income. I think that the petitioner's argument must extend to that length and I cannot agree with it.

With regard to another argument put forward, namely, that as the term "rent" in section 3 (11) (b) of the Madras Estates Land Act includes rent from fisheries this must be taken to be agricultural income, it seems to me that that provision of the Act cannot assist the petitioner because it only extends the procedure prescribed in the said Act for the recovery of arrears of land rent to the recovery of sums payable by a ryot on account of fishery rents. I agree with the observations of DAWSON MILLER C.J. in *Maharajadhiraj of Darbhanga v. Commissioner of Income-tax*(1) in dealing with a similar argument based upon section 193 of the Bengal Tenancy Act that so far from helping the petitioner the provision only emphasizes the difference between the revenue derived from land let for agricultural purposes and that derived from fisheries and the other sources of income mentioned in the section.

In my view the question referred to us must be answered in the negative. Costs Rs. 250 to the Commissioner of Income-tax.

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ANANTAKRISHNA AYYAR J.—Under section 66 (2) of the Indian Income-tax Act (XI of 1922) the Commissioner of Income-tax, Madras, has referred for the decision of the High Court the following question :

“ Whether the income from the fisheries is exempt from the assessment from income-tax on the grounds that they are not so assessable under the terms of the sanad granted to the zamindar of Seithur and of sections 1 and 4 of the Madras Regulation XXV of 1802 and on the ground that the said income is agricultural income especially in view of the definition of rent in section 3 (11) (b) of the Madras Estates Land Act.”

The assessee is the zamindar of Seithur tracing his title to the zamindari to a sanad issued to his predecessors by the Government under the Madras Permanent Settlement Regulation (XXV of 1802). In calculating the peshkash fixed on the zamindari, income from fisheries also seem to have been taken into account. During the year of assessment, the assessee derived an income of Rs. 6,956 by leasing out the right to fish in a number of tanks and connected supply channels in the zamindari the water in which is used for agricultural purposes. Exemption was claimed by the assessee on two grounds :—

1. That the income from fisheries was included in the assets of the zamindari for fixing peshkash payable by the zamindar to the Government, and that he could not be required to pay income-tax on any of the items of income included in the assets of the zamindari with reference to which peshkash was fixed, since it would be a case of double taxation, which, it was contended, would be illegal ; and

2. That income derived by leasing the right to fish in the tanks and connected supply channels in the zamindari is agricultural income, and as such is exempted under section 4 (3) (viii) of the Act.

After the decision of the Privy Council in *Probhat Chandra Barua v. King-Emperor*(1), the first contention is not tenable. With reference to a similar contention based on substantially (for the present purpose) similar provisions of the Bengal Permanent Settlement Regulation (I of 1793), the Privy Council held :

“ While the Regulations contain assurances against any claim to an increase of the jama based on an increase of the zamindari income, they contain no promise that a zamindar shall in respect of the income which he derives from his zamindari be exempt from liability to any future general scheme of property taxation, or that the income of the zamindari shall not be subjected with other incomes to any future general taxation of incomes.”

Their Lordships agreed with the view expressed by GHOSH J. in the following passage in his judgment :—

“ There was no promise or engagement of any description whatsoever by which the Government of the day surrendered their right to levy a general tax upon incomes of all persons irrespective of the fact whether they are zamindars with whom the Permanent Settlement was concluded or not.”

In these circumstances, the first contention raised on behalf of the assessee should be disallowed.

I may state that Mr. S. Srinivasa Ayyangar, the learned Advocate who appeared for the assessee, did not really seriously argue this point, having regard to the recent Privy Council case mentioned above which settled the controversy on a point on which there was difference of opinion among various learned Judges of the several High Courts in India. As the Privy Council remarked in the course of the judgment in the above case, as many as thirteen learned Judges of the High Courts in India had occasion to consider this question, five being of the opinion which was finally accepted by

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the Privy Council, while eight were of a different opinion. The question being now concluded by the decision of the Privy Council, it must be held the inclusion of income from fisheries in the assets of the zamindari in fixing the peshkash is by itself no ground for claiming exemption from assessment under the Indian Income-tax Act.

The second contention, which was in fact the only point that was really argued before us, was based on the provisions of sections 2 and 4 of the Indian Income-tax Act. It was argued that income derived by leasing the right to fish in the tanks and connected supply channels in the zamindari is agricultural income within the meaning of section 2 (1) of the Act. If it is "agricultural income" then under section 4 (3) (viii) the Act would not apply to such income. The only question therefore is whether such income is "agricultural income". Section IV (1) enacts:—

"Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in section 6, from whatever source derived."

Sub-section (3) constitutes an exception, and any person claiming the benefit of an exception should strictly prove that his case comes within the exception. Agricultural income is defined in section 2 of the Act as follows:—

"2. In this Act, unless there is anything repugnant in the subject or context,—

(1) 'Agricultural income' means—

(a) any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of Government as such;

(b) any income derived from such land by

(i) agriculture, or

(ii) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or

receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market, or

(iii) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-clause (ii);

(c) any income derived from any building owned and occupied by the receiver of the rent or revenue of any such land, or occupied by the cultivator or the receiver of rent-in-kind of any land with respect to which, or the produce of which, any operation mentioned in sub-clauses (ii) and (iii) of clause (b) is carried on:

Provided that the building is on or in the immediate vicinity of the land, and is a building which the receiver of the rent or revenue or the cultivator or the receiver of the rent-in-kind by reason of his connection with the land requires as a dwelling-house or as a store-house, or other out-building."

It was admitted by the learned Advocate for the assessee that the present case does not come under clause (b)—his contention being that the present case comes under clause (1) (a) of section 2. It will be noticed that, though the words used are "any rent or revenue" (the word "revenue" being a word of wider import than the word "rent"), the same must be "derived from land which is used for agricultural purposes". Could it be said that "fishery rent" is "derived from land which is used for agricultural purposes"? In clause (b) the expression "derived from such land" occurs, and the light (if any) thrown by clause (b) does not enable me to say that fishery rent is "derived from land which is used for agricultural purposes". The lease granted to the lessees in the present case—Exhibit A—empowers the lessees to fish in the tanks and supply channels; and, excepting the right to fish, the lessees have no other rights whatsoever in the water of the tanks and channels, nor over the beds of the tanks or the channels. It is therefore *prima facie*

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difficult to say that such income is derived from land which is used for agricultural purposes. The water of the tanks and connected supply channels is undoubtedly used for agricultural purposes, and I am prepared to assume for the purpose of argument that tanks and supply channels are lands used for agricultural purposes in a wider sense though no crops are raised—ordinarily, at any rate—on the site of tanks and supply channels. But the question is—is fishery income “derived from land which is used for agricultural purposes”? Right of fishery may be an interest in immovable property, but that is not the question that I have to decide here.

The zamindar may derive income by allowing the land to be used for various purposes which might not be agricultural. He may make money by allowing a *mela* to be held on the land, and it has been held that income thus derived would not be agricultural income within the meaning of the Income-tax Act; see *Umed Rasul Shaha Fakir v. Anath Bandhu Chowdhuri*(1). He may let the land for shooting; he may similarly make money by allowing quarrying on the land; he may allow boating on the waters of the tanks and levy fees for the same; he may allow a ferry to be established across the tank, which may enable the public to travel from one side to the other in a convenient way, and levy fees therefor; there may be springs in the tank, and, even after supplying water necessary for the customary cultivation of wet lands under the ayacut of the tank, he may sell the surplus water of the tank to a neighbouring village, town or municipality, for consumption by the people thereof, or let the water to the lands of the neighbouring village, which otherwise may have no right to the said water, and receive money for the same.

(1) (1901) I.L.R. 28 Calo. 637.

Other instances might be imagined. Could it be said that such incomes are “rent or revenue derived from land which is used for agricultural purposes”? The word “agriculture”, even in its widest import, has received some sort of definite and restricted meaning, and I find it difficult to bring fishery under the heading “agriculture” even in its widest sense as ordinarily understood.

The provisions in section 2 of the Income-tax Act exempting incomes derived from certain buildings only on such lands from assessment under the Income-tax Act would also seem to support the respondent's contention.

The definition of “rent” in the Madras Estates Land Act was referred to, but I do not think that any real help is derived by reference to the Estates Land Act in this case. In the first place, the two Acts (the Indian Income-tax Act and the Madras Estates Land Act) were passed by two different Legislatures, and it cannot, ordinarily, be that the expression “agricultural income” should have one meaning in one Presidency and another meaning in another, seeing that the Indian Income-tax Act extends to the whole of British India. Further, the definition of rent in the Madras Estates Land Act is only for the purposes of that Act and to enable the special remedies provided for by that Act being available to realize rent as defined therein. I do not therefore consider that the provisions of the Estates Land Act that were referred to really help me in the decision of the exact question before me.

Before the Privy Council, a similar question as the one raised before us seems to have been raised. Among the ten items included in the assessment in the case before the Privy Council, the first item referred to “*jalkar* or rents received from fisheries”, and the first question

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referred to the Full Bench in that case was whether the ten sources of income specified were agricultural incomes and therefore exempt from assessment to income-tax under section 4 (3) (viii) of the Act. Their Lordships of the Privy Council noticed that matter at page 448 in *Probhat Chandra Barua v. King-Emperor*(1):

"Question I was but faintly argued before the Board. As to it their Lordships need only say that they have not been furnished either with materials or reasons which would justify them in suggesting that any of the ten specified items could properly be described as agricultural income, within the definition of "agricultural income" contained in section 2(1) of the Indian Income-tax Act, 1922. Their Lordships, accordingly, agree with the negative answer which has been given to Question I."

No decision directly deciding this question in favour of the assessee was cited to us by the learned Advocate for the assessee. On the other hand, some decisions of Indian Courts were cited to us by the learned Advocate who appeared for the Commissioner of Income-tax as supporting the contention of the Crown. I have already noticed the decision in *Umed Rasul Shaha Fakir v. Anath Bandhu Chowdhuri*(2)—the *mela* case. At page 639, the learned Judges—RAMPINI and GUPTA JJ.—observed as follows:—

"It would seem to us that the profits of a *mela* cannot be regarded as incomes derived from agriculture. The land on which the *mela* is held is no doubt land used for purposes of agriculture when it is not being used for the purposes of the *mela*; but when it is being used for the purposes of the *mela* it is not being used for agricultural purposes, and therefore the profits of the *mela* are not incomes, which would be exempt from income-tax under section 5 of Act II of 1886."

In *Emperor v. Probhat Chandra Barua*(3) it was held that income derived from fisheries, and from *sthaljat*

(1) (1930) I.L.R. 58 Calc. 430 (P.C.).

(2) (1901) I.L.R. 28 Calc. 637.

(3) (1924) I.L.R. 51 Calc. 504.

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(i.e., land used for stacking timber) is not "agricultural income" or "income derived from land which is used for agricultural purposes" within the meaning of sections 2 and 4 of the Income-tax Act (XI of 1922). The question is discussed by RANKIN J. (as he then was) at page 524:—

"It remains to consider the assessee's claim to exemption as a claim to come within the provisions of section 2 of the Act. In my opinion, income derived from a fishery is not 'rent or revenue derived from land which is used for agricultural purposes'. Learned Counsel for the assessee has suggested that land used for agricultural purposes becomes at certain seasons flooded, and that in *bhils* and *dobas* thus formed over such land there may be right of fishing of some value. Any such case will require careful consideration on its own facts. If the argument is that the income in such a case is "derived from land which is used for agricultural purposes" although it is not derived from any such use, it may be observed that the decision in the *mela* case—*Umed Rasul Shaha Fakir v. Anath Bandhu Chowdhuri*(1)—is some authority the other way. From the papers in the present case I do not collect that this is the special case made by the assessee, who claims to own extensive fisheries called *jalkar mehals*, which are leased out in consideration of the payment of rent called *jalkar* rent. In my opinion, 'fishery' is not 'agriculture' nor an 'agricultural purpose', and income derived from fisheries is not exempt as such even when the fisheries are comprised in a permanently settled estate."

Similarly, PAGE J. (as he then was) remarked at page 528 as follows:—

"I agree with the view expressed by the Commissioner that income derived from fisheries cannot reasonably be regarded as income derived from agriculture, however wide the meaning may be which is attributed to the word agriculture. It is, I think, unnecessary to dilate upon the subject, and, in my opinion, income derived from fisheries is not within any of the exemptions set out in section 4 of the Income-tax Act."

The Patna High Court had to consider this question in *Muharajadhiraj of Darbhanga v. Commissioner of*

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Income-tax(1) where they held that "rent derived from *jalkar* (fisheries), *hats* (markets) and *ghatlagi* (moorings and ferries) is not income derived from agriculture." DAWSON MILLER C.J. discussed this question at page 486. Reference was made to the Oxford Dictionary, among others, to understand the meaning of the word "agriculture". This is what the learned Chief Justice stated at page 485:—

"It was urged, however, that fisheries were, or might be in certain cases, as where the fishing is from tanks, so intimately connected with the pursuit of agriculture that they should be included under that designation. The popular conception of agriculture, even if it should include the rearing of livestock and poultry fed on the produce of the land and requiring in certain cases cultivation of the land for grazing purposes, or otherwise, seems hardly wide enough to include the rearing of fish in rivers or tanks. Agricultural income is defined in clause (2) of the Income-tax Acts of 1918 and 1922. The definition includes rent or revenue derived from land used for agricultural purposes as well as income derived from agriculture and from the sale of agricultural produce. The definition does not carry the case any further. The question is whether the rent paid for the fishing rights, or for the markets, ferries, or moorings is income derived from agriculture. In my opinion, it is not. The fact that the Bengal Tenancy Act by section 193 applies the procedure provided by the Act for the recovery of arrears of rent to suits for recovery of anything payable in respect of fishery rights and the like is of no assistance to the petitioner. It rather emphasises than otherwise the difference between revenue derived from land let for agricultural purposes and that derived from fisheries and the other sources of income mentioned in the section. Nor does it seem reasonable to hold that income derived from fishing over land covered by water and which is not used for any agricultural purpose is income derived from agriculture. Fish are not the produce of the land. Their natural element is the water and their cultivation and welfare depend in no sense upon agriculture. It may be that in certain cases the *jalkar* rights include the right to cultivate the soil of the tank when

(1) (1924) I.L.R. 3 Pat. 470.

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dry, but the facts of this case do not show that the income sought to be exempted from the tax was other than that derived from the right to catch fish. In my opinion the question whether the income derived from *jalkar*, *hats* and *ghatlagi* is agricultural income and so exempt from income-tax should be answered in the negative."

Reference was made by the learned Advocate for the assessee to Halsbury's Laws of England, Vol. XIV, page 572; but I do not think that that really solves the question before us. Right of fishery may be an interest in immovable property, but that does not, in my opinion, lead to the conclusion that income from leasing the right to catch fish in a tank is agricultural income within the meaning of the Income-tax Act.

For the above reasons, I am of opinion that the assessee's second contention also should be overruled.

It follows that the income of Rs. 6,956 derived by the assessee from the lease of the right to fish in the tanks and connected supply channels in the zamindari was properly included in the assessment made under the Income-tax Act; and I agree with my Lord that the question should be answered in the negative.

CORNISH J.—I am of the same opinion. I do not think it makes any difference whether the money paid to the zamindar for the fishing rights in his tanks is called rent or revenue. It might be described by either word. The test of its exemption from income-tax is whether it is "agricultural income" as defined by the Act. One of the purposes for which the tanks are used is irrigation, which is undoubtedly an agricultural purpose. But the money sought to be taxed is received for the right of catching fish, and there is ample authority that the use of a tank as a fishery is not a use of land for agricultural purposes; *Probhat Chandra Barua v. King-Emperor*(1), *Emperor v. Probhat Chandra Barua*(2) and

(1) (1930) I.L.R. 58 Calc. 430 (P.C.).

(2) (1924) I.L.R. 51 Calc. 504.

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Maharajadhiraj of Darbhanga v. Commissioner of Income-tax(1). In those cases, it is true, the tanks do not appear to have been used for any other purpose than a fishery. And in the Patna case, DAWSON MILLER C.J. suggests that it might make a difference if the fishing rights included a right to cultivate the bed of the tank when dry. The argument here is that if the land is used for an agricultural purpose, any source of income from it is agricultural income. This supposes that agricultural income means income derived from agricultural land. But the definition clause in section 2 (1) (a) shows that the income intended is the income derived as rent or revenue from the use of the land for agricultural purposes. If this be so, the income derived from the use of the land for some purpose which is not agricultural is not "agricultural income".

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(1) (1924) 1.L.R. 3 Pat. 470.

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Cornish.*

VALLIAMMAL (FIRST RESPONDENT), APPELLANT IN
ORIGINAL SIDE APPEAL NO. 23 OF 1932,—

V. C. RANGANADHA MUDALIAR AND ANOTHER
(SECOND AND THIRD RESPONDENTS), APPELLANTS
IN ORIGINAL SIDE APPEAL NO. 24 OF 1932,

1932,
May 11.

v.

THE OFFICIAL ASSIGNEE, MADRAS (PETITIONER),
RESPONDENT IN BOTH THE APPEALS.*

*Presidency-towns Insolvency Act (III of 1903), sec. 108—
Administration of estate of deceased under—Ss. 7 and 36
of Act—Inability of Official Assignee to take proceedings
under—Sec. 58 of Act—Scope of—Report of Official
Assignee—Evidentiary value of, in proceedings taken by
Official Assignee under sec. 58 of Act.*

A person died in insolvent circumstances. After his death his estate was being administered in insolvency in virtue of proceedings instituted under section 108 of the Presidency-towns Insolvency Act. Under section 36 of the Act, the Official Assignee examined certain persons in order to ascertain whether they had in their possession certain account books and documents of the deceased debtor. They denied being in possession of the same. The Official Assignee then took out an application in the Insolvency Court under section 7 of the Act supported by a report filed by him for an order directing them to bring the said documents into Court or committing them for contempt of Court. They filed affidavits contradicting the case put forward by the Official Assignee. On these materials the Judge sitting in Insolvency made the following order: "Books to be delivered within two weeks."

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On appeal from this order, *held* : (1) The Official Assignee, in cases where he administers an estate under section 108 of the Act, has no power to examine persons under section 36 of the Act and no power to take proceedings under section 7 of the Act, and even if he had the power, he could not, without the consent of those persons, have proceeded with the application, having examined them under section 36 and the possession of the documents, etc., having been denied by them. (2) An application could be made under section 58 of the Act for an order for delivery up of possession of the documents of a deceased debtor, admittedly his property, the only question being whether or not the respondent to the application is possessed of them. (3) In such proceedings the report of the Official Assignee is not evidence in support of his application.

APPEAL from the judgment of STONE J. dated 29th February 1932, and passed in the Insolvency Jurisdiction of the High Court in Application No. 19 of 1932 and Petition No. 197 of 1930.

K. Narasimha Ayyar for appellant in Original Side Appeal No. 23 of 1932.

S. Doraiswami Ayyar with *P. Viswanatha Ayyar* for appellants in Original Side Appeal No. 24 of 1932.

V. C. Gopalaratnam for respondent in both appeals.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J. — These are two connected appeals from an order of STONE J. made in the Insolvency Court on the application of the Official Assignee that the appellants should be ordered to produce certain account books or be committed for contempt of Court. On the 29th February 1932 STONE J. passed the following order: "Books to be delivered within two weeks." Against that order this appeal has been presented. It raises some interesting and important questions.

The proceeding in which the order under appeal was made was the administration by the Insolvency Court of the estate of one Gurunatha Mudaliar who died on the 5th June 1930. His estate was insolvent but he had not before his death been adjudicated an insolvent. One of his creditors presented a petition to the Insolvency Court for the administration of the deceased debtor's estate under section 108 of the Presidency-towns Insolvency Act, and an order for the administration of that estate in insolvency was made after notice of the petition had been served upon the deceased's widow, Valliammal, appellant in Original Side Appeal No. 23 of 1932, who appeared by Mr. Varadaraja Mudaliar on the hearing of the petition but did not oppose it. The deceased debtor, during his lifetime, carried on a timber business, but he did not live at his place of business but lived at No. 52, Vellala Street, Purasavakkam, Madras, with his wife. He had a brother Ranganadha Mudaliar who is the first appellant in Original Side Appeal No. 24 of 1932. Immediately after the order for the administration of the estate in insolvency, the Official Assignee took possession of a superstructure belonging to the deceased and some timber and some old pieces of furniture, and although the house and the business premises of the deceased were searched and an inventory was taken of all articles and documents, no account books and other documents or papers relating to the timber business were discovered, except some bill books for timber sold; and certain title deeds, which the Official Assignee alleges to have been in the possession either of Valliammal or Ranganadha Mudaliar, were not found. At this time there was in Madras, Murugesha Mudaliar, the second appellant in Original Side Appeal No. 24 of 1932, alleged to be a relation of the deceased debtor or of Valliammal, who was assisting her in the

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administration of the estate and took some action with regard to the leasing of some properties. The Official Assignee's case is that the appellants have taken possession of the account books and other documents relating to the timber business carried on by the deceased, and also the title deeds to some of the properties. The Official Assignee made a number of efforts to get the appellants before him for the purpose of examining them under section 36 of the Presidency-towns Insolvency Act in order to ascertain whether they had the property, in the shape of account books, documents and title deeds, etc., of the deceased debtor in their possession, and eventually all the appellants were examined, and all of them denied having in their possession those documents. Faced with these denials and being unable to get the documents, the Official Assignee presented the application to the Court upon which the order appealed from was made. Affidavits in answer to the Official Assignee's application were filed by all the three appellants contradicting the Official Assignee's case. No evidence was taken by the learned trial Judge, although we are informed by Mr. V. C. Gopalaratnam, appearing on behalf of the Official Assignee, that he had his witnesses in Court. The learned trial Judge, upon the report of the Official Assignee on the one side and the affidavits of the respondents on the other side, passed the order that the books were to be delivered within two weeks. As learned Counsel before us were unable to agree as to what happened in the trial Court we have consulted STONE J. who states that he made his order very quickly without considering any evidence other than the documentary evidence before him, intending on the next occasion, namely at the end of the period prescribed in his order, to inquire into the question of the possession of the account books. We also ascertained

from him that Mr. Narasimha Ayyar who was then appearing for Valliammal did not state that he wished to argue any question as to the jurisdiction of the Court to entertain the application, although we accept Mr. Narasimha Ayyar's statement that he intended to take the point and had the necessary authorities to support his argument ready in Court, and it was only the rapidity with which the order was made by our learned brother that prevented him taking this legal objection. It is conceded however that he informed our learned brother that the order made by him amounted really to a finding that either his client or the other appellants, or all of them acting together, were in possession of this property. Notwithstanding that, the order was passed.

The points taken here in appeal are (1) that the Court had no jurisdiction to entertain a claim under section 7 of the Act; (2) that even if it had, as the appellants had been examined under section 36 and had denied possession of the books, etc., the Official Assignee's remedy was by suit and not under section 7; (3) that if the application was not one under section 7 there is no other section in the Insolvency Act which entitles the Official Assignee to present it; and (4) that there was no evidence before STONE J. upon which he could make the order that he did, as the report of the Official Assignee cannot be evidence upon such an application, and that therefore the denials of possession of the books by the appellants stood uncontradicted, whereas the allegations made by the Official Assignee in his report remained unproved.

With regard to the first point the contention is that, as this is an administration of the estate of a person dying insolvent under section 108, the only provisions of the Act, except of course Part X in which section 108

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is, that apply are those contained in Part III. It is necessary to refer to section 109. Section 109 (1) reads as follows :—

BEASLEY C.J. “Upon an order being made for the administration of a deceased debtor’s estate under section 108, the property of the debtor shall vest in the Official Assignee of the Court, and he shall forthwith proceed to realize and distribute the same in accordance with the provisions of this Act and (2) with the modification hereinafter mentioned, all the provisions of Part III, relating to the administration of the property of an insolvent, shall, so far as the same are applicable, apply to the case of such administration order in like manner as to an order of adjudication under this Act.”

It is argued that as section 7 is in Part I of the Act its provisions do not apply to these administrations. In support of this argument reference was made to *Sornammal v. Official Assignee, Madras*(1). It was there held that section 7 is not applicable to proceedings to administer a deceased debtor’s estate initiated under section 108. WHITE C.J. held that the decision in *In re Hewitt*(2) governed the question. The facts in *In re Hewitt*(2) were that the deceased debtor’s estate was being administered by the Bankruptcy Court under section 125 of the Bankruptcy Act, 1883, the section corresponding to section 108 of the Presidency-towns Insolvency Act. The Official Receiver applied to the County Court having jurisdiction in the matter of the administration for an order for the examination on oath before the Court of the widow and executrix of the deceased and the deceased’s son upon the ground that they were capable of giving information respecting the deceased’s property. It was ordered by the County Court that these persons should attend before the Court for examination on oath under section 27 of the Bankruptcy

(1) (1914) 27 M.L.J. 66.

(2) (1885) 15 Q.B.D. 159.

Act, the section corresponding to section 36 of the Presidency-towns Insolvency Act. This order they did not obey and an order for their committal for contempt was obtained. They appealed. Under the Bankruptcy Act of 1883 there is a provision similar to section 109 (2) of the Presidency-towns Insolvency Act applying the provisions of Part III of the Bankruptcy Act to such administrations. That is section 125 (5) to (8). Section 27 is not in Part III of the Bankruptcy Act of 1883 and it was held on appeal there was no power in cases of such administrations to apply the provisions of section 27. WILLS J., who together with CAVE J. decided this matter, at page 167 states thus :

“Now, by sub-section 6 of section 125 the Legislature has specifically pointed out certain sections of the Bankruptcy Act which are to be applied to the administration of the estates of persons dying insolvent. According to the ordinary rule of interpretation, unless there are strong reasons to the contrary, when they provide that the provisions of Part III shall be applicable, they must be considered to mean that other parts of the Act shall not be applicable.”

This case has been referred to repeatedly in English decisions in the course of the arguments in reported English cases, and as an authority upon this point has never been questioned. Indeed it is probable that it was in consequence of this decision that in the Bankruptcy Act of 1914 an alteration was made in the law and the power to examine persons in such administrations was given to the Bankruptcy Court. No such alteration has been made in the Presidency-towns Insolvency Act. *In re Hewitt*(1), therefore, strongly supports the appellants’ contention that no sections of the Act which are not included in Part III have any application to administrations of estates under section 108, unless there are very strong reasons for applying

(1) (1885) 15 Q.B.D. 159.

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other sections. *In re Hewitt*(1) was considered by a Full Bench of the Rangoon High Court in *D. J. Kolapore v. The Port Commissioners, Rangoon*(2). There the question to be considered was whether the provisions of section 7 of the Act could be applied in the case of an administration under section 108 and it was held by RUTLEDGE C.J. and MAUNG BA J., HEALD J. dissenting, that section 7 is not a provision of the Act which, either expressly or by necessary implication, can be applied in such cases. HEALD J. took the view that the words "case of insolvency" in section 7 of the Act are sufficiently wide to cover a case of administration in insolvency. Great reliance was placed by the majority of the Full Bench upon *Hewitt's case*(1), and it is very difficult to understand why HEALD J. did not consider that *Hewitt's case*(1) strongly supported the view expressed by the other two learned Judges. At page 167 he says:

"The position is therefore that there is one English ruling, namely, *Hewitt's case*(1), which suggests that the fact, that a section which is sought to be applied to cases of administration in bankruptcy or insolvency falls outside Part III of the Act, precludes its application to such cases . . ."

and

"With the greatest respect I find myself unable to apply that suggestion to the Indian Act."

I am quite unable to follow HEALD J.'s inability to apply *Hewitt's case*(1) to the Indian Act which is almost word for word the English Bankruptcy Act. As I have already stated, *Hewitt's case*(1) has, since its decision, been treated with the greatest respect both in the arguments at the Bar and in the judgments found in many reported English cases. In *In the matter of the*

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Estate of P. A. Mohamed Ganny(1), CHANI J. held that sections 36, 55 and 56 of the Presidency-towns Insolvency Act are not applicable to administrations under section 108 of the Act; section 36 because of the authority of *Hewitt's case*(2), and the other two sections because of *Ex parte Official Receiver. In re Gould*(3). In the latter case it was held that section 47 of the Bankruptcy Act, 1883, corresponding to section 55 of our Act, which avoids certain voluntary settlements executed by a bankrupt, does not apply to the administration of the estate of a deceased insolvent by the Court of Bankruptcy under section 125 of the Act. The *ratio decidendi* of this case was that section 125 of the Bankruptcy Act, 1883, corresponding to section 108 of the Indian Act, is confined to the administration of the estate of a deceased debtor and does not include the administration of the property of other persons. The property having been voluntarily transferred by settlement ceased to be the property of the deceased debtor and hence it was not property, the subject-matter of section 125. *Hewitt's case*(2), therefore, confines the provisions of the English Bankruptcy Act applying to administrations under section 125 of that Act to those in Part III of the Act. *Ex parte Official Receiver. In re Gould*(3) goes further and decides that even some sections included in Part III of the Act have no application to such administrations because the Court has power to deal only with the property of the deceased debtor and not that of other persons. In my view, the decision in *D. J. Kolapore v. The Port Commissioners, Rangoon*(4) is correct. It appears to me that it was not intended by the use of the words "in any case

(1) (1927) I.L.R. 5 Rang. 375.

(3) (1887) 19 Q.B.D. 92.

(2) (1885) 15 Q.B.D. 159.

(4) (1926) I.L.R. 4 Rang. 157 (F.B.).

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of insolvency" in section 7 of the Presidency-towns Insolvency Act to include the exercise of the powers of the Insolvency Court in cases of administration in insolvency such as this. The deceased debtor was not an adjudicated insolvent and, in my view, section 7 was only intended to apply to cases where there had been an adjudication in insolvency. In my view, the Official Assignee had no power to examine the appellants under section 36 of the Act and no power to take proceedings under section 7. Even if he had possessed the latter power, he could not, without the consent of the appellants, have proceeded with the application, having examined them under section 36, and the possession of the documents, etc., having been denied by them. This right is clearly negatived by a Full Bench of this Court, of which I was a member, in *Official Assignee, Madras v. Narasimha Mudaliar*(1), where it is pointed out that in such cases the Official Assignee's only remedy is to proceed by way of suit. This disposes of points one and two.

I shall now proceed to deal with the third point taken by the appellants, namely, that if section 7 is inapplicable, there is no other section in the Insolvency Act which entitles the Official Assignee to proceed with this application. It is argued that section 58 of the Act does not give the Official Assignee this power because section 58 (2) says :

"The Official Assignee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the insolvent, be in the same position as if he were a receiver of the property appointed under the Code of Civil Procedure, 1908, and the Court may on his application enforce such acquisition or retention accordingly."

(1) (1929) I.L.R. 52 Mad. 717 (F.B.).

This, it is argued by the appellants, limits the power of the Official Assignee to that possessed by a receiver appointed under the Civil Procedure Code, and that a receiver thus appointed has no power to deal with persons who are not parties to the suit in which he has been appointed receiver. Hence it is argued that, as a receiver can only get the property of the estate which is in the hands of strangers to the suit by filing a suit against them, the Official Assignee is in no better position, and his remedy is by way of a suit and not by such an application as this. In support of this argument the notes to Order L, rule 16 of the Rules of the Supreme Court were referred to (page 899 of the Annual Practice, 1932). There it is stated:

"As against a stranger to the action who is in actual possession, the appointment of the receiver is of no effect."

In re Crowther. Ex parte Ellis(1) was also referred to. There it was held that a County Court Judge, sitting in bankruptcy, had no jurisdiction, unless by consent, to order payment to the Official Receiver of money received under a garnishee order attaching a debt due to the estate of a deceased debtor which is being administered under section 125 of the Bankruptcy Act of 1883. The County Court Judge made the order and the persons who had attached the debt appealed and CAVE J. in allowing the appeal said :

"Section 125 of the Bankruptcy Act, 1883, has given power to the Court of Bankruptcy to administer the estate of a debtor who has died insolvent. Unless there is some provision to the contrary the Court in acting under this section must follow the practice of the Chancery Division of the High Court of Justice with regard to the administration of the estates of deceased persons. In the High Court an application for an order such as that now appealed against would not be entertained without the consent of the person against whom the order was asked for."

(1) (1887) 20 Q.B.D. 38.

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I do not, however, think that this case goes as far as Mr. Doraiswami Ayyar for the appellants argues it does. When the facts of the case are examined it will be seen that what was decided that the Bankruptcy Court had no power to do was to entertain an application for the delivery up, to the Official Receiver, of money which the appellant not only claimed a right to possess but had got an order from the Court showing that he had made out a *prima facie* case for such a claim. That this is so will be seen from the argument of Mr. Herbert Reed who appeared for the appellant in that case. His first point was that the section under which the County Court Judge acted was not contained in Part III of the Act, and therefore, following *In re Hewitt*(1), the Court had no jurisdiction to act under that section. His second point was that the order affected not only the estate of the deceased debtor but also the property of another person, namely, the appellant, and in support of that argument he relied upon *Ex parte Official Receiver. In re Gould*(2). This case, in my view, does not say that, where a third person is in possession or is alleged to be in possession of property admittedly belonging to a deceased debtor, such an application as this cannot be made, although it must be conceded that the notes to Order L, rule 16 of the Rules of the Supreme Court certainly do support Mr. Doraiswami Ayyar's argument. Although the Official Assignee is to have the same powers as a receiver appointed under the Civil Procedure Code, section 58(1) says :

"The Official Assignee shall, as soon as may be, take possession of the deeds, books and documents of the insolvent and all other parts of his property capable of manual delivery." and sub-section (2) provides that on his application the

(1) (1885) 15 Q.B.D. 159.

(2) (1887) 19 Q.B.D. 92.

Court will enforce his acquisition of that property or its retention. In my opinion, the words of the section are sufficiently wide to cover an application made to the Court for delivery up of possession of the documents of a deceased debtor, admittedly his property, the only question being whether or not the respondent to the application is possessed of them. Section 59 entitles the Court to issue a search warrant and under it houses belonging to a person not the insolvent may be searched and the property of the insolvent discovered there seized. I cannot accede to the appellants' contention that, where the Official Assignee has a well-founded belief that property of an insolvent or a deceased debtor lies in the house of a third person, obtains a search warrant from the Court, searches the house and is unable to discover that property because it is cleverly concealed by the occupier of the house, the Official Assignee is driven to file a suit against him instead of applying to the Court for directions or for such an order as was made in this case. Mr. Narasimha Ayyar, for Valliammal, argues that the Official Assignee's remedy must be by way of suit because non-compliance with the order such as was made in this case exposes his client to the risk of being committed for contempt, whereas if a suit is filed against her and a decree is obtained she runs no such risk. The answer to that contention is that, under Order XXI, rule 31 of the Code of Civil Procedure, such a decree could be executed by the detention in a civil prison of his client, the judgment-debtor, and or by the attachment of her property. Holding the view that the Official Assignee was entitled to make this application under section 58 of the Act because the appellants are persons alleged to be in possession of property admittedly belonging to

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VALLIAMMAL the deceased debtor, it is not necessary for me to consider the question as to whether or not he was entitled to do so because the appellants are to be regarded as parties to the suit. It was argued alternatively by Mr. Gopalaratnam, for the Official Assignee, that the appellants would be proper parties to an administration suit and therefore the receiver would be entitled to make this application. Valliammal is the next-of-kin of the deceased and a next-of-kin is certainly a proper party to an administration suit. As regards the other appellants and indeed as regards Valliammal, the allegations are that they have intermeddled in the estate and if those allegations are true—it is not for us to enquire into them; that is a matter for the learned trial Judge—then obviously they would be proper parties to the suit; but in my view it is unnecessary to go into this question.

There remains the fourth point argued by the appellants, namely, that there was no evidence before the learned Judge upon which he could make his order. With this contention I entirely agree. Before such an order as this could be made, the Official Assignee had to make out a *prima facie* case that the appellants had in their possession the property he sought to get delivery of. What was the sworn evidence put forward by the Official Assignee in support of his claim? Sworn evidence there was none, either oral or by affidavit. The whole case of the Official Assignee was set out in his report. Most of what is contained therein is derived from persons who did not give evidence. On the side of the appellants were the affidavits contradicting the Official Assignee's allegations. The question which arises here is, is the report of the Official Assignee in such a proceeding as this *prima facie* evidence in support of his application? It was argued on behalf of

the Official Assignee that rule 117 of the Presidency-towns Insolvency Act makes the Official Assignee's report *prima facie* evidence of the matter reported upon. That rule is as follows:—

"Except where otherwise provided by the Act or these rules, evidence to be given by the Official Assignee may be given by his report to the Court and need not be upon affidavit; and such report shall be *prima facie* evidence of the matter reported upon."

The Act does not provide anywhere that the evidence on such an application as this to be given by the Official Assignee is not to be by his report nor must be upon affidavit. That rule is sufficiently wide even to enable the Official Assignee who has a money claim against strangers in an insolvency and against debtors to an insolvent's estate and in many other cases to rest his case upon his report only. This rule offends against two of the most important rules of evidence, namely, that testimony shall be on oath or by affirmation and that hearsay evidence shall be excluded. Under the English Bankruptcy Act the report of the Official Assignee is only receivable in evidence in the cases provided for in the Act and the rules, such as cases of composition or applications for discharge or where the conduct of the insolvent is in question, i.e., failure to attend for examination, file his schedule, or assist the Official Assignee; and Rule 190 of the Bombay Rules under the Act provides for the cases in which the Official Assignee's report is receivable by itself as evidence. If rule 117 is intended to allow the Official Assignee's report to be *prima facie* evidence in such a case as this, then I have no hesitation whatever in saying that the rule is *ultra vires*. In my opinion, the Official Assignee's report was not evidence at all. The learned trial Judge therefore had no evidence before

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him upon which he could make the order. With all respect to the learned trial Judge, I think he should have decided the question of possession first before making the order and after taking evidence. Indeed the only inference arising from his order is that he had decided that question and not left it for decision, as he intended to do, on the next occasion.

There is one other matter to be dealt with and that is the respondent's argument that, if the appellant's contention is right, namely, that the only sections of the Act applicable to such an administration are those contained in Part III, the appellants have no right of appeal because section 8 is the section giving the right of appeal and that is not contained in Part III. Adopting the view of WILLS J. in *In re Hewitt*(1), unless there are strong reasons to the contrary, the words of section 109 of our Act must mean that all the other parts of the Act except Part III shall not be applicable. But there are the strongest reasons to the contrary. No right of appeal is given by any of the other sections of the Act and it seems to me to be an amazing contention that, whereas in the case of an insolvent there is a right of appeal and the Court may review, rescind or vary any order made under its insolvency jurisdiction; where you have a deceased debtor no such right exists. Amongst other things, Part III deals with the proof of debts and, when in an insolvency a creditor whose proof of debts has been rejected is entitled to appeal, why should the creditor, whose proof is rejected merely because his debtor is dead be deprived of such a right? I am supported in the view I take about this matter by RUTLEDGE C.J. in *D.J. Kolapore v. The Port Commissioners, Rangoon*(2) who says that he would be prepared

(1) (1885) 15 Q.B.D. 159.

(2) (1926) I.L.R. 4 Rang. 157 (F.B.).

to hold that by necessary implication section 8 (1) of the Act applies to orders of the Insolvency Judge arising in administration of the estates of deceased debtors. In my view, that contention fails.

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In the result the appeal must be allowed and the case remanded to the Insolvency Court where this application will be reheard in the light of the opinion expressed by the Court with regard to the evidence. With regard to costs, as a great deal of the appellants' argument was directed to the third point raised and it has been decided in favour of the respondent, I think the proper order will be to direct the costs of the appeal to abide the rehearing of the Official Assignee's application.

CORNISH J.—I am of the same opinion and for the same reasons.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

S. ALWAR CHETTY (PLAINTIFF), APPELLANT,

v.

THE MADRAS ELECTRIC SUPPLY CORPORATION,
LIMITED (DEFENDANTS), RESPONDENTS.*

1932,
May 6.

Nuisance—Owner of premises not in occupation of same—Suit by, for injunction and damages for nuisance without joining the occupier of the premises—Competency of—"Permanent"—Meaning of.

An owner who is not in occupation of a house can file a suit for damages for nuisance without joining the occupier if the nuisance complained of is "permanent" and of such a character as to injuriously affect the reversion.

* Original Side Appeal No. 81 of 1931.

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Where the nuisance is caused by machinery installed in certain premises for the purpose of supplying electricity to a city in pursuance of a licence granted by Government for the said purpose, the nuisance is practically a "permanent" one, i.e., one "which will continue indefinitely unless something is done to remove it."

APPEAL from the judgment of WALLER J. dated 20th January 1931 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 213 of 1930.

Plaintiff (appellant) was the owner of certain premises. Defendants (respondents) were the owners of the adjacent premises. The defendants had obtained a licence under the Indian Electricity Act, 1903, from the Madras Government to supply electricity to the City of Madras for lighting and other purposes. The defendants installed in their premises electric dynamos for the said purpose. Plaintiff filed a suit for injunction and damages on the ground that the noise was interfering with the physical comfort and enjoyment of the occupants of his house, and the vibratory and jarring effects produced by the machinery rendered the walls of his house unsafe. The defendants denied that there was any substantial nuisance, or that the plaintiff's house was affected by the vibratory effects of the machinery. The trial Judge held that, as the plaintiff was not the occupier, the suit was not maintainable. Reference was made to *Cooper v. Crabtree*(1) and *Jones v. Chappell*(2). His Lordship remarked that the noise of the defendants' machinery was not permanent, and found that it had not been proved that the noise amounted to an actionable nuisance, and that the plaintiff's house was benefited by the new walls erected by the defendants which must have deadened the noise

(1) (1881) 19 Ch.D. 193.

(2) (1875) L.R. 20 Eq. 539.

considerably. The suit was dismissed with costs. The plaintiff appealed.

S. Srinivasa Ayyangar and *K. S. Krishnaswami Ayyangar* for *T. C. A. Anandalwan* and *T. C. A. Bashyam* for appellant.

Nugent Grant, V. V. Srinivasa Ayyangar and *O. T. G. Nambiar* for respondents.

Cur. adv. vult.

JUDGMENT.

[His Lordship after setting out the facts discussed RAMESAM J. the evidence and proceeded as follows :—]

The case was started on account of the apprehension of the safety of the house by the digging for the new foundations north of the plaintiff's house; when the suit was actually launched, the vibration was added as an afterthought and Exhibit A-1 was altered correspondingly to suit the addition; there was really no vibration, by which I mean vibration to the ground communicated to the neighbouring house, (not vibration caused by a sound which, unless the sound is very great, can have no effect)—the vibration is practically nil; the cracks in the house are really due to the house being an old house and have nothing to do with the vibration; possibly they may be due to the deprivation of the lateral support at the time of digging the foundations, but for two years there is no increase in the cracks; as to the noise, practically there is none that disturbs sleep between 10-30 p.m. and 5-30 a.m., but when the machines change at 5-30 there is a sudden noise for a minute or two which may disturb one's sleep and there is slightly less noise between 9 and 10-30 p.m. If one should take 9-30 p.m. as the normal hour for going to sleep, one's sleep is disturbed for an hour. This must have been the state of things at the time the action was launched. After the building of the

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deadening wall to the north of the plaintiff's house, the noise is practically not worth mentioning except between 9 and 10-30 p.m. when it is slighter than before but still exists but not in such a substantial manner as to entitle the plaintiff to a relief in a Court of law.

In the face of the above conclusions it is practically unnecessary to discuss any question of law arising in the case, but, as the point has been elaborately argued, I think it is necessary to state my opinion on the matter. The learned trial Judge, relying on *Cooper v. Crabtree*(1) and *Jones v. Chappell*(2), held that the plaintiff not being the occupier cannot maintain the action. In *Simpson v. Savage*(3) it was held that the landlord could not maintain an action for injury to the reversion caused by the erection of workshops and a forge and chimney on adjoining land producing smoke and making loud noise. In *Jones v. Chappell*(2) it was held that the owner cannot maintain an action to restrain a temporary nuisance such as the noise of machinery in adjacent premises. The defendant in that case erected steam engines and stone saw-mills and other machinery therein. It was held that the plaintiff could not maintain the action. JESSEL M.R., after referring to *Simpson v. Savage*(3), observes :

"The injury is a temporary nuisance, because the saws might be stopped and the steam engines might cease working at any moment. It is only an injury to the occupier, and the landlord cannot bring an action, because before his estate comes into possession the nuisance may have ceased or the person committing it may choose to make it cease the moment the estate comes into possession. Another ground of action on the part of the landlord might be that the existence of a nuisance of a temporary character would render it more difficult for him to let to a future tenant or to sell. But that is said not to be a good ground of action, because the theoretical diminution of

(1) (1881) 19 Ch.D. 193.

(2) (1875) L.R. 20 Eq. 539.

(3) (1856) 1 C.B. (N.S.) 347; 140 E.R. 143.

the value of the property cannot be taken into account, inasmuch as the purchaser or the new occupier would have a right to stop the nuisance, so that he ought not to give less on that account than he otherwise would. It appears to me I am not able to overrule *Simpson v. Savage*(1)."

The second paragraph of JESSEL M.R.'s remarks produces the impression that he would have been glad to overrule *Simpson v. Savage*(1), but thought he could not. In *Cooper v. Crabtree*(2) the defendant put up some poles and hoarding to prevent the plaintiff's house from acquiring a right to the easement of light. The nuisance complained of here is very temporary in its nature. One may regard the defendant's conduct in the case as whimsical, and he may change his whim at any moment. In such circumstances it may perhaps be proper to hold that the absentee owner has no right to maintain the action. The case was affirmed on appeal in *Cooper v. Crabtree*(3). But the ground of the appellate judgment is that the poles and hoarding are not of such a permanent character as to injure the reversion and the erection of the poles was too trifling to entitle the plaintiff to an injunction. In Clerk and Lindsell on Torts, eighth edition, at pages 376 and 377, the cases are collected. The criticism at page 377 shows that the English rule itself has not had the acceptance of Judges and text-writers. In Gale on Easements, tenth edition, page 511, the rule is summed up in this form :

"According to modern authorities an interference will be injurious to the reversion if (i) it be something which will in the future continue to the time when the reversion falls into possession or if (ii) it be something which in the present operates as a denial of the right of the reversioner. (Vide Kerr on Injunctions, page 135, sixth edition)."

(1) (1856) 1 C.B. (N.S.) 347; 140 E.R. 143. (2) (1881) 19 Ch.D. 193.

(3) (1882) 20 Ch.D. 589.

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The remarks of PARKER J. in *Jones v. Llanrwst Urban Council*(1) are specially quoted. There he says:

"I take 'permanent', in this connexion, to mean such as will continue indefinitely unless something is done to remove it."

It may be that the poles and hoarding in *Cooper v. Crabtree*(2) obviously could not be regarded as "permanent". In *Tinkler v. Aylesbury Dairy Company (Limited)*(3) the suit was for restraining the defendants from working an engine on the premises and loading or unloading carts, etc. KEKEWICH J. observed:

"If the existence of a nuisance was conclusively proved, injury to property followed, and if injury to property was proved, there was strong, though not conclusive, evidence of nuisance."

Finally he observed,

"In the day time the cart noise was merged in the greater din of the street traffic."

He found that the noise in the defendants' business had driven people from the neighbourhood and that on the ground of interference with personal comfort there was a nuisance in respect of which relief must be granted. In *Wood v. Conway Corporation*(4), a judgment of the Court of Appeal, BUCKLEY L.J. observed:

"If the owner is substantially injured in the reasonable enjoyment of the property so that he sustains that which is equivalent to a legal nuisance, he is entitled to an injunction."

It was there found that the plaintiff's plantation suffered from the fumes and smoke from the defendants' gas-works. As to the argument based upon the nuisance being temporary COZENS-HARDY M.R. observed:

"We have heard a good deal about it being temporary. That argument seems to me to have nothing whatever to do with the case. This is not the case of a man carrying on a business which he may give up next week."

(1) [1911] 1 Ch. 393, 404.

(3) (1887) 5 T.L.R. 52.

(2) (1881) 19 Ch.D. 193.

(4) [1914] 2 Ch. 47.

(It may be said that in the case of *Cooper v. Crabtree*(1) the poles and hoarding may be removed in a week).

"It is the case of a corporation which succeeded a parliamentary gas company . . . as is quite clear from the Act of Parliament, an obligation was imposed on the corporation to supply gas from their works to their customers."

The last remark of COZENS-HARDY M.R. is very important to the present case. In the present case the defendants have been authorized by licence from the Madras Government to supply electric light to the City of Madras, and one may observe it is practically impossible that the defendants' works will cease within a week or even years. In *Shelfer v. City of London Electric Lighting Co.*; *Meux's Brewery Co. v. City of London Electric Lighting Co.*(2) it was held that both the reversioner and the owner could maintain an action. In the particular case only damages were given. In *Heath and others v. Mayor, &c., of Brighton*(3) it was found as a fact that the sound of the electric lighting works did not generally distract the attention of ordinary healthy persons and was not a legal nuisance. In *Wilson v. Townend*(4) it was held that the jurisdiction of the Court is not confined to restraining injury to the enjoyment and comfort in the occupation and it is not necessary that a plaintiff should be in the actual occupation of the property. In my opinion in this case, if there had been a substantial nuisance to the tenants and therefore of a kind which could be regarded as detrimental to the letting value of the plaintiff's house, the plaintiff would be justified in maintaining the action. In Halsbury's Laws of England, Vol. XXI, section 943, the rule is stated in almost identical terms as was

(1) (1881) 19 Ch. D. 193.

(3) [1908] 93 L.T. 718.

(2) [1895] 1 Ch. 287.

(4) (1860) 1 Dr. & Sm. 324; 62 E.R. 403.

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stated in Gale on Easements already quoted. If on the facts I had found that there is a substantial injury in the terms described I would have held that the plaintiff could maintain his action. But on the facts I have found that there is no such nuisance as would justify either the occupier or the landlord in complaining of the defendants' works as a legal nuisance. Such little justification as might have existed before the deadening wall was erected had ceased after the erection of that wall. If the contemplated erection of that wall was not known to the plaintiff, that will be a ground for disallowing costs to the defendants in the trial Court. From 1926 onwards, complaints were received by the Municipal Corporation from the residents of the locality about the noise caused by the machinery. In the various replies that the defendants gave to the Municipal Corporation Engineer contained in Exhibit (C) series beyond saying that arrangements would be made to cause as little unnecessary noise as possible there is no further information as to the manner by which the noise was to be minimised. Even in October 1929 when the defendants gave an assurance that the noise would be minimised there is nothing to show the nature of the steps intended to be taken for minimising the noise. Again in April 1930 when the plaintiff gave a notice of action to the defendants it is obvious that he was under the impression that the object of the defendants was to instal new machinery and it was for this purpose that the old wall was being demolished and the foundations for the new wall were being prepared. It refers to the "electric plant and machinery you are putting up and enlarging in the adjacent premises." In neither of the two replies, dated 9th and 15th April, is there any reference to the contemplated erection of a deadening wall which will

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diminish the annoyance caused to the plaintiff's house by the noise. The letter of 15th April merely says that the new building proposed to be erected will not interfere with the plaintiff's rights as the owner of his house. This is entirely different from saying that the new wall will actually diminish the noise that was theretofore caused to the residents in plaintiff's house. It is true that the plaintiff knew the building of the wall, but there is absolutely nothing in the whole record to show that the plaintiff knew or that it was pointed out to him that the effect of the building of the new wall would be to diminish the noise and the annoyance caused by it particularly in the evening hours between 9 and 9-30 p.m. If the defendants had pointed this out to the plaintiff and asked him to wait until the wall was finished and then judge the state of things, the plaintiff would have had no justification in going to Court after such a reply. As it is, it is difficult to say that the plaintiff was wrong in going to Court though, as the nuisance had ceased to exist in a substantial manner during the pendency of the action on account of the finishing of the wall, the plaintiff has now become disentitled to any relief. If the deadening wall had not been built, the plaintiff would have a cause of action entitling him to at least damages if not injunction. I think the defendants are to be blamed for not pointing this out to the plaintiff and asking him to wait until the wall is finished. If he did not listen to such advice then he would not be entitled to rush to the Court. On these grounds I would disallow the costs of the defendants in the trial Court. But as these reasons did not exist for the plaintiff's filing the appeal, I dismiss the appeal with taxed costs and with the modification as to costs in the Court below (certify for two counsel).

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CORNISH J.—I agree that the appeal fails. The plaintiff has put his case upon two grounds: firstly that the vibration produced by the defendants' machinery has rendered the walls of his house unsafe; and, secondly, that the noise of the machinery has so interfered with the comfort of the plaintiff's tenants in the house as to constitute an actionable nuisance.

If the cracks in the wall of plaintiff's house have, as alleged, been caused by the vibration of the machinery, then, the nuisance being one which is actually damaging his property, the plaintiff, as owner, would undoubtedly be entitled to sue and to obtain an injunction; *Wood v. Conway Corporation*(1). But I agree with the learned trial Judge that the plaintiff has failed to prove his case. The plaintiff has not gone into the witness-box to say that the cracks were caused by the vibration, and his expert witnesses do not say so. None of them was able to detect vibration in the plaintiff's house or in the passage between it and defendants' premises. The utmost that one of these witnesses, P.W. 14, says is that vibration would aggravate the cracks; and he gave the opinion that the major reason for the cracks was the settlement of the wall owing to its foundation having been disturbed by excavation. But that is not the case in the plaint.

Turning to the second ground of complaint, a suit is not maintainable by a non-occupying owner in respect of a nuisance which is only alleged, as in paragraph 10 of the plaint, to be personally injurious to the occupier; see *Jones v. Chappell*(2) and *House Property and Investment Company v. H. P. Horse Nail Company*(3). An owner, as distinguished from the occupier, can sue without joining the occupier if the nuisance is such as

(1) [1914] 2 Ch. 47.

(2) (1875) L.R. 20 Eq. 539.

(3) (1885) 29 Ch. D. 190.

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to cause injury to the reversion; and a nuisance from noise or smell, apart from causing personal discomfort, may, as pointed out by BUCKLEY L.J. in *Wood v. Conway Corporation*(1), be of such a character as to injuriously affect the value of the reversion. But the nuisance must be of a permanent character and injurious to the property. This is clear from the judgment of PARKER J. in *Jones v. Llanrwst Urban Council*(2) where he says:

"If the thing complained of is of such a permanent nature that the reversion may be injured, the question of whether the reversion is or is not injured is a question for the jury. I take 'permanent', in this connexion, to mean such as will continue indefinitely unless something is done to remove it. Thus, a building which infringes ancient lights is permanent within the rule, for, though it can be removed before the reversion falls into possession, still it will continue until it be removed. On the other hand, a noisy trade, and the exercise of an alleged right of way, are not in their nature permanent within the rule for they cease of themselves, unless there be someone to continue them."

In the present case, there is no doubt that the noise complained of is "permanent" within the meaning of the rule. The defendants are under a statutory duty to supply electricity, and it appears upon the evidence that in the fulfilment of their obligation it would be impracticable for them to alter the working of the machines or to instal a different system of machinery. The alleged nuisance is, therefore, incapable of being regarded as of a temporary character, which is likely to be stopped at any time; *Wood v. Conway Corporation*(1). The plaintiff, however, in order to succeed in this suit must prove that the noise has injuriously affected the value of his property. He has produced no proof of injury to the property as a consequence of the noise; and, with regard to the alleged nuisance to

(1) [1914] 2 Ch. 47.

(2) [1911] 1 Ch. 393, 404.

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the occupier, the learned trial Judge has come to the conclusion that the noise does not amount to a nuisance. He finds that in point of fact the comfort of the residents in the immediate neighbourhood of the defendants' premises is not materially diminished by the noise. The learned Judge was entitled to come to that conclusion upon the evidence, and I see no reason to differ from it.

But I think that the slowness of the defendants in carrying out the assurance which was given by them to the Madras Corporation in 1926 to do something to meet the complaints about the noise was in large measure responsible for this suit, and justifies the special order as to costs which my brother RAMESAM has proposed.

Attorneys for respondents.—*Moresby and Thomas.*

G.R.

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Mockett.

RAGHUNATHA DESIKACHARIAR (DEFENDANT),
APPELLANT,

v.

RANGASWAMI PILLAI (PLAINTIFF), RESPONDENT.*

Madras Estates Land Act (I of 1908), sec. 24—Enhancement of rent by private contract—Permissibility—Sec. 112—Suit by ryot under—Muchilika previously executed accepting puttah containing an enhancement—Legality of—Ryot's right to contest, in the suit—Secs. 52 and 53 of the Act—Effect of.

A landholder cannot enhance the rent without a suit, and independently of the Madras Estates Land Act, by agreement with his tenant. Section 24 of that Act is absolute and peremptory, and it leaves no room for enhancement otherwise than

* Second Appeal No. 1272 of 1930.

as provided for by the Act, as for instance, by private contract. The omission of such contracts from section 187 cannot affect the plain language of section 24.

A ryot who has once given a muchilika accepting a puttah containing an enhancement is not debarred from contesting its legality in a suit filed by him under section 112 of the Act. The expression "contesting the right of sale" in that section is wide enough to allow him to raise all possible pleas, including the plea that a portion of the arrear claimed is an enhancement not as provided by the Act, and therefore an amount which cannot be claimed under the Act. Sections 52 and 53 of the Act do not warrant the view that once there has been an exchange, then for all purposes of distraint, the puttah shall be held to be valid.

APPEAL against the decree of the District Court of South Arcot in Appeal Suit No. 243 of 1928 preferred against the decree of the Court of the Deputy Collector of Tindivanam Division in Revenue Suit No. 1 of 1927.

S. Varadachariar for *S. V. Venugopalachariar* for appellant.

K. Rajah Ayyar for *K. Desikachari* for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by JACKSON J.—Suit by a ryot contesting the right of the landholder to sell his holding under section 112, Madras Estates Land Act I, 1908, for arrears of rent.

It is not disputed that from 1919, or fasli 1329, the rent was enhanced by two annas in the rupee by mutual consent. Nor is it disputed that this enhancement was due to a rise in local prices, and to repairs to the irrigation works. On the facts the landholder may or may not have had good grounds for a suit under section 30 of the Act. But, could he, and this is the question, enhance the rent without a suit, and independently of the Act, by agreement with his tenant?

Section 24, marginally described as "restriction on enhancement", runs "the rent of a ryot shall not be

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enhanced except as provided by this Act", and then section 30 provides for a suit to that end by the landholder. So far as we can discover from the reports it has never been argued before a Bench, much less held, that section 24 was otherwise than absolute and peremptory. It leaves no room for enhancement otherwise than as provided for by the Act, as for instance, by private contract.

No doubt under section 187 certain contracts made before or after the passing of the Act are invalidated, and a contract to enhance rent is not in this category. But there is no question of invalidating a contract to enhance rent made before the passing of the Act, and therefore contracts limited to those made after the passing would not naturally fall into this dual category of contracts "made before or after".

We do not find that the omission of such contracts from section 187 affects the plain language of section 24; compare *Venkataramanachar v. Ibrahim Sahib*(1). Nor do we find anything in the Act to justify the further argument that a ryot who has once given a muchilika accepting a puttah containing an enhancement is any way debarred from contesting its legality. The language of section 112 is very broad. On a landholder's attempting to sell a holding for an arrear of rent under section 111, the ryot may file a suit "contesting the right of sale". This will allow him to raise all possible pleas, including the plea that a portion of the arrear claimed is an enhancement not as provided by the Act, and therefore an amount which cannot be claimed under the Act.

It is argued that this broad right of suit is narrowed by the terms of sections 52 and 53; but those sections

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only lay down the formal pre-requisites for the process of distraint without in any way begging the question at issue between the parties. Before a landholder can distrain by summary process he and the ryot in question must be deemed to have exchanged puttah and muchilika under section 53, and the circumstances in which, and the period for which, such exchange will be deemed to have occurred is explained in sections 52 and 53. But there is no warrant for reading into these sections that once there has been an exchange, then for all purposes of distraint, the puttah shall be held to be valid. On the contrary as regards a puttah of previous faslis continuing in force (the present case) it is expressly laid down at the end of section 53 (1) that it must be a valid puttah. As a mere matter of drafting the word "valid" might have been inserted before puttah wherever it occurs in this sub-section; or it might have been omitted altogether, with the natural presumption that the puttah whether exchanged, tendered or continued must be valid; but the sense of the section is perfectly clear. A distraining landholder must show a puttah (or prove its tender) as certifying his *prima facie* right to distrain; and the ryot may then go below the surface and question whether the puttah is so valid as to justify the distraint.

For these reasons we agree that the judgment of the learned District Judge is correct, and the appeal must fail.

The appellant did not attempt to argue in this appeal that another item of the arrear claimed, a charge for taking green manure from land not in the use or occupation of the ryot, is rent, and withdrew his claim to that amount; so we have not discussed the item.

The appeal is dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Mockett.

1932,
August 2.

N. K. N. RAMIER AND BROTHERS (PLAINTIFFS), APPELLANTS,

v.

S. S. RAMUDU AYYAR AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Contract—Sale of goods—Delivery by instalments—Contract goods mixed up with defective goods in regard to one instalment—Buyer's right on—Repudiation of whole contract by him—Subsequent complaint with regard to defective goods—Buyer's right of—Seller not accepting repudiation but keeping contract alive—Liability of seller in case of.

Where, under a contract for the sale of bales of cotton by instalments, the seller tenders to the buyer in respect of one of the instalments bales according to the contract mixed with defective bales, the buyer is entitled to reject not only the defective bales, but the whole instalment. Where the buyer does not state that he rejects the instalment because good bales were mixed with bad bales, but prefers to repudiate the whole contract, and the time in which the seller might replace the defective bales has expired and there can be no further question of replacement, the buyer cannot thereafter for the first time complain that some of the bales were defective.

Where, under a contract for the sale of goods by instalments, the buyer improperly rejects one instalment and repudiates the whole contract, the seller is entitled to accept the repudiation of the contract and to sue the buyer regarding the remaining instalment or instalments at once. If, without doing so, he elects to keep the contract alive as regards the remaining instalment or instalments, he thereby preserves the mutual obligations of the parties intact. One of these obligations is that he should tender the remaining instalment or instalments; and, if he does not do so, he cannot claim to retain the buyer's earnest money on account of that instalment or those instalments.

* Second Appeal No. 1060 of 1928.

APPEAL against the decree of the District Court of Madura in Appeal Suit No. 232 of 1926 preferred against the decree of the Court of the Subordinate Judge of Madura in Original Suit No. 73 of 1925.

T. R. Venkatarama Sastri and N. Rajagopala Ayyangar for appellants.

T. Krishnaswami Ayyangar and S. K. Narasimhachari for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by JACKSON J.—The appellants-plaintiffs and respondents-defendants are Madura cotton brokers who on 21st August 1918 Exhibit VIII engaged with others in what is known there as a chain contract.

The mills of Messrs. Harvey were to produce sixty bales of certain counts, and, as they passed down the chain, these were to be received by Messrs. Ramudu Ayyar, the defendants, and sold by them to Messrs. Ramier, the plaintiffs, who will be described henceforth as the sellers and the buyers, because in previous litigation their position was reversed and the terms plaintiffs and defendants will only lead to confusion.

Twenty-eight bales were tendered by the sellers, and taken delivery of by the buyers.

Nine bales were tendered (as will be shown below) by the sellers and rejected by the buyers. Twenty-three bales have never been tendered at all.

The buyers now sue for a return of the advance made by them to the sellers on the date of the contract with interest thereon in respect of the thirty-two bales of which they did not take delivery. The suit has been dismissed by both lower Courts, and the buyers appeal.

We agree with the lower appellate Court that the terms of Exhibit IX clearly constitute a tender of the nine bales on 15th November 1918.

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On 19th December 1918 Exhibit X the buyers complained that contrary to the custom of the trade deliveries were not being made as and when the bales were ready at the mills, and therefore they refused both to admit liability for the twenty-eight bales already delivered, and to take delivery of the nine bales tendered on 15th November 1918.

It came out in the course of another suit between the parties that three out of these nine bales had been bought from the mills at a price less than that contracted for in the chain contract, Exhibit VIII, and therefore the buyers would have been justified, on these grounds, in refusing not only the three defective bales but the whole instalment. The point is not one covered by the Indian Contract Act, but is clearly laid down in the English Sale of Goods Act, 1893, which embodies the existing law on the subject. Section 30 (3):

"Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may . . . reject the whole."

This section has been repeated since this suit began in section 37 (3) of the Indian Sale of Goods Act (III of 1930) and the parties are agreed that, whatever be its interpretation, this is the law on the subject.

Therefore if on 19th December 1918 the buyers had said we reject the nine bales because six good are mixed with three bad bales, they would have been within their rights. The sellers might then immediately have tendered the six good bales as a fresh instalment, and, if so advised, they had plenty of time in which to replace the three bad bales.

But since the buyers did not so state, but preferred to repudiate the whole contract, the question arises whether when the time has expired and there is no

further question of replacement, the buyers can for the first time complain that three bales were defective. This proposition is precisely what MATHEW L.J. stigmatizes as unbusinesslike and unreasonable in the leading case on the subject, *Braithwaite v. Foreign Hardwood Company*(1). This case has been canvassed in the English rulings, but as regards our Court its principle is clearly affirmed in *Rayulu Aiyar v. Kuppu Aiyar & Sons*(2) and *Nannier v. Rayalu Iyer*(3) and the following passage, page 551, shows how closely it runs on all fours with our present case:—

"After there had been a general repudiation of the contract by the defendants, the plaintiff's agent informed them that he had received the bill of lading for the first instalment, but the defendants again wrote refusing to take the bill of lading on the ground that they had previously repudiated the whole contract, and refused to be bound by it."

In the opinion of COLLINS M.R.,

"that act of the defendants amounted in fact to a waiver by them of the performance by the plaintiff of the conditions precedent which would otherwise have been necessary to the enforcement by him of the contract which presumably he had elected to keep alive against the defendants notwithstanding their prior repudiation, and it is not competent for the defendants now to hark back and say that the plaintiff was not willing and ready to perform the conditions precedent devolving upon him."

Commenting upon this decision in *British and Beningtons, Ltd. v. N.W. Cachar Tea Co. and others*(4), Lord SUMNER says:

"Furthermore it does not anywhere appear that, even if the first cargo might rightly have been rejected, the seller could not have found another exactly conforming with the contract which he might have duly tendered and so have put himself right."

(1) [1905] 2 K.B. 543, 554.

(3) (1925) I.L.R. 49 Mad. 781.

(2) (1924) 49 M.L.J. 1.

(4) [1923] A.C. 48, 71.

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Therefore, since the sellers have proved that they duly tendered these nine bales, we do not find that it is open to the buyers to raise the belated plea that three of the bales were not according to the contract which they had preferred entirely to repudiate.

But as regards the twenty-three bales there was no tender at all. It is clear that the sellers did not accept the repudiation of the contract, and on 2nd April 1919 Exhibit XIV they are warning the buyers that "you should also take delivery of the remaining bales (i.e., twenty-three) without delay on payment of the amount when and as they are received", but as a matter of fact they never did tender, and there was never any rejection after tender as with the nine bales.

It was argued for the sellers that this contract though by instalments was indivisible and that a repudiation of one instalment was a repudiation of the whole so as to absolve the sellers from the obligation to tender the twenty-three bales.

The answer to this is that as stated in section 31 (2) of the English Sale of Goods Act the question of indivisibility is a matter of fact in each case and as will later appear the sellers themselves clearly treated the contract as divisible.

In these circumstances the law seems clear as laid down in *Frost v. Knight*(1):

"The promisee may treat the notice of intention (to renounce) as inoperative and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance. But in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any

(1) (1872) L.R. 7 Exch. 111.

supervening circumstance which would justify him in declining to complete it."

Cf. Leake on Contracts, eighth edition, page 675. The sellers were still under the obligation of tendering, as they themselves admitted in their letter of 2nd April 1919, Exhibit XIV, and in the "Note" to their plaint in Original Suit No. 70 of 1919, Madura Sub-Court, which is an exhibit in this case.

The sellers at that time instead of bringing their suit regarding the twenty-three bales at once as they might have done elected to keep the contract alive so far as the twenty-three were concerned thereby preserving the mutual obligations of the parties intact.

One of those obligations was that they the sellers should tender the goods; and since they never did tender, they cannot now be heard to say that they can retain the buyers' earnest money on account of the twenty-three bales.

For the above reasons we agree with the lower Courts in respect of the nine bales, but allow the appeal in regard to the twenty-three bales; the advances for which must be returned with interest at nine per cent from date of demand. Proportionate costs throughout.

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APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Mockett.

1932,
August 11.

TADEPALLI SRIRAMULU AND TWO OTHERS (PLAINTIFFS),
APPELLANTS,

v.

THE FIRM OF KOLLIPARA SRIRAMULU, KOLLIPARA
VENKATA RAMACHANDRAYYA AND AKULA
SATYANARAYANA, REPRESENTED BY KOLLIPARA
SRIRAMULU, THE MANAGING PARTNER, AND
ANOTHER (DEFENDANTS), RESPONDENTS.*

*Mortgage suit—Final decree in—Application for—Dismissal of,
for non-payment of batta—Effect of—Fresh application
for such decree—Maintainability of—Code of Civil Proce-
dure (Act V of 1908), O. IX and O. XVII—Applicability of.*

The dismissal of an application for a final decree in a mortgage suit on the ground that batta has not been paid cannot be construed to be the dismissal of the suit itself and is no bar to the filing of a fresh application by the plaintiff.

An application for a final decree is not an application in execution, and, by force of section 141 of the Code of Civil Procedure, is governed by Order IX and Order XVII as though it is a suit. Where, therefore, such an application is dismissed for non-service, the plaintiff may, under rule 4 of Order IX, put in a fresh application.

APPEAL against the decree of the District Court of Kistna at Masulipatam in Appeal Suit No. 237 of 1928 preferred against the decree of the Court of the District Munsif of Gudivada in Original Suit No. 679 of 1926.

B. Somayya for appellants.

P. Venkataramana Rao and *P. V. Rajamannar* for respondents.

Cur. adv. vult.

* Second Appeal No. 1143 of 1928.

The JUDGMENT of the Court was delivered by JACKSON J.—This is a class of case which has given Courts considerable trouble. The present first defendant obtained a preliminary decree upon a mortgage against the father of the present plaintiffs. There then followed these applications for a final decree.

Exhibit A. Steps not taken. Dismissed.

„ B. Dismissed for failure to pay batta.

„ C. Dismissed.

„ D. 29th September 1919. Ordered on 14th November 1919.

The plaintiffs have brought a suit to set aside the consequent sale on the plea that, when the Court passed orders upon Exhibit D, it had already dismissed the suit and was *functus officio*. The lower appellate Court has held that the Court's final decree was not made without jurisdiction and plaintiffs appeal.

In this case it is a pure assumption that the suit was dismissed, and there is no reason to suppose that the Court really intended anything of the sort. In *Iachmi Narain Marwari v. Balmakund Marwari*(1) where the Judge actually used the phrase “The suit is dismissed for want of further prosecution” he explained that the object of dismissal “had not been to discharge or vacate the appellate decree”. And, as pointed out by the Judicial Committee in that case, he would have no jurisdiction to dismiss the suit. “The parties have on the making of the (preliminary) decree acquired rights which are fixed unless the decree is varied.” All that the Munsif did in the present case was to dismiss the applications for a final decree because batta had not been paid. Before its amendment in 1st September 1931 there was no provision in Order XXXIV, rule 5 (3), of the

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(1) (1924) I.L.B. 4 Pat. 61 (P.O.).

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Code of Civil Procedure for serving notice on parties ; and a Court dismissing an application for a final decree on the ground of non-payment of batta for serving notice was acting under its inherent and not under any statutory power. It arrogates to itself the right to dismiss an application filed under Order XXXIV, rule 5 (3). It is difficult to see how this peculiar action can be construed to be the dismissal of the suit itself, which, as pointed out by the Judicial Committee, is not within the power of the Court. A Court will not ordinarily be presumed to do an illegality. It seems better to follow the face of the record and to hold that the Court successively dismissed applications for a final decree. Such applications, as observed by CUNNINGHAM J. in *Venkatarama v. Marudachala*(1), are not applications in execution, and by force of section 141, Civil Procedure Code, are governed by Order IX and Order XVII as though they are suits. Under Order IX, rule 2, the Court dismisses the "suit", here, the application, for non-service. Then under Order IX, rule 4, the plaintiff may bring a fresh "suit", here, put in a fresh application. There is then no need for the plaintiff to get the previous order of dismissal set aside. *Mumtazi Venkataiah v. Boganatham Venkata Subbiah*(2), upon which the appellant strongly relies, lays down that the previous order is not *ultra vires*, though it may be erroneous. To this we entirely defer, and think it a dangerous doctrine that the judicial acts of Courts can be treated as mere nullities, and of no effect whatsoever. It was for this reason that this Court declined to interfere in revision in *Sreeramulu v. Nagabhushanam*(3). We also think it dangerous to carry the principle that a Court may rectify mistakes inadvertently made beyond

(1) A.I.R. 1931 Mad. 795.

(2) (1921) 42 M.L.J. 51.

(3) (1928) M.W.N. 542.

the ambit of the facts in *Debi Bakhsh Singh v. Habib Shah*(1) and should hesitate to say, as in *Jodha Singh v. Gokaran Das Pande*(2), that a Court can revoke its own order of dismissal. But the line of reasoning in *Venkatarama v. Marudachala*(3) makes revocation unnecessary. The orders of dismissal, Exhibits A, B, C, stand as good orders, but plaintiff has in Order IX, rule 4, a *locus penitentiae* which gives room for a fresh application. It may be added that this is no artificial way of avoiding a hard case, but runs with the real facts of the situation. The Court when it dismissed the applications had no real intention of dismissing the suit and was only acting *in terrorem* as said in *Lachmi Narain Marwari v. Balmakund Marwari*(4) to induce plaintiff to pay process fees ; and when plaintiff put in a fresh application it was precisely what the Court expected. Artificiality is imported by the assumption that the Court deliberately dismissed the whole suit, and rendered itself *functus officio*.

Accordingly the appeal is dismissed with costs.

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(1) (1913) I.L.R. 35 All. 331 (P.C.).

(2) (1935) I.L.R. 47 All. 548.

(3) A.I.R. 1931 Mad. 795.

(4) (1924) I.L.R. 4 Pat. 61 (P.C.).

APPELLATE CIVIL.

*Before Mr. Justice Jackson and Mr. Justice Mockett.*1932,
August 30.IN RE MAZUMDAR SOBHANADRI RAO PANTULU
GARU (PLAINTIFF), PETITIONER.**Court Fees Act (VII of 1870), sec. 7 (iv) (c), v and xi (cc)—
Applicability of—Inamdar admittedly entitled to mel-
varam—Ejectment suit by, after due notice, in virtue of
his title to kudivaram—Nature of—Court-fee payable on
plaint in.*

A suit by an inamdar, who is admittedly entitled to the melvaram in the suit lands comprising the inam, asserting his title to the kudivaram therein and claiming the right to eject the defendants after due notice by virtue of his title to the kudivaram, is a suit to obtain a declaratory decree (that he is entitled to the kudivaram) and consequential relief of possession within the meaning of section 7 (iv) (c) of the Court Fees Act and is to be valued accordingly for purposes of court-fee.

PETITIONS under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Masulipatam, dated the 26th day of August 1931 and made in Original Suits Nos. 12 to 46 of 1930.

*S. Varadachariar for N. Rama Rao for petitioner.
Government Pleader (P. Venkataramana Rao) for
Government.*

Cur. adv. vult.

JACKSON J. JACKSON J.—The ORDER of the Court was delivered by
The plaintiff, an inamdar, claims to have full right to both kudivaram and melvaram in the land which comprises

* Civil Revision Petitions Nos. 1195 to 1229 of 1931.

the inam (paragraph 3) so the letting to tenants is for temporary periods (paragraph 4) and the inam is not an estate within the definition in the Madras Estates Land Act (I of 1908) (paragraph 5) all tenants are tenants at will (paragraph 6) in December 1926 the defendants who are temporary tenants were given notice to quit (paragraph 7) and the plaintiff prays for a decree establishing his right in the suit lands, and removing the defendants.

This plaint plainly sets forth a familiar form of suit. The inamdar claims both varams, and therefore though he has no proof of actually letting the defendants into possession, he claims the right to eject them after due notice, by virtue of his title to the kudivaram. The tenants do not dispute his claim to the melvaram, but assert occupancy right.

The court-fee has been paid under section 7, clause xi (cc) of the Court Fees Act. The lower Court has ordered that the fee shall be computed under section 7 (v) and the plaintiff appeals.

Clause xi is applicable when the suit is based on a lease, but not when the plaintiff also wants a decree establishing his title; *Balasidhantam v. Perumal Chetti* (1). So far the order of the lower Court is unexceptionable. But the learned Subordinate Judge finds that the suits are for the declaration of plaintiff's title to the plaint scheduled lands, which is not quite correct. The defendants, though they do not put plaintiff's title as high as he would like, at least admit that he is the landholder of the land in question, and so far his title to the land is not in dispute. The only quarrel between them is whether he is entitled to the kudivaram, and that is not on the same footing as a dispute between alleged

(1) (1914) 27 M.L.J. 475.

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owner and trespasser. Clause v (c) would apply to a case where the plaintiff is suing to be put into possession of an inam, and it can hardly have been contemplated that a plaintiff should pay the same court-fee when he sues for possession of an inam against a rival claimant, and when as undisputed inamdar he asserts his title to the kudivaram.

The appropriate section would therefore seem to be 7 (iv) (c) to obtain a declaratory decree (that he is entitled to the kudivaram) and consequential relief of possession.

The record will be returned to the lower Court to value the suits accordingly.

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APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Mockett.

GURUSAMY GOUNDAN (PETITIONER), APPELLANT,

v.

SIVANMALAI GOUNDAN AND THREE OTHERS
(RESPONDENTS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXI, rr. 2 and 15—Uncertified adjustment—Plea of—Applicability of bar to—Decree-holder and third person, such as a purchaser from judgment-debtor—Transaction pleaded as an adjustment being between—Joint decree-holders—Application for execution by one of—Plea of uncertified adjustment by other decree-holders—Entertainment of—Power of Court as to.

The bar under rule 2 of Order XXI of the Code of Civil Procedure to a plea by the judgment-debtor of an uncertified adjustment applies as much to a case where the transaction

* Appeal against Order No. 477 of 1929.

pleaded as an adjustment is between the decree-holder and a third person, such as a purchaser from the judgment-debtor, as to a case where such transaction is between the decree-holder and the judgment-debtor himself. The judgment-debtor himself cannot plead an uncertified adjustment even under rule 15 of Order XXI of the Code. But, as the Court has, under that rule, to find sufficient cause for allowing the decree to be executed by one of several joint decree-holders, it is entitled to hear what the other decree-holders have to say, and, if they say that the application of their fellow decree-holder is a fraud, nothing in rule 2 of Order XXI or any other provision of law prevents the Court from disallowing execution.

APPEAL against the order of the Court of the Subordinate Judge of Coimbatore, dated 28th March 1929, and made in Execution Petition No. 303 of 1928 in Original Suit No. 244 of 1921.

V. Balasundaram for appellant.

T. M. Krishnaswami Ayyar and K. V. Ramachandra Ayyar for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by JACKSON J.—Three persons, Sivanmalai, Chidambara and Amarapathi Goundan, obtained a mortgage decree against one Ammani Ammal. She sold lands to Palaya-kottai Pattakkarar, and part of the purchase price was paid by him in satisfaction of the decree. Sivanmalai and Chidambara were satisfied, and state in their affidavit that nothing more was due. The third decree-holder Amarapathi however assigned his right to one Gurusami Goundan and he applied to execute the decree by sale of the hypotheca after recognizing his assignment.

The Subordinate Judge has found these facts to be true, and we see no reason not to accept his finding. As he says, Amarapathi Goundan got a final decree fraudulently behind the back of the judgment-debtor

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and other decree-holders. Accordingly he dismissed the petition and Gurusami Goundan appeals.

The appellant contends that Ammani Ammal has no right to plead against his application an uncertified adjustment. We entirely agree. It makes no difference that Gurusami Goundan is not an original decree-holder, but his assignee applying for recognition; because it has now been clearly held by a Full Bench that in such circumstances Order XXI, rule 2, is still operative; *Subramanyam v. Ramaswami*(1). Nor in our opinion does it make any difference that Ammani Ammal is not pleading a direct payment by herself, but a payment through her vendee, as satisfaction of the decree. The law in this matter has been left in an unfortunate state. In *Rama Ayyan v. Sreenivasa Pattar*(2) a single Judge held that if the transaction subsequently pleaded as an adjustment was by some person other than the decree-holder Order XXI, rule 2, or as it then was section 258, Civil Procedure Code, would not apply. If *A* the judgment-debtor transfers property to *B* on condition of his paying *C* the judgment-creditor, then if *B* as subsequent assignee of the decree from *C* attempts to execute it *A* is not debarred by Order XXI, rule 2, from pleading the uncertified adjustment.

This was approved by one member of the Bench in *Ponmusami Nadar v. Letchmanan Chettiar*(3) and dissented from by the other member ABDUR RAHIM J. who held that by the plain language of Order XXI, rule 2, the judgment-debtor would be precluded from pleading any such adjustment. One of us had occasion to consider the passage in *Rama Ayyan v. Sreenivasa Pattar*(2) in *Gopala Krishna Iyer v. Sankara Iyer*(4) and held that as soon as the agreement, no matter whether it be

(1) (1932) I.L.R. 55 Mad. 720 (F.B.).

(3) (1911) I.L.R. 35 Mad. 659.

(2) (1895) I.L.R. 19 Mad. 230.

(4) A.I.R. 1930 Mad. 673.

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between judgment-debtor and decree-holder or some one else, is pleaded as an adjustment the mischief of Order XXI, rule 2, is attracted. To this opinion we adhere and unhesitatingly endorse the view of ABDUR RAHIM J. in *Ponmusami Nadar v. Letchmanan Chettiar*(1). Therefore Ammani Ammal in this case cannot plead an adjustment which she has not troubled to certify under Order XXI, rule 2.

But the present case is not entirely between the assignee decree-holder and the judgment-debtor. There are the other two persons in whose favour the decree has been jointly passed, and in such circumstances the Court is allowed a large discretion under Order XXI, rule 15. For one decree-holder to be doing the execution on behalf of all is a curious business which may well put the Court upon its guard; and the Code very sensibly warns the Court to find sufficient cause for allowing the decree to be executed. Under this provision there is no objection to the Court hearing what the other decree-holders have to say, though no doubt the judgment-debtor even under this section could not plead an uncertified adjustment. If the other decree-holders say, as they say in their present affidavit (16th November 1928), that the application of their fellow decree-holder is a fraud, nothing in Order XXI, rule 2, or any other provision of law prevents the Court from disallowing execution, and in this case the Court has acted quite properly in doing so.

The appeal is dismissed with costs to respondents one to four.

A.S.V.

(1) (1911) I.L.R. 35 Mad. 659.

APPELLATE CIVIL.

*Before Mr. Justice Madhavan Nair.*1932,
August 5.RAJAH OF RAMNAD (DECREE-HOLDER AND LEGAL
REPRESENTATIVE), APPELLANT,

v.

KUPPUSWAMI PILLAI (RESPONDENT), RESPONDENT.*

Indian Limitation Act (IX of 1908), art. 182 (5)—Judgment-debtor in prison—Subsistence allowance for detention of—Remittance of money-order to Jail Superintendent—Step in aid.

A remittance by money-order to the Jail Superintendent of subsistence allowance necessary for the detention of a judgment-debtor in prison is an application to the Court within the meaning of article 182 (5) of the Indian Limitation Act and is a step in aid of execution.

APPEAL against the order of the Court of the Temporary Subordinate Judge, Devakottah, dated 5th February 1927, in Appeal Suit No. 34 of 1926 preferred against the order of the Court of the District Munsif of Devakottah, dated 26th August 1926, in Execution Petition No. 382 of 1926 in Original Suit No. 908 of 1917.

S. Sundararaja Ayyangar for appellant.*V. Ramaswami Ayyar* for respondent.

JUDGMENT.

The question in this appeal is whether the application for execution is barred by limitation. The decree is dated 1st December 1917. The application for execution was presented on 28th June 1926, the date on which the first Court reopened after the summer-recess of 1926. The prior execution application was presented on 1st February 1923. It is clear that the

* Appeal against Appellate Order No. 164 of 1927.

present application would be barred by limitation unless the facts relied upon by the decree-holder are sufficient to save limitation. The judgment-debtor was committed to jail on 28th February 1923. The decree-holder has remitted by postal money-orders to the Jail Superintendent subsistence allowances necessary for the detention of the judgment-debtor in prison. Those remittances had been made on 24th March 1923, 23rd April 1923, 23rd May 1923 and 25th June 1923. It is argued that the remittance made on 25th June 1923 is sufficient to save limitation as being a step in aid of execution. If this payment could be considered to be a step in aid of execution, it is clear that the present application is not barred by limitation. The lower Courts held that, as the payment was made to the Superintendent of Jail, it cannot be considered that the application was made to the "proper Court" within the meaning of Article 182 of the Limitation Act to save limitation and therefore the present petition is barred by limitation.

The respondent relies on a decision of this Court in *Ramudu Chetti v. Varadaraja Chariar*(1) by KRISHNAN J. The facts of that case are not very clear. Apparently the learned Judge's view is that if payment was made within three years of the prior application, then such payment would be a step in aid of execution provided there was an application. And with regard to the application the learned Judge says: "We cannot presume that an application would have been made when the decree-holder paid such charges." Whether the application should be one to the Court or whether it would be enough if that was made to the Superintendent of Jail is not made clear in that judgment. But both the Courts in that case seem to have been of the opinion

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(1) (1920) 13 L.W. 289.

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that a payment of maintenance charges would be a step in aid of execution. The first appellate Court did not consider the question whether there was an application at all because the payment in that case was made admittedly three years after the previous application. Therefore I find that that decision does not render much help for deciding this case.

It is argued that the payment of maintenance charges should be to the Court and, since it was not made into the Court, it cannot be said that there was any request made to the Court to take a step in aid of execution. Under Order XXI, rule 39, clause 4 of the Code of Civil Procedure the first payment in connection with the arrest of the judgment-debtor is to be made to the Court and the subsequent payments should be made to the officer in charge of the civil prison. So if an application was made to the Court on a subsequent occasion to receive the subsistence charges, that application would not be an application in accordance with the provisions of Order XXI, rule 39, clause 4; the application should be made according to the provisions of the Code to the Superintendent of Jail who is constituted by the Code as the proper officer to receive the application. In my opinion an application made to him should in the circumstances be considered to be an application made to the Court under article 182 (5) of the Limitation Act.

The next question is whether it can be said that there was an application in this case. It is argued that there was no such application. The facts show that the amounts were sent by money-order. In the circumstances of the case I am inclined to accept the despatch by money-order to the Jail Superintendent as amounting to an application.

For the above reasons I am of opinion that the remittance made by the decree-holder on 25th June 1923 in

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the present case is a step in aid of execution and therefore the present application is not barred by limitation. In the result the orders of the lower Courts are set aside, and the petition will be taken on file and disposed of according to the merits by the District Munsif. The appellant will get his costs throughout.

K.N.G.

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Bardswell.*

THIRUPURANENI NARAYANA RAO (RESPONDENT),
APPELLANT,

1933,
February 24.

v.

SOORAPANENI VEERAYYA AND THREE OTHERS
(PETITIONERS), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XLIV, r. 1,
proviso—Leave to appeal in forma pauperis—Grant of—
Condition—Security for costs—Order for, against pauper
appellant—Grounds for making.*

The proviso to Order XLIV, rule 1, of the Code of Civil Procedure is mandatory, and, unless, upon a perusal of the application, the judgment and the decree appealed from, the Court is satisfied that the decree appealed from is contrary to law or otherwise erroneous or unjust, it is bound to dismiss the application. Neither the fact that the appeal raises a substantial question of law nor the fact that *prima facie* the appellant has a good case or an arguable point is a ground for granting leave to appeal in *forma pauperis*.

Chennamma, In re, (1929) I.L.R. 53 Mad. 245, dissented from.

The grounds on which leave to appeal in *forma pauperis* is granted should be briefly stated.

* Letters Patent Appeal No. 86 of 1932.

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In considering whether security for costs should be ordered in a case in which leave to appeal *in forma pauperis* has been granted, it is permissible for the Court to peruse the judgment which is being appealed against and to see whether there are circumstances which would justify an order for security for costs.

APPEAL under Clause 15 of the Letters Patent against the order of BURN J. dated the 8th day of November 1932 and made in Civil Miscellaneous Petition No. 3515 of 1932 in Appeal No. 58 of 1932 preferred to the High Court against the order of the Court of the Subordinate Judge of Masulipatam in Original Suit No. 56 of 1929.

J. Sambasiva Rao for appellant.

A. Lakshmayya for respondents.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.

BEASLEY C.J.—This is a Letters Patent Appeal from an order of BURN J. ordering the appellant to give security for the costs of his appeal. The appellant here has been given leave to appeal *in forma pauperis*. BURN J. ordered the appellant to furnish security for Rs. 1,000 and it is contended on behalf of the appellant that the order of BURN J., being based merely upon the poverty of the appellant and nothing more, is wrong. It is quite true that our learned brother BURN J. has given no other reason for ordering the appellant to furnish security but it is quite open to us to see whether good reasons exist for such an order being made. It is contended here that security for costs can only be ordered to be given by a pauper-appellant in special circumstances [*Seshayyengar v. Jainulavadin*(1), *Srinivasa Sastri v. Subramania Aiyer*(2) and *Subbiah Thevar v. Balasubramania Pandia Thalavar*(3).] I agree that

(1) (1880) I.L.R. 3 Mad. 66.

(2) (1907) 17 M.L.J. 583.

(3) (1931) M.W.N. 1157.

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ordinarily where an appellant has been allowed to appeal as a pauper there should be reasons other than poverty justifying an order being made upon him to furnish security and the fact that leave has been granted to him to appeal *in forma pauperis* should of itself be sufficient to show that the judgment appealed against upon a perusal of it appears to be contrary to law or otherwise erroneous or unjust. Unfortunately, following what is stated to be the practice of this High Court, leave to appeal *in forma pauperis* has been granted frequently on the ground that the appeal raised a substantial question of law or that *prima facie* the appellant had a good case or an arguable point; and there is one reported decision of this High Court, *Ohennamma, In re*(1) by VENKATASUBBA RAO and MADHAVAN NAIR JJ., where it was held that 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, that it is enough if the applicant shows that he has *prima facie* a good case and that, if he does so, leave to appeal should be granted. With great respect to the learned Judges who have decided that case, I am unable to see that Order XLIV, rule 1, of the Civil Procedure Code contemplates anything else but what it so definitely states. The proviso is perfectly clear, namely,

“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.”

The order is mandatory and only contemplates a perusal of the application, the judgment and the

(1) (1929) I.L.R. 53 Mad. 245.

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decree and nothing else; and, unless in the opinion of the Court the decree is contrary to law or otherwise erroneous or unjust, the Court is bound to dismiss the application. Order XLIV, rule 1, Civil Procedure Code, does not say that the Court shall reject the application unless the appeal raises a substantial question of law or unless the appellant has *prima facie* a good case. I am unable to agree with the decision in *Chennamma, In re*(1) and in my opinion this Bench should not follow it. It is certainly in conflict with the view of JENKINS C.J. in *Sakubai v. Ganpat*(2) and also *Rajendra Prasad Bose v. Gopal Prasad Bose*(3) and *Maung Tha Din v. Daw Paw*(4). Upon perusing the judgment in this case it is very difficult to understand how leave to appeal *in forma pauperis* was ever granted at all. The learned Judge who granted the application has not given his reasons for doing so; and I may here state that I think that, when such leave is given, the reasons of the Court for granting such leave should be briefly stated. I am quite unable, after a careful perusal of the judgment under appeal, to say that on the face of it it is contrary to law or otherwise erroneous or unjust. It certainly raises no substantial question of law and therefore does not even satisfy the test applied in *Chennamma, In re*(1); nor, in my opinion, does the appellant shew even a *prima facie* good case; and, as I have already stated, no reasons have been given by the Court for allowing the application. What appears to me to have been overlooked in *Chennamma, In re*(1) is the difference between an application for leave to sue as a pauper and an application for leave to appeal as a pauper. In the former case, apart from the question of pauperism, the only test applied is whether there is a cause of action shown; but when the

(1) (1929) I.L.R. 53 Mad. 245.
(3) (1924) I.L.R. 4 Pat. 67, 73.

(2) (1904) I.L.R. 28 Bom. 451.
(4) A.I.R. 1925 Rang. 249.

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appellate stage is reached, a more severe test has to be applied. The defendant has been successful in the lower Court and he has been put to great cost in successfully defending the suit and in most cases he has not been able to recover one anna from the plaintiff towards his costs. Therefore it is that when the pauper litigant comes to the appellate Court for leave to continue the litigation as a pauper, it is incumbent upon him to satisfy the Court that the judgment is erroneous. This does not mean a final decision by the Court, but such a decision as can be given after a perusal of the judgment and the decree. On the question as to security for costs being ordered where leave to appeal has been granted, I think that it is permissible for the Court to peruse the judgment which is being appealed against and to see whether there are circumstances which would justify an order for security for costs. In my opinion, the chance of the appellant's success is such a circumstance. In the present case, taking the view that I do that the appellant has not *prima facie* a good case, I am satisfied that this is a case for ordering the appellant to furnish security for costs even though he be a pauper. The fact that a person is a pauper is not alone a reason for not ordering him to give security for costs and this is the view taken by SCRUTTON L.J. in *Carroll, In re*(1). He there states:

"On the question of ordering security for costs I desire to say this: the mere fact that a person is in poor circumstances does not justify security being ordered where that person is making his first effort to obtain a decision. A perfectly impecunious person may commence proceedings by the issue of a writ which may involve the defendant in a large sum for costs because the plaintiff, who, I will assume, is unsuccessful, has no funds. As I have sometimes expressed it, the Courts allow an impecunious person to get one bite of the cherry but

(1) [1931] 1 K.B. 104, 108.

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will not allow him a second bite unless he, as appellant, is able to provide security for the costs of the appeal."

BEARLEY C.J. Although BURN J. has given no reason other than the poverty of the appellant for making his order, for the reasons I have already stated, his order must be upheld and this letters patent appeal dismissed with costs.

One month for finding the security ordered.

BARDSWELL
J.

BARDSWELL J.—I agree. As to Order XLIV, rule 1, I cannot see why it should be taken to mean something less than what appears from its plain language.

A.S.V.

INCOME-TAX REFERENCE.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Sundaram Chetti and Mr. Justice Burn.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
PETITIONER,

1932,
August 31.

v.

T. NAMBERUMAL CHETTY AND SONS, RESPONDENTS.*

Indian Income-tax Act (XI of 1922), sec. 32—Enhancement of assessment within meaning of—Enhancement of income under one head without enhancing the total income assessable to income-tax not an—Appeal to Commissioner under sec. 32 not competent in case of—"Assessment" in the Act—Meaning of.

The computation of an income under each head set out in the Income-tax Act XI of 1922 is not itself an assessment within the meaning of section 32 of that Act. It is merely a computation of an item of income or class or classes of income which go to make the whole and, when the whole has been arrived at, there is an assessment within the meaning of section 32.

Where, on an appeal to the Assistant Commissioner, he does not enhance the total income assessable to income-tax but by means of a reduction under one head and an increase under another head allows the Income-tax Officer's total assessment to remain the same or reduces it, there is no enhancement of the assessment within the meaning of, and an appeal does not lie to the Income-tax Commissioner under, section 32 of the Act merely by reason of the fact that the Assistant Commissioner has increased the income under one head.

REFERENCE to the High Court under section 66 (1) of the Indian Income-tax Act (XI of 1922) in the matter of T. Namberumal Chetty & Sons.

G. T. Ramanujachari for assesseees.

M. Patanjali Sastri for Commissioner of Income-tax.

Cur. adv. vult.

* Original Petition No. 29 of 1932.

JUDGMENT.

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BEASLEY C.J.—The question referred to us by the Commissioner of Income-tax is :—

“ When the Assistant Commissioner in an appeal to him from the order of assessment of the Income-tax Officer enhances the assessment under one head of income without causing an increase in the total income (by not including altogether income assessed under another head) does an appeal lie to the Commissioner under section 32 against that order? ”

This is a novel point and the facts which give rise to the question are as follows :—The petitioners were assessed by the Income-tax Officer, Madras, Second Circle, on a total income of Rs. 41,154 made up as follows : (1) property, Rs. 46,092 and (2) other sources—dividends, interest on debentures and remittances of profits from Trichur—Rs. 2,206 less (3) loss in business, Rs. 7,144, making a total as before-mentioned of Rs. 41,154. The tax levied was Rs. 4,068-12-0. The petitioners appealed to the Assistant Commissioner and claimed that the figure adopted by the Income-tax Officer under “ other sources ” should be reduced by Rs. 2,048. This point the Assistant Commissioner conceded. In the course of the appeal, however, the Assistant Commissioner, whilst conceding that point which of course reduced *pro tanto* the total income assessable of the assessee, was of the opinion that the Income-tax Officer had incorrectly allowed two deductions from the income arrived at under the first heading, namely, “ property ”. He went into the matter and computed the income of the assessee under the heading of property at Rs. 47,744 instead of Rs. 46,092, the computation of the Income-tax Officer. The result was that the total income assessed by the Income-tax Officer was reduced by this method by Rs. 396, as the total income was found to be Rs. 40,758 by the Assistant Commissioner

The petitioners here argue that they were entitled under section 32 of the Indian Income-tax Act to prefer an appeal to the Commissioner, arguing that there had been an enhancement of the assessment.

Section 32 (1) reads as follows :—

“ Any assessee objecting to an order passed by an Assistant Commissioner under section 28 or to an order enhancing his assessment under sub-section (3) of section 31, may appeal to the Commissioner within thirty days of the making of such order.”

The argument of the assesseees is that the computation of the income of an assessee arising under any or all of the various heads of income set out in the Act is itself an assessment and that therefore what the Assistant Commissioner did by increasing the amount under “ property ” amounts to an enhancement of the assessment thereby giving the assesseees the right of appeal to the Income-tax Commissioner. On the other hand, the Income-tax Commissioner contends that “ assessment ” in section 32 means the assessment of the total income of the assessee. Unfortunately we gain no help by any definition of the word “ assessment ” in the Act because it is not therein defined. We have to see whether any other sections of the Act do give us any assistance. In my view some assistance is to be gained from section 23 (1) which provides that, if the Income-tax Officer is satisfied that a return made under section 22 is correct and complete, he shall assess the “ total income ” of the assessee, and shall determine the sum payable by him on the basis of such return. Then again sub-section (3) of the same section provides that where the assessee has not made a return the Income-tax Officer shall, by an order in writing, assess the “ total income ” of the assessee. There are some other sections which may possibly throw some light upon this question. Section 30 speaks of “ the assessment ” which seems, in

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my view, to mean that there is only one assessment and not several. Then we have to see what the assessee is entitled to do by way of an appeal to the Assistant Commissioner. Under section 30, if he objects to the "amount" or "rate" at which he is assessed under section 23 or section 27, he may prefer an appeal to the Assistant Commissioner, and again by the use of the word "amount" it seems to me to follow that what is meant is the total amount of the income and not the smaller amounts which go to make up the total. When he has got to the Assistant Commissioner, the Assistant Commissioner in disposing of the appeal may, in the case of an order of assessment, confirm, reduce, enhance or annul the assessment or set it aside. Having done that it is only when he has enhanced the assessment that under section 32 any appeal lies to the Income-tax Commissioner. If, on an appeal to the Assistant Commissioner, the Assistant Commissioner upholds *in toto* the assessment of the Income-tax Officer there has been no enhancement of the assessment nor any reduction of it. Clearly in such a case as that no appeal lies to the Commissioner of Income-tax. *A fortiori*, if, on appeal to the Assistant Commissioner, he accedes to some of the contentions of the assessee and reduces the total amount of the assessment, no appeal lies to the Income-tax Commissioner. The question here is, whether, when the Assistant Commissioner does not enhance the total income assessable to income-tax but by means of a reduction under one head and an increase under another head allows the Income-tax Officer's total assessment to remain the same or reduces it, merely by reason of the fact that the Assistant Commissioner has increased the income under one head, does an appeal lie to the Income-tax Commissioner?

The Income-tax Commissioner in his order of reference is of the opinion that the enhancement referred to in sections 31 (3) and 32 (1) is an enhancement of the assessment and that it means an enhancement of the assessment as a whole and not an enhancement of a particular item of income in the assessment which does not result in the enhancement of the assessment as a whole. Income-tax, in his view, is one tax and not a collection of taxes on different items of income—that is obviously correct—and assessment to income-tax is one whole and not a group of assessments of different items of income. With that view I entirely agree. It cannot be correct that the computation of an income under each head set out in the Income-tax Act is itself an assessment. It is merely a computation of an item of income or class or classes of income which go to make the whole and, when the whole has been arrived at, there is an assessment. In my opinion, the view taken by the Income-tax Commissioner upon this point is the correct one and the answer to the question referred must be that an appeal in such a case does not lie.

Costs to the Commissioner of Income-tax Rs. 250.

SUNDARAM CHETTI J.—I agree.

BURN J.—I agree.

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APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Burn.

1932,
July 29. ADAM HAJEE PEER MOHAMMAD ESSACK (PLAINTIFF),
APPELLANT,

v.

HAJEE SUKUR GANNY (DEFENDANT), RESPONDENT.*

Contract—Sale of ready goods in a bonded warehouse—Contract silent as to who should pay duty—Increase of duty between date of sale and delivery—Liability of buyer to pay—Indian Tariff Act (VIII of 1894), sec. 10—"Article duty-paid"—Meaning of—Sea Customs Act (VIII of 1878), sec. 37—Duty paid on goods intended for home consumption—Goods allowed to remain in bonded warehouse—Increase of duty before delivery taken—Liability to pay increased duty under sec. 37.

In the case of a sale of ready goods in a bonded warehouse, the seller is entitled, in the absence of a contract to the contrary fixing the liability as between the seller and buyer to pay the duty on the said goods, to refuse to give delivery of the said goods if the increase of duty on the said goods between the date of sale and delivery is not paid by the buyer.

The words "article duty-paid" in section 10 of the Indian Tariff Act, 1894, mean "article in respect of which the liability to pay duty is on the seller and he sells the article duty-free", and do not mean "article in respect of which duty has been paid at the time of the making of the contract". Under section 37 of the Sea Customs Act (VIII of 1878) even if the old duty had been paid by the seller and the goods had been allowed to remain in the bonded warehouse and subsequent to the payment of the old duty a new duty, the increased duty, had been put upon the goods, then that duty would have to be paid if and when the goods were removed from the warehouse, if the purpose for which the goods were removed was home consumption.

* Original Side Appeal No. 83 of 1931.

APPEAL from the judgment of STONE J. dated 31st July 1931, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 120 of 1930.

K. S. Krishnaswami Ayyangar with G. Ramakrishna Ayyar and C. Srinivasachari for appellant.

S. Duraiswami Ayyar, with Messrs. Srinivasaraghavan and Tyagarajan, and T. N. Sambasivan for respondent.

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JUDGMENT.

BEASLEY C.J.—This appeal raises an interesting point. BEASLEY C.J. The appellant was the plaintiff in the trial Court and in the suit he claimed damages from the defendant for non-delivery of some bags of sugar. The defendant, the respondent here, was the seller of those bags which had been imported from Java and at the time of the sale lay in a bonded warehouse. The sale was effected on the 28th February 1930 and on the next day the import duty on sugar was increased by Rs. 3 per bag. On that day the plaintiff demanded delivery of the sugar from the defendant and delivery was refused because the Customs House authorities refused to allow delivery to be given unless the increased duty in respect of the bags was paid. The sale was a sale of ready goods for ready delivery. STONE J. has found as a fact that the sale was of goods in a bonded warehouse—and there is ample evidence to support that finding—indeed, there is no evidence on the appellant's side to the contrary. Evidence was necessary upon the point because it was argued that a sale of goods of this description meant a sale of goods in a warehouse which was not a bonded warehouse, not requiring the payment of any extra customs duty. It should be mentioned that the appellant possesses another warehouse in Madras but the limit of its accommodation is 1,000 bags of sugar

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and that the suit claiming damages was in respect of bags which lay in the bonded warehouse. I see no reason whatever to find fault with the findings of fact of the learned trial Judge on this point.

What we have now got to consider is whether the appellant was entitled to demand delivery of the bags of sugar without paying the increased duty. It is argued that, by reason of section 10 of the Indian Tariff Act, 1894, the liability to pay the increased duty does not fall upon the appellant at all but upon the respondent, because the respondent has not brought himself within the provisions of that section. That section obviously was enacted for the purpose of making it plain, in the absence of any agreement, upon whom the liability to pay duty upon articles which had been agreed to be sold was, where the duty had increased between the time the contract of sale was made and the delivery of the goods. It was in order to make quite clear what the position both of the seller and the purchaser of the goods would be under such circumstances. Here, in between the time of entering into the contract of sale of these bags of sugar and their delivery, the import duty was increased by Rs. 3 per bag. Upon whom was the liability to pay that increase? The section in question, section 10, reads as follows:—

“In the event of any duty of customs or excise on any article being imposed, increased, decreased or remitted after the making of any contract for the sale of such article without stipulation as to the payment of duty where duty was not chargeable at the time of the making of the contract, or for the sale of such article *duty-paid* where duty was chargeable at that time, . . . ”

It is the latter part of the section which has application here. This was a case of the sale of an article in respect of which there was a duty chargeable and that duty chargeable was subsequently increased. Here

sub-clause (a) to section 10 comes into play. It is as follows:—

“If such imposition or increase so takes effect that the duty or increased duty, as the case may be (or any part thereof), is paid, the seller may add so much to the contract price as will be equivalent to the (amount paid in respect of such) duty or increase of duty, and he shall be entitled to be paid and to sue for and recover such addition, . . . ”

Sub-clause (b) has no application here. The point taken before us, although it does not appear to have been taken at all before the learned trial Judge, is that the words “article duty-paid” in the section mean articles upon which the duty has been paid at the time of the making of the contract. In my view, that is not the meaning of those words. What, in my view, is meant is that it is to be a sale of an article in respect of which the liability to pay duty is upon the seller and he sells the article duty-free. If it had been intended that, in order to comply with the provisions of that section or to bring himself within the provisions of that section, a seller must already have paid the duty, then I should expect the section to read “for the sale of such article upon which the duty has been paid.” That is not what the section says. STONE J. says that it was the duty of the purchaser who is under that section liable to pay the increased duty to tender the proper amount to the seller before he was entitled to demand delivery. That of course is one alternative. It is also pointed out by the learned trial Judge that the seller himself might have paid the duty and recovered the increase from the purchaser; but this is a suit by the appellant to recover damages for non-delivery of the goods and, in my view, the respondent was perfectly entitled to refuse to give delivery until the proper price, that is to say, the agreed purchase price *plus* the increased duty had been tendered to him. The fact

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that the duty had not been paid in this case makes no difference at all. It is found as a fact that the sale was of goods in a bonded warehouse and by reason of section 37 of the Sea Customs Act it does not matter at all whether the old duty had been paid. Under that section if the old duty had been paid and the goods had been allowed to remain in the bonded warehouse and subsequent to the payment of the old duty, a new duty, the increased duty, had been put upon the goods, then that duty would have to be paid if and when goods were removed from the warehouse if the purpose for which the goods were removed was home consumption; and that is this case. So that it did not make any difference at all whether the old duty had been paid or not. The new duty would still have to be paid under section 37 of the Sea Customs Act, the goods not having been removed from the warehouse before the date of its imposition. It being found that this was a sale of goods in a bonded warehouse, the question as to whether or not the old duty has been paid is immaterial. In my view, section 10 of the Indian Tariff Act means a sale of goods duty-free. For these reasons, this appeal must be dismissed with costs.

BURN J.—I agree with my lord the CHIEF JUSTICE.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Pakenham Walsh.

VENKATA REDDI (PETITIONER—FOURTH DEFENDANT),
APPELLANT,

1932,
August 6.

v.

T. V. DORASAMI PILLAI (RESPONDENT—PLAINTIFF),
RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. XXI, rr. 18 and 20—Mortgage decree and money decree—Set-off of one against the other—Permissibility—Conditions.

The mere fact that the decrees in which the set-off is sought are mortgage decrees, or one of the two decrees is a mortgage decree, does not by itself amount to an objection to the set-off claimed.

A mortgagee against whom a money decree has been obtained by his mortgagor can claim to set off that decree against a decree for sale obtained by him against his mortgagor on foot of his mortgage in a case in which, under the decree for sale, the mortgagor is liable for all the deficiency that may remain after the sale. The position will be different if, under the decree for sale, the mortgagor is not able for the deficiency. In such a case it cannot be said that there is any decree for money against the mortgagor.

APPEAL against the order of the Court of the Subordinate Judge of Vellore, dated 26th September 1928, and made in Execution Application No. 512 of 1928 in Execution Petition No. 86 of 1928 in Original Suit No. 1 of 1926.

B. Somayya for appellant.

C. S. Venkatachariar for respondent.

Cur. adv. vult.

* Appeal against Order No. 353 of 1928.

JUDGMENT.

VENKATA
REDDI
v.
DORASAMI
PILLAI.
RAMESAM J.

RAMESAM J.—In this case the appellant before us is the fourth defendant in Original Suit No. 1 of 1926. The plaintiff obtained a decree in that suit for Rs. 4,214-0-4 towards *peshkash* and road cess. In Original Suit No. 25-A of 1918, which was a suit for redemption of a mortgage, the defendant obtained a final decree for Rs. 6,908-14-4. This final decree is a decree directing the sale of the mortgaged property and, if there is any deficiency, it should be paid by the plaintiff. In the connected Appeal No. 35 of 1931 we have held that that final decree should not have been amended by the Subordinate Judge of Chittoor and should remain as it was originally passed. The result is the mortgage decree is a decree for an amount which in the last resort may have to be paid personally by the plaintiff. In the petition against which this civil miscellaneous appeal arises, Execution Application No. 512 of 1928, the fourth defendant seeks to set off the money decree against him in Original Suit No. 1 of 1926 against the mortgage decree obtained by him and to stop all further proceedings for his arrest in Execution Petition No. 86 of 1928 in execution of Original Suit No. 1 of 1926. The question of law that arises before us is whether the two decrees can be so set off against each other. Order XXI, rule 20, Code of Civil Procedure, now enacts :

“The provisions contained in rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge.”

This shows that the mere fact that the decrees in which the set-off is sought are mortgage decrees, or one of the two decrees is a mortgage decree, does not by itself amount to an objection to the set-off claimed. I do not mean to say that there may not be some other objection. Without any other objection the mere fact

that one of the decrees is a mortgage decree is not enough to refuse the set-off. This is the view of the Allahabad High Court in *Nagar Mal v. Ram Chand*(1) and this was always the view of the Madras High Court prior to the Code of Civil Procedure of 1908. But the decision in *Nagar Mal v. Ram Chand*(1) had to be considered and was distinguished in *Sheo Shankar v. Chunni Lal*(2). In that case the decree is a foreclosure decree which is of a nature giving simply an option to the mortgagor to redeem and, if he does not, his right to redeem is simply foreclosed. It is not a decree to which ordinarily Order XXI, rule 20, applies. Therefore that case is distinguishable. But I will observe that even in a decree for sale it may be that the property is worth much less than the amount of the decree and the mortgagor may find it convenient to allow the property to be sold, and in such a case if he is not liable for the deficiency it cannot be said that there is any decree for money against him and it may be proper to describe the decree as one giving an option like the decree for foreclosure. In *Sheo Shankar v. Chunni Lal*(2) the person against whom the decree was sought to be set off was the purchaser of a portion only of the mortgaged property and he was under no personal liability. In such a case it may be said that he was filling a different character in the mortgage suit from the one in the decree sought to be set off. In the present case there is a personal decree against the plaintiff. By saying he is liable for all the deficiency that may remain after the sale, the true character of his liability is known. If the sale realizes nothing, he is liable for the whole amount. In such a case to say that the sale must first be held and only for the balance

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(1) (1910) I.L.R. 33 All. 240.

(2) (1916) I.L.R. 33 All. 669.

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RAMESAM J.

the judgment-debtor in the mortgage decree is personally liable is to look at the matter too technically and to cause unnecessary expense to the parties. In such a case it may be very equitable and just to deduct the amount of the money decree from the mortgage decree and to permit execution for the balance only. The case in *The Burma Oil Company, Ltd. v. Ma Tin*(1) is also a case of a mortgage decree in which it is not clear that the mortgagor will be liable personally for the deficiency. In that case the decree at the time the question arose was only against the property and the decree provided for liberty to apply for a personal decree for the amount of the balance and one does not know how the application may end. On the actual facts I think that the decisions in *The Burma Oil Company, Ltd. v. Ma Tin*(1) and *Sheo Shanker v. Chunni Lal*(2) are correct; but they do not apply to the facts of the case before us. Therefore in this case there is no objection to the set-off claimed. The set-off is a satisfaction of the decree to that extent and, if the balance after set-off is paid, the whole decree must be regarded as satisfied. We now direct the Subordinate Judge of Vellore to proceed with the execution of the mortgage decree after setting off the money decree towards it and to proceed with the execution for the balance. The appellant will be entitled to his costs in appeal. In the Court below, each party will bear his own costs.

PAKENHAM WALSH J.—I agree.

A.S.V.

(1) (1929) I.L.R. 7 Rang. 505.

(2) (1916) I.L.R. 38 All. 689.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.

S. SRINIVASA AYYAR AND ANOTHER (RESPONDENTS),
APPELLANTS,

1932,
August 18.

v.

LAKSHMI AMMAL alias YOGAMBAL AMMAL
(PETITIONER), RESPONDENT.*

Execution of decree—Hindu widow—Maintenance of—Decree for, charging items of joint family property with maintenance awarded—Execution of, by attachment and sale of joint family property not charged by decree—Widow's right of, without exhausting remedy against charged property.

A decree for maintenance obtained by a Hindu widow against her husband's co-parceners directed the defendants to pay the plaintiff maintenance at a certain rate out of the assets of their joint family and charged some specific items of property with the maintenance awarded.

Held that, as the decree provided concurrent remedies, the plaintiff could in execution of her decree attach assets of the joint family other than the charged property before exhausting her remedies against the charged property.

Per VENKATASUBBA RAO J.—If the defendants succeed in showing that the plaintiff's application is *mala fide* and oppressive and not made for a legitimate purpose, the Court may, in the exercise of its discretion, refuse the plaintiff's application and compel her to pursue her remedy against the security.

APPEAL against the order dated 6th August 1928 of the Court of the Subordinate Judge of Tinnevely in Execution Petition No. 75 of 1928 in Original Suit No. 2 of 1923 (Appeal Suit No. 236 of 1925 on the file of the High Court).

N. A. Krishna Ayyar for appellants.

C. A. Seshagiri Sastri and S. Panchapagesa Sastri for respondent.

* Appeal against Order No. 89 of 1929.

JUDGMENT.

SRINIVASA
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 AMMAL.
 —
 VENKATA-
 SUBBA RAO J.

VENKATASUBBA RAO J.—The lower Court has made an order allowing execution and the defendants contend that that order is wrong, on the ground that the plaintiff is bound to proceed in the first instance against the properties charged under the decree. The decree sought to be executed is one for maintenance obtained by the plaintiff against her husband's co-parceners. Paragraph 2 directs the defendants to pay the plaintiff maintenance at a certain rate *out of the assets of their joint family* and under paragraph 4 some specific items of property are charged with the maintenance awarded. The plaintiff applied in the lower Court by way of execution for attachment of the defendants' family house—an asset of their joint family but not an item over which the charge was created. The appellants' contention is that the plaintiff should not be permitted, before exhausting her remedies against the security, to attach their other properties. The appeal raises the question whether, in the case of maintenance decrees providing concurrent remedies, there is a rule of law which makes it incumbent on the plaintiff to proceed against the security in the first instance. The analogy of mortgage decrees which has been pressed on us is, in our opinion, inapplicable and no useful purpose will be served by our referring to the cases cited at the Bar. Considerations that apply to decrees obtained by widows for maintenance are different from those that apply to mortgage decrees. The object of charging specific properties with the maintenance awarded to a widow is to safeguard her right and to make it prevail against persons claiming under subsequent transfers; while the decree confers on her this special right, there is no reason to hold that her ordinary right is curtailed while that very decree in terms provides concurrent

remedies. If the defendant succeeds in showing that the plaintiff's application is *mala fide* and oppressive and not made for a legitimate purpose, the Court may, in the exercise of its discretion, refuse the plaintiff's application and compel her to pursue her remedy against the security. But, in the present case, the facts show that, far from the plaintiff's action being *mala fide*, the defendants, who own extensive property, are withholding maintenance with the object of spiting the plaintiff.

We confirm the lower Court's order and dismiss the appeal with costs.

REILLY J.—I agree. If I may say so with respect, the decree made by the Subordinate Judge and amended by this Court on appeal does not appear to me to have been very happily worded. But I think there is no doubt that the plaintiff (respondent before us) is within her rights as given by that decree in applying for execution in respect of the particular arrears in question in this case against the assets of the joint family other than the charged property.

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REILLY J.

APPELLATE CIVIL.

*Before Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.*1932,
August 19.P. RAMA NAIDU AND THREE OTHERS (PLAINTIFF AND
HIS LEGAL REPRESENTATIVES), APPELLANTS,

v.

RANGAYYA NAIDU AND TWO OTHERS (DEFENDANTS
TWO TO FOUR), RESPONDENTS.**Executor—Probate—Application for—Representative character
of executor in—Death of executor during pendency of
proceedings—Continuation of proceedings after—Right of
his sons entitled to benefit under will.*

An executor who prays for probate prays in form for something which can be granted to no one else. But the essence of the proceedings is that he seeks to establish a will, not for himself, but as the representative of those who take benefits under it. If he fail in his duty, any of those whom he represents may intervene to carry on the proceedings, having in effect by representation through the executor been a party to the proceedings from the outset. And, if in the course of the proceedings the executor drops out through death, any of those he has represented may similarly carry on the proceedings with the unessential modification that the prayer must then be for letters of administration with the will annexed.

Where an executor died during the pendency of an appeal preferred by him against the dismissal of his suit to establish the will, *held*, accordingly, that his sons, who were entitled to a benefit under the will, were entitled to prosecute his appeal.

APPEAL against the decree of the District Court of Chingleput in Original Suit No. 5 of 1927.

Advocate-General (Sir A. Krishnaswami Ayyar) and M. Venkatasubbayya for appellants.

S. Varadachariar and R. Rajagopala Ayyangar for respondents.

* Appeal against Order No. 294 of 1928.

JUDGMENT.

VENKATASUBBA RAO J.—One Rama Naidu applied in the lower Court for probate of the will of the deceased. Certain persons entered a *caveat* and the proceeding became a contentious one. The lower Court, holding that the will had not been proved to be genuine, refused probate and Rama Naidu filed the present appeal and died before the hearing. His sons have been brought on the record and an objection has been taken as to their legal competence to prosecute the appeal, and that is the first question we have to decide.

Rama Naidu besides being the executor is also the residuary legatee. We cannot as a Court of Probate decide questions of construction; but it is not disputed that, in any view, Rama Naidu's sons would be beneficiaries. If the estate taken by the deceased was an absolute one, his sons, on his death, become entitled to the legacy as his heirs; if, on the other hand, the bequest is to be construed as conferring on him only a life estate, the sons, by reason of the words "his male descendants" would take the legacy in their own right. In either case, the sons of Rama Naidu are persons entitled to a benefit under the will.

The decision on the point raised depends upon the view the Court takes of the true nature of the sons' application. Is that to be regarded as an application under Order XXII, Civil Procedure Code? Is it necessary for the sons to make out that the right to sue in such a proceeding *survives* and that they are their father's *legal representatives*? An applicant under Order XXII, rule 3, must establish these two positions, first, that the right to sue survives, secondly, that he is the plaintiff's legal representative. If the original plaintiff in filing the petition in his character as executor represented the estate of the deceased testator, then, on his death,

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his right may fairly be said to have devolved upon his sons. This follows from the construction which the Judicial Committee was disposed to place in *Venkatanarayana Pillai v. Subbammal*(1) upon the expression "legal representative", when a contingent reversioner applied to be substituted in appeal in the place of the deceased presumptive reversioner. But, in my opinion, this is an inquiry which need not be pursued, for the applicants' right stands independent of Order XXII and this position, if realized, will clear the way of much irrelevant discussion.

The question is not, have the applicants a right to be substituted?; but is much more fundamental, have they a right to intervene at any stage of the proceedings? If they can come in at any time, the fact that the original petitioner has died can be of no consequence. Nor does it in principle make any difference whether they seek to intervene before or after the judgment was rendered by the first Court. The question then resolves itself into this; is a proceeding for the grant of probate (or letters of administration with a copy of the will annexed) a representative one; in other words, is the person who has commenced it to be regarded as having done so in his representative or merely individual character? In considering this question, there are two distinct matters which must not be confused. The right which a petitioner in such a proceeding asserts is in one sense an individual or a personal right. But because he asserts a *personal right*, the proceeding does not become one for his *personal benefit*. An executor applies for probate, for instance, on the strength of his special right, which he derives from his appointment under the will. But is the proceeding on that account to be regarded as having

been initiated by him in his individual character? He may often possess no beneficial interest and his right may rest on no more than a bare legal title. The proper view to take is that his object in commencing the proceeding is to get an adjudication in the interests not only of himself but of others that the will propounded is genuine and valid. In inviting the Court to pronounce in favour of the will, the executor is acting in a *representative capacity*, that is to say, for the benefit of the whole class of persons, including himself, interested in having it established. The position of a petitioner for probate is not dissimilar to that of a plaintiff under Order I, rule 8, Civil Procedure Code. What that rule contemplates is a common interest and, in the case of a petition for probate, there is an identity of interest on the part of the whole body of persons claiming under the will. One of the necessary incidents of a representative suit is that any person for whose benefit it is instituted may intervene and ask to be made a party—Order I, rule 8, clause 2. If a petition for probate stands on a footing similar to that of a representative suit, it is right in principle to extend the analogy and hold that any legatee or beneficiary may, on a proper case being made out, intervene at any stage and claim to come on the record. True, an executor when applying for probate does not purport to act under Order I, rule 8. This remark applies equally to a presumptive reversioner who brings a suit in the life-time of a Hindu widow for getting rid of an adoption or an alienation made by her. Nevertheless, the Judicial Committee has held in the case relied upon by the learned Advocate-General, *Venkatanarayana Pillai v. Subbammal*(1) already cited, that, on the death of the presumptive reversioner, the person next entitled to

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(1) (1915) L.R. 42 I.A. 125; I.L.R. 38 Mad. 406.

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The two questions, the right to intervene and the binding character of the judgment as *res judicata*, are, as Mr. Varadachariar rightly points out, inter-dependent.—Are the legatees entitled to intervene? If they are, the judgment given in their absence would be binding upon them as *res judicata*. Does the adjudication operate as *res judicata*? If it does, surely, they would have a right to intervene, for it would be unjust to hold that they would be bound by the judgment and yet deny to them the right of intervention. Explanation 6 to section 11, Civil Procedure Code, recognizes this principle and provides that judgments in representative actions bind also persons who are constructively parties.

Mr. Varadachariar, for the respondents, relies principally upon two cases of the Calcutta High Court. In *Sarat Chandra Banerjee v. Nani Mohan Banerjee*(2) the application for the grant was made by the residuary legatee who died pending the suit. On his death, his widow applied for being substituted. In refusing her

(1) (1924) L.R. 51 I.A. 381; I.L.R. 46 All. 831.
(2) (1909) I.L.R. 36 Cal. 799.

request, HARRINGTON J. observes that the right to represent the estate has not devolved upon her. This case was followed by GREAVES J. in *Haribhusan Datta v. Manmatha Nath Datta*(1). It was the son of the original applicant, the residuary legatee, that applied to be made a party, and his application was similarly rejected. In these two cases, the question was not presented to the learned Judges in the form in which we are now considering it. The only contention put forward was that the applicants were entitled to be substituted under Order XXII, rule 3. It was not argued that they had a larger right flowing from the nature of the proceeding, namely, a right to intervene at any stage. *Musammam Phekni v. Musammam Manki*(2), on which the applicants rely, supports their contention. The facts in that case were similar to those in the present and it was held that the heir could be substituted. The conclusion although based on a ground different from what we are adopting seems, in my opinion, sound. This remark applies to another case relied on by the applicants, *Sachindra Nath Maity v. Bepin Behari Sasmal*(3), where also, on the death of the legatee who applied for probate, her representatives were substituted. Apart from authority, I am satisfied on principle that the sons of Rama Naidu have been properly brought on the record. In the course of the argument, my learned brother drew attention to a passage in Williams on "Executors", which most clearly and unequivocally supports my view. I shall extract that passage:—

"A legatee cannot set up a will after it has been litigated between the executor and next-of-kin, or between the executor and the executor of another will, and pronounced against, unless he can show the parties agreed to set aside the will by

(1) (1918) I.L.R. 45 Cal. 862.
(3) (1931) 35 C.W.N. 1028.

(2) (1929) I.L.R. 9 Pat. 698.

RAMA NAIDU v. BANGAYYA NAIDU. VENKATA-SUBBA RAO J. fraud or collusion. But, if he is afraid the executor will not do justice, he may intervene in his own interest pending the suit but apparently not after the hearing."—*Williams on "Executors"*, twelfth edition, Volume I, page 213.

A further question was raised and argued, whether a judgment of a Probate Court, if against a will, amounts or not to a judgment *in rem* under section 41 of the Indian Evidence Act. On this point, several cases, such as, *Chinnasami v. Hariharabadra*(1), *Kalyanchand Lalchand v. Sitabai*(2), *Saroda Kanto Das v. Gobindo Mohun Das*(3) and *Ramani Debi v. Kumud Bandhu Mukerji*(4), have been cited at the Bar, but, in the view I have taken, it becomes unnecessary to deal with that question and I, therefore, refrain from dealing with it.

In the result, I have come to the conclusion that Rama Naidu's sons have been rightly brought on the record and are entitled to prosecute the appeal.

[His Lordship then considered the evidence and held that the execution of the will had been duly proved and concluded:—]

In the result, the appeal is allowed with costs throughout.

The District Judge is accordingly directed to issue under the provisions of the Indian Succession Act letters of administration with a copy of the will annexed to the appellants (the sons of Rama Naidu) or any of them as the District Judge may in his discretion think fit.

REILLY J.—I agree with my learned brother that it is unnecessary on this occasion to express an opinion on the question whether a judgment refusing probate of a will is a judgment *in rem*, though that question was argued before us at some length. On that question.

(1) (1893) I.L.R. 16 Mad. 380.
(3) (1910) 12 C.L.J. 91.

(2) (1913) I.L.R. 38 Bom. 309 (F.B.).
(4) (1910) 12 C.L.J. 185.

there is a conflict between the view expressed in this Court and the Calcutta High Court on the one hand and that of the Bombay High Court on the other. If Rama Naidu, the plaintiff, when he sought to prove the will in his suit for probate, was not only asserting his claim to be recognized as executor but can be regarded as seeking to establish the will as representing all the beneficiaries under it, then on his death any other beneficiary represented by him or any person succeeding to a benefit under it through his death could continue the proceedings either in the original Court or on appeal, though the prayer for probate would in those circumstances necessarily be changed to one for letters of administration with the will annexed. Representative suits in this country, in which those who are by name on the record fight the battles and represent the interests, not only of themselves, but also of others, who are in effect, though not in name, parties to the suits from the beginning, are not confined to suits in which permission to represent other persons has been obtained under rule 8 of Order I of the Code of Civil Procedure. That was recognized by their Lordships of the Privy Council in regard to Hindu reversioners in *Venkatanarayana Pillai v. Subbammal*(1), *Janaki Ammal v. Narayanasami Aiyer*(2) and *Kesho Prasad Singh v. Sheo Pragash Ojha*(3), in regard to members of the public interested in a public trust of a religious and charitable nature in *Raja Anand Rao v. Ramdas Daduram*(4) and in regard to worshippers in a temple in *Sankaralinga Nadan v. Raja Rajeswara Dorai*(5). In England that principle was long ago applied to probate

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(1) (1915) L.R. 42 I.A. 125; I.L.R. 38 Mad. 406.
(2) (1916) L.R. 43 I.A. 207; I.L.R. 39 Mad. 634.
(3) (1924) L.R. 51 I.A. 381; I.L.R. 46 All. 831.
(4) (1920) L.R. 48 I.A. 12; I.L.R. 48 Cal. 493.
(5) (1903) L.R. 35 I.A. 176; I.L.R. 31 Mad. 236.

RAMA NAIDU v. RANGAYYA NAIDU.
REILLY J. proceedings. In 1755 in *Bittleston v. Olark*(1) Sir GEORGE LEE said :

"A legatee cannot set up a will after it has been litigated between the executor and the next-of-kin and pronounced against, unless he can show the parties agreed to set aside the will by fraud or collusion, and so the Delegates held in *Lewis and Bulkeley*(2); but a legatee, if he is afraid the executor will not do justice, may intervene in his own interest", which is in effect quoted in the passage taken by my learned brother from Williams on "Executors". In 1836 in *Hayle v. Hasted*(3) Sir HERBERT JENNER described executors who prayed for probate of a will and codicil as

"in effect representing and protecting the interests of all the parties benefited under those instruments."

Mr. Varadachariar contended that, when an executor prays for probate, he prays for something which is personal to himself, as no one but an executor can get probate. That is to look at the mere form of the proceedings and to ignore their real effect. As Sir HERBERT JENNER said in the same case,

"the executors in the former will represent and are the protectors of the legatees under it, being specially entrusted by the deceased with the care and management of her property and to see her intentions carried into effect" and again

"the executors were bound to the best of their ability to defend the interests of the legatees under the first will, of which they stood before the Court praying probate and which they must be taken to have considered as containing the last will of their testator and which as such it was their duty to see carried into effect; for it is not the interest of the executors but the intention of the testator which is to be attended to."

It cannot be denied that the passages I have quoted represent the law in England to-day. An executor who

prays for probate prays in form for something which can be granted to no one else. But the essence of the proceedings is that he seeks to establish a will, not for himself, but as the representative of those who take benefits under it. If he fail in his duty, any of those whom he represents may intervene to carry on the proceedings, having in effect by representation through the executor been a party to the proceedings from the outset. And, if in the course of the proceedings the executor drops out through death, it follows that any of those he has represented may similarly carry on the proceedings with the unessential modification that the prayer must then be for letters of administration with the will annexed. There is no reason to doubt that the position is the same in this country. This aspect of the matter, I think it is clear, was overlooked in *Sarat Chandra Banerjee v. Nani Mohan Banerjee*(1) and *Haribhusan Datta v. Manmatha Nath Datta*(2), on which Mr. Varadachariar relies, where the petitions before the Court were dealt with as if the only question arising was how Order XXII of the Code applied to them. I agree that Rama Naidu's sons are entitled to prosecute his appeal against the dismissal of his suit to establish the will.

[His Lordship then considered the evidence and held that the execution of the will had been duly proved.]

A.S.V.

(1) (1909) I.L.R. 38 Calo. 799.

(2) (1918) I.L.R. 45 Calo. 882.

(1) (1755) 2 Lee 248; 161 E.R. 330.
(2) (1732) 1 Lee 513 Notes; 161 E.R. 189.
(3) (1836) 1 Curt. 236; 163 E.R. 80.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.

1932,
October 5.

SRI RAJAH SATRUCHERLA SIVASKHANDARAJU
BAHADUR GARU AND TWO OTHERS (PETITIONERS—
JUDGMENT-DEBTORS 4, 5 AND 6), APPELLANTS,

v.

SRI SRI SRI RAMACHANDRA DEO GARU, MAHA-
RAJAH OF JEYPORE SAMASTHANAM AND FIVE OTHERS
(RESPONDENTS—AUCTION PURCHASERS 1 AND 2 AND JUDGMENT-
DEBTORS 2, 8 AND 9), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXI, r. 90—Material irregularity—Sale proclamations inaccurate and misleading, though superfluous—Affixing of—Material irregularity if—Substantial loss by reason of irregularity—Direct evidence of—Necessity—Execution sale—Conduct of—Spreading over sale for a long period and continuing it from day to day during that period—Termination of sale—Fixing of date for—Impropriety of—Court-hours—Continuance of sale beyond—Order for continuing sale until a particular day does not mean.

In a case in which two estates comprising a number of villages were ordered to be sold in two lots, i.e. each estate in one lot, a proper proclamation, stating that each estate would be sold as a whole in one lot, was duly published in accordance with law; it was put up in the Court-house, in the Collector's office and in the proper place in each of the two estates. Proclamations of sale were however also affixed in every village in the two estates, but what was described in each of those proclamations as the subject of the sale was the particular village in which that copy was affixed and not the lot of which that village was a part.

Held that the affixing in the villages of such inaccurate and misleading, though superfluous, proclamations was a material irregularity within rule 90 of Order XXI of the Code of Civil Procedure.

* Appeals against Orders Nos. 412 and 413 of 1930.

Under rule 90 of Order XXI of the Code, as it now stands, the absence of direct evidence, that is the evidence of some witness coming before the Court and saying that an irregularity in the conduct or publication of a sale has caused substantial loss, will not necessarily prevent a reasonable inference being drawn that by such an irregularity substantial loss has been caused to the judgment-debtor.

A Court-auction ought not to be spread over a long period and continued from day to day during that period.

Per VENKATASUBBA RAO J.—It is wrong to fix a date for the termination of a Court-auction.

Per REILLY J.—An order of Court that a sale shall be continued until a particular day means that it shall be stopped at the end of Court-hours on that day and not that it should be continued beyond the Court-hours on that day.

APPEALS against the orders of the District Court of Vizagapatam, dated the 7th day of October 1929, and made in Execution Application No. 469 of 1928 (Execution Petition No. 9 of 1927) and in Execution Application No. 470 of 1928 (Execution Petition No. 9 of 1927).

K. Ramanath Shenai for appellants.

Advocate-General (Sir A. Krishnaswami Ayyar) and P. Somasundaram for respondents.

JUDGMENT.

VENKATASUBBA RAO J.—The first question with which I propose to deal is, whether the judgment-debtors have sustained a substantial injury within the meaning of Order XXI, rule 90. If this point is answered in the negative, the consideration of the other questions raised becomes unnecessary. In regard to the injury alleged, there is one puzzling feature in the case, to which I shall presently refer. But, apart from that, we have to decide whether the lower Court's finding that no damage has been sustained is correct or not. The sale commenced by order of Court on the 27th June

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1928; leave to bid was granted to the decree-holders on the 12th July and on the last-mentioned date an order was made directing that the sale was to proceed from day to day to the end of July. On the 17th July the zamindar of Andra bid Rs. 2,50,000 for each of the two lots. It may be mentioned that the zamindar is a near relation of one of the judgment-debtors. On the 31st July there was no further bid made until the decree-holders offered for each lot a sum of Rs. 1,000 more. At 5 p.m. on the 31st of July the sale was concluded and the decree-holders were declared the purchasers, their bid for Rs. 2,51,000 for each of the two lots having been accepted by the Court. [His Lordship considered the evidence and held that the statement as to the price in the proclamation was not an underestimate and that there was no inadequacy in the sale price realised at the auction.] This finding would be enough to dispose of these appeals. But I cannot help advert to certain irregularities in the conduct of the sale brought to our notice in the course of the hearing. In the lower Court several objections were taken by the judgment-debtors, but it is regrettable that a most patent irregularity that occurred has not been noticed. The sale was ordered to be made in two lots, each lot comprising several villages. The proclamation was published in the usual way, and, as I have said, the sale was widely announced also in the leading newspapers. But the decree-holders affixed proclamations of sale in each village, and the fact has now come to light that what was described in each copy as the subject of the sale was the particular village at which that copy was posted and not the lot of which that village was but a part. That it is a material irregularity within the rule admits in my opinion of no doubt. If I was satisfied that the judgment-debtors have sustained

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substantial injury by reason of this irregularity, I should without doubt have set aside the sale. I think it necessary in this connexion to notice one contention put forward by the learned Advocate-General. It is argued that only by *direct, as opposed to circumstantial, evidence* an applicant under Order XXI, rule 90, can show that the injury is the result of the irregularity. This contention does not require serious notice. He has cited cases which cannot be held to be authorities on the interpretation of the rule as it now stands. As a matter of fact those very cases, I presume, have led to an important amendment of the rule by the Legislature. In the view I have taken, this question of law does not assume any importance, but I have been obliged to refer to it on account of the contention put forward by the learned Advocate-General. As I pointed out in the course of the arguments, if the property to be sold is 1,000 acres of valuable wet land, say in the Godavari delta tract, and the proclamation describes it as dry land, would any Court insist upon direct evidence for proving that the injury is the result of this irregularity? Or again, as has happened in one of the cases to which our attention has been drawn, if a sale announced to take place at 11 o'clock is held at 7, can nothing short of direct oral evidence satisfy the Court that the loss is due to that patent and obvious irregularity? It is unnecessary, as I have said, in the view I have taken to pursue this matter.

There remains another argument to which I must now advert. Mr. Ramanath Shenai complains against the manner in which the sale was conducted. I must observe that the learned Judge attended to several matters in connexion with the sale with great care, but allowed the sale to spread over a long period; in fact he made an order, as I have said, that the sale was

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to continue from day to day from the 27th June to the 31st July. Mr. Ramanath Shenai contends that it is wrong to fix a date for the terminating of the sale. I entirely agree. It is not only proper, but necessary, to fix the time when the sale is to commence; but what possible purpose can be served by fixing in advance the time when the sale is to come to an end? The person or authority in control of the sale must be free to decide, as the person most competent to do so, when the sale is to terminate. This fixing of time for the bringing of the sale to an end is allied to the pernicious system, to which I have adverted, that of directing the sale to be conducted from day to day. A sale by auction fundamentally differs from a sale by private contract. In a private sale negotiations move slowly, the parties consult and deliberate at leisure; but in the case of an auction-sale investigations are made and inquiries are pursued beforehand; at the moment of the auction the various bids offered in quick succession are intended to stimulate competition, and rapid decisions have to be made, and are made, on the spot. If the sale is lengthened out (in this case the duration was over a month) the bidders, who are diligent enough to attend on the first day, may not care to attend on the second, and may never dream of waiting till the last; and the very object of adopting this method of sale would be completely defeated. Moreover, what prevents a person, who has made under the stimulus of competition a good bid, from holding himself not bound by it when he finds that the sale is protracted and prolonged? It is not my intention to lay down at once that the conducting of a sale in this manner necessarily amounts to a material irregularity, but I must most strongly condemn and deprecate the practice that has grown up.

Lastly, I am not prepared to believe that the Andra zamindar came to the Court on the 31st July after 5 p.m. with a *bona fide* desire to purchase the property.

In the result, the appeals fail and are dismissed. Ordinarily I should direct the unsuccessful party to pay the costs, but in this case to mark my disapproval of the manner in which the case was conducted for the decree-holders, I deprive them of costs. Each party shall therefore bear his own costs.

REILLY J.—I agree with the result at which my learned brother has arrived, though I have reached it perhaps by a slightly different road.

In the first place I should like to say that I agree with what my learned brother has said about the extraordinary prolongation of this sale, which began on the 27th June 1928 and was closed on the 31st July of that year, being continued from day to day. That appears to me to be a very bad and unbusinesslike way of conducting a Court-auction; and it is not the intention, I think, of the Code of Civil Procedure that an auction should be so conducted. There are many obvious disadvantages in such a method of conducting an auction. Bidders may come at the beginning, as my learned brother has pointed out, and may go away in despair; they cannot wait for weeks. They may change their minds. Some, who have money at the beginning of the auction, may not have money at the end. Nobody at first considers the matter at all as serious; there is plenty of time, and intending bidders need not make up their minds what they are going to bid. I agree that a Court-auction should not be conducted in that way. But in this case I understand that no complaint has been made by the judgment-debtors on the ground of the extraordinary

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extension of the sale. Their complaint, as put before us, has been rather that it was not extended a little longer. In the circumstances I do not think we can say that the sale is vitiated by the length of time over which it was spread in this case. At any rate we cannot come to such a conclusion in favour of the judgment-debtors.

But it has been urged before us that these two estates, which were put up for auction, were eventually sold much below their real value, that they were very much undervalued in the sale proclamation and that thereby substantial loss was caused to the judgment-debtors. [His Lordship considered the evidence and proceeded:—] I think we must take it therefore that on the evidence there was an under-valuation of each of these estates in the sale proclamation and a considerable under-valuation.

Does it follow that the sale is vitiated? I do not see any reason to suppose that there was fraud in the under-valuation. The District Judge did his best to arrive at a proper valuation of both the estates after hearing all the judgment-debtors had to say. I do not see how fraud can be made out in that matter. But so seriously to under-value property announced for sale in such a proclamation is undoubtedly an irregularity. Can we say that that irregularity led to the estates being sold for less than what they would otherwise have fetched in this case? That in my opinion the judgment-debtors have been unable to make out.

[His Lordship considered the evidence on the point and concluded:] Although these estates were eventually sold in this auction for comparatively low prices—Rs. 2,51,000 in each case—in the circumstances I am not at all satisfied that that was due to the unduly low values entered in the sale proclamation.

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It has been suggested for the judgment-debtors also that there was some fraud towards the close of the auction in regard to the dewan of Andra, who was somehow prevented by the dewan of Jeypore from bidding more than rupees two and a half lakhs for each estate in accordance with his master's directions. There is really no evidence in support of that suggestion, and it is destroyed I think by the fact that the dewan of Andra was still in the service of the zamindar of Andra when this case was tried by the District Judge more than a year after the sale.

As my learned brother has pointed out, in the course of the hearing before us a very curious feature of the case was discovered, namely that in every village in the two estates a proclamation in regard to the sale was put up in April or May, but that proclamation was inaccurate. We find from the specimen proclamations at which we have looked that what was put up in the villages in each case was a proclamation that the sale would be held for the decree debt. That was correct; but the property described as for sale in each of those proclamations was the village itself and nothing more. That would undoubtedly be misleading to anybody who paid any attention to it. It was a very curious and careless irregularity. But it has not been denied before us, and it has not been denied at any stage, that a proper proclamation, stating that each estate would be sold as a whole in one lot, was duly published in accordance with law; it was put up in the District Court-house, in the Collector's office and in the proper place in each of the two estates. Although no doubt there was a proper proclamation made in accordance with all the prescribed rules in regard to the auction as it was actually held, that is to say for the sale of each estate in one lot, there were these superfluous notices in the villages, notices which were both superfluous and inaccurate and would

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have misled anybody who had paid attention to them. But there is no evidence whatever that anybody, who was at all likely to be a bidder, ever imagined that the villages would be sold individually and not the estates in one lot each. And in the absence of any such evidence, we could not find, I think, that the publication of these superfluous and inaccurate notices, as indeed they were, in the villages had any effect upon the result of the sale. I do not wish it to be understood that the absence of direct evidence in such a case as this, that is the evidence of some witness coming before the Court and saying that he was misled by such a notice as these which were published in the villages, would in all cases prevent a reasonable inference being drawn that by such an irregularity in the publication of the proclamations substantial loss had been caused to the judgment-debtors. Whatever may have been declared in any decision to have been the law before what corresponded to rule 90 of Order XXI of the Code of Civil Procedure assumed its present form, certainly it is not necessary now to rule out reasonable inferences from evidence in order to establish that an irregularity in the conduct and publication of a sale has caused substantial loss. In this case however there is not only no direct evidence, but I see no sufficient ground for an inference that the result of these sales was affected by the inaccurate proclamations published in the villages. And, as I mentioned, the publication of these notices in the villages was discovered in this Court. The judgment-debtors said nothing about it at any stage and felt no grievance on this account. Indeed it would be a proper objection, which their opponents might well raise, that the point was never taken by the judgment-debtors in their petition to the District Court, that it was not taken in the grounds of appeal here, and that, unless it had been noticed by us accidentally during the course of the hearing

of this appeal, the judgment-debtors would have known nothing about it. There is no reason to interfere with the sales on that account.

There is one other matter to which Mr. Ramanath Shenai referred as being of some importance. He objected to the eventual closing of this long protracted sale at 5 p.m. on the 31st July 1928. The Judge had ordered that the sale should be continued until the 31st July of that year. That was long enough. But it is suggested by Mr. Ramanath Shenai that we ought not to understand the order that the sale was to continue till the 31st July as meaning that it should stop at the end of Court-hours on that day, but that it should have been continued until some unspecified hour in the night. I can see no basis whatever for any such suggestion. It is urged that the zamindar of Andra came to the Court-house after 5 p.m. on the 31st July anxious to make some belated bid for these estates. If he did intend to bid at that hour, he had nothing to complain of when he found that the sale had stopped, as it was obviously intended that it should stop, at the close of the Court-hours on the 31st July. The judgment-debtors can have no reasonable grievance whatever in the fact that the sale at last came to an end when the working Court-hours for the 31st July ended.

In my opinion there were irregularities in this case and some very curious irregularities, but there is no sufficient reason why we should interfere with the decision of the District Judge. I agree that these appeals should be dismissed, and I agree also with the order which my learned brother has proposed as to costs.

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APPELLATE CIVIL.

Before Mr. Justice Wallace.

[UNDER CLAUSE 36 OF THE LETTERS PATENT ON A DIFFERENCE
OF OPINION BETWEEN WALLER AND KRISHNAN
PANDALAI JJ.]

1932,
April 20. POGARU RAMAMURTHI (SECOND PLAINTIFF), APPELLANT,

v.

SRI RAJA MIRJA SRI PUSHAVATI ALAKA
RAYANA GAJAPATIRAJU MAHARAJU MANYA
LTAN BAHADUR (FIRST DEFENDANT), RESPONDENT.*

*Madras Survey and Boundaries Act (IV of 1897), sec. 13—
Boundary dispute within meaning of Act—Zamindari—
Land situated in, whether part of ryoti land of zamindari
or inam land not included in it—Dispute as to—Survey
Officer's decision as to—Conclusive under sec. 13 of Act,
if party affected by decision does not file a suit within one
year to set it aside—Jurisdiction of Survey Officer—Title
and possession—Jurisdiction on matters of—Adverse posses-
sion—Interruption of—Survey Officer's decision if has effect
of—Madras Hereditary Village Offices Act (III of 1895),
ss. 13 and 21—Holder of office—Ejectment of trespasser on
inam land forming part of emoluments of office—Suit for
—Secs. 13 and 21 not a bar to.*

In the course of the survey of a zamindari a dispute arose whether a survey field situated in a village within the ambit of the zamindari should be demarcated as an inam or as part of the ryoti (jeroyati) land of the zamindari, the zamindar claiming the land as ryoti land and the inamdar as his mirasi inam. The Survey Officer demarcated the land as mirasi inam and his decision was, in an appeal preferred by the zamindar under section 12 of the Madras Survey and Boundaries Act (IV of 1897), affirmed by the Assistant Superintendent of Survey. The zamindar did not file a suit within a year to get that decision set aside. In a suit subsequently brought by the inamdar against the zamindar

* Letters Patent Appeal No. 125 of 1926.

Held (on a reference under Clause 36 of the Letters Patent, on a difference of opinion between WALLER and KRISHNAN PANDALAI JJ.) by WALLACE J. (concurring with WALLER J.) that the dispute before the Survey Officer was a boundary dispute within the meaning of the Survey and Boundaries Act of 1897, that the Survey Officer had jurisdiction to decide that dispute, and that, as the zamindar did not file a suit within a year to get that decision set aside, it was conclusive under section 13 of the Survey and Boundaries Act as to the land being Government service inam and not part of the zamindari.

Held further by WALLACE J. (concurring with WALLER J.) that a decision by a Survey Officer does make a break in existing possession so as to render ineffective, for purposes of limitation, any adverse possession running at its date.

Azhagaperumal Pillai v. Rasa Pillai, (1931) 35 L.W. 388; 62 M.L.J. 399, dissented from.

Per WALLACE J.—What the Survey Officer had to decide and had jurisdiction to decide was how the boundary of the zamindari was to run, whether it should exclude or include the land in question, and his decision was that the inam being Government property must be excluded from the estate, demarcated out of the estate. Such a dispute can properly be called a boundary dispute, because, unless controversies of that kind are settled, the boundary of the zamindari cannot be properly demarcated. There can be a boundary dispute within the meaning of the Act even though the boundary of the disputed portion is not itself in dispute.

Per WALLER J.—Strictly speaking, there was no dispute about the dimensions of the survey number itself, but there was a dispute about the boundary and extent of the ryoti land of the zamindari—that is to say, whether it did or did not include the field in question—and that was a boundary dispute within the meaning of the Act.

Per KRISHNAN PANDALAI J.—Whether there is or is not in any particular case a real dispute about a boundary is to be determined on the facts of the dispute itself. When two people dispute title to an ascertained and definite piece of land or to subordinate interests therein the dispute cannot in any proper sense be described as a boundary dispute though as a result of the disputed title being settled the boundaries of the property of one or other of the disputants may be accordingly shifted. The dispute in the present case was not about the physical

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Per WALLACE J.—The decisions of a Survey Officer in a boundary dispute are not limited to the mere abstract question of what are the physical boundaries in dispute but are decisions on matters of title and possession and are conclusive on those matters.

Per KRISHNAN PANDALAI J.—If from a particular boundary being conclusively established the right of either party to the intervening space necessarily follows, that will be held concluded not because of the Act but because of the force of logic. The Act itself confers no conclusiveness upon anything else but boundaries and says nothing about the right to the property or about its possession.

A Survey Officer's decision as to boundary although conclusive as to the boundary does not have the legal effect of terminating the possession of the party who was in possession or of destroying its legal effect if it had already conferred a title upon the possessor or breaking the running of possession in favour of the person in whose favour the boundary is ordered.

Azhagaperumal Pillai v. Rasa Pillai, (1931) 35 L.W. 388; 62 M.L.J. 399, followed.

Per WALLER and KRISHNAN PANDALAI JJ.—A suit by the holder of an office to eject persons who are alleged to have trespassed on some inam land, which forms part of the emoluments of the office, is not barred by sections 13 and 21 of the Madras Hereditary Village Offices Act (III of 1895).

Per WALLER J.—*Quaere* whether a suit by the holder of an office to recover the emoluments attached to it is taken by section 21 of the Madras Hereditary Village Offices Act out of the jurisdiction of the ordinary Courts.

The language of section 13 of the Act is inapplicable to a suit by an actual holder of an office to recover the emoluments thereof. Such a person comes into Court as the holder of the office and not as a person claiming to be entitled to it.

APPEAL under Clause 15 of the Letters Patent against the judgment of SPENCER J., dated 8th February 1926 and passed in Second Appeal No. 951 of 1923 preferred

against the decree of the District Court of Vizagapatam in Appeal Suit No. 329 of 1920 preferred against the decree of the Court of the Temporary Subordinate Judge of Vizagapatam in Original Suit No. 37 of 1917.

The appeal originally came on for hearing before WALLER and KRISHNAN PANDALAI JJ. who delivered the following judgments, dated 30th March 1932:—

WALLER J.—The appellant has no case whatever on the merits. He relies on an order passed by the Assistant Superintendent of Survey in 1905, on an appeal by the respondent, confirming the demarcation of the survey number in dispute as mirasi inam, by which was meant, I presume, a pre-settlement inam. The real dispute between the parties was whether the land should be demarcated as a post-settlement inam or as a part of the ryoti land of the estate. No one could possibly have contended that it was a pre-settlement inam, in which the Government had any interest. It was an inam granted by the ryots themselves in 1820, which has been resumed by them even before the year 1873 and the landholder had been allowing the appellant a concession of Rs. 30 a year on that account. So that, it would seem, the appellant had no case at all, still less a case that the inam had been granted before the permanent settlement. The decision, however, of the Survey Officer was in his favour and, if he had jurisdiction to pass it, it became final, for the Maharajah did not file a suit within a year to get it set aside. It is contended—and the contention found favour with SPENCER J.—that the Survey Officer's order was passed without jurisdiction as there was no boundary dispute between the parties within the meaning of the Madras Survey and Boundaries Act. As the respondent appealed to that jurisdiction and, failing in his appeal, did not take the proper steps to get the order against him set aside, it seems scarcely to lie in his mouth to urge many years later that there was no jurisdiction and that he was entitled to ignore the order.

The Act does not itself define what is meant by a boundary dispute. It is, I take it, a dispute about the demarcation of a field arising in the course of survey operations. In 1905 the Vizianagaram estate was being surveyed and, in the course of the survey, a dispute arose whether the field in question should be demarcated as an inam or as part of the ryoti land of the estate. The dispute was taken before the Survey Officer

RAMAMURTHI under the Act, both parties consenting to his exercising jurisdiction over it. It is true that, strictly speaking, there was no dispute about the dimension of the survey number itself, but there was a dispute about the boundary and extent of the ryoti land of the estate—that is to say, whether it did or did not include the field in question. That being so, I find it impossible to say that there was not a boundary dispute within the meaning of the Act. If that were so, the decision of the Survey Officer—however erroneous—became final, as no suit to set it aside was filed within a year. I think that the District Judge was right in his observation that “there was as much a dispute about the boundary in this case, as in that reported in *Muthirulandi Poosari v. Sethuram Aiyar*(1).”

The appeal was posted for further argument on the question whether there was a boundary dispute. After hearing it, I remain of the opinion that there was here as much a boundary dispute as in *Muthirulandi Poosari v. Sethuram Aiyar*(1) and as in the cases of *Kamaraju v. The Secretary of State for India*(2) and *Muthammal v. The Secretary of State for India*(3).

I find that I have omitted to deal with another contention that found favour with SPENCER J. It was that the suit—being a suit to recover the emoluments of a Kurnam's office—was, under section 21 of Madras Act III of 1895, not cognizable by a Civil Court. The suit is not one to recover the emoluments of an office, but to eject persons who are alleged to have trespassed on some inam land, which forms part of the emoluments of the office. Apart from that, I find great difficulty in following the decisions which have laid down that section 21 of the Act takes suits by holders of offices for recovery of their emoluments out of the jurisdiction of the ordinary Courts. The Act is intended to deal with the succession to certain hereditary village offices and to provide for the hearing of claims to such offices or their emoluments. Section 13 says that “any person”—not, be it observed, any village officer—“may sue for any of the village offices specified in section 3 on the ground that he is entitled” under the material sections of this and another Act “to hold such offices”. That is a suit by a claimant to an office for a declaration that he is entitled to succeed to it. The section also provides for suits for recovery of the emoluments attached to

(1) (1919) I.L.R. 42 Mad. 425 (F.B.). (2) (1888) I.L.R. 11 Mad. 309 (F.B.).
(3) (1914) I.L.R. 39 Mad. 1202.

such offices. It says that “any person”, in other words, a claimant and not a village officer *in esse*, “may sue for the recovery of the emoluments of any such office on the ground that he is entitled” under the material sections of this and another Act “to hold such office”. I am unable to see how the language of the section can apply to a suit by an actual holder of an office to recover the emoluments thereof. Such a person comes into Court as the holder of the office and not as a person claiming to be entitled to hold it. If there could be any doubt about the point, it is removed by the second proviso to section 13, which runs as follows:—

“If at any time before the completion of the trial of a suit preferred under this section for any office or for the recovery of the emoluments of any office, it appears to the Collector that the claimant is not eligible for appointment under section 1 of section 10 or sub-section (1) of section 11 of this Act, as the case may be, he must pass an order rejecting the plaint.”

The question of eligibility for appointment could, in relation to a suit for recovery of the emoluments of an office, arise only in the case of a claimant to an office. Such a question could not arise in the case of an actual holder of an office. That being so, it seems to me open to serious doubt whether a suit by the holder of an office to recover the emoluments attached to it is taken by section 21 out of the jurisdiction of the ordinary Courts.

Since we reserved judgment it has been brought to our notice that a Bench of this Court has held that a decision by a Survey Officer does not make a break in existing possession so as to render ineffective, for purposes of limitation, any adverse possession running at its date; see *Azhagaperumal Pillai v. Rasa Pillai*(1). The Judges thought that their view did not run counter to the decision of the Full Bench in *Muthirulandi Poosari v. Sethuram Aiyar*(2). With great respect, I think that it does. The referring Judges in that case were definitely of opinion that the decision of the Survey Officer made a break in the adverse possession and that the period before the decision could not be tacked on to the period after it so as to make the adverse possession continuous. And the Full Bench did not dissent from their opinion. Even if it be assumed that the two periods can

(1) (1931) 35 L.W. 388; 62 M.L.J. 399. (2) (1919) I.L.R. 42 Mad. 425 (F.B.).

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be tacked on to each other, what was the decision of the Survey Officer in this case? That the inam was pre-settlement inam and that sixty years' adverse possession was necessary to establish the title claimed by the Maharajah. The decision was erroneous, but he had jurisdiction to pass it and it holds the field till it has been displaced in the proper way. The land having been demarcated as pre-settlement inam, it would lie on the Maharajah to shew that he had been over sixty years in adverse possession. All that has been shewn is possession from 1873 till 1917. From either point of view, the contention fails and I would allow the appeal. I should like to add, in regard to the decision in *Chinna Venkatrayudu v. Ramamurti*(1), that I concur in SPENCER J.'s criticism of that decision. In the course of the argument, we sent for the printed record, but I was unable to discover from it on what facts or evidence the observations of the Judges were based. I would restore the decision of the District Judge with costs in this and the lower Court.

KRISHNAN
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KRISHNAN PANDALAI J.—Though with great reluctance to differ from my learned brother's opinion which I have respectfully considered, I find myself unable to say that SPENCER J. was wrong when he held that there was no such dispute about a boundary as was necessary to make the order, Exhibit 23, conclusive under section 13 of the Madras Survey and Boundaries Act of 1897 unless it was set aside by a suit filed within a year thereafter. The nature of the dispute can be seen from the appeal petition, Exhibit 23 (a), by the Vizianagaram Samasthanam. The subordinate Survey officers had demarcated, i.e., described a particular survey field, No. 339, as "subsequent service inam" meaning post-settlement service inam, whereas the zamindar contended that it was no longer service inam but ryoti (jeroyati) land. There was no dispute about the physical properties or dimensions of the land. The dispute was about tenure or the quality of estate possessed by the parties in the land and it is to be noted that, whichever contention prevailed, the land was part of the zamindari. When this dispute was taken in appeal before the Assistant Superintendent of Survey the present appellant (then respondent) admitted, as it is even now admitted in the plaint, that, though the inam was a post-settlement inam, he had lost

possession for a great many years and the zamindar had let out the land as jeroyati to his ryots and made an allowance of Rs. 30 per year to himself as compensation for the loss of the land. The result of the appeal was that the "present demarcation and registration of Survey No. 339 as mirasi inam was confirmed—" by which I understand that it was demarcated as post-settlement hereditary inam. But the appellant refers to the penultimate paragraph of the order where it is said that the land is Government service inam and therefore that the appellant should prove right by prescription for a period of over sixty years. All I can say about this is that the passage discloses some error or confusion of facts quite against the admitted facts and the contentions of both parties. Whatever these expressions were intended to convey, I read the decision as confirming the order appealed against and not as ordering a third alternative, i.e., pre-settlement inam. This, however, is a detail, the substantial point being that it is abundantly clear that the dispute was not about the boundary of anything but about the tenure of a specific piece of land—the zamindar claiming it as ryoti land and the appellant as his inam. In my opinion the decision in such a dispute by a surveyor is not final under section 13 of the Madras Survey and Boundaries Act merely because it is placed before him in the course of survey operations and he passes orders thereon. There can be no estoppel on such a point. The only class of orders which derive finality under the Act are those which decide boundary disputes. It is no doubt possible by ingenious use of language to describe a dispute about title as a dispute about boundary in the sense that when the disputed title is decided the boundary of the successful party's possessions is extended and that of the other diminished. But this is really a play upon words and not what is intended when it is said that the Survey Officer shall have power to determine and record undisputed boundaries and that when a boundary is disputed the Survey Officer shall determine the boundary and record it [Sections 9 and 10 of Act VIII of 1923 corresponding to section 11 (1) and (2) of Act IV of 1897]. It is this determination against which an appeal is allowed by section 12 of the Act of 1897 corresponding to section 11 of the Act of 1923 and in respect of which the appellate decision shall unless modified by a decree of the Court be conclusive as to the right of the dissatisfied party in respect of the boundary of the property surveyed

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according to section 13 of the Act of 1897, or conclusive proof that the boundaries determined and recorded therein have been correctly determined and recorded according to section 13 of the Act of 1923. Whether there is or not in any particular case a real dispute about a boundary is to be determined on the facts of the dispute itself. In my opinion when two people dispute title to an ascertained and definite piece of land or to subordinate interests therein, the dispute cannot in any proper sense be described as a boundary dispute though, as a result of the disputed title being settled, the boundaries of the property of one or other of the disputants may be accordingly shifted. If there was a real boundary dispute I can understand that a question of title depending solely on the boundary may become concluded—as a necessary logical consequence but not by virtue of the Act. But, if there was no such dispute, it cannot be inferentially introduced into a dispute about title and then held to be inferentially decided under the Act so that the question of title becomes concluded by a further inference. There was, in my opinion, no boundary dispute in the proper sense before the Assistant Superintendent of Survey and his order, Exhibits G and XXIII, being one on a matter beyond his jurisdiction could not become conclusive under the Madras Survey and Boundaries Act.

The further argument has confirmed me in my opinion about the scope and purpose of the Act and of its effect on the case. The scope and purpose of the Act of 1897 (the material Act in this case) as well as of that of 1923 is to consolidate and amend the law relating to survey of lands and settlement of boundary disputes. The power of Survey Officers is to fix boundaries, i.e., demarcate the physical extent of properties by setting up the boundaries between them. They have no power to decide disputes about title, but only disputes about boundaries. They were not intended to be a sort of quasi Civil Courts whose decisions operate as *res judicata* in the proper sense as to all matters decided by them or which may inferentially be involved in their decisions. Thus two matters must be distinctly borne in mind: (1) the Survey authorities have no jurisdiction at all in any matter except that of boundaries and (2) the only effect of their decisions on matters within their jurisdiction is not that they have the effect of *res judicata* but that so far as they are boundary decisions they can only be questioned by a suit brought within a certain time—which is quite a different

thing. I will not say that some decisions on the Madras Survey and Boundaries Act are not capable of being read as imputing a wider jurisdiction to officers acting under the Act and a more extensive effect to their actual decisions. But I believe that the scope of the Act and the limits of the jurisdiction of Survey Officers and of the effect of their orders are generally recognized as I have stated. In *Kamaraju v. The Secretary of State for India*(1) the boundary between the zamindari and a neighbouring tract of Government land had been settled in 1875 under the Boundaries Act of 1860. The zamindar then a minor was represented before the Survey Superintendent by his estate manager. Later the portion so excluded from the zamindari was included in a reserve forest under the Madras Forest Act of 1882. The Forest Settlement Officer rejected the claim of the zamindari to the area excluded from it by the survey decision. Of the two questions involved, the first, namely, whether an appeal lies to the High Court from a decision of the District Court passed under section 10 of the Madras Forest Act, is not relevant to this case. But the second question was whether the zamindar was properly represented in the survey proceedings. It was held that he was. There was no question raised whether there had been a boundary dispute such as to give jurisdiction to the Survey Superintendent for the decision of 1875. The Court simply said that the matter in dispute was *res judicata* and that the zamindar was bound by the proceedings under the Boundaries Act in 1875. This decision is hardly in point on the question before me. Nor can the use of the expression "*res judicata*" be understood as meaning that the Survey Superintendent's decision is *res judicata* in the proper sense in view of the decision of the Privy Council pointing out the distinction between *res judicata* in the proper sense and the statutory prohibition of questioning executive or administrative acts except in a particular way; see *Radhakrishna Ayyar v. Sundaraswamier*(2), confirming the decision of this Court in *Radhakrishna Ayyar v. Swaminatha Ayyar*(3). In *Muthammal v. The Secretary of State for India* (4) the question before the High Court was whether a mittadar, against whom the decision of the Boundary Commissioner excluding a certain area from his mitta had become final, could maintain a prayer to the Civil Court to reduce his peshkash

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(1) (1888) I.L.R. 11 Mad. 309 (F.B.).

(2) (1922) I.L.R. 45 Mad. 475 (P.O.).

(3) (1916) 6 L.W. 16.

(4) (1914) I.L.R. 39 Mad. 1203.

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proportionately to the excluded area. WALLIS C.J. held that that question did not arise in view of his opinion on the effect of the boundary decision. He said:—

“In these circumstances the decision of the Boundary Settlement Officer that the lands in question did not form part of the zamindari is *res judicata* according to the decision of the Full Bench in *Kamaraju v. The Secretary of State for India* (1), and I think that the ground of the decision, namely, that they never had formed part of the mitta is also *res judicata* as having formed the ground of the decision.”

In view of the opinion expressed by this very learned Judge in *Muthirulandi Poosari v. Sethuram Aiyar*(2) and *Chinna Venkatrayudu v. Ramamurti*(3), the opinion that Survey Officers' decisions operate by way of *res judicata* is open to the remark that it does not recognize the distinction now pointed out by the Privy Council and was perhaps not intended to be understood in that particular sense. The opinion that the effect as *res judicata* of decisions by Survey authorities extends to the grounds of the decisions also is in my opinion not justified by the Madras Survey and Boundaries Act. In *Muthirulandi Poosari v. Sethuram Aiyar*(2) there had been a litigation in the year 1900 between the parties, and a decree was passed. There arose a dispute between the parties as to whether that decree conferred the right to a lane to the present plaintiff. In 1904 this dispute came before the Survey Officers who were surveying the town of Madura. The Survey Officer decided that the lane belonged to the defendant and demarcated it accordingly as part of his property. This decision was not questioned by a suit within a year, but the plaintiff brought a suit in 1913 for an injunction against the defendant alleging that the decree of 1900 had awarded the lane to him, that he was in possession under it both before and after the survey decision and that the defendant had no right to interfere with the plaintiff's enjoyment. It was recognized that, unless there was a boundary dispute, the survey officials could not by demarcating a boundary affect title to property. Both the referring Judges, PHILLIPS and SESHAGIRI AYYAR JJ., refer to this at pages 427 and 428 of the report. The question referred was, when a plaintiff's claim has been disallowed

(1) (1898) I.L.R. 11 Mad. 309 (F.B.). (2) (1919) I.L.R. 42 Mad. 425 (F.B.).
(3) (1920) I.L.R. 44 Mad. 340.

under the Madras Survey and Boundaries Act IV of 1897 but he has been in possession of the property, does the decision of the Survey Officer operate as *res judicata* in a subsequent suit for possession? In the opinion of the Full Bench delivered by WALLIS C.J., he carefully guards himself by premising it with the words:—

“Assuming that in this case the boundary was disputed and the dispute was the subject of an order by the Survey Officer under section 11 of the Madras Act IV of 1897,”

and then he stated the opinion that

“in that case the order if not reviewed by the appellate authority or questioned by a suit as provided in the section was conclusive as to the rights of the parties and none the less so because the unsuccessful party, who was in possession at the date of the order, was not subsequently ousted from possession.”

This clearly recognizes that, to give jurisdiction to a Survey Officer to make an order which shall be conclusive under section 13 of the Act of 1897, there should be a boundary dispute as stated in the opening words of that section, and all that is meant is that the conclusive character of the order, which according to the section itself relates to the rights claimed in respect of the boundary of the property, is not affected by the unsuccessful party, who was in possession at the date of the order, continuing to be in possession. In *Chinna Venkatrayudu v. Ramamurti*(1) the distinction between orders which are final under section 12 (3) of the Act of 1897 and those which are conclusive of the rights as to the boundary unless set aside by a suit under section 13 is pointed out by WALLIS C.J. himself. In that case a karnam in the Pithapur estate had during the survey operations of that estate succeeded in getting the Survey Officers to demarcate as included in his inam lands the neighbouring *jeroyati* lands of the zamindar. Neither the zamindar nor his agents had appeared before the Survey Officers, and there had been no appeal and no suit to set aside the order. It was pointed out that in the Full Bench case of *Muthirulandi Poosari v. Sethuram Aiyar*(2) all that was decided was that the Survey Officer's order in boundary cases is conclusive under section 13 only when there was a dispute and that nothing was stated therein about the effect of the word

(1) (1920) I.L.R. 44 Mad. 340.

(2) (1919) I.L.R. 42 Mad. 425 (F.B.).

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"final" in section 12 (3). The effect of section 12 (3) was held to be to make the boundary final as far as the authorities are concerned but not to preclude landowners from ever afterwards disputing the correctness of the boundary in a Court of law. The opinion that the conclusiveness of a Survey Officer's order under section 13 of the Act of 1897 can only arise if there was a boundary dispute was again laid down in *Subramania Mudali v. Meenakshi Ammal*(1) and *Municipal Council, Cochin v. Baru Devussi*(2). It must have been in view of these decisions that in section 13 of Act VIII of 1923 the words

"any party to a boundary dispute before the Survey Officer, and any party to an appeal preferred under section 12 or to whom notice of such appeal is given, and any person claiming under any such party"

which are found in section 13 of the Act of 1897 have been omitted. Under section 13 of the new Act all persons to whom notice of orders passed under sections 9, 10 or 11 of the Act has been given are required to get the orders modified by suits within three years. This case, however, has to be decided on the words of section 13 of the Act of 1897.

As to what it is that is concluded by a Survey Officer's decision acting within his jurisdiction, that is, in respect of a boundary, the words of section 13 of the Act of 1897 are that a suit is to be filed to establish the right which the dissatisfied party claims in respect of the boundary of the property surveyed and that subject to the result of such suit such order or decision shall be conclusive. The words of section 13 of the Act of 1923 are that the record of the survey shall be conclusive proof that the boundaries determined and recorded therein have been correctly determined and recorded. In my opinion the effect of both the sets of words is the same, and they mean that, unless the order is set aside by the suit, the boundary as determined is conclusive. As I have already said, if from a particular boundary being conclusively established the right of either party to the intervening space necessarily follows, that will be held concluded not because of the Act but because of the force of logic. The Act itself confers no conclusiveness upon anything else but boundaries and says nothing about the right to the property or about its possession. This last point

(1)(1922) 43 M.L.J. 194.

(2) (1925) 22 L.W. 671.

as to possession is clearly stated in *Azhagaperumal Pillai v. RAMAMURTHI Rasa Pillai* (1), with which I respectfully agree, when it holds that a Survey Officer's decision as to boundary although conclusive as to the boundary does not have the legal effect of terminating the possession of the man who was in possession or of destroying its legal effect if it has already conferred a title upon the possessor or breaking the running of possession in favour of the person in whose favour the boundary is ordered. As pointed out in that decision it would be very extraordinary if the Survey Officer's decision could have such a result which would not follow even a declaratory decree of a Civil Court that a party had or had not title.

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I am not satisfied that there was in this case any dispute about any boundary in the proper sense of the term. The dispute was about title. The Survey Officer had no jurisdiction to decide it and no jurisdiction to decide such a point can be conferred upon him by calling the dispute a dispute about boundary which it is not except by a play upon words.

I do not understand how the District Judge's decree for three years' rent against the respondent can in any event be supported. It is held that the ryots are not bound by the Survey Officer's order and that they have occupancy rights. The rents paid by them to the zamindar were paid under engagements between him and his ryots. The plaintiff had no connexion with these engagements which are several decades old.

The case is not one in which a trespasser has taken possession of rents due to plaintiff and collected rents from the plaintiff's tenants, and I do not see how, if the plaintiff is not entitled to possession as against the ryots, he can claim the rents paid by them to the zamindar under engagements to which he was not a party. According to the decision in *Azhagaperumal Pillai v. Rasa Pillai*(1) the zamindar's possession of the property through his tenants which began in 1873 is not affected by the Survey Officer's decision and, even if the zamindar is not in a position to question that decision assuming it related to any boundary, the plaintiff has got no right thereby to claim either possession of the property from the tenants or the rents from the zamindar. In fact the survey

(1) (1931) 35 L.W. 388; 62 M.L.J. 399.

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decision does not mention or necessarily mean anything about the tenants or rents paid by them.

On the last point based on the Hereditary Village Offices Act I agree with my learned brother that the suit is not barred by section 13 or 21 thereof.

In the result I would dismiss the appeal with costs.

By Court.—As we are not agreed, the appeal will have to be dealt with under Clause 36 of the Letters Patent. The questions on which we differ are these:—

(a) Whether there was a boundary dispute within the meaning of the Madras Survey and Boundaries Act.

(b) Whether the plaintiff is entitled to recover from the first defendant the *melvaram* collected by him from the other defendants for the three years preceding suit and to the declaration granted to him in clause (1) of the decree of the trial Court.

The appeal again came on for final hearing in pursuance of the order of reference contained in the above judgment before WALLACE J.

V. Govindarajachari for appellant.

S. Venkatesa Ayyangar for respondent.

Cur. adv. vult.

JUDGMENT.

WALLACE J. WALLACE J.—This appeal has been referred to me because of a difference of opinion between the learned Judges of the Bench who heard it. The suit is one of ejectment, the plaintiff claiming to be the Government *mirasi* karnam of Laveru village within the ambit of the Vizianagaram estate. This appeal is concerned with his plaint prayer to eject the defendants from a land, Survey Number 339, on the ground that he is the *mirasi* inamdar. The first defendant is the zamindar and claims the *melvaram* right over the land, the other defendants claim to be the *kudivaram* tenants thereof.

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The village was surveyed by Government in 1904 in the course of the survey of the Vizianagaram estate under Act IV of 1897 and the suit land was then demarcated by the Survey Officer as *mirasi* inam. Against this decision the first defendant's representative presented under section 12 an appeal that the land should have been classed as *jeroyati*. This appeal was thrown out. The estate did not file any suit under section 13 to have that decision set aside. Under that section of the Act the decision therefore became conclusive between the parties to the dispute as regards all matters in dispute. The main point contested throughout in this case has been whether the decision of the Survey Officer precludes the defendants from resisting the plaintiff's claim. It was decided by the trial Court, and that decision has not been since contested, that the order of the Survey Officer does not bind the tenant-defendants 2 to 12 as they were not parties to the appeal before the Survey Officer. As regards the first defendant, the zamindar, both the lower Courts held that he was precluded by the decision of the Survey Officer from resisting the plaintiff's claim and they therefore gave a decree that the plaintiff was entitled to the *melvaram* right over Survey Number 339. In second appeal SPENCER J. held that the Survey Officer's decision was without jurisdiction and therefore void, and, on the ground that the plaintiff had not independently established his title, he dismissed the plaintiff's suit. At the letters patent appeal the learned Judges differed on this main point and it is the chief question which I have to decide.

One would imagine that as it is the point on which the case really turned all available records in the survey proceeding would have been produced and exhibited. So far from that being so, the original proceedings of

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the Survey Officer are not filed nor is the entry in the Survey Register. We have only one decision on appeal, Exhibit G, the grounds of that decision, Exhibit XXIII, and the appeal petition of the zamindar, Exhibit XXIII-a, and these are by no means consistent. For example, Exhibit XXIII-a, does not show that Government was a party to the enquiry, while Exhibit XXIII says that Government was a party. Again, Exhibit XXIII-a says that the original decision was that the land was "subsequent", that is, post-settlement service inam, while Exhibit XXIII says the original decision was that it was a *mirasi* inam by which the Survey Officer on appeal, as he states clearly in his grounds, means Government service inam, that is, pre-settlement inam. It seems to be now admitted by the plaintiff that the inam was really post-settlement but that error of fact on the part of the Survey Officer cannot affect the validity of his decision if he had jurisdiction to pass it.

The first defendant claims that the order is without jurisdiction because there was no "boundary dispute" within the meaning of the Act. One would expect that, if there was at the time of the survey inquiry any substance in this contention, it would have been put in the forefront of the first defendant's appeal, Exhibit XXIII-a, but there is no suggestion of it there. The contention is advanced on two grounds: first, that the dispute was really whether the land was *jeroyati* or *darmilla* inam, that is, there was no decision that it did not form part of the estate, and secondly, even if the dispute was whether it was *jeroyati* or pre-settlement inam, still that is not a dispute about a boundary and therefore there is no boundary dispute. The first contention is based entirely on the wording of Exhibit XXIII-a which, as I have said, is inconsistent with the

statements in Exhibit XXIII. I see no reason why, if I am to make speculations, I should speculate that Exhibit XXIII-a is right and Exhibit XXIII wrong. The first defendant could have made the matter quite clear by producing the original registry entry, but, though it is now fifteen years since the plaint was filed, he has not so far done so. I must presume that the official act of the Survey Officer was regularly performed and with jurisdiction, that is, that the dispute was whether the land was to be demarcated within or outside of the estate, i.e., *zamin jeroyati* or Government service inam. As to the second contention, I find it a little difficult to follow. I understand the argument to be that there cannot be a boundary dispute unless there is a dispute between two estates or between Government and an estate regarding the physical boundary of some piece of land contiguous to both, that is, a dispute as to when, where and how the boundary between both shall run, but that, if the dispute involves on one side or the other the whole of the contestant's property, there cannot be any boundary dispute, because the boundary of the disputed portion is not itself in dispute. I can see no principle in such a contention. What the Survey Officer had to decide and had jurisdiction to decide was how the boundary of the Vizianagaram estate was to run, whether it should exclude or include the suit inam, and his decision was that the inam being Government property must be excluded from the estate, demarcated out of the estate. It does not seem to me that such a dispute cannot properly be called a boundary dispute or that it is not one of the kind of disputes with which the Act was enacted to deal. Obviously the boundary of the estate cannot be properly demarcated unless controversies of this kind are settled.

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If we examine the important rulings of this High Court under this Survey Act and its predecessor, we find that this is just the sort of case that has arisen and has been held to come under the Act. In the Full Bench case of *Kamaraju v. The Secretary of State for India*(1), a Survey Officer had demarcated out of the Bodinaickanur estate a tract of land which Government claimed to be reserved forest. There could be here no suggestion that the tract of land constituted the whole of the Bodinaickanur estate or the whole of Government land. Nor was there any suggestion that there was any dispute as to the physical boundaries of the tract itself. The question was merely whether the tract was to be demarcated within the estate or outside the estate as Government land. The Full Bench held that this was a boundary dispute under the previous Act, XXVIII of 1860, and that the decision was *res judicata* and the zamindar was estopped from claiming the tract as part of his estate. The ruling in *Muthammal v. The Secretary of State for India*(2) is a decision of three Judges in a letters patent appeal in a similar case also under Act XXVIII of 1860. The dispute there was whether a perfectly definite tract of land was part of a mita or Government reserved forest. The finding was that the Survey Officer's decision that the land did not form part of the mita is *res judicata*. In the Full Bench case of *Muthirulandi Poosari v. Sethuram Aiyar*(3), it does not seem to have been even argued before the Full Bench that the dispute before the Survey Officer as to the possession of a perfectly definite piece of land, a lane, was not a boundary dispute within the meaning of Act IV of 1897. The only attack the first defendant is able to make on these

(1) (1888) I.L.R. 11 Mad. 309 (F.B.). (2) (1914) I.L.R. 39 Mad. 1202.
(3) (1919) I.L.R. 42 Mad. 425 (F.B.).

decisions is that the first two were passed under the prior Act, XXVIII of 1860, and that the learned Judges made a wrong use of the words "*res judicata*". As to the first point, section 25 of the Act of 1860 under which the decisions were passed lays down practically the same procedure and the same principles, stated in fact in much less emphatic terms, as sections 11 to 13 of the later Act. The scope of the inquiry under Act XXVIII of 1860 has been clearly stated in a Bench decision of this Court, *Kirukan v. Alagappa Chetti*(1). As to the second point, it is argued that the Privy Council in a passage in *Radhakrishna Ayyar v. Sundaraswamier*(2), which had nothing to do with a controversy like the present, pointed out the legal distinction between *res judicata* and statutory prohibition. I cannot see how that decision can be of any assistance to the first defendant here; whether one calls the decision of the Survey Officer *res judicata* or not, the first defendant is, by force of section 13 of the Act, estopped from agitating anew the right which he there claimed and lost, since it is conclusive against him because he did not file a suit within the time granted in order to have his right restored.

It is next contended that, even taking it that the Survey Officer's decision is about a boundary dispute under the Act, it cannot preclude the first defendant from now contending that the inam is not Government service inam, because the Survey Officer had no jurisdiction to decide questions of title. That is, if I understand the argument, while it is open to the Survey Officer to decide that the inam was outside the estate, he had no jurisdiction to decide that it was

(1) (1920) 13 L.W. 172.

(2) (1922) I.L.R. 45 Mad. 475 (P.O.).

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Government service inam. This contention also I do not follow. A Survey Officer obviously had jurisdiction to decide anything which it was necessary to decide in order to come to his conclusion, and he obviously cannot avoid deciding questions of title in such cases. If parties A and B are disputing whether a particular piece of land is part of the property of A or B and the Survey Officer decides that it is the property of A, he is deciding that it is not the property of B. If that is not his function, the Act would seem to be useless; and if B's civil rights were not interfered with by the Survey Officer's decision it would not have been necessary to declare that B is entitled to establish his right in a Civil Court within one year. The Full Bench decisions already quoted are clear authority for the proposition that such decisions of a Survey Officer in a boundary dispute are not limited to the mere abstract question of what are the physical boundaries in dispute but are decisions on matters of title and possession. *Kamaraju v. The Secretary of State for India*(1) and *Muthammal v. The Secretary of State for India*(2) lay down that his decision is a decision on title and conclusive. These decisions also implicitly, and *Muthirulandi Poosari v. Sethuram Aiyar*(3) explicitly, lay down that his decision on the question of possession also is conclusive. In all these cases it was held that the decision of a Survey Officer on all these points is *res judicata* and binding on the parties to the boundary dispute. *Kirukan v. Alagappa Chetti*(4) is a Bench case directly on the finality of the Survey Officer's decision on a question of title, and *Kuppuswami Iyer v. Venkataswami*(5) is a Bench decision directly

(1) (1888) I.L.R. 11 Mad. 309 (F.B.). (2) (1914) I.L.R. 39 Mad. 1202.
(3) (1919) I.L.R. 42 Mad. 425 (F.B.). (4) (1920) 13 L.W. 172.
(5) (1922) 16 L.W. 99.

holding the finality of the Survey Officer's decision on a question of possession, even when the decision was in fact wrong. *Muthirulandi Poosari v. Sethuram Aiyar*(1) is particularly instructive on this point because it held that the decision of a Survey Officer is a decision that the successful party is in possession even though the unsuccessful party was really in possession, and that the decision estops the unsuccessful party from urging later on that he was in possession. The first defendant seeks to turn the edge of this decision by referring me to a Bench ruling of this Court in *Azhagaperumal Pillai v. Rasa Pillai*(2), where the learned Judges say that they do not interpret the Full Bench decision as meaning that the Survey Officer's decision stops the running of possession of a party really in possession. The learned Judges of the Bench give no reasons for this opinion except to refer to an opinion of RAMESAM J. in *Kuppuswami Iyer v. Venkataswami*(3), which, if I may say so with the greatest respect, cannot quote the learned Judge correctly, because, if he really meant that the possession of the defendants in that case was not interrupted by the decision of the Survey Officer, then he would have upheld the defendants' title by adverse possession. But on the contrary he agreed with the other learned Judge of the Bench in decreeing for the plaintiff on the ground that the decision of the Survey Officer that the plaintiffs were in possession is binding on the defendants. I therefore agree with WALLACE J. in his referring judgment in this case that the plain meaning of the Full Bench ruling is that the decision of the Survey Officer is conclusive on the question of possession. There is no real hardship done and there is

(1) (1919) I.L.R. 42 Mad. 425 (F.B.). (2) (1931) 35 L.W. 388; 62 M.L.J. 399.
(3) (1922) 16 L.W. 99.

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nothing extraordinary in the decision of an executive officer having such an effect since the civil rights of the parties are not injured provided they sue, as in the Act they are directed to sue, within one year of the decision.

The first defendant relies on a ruling in *Chinna Venkatrayudu v. Ramamurti*(1) that the correctness of an order under section 12 of Act IV of 1897 may be disputed afterwards in a Court of law. That case is really against him. It clearly lays down that if the order was passed under section 13 its correctness cannot be subsequently disputed.

The order in the present case is under section 13. I am quite clear therefore that the decision of the Survey Officer, expressed in Exhibits G and XXIII, is binding on the first defendant and he is not at liberty now and here to canvass its correctness.

The Full Bench decision in *Muthirulandi Poosari v. Sethuram Aiyar*(2) settles his further contention based on adverse possession. The first defendant's possession was interrupted in 1905 on 31st July 1905 by the decision of the Survey Officer. The suit was within twelve years of that date and therefore the first defendant has not prescribed by twelve years' continuous adverse possession before suit.

It may be mentioned incidentally that, even if there were any substance in the first defendant's contention that the original dispute was as to whether the land was *jeroyati* or *darmilla* inam, the case of *Chinna Venkatrayudu v. Ramamurti*(1) is authority for the proposition that even so it would be a boundary dispute within the Act and the decision is therefore final. This also receives support from the judgment of SADASIVA AIYAR J. in *Kirukan v. Alagappa Chetti*(3).

(1) (1920) I.L.R. 44 Mad. 340. (2) (1919) I.L.R. 42 Mad. 425 (F.B.).
(3) (1920) 13 L.W. 172.

I therefore hold that the decision of the Survey Officer is conclusive that the inam is not part of the first defendant's estate, but is Government service inam. It is the fault of the first defendant or rather the fault of his predecessor that he cannot now contest these matters. That decision then puts the plaintiff in the position of a Government service inamdar and from that position he cannot now be dislodged. Whether or not the attainment of that position in 1905 gave him both the melwaram and kudiwaram rights need not now be discussed, since the plaintiff is not here contending that he possesses the kudiwaram right. That would be a difficult position to maintain against the sitting tenants, defendants 2 to 12, who were not parties to the proceedings which declared him to be the mirasi-inamdar. He was therefore rightly held by the lower Courts not to be entitled to eject the tenants but entitled only to a decree declaring his melwaram rights against the first defendant. The first defendant contends that such a decree was for a relief for which the plaintiff had never asked. But that is fundamentally to misunderstand the legal position. The plaintiff sued for possession and the melwaram right is a possessory right. It is not accurate to describe it as a mere declaratory right. It is a species of possession, in fact the only kind of possession which, for example, a landlord and estate proprietor under the Madras Estates Land Act can have, and no one has yet dreamt of contending that such a landlord has no possessory right. The plaintiff therefore has been given such possession as he could be given consistent with the finding in the case. He is not entitled to possession against the tenants, he is entitled to have his possessory right to the melwaram declared against one who has been wrongfully in possession of it. For the same reason the decree for recovery of three years' melwaram

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RAMAMURTHI from the first defendant is correct since the first defendant has been trespassing on the plaintiff's rights as melwaramdar and wrongfully appropriating what belongs to the plaintiff.

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The first defendant has founded an argument on this point on a statement of the trial Court at page 8 of the printed papers. "The relationship of landlord and tenant has never been established between the plaintiff and defendants 2 to 12" and argues that therefore the first defendant could not trespass on a relationship which did not exist. The context in the judgment shows clearly that what the Subordinate Judge meant was that, since the Survey Officer's decision did not bind defendants 2 to 12 and since defendants 2 to 12 were not shown to be the tenants of the plaintiff, the plaintiff could not get a decree to eject them. By "tenants" he obviously meant ordinary tenants. But where the plaintiff is found to have been the melwaramdar since 1905, as the trial Court itself held, it is not open to kudiwaram tenants to say that he is not their landlord, and the trial Court in view of its decision in the case could not possibly have meant to say so.

I therefore agree with WALLER J. that the decree of the District Court is correct and the decree of that Court must therefore be restored. The plaintiff will have his costs against the first defendant throughout in all Courts.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Mockett.

THE BELLARY ELECTRIC SUPPLY COMPANY,
LIMITED (IN LIQUIDATION), (COUNTER-PETITIONER), APPELLANT, ^{1932,}
_{September 9.}

v.

KANNIRAM RAWOOTHMAL (PETITIONER), RESPONDENT.*

Company—Allotment of shares in—Contract for—Communication to shareholder of allotment—Necessity—Entry of his name in company's register—Sufficiency of—Interest Act (XXXII of 1839)—Amount deposited by shareholder for allotment of shares—Recovery by him of, on non-allotment—Interest on amount—Right to, only from date of demand.

An application for shares in a company is an offer and like any other offer must not only be accepted but the acceptance must be communicated to the person making the offer. A shareholder to whom the fact that an allotment of shares has been made has not been communicated is not bound by any contract. The mere entry of his name in the company's register is not sufficient for this purpose.

A sum of money payable by a company to a shareholder in respect of the amount deposited by him with it for the allotment to him of certain shares in the company, which shares were in fact never allotted, is not "a debt or sum certain payable at a certain time by virtue of a written instrument" within the meaning of section 1 of the Interest Act (XXXII of 1839). The sum is payable "otherwise" (i.e. as money had and received) and interest thereon is therefore recoverable only from the date of demand.

APPEAL against the order of the District Court of Bellary, dated 11th December 1928 and made in Interlocutory Application No. 382 of 1928 in Original Petition Nos. 1 and 19 of 1926 on the file of the High Court, Madras.

* Appeal against Order No. 263 of 1929.

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ELECTRIC
SUPPLY Co.,
LTD.
v.
KANNIRAM
RAWOOTH-
MAL.

V. S. Narasimhachari for appellant.
C. S. Venkatachari and L. Krishna Das for respon-
dent.

Cur. adv. vult.

MOCKETT J. The JUDGMENT of the Court was delivered by
MOCKETT J.—The relevant facts in this appeal are
that the respondent's firm purchased 110 shares in the
Bellary Electric Supply Company, Limited, at some time
previous to October 14, 1925, and that on that date on
behalf of his firm the respondent deposited Rs. 1,400
with the company in respect of 140 more shares. The
application for the 140 shares, Exhibit 1, dated Octo-
ber 14, 1925, contains the words "I request you to
allot me" 140 shares. No share certificate was admit-
tedly issued in respect of the 140 shares nor was a letter
of allotment sent. The company went into liquidation
on a date subsequent to October 14, 1925, and the respon-
dent now calls upon the Official Liquidator to refund
the Rs. 1,400 because no allotment of shares had been
made to him. The Official Liquidator contends that
there was such an allotment. The learned District
Judge found after an elaborate examination of the facts
and the documents that there was no allotment. The
short point is : was there an allotment? The respondent
filed an affidavit setting out the above facts. No counter-
affidavit was filed. At the hearing two witnesses
were called. The respondent (there the petitioner)
examined one S. M. Hussain once managing director
of the Bellary Electric Supply Company. He stated
that the Members Register, Exhibit II, which purport-
ed to show that on 14th October, 1925, 140 shares were
allotted to the respondent, could not in fact be relied
upon as the rubber stamp of the company was not
placed upon the respondent's page nor did it appear on
Exhibit III, the Members Register. The appellant

examined a clerk of the company who states that,
although the allotment was authorized by the managing
director and the entries made in Exhibit II, "the
applicant was not notified of the allotment". The
appellant relies on section 40 of the Indian Companies
Act:—

"The Register of members shall be *prima facie* evidence
of any matters by this Act directed or authorized to be inserted
therein."

and argues that Exhibit II raises a presumption of
allotment which the respondent (who did not give
evidence) has not rebutted. The respondent could
of course have been cross-examined on his affidavit but
the appellant did not give him notice to appear for
this purpose. Any presumption under section 40 was
clearly rebutted by the evidence of the above two
witnesses.

But apart from this aspect of the case there is ample
authority for the proposition that the mere entry of a
shareholder's name in the company's register is insuffi-
cient to establish that an allotment of shares was in
fact made. An application for shares is an offer and
like any other offer must not only be accepted but
the acceptance must be communicated to the person
making the offer. No Indian case in point has been
cited, but in *Gunn's case*(1) it was held that the
principles governing the formation of a contract
between a company and a member of the public
are identical in principle with those regulating the con-
tractual relations between individuals. The facts in the
above case are sufficiently similar to the facts in this
appeal and it was held that a shareholder to whom the
fact that an allotment of shares had been made had not
been communicated was not bound by any contract.

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The mere entry of his name on the register was held not sufficient for this purpose. We therefore agree with the decision of the learned District Judge.

The lower Court has allowed the petitioner interest at six per cent from October 14, 1925, and the appellant contends that interest should be payable only from the date of demand. We think that this contention must prevail. The law relating to the payment of interest is dealt with in *Nanchappa Goundan v. Ittichathara Mannadiar*(1) the effect of which is that the provisions of the Interest Act are all-comprehensive and interest can only be allowed in accordance therewith. Applying that principle it is clear that this payment of Rs. 1,400 cannot be construed to be "a debt or sum certain payable at a certain time . . . by virtue of a written instrument". It is payable "otherwise" (i.e., as money had and received) and interest is therefore only recoverable from the date of demand, that is, Petition 27th July 1928. We therefore vary the decree of the lower Court to this extent and with this variation dismiss this appeal with costs here and as decreed in the lower Court.

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(1) (1929) I.L.R. 53 Mad. 549.

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Mockett.

CHELLA RANGAPPA (PETITIONER), APPELLANT,

v.

YERRA VENKATAGIRI RANGAPPA AND TWO OTHERS
(RESPONDENTS), RESPONDENTS.*

1932,
September
16.

Res Judicata—Insolvency proceedings—Applicability to—Provincial Insolvency Act (V of 1920), sec. 54—Official Receiver's petition under—Dismissal of—Fresh petition under section in respect of same sale by a creditor—Maintainability of.

The doctrine of *res iudicata* is applicable to proceedings in insolvency.

Held, accordingly, that the dismissal of a petition under section 54 of the Provincial Insolvency Act by the Official Receiver in respect of a sale by the insolvent on the ground that the sale did not amount to a fraudulent preference was a bar to a subsequent petition under the same section by a creditor of the estate of the insolvent in respect of the same sale.

APPEAL against the order of the District Court of Anantapur, dated 7th March 1929 and made in Original Petition No. 19 of 1928.

T. R. Ramachandra Ayyar, R. Srinivasa Ayyangar and G. Musalappa Reddy for petitioner.

B. Somayya, S. Ranganadha Ayyar and T. R. Arunachalam for respondents.

Our. adv. vult.

The JUDGMENT of the Court was delivered by
MOCKETT J.—In this Original Petition No. 19 of 1928 MOCKETT J. the petitioner, a creditor of the estate of the second respondent (insolvent), seeks to set aside a sale to the first respondent of certain properties. The third

* Appeal against Order No. 480 of 1929.

RANGAPPA respondent is the Official Receiver of Anantapur. The
 RANGAPPA. petition is stated to be under section 4 of the Provincial
 MOCKETT J. Insolvency Act and paragraph 4 alleges that the sale
 was "in fraud of other creditors". This same sale was
 the subject of Original Petition No. 13 of 1924 filed by
 the Official Receiver now the third respondent. That
 petition was stated to be under sections 4, 54 and 56,
 Provincial Insolvency Act, and prayed that "the
 execution sale in favour of the first counter-petitioner
 (now the first respondent) be set aside as fraudulent and
 preferred."

The third issue in that original petition was
 "whether the sale amounts to a fraudulent preference
 . . . " and the fourth issue "whether in any
 event the sale can be set aside under section 4,
 Insolvency Act."

The learned Subordinate Judge held that on the
 facts there was no fraudulent preference and that the
 provisions of section 4 could not be invoked. It was
 of course obvious that section 56 did not apply. The
 matter came before the High Court in Civil Miscel-
 laneous Appeal No. 115 of 1927 on a question as to
 whether a second appeal lay from the District Judge
 and RAMESAM and DEVADOSS JJ. gave judgment as follows
 (Exhibit A):—

"We think that the order of the Subordinate Judge was
 passed under sections 51 and 54, Provincial Insolvency Act.
 He expressly refuses to apply section 4 of the Act. The
 order is therefore not an order under section 4. . . ."

Mr. T. R. Ramachandra Ayyar now argues that the
 appellant (petitioner) is free to proceed with his present
 petition as (i) it is *res judicata* that there has been
 no decision under section 4 which is the basis of this
 petition, and (ii) that the respondent cannot plead *res*
judicata to the decision under section 54 as section 11
 of the Code of Civil Procedure does not refer to

insolvency proceedings which are not "suits". We
 agree with his contention as to the first point as Exhibit
 A is clear and in insolvency proceedings the Official
 Receiver represents the general body of creditors of
 whom the present appellant is one.

As to the second point it is true that no authority
 has been cited before us to the effect that insolvency
 proceedings can be the subject of *res judicata*, but there
 is ample authority for the position that section 11,
 Civil Procedure Code, is not exhaustive and that, as
 stated by the Privy Council in *Ram Kirpal Shukul v.*
Mussumat Rup Kuari(1), "the binding force of such a
 judgment (i.e. a previous judgment) depends not upon
 section 13 of Act X of 1877, but upon general principles
 of law." The section referred to corresponds to section
 11, Civil Procedure Code. "If" say their Lordships
 "it were not binding there would be no end to litiga-
 tion." This is manifestly so and is especially applicable
 to insolvency proceedings. Were it otherwise it would
 be impossible for any one, whose possession of property
 received from an insolvent had been unsuccessfully
 impeached as a fraudulent transfer or preference, to be
 able to sell that property or even to enjoy its proceeds
 with any sense of security. This is a position which is
 clearly opposed to the principle "*Nemo debet bis vexari*".
 The above case, *Ram Kirpal Shukul v. Mussumat Rup*
Kuari(1), was decided in 1883. Since then the Privy
 Council have reaffirmed their statement of the law
 bearing on the point in *Hook v. Administrator-General*
of Bengal(2) and *Ramachandra Rao v. Ramachandra*
Rao(3), the latter a case under the Land Acquisition Act.
 On the authorities above cited we are of opinion
 that the doctrine of *res judicata* is applicable to

(1) (1883) L.R. 11 I.A. 37, 41.

(2) (1921) I.L.R. 48 Calc. 499 (P.C.).

(3) (1922) I.L.R. 45 Mad. 320 (P.C.).

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v.
RANGAPPA. proceedings in insolvency and that the present petition is therefore unsustainable. We therefore agree with the learned District Judge and dismiss this appeal with customary costs throughout including pleader's fee. This disposes of the memorandum of objections.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

1932,
October 21.

SRI VENKATACHALAPATHI NIDHI, LTD.,
COIMBATORE, AND TWO OTHERS (PLAINTIFFS AND NIL),
APPELLANTS,

v.

G. K. NANJAPPA GOUNDAN AND THREE OTHERS
(DEFENDANTS ONE TO THREE AND NIL), RESPONDENTS.*

Negotiable Instrument—Suit on a, under the summary procedure under O. XXXVII of the Code of Civil Procedure (Act V of 1908)—Instrument silent as to interest—Power of Court to award the statutory rate of interest under sec. 80 of Indian Negotiable Instruments Act (XXVI of 1881).

In a suit on a negotiable instrument under the summary procedure, the Court has power to award the statutory rate of interest, six per cent per annum, when there is no term in the instrument for the payment of interest. The operation of section 80 of the Negotiable Instruments Act is not excluded by Order XXXVII, rule 2 of the Code of Civil Procedure.

APPEAL against the decree of the Court of the Subordinate Judge of Coimbatore in Original Suit No. 64 of 1925.

M. Krishna Bharati for appellants.

S. Ranganādha Ayyar for respondents.

* Appeal No 20 of 1926.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The plaintiff is the appellant. The suit out of which this appeal arises was instituted by him for the recovery of Rs. 5,000 with interest on five hundis, Exhibits A to A-4. A decree has been given in his favour for the principal amount. The learned Judge having refused to award him interest on the principal amount, in this appeal the plaintiff claims that he is entitled to interest.

The suit was instituted under Order XXXVII of the Code of Civil Procedure under the special rules relating to summary procedure on negotiable instruments. Under rule 2 (2) (a) of this Order the plaintiff is entitled to get interest on the amount claimed in accordance with the provisions of section 79 or section 80, as the case may be, of the Negotiable Instruments Act of 1881 up to the date of the institution of the suit, or for the sum mentioned in the summons, whichever is less, and for interest up to the date of the decree at the same rate or at such other rate as the Court thinks fit. Since there is no agreement to pay any interest in the documents, section 79 is obviously inapplicable, and so, under Order XXXVII, rule 2 (2) (a), the plaintiff will be entitled to get only the statutory rate of interest, six per cent, under section 80. But the learned Judge refuses to apply section 80 because he says that the operation of this section is excluded by Order XXXVII, rule 2. We have read the section carefully. We are not able to see how the operation of section 80 of the Indian Negotiable Instruments Act is excluded by Order XXXVII, rule 2, Civil Procedure Code. On the other hand, it seems to us that Order XXXVII, rule 2, makes section 79 or section 80, as the case may be, specifically applicable to a case filed under Order XXXVII. We cannot therefore accept the opinion of

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NAIR J.

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NAIR J.

the learned Judge that the plaintiff is not entitled to the statutory interest mentioned in section 80.

It is argued on behalf of the appellant that he is entitled to thirty-three and one-third per cent which he has claimed in the plaint. He contends that Order XXXVII, Civil Procedure Code, supports him, having regard to the language of rule 2, namely, "the allegations in the plaint shall be deemed to be admitted". We are not able to accept this contention. No authority in support of the plea has been cited. On the other hand it appears to us that that interpretation cannot be accepted, because in clause (a) of sub-rule 2, special provision for interest is made to the effect that section 79 or section 80 of the Negotiable Instruments Act will apply as the case may be. Therefore the admissions of the allegations in the plaint relied upon by the appellant under sub-rule 2 cannot refer to the award of interest which is specifically provided for in clause (a). We would therefore allow the appeal and award interest at the rate of six per cent from the date of the hundis to the date of the decree and subsequent interest also at the same rate thereafter.

The plaintiff will get his costs in this appeal on the amount which we have decreed to him.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair.

THANGACHI AMMAL (PLAINTIFF), PETITIONER,

1932,
October 4.

v.

MOHAMED MOIDEEN MARICAIR (DEFENDANT),
RESPONDENT.*

Court Fees Act (VII of 1870), sec. 7 (iv-A) and (v)—Applicability of—Vendor—Setting aside of sale deed and recovery of possession of property covered by it—Suit for—Court-fee payable in.

In a suit by a vendor to set aside a sale deed and for the recovery of possession of the property covered by the deed, it is enough if the plaintiff pays court-fee under section 7 (iv-A) of the Court Fees Act. He need not also pay court-fee on the relief with regard to possession under section 7 (v) of the Act, because the claim with regard to possession is only ancillary to the main claim which is the setting aside of the sale deed.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Tiruvarur, dated 5th February 1932 and made in Original Suit No. 37 of 1931.

K. S. Desikan for petitioner.

K. S. Champakesa Ayyangar for respondent.

JUDGMENT.

The plaintiff is the petitioner. The question raised in the case is whether the court-fee paid by her is sufficient.

The suit was for cancellation of a sale deed executed by the plaintiff and for recovery of possession of the land and mesne profits. The consideration for the sale deed was Rs. 2,750. The petitioner paid court-fee for the cancellation of the sale deed on the amount of the consideration specified in the deed under section 7 (iv-A)

* Civil Revision Petition No. 365 of 1932.

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of the Court Fees Act. She also paid court-fee on the mesne profits. The defendant's contention is that the petitioner should pay court-fee in respect of the claim for possession of the property also.

The point for decision is whether the plaintiff is bound to pay court-fee in respect of the claim for recovery of possession of the land from the defendant. The lower Court held that the plaintiff should pay court-fee for possession as well under section 7 (v) of the Court Fees Act. Section 7 (iv) of the Court Fees Act has been amended in 1922 and clause (iv-A) has been newly introduced by the amendment. It states: "In a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having such value," the court-fee should be calculated "according to the value of the subject-matter of the suit, and such value shall be deemed to be, etc." Prior to this amendment suits like the present one fell under section 7 (iv) (c); that is, for purposes of court-fee, such suits were considered as suits to obtain a declaratory decree or order where consequential relief is prayed. It is not disputed that the plaintiff has to pay court-fee so far as the setting aside of the sale deed is concerned under clause (iv-A) of the section. The only question is whether besides paying court-fee under clause (iv-A) the petitioner should be compelled to pay court-fee under section 7 (v) also. No decision directly bearing on the point has been brought to my notice. Though the question has not been specifically decided in any case, some decisions of this Court may with advantage be referred to, those being *Lakshmi Ammal, In re*(1) and *Venkatasiva Rao v. Satyanarayanamurty*(2). Of these two, the first one, *Lakshmi Ammal, In re*(1), is very much like the

(1) (1925) 49 M.L.J. 608.

(2) (1932) I.L.R. 56 Mad. 212.

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present case though the particular point now argued does not seem to have been specifically raised in that case. The present suit, as I have already stated, is one by a vendor to set aside a sale deed and for the recovery of possession of the property covered by the deed. The suit in *Lakshmi Ammal, In re*(1) was by the vendee. That was also for setting aside a sale deed. The relief asked for was the return of the consideration and some damages. It was argued in that case that the suit should be valued as one falling under section 7 (iv) (c), i.e., for the purpose of court-fee it should be treated as a suit for a declaratory decree where consequential relief is prayed. Having regard to the prayer for cancellation of the document and the new amendment introduced by the Legislature in 1922, DEVAOSS J. held that the suit should be valued under section 7 (iv-A). Should it be valued also under section 7 (v) with regard to the return of the money does not seem to have been specifically argued. But it was urged that under section 7 (iv) (c) the plaintiff is bound to value the relief sought for at Rs. 1,300, i.e., the amount so claimed. With regard to this argument the learned Judge pointed out: "The main relief claimed is really the setting aside of the conveyance and the claim for money is only ancillary to it. To such cases section 7 (iv) (c) has no application." And then the learned Judge held that the new clause applied to the case. In the same way it may be said in this case also that the claim with regard to the possession of the property is ancillary to the setting aside of the document and, if so, section 7 (iv-A) is the only provision under which the court-fee has to be levied. In *Venkatasiva Rao v. Satyanarayanamurty*(2) a decree was sought to be set aside and possession as a result of such setting aside of the decree was also

(1)(1925) 49 M.L.J. 608.

(2) (1932) I.L.R. 56 Mad. 212.

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asked for. The learned Judges held that the case fell under both section 7 (iv-A) and section 7 (v). But they did not say that both the provisions applied to the case and that the plaintiff should pay court-fee under the two provisions. No doubt the point was not specifically raised in the case as I have already pointed out. Some support for the position contended for by the petitioner may be found in *Rajagopala v. Vijayaraghavalu*(1) though the question of court-fee in that case arose before the amendment of the Act in 1922. That was a suit for a declaration that a certain decree was of no legal effect and for possession of the properties. Under the present Act the suit would be one for cancellation of the decree and for possession of the properties. The learned Judges in the course of their judgment pointed out with reference to the claim of possession in that case: "Possession is not asked for on any other ground than that the decree in execution of which it was lost should be declared invalid; and it is therefore asked for consequently on the grant of declaration." Using a similar language it may be said in the present case that possession is not asked for on any other ground than that the sale deed by the execution of which it was lost should be set aside and it is therefore asked for consequently on the setting aside of the sale deed or in other words as mentioned by DEVADOSS J. in *Lakshmi Ammal, In re*(2) the claim with respect to possession is only ancillary to the main claim which is the setting aside of the sale deed.

For the above reasons I am of opinion that in this case the petitioner need not pay court-fee on the relief with regard to possession. The order of the lower Court is set aside with costs here and in the Court below.

K.N.G.

(1) (1914) I.L.R. 38 Mad. 1184.

(2) (1925) 49 M.L.J. 608.

PRIVY COUNCIL.

GUMMIDELLI ANANTAPADMANABHASWAMI,
APPELLANT,

J.C.*
1933,
February 2

v.

OFFICIAL RECEIVER OF SECUNDERABAD
AND OTHERS, RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Attachment—Foreign Insolvency—Effect on property in British India—Secunderabad Court—International Law—Code of Civil Procedure (Act V of 1908), sec. 64.

Upon a foreign Court adjudicating a person an insolvent the only property in British India which vests in the Receiver by virtue of private international law is such movable property as the insolvent was free to assign to the Receiver at the date of the adjudication.

The District Court at Secunderabad adjudicated persons insolvents under the Provincial Insolvency Act, 1907. Jurisdiction is exercised at Secunderabad, and the above Act was there applied by orders made by the Governor-General in Council by authority of the Foreign Jurisdiction Act, 1890, and the Indian (Foreign Jurisdiction) Order, 1902. The insolvents were holders of a decree of the Madras High Court, which, before the adjudication, had been attached by that Court in execution proceedings. By section 64 of the Code of Civil Procedure, 1908, any private transfer of the attached decree was made void against claims under the attachment.

Held, that the District Court at Secunderabad was a foreign Court; accordingly, the adjudication operated in British India only under private international law and, having regard to section 64 of the Code, did not affect the rights of the attaching creditor.

Galbraith v. Grimshaw, [1910] A.C. 508, applied.

It was unnecessary to consider whether an attachment creates a lien or charge, or confers title: On that question

* Present: Lord TOMLIN, Lord THANKERTON and Sir GEORGE LOWNDEN.

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ANANTA-PADMANABHA-SWAMI v. OFFICIAL RECEIVER, SECUNDERABAD. *Kristnasawmy Mudaliar v. Official Assignee of Madras*, (1903) I.L.R. 26 Mad. 673, and *Frederick Peacock v. Madan Gopal*, (1902) I.L.R. 29 Cal. 428, commented upon.

Judgment of the High Court, *Official Receiver of Secunderabad v. Lakshminarayana*, (1930) I.L.R. 54 Mad. 727, reversed.

APPEAL (No. 86 of 1931) from a decree of the High Court in its appellate jurisdiction (October 2, 1930) reversing an order of the Court in its original jurisdiction (April 23, 1929).

The question for determination in the appeal was whether, under an adjudication in insolvency by the District Court at Secunderabad on September 15, 1928, there vested in the respondent, as Receiver, the benefit of a decree obtained by the insolvents in the Madras High Court freed from an attachment previously made by that High Court upon the application of the appellant's father, Lakshminarayana, since deceased and represented by the appellant.

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

Secunderabad was fixed as a place for a British Cantonment in pursuance of article 4 of a treaty between the Nizam and the East India Company. Civil jurisdiction is exercised in the Administerial Areas of the Hyderabad State, which include the Cantonment of Secunderabad, under an order of the Governor-General in Council made on December 21, 1925, under the Indian (Foreign Jurisdiction) Order in Council, 1902; the Order of 1925 superseded earlier Orders. In 1913 an Order similarly made applied the Provincial Insolvency Act (III of 1907) to the Cantonment of Secunderabad; the amending Act, V of 1920, was not so applied until 1929.

The appellate Court (CURGENVEN and BHASHYAM AYYANGAR JJ.), while agreeing with the view of the trial Judge, KUMARASWAMY SASTRI J., that the District

Court at Secunderabad was a foreign Court in relation to the Courts of British India, reversed his decision as to the effect of the adjudication. By separate judgments the learned Judges held that the claim of the Receiver in the insolvency had priority over the claim under the attachment. The appeal is reported as *Official Receiver of Secunderabad v. Lakshminarayana*(1).

Upjohn K.C. and *Hyam* for appellant.—It was rightly held by the Courts in Madras that the District Court at Secunderabad was a foreign Court in relation to Courts in British India. The adjudication therefore affected no immovable property in British India, nor any movable property there which the insolvents could not assign to the Receiver, although that inability was due to legal process which was incomplete: *Galbraith v. Grimshaw*(2); Dicey's Conflict of Laws, 5th edition, rules 123, 124. Upon the true construction of the Code of Civil Procedure the attachment operated as a charge or lien on the decree; it made the decree realizable by sale: Code of Civil Procedure, 1908, sections 60, 64, 73; Order XXI, rule 53(4) and (6); and Appendix E, Forms 22, 23. The judgments to the contrary in *Kristnasawmy Mudaliar v. Official Assignee of Madras*(3) and *Frederick Peacock v. Madan Gopal*(4) conflicted with the judgment of the Board in *Suraj Bunsu Koer v. Sheo Proshad Singh*(5) and that of the Calcutta Full Bench in *Anand Chandra Pal v. Panchilal Sarma*(6). The judgment in *Moti Lal v. Karrab-ul-din*(7) was misunderstood and did not decide the question. The statement in *Raghunath Das v. Sundar Das Khetri*(8) was in terms based upon a concession by Counsel. All the decisions relied on against the appellant upon this point were as to the effect of an adjudication in British India under the Indian Insolvent Act, 1848, upon a previous attachment, and that is a different question to that now arising. But, whether or not the attachment created a charge, its effect, under section 64 of the Code, was to preclude the insolvent from assigning it to the Receiver; consequently upon the principle of international law

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| (1) (1930) I.L.R. 54 Mad. 727. | (2) [1910] A.C. 508. |
| (3) (1903) I.L.R. 26 Mad. 673. | (4) (1902) I.L.R. 29 Cal. 428 (F.B.). |
| (5) (1879) I.L.R. 5 Cal. 143, 174; L.R. 6 I.A. 88, 109. | (6) (1870) 5 Ben. L.R. 691 (F.B.). |
| (7) (1897) I.L.R. 25 Cal. 179; L.R. 24 I.A. 170. | (8) (1914) I.L.R. 42 Cal. 72; L.R. 41 I.A. 251. |

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already mentioned, the decree did not vest in the Receiver, or vested subject to the attachment. It is not material that, had the adjudication been in British India, section 34 of the Provincial Insolvency Act, 1907, would have prevented the attachment, without a sale, being available against the Official Assignee.

Narasimham for first respondent.—Although Secunderabad is foreign territory the District Court was not a foreign Court. It was established and administered by the Government of India, appeals from Secunderabad lie to the Privy Council, and in making the adjudication the Court was applying legislation of British India. Effect should be given to the whole of the Act of 1907; under section 34, the attachment not being followed by a sale, the decree vested in the first respondent as Receiver. In any case the authorities already referred to do not show that the attachment in itself operated so as to affect the title of the respondent under the adjudication. [Reference was made also to the Code of Civil Procedure, section 73; Provincial Insolvency Act, 1907, section 16, sub-sections 2 and 5.] The judgment of the Board in *Mohammad Afzal Khan v. Abdul Rahman*(1) assumed that the attachment there in question did not operate as a charge. In *Moti Lal's case*(2) it was stated in terms that "an attachment only prevents alienation, it does not confer title."

Upjohn K.C. replied.

LORD
THANKERTON.

The JUDGMENT of their Lordships was delivered by Lord THANKERTON.—This is an appeal from a decree of the High Court of Judicature at Madras, dated the 2nd October 1930, which set aside a judgment and order dated the 23rd April 1929, made by the same Court in its Original Civil Jurisdiction.

The appellant is in right of a money decree for Rs. 53,230-9-0, dated the 15th June 1926, made in the Bombay High Court in favour of the appellant's father against three persons, who may be conveniently referred to as the judgment-debtors. At that time the judgment-debtors were the plaintiffs in a suit then pending in the

(1) (1932) I.L.R. 13 Lah. 702; L.R. 59 I.A. 405.
(2) (1897) I.L.R. 25 Calc. 179, 185; L.R. 24 I.A. 170, 175.

Madras High Court for partition of certain joint family property between the plaintiffs' and the defendants' branches of the family. The Madras partition suit had been instituted in 1922, and on the 5th December 1922 a preliminary decree by consent had been made, declaring *inter alia* certain properties and business assets involved in the suit to be the exclusive properties of the plaintiffs' branch and directing certain interim payments of money to be made by the defendants to the plaintiffs. The decree further directed certain arbitrators to take the joint family account and to partition the joint family property between the two branches of the family in two equal shares. The arbitrators failed to come to any final decision and the matter was referred to the Official Referee of the Court by consent.

On the 20th December 1926, the preliminary decree in the Madras suit was attached in the Madras High Court by the present appellant's father, in execution of the decree in the Bombay suit, the execution proceedings having been transferred from the Bombay High Court to the Madras High Court.

In September 1928, the defendants in the Madras suit applied for a final decree in terms of a compromise entered into between them and the plaintiffs on the 5th August 1928, and, on the 21st September 1928, the High Court of Madras passed an order for a final decree in the partition suit in terms of the compromise but upon certain conditions, one of which was that the defendants should first pay into Court the amount of money due to the present appellant under the Bombay decree in respect of which the attachment had been made. That order has not been carried out and, in fact, is now under appeal in the Madras High Court.

On the 15th September 1928, an order was made by the District Court at Secunderabad, on a creditors'

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petition, adjudging as insolvents two of the plaintiffs in the Madras partition suit, who are also the judgment-debtors (the third plaintiff having died leaving his widow as his legal representative). The Official Receiver of Secunderabad, who is trustee in the bankruptcy, is a respondent in the present appeal.

On the 4th March 1929, the appellant's father took out a Judge's summons in the High Court of Madras and started the present proceedings against the parties to the Madras partition suit, for leave to execute the decree attached by him. The proceedings were opposed by the defendants in the partition suit and by the Official Receiver of Secunderabad, who was then made a party plaintiff to the partition suit in substitution of the insolvents, the two surviving plaintiffs in that suit, and who is the active respondent in the present appeal.

It is first necessary to consider whether, in the Madras Court, the adjudication order is to be regarded as the order of a foreign Court. Both the Courts below have held that it is to be so regarded and their Lordships agree with that conclusion. It is not suggested that the position of Secunderabad has altered from that stated by the Foreign Office to the Court, and referred to in the judgment in *Hossain Ali Mirza v. Abid Ali Mirza*(1). That reply makes clear that the British Cantonment in Secunderabad still remains part of Hyderabad State and the property of the Nizam. The administration of justice according to British enactments by the District Court established there does not render the orders of that Court anything but the orders of a foreign Court in relation to the Courts of British India.

There remains the question of what effect is to be given by the Madras Courts to the adjudication order

(1) (1893) I.L.R. 21 Calo. 177, 179.

of a foreign Court in competition with the prior attachment of a decree in the Madras Court.

The learned trial Judge held, under the principles laid down in *Galbraith v. Grimshaw*(1), that the present respondent could only take subject to the present appellant's rights of attachment, and made an order continuing the attachment until the further orders of the Court, and giving the appellant leave to execute the preliminary decree in the partition suit. The appellate Court set aside that order and dismissed the present appellant's application, in substance on the ground that an attachment under the Code of Civil Procedure is purely prohibitory and does not operate to create any title, lien or security in favour of the attaching creditor which, according to British Indian law, could prevail over the Receiver in insolvency, and that it made no difference that the adjudication order was made by a foreign Court.

Their Lordships do not agree with the reasoning or conclusion of the appellate Court. The question is one of comity between States and not one of the municipal bankruptcy codes of either country. The rule of private international law is clearly laid down in *Galbraith v. Grimshaw*(1) as regards movable estate, for it is settled that no adjudication order is recognized as having the effect of vesting in the receiver any immovables in another country.

The reason for the rule is stated in the speech of Lord DUNEDIN in *Galbraith's case*(1) at page 513 :

"Now so far as the general principle is concerned it is quite consistent with the comity of nations that it should be a rule of international law that if the Court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution ; and that I take to be the doctrine at the bottom of the cases of which *Goetze v. Aders*(2) is only one example."

(1) [1910] A.O. 508.

(2) (1874) 2 R. 150.

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This means that, after the date of the foreign adjudication order, it will be recognized as effective, but it is equally clear from the opinions expressed in *Galbraith's case*(1) that it will not be allowed to interfere with any process, at the instance of a creditor, already pending, even though such process is incomplete, provided that at that date the bankrupt's freedom of disposal was so affected by the process that he could not have assigned the subject-matter of the process to the Receiver. As Lord MACNAGHTEN says in *Galbraith's case*(1) at page 512 :

"The Scottish Court (the foreign Court) can only claim the free assets of the bankrupt. It has no right to interfere with any process of an English Court pending at the time of the Scotch sequestration. It must take the assets of the bankrupt such as they were at that date and with all the liabilities to which they were then subject. The debt attached by the order *nisi* was at the date of the sequestration earmarked for the purpose of answering a particular claim—a claim which in due course would have ripened into a right. With this inchoate right the Scottish Court had no power to interfere, nor has it even purported to do so."

In an earlier passage Lord MACNAGHTEN had said :

"A creditor of the bankrupt having duly obtained an attachment in England before the date of the sequestration cannot, I think, be deprived of the fruits of his diligence."

In the present case, at the date when the foreign adjudication order was made, the appellant was entitled to the benefit of his prior attachment of the decree in the Madras partition suit. The decree was thereby earmarked for the purpose of answering the Bombay money decree, and that inchoate right would have ripened into execution and sale; it is no matter that under section 73 of the Code of Civil Procedure the appellant would have to share the proceeds of sale with other decree-holders; it would still be a valuable right.

(1) [1910] A.C. 508.

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The Scottish case of *Hunter & Co. v. Palmer*(1), in which an arrestment in Scotland was preferred to a posterior English commission of bankruptcy, is very similar to the present case. Arrestment is only inchoate diligence; to complete the transfer and make the arrester's right real a decree of furthcoming* must be subsequently obtained, which adjudges the fund arrested to the arrester. No decree of furthcoming had been obtained in *Hunter's case*(1).

It is irrelevant to consider what effect a British Indian adjudication order would have had on the appellant's prior attachment. The question is what the pending process of attachment would have ripened into, if uninterrupted. Equally, it is irrelevant to point out that a British Indian adjudication order would not be affected by the prohibitory provisions of section 64 of the Code, as it is not a private transfer; such an order operates *vi statuti*, but the foreign adjudication order does not operate in British India *vi statuti*, but only under the rule of private international law. In *Galbraith's case*(2), Lord LOREBURN states the test as follows :—

"In each case the question will be whether the bankrupt could have assigned to the trustee, at the date when the trustee's title accrued, the debt or assets in question situated in England. If any part of that which the bankrupt could have then assigned is situated in England, then the trustee may have it; but he could not have it unless the bankrupt could himself have assigned it."

It is clear in the present case that, by reason of section 64, the bankrupts could not have assigned their right in the decree which had been attached.

This test renders it irrelevant to consider whether the attachment created a lien or charge or conferred

(1) (1825) 3 Shaw 402.

(2) [1910] A.C. 508.

* See Encyclopædia of the Laws of Scotland,
s. v. "Arrestment", paragraph 1856.

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title, and the cases relating to British Indian bankruptcies relied on by the learned Judges of the appellate Court have no bearing on the present question. In *Kristnasawmy Mudaliar v. Official Assignee of Madras*(1) the Court appears to have ignored the opinion expressed by this Board in *Suraj Bunsu Koer v. Sheo Proshad Singh*(2) which was cited to them, and to have taken a dictum in the judgment of this Board in *Motilal v. Karrab-ul-Din*(3) from its context and used it for a purpose which it did not have in view. In *Frederick Peacock v. Madan Gopal*(4) the case of *Suraj Bunsu*(2) was not referred to, and the dictum from *Motilal's case*(3) was similarly employed. Their Lordships desire to reserve their opinion as to the soundness of the Madras and Calcutta decisions. The decision of this Board in *Raghunath Das v. Sundar Das Khetri*(5) was also referred to, but that decision proceeded on an admission by Counsel, the point was not argued and the case of *Suraj Bunsu*(2) was not referred to.

Accordingly, their Lordships are of opinion that the decision of the trial Judge was right, and they will humbly advise His Majesty that the appeal should be allowed, that the decree of the appellate Court, dated the 2nd October 1930, should be reversed and that the order of the trial Judge, dated the 23rd April 1929, should be restored. The appellant will have the costs of this appeal and his costs in the appeal before the appellate Court.

Solicitors for appellant: *Barrow, Rogers and Nevill*.

Solicitor for first respondent: *Harold Shephard*.

A.M.T.

(1) (1903) I.L.R. 26 Mad. 673.

(2) (1879) I.L.R. 5 Calc. 148, 174; L.R. 6 I.A. 88, 109.

(3) (1897) I.L.R. 25 Calc. 179, 185; L.R. 24 I.A. 170, 175.

(4) (1902) I.L.R. 29 Calc. 428 (F.B.).

(5) (1914) I.L.R. 42 Calc. 72; L.R. 41 I.A. 251.

INCOME-TAX REFERENCE.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice
Ramesam, Mr. Justice Sundaram Chetti, Mr. Justice
Pakenham Walsh and Mr. Justice Burn.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
PETITIONER,

1932,
September
28.

v.

THE MADURA HINDU PERMANENT FUND, LIMITED,
RESPONDENT.*

Income-tax Act (XI of 1922), ss. 3 and 10 (2) (iii) and explanation—Fund registered under the Indian Companies Act, with capital raised by recurring subscriptions paid periodically by share-holders or subscribers—Nature of—Fund or Mutual Benefit Society—Subscriptions if share capital—"Guaranteed interest" paid by Fund to subscribers on their subscriptions—Assessability to income-tax of—Styles' case—Scope of.

A Fund incorporated as a limited company under the Indian Companies Act (VI of 1882) had its capital contributed by "A" and "B" class subscribers at the rate of Re. 1 per mensem per share. The subscribers in "A" class paid their subscriptions for 45 months and those in "B" class for 84 months. As soon as an "A" class subscriber paid Rs. 45 for one share in that manner, his account, in so far as that particular share was concerned, was closed, and he was paid off with a sum of Rs. 50. A "B" class subscriber was paid off at the end of 84 months with Rs. 102-8-0. The amounts of Rs. 5 and Rs. 18-8-0 thus paid out to "A" and "B" class subscribers in excess of their subscriptions to the Fund were called "guaranteed interest". The rules of the Fund made provision for the receipt of fixed and current deposits from any person, whether a subscriber to the Fund or not, and also for the grant of loans not only to subscribers but also to non-subscribers and to registered Co-operative Societies. In the year of account, however, no fixed deposits had in fact been received and no loans made either to non-subscribers or to Co-operative Societies, and all the transactions of the Fund were with its own members. The members of the

* Original Petition No 243 of 1931.

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Fund subscribed the capital and the subscribed capital was lent to them. A sum of Rs. 68,000 odd was, in the year of account, distributed by the Fund in the shape of "guaranteed interest" to the "A" and "B" class subscribers and the Fund claimed to be entitled to deduct that sum from its total income during the year of account.

Held that the "guaranteed interest" was interest on capital borrowed for the purpose of the Fund's business within the meaning of section 10 (2) (iii) of the Income-tax Act, that its payment was not in any way dependent on the earning of profits, and that the Fund was entitled to claim a deduction in respect of the sum of Rs. 68,000 odd distributed by it as "guaranteed interest" in the year of account.

The Fund, though registered under the Companies Act and subject to its provisions, was not really a company but a Mutual Benefit Society with a fluctuating capital dependent entirely upon the amount subscribed by its members and the repayment of subscriptions plus guaranteed interest to the members. The subscriptions, though called share-capital, were not really so; nor were they capital borrowed for the purpose of the business as that capital is ordinarily understood. That this is so is clearly shown by the explanation to section 10 (2) (iii) of the Income-tax Act in enacting which the Legislature has shown its intention to recognise an association of persons not having share-capital but borrowing and lending from and to themselves for the mutual benefit of themselves. This borrowing is to be deemed to be a borrowing of capital and that being so interest only can be deducted from the profits and gains of the Association under section 10 (2) (iii) of the Act if the payment of interest upon it is not in any way dependent upon the earning of profit.

New York Life Insurance Company v. Styles, (1889) 14 App. Cas. 381, did not govern either the *Mylapore Fund Case*, (1923) I.L.R. 47 Mad. 1 (S.B.), or the *English & Scottish Co-operative Society v. Commissioner of Income-tax, Madras*, (1929) 3 I.T.C. 385, although the observations made by their Lordships in their judgments certainly support the result arrived at in both. *New York Life Insurance Company v. Styles* does not also govern the present case.

REFERENCE by the Commissioner of Income-tax, Madras, under section 66(2) of the Income-tax Act (XI of 1922)

passed in the exercise of the Ordinary Original Civil Jurisdiction, High Court, Madras.

M. Patanjali Sastri for petitioner.

S. Srinivasa Ayyangar for *K. Rajah Ayyar* for assessee.

Cur. adv. vult.

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JUDGMENT.

BEASLEY C.J.—This reference by the Commissioner of Income-tax, Madras, under section 66 (2) of the Indian Income-tax Act (XI of 1922) has arisen out of an assessment to income-tax of the profits of the Madura Hindu Permanent Fund, Limited. This Fund was incorporated as a limited company in 1894 under the Indian Companies Act (VI of 1882). Its Memorandum of Association shows that the objects of the Fund are:

- (a) to enable persons to save money;
- (b) to invest their savings in landed property and Government Promissory Notes;
- (c) to secure loans at favourable rates of interest and to grant loans on sound securities; to grant loans to societies registered under the Co-operative Credit Societies Act; and
- (d) to do all such other things as are incidental or conducive to the attainment of the above objects.

The nominal capital of the Fund at its inception was stated to be Rs. 2,99,964 divided into 3,571 shares of Rs. 84 each to be paid in monthly instalments of one rupee. This was raised in 1896 and again in 1902 by the addition of further shares of the same denomination. In 1906 a new class of shares of Rs. 45 each was introduced, and in 1909, 1914, 1915, 1923, 1927 and 1929 the numbers of the shares in both classes were raised until in the last year the capital was stated to be Rs. 38,70,000 divided into 30,000 shares of Rs. 84 each ("B" class shares) and 30,000 shares of Rs. 45 each ("A" class shares).

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The capital of the Fund is contributed by these "A" and "B" class subscribers at the rate of Re. 1 per mensem per share. The subscribers in "A" class go on paying their subscriptions for 45 months and those in "B" class for 84 months. As soon as an "A" class subscriber has paid Rs. 45 for one share in this manner, his account, in so far as that particular share is concerned, is closed, and he is paid off with a sum of Rs. 50. A "B" class subscriber is paid off at the end of 84 months with Rs. 102-8-0. The amounts of Rs. 5 and Rs. 18-8-0 thus paid out to "A" and "B" class subscribers in excess of their subscriptions to the Fund are called "guaranteed interest".

During the year of account (ending with the 20th January 1930) there was also a third class of subscribers ("C" class). These subscribers did not pay any periodical contributions but paid a subscription of Rs. 2 on entry into the Fund. They had no share in the profits but were entitled to obtain loans from the Fund and their accounts were closed when they repaid their loans or at the expiry of three years from the date of admission if they did not take any loan. For the purpose of this reference it is not necessary to take into account the existence of these subscribers in "C" class.

The rules make provision for the receipt of fixed and current deposits from any person, whether a subscriber to the Fund or not. The rules also make provision for the grant of loans not only to subscribers but also to non-subscribers and to registered Co-operative Societies. But in fact no fixed deposits have been received, and no loans have been made either to non-subscribers or to Co-operative Societies. The reference has therefore been made, and falls to be dealt with, on the assumption that all the transactions of the Fund are with its own members. It is the members of the Fund

who subscribe the capital, and it is to the members of the Fund that the subscribed capital is lent.

During the year of account the Fund received a total income of Rs. 1,00,907-8-10 made up as follows :—

	RS.	A.	P.
From "A" and "B" class subscribers.	84,205	14	2
From "C" class subscribers	2,808	4	8
From others	12,698	8	0
House rent	1,194	14	0

From this the Fund claimed to be entitled to deduct Rs. 86,559-3-8 made up as follows :—

	RS.	A.	P.
Guaranteed interest to "A" and "B" class subscribers	68,462	13	3
Interest paid to "A" and "B" class subscribers on fixed deposits	6	9	3
Interest paid on security deposits and Provident Fund	850	14	3
Interest paid to non-subscribers	139	12	0
Establishment	10,308	5	1
Contingencies	6,790	13	10

This left a net profit according to the Fund of Rs. 14,348-5-2 and that figure was returned to the Income-tax Officer. The Income-tax Officer made certain minor adjustments. He allowed in the main all the items of expenditure except the item of Rs. 68,462-13-3. He held that this was a profit earned during the year and therefore liable to be assessed to income-tax. His decision was based mainly upon the point that the Fund had dealings with "C" class share-holders who were not subscribers of capital and not sharers in the profits. He was influenced also by the fact that according to the by-laws loans could be made to persons who were not members of the Fund and to Co-operative Societies. As already indicated, these circumstances have to be left out of account in dealing with this reference.

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The Fund appealed to the Assistant Commissioner of Income-tax and the appeal was dismissed. The Fund thereupon applied to the Commissioner of Income-tax to make a reference to this Court under section 66 (2) of the Income-tax Act. The Commissioner considers, agreeing with the Income-tax Officer and the Assistant Commissioner, that this amount of Rs. 68,000 distributed in the shape of "guaranteed interest" forms part of the profit earned by the Fund (by trading with its own members), and that this would be assessable to income-tax if it were not for the decision of this Court in the *Mylapore Fund case*(1). The Commissioner admits that the facts of the present case are very similar to those of the *Mylapore Fund case*, and, as the decision in the *Mylapore Fund case* was based upon the case of *New York Life Insurance Company v. Styles*(2), he has framed the questions which he desires to refer in the following form :—

Question I.—Are the facts of this case such that the ruling in *New York Life Insurance Company v. Styles*(2) can be applied to them?

Question II.—If the Fund is conducting a business and making a profit, is the "guaranteed interest" to be deducted in computing that profit as being "interest on borrowed capital" within the meaning of section 10 (2) (iii) of the Act?

With regard to the first question, what were the facts in *New York Life Insurance Company v. Styles*(2)? They were that the Life Insurance Company had no shares or share-holders. The only members were the holders of participating policies, each of whom was entitled to a share of the assets and liable to all losses. A calculation was made by the Company of the probable death-rate among the members and of the probable

(1) (1923) I.L.R. 47 Mad. 1 (S.B.). (2) (1839) 14 App. Cas. 331.

expenses and other liabilities, and the amount claimed for premiums from members was commensurate therewith. An account was annually taken and the greater part of the surplus of such premiums over expenditure referable to these policies was returned to the policy-holders as bonuses, either by addition to the sums insured or in reduction of future premiums. The remainder of the surplus was carried forward as funds in hand to the credit of the general body of members. It was admitted that the income derived by the Company from investments and from all transactions with persons not members was assessable to income-tax. It was held by Lords WATSON, BRAMWELL, HERSCHELL and MAONAGHTEN, Lord HALSBURY L.C. and Lord FITZGERALD dissenting, that no part of the premium income received under participating policies was liable to be assessed to income-tax as profits or gains under Schedule D. Lord HALSBURY L.C. and Lord FITZGERALD held that the surplus returned or credited to members was liable to income-tax. In this case the majority of their Lordships distinguished the case from *Last v. London Assurance Corporation*(1), the income in that case being derived from transactions with persons not members and not from mutual insurance between members only. That is what the headnote to *Styles' case* states. Lord WATSON on page 393 says :

"The main and to my mind essential difference between *Last's case*(1) and the present consists in the fact that in this case the policy-holders are not outsiders, because they, and they alone, are members of the company. In *Last's case*(1) the insured and the corporation stood to each other in no other relation than that of creditor and debtor; they were in all respects separate and independent bodies, without community of rights and interests, their sole connection being a right on

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(1) (1885) 10 App. Cas. 433.

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the one part to pay premiums, with a counter-obligation, when these had been duly settled, to pay the sum insured."

And on page 394:

"When a number of individuals agree to contribute funds for a common purpose, such as the payment of annuities, or of capital sums, to some or all of them, on the occurrence of events certain or uncertain, and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them, I cannot conceive why they should be regarded as traders, or why contributions returned to them should be regarded as profits. That consideration appears to me to dispose of the present case. In my opinion, a member of the appellant company, when he pays a premium, makes a rateable contribution to a common fund in which he and his co-partners are jointly interested, and which is divisible among them, at the times and under the conditions specified in their policies."

On page 396 Lord BRAMWELL states with reference to the facts in *Last v. London Assurance Corporation*(1) as follows:

"I understand the principle of that decision to be, that there was a company making profits, meaning to make profits, not from its own members, but from those it dealt with; that, although it returned two-thirds of those profits to those it dealt with, they were not the less profits and that therefore income-tax was payable on them. I thought, and still think, that wrong. I thought that the profits were only what remained, after the return they had agreed to make, on what was divisible among the share-holders. But whichever opinion is right, and it must be taken that the opinion of the majority was, it seems clear that it does not govern this case. There were in that case two bodies, the share-holders and the assured. The object of the former was to make profits in dealing with the latter, and as much profit as they could giving them no better terms than were necessary to attract business. Here there is one body only, the assured, who are not dealing with another body, and are not to make profits, but to insure themselves and each other on terms as low as can be consistent with safety and solvency. In that case it was the insurers who were taxed; in this it is the assured. I think the case wholly different."

(1) (1885) 10 App. Cas. 438.

On page 411 Lord MACNAGHTEN says:

"Certain persons agree to insure their lives among themselves, on the principle of mutual insurance. They take care to admit none but healthy lives. They contribute according to rates fixed by approved tables and they invite other persons to come in and join them by insuring their lives on similar terms. The rates fixed by the tables are taken as being sufficient to provide for expenses, to meet liabilities and to leave a margin for contingencies. What is to become of the surplus if everything goes right? The practice is to take an account every year of assets and liabilities, and to give the insured the benefit of the surplus, either by way of reduction of premium or by way of addition to the sum insured. It can make no difference in principle whether the surplus is so applied, or paid back in hard cash. In either case it is nothing but the return of so much of the amount contributed as may be in excess of the amount really required. I do not understand how this excess can be regarded from any point of view or for any purpose as gain or profit earned by the contributors. I do not understand how persons contributing to a common fund in pursuance of a scheme for their mutual benefit—having no dealings or relations with any outside body—can be said to have made a profit when they find that they have overcharged themselves, and that some portion of their contributions may be safely refunded. If profit can be made in that way, there is a field for profitable enterprise, capable, I suppose, of indefinite expansion."

At the bottom of page 412 he continues:

"I do not think that that decision [*Last v. London Assurance Corporation*(1)] compels your Lordships to hold in a case like the present, where the business is a mutual undertaking pure and simple, that persons who contribute in the first instance more than is wanted, and then get back the difference, are earning gains or profits, and so liable to income-tax."

On page 410 Lord HERSCHELL says:

"Once shew that profits are made by trading and they are taxable, whatever the purpose to which they may be applied. But in the present case I cannot see that the income sought to be taxed is profit arising from trading."

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(1) (1885) 10 App. Cas. 438.

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It is obvious that in one respect—and it certainly is an important one—the facts of this case differ from those in *New York Life Insurance Company v. Styles*(1). In the latter case the fund sought to be taxed was the surplus arising out of an over-estimate. It was nothing that had been earned. A member who paid a premium of £50 got back not more than the £50 contributed by him either by means of a cash bonus or by reduction of premium. Their Lordships in that case were therefore dealing only with a surplus. Here the facts are quite different because the guaranteed interest is certainly interest which has been earned. *New York Life Insurance Company v. Styles*(1) therefore can have no application here; nor could the decision in the *Mylapore Fund Case*(2) have been rightly based upon it. The only support that it gives to that case are the observations of Lord BRAMWELL, Lord WATSON, Lord MACNAGHTEN and Lord HERSCHELL—where the fact that the business was a mutual undertaking pure and simple was so strongly emphasised. *Styles' case*(1) was also the basis of this High Court's decision in *English & Scottish Co-operative Society v. Commissioner of Income-tax, Madras*(3). It is not necessary to refer to the facts of that case because the point for consideration is shortly set out in the concluding portion of ODGERS J.'s judgment as follows:—

“If therefore this return of interest on the share-capital to the persons called share-holders, namely, the Co-operative Wholesale Society and the Scottish Co-operative Wholesale Society, is simply, as it appears to be and as is sworn by the affidavit of Sir Fairless Barber, merely a return on the amount of its subscribed capital or a handing back of a portion of the amount subscribed and in no sense a dividend on the profits earned by the Company, then I think it falls within the ambit of

(1) (1889) 14 App. Cas. 381. (2) (1923) I.L.R. 47 Mad. 1 (S.B.).
(3) (1929) 3 I.T.C. 335.

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Styles' case(1); and if this is so, it is simply a return in another form of the rateable dividend in rule 20(e). It is clearly not a division of profits in the ordinary sense but is purely notional, for we are told that no money changes hands. This notional profit is calculated on the difference between the market price of the commodities at the time they are distributed to the members of this Society and the actual cost of their production to the Society when ascertained. This so-called profit is distributed in the six ways provided for by rule 20 and, on this so-called profit after allowing for depreciation, interest is to be paid on the share-capital, i.e., to the only two members of the Society in proportion to their contributions to the capital. I am unable to see on the facts of this case as disclosed in the rules and on the only evidence we have, namely, the affidavit of Sir Fairless Barber, any evidence of a profit being made by sales to persons outside the membership of the Society. There is no evidence as stated above that any other societies except the two named in rule 5 have been admitted to membership. It seems to me that this is a case of a purely mutual concern. We know that the whole of the produce raised and exported by the Association is in fact divided among these two members.”

I think that it is hardly right to say that *New York Life Insurance Company v. Styles*(1) governed either of the two cases referred to—and it does not govern this case—although the observations made by their Lordships in their judgments certainly support the result arrived at in both. I am not disposed to say therefore that those two cases were wrongly decided although, in my opinion, *New York Life Insurance Company v. Styles*(1) does not govern them. I would answer Question No. I in that way although, in my opinion, it is not necessary here to consider the effect of the ruling in *New York Life Insurance Company v. Styles*(1) or the two income-tax decisions of this High Court to which reference has already been made because I think that this question can be answered favourably to the assesses in Question No. II for reasons which I will now

(1) (1889) 14 App. Cas. 381.

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give. Of course, if no profit has been earned, then no question of deductions under section 10 (2) (iii) of the Indian Income-tax Act arises. But, on the assumption that the assessee has earned a profit, I will proceed to the consideration of Question No. II. Is this guaranteed interest on capital borrowed for the purpose of the business where the payment of interest thereon is not in any way dependent on the earning of profits? For the Income-tax Commissioner it is contended that this guaranteed interest is interest on share-capital, that interest on share-capital must always be dependent upon its being earned by profits being made and that it is not capital borrowed for the purposes of the business within section 10 (2) (iii) of the Indian Income-tax Act. It is to be observed that by clause 5 of the Memorandum of Association there is to be a nominal capital divided into shares, and it is further argued that there is here a share-capital, that the proprietors of the shares are share-holders and that the interest earned is profit made by the assessee. On the other hand the contention of the assessee is that this is not really share-capital at all but subscription capital raised by recurring subscriptions paid periodically by the share-holders or subscribers, that the share-holders or subscribers are creditors of the company and that, as they must under the Articles of Association be repaid the accumulated subscriptions plus the guaranteed interest at the end of the specified period, these subscriptions cannot really be share-capital, although so described and of course a share-holder cannot demand repayment of his share-capital. The Income-tax Commissioner meets this point with the argument that the provision for the return to the share-holders of the amounts contributed by them is *ultra vires* because this Fund has chosen to get itself registered under the Indian Companies Act

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and it is therefore a company and it must have capital and it is repugnant to the provisions of the Indian Companies Act for the capital of registered companies to be returned to its share-holders. Capital of course can be reduced but only with the sanction of the Court. In my opinion, the fact that the Fund is registered under the Indian Companies Act and is subject to its provisions is not by any means conclusive of a question which arises under the Indian Income-tax Act. The fact is that the machinery of the Indian Companies Act cannot in its entirety be adopted to a Fund such as this. This Fund and many similar are not really companies but Mutual Benefit Societies with a fluctuating capital dependent entirely upon the amount subscribed by their members and the repayment of subscriptions plus guaranteed interest to the members. The capital is bound to vary from time to time and to say that, whenever this capital is reduced by a repayment to the members, it is necessary to get the sanction of the Court would be to make such Funds unworkable. In my opinion, although these subscriptions are called share-capital, they are not really so as that description is understood in its ordinary sense; nor is this capital borrowed for the purpose of the business as that capital is ordinarily understood. It is something different from both. That this is so and that the Legislature recognised the distinction is clearly shown by the explanation to section 10 (2) (iii) of the Indian Income-tax Act where recurring subscriptions paid periodically by share-holders or subscribers in such Mutual Benefit Societies as may be prescribed are to be "deemed" to be capital borrowed within the meaning of section 10 (2) (iii). If it is to be "deemed" to be capital borrowed, then it is not really capital borrowed but is for the purpose of the Indian Income-tax Act to be so considered. The fact that no Mutual Benefit Societies have

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as yet been prescribed may be due to various causes with which we are not really here concerned. What we are concerned with is the apparent intention of the Legislature to recognise an association of persons not having share-capital but borrowing and lending from and to themselves for the mutual benefit of themselves. This borrowing is to be deemed to be a borrowing of capital and that being so the interest only can be deducted from the profits and gains of the Association under section 10 (2) (iii) of the Indian Income-tax Act if the payment of interest upon it is not in any way dependent on the earning of profit. For the Income-tax Commissioner it is argued that, if the subscriptions to this Fund are to be treated as capital borrowed for the purpose of the business, the payment of interest upon that capital is dependent upon the earning of profits. If there are no profits, it is argued, there can be no interest; and a company can only pay interest out of profits and cannot pay interest out of capital. The answer to that contention is that this Fund is really not a company and that it is not paying interest on its share-capital but is paying a fixed interest to its members or subscribers who occupy the position of lenders to the Fund of sums of money upon which the Fund contracts to pay fixed interest and for which I am of the opinion the lender can sue the Fund in the same manner as any one who has lent money to a partnership or firm at a certain rate of interest could sue that partnership or firm for repayment of the principal and interest. It seems to me, therefore, that the guaranteed interest is interest on capital borrowed for the purpose of the Fund's business and that its payment is not in any way dependent on the earning of profits. I would accordingly answer Question No. II in the affirmative.

RAMESAM J.—I entirely agree with my Lord's judgment.

As I delivered the judgment in the *Mylapore Fund case*(1) it is only proper to add that I also agree with my Lord in thinking that the actual decision in *Styles' case*(2) did not govern the *Mylapore Fund case* "although the observations made by their Lordships in the judgments certainly support the result arrived at" in the latter case and that it cannot be said that the *Mylapore Fund case* was wrongly decided. That case arose under section 9 of Act VII of 1918.

It is unnecessary now to say how exactly that decision ought to have been put—whether the guaranteed interest payable to subscribers was not "profits" at all within the meaning of section 9 of Act VII of 1918, or whether the subscriptions paid by the subscribers should be considered to be analogous to borrowed capital. It seems to me that the Legislature considered the decision right and sought to put it on the latter basis by adding the explanation to sub-clause (iii) of section 10 (2) of the present Act, the sections being otherwise similar. The fact that no Mutual Benefit Societies have been prescribed under the explanation does not, as pointed out by my Lord, prevent us from adopting the construction now adopted.

The assessee will have his costs which we fix at Rs. 500.

SUNDARAM CHETTI J.—I am in entire agreement with the judgment of my Lord the CHIEF JUSTICE and have nothing to add.

PAKENHAM WALSH J.—I agree with my Lord and have nothing to add.

BURN J.—I agree with my Lord the CHIEF JUSTICE.

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(1) (1923) I.L.R. 47 Mad. 1 (S.B.).

(2) (1889) 14 App. Cas. 381.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Ramesam, Mr. Justice Anantakrishna
Ayyar and Mr. Justice Cornish.

1933,
January 6. MUTHALAKKAMMAL (PETITIONER—DEFENDANT), APPELLANT,
v.

NARAPPA REDDIAR (MINOR) BY MOTHER AND NEXT FRIEND
NAGAMMAL (RESPONDENT—PLAINTIFF), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. XXXII,
r. 7—Applicability to execution proceedings.

Order XXXII, rule 7, of the first Schedule of the Code of
Civil Procedure (Act V of 1908) applies to execution proceedings.

APPEAL against the order of the Court of the Sub-
ordinate Judge of Tuticorin, dated 19th February 1929,
in Execution Application No. 1170 of 1928 in Original
Suit No. 85 of 1925.

K. V. Sesha Ayyangar for appellant.—Sanction of the Court
is not required for an application by the judgment-debtor under
Order XXI, rule 2 (2) of the Code of Civil Procedure. Order
XXXII, rule 7, applies only to agreement or compromise with
reference to a suit, i.e., a pending suit. The scheme of Order
XXXII shows that it has application to proceedings in suits
before decrees are passed except in the case of Order XXXII,
rule 6 (1) (b), and possibly, rule 12; see *Fani v. Surendra*(1),
Rakhal Chandra De v. Mt. Kumudini Debya(2), *Ram Gulam
Sahu v. Sham Sahai Das*(3) and *Govindarajulu Naidoo v. Ranga
Rao*(4). The decisions in *Shaik Davud Rowther v. Paramasami
Pillai*(5) and *Kancherla Kanakayya v. Mulpuru Kotayya*(6)
require reconsideration. The language of the rules in Order
XXXII cannot without considerable strain be construed so as to
bring execution proceedings within their scope. The reasoning
in *Arunachalam v. Veerappa Chettiar*(7) about the rules of Order

IX applies *mutatis mutandis* to the rules in Order XXXII. Further, Order XXIII, rule 4, excludes adjustments of execution proceedings from the sphere of Order XXXII, rule 7, also. Again, of the two methods in Order XXIII, rule 3, viz., (i) adjustment by lawful agreement or compromise and (ii) satisfaction in respect of part or whole of the subject-matter of suits, adjustment by agreement or compromise alone is dealt with under rule 7 of Order XXXII. The case of satisfaction is probably meant to be covered by Order XXXII, rule 6. Adjustment to the satisfaction of the decree-holder, which is dealt with under Order XXI, rule 2, does not come under Order XXXII, rules 6 and 7.

P. Vedachala Ayyar and K. S. Narayana Ayyar for respondent were not called upon.

The JUDGMENT of the Court was delivered by

RAMESAM J.—The decision in *Arunachellam Chetty v. RAMESAM J.
Ramanadhan Chetty and Alamelu Achi*(1) was in accordance with the earlier decision in *Virupakshappa v. Shiddappa and Basappa*(2), though the latter decision was not actually cited. In the latter case, JENKINS C.J. and CHANDAVARKAR J. held that proceedings in execution are proceedings in suits and that the compromise of such a proceeding is a compromise with reference to the suit. These decisions were followed in this Court in *Shaik Davud Rowther v. Paramasami Pillai*(3).

In *Fani v. Surendra*(4), the rules of Order XXXII, Schedule I of the Code of Civil Procedure, which were in question, were rules 1, 3 and 11 and the decision did not turn on the applicability of Order XXXII, rule 7. The same remarks apply to *Rakhal Chandra De v. Mt. Kumudini Debya*(5) and *Bansi Dhar v. Md. Suleman*(6). In *Ram Gulam Sahu v. Sham Sahai Das*(7), the learned Judges did not give a final opinion as to the

* Appeal against Order No. 376 of 1929.

(1) (1921) 35 C.L.J. 9. (2) A.I.R. 1927 Cal. 930.

(3) (1920) 5 P.L.J. 379. (4) (1920) 40 M.L.J. 124.

(5) (1916) 31 M.L.J. 207. (6) (1921) 41 M.L.J. 75.

(7) (1931) I.L.R. 55 Mad. 17 (F.B.).

(1) (1905) I.L.R. 29 Mad. 309.

(2) (1901) I.L.R. 26 Bom. 109.

(3) (1916) 31 M.L.J. 207.

(4) (1921) 35 C.L.J. 9.

(5) A.I.R. 1927 Cal. 930.

(6) A.I.R. 1926 Lah. 490.

(7) (1920) 5 P.L.J. 379.

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applicability of Order XXXII, rule 7, in execution but held that, if it did not apply, the principles of i would apply. We do not think that the authority o *Arunachellam Chetty v. Ramanadhan Chetty and Alamelu Achi*(1) and *Virupakshappa v. Shiddappa and Basappa*(2) and *Shaik Davud Rowther v. Paramasami Pillai*(3) is shaken by *Arunachalam v. Veerappa Chettiar*(4). I is unnecessary to refer in detail to certain other Madras cases cited by the learned Advocate for the appellant as they relate to transfer of decrees. We are therefore of opinion that Order XXXII, rule 7, Schedule I of the Code of Civil Procedure, applies to execution proceedings.

The learned Advocate for the appellant now applies to us for sanction of the adjustment. The respondent opposes this on the ground that the award and the decree on the award are collusive. The Subordinate Judge will now enquire into the question whether the adjustment is a proper adjustment and dispose of the matter according to law.

Costs will abide the result.

G.R.

(1) (1905) I.L.R. 29 Mad. 309.
(3) (1916) 31 M.L.J. 207.

(2) (1901) I.L.R. 28 Bom. 109.
(4) (1931) I.L.R. 55 Mad. 17 (F.B.)

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Jackson, Mr. Justice Sundaram Chetti
and Mr. Justice Mockett.

VENKATACHALAM PILLAI (SECOND DEFENDANT),
APPELLANT,

1932,
August 22.

v.

SETHURAM RAO *alias* LAKSHMIKANTHA SASTRIAR
AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT),
RESPONDENTS.*

Minor—Contract of sale by a guardian on behalf of, containing a covenant to repurchase if vendee desired to sell—Completed contract or standing offer—Whether mutuality existed when guardian agreed to sell on behalf of minor—Specific performance—Enforceability.

A acting as the guardian of a minor, B, sold to C some land belonging to B by a registered sale-deed which contained the following covenant: "If it happens that you (C) or your heirs have to sell the property to others, then you must sell it to B or his heirs for the same price and also for such price as may be determined by arbitrators in respect of any building that may be constructed on the land." In a suit for specific performance of the above agreement to resell the property brought by B, after he attained majority, against C's heirs,

held, (1) that it was not merely a standing offer on the part of the vendee but a completed contract, and (2) that, inasmuch as B was a minor when the contract was entered into, it was for want of mutuality unenforceable by either party in a suit for specific performance since it was an executory contract, and the fact that such a contract was for the benefit of the minor did not alter the position.

APPEAL against the judgment and decree of the District Court of West Tanjore at Tanjore in Appeal Suit No. 224 of 1927 preferred against the judgment and decree of the Court of the District Munsif of Tanjore in Original Suit No. 423 of 1926.

* Second Appeal No. 1118 of 1929.

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K. Desikachari for appellant.—The suit was for specific performance of a contract. The plaintiff was a minor when his guardian sold the property to the first defendant's father under a registered sale-deed which contained a clause giving the minor an option to repurchase the property in a certain contingency, which in effect gave the minor an option of first refusal. It is merely a standing offer on the part of the vendee which could be withdrawn by the vendee before it is accepted; see *Papa Naidu v. Munisamy Aiyar*(1), *Alagirisami v. Kothia Gounder*(2) and *Munuswami Nayudu v. Sagalaguna Nayudu*(3). If this submission is not correct then the covenant is merely an independent personal covenant given by a guardian on behalf of a minor. Such a covenant could not be enforced; see *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri*(4). Moreover it is not an executed contract but an executory one inasmuch as the minor has to pay the price when he takes back the property. There is want of mutuality. In *Narayana Rao v. Venkatasubba Rao*(5) it was held that a guardian could not bind a minor by such a covenant. Even if the plaintiff tenders the price there is no obligation on the part of the first defendant to sell unless he chooses to do so. No time limit is fixed for the enforcement of this contract. It also offends the rule against perpetuities as laid down in section 14 of the Transfer of Property Act; see *Kolathu Ayyar v. Ranga Vadhyar*(6).

[SUNDARAM CHETTI J.—If the covenant should be held to be unenforceable for want of mutuality, this question need not be considered.]

Salem Ramaswami Iyer for *T. Appaji Row* for first respondent.—There was a completed contract on the date of the sale by the guardian which was capable of enforcement on the happening of an event, viz., when the vendee made up his mind to sell; see *Sakalaguna Nayudu v. Chinna Munuswami Nayakur*(7). In such a contract when the vendee makes up his mind to sell the property what he does is to call upon the other party to perform his portion of the contract, i.e., to exercise his option of repurchase. If he chooses to avail himself of the

(1) (1922) I.L.R. 46 Mad. 30. (2) (1931) M.W.N. 957.
(3) (1925) I.L.R. 49 Mad. 387.
(4) (1911) I.L.R. 39 Cal. 232, 237 (P.C.).
(5) (1919) 38 M.L.J. 77. (6) (1921) I.L.R. 38 Mad. 114.
(7) (1928) I.L.R. 51 Mad. 533. (P.C.).

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option, then he has to refund the consideration received by him. As a result of his exercising the option obligations may arise. There is no obligation under the original covenant to pay. These are not onerous obligations in the eye of the law because they are merely options which might be taken advantage of or not. It is this aspect of the case that distinguishes this case from *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri*(1). See *Raghava Chariar v. Srinivasa Raghava Chariar*(2). Cases dealing with options to repurchase are exceptions to the rule which says that mutuality between parties is a condition precedent to the granting of specific performance; see *Halsbury's Laws of England*, Vol. XXVII, page 10, paragraph 14. As regards the point whether section 14 of the Transfer of Property Act is infringed, it is clear that, under section 54 of the Transfer of Property Act, no interest in land flows from a contract of sale of land. On the last point, in Indian Law there is no distinction between legal and equitable estates; see *Rani Chhatra Kumari Devi v. Mohan Bikram Shah*(3). See also *Aulad Ali v. Ali Athar*(4).

[SUNDARAM CHETTI J.—We do not want to hear you further on this point.]

K. Desikachari replied.

The JUDGMENT of the Court was delivered by
SUNDARAM CHETTI J.—This second appeal arises out of the suit filed by the plaintiff (first respondent) for specific performance of an agreement to resell the plaintiff-mentioned site. The plaintiff's case is that the suit site belonged to his adoptive father, that it was sold during the minority of the plaintiff by his natural father as his guardian to first defendant's father on 14th December 1912 under a registered sale deed, that there is a stipulation in the sale deed for the re-conveyance of the property to the plaintiff and his heirs for the original price itself, that in violation of that contract the first defendant sold the property to the

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(1) (1911) I.L.R. 39 Cal. 232 (P.C.).
(2) (1916) I.L.R. 40 Mad. 308 (F.B.).
(3) (1931) 61 M.L.J. 78 (P.C.). (4) (1927) I.L.R. 49 All. 527 (F.B.).

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second defendant on 6th December 1923, that this sale is not binding on the plaintiff, and that he is entitled to enforce specific performance of the agreement to resell on tendering the purchase-money and get a conveyance in his favour. The defendants attacked the plaintiff's claim on several grounds and contended that he was not entitled to specific performance of the alleged agreement. The first Court gave a decree in plaintiff's favour, which was confirmed by the lower appellate Court.

In this second appeal preferred by the second defendant, three main contentions have been raised on his behalf in order to show that the plaintiff could not claim specific performance of the plaintiff-mentioned agreement. The first is, that the agreement contained in the sale deed, Exhibit A, was not a completed contract but only an offer by the vendee to resell the property to the vendor, which could become a completed contract only on acceptance of the offer by payment of the price, and that, the offer having been at an end by the sale of the property to the second defendant, there was no subsisting offer for acceptance by the plaintiff and as such there was no contract of which specific performance could be claimed on the date of the suit. The second is, that, even if it should be held that there was a completed contract on the date of Exhibit A itself, it was not competent for the guardian of the minor plaintiff to bind him by a contract for the purchase of the site and, as the minor was not bound by that contract, there was no mutuality and consequently specific performance of such a contract is unenforceable in law. The third is, that the stipulation for resale as contained in Exhibit A is void as it is obnoxious to the rule against perpetuities as laid down in section 14 of the Transfer of Property Act.

The covenant in question contained in the sale-deed, Exhibit A, is substantially as follows :—

“If it happens that you or your heirs have to sell the property to others, then you must sell it to the plaintiff or his heirs for the above price and also for such price as may be determined by arbitrators in respect of any building that may be constructed upon the land.”

There is some dispute as regards the construction of this clause. It may be understood to mean that, on the happening of the contingency, namely, the determination of the vendee or his heirs to sell the property and thus part with it, the vendee must sell it to the plaintiff or his heirs and that the latter must also purchase it as per the terms of the covenant. In the absence of any words to signify that the repurchase was only optional with the plaintiff or his heirs, it would not be unreasonable to hold that under this contract the vendee was bound to make the offer for resale and the vendor was equally bound to buy it, and we are prepared to hold accordingly. The learned District Judge, however, construed this clause in a different way and was of opinion that, though there was an obligation on the part of the vendee to resell, the vendor's was only an option to repurchase. It is on the basis of this construction that the learned Advocate for the appellant contends that the agreement in question was not a completed contract, but only a standing offer on the part of the vendee. The decision in *Papa Naidu v. Munisamy Aiyar*(1) would be on all fours with the present case and doubtless supports his contention. Following the English decisions in *Helby v. Matthews*(2) and *Dickinson v. Dodds*(3) the learned Judge held that there was a binding offer to resell on the part of the vendee and no agreement to buy on the

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(1) (1922) I.L.R. 46 Mad. 30.

(2) [1895] A.C. 471.

(3) (1876) 2 Ch. D. 462.

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part of the vendor but only an option to repurchase. The view expressed in *Helby v. Matthews*(1) that until acceptance of the offer there was no completed contract was adopted. It is also said that an offer would be at an end by the death of the promisor or by the promisor selling it to a third party, the sale being known to the promisee before acceptance. A similar question arose for consideration in the case of *Alagirisami v. Kothia Gounder*(2). This case was decided by RAMESAM J. sitting as a single Judge, and he was also a party to the decision in *Munuswami Nayudu v. Sagalaguna Nayudu*(3). The learned Judge seems to have adopted the same view by construing the contract as one consisting of an undertaking by the vendee to make the offer for resale whenever he thought of selling the property, and by stating that the vendor who had only an option to repurchase cannot sue for specific performance of the contract but may sue for damages if there was consideration for the contract. But the soundness of this view seems to be shaken by the pronouncement of their Lordships of the Privy Council in an almost similar case; *Sagalaguna Nayudu v. Chinna Munuswami Nayakar*(4). In that case the counterpart to the sale-deed provided that the vendee should reconvey the property to the vendor after a period of 30 years from that date, in case the vendor wished to have the property again and upon his paying a sum of Rs. 10,000. It is thus clear that the vendor had the option of repurchasing the property or not. Their Lordships have held that it was not a case of a mere standing offer by the vendee which could ripen into a contract to buy and sell only on the acceptance of that offer by the vendor by tender of the

(1) [1895] A.C. 471.

(2) (1931) M.W.N. 957.

(3) (1925) I.L.R. 49 Mad. 387.

(4) (1928) I.L.R. 51 Mad. 533 (P.C.).

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purchase-money. On the other hand, it was distinctly held that there was a completed contract between the parties even on the date of the counterpart document (27th January 1891) and that the right of the vendee under that contract was assignable to a stranger. This decision of the Privy Council was given in an appeal against the decision in *Munuswami Nayudu v. Sagalaguna Nayudu*(1), to which RAMESAM J. was a party. It looks as if this decision of the Privy Council was not brought to the notice of the learned Judge when hearing the case reported as *Alagirisami v. Kothia Gounder*(2). We should now take it that the matter is concluded by the decision of the Privy Council, and, on the strength of that authority, it must be held that there was a completed contract between the parties on the date of Exhibit A itself, even adopting the construction put upon the covenant in Exhibit A by the lower appellate Court and urged for acceptance by the learned Advocate for the appellant. The plea that the stipulation in question was not a completed contract and therefore specific performance could not be enforced is unsustainable. This disposes of the first point raised by the appellant.

Coming now to the second point, the contention put forward on behalf of the appellant appears to rest on a much firmer ground. The leading authority on this point is the decision of the Privy Council reported as *Mir Sarwarjun v. Fakhruddin Mahomed Chowdhuri*(3). In that case, the guardian of a minor entered into an agreement with another for the purchase of certain immovable property by the minor. The minor after attaining majority sued for specific performance of that

(1) (1925) I.L.R. 49 Mad. 387.

(3) (1931) M.N.N. 957.

(3) (1911) I.L.R. 39 Cal. 232 (P.C.).

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contract. Their Lordships have laid down the principle of law in the following passage found on page 237 :

"They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property, and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality and that the minor who has now reached his majority cannot obtain specific performance of the contract."

The present case is in our opinion governed by the aforesaid decision. The agreement for resale contained in Exhibit A being an executory contract without mutuality, it is unenforceable by either party in a suit for specific performance. An attempt has been made by the learned Advocate for the first respondent to get over the effect of this decision by urging that the first Court has found that this contract was for the benefit of the minor and therefore this fact should enable him to enforce specific performance of the contract. But in the case dealt with by their Lordships of the Privy Council it was found that the contract was validly entered into and was for the benefit of the minor and was even ratified by him. Still, their Lordships held that there was no mutuality and on that ground declared the contract to be invalid and unenforceable. The validity or the enforceability of such a contract does not therefore depend upon the question whether it was conducive to the benefit of the minor or not. That being so, the argument on the first respondent's side is unacceptable.

It is urged on behalf of the first respondent that, inasmuch as there was an undertaking on the part of the vendee to resell with only an option on the part of the plaintiff to repurchase, the contract may be deemed

to be a unilateral contract with no reciprocal obligations and only in favour of the minor plaintiff. Reference was made to the Full Bench decision of this High Court in *Raghava Chariar v. Srinivasa Raghava Chariar*(1). The specific question decided in that case is that a mortgage executed in favour of a minor who has advanced already the whole of the mortgage money is enforceable by him. It has also been held that a sale to a minor under similar circumstances is quite good. But, on a careful perusal of that decision, it is clear that the mere fact that a sale or a mortgage is in favour of a minor is not enough to hold that it is valid and enforceable. Where a mortgage or sale has been effected as a completed transaction in favour of the minor and it does not involve the performance of any onerous act by the minor by reason of any contractual obligation in respect of the sale or mortgage, such a sale or mortgage would not be invalid. This is clearly indicated in the following passage on page 313 in the judgment of WALLIS C.J.—

"The question then is whether it makes any difference that the transfer in favour of the minor by way of sale or mortgage is made in consideration of a price paid or a loan advanced by the minor. No doubt according to their Lordships' decision in such a case, the minor could not bind himself by contract to pay the price or advance the mortgage money; but when he has done so and the vendor or mortgagor has executed a registered conveyance in his favour, is there any reason why the transfer in his favour should not take effect?"

It is also said by SRINIVASA AYYANGAR J. that the transfer in favour of the minor cannot be void unless the transfer is conditional on the passing of consideration and the consideration did not pass (page 336). If the test laid down in that decision is adopted, the position in the present case is this. In the first place,

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this is not a case where a registered conveyance has been executed in favour of the plaintiff in pursuance of the original contract. On the strength of that contract, the plaintiff seeks to get a conveyance by specifically enforcing that contract. Even granting that under the contract an option to repurchase was reserved to him, want of mutuality must be judged as on the date of that contract. On exercising his option in favour of the repurchase, he has to pay the price mentioned in Exhibit A and also pay such price as may be determined by arbitrators in respect of any building constructed on the land. That being so, how can it be said that under this contract the vendee should simply execute a reconveyance in favour of the plaintiff who has no sort of corresponding obligation? It is true that no building was constructed upon the land and the necessity for payment of the price as fixed by arbitrators has not arisen, but still the plaintiff has to pay the original price for the site. That being so, the Full Bench decision in *Raghava Chariar v. Srinivasa Raghava Chariar*(1) is of no avail to the plaintiff. On the authority of the Privy Council decision in *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri*(2), it must be held that the contract in question is void for want of mutuality and specific performance of such a contract is unenforceable by either party.

The plaintiff's claim must fail on the aforesaid short ground, and it is therefore unnecessary to discuss the third point raised on behalf of the appellant. If the contract embodied in Exhibit A does not create an interest in immovable property, as is clear from the statutory provision in section 54 of the Transfer of Property Act, the case cannot come under section 14

(1) (1918) I.L.R. 40 Mad. 308 (F.B.) (2) (1911) I.L.R. 39 Cal. 232 (P.C.).

thereof. There is some conflict of judicial opinion on this point and several decisions have been cited at the Bar. As the decision on the second point is sufficient for the disposal of this appeal, it is unnecessary to discuss this question.

In the result, the second appeal should be allowed as the plaintiff is not entitled to sue for specific performance of the plaint-mentioned agreement, and his suit is therefore dismissed with costs of second defendant in all the Courts.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.

K. V. SRINIVASATHATHACHAR (PETITIONER—
SECOND PLAINTIFF), APPELLANT,

1932,
August 26.

v.

NARAVALLUR SRINIVASATHATHACHAR
(RESPONDENT—DEFENDANT), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 54—Applicability of—Portion of undivided estate—Partition of—Decree for, if falls within sec. 54.

Section 54 of the Code of Civil Procedure refers to the partition of an estate assessed to the payment of revenue and not necessarily to the partition of such an estate accompanied by apportionment of the revenue.

Where the plaintiff and the defendant are entitled to a portion of an undivided estate, a decree directing that that portion should be divided into two equal halves does not fall within the terms of section 54. A share of an estate is not equivalent to a share of a portion of an estate; when the decree relates to the separate possession of a share of a portion, that decree does not fall within the terms of section 54.

* Appeal against Order No. 112 of 1931.

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APPEAL against the order of the Subordinate Judge of Salem, dated 14th November 1930 and made in Interlocutory Application No. 269 of 1928 in Original Suit No. 62 of 1926.

C. S. Venkatachariyar for appellant.

B. Sitarama Rao for respondent.

JUDGMENT.

VENKATASUBBA RAO J.—The question raised relates to the construction of section 54, Civil Procedure Code. The lower Court has made an order directing the decree to be forwarded to the Collector for partition being effected. Mr. Venkatachari for the appellant contends that the order is wrong. It is first urged that the section does not apply unless the partition is not only of the land but also of the revenue assessed on it; in other words, unless the division of the land is to be followed by the apportionment of the revenue. This construction is opposed to the plain provisions of the section. What the section refers to is the partition of the estate *assessed to the payment of revenue* and not the partition of the estate *as well as* the revenue. Why in construing the section, which is plain and unambiguous, words not to be found there should be imported into it, I fail to see. I agree with the observations of RANKIN C.J. on this point in the two cases cited at the Bar, namely, *Abdul Razak v. Shreenath Ghosh*(1) and *Rai Kiran Chandra Roy Bahadur v. Rama Nath Dutta Chowdhury*(2). But it is unnecessary to pursue this point, as the second contention of Mr. Venkatachari is, in my opinion, clearly well-founded. He argues that what the section contemplates is an *entire* undivided estate and not merely *a part* of it. In the present case,

the plaintiff and the defendant were entitled to a *portion* of the undivided estate and the decree directed that that portion should be divided into two equal halves. Such a decree does not fall within the terms of the section. Is this decree one for the partition of an undivided estate? Or again, is it for the separate possession of a share of such an estate? The answer is in the negative. A share of an estate is not equivalent to a share of a portion of an estate; when the decree relates to the separate possession of *a share of a portion*, that decree does not fall within the terms of the section. TREVELYAN J. expresses this tersely in *Jogodishury Debea v. Kailash Chundra Lahiry*(1), in a passage extracted by RANKIN C.J. in the first of the two cases already cited. Says TREVELYAN J. :—

“The section applies only to a case where the decree comprehends the partition of the whole of the estate paying revenue to Government. A decree for possession of a share of a portion of an undivided estate is not a decree for ‘possession of a share of an undivided estate’ in any sense.” (page 894).

The intention of the statute seems to be that, where the duty is cast upon the Collector of executing the decree, the partition he has to effect is to be both complete and perfect, that is, not only is the land to be divided, but the revenue also is to be allocated, the object being that the interests of the Government are safeguarded and there is also a final adjudication of the rights and liabilities of the parties in the sense that one sharer shall no longer be at the mercy of the other co-owners; and such a course the Collector can appropriately adopt only when the decree relates to the whole, and not merely a part of, the undivided estate and all the parties interested and to be affected by the proposed division are before him.

(1) (1930) I.L.R. 58 Calc. 122.

(2) (1930) 34 C.W.N. 896.

(1) (1897) I.L.R. 24 Calc. 725 (F.B.).

SRINIVASA-THATHACHAR v. SRINIVASA-THATHACHAR.
 VENKATASUBBA RAO J. I agree with the view taken of the section by the learned Judges of the Calcutta High Court in *Abdul Razak v. Shreenath Ghosh*(1) and *Rai Kiran Chandra Roy Bahadur v. Rama Nath Dutta Chowdhury*(2), referred to by me. The result is, the Subordinate Judge's order is set aside and the appeal is allowed with costs.

I must point out that there was some difficulty in the lower Court as regards getting a proper officer appointed for effecting the partition. The commissioner selected reported that without the aid of an expert surveyor he was unable to make a partition. We direct the Court to appoint a fresh commissioner and would suggest that, if possible, a trained surveyor should be appointed.

REILLY J.—It appears in this case that the agra-haramdars of this village in 1876 by an arrangement among themselves allotted certain plots of land in the village to each other to be enjoyed separately in accordance with their vrithis, reserving, we are told, certain other plots still to be enjoyed in common. In course of time plots of land representing about 7/9ths of the whole village, we are told, came into the possession of the plaintiff and the defendant in this suit. The suit is for the partition of those plots between the plaintiff and the defendant. It appears to me quite clear that such a suit does not come within the meaning of section 54 of the Code. It is certainly not a suit for the partition of an undivided estate within the words of the section. It is not a suit for the partition of the whole agra-haram village. Nor is it a suit for the separate possession of a share of that village. If it were a suit for the separate possession of a share of that village, not only would the plaintiff and the defendant

(1) (1930) I.L.R. 58 Calo. 122.

(2) (1930) 34 C.W.N. 895.

be parties, but all the agra-haramdars would have to be parties to the suit. Here we are quite outside the provisions of section 54 of the Code, as I understand them. Perhaps I may also say with respect that I entirely agree with the interpretation of section 54 of the Code given by RANKIN C.J. in *Abdul Razak v. Shreenath Ghosh*(1).

I agree that this appeal should be allowed with costs and that the revision petition should be dismissed but without costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.

S. R. M. M. SEETHARAMAN CHETTIAR (FIRST RESPONDENT), APPELLANT,

v.

A. RM. N. CHIDAMBARAM CHETTIAR AND THREE OTHERS (PETITIONERS 1 AND 2 AND RESPONDENTS 2 AND 3), RESPONDENTS.*

1932,
 September 7.

Code of Civil Procedure (Act V of 1908), sec. 47—Execution of decree—Sale in, of property attached before judgment—Application for—Right to intervene in—Purchaser of same property under decree in another suit filed after attachment before judgment, purchase, however, being prior to application for sale, has—Intervenor's decree and purchase attacked by applicant for sale as being fraudulent and collusive and benami—Executing Court if bound to decide question or can refer applicant to a regular suit.

The appellant, who had attached before judgment the immovable property of his judgment debtor, filed, after obtaining a decree in his suit, an execution petition for the purpose of

(1) (1930) I.L.R. 58 Calo. 122.

* Appeals against Orders Nos. 110 and 111 of 1929.

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bringing the attached property to sale. The respondent was a purchaser of the same property from one *M*, who had in the meantime, but subsequent to the attachment before judgment, filed a suit against the same judgment-debtor and purchased the property in execution of the decree therein. The respondent intervened in the execution petition filed by the appellant and filed an execution application asserting his right to the property and resisting the execution of the appellant's decree. The appellant urged that the decree obtained by *M* was fraudulent and collusive, that the respondent was a benamidar for the judgment-debtor and that in point of fact the property in question continued to be in the possession of the latter. The Court below allowed the respondent to intervene in the execution petition filed by the appellant, but without deciding the question raised by the appellant referred him to a regular suit for the purpose of getting rid of the decree obtained by *M* and the sale held in pursuance of it.

Held that the respondent was the representative of the judgment-debtor and that, as the question was one relating to the execution of the appellant's decree, the respondent had properly been allowed to intervene under section 47 of the Code of Civil Procedure in the appellant's execution petition.

Held further that the Court below ought to have decided the question raised by the appellant in execution under section 47 and ought not to have referred him to a regular suit for the purpose.

Paragraphs one and two of section 47 should be read together and under them, when once it is held that resort to section 47 is the proper remedy, the Court has no option but is bound to decide the question in execution under that section.

APPEALS against the orders of the Court of the Temporary Subordinate Judge of Devakotta, dated 16th August 1928, and made in Execution Application No. 91 of 1928 in Execution Petition No. 39 of 1927 in Original Suit No. 39 of 1924 Subordinate Court, Kumbakonam, and in Execution Petition No. 39 of 1927 in Original Suit No. 39 of 1924 on the file of the Court of the Subordinate Judge of Kumbakonam.

S. Panchapagesa Sastri and K. R. Krishnaswami Ayyar for appellant.

N. Muttuswamy Ayyar for respondents.

Our. adv. vult.

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JUDGMENT.

VENKATASUBBA RAO J.—Before stating the point of law raised, it is necessary that I should set out briefly the facts which have given rise to these appeals. The decree that is under execution is the one passed in Original Suit No. 39 of 1924. The plaintiff in that suit (the appellant) attached before judgment the immovable property in question. Having obtained a decree in his suit, he has filed Execution Petition No. 39 of 1927 for the purpose of bringing the attached property to sale. In the meantime, but subsequent to the attachment before judgment, one Meyappan Ambalam filed Original Suit No. 498 of 1924 against the same judgment-debtor and, in execution of the decree he obtained, he brought the same property to sale, purchased it in Court auction and conveyed it to the respondent. As such purchaser, he is interested in resisting Execution Petition No. 39 of 1927 filed by the appellant. He first sought to assert his right by filing a claim petition under Order XXI, rule 58, Civil Procedure Code. But that petition was summarily rejected on the ground that at the time of the attachment before judgment the respondent had no right to the property and his claim petition therefore was unsustainable. Having failed in this, he had recourse to another method for asserting the same right, that is, he intervened in Execution Petition No. 39 of 1927 under section 47, Civil Procedure Code, claiming that, as the representative of the judgment-debtor, he could assert his right to the property and resist the execution of

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the decree in Original Suit No. 39 of 1924. The application he filed for the purpose was Execution Application No. 91 of 1928. The first point that has to be decided is, whether the respondent is the representative of the judgment-debtor and whether he can intervene under section 47. There can be no doubt that, as the purchaser of the property belonging to the defendant, he should be regarded as his representative and the question is undoubtedly one relating to the execution of the decree; see *Veyindramuthu Pillai v. Maya Nadan*(1). His application therefore under section 47 was properly made and this is also the view taken by the lower Court. Mr. Panchapagesa Sastri, the appellant's learned Counsel, does not question the correctness of this part of the learned Judge's order. The question then arises: what was the proper procedure the lower Court should have adopted, after it held that the respondent could rightly come in under section 47? The appellant's contention was that the decree obtained by Meyappan Ambalam was collusive and fraudulent, that the respondent was a benamidar for the judgment-debtor and that in point of fact the property in question continues to be in the possession of the latter. The lower Court, without deciding this question which is the subject of issues 1 and 3 framed by it, has referred the appellant to a regular suit for the purpose of getting rid of the decree obtained by Meyappa and the sale held in pursuance of it. It is this part of the order that Mr. Panchapagesa Sastri impugns. The learned Judge apparently seems to think that he has an option either to dispose of the application under section 47 or refer the parties to a regular suit. In this he seems to be wrong. Is a question to be

(1) (1919) I.L.R. 43 Mad. 107 (F.B.).

agitated under section 47 or by a separate suit? Once it is held that resort to section 47 is the proper remedy, the Court has no option but is bound to decide the question in execution under that provision. The first paragraph of the section shows that it is incumbent on the Court to decide the questions referred to there under that very section. The words used are "shall be determined by the Court executing the decree and not by a separate suit." These words are imperative and vest no discretion in the Court. The second paragraph is no doubt not happily worded, but both the parts should be read together and the interpretation I have suggested is the only proper one. The order made by the lower Court reads thus:—

"Under the above circumstances, I would declare, in Execution Application No. 91 of 1928, that the property sought to be sold in Execution Petition No. 39/27 is not liable to be sold until the decree-holder gets the Court sale in favour of the vendor of the petitioner in Execution Application No. 91/28 set aside by a decree of Court and also obtains a declaration that the sale in favour of the petitioner in Execution Application No. 91/28 is benami for the judgment-debtor and is not valid and binding on him (the said decree-holder) and I would dismiss Execution Petition No. 39/27 with a direction to the decree-holder (petitioner in the said Execution Petition No. 39/27) to comply with the abovesaid direction before he seeks to bring the property to sale in execution of his decree."

This order cannot be sustained and the lower Court should itself decide under section 47 the question of fact raised by the appellant.

The respondent's Counsel in supporting the lower Court's order contends that an executing Court cannot take upon itself the responsibility of setting aside a decree passed by a competent Court. This argument is based upon a fallacy. In this case, the executing Court is not called on to pronounce upon the validity of the decree which it is executing. The respondent's

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title to the property depends upon some decree and the question is whether that decree is vitiated by fraud or collusion. That is not the decree which the lower Court is executing and there is nothing to prevent it from deciding whether that was properly obtained or not, as incidental to the main question, namely, is the appellant's objection that the respondent is a benamidar well-founded? The case relied upon by the respondent's learned Counsel, *Venkatasami Naidu v. Gurusami Aiyar*(1), does not help him. The point under discussion did not arise for decision there. A suit had already been instituted and it was taken for granted that the parties were to be governed by the result of that suit.

The orders of the lower Court are set aside and Execution Petition No. 39 of 1927 and Execution Application No. 91 of 1928 are remanded to it for disposal in the light of these observations.

The appellant's conduct disentitles him to costs. He raised several objections in the lower Court which were untenable and repeated them in the memorandum of appeal filed by him here. For this reason I direct each party to bear his costs of the appeal.

REILLY J. REILLY J.—I agree. Mr. Muttuswami Ayyar for the respondent here, that is the petitioner in Execution Application No. 91 of 1928, has maintained that his client rightly preferred that application to the Subordinate Judge's Court under section 47 of the Code, and in that we agree with him. But he has gone on to contend that, although he came in rightly under that section, the Subordinate Judge had no jurisdiction to make any but one order on that application, viz. that he was bound to give effect to the applicant's objection without going into the answer of the decree-holder in

(1) (1919) 38 M.L.J. 441.

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Original Suit No. 39 of 1924, who was the execution-petitioner before the Subordinate Judge. That appears to me an obviously impossible contention. The answer of the decree-holder in Original Suit No. 39 of 1924 was that Mr. Muttuswami Ayyar's client was merely a benamidar for the judgment-debtor in Original Suit No. 39 of 1924, which would be an effective answer, if true. It is quite impossible for Mr. Muttuswami Ayyar to maintain that his client had the right to come in with a petition under section 47 of the Code but that his opponent had no right to urge his answer and to claim that his answer should be heard under that section.

I agree with the order proposed by my learned brother in regard to the disposal of the appeals and as to costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.

K. G. ETHIRAJULU CHETTIAR (RESPONDENT), APPELLANT,

1932,
October 3.

v.

THE OFFICIAL RECEIVER, EAST TANJORE, NEGAPATAM (PETITIONER), RESPONDENT.*

Provincial Insolvency Act (V of 1920), sec. 52—Property "in the possession of the Court" within the meaning of—Immovable property—Decree creating charge on—Sale of property in execution of—Stay of—Interim receiver's right to apply for—Property in such a case not property "in the possession of the Court"—Application under sec. 52 by interim receiver impleaded as party to a suit in execution—Order on—Appeal from—Right of.

Immovable property which a judgment-creditor seeks to bring to sale on the ground that his decree creates a charge on

* Appeal against Order No. 226 of 1932.

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it is not property in the possession of the Court within the meaning of section 52 of the Provincial Insolvency Act. An interim receiver is not, therefore, entitled to apply under that section to have the sale stopped.

No appeal lies from an order on an application made under section 52 of the Provincial Insolvency Act by an interim receiver impleaded as a party to a suit in execution. Such an order neither comes within section 47 of the Code of Civil Procedure nor falls within the definition of "decree" in the Code.

APPEAL against the order of the Court of the Subordinate Judge of Mayavaram, dated 24th March 1932 and made in Execution Application No. 158 of 1932 in Execution Petition No. 114 of 1931 (in Civil Suit No. 164 of 1931, on the file of the High Court, Madras) in its Ordinary Original Civil Jurisdiction.

T. R. Venkatarama Sastri and K. P. Mahadeva Ayyar for appellant.

O. A. Seshagiri Sastri and K. S. Desikan for respondent.

JUDGMENT.

VENKATA-
SUBBA RAO J.

VENKATASUBBA RAO J.—The lower Court has held that the decree is invalid for want of registration under section 17 of the Registration Act, and Mr. Venkatarama Sastri contends that this view is wrong. It is unnecessary to consider this point on account of the opinion we have formed on another question that has been raised.

A few facts bearing on that question may be stated. The appellant filed a suit (Civil Suit No. 164 of 1931) in the High Court on its original side for the recovery of a certain sum of money. That suit was compromised by the defendant agreeing to pay a certain specified amount, which was declared to constitute a charge on some immovable property. It was also stipulated

that in default of payment of the sum the property itself should be sold. In pursuance of this compromise a decree was passed, which, after stating that the immovable property set forth in the schedule thereto should be security for the payment of the amount mentioned, went on to provide that in default of payment the plaintiff was to be at liberty to bring the property to sale in execution of the decree itself. This decree was passed in April 1931, and in June the plaintiff (appellant) got it transferred to the lower Court for execution as the property charged by the decree was situated within the jurisdiction of that Court. In July 1931 a petition was filed for adjudicating the defendant an insolvent, and the respondent was appointed interim receiver in the insolvency. In September 1931 the appellant filed an execution petition in the lower Court applying for the sale of the property, which was charged by the decree. He also applied that the interim receiver should be impleaded as the second defendant in the suit. The latter did not oppose the application and was accordingly impleaded as a party. The proclamation of sale was in due course settled, and the sale was finally fixed for the 21st March 1932. In the meantime on the 12th March the interim receiver applied to the executing Court under section 52 of the Provincial Insolvency Act that the sale should be stopped and that other suitable relief should be granted.

Mr. Venkatarama Sastri on these facts contends that section 52 is inapplicable. The gist of the interim receiver's application is that the decree of the High Court was ineffectual, not having been registered, and that it did not therefore have the effect of making the plaintiff a secured creditor. The section provides as to what should be done, where a decree being under

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execution, the executing Court is informed that a petition to declare the judgment-debtor as insolvent has been admitted. The executing Court, the section says, shall direct the property of the debtor, against which execution has issued, if in the possession of the Court, to be delivered to the receiver. Mr. Venkatarama Sastri's contention is that the property in question was not in the possession of the Court and that the section therefore is inapplicable. The words "if in the possession of the Court" have given rise to some difficulty. If what is attached is movable property, there can be no doubt that it is the property in the possession of the Court. As immovable property under the procedure obtaining in India is not attached by seizure, some doubts were expressed whether such property can be said to be property in the possession of the Court. In *Sivasami Odayar v. Subramania Aiyar*(1) a Bench of this Court, after referring to *Mahasukh v. Valibhai*(2) and *Haranchandra Chakravarti v. Juy Chand*(3), reluctantly came to the conclusion that immovable property under attachment must be held to come within the terms of the section. But at any rate there is no warrant for holding that property, which is not even attached, is in the possession of the Court. By no fiction of law can it be held that the property which a judgment-creditor is seeking to bring to sale on the ground that the decree creates a charge upon it is property in the possession of the Court. Section 52 does not therefore apply, and the lower Court should not have allowed the interim receiver's application.

A preliminary objection has been taken that the appeal is incompetent. The interim receiver, as I have pointed out, was impleaded as a party to the suit in

execution. But his application cannot be treated as falling within section 47 of the Code of Civil Procedure. In making the application he cannot be deemed to have represented the judgment-debtor; for the right he put forward was a paramount one, being that of the general body of creditors. Mr. Venkatarama Sastri in the circumstances did not seriously contend that this should be treated as an appeal filed from an order made under section 47, Civil Procedure Code. The interim receiver, by reason of a statutory right conferred upon him by section 52 of the Provincial Insolvency Act, made the application in question to the lower Court, and against an order made in such a proceeding no appeal is provided. Such an order neither comes under section 47 nor falls within the definition of "decree" in the Code. To give effect to Mr. Venkatarama Sastri's contention, we must be prepared to convert the appeal into a civil revision petition. The question then is, can we in the exercise of our discretion treat this appeal as a civil revision petition? We are prepared to so treat it, as the lower Court has infringed the plain provisions of section 52 and had no jurisdiction to make the order in question.

The order of the lower Court is accordingly set aside but in the circumstances we direct the appellant to pay the respondent's costs of this appeal.

REILLY J.—I agree.

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(1) (1931) I.L.R. 55 Mad. 316.

(2) (1927) 30 Bom. L.R. 455.

(3) (1929) I.L.R. 57 Calo. 122.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair.

1932,
August 18.

AHAMMAD KUTTY AND SIX OTHERS (COUNTER-PETITIONERS
1 AND 6, LEGAL REPRESENTATIVES OF COUNTER-PETITIONER 6),
APPELLANTS,

v.

KOTTEKKAT KUTTU (PETITIONER), RESPONDENT.*

Indian Limitation Act (IX of 1908), art. 182 (2)—Mortgage suit—Final decree—Execution of—Limitation—Starting point—Final decree passed during pendency of appeal from preliminary decree—No appeal filed from final decree—Art. 182 (4)—Amendment of decree after execution of decree has become barred by limitation—Decree not revived by.

"Appeal" in article 182 (2) of Schedule I of the Indian Limitation Act is appeal from the decree or order sought to be executed. Where, during the pendency of an appeal from the preliminary decree in a partition suit, the trial Court passes a final decree in the suit and that decree is not appealed from, limitation for execution of the final decree runs from the date thereof and not from the date of the decree of the appellate Court in the appeal from the preliminary decree. The final decree will no doubt have to be altered in the event of the appeal from the preliminary decree succeeding; but nothing stands in the way of the party concerned applying for the passing of a fresh final decree in accordance with the appellate decree.

A decree which has already become barred by limitation cannot be revived for purposes of execution by a subsequent amendment. Hence article 182 (4) is inapplicable to a case where the decree had, prior to the date of its amendment, become barred by limitation.

APPEAL against the order of the Court of the Subordinate Judge of South Malabar at Calicut, dated 23rd

* Appeal against Appellate Order No. 123 of 1927.

February 1927 and made in Appeal Suit No. 260 of 1926 preferred against the order of the Court of the District Munsif at Parappanangadi, dated 28th September 1925 and made in Execution Petition No. 544 of 1925 in Original Suit No. 105 of 1914.

K. Kuttikrishna Menon for appellants.

P. Govinda Menon for respondent.

Cur. adv. vult.

JUDGMENT.

Defendant 2 and the legal representatives of defendant 9 are the appellants. This civil miscellaneous second appeal arises out of an application for execution made by the decree-holder in Original Suit No. 105 of 1914 (Parappanangadi District Munsif's Court) to execute a partition decree. The question for decision is whether the application is barred by limitation or not.

The facts are briefly these: In Original Suit No. 105 of 1914 the plaintiff-respondent obtained a preliminary decree for partition on the 18th of April 1918. The decree was confirmed in appeal on 31st March 1919 by the first appellate Court and on the 20th of March 1923 by the High Court. On the 18th of April 1918 the plaintiff applied for a final decree and on the 30th of September 1919 a final judgment was pronounced. As the requisite stamp papers were not supplied in time, the final decree was drawn up only on the 14th of December 1924. As the decree must bear the date on which the judgment was pronounced the decree that was drawn up in 1924 bears the date 30th September 1919. The plaintiff-decree-holder put in an execution application, Execution Petition No. 502 of 1924, but that petition was not pressed and was consequently dismissed. The petition out of which the present proceedings arise, Execution Petition No. 544 of 1925, was

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filed on the 24th of March 1925. It will be observed that the present petition as well as the previous one has been put in more than three years after the date of the final decree, and the question is whether, in the circumstances, these petitions are time-barred.

It was argued before the District Munsif that the period of three years for executing the decree in this case under article 182, clause 2, of the Limitation Act should be calculated from the date of the High Court's decree and that, therefore, the petitions are not time-barred though they were filed beyond three years from the date of the final decree which is the one now sought to be executed. He did not accept this argument but held that the time for execution began to run from the date of the final decree. On appeal the learned Subordinate Judge came to a contrary conclusion and held that the time began to run from the date of the High Court's decree and that, therefore, the applications are not time-barred. He held that the applications are not time-barred for another reason also. I have already stated that the final decree was passed on the 30th of September 1919. But on the 6th of December 1924 it was amended as per order on Execution Application No. 1249 of 1924. It was contended before the learned Subordinate Judge that the decree having been amended on the 6th of December 1924, the decree-holder has got three years' time to execute the decree from the date of this amended decree under article 182, clause 4, of the Limitation Act and that, therefore, the applications are within time. This argument was accepted by the learned Subordinate Judge and on this ground also he held that the applications were not time-barred. Another point was also argued before the learned Subordinate Judge and that was, that the final decree in this case was drawn up only on the 14th of December

1924, that till then there was no decree which could have been executed and that the petitioner had therefore three years' time from the 14th of December 1924. The decree that was drawn up in 1924 bears the date 30th September 1919. The learned Subordinate Judge did not express any definite opinion upon this point. But, as the argument is obviously untenable, it was not pressed before me by the learned Counsel for the respondent.

And so, the two points arising for determination in this second appeal are (i) whether the period for the execution of the decree should be calculated from the date of the High Court's decree (i.e., 20th March 1923), or from the date of the final decree (i.e., 30th September 1919); (ii) whether time in this case can be calculated under article 182, clause 4, of the Limitation Act from the date of the amended decree.

I shall first deal with the question with reference to article 182, clause 2, of the Limitation Act. Under this clause the period of the prescribed three years is to be calculated from " (where there has been an appeal) the date of the final decree or order of the appellate Court or the withdrawal of the appeal". It is argued for the appellants that, since there has been no appeal against the final decree, time for execution should be calculated from the date of the final decree which is the decree sought to be executed and not from the date of the High Court's decree passed in appeal against the preliminary decree. On the other hand, the respondent contends that there is nothing in the wording of clause 2 of article 182 to show that the appeal therein referred to is an appeal against the decree sought to be executed and since there has been an appeal in the present case, though not against the final decree, the date of the final disposal of the appeal

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should be the date from which the period of limitation should be computed. In support of this view it is urged that the appeal against the preliminary decree may imperil the decree sought to be executed and therefore the Legislature has deliberately extended the period by fixing the date of the disposal of the appeal as the date for calculating the period of limitation. It is somewhat curious that this question has not arisen for decision in any of the High Courts with reference to the execution of a partition decree. But the question arose in *Somar Singh v. Deonandan Prasad Singh*(1) in connection with the execution of the final decree in a mortgage suit in which an appeal had been filed against the preliminary decree. In that case a preliminary decree in a mortgage suit was passed on the 23rd of August 1921 and there was an appeal against that decree to the High Court. During the pendency of the appeal the mortgagee decree-holder obtained a final decree for sale on the 28th of October 1922. The appeal to the High Court against the preliminary decree was dismissed on the 29th of October 1925. The application for execution was made on the 2nd of February 1926. The judgment-debtor contended that the application was barred by limitation. It was held by the learned Judges that limitation ran from the date of the final disposal of the appeal by the High Court and that therefore the application for execution was within time. This decision is strongly relied on by the learned Counsel for the respondent. If the decision correctly lays down the law, there can be no doubt that it may be applied to this case. The fact that the decree in that case was passed in a mortgage suit while the present one was passed in a partition

(1) (1927) I.L.R. 6 Pat. 780.

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suit does not make any difference with regard to the application of the principle. The appellants' learned Counsel argues that this decision does not lay down the correct law.

The conclusion arrived at by the learned Judges in *Somar Singh v. Deonandan Prasad Singh*(1) is based mainly on two considerations, (i) the wording of the clause and (ii) a decision of the Privy Council in *Ashfaq Husain v. Gauri Sahai*(2). I shall first consider the Privy Council decision and see whether it supports the principle extracted from it by the learned Judges. To appreciate the decision it is necessary to state the facts of the case. These appear in the head-note as follows:—

"A decree for sale on a mortgage was passed against several defendants jointly on the 25th August 1900 and made absolute on the 21st December 1901. As against one defendant, however, the decree was *ex parte*, and it was set aside as against her on appeal on the 11th March 1902. Subsequently, a decree was passed on the merits against this defendant on the 15th August 1902, and her appeal was dismissed by the High Court on the 16th November 1904 and as against her that decree was made absolute on the 27th November 1905. An application for execution was made against all the defendants on the 21st December 1905, based on the decrees of the 25th August 1900, the 15th August 1902, the 16th November 1904, the 21st December 1901 and the 27th November 1905."

The defendants contended that the decrees of the 25th August 1900 and the 21st December 1901 were time-barred. *Prima facie* the application was barred by limitation. But their Lordships of the Privy Council held that the decrees of the 25th August 1900 and the 16th November 1904 were steps in granting the plaintiff the relief to which he was entitled. The latter decree supplemented and completed the former and for the

(1) (1927) I.L.R. 6 Pat. 780. (2) (1911) I.L.R. 33 All. 264 (P.O.).

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first time justified the plaintiff in applying for the joint execution of the decree. Time under the Limitation Act began to run from the date of the latter decree, or rather from the date on which it was made absolute, the 27th November 1905, and consequently the application was not barred. From the reasoning adopted by their Lordships it does not appear to me that this case can be used as an authority for the position contended for by the respondent. Their Lordships do not say that time should be calculated from the 16th November 1904 (or rather from the 27th November 1905) because this is the date of the final decree of the appellate Court but what they say is that time should be calculated from that date because "it was then for the first time that the Court granted a complete decree to the respondent". According to their Lordships the plaintiff was entitled to get a joint decree against all the defendants. But owing to an irregularity in procedure the decree which he obtained against one of the defendants was set aside and ultimately a decree was passed against that defendant. Their Lordships point out that the decree dated the 15th November 1904 was the second step in granting to the plaintiff the relief to which he was entitled, the first step being the original decree of the 25th August 1900. Considered in this view, the decree of the 16th November 1904 "supplemented and completed the decree granted on the 25th August 1900 and for the first time gave to the plaintiff that which alone would justify him in applying for the joint execution to which he was entitled." Viewed in this light the decree which the decree-holder in that case was executing was an incomplete decree of 25th August 1900 completed by the decree passed on 16th November 1904 and time was calculated from the date when the Court granted a complete decree to the

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decree-holder. In the present case the decree-holder had obtained a complete executable decree on the date of the final decree. Speaking with the greatest respect I do not think the decision of the Privy Council in *Ashfaq Husain v. Gauri Sahai*(1) has been correctly applied by the learned Judges of the Patna High Court in *Somar Singh v. Deonandan Prasad Singh*(2). Now coming to the first ground, no doubt the wording of the clause as it stands supports the conclusion arrived at by the learned Judges. But I think it is wrong to interpret the clause in this way ignoring the context in which it appears. There can be no doubt that under the first clause the period for the execution of a decree is three years "from the date of the decree or order". This clearly means from the date of the decree or order that is sought to be executed. Then comes clause 2 which says, "(where there has been an appeal) the date of the final decree or order . . .". Appeal from what decree or order? Surely, appeal from the decree or order sought to be executed. This seems to me to be the only interpretation possible having regard to the context in which the clause stands. In the present case there has been no appeal against the final decree which is the decree sought to be executed, and, therefore, time should be computed from the date of the final decree. It was argued for the respondent that the final decree is imperilled by the appeal preferred against the preliminary decree and in case of success in the appeal the final decree will have to be altered. True, but nothing stands in the way of the party concerned applying for the passing of a fresh final decree in accordance with the appellate decree; and this I believe is what is generally done when after

(1) (1911) I.L.R. 33 All. 264 (P.O.).

(2) (1927) I.L.R. 6 Pat. 780.

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the passing of a final decree by the first Court during the pendency of the appeal the appellate Court ultimately interferes with the preliminary decree. I am not satisfied that there is much substance in the argument that the final decree is imperilled by the decree that may be passed by the appellate Court in the appeal against the preliminary decree, and that, therefore, the time should be calculated only from the date of the appellate decree.

Mr. Kuttikrishna Menon on behalf of the appellants has brought to my notice various cases, such as, *Fakir Chand Mandal v. Daiba Charan Parni*(1), *Profulla Kumar v. Mt. Sorojibala*(2), *Jivaji v. Ramchandra*(3), *Sheo Prasad v. Anrudh Singh*(4), *Narsingh Sewak Singh v. Madho Das*(5) and *Mulkh Raj v. Gurditta Shah*(6). Generally stated, in these cases it was held that appeals from orders refusing to set aside *ex parte* decrees are not to be regarded as appeals from the decrees themselves and therefore cannot be availed of by the decree-holder to save his application to execute the decree from the bar of limitation under article 182, clause 2. These cases do not apply to the present case inasmuch as there were no appeals in these cases against the decrees sought to be executed.

For the above reasons, I am of opinion that in the present case the period of limitation should not be computed from the date of the High Court's decree on 20th March 1923, but should be computed from the date of the final decree on 30th September 1919. I think this conclusion follows from a true interpretation of article 182, clause 2, of the Limitation Act having regard to its context.

(1) (1927) I.L.R. 54 Cal. 1052.

(3) (1891) I.L.R. 16 Bom. 123.

(5) (1882) I.L.R. 4 All. 274.

(2) A.I.R. 1931 Cal. 332, 334.

(4) (1879) I.L.R. 2 All. 273.

(6) A.I.R. 1929 Lah. 283.

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The next question is whether time can be computed in this case from the date of the amended decree. Article 182, clause 4, prescribes "(where the decree has been amended) the date of amendment" as the starting point for limitation. Here again, if you rely merely on the express language of the clause the respondent's contention should be upheld. In the present case before the amendment the decree had become admittedly barred. If the literal construction of article 182, clause 4, is to be accepted, then it would enable the decree-holder to execute a barred decree, but I cannot believe that this result was intended by the Legislature to follow from this provision. In *Rabiuddin v. Ram Kanai Sen*(1) it was held that

"a decree which is capable of execution and is not executed within three years from its date becomes dead and cannot be revived by a subsequent application for amendment."

To the same effect is the decision in *Jhamman Lal v. Daulat Ram*(2). As against these decisions Mr. Govinda Menon for the respondent relies upon the following observations in *Durga Prasad v. Kedarnath*(3) in support of his contention that the starting point of limitation is the date of the amended decree:

"Where the Legislature has provided that the time from which period of limitation for execution of a decree should begin to run where a decree has been amended is the date of amendment, it is not for the Court of execution to enquire whether the original decree was capable of execution or whether for any other reason the Court was wrong in making the order for amendment of the decree."

I agree that it is not the duty of an executing Court to consider whether the amendment has been properly made, but it has to decide whether the application is barred by limitation or not. I do not think it

(1) (1920) 59 I.O. 186.

(2) A.I.R. 1924 Lah. 329.

(3) A.I.R. 1929 Cal. 650.

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is necessary to discuss this decision any further as it runs counter to the previous decision of the Calcutta High Court itself, *Rabiuddin v. Ram Kanai Sen*(1), already noticed, and as in that case when the application which was said to have been barred was filed there was already an execution application pending which was within time. The final decree in the case was made on the 8th May 1924 and the first application for execution was filed on the 7th May 1927. In the course of narrating the facts of the case the learned Judges say :

"It is unnecessary to mention that the execution was asked for of the amended decree in continuation of the application presented in Court on the 7th May 1927."

In this view the learned Judges' conclusion that the execution application was not barred by limitation seems unobjectionable, whatever may be said against their observations quoted above. In my opinion a decree which has already become barred by limitation cannot be revived for purpose of execution by a subsequent amendment. I must not fail here to point out that the appellants' learned Counsel objects to the respondent relying on the amended decree for the reason that no notice was given to his client at the time when the amendment was made. The amendment of the decree was not relied on in the first Court as a ground for saying that the applications for execution were not barred by limitation. The point was taken for the first time in the appellate Court and the learned Judge has not anywhere in his judgment stated that notice of amendment was or was not sent to the appellants. In the view I take that the amended decree cannot in the present case form the starting point for limitation there is no need for considering whether the

(1) (1920) 59 I.C. 186.

notice of amendment was as a matter of fact sent to the appellants and if not whether the amended decree can be relied on to save limitation.

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In the result I set aside the decision of the lower Court and restore that of the District Munsif with costs here and in the Court below.

K.W.R.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

TADIKONDA SREERAMAMURTHI (LEGAL REPRESENTATIVE
OF THE LEGAL REPRESENTATIVE OF PLAINTIFF), APPELLANT,

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December
15.

v.

JAYARAJALAKSHMIAMMA, MINOR BY HER FATHER
MOTTAMARRI SUBBA RAO AND FIFTEEN OTHERS (LEGAL
REPRESENTATIVE OF FIRST DEFENDANT AND DEFENDANTS THREE TO
SEVEN AND NINE TO EIGHTEEN), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XXII, r. 10—
Plaintiff—Mortgagee from—Representative character of,
for being allowed to continue suit and appeal.*

Under Order XXII, rule 10, of the Code of Civil Procedure, a mortgagee from the plaintiff of his interests in a suit can come on the record as his representative and be allowed to continue the suit and appeal.

Maharaja Sir Manindra Chandra Nandi v. Ram Lal Bhagat, (1922) I.L.R. 1 Pat. 581 (P.C.), distinguished.

APPEAL against the decree of the Court of the Sub-ordinate Judge of Masulipatam in Original Suit No. 4 of 1925.

Ch. Raghava Rao for appellant.

* Appeal No. 246 of 1928 and Civil Miscellaneous Petition No. 995 of 1932.

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The Advocate-General (Sir A. Krishnaswami Ayyar) and *K. Umamaheswaran* for third respondent. *V. Govindarajachari* for second respondent. *V. Pattabhirama Sastri* for fourth and fifth respondents. *V. Krishna Mohan* for seventh, eighth, ninth and fourteenth respondents. *K. Kameswara Rao* for tenth respondent. First, sixth, eleventh to thirteenth, fifteenth and sixteenth respondents were unrepresented.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by
MADHAVAN NAIR J.—

[His Lordship, after coming to the conclusion that the appeal should be dismissed, proceeded as follows :—]

In considering whether, while dismissing the appeal, the appellant should be made to pay the costs of the successful respondents, we have to decide the question whether the appellant is competent to prosecute this appeal. The present appellant is a mortgagee of the rights of the plaintiff in the suit. The suit having been dismissed, the plaintiff's widow filed an appeal to this Court against the decree, the plaintiff having died in the meanwhile. His widow is now dead, and the mortgagee has filed an application to this Court to be allowed to continue the appeal. Under Order XXII, rule 10 (1),

“in other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.”

In *Maharaja Sir Manindra Chandra Nandi v. Ram Lal Bhagat*(1) it was held by the Privy Council that

“where a decree for possession and mesne profits has been obtained there is not power under Order XXII, rule 10 or section 47 of the Code of Civil Procedure, 1908, to join a

(1) (1922) I.L.R. 1 Pat. 581 (P.C.).

defendant to the suit a tenant to whom during the pendency of the suit the defendant has let the property, so as to compel the tenant to account for profits which he has received from the land.”

On the reasoning of their Lordships contained in this decision it is argued that the mortgagee of the plaintiff's interests in this case should not be allowed to continue this appeal.

The decision in *Maharaja Sir Manindra Chandra Nandi v. Ram Lal Bhagat*(1) was passed in appeal from the judgment of the High Court of Patna reported as *Ram Kumar Lal Bhagat v. Raja Mukund Sahi*(2). Their Lordships reversed the decision of the High Court. The facts of the case were briefly these. The respondents before the Privy Council instituted as plaintiffs a suit against one Raja Mukund Sahi to recover possession of six villages and a jungle which they claimed. The Court of first instance dismissed the suit. Just one year after the dismissal, the Raja gave a lease for a term of years of the right of mining for mica, and otherwise exploiting the jungle, to the appellant before the Privy Council. On appeal by the unsuccessful plaintiffs the High Court reversed the decision of the first Court and made a decree in favour of the plaintiffs and remitted the case to the lower Court to take an account of the mesne profits to which the appellants were entitled for three years prior to the institution of the suit and for the period thereafter till the delivery of possession. In inquiring into the mesne profits the amin not only ascertained the rents which the Raja had received from the appellant before the Privy Council and the other tenants, but also proceeded to inquire what the profits were which the various lessees might be taken to have made from the mica which

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(1) (1922) I.L.R. 1 Pat. 581 (P.C.).

(2) (1916) 1 P.L.J. 596.

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they had extracted during the terms of their leases, pending the somewhat protracted litigation. It is clear, as pointed out by the Privy Council, that in ascertaining such mesne profits the successful plaintiffs would not be entitled to the actual rents which the trespassing defendant had received, nor could the lessees be rendered liable for damages in that suit to which they were not parties in respect of the mica that they had removed. On the receipt of the amin's report the plaintiffs (that is, the respondents before the Privy Council) relying on the statements with regard to the profits obtained from the mines made an application that the several lessees from the Raja should be made parties to the proceedings. The appellant before the Privy Council raised various objections and said that since he knew of the plaintiffs' claim to the property he had surrendered his leases and that he should not be made a party. The Subordinate Judge accepting his contentions dismissed the plaintiffs' application. The High Court in appeal from his order held, basing their order on the language of Order XXII, rule 10, of the Code of Civil Procedure, that

"the appellants are entitled to have the persons in question added as parties to the proceedings, and compel them to account for any profits which they may have received from the land." (page 586).

Their Lordships of the Privy Council set aside this order, and in doing so they considered the scope of Order XXII, rule 10, of the Code of Civil Procedure.

Its scope is thus described:

"The order contemplates cases of devolution of interest from some original party to the suit, whether plaintiff or defendant, upon some one else. The more ordinary cases are death, marriage, insolvency, and then come the general provisions of rule 10 for all other cases. But they are all cases of devolution." (page 587).

Then, after referring to section 372 and noting that the words "in addition to" in the earlier Code have disappeared in the present Code, their Lordships state this:

"But the matter does not rest upon this change. The liability, if any, of the appellant to pay damages for removal of the mica is not a liability which has devolved to him from the defendant Raja. They were both liable, if liable at all, as trespassers, and a case, if any, against the appellant must rest upon his action and the direct relation established thereby between him and the plaintiffs." (page 588).

And then they point out that serious injustice would be done if any other view was taken. The reasoning contained in the last extract we have quoted from the judgment affords the real basis of their Lordships' decision. Order XXII, rule 10, relates to cases of devolution, and, as the liability of the appellant in that case was the liability of a trespasser which cannot be said to have devolved upon him from the defendant Raja, their Lordships held that he cannot be made liable in that suit and therefore refused to make him a party, the provisions of Order XXII, rule 10, in such a case being absolutely inapplicable. This is the reasoning of their Lordships and it is not affected, if we may say so with great respect, by the change in the language of the present rule. We may also point out that there is nothing in their Lordships' observations to justify the view that the devolution of interest contemplated in rule 10 is a devolution of the entire interest. The terms of the rule which speaks of a devolution of "any interest" do not support such a view. For the above reasons it appears to us that the reasoning of their Lordships in the Patna case cannot be relied upon for the view that the mortgagee of the plaintiff's interests in the suit should not be substituted in the place of the mortgagor and be allowed to continue the suit on his

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death. For the same reasons we regret we are unable to accept as correct the contrary view enunciated by KRISHNAN PANDALAI J. in Civil Miscellaneous Appeal Nos. 69 and 70 of 1929, etc. The decision in *Srinivasa Aiyangar v. Pratapa Simha Rajah Saheb*(1) has no application to the case before us, as in that case a mortgagee was sought to be brought on the record after the termination of the suit.

In the present case the petitioner being a mortgagee of the deceased plaintiff's share in the suit properties, an "interest" as contemplated by Order XXII, rule 10, has devolved on him and he may therefore be allowed to continue this appeal. We would therefore allow his petition. He being thus declared competent to conduct the appeal, it must follow, the appeal having been dismissed, that he should pay the costs of the respondents. It is argued by Mr. Raghava Rao on his behalf that the costs should be limited to the costs incurred by the respondents since the date of his application. We see no reason to limit the order in this manner. The appeal is dismissed with costs—one set.

The petitioner in Civil Miscellaneous Petition No. 995 of 1932 will get his costs of the application.

G.R.

(1) (1925) 49 M.L.J. 704.

APPELLATE CRIMINAL.

Before Mr. Justice Burn.

IN RE PONNUSAMI CHETTY (FIRST ACCUSED), PETITIONER.*

1933,
January 16.

Code of Criminal Procedure (Act V of 1898), sec. 162—Use of statement recorded under—For contradiction only—Omission from such statement of a statement made at the trial is not contradiction of latter statement.

A statement made by a witness to the police in an investigation under section 162 of the Code of Criminal Procedure cannot be used when the witness is under examination in an inquiry under Chapter XVIII, Criminal Procedure Code, in order to show that while giving evidence the witness has made assertions which he did not make when he was examined by the police. Statements recorded under section 162 can be used at a subsequent inquiry or trial for one purpose only, to contradict the witness. An omission from a statement made under that section cannot be said to be a contradiction of a statement made in the witness box. It is not permissible to use such statements to show "development" of the prosecution case.

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 Negapatam, dated the 9th day of December 1932 and made in Preliminary Register Case No. 4 of 1932.

K. S. Jayarama Ayyar and *K. Venkataramani* for petitioner.

Public Prosecutor (L. H. Bewes) for the Crown.

Cur. adv. vult.

JUDGMENT.

The point raised in this case is whether a statement made by a witness to the police in an investigation

* Criminal Revision Case No. 14 of 1933.

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under section 162 of the Code of Criminal Procedure can be filed, or exhibited, or, in short, used, when the witness is under examination in an inquiry under Chapter XVIII of the Code of Criminal Procedure in order to show that while giving evidence the witness has made assertions which he did not make when he was examined by the police.

Statements recorded under section 162 of the Code of Criminal Procedure can be used at a subsequent inquiry or trial for one purpose only, to *contradict* the witness. If they are to be used for this purpose the statements made under section 162 must be duly proved, and used in the manner laid down in section 145 of the Evidence Act. It follows of course that, unless there is a *contradiction* between the statement recorded under section 162 and the statement made by the witness in the course of his deposition, the statement recorded under section 162 cannot be used at all. It is therefore obvious that the question raised in this case must be answered in the negative, unless an *omission* from a statement under section 162 can be said to be a *contradiction* of a statement made in the witness box. Reduced to these terms the matter appears to me to be too simple to admit of any argument. Whether it is considered as a question of logic or of language, "omission" and "contradiction" can never be identical. If a proposition is stated, any contradictory proposition must be a statement of some kind, whether positive or negative. To "contradict" means to "speak against" or in one word to "gainsay". It is absurd to say that you can contradict by keeping silence. Silence may be full of significance, but it is not "diction", and therefore it cannot be "contradiction".

It is clear therefore that a statement under section 162 of the Code of Criminal Procedure cannot be used

during an inquiry or trial in order to show that a witness is making statements in the witness box which he did not make to the police.

The same conclusion follows from a consideration of section 145 of the Evidence Act. If it is intended to contradict the witness *by the writing*, his attention must be called to those parts of the writing which are to be used to contradict him. It would be in my opinion sheer misuse of words to say that you are contradicting a witness *by the writing*, when what you really want to do is to contradict him by pointing out omissions from the writing. I find myself in complete agreement with the learned Sessions Judge of Ferozepore who observed that "a witness cannot be confronted with the unwritten record of an un-made statement." See *Mohinder Singh v. Emperor*(1).

In the case cited, it was held by COLDSTREAM J. that the view of the learned Sessions Judge was not correct. Reference was made to the judgment of DALIP SINGH J. in *Hazara Singh v. The Crown*(2), but in neither of these cases was it explained how an omission could amount to a contradiction. The instance given by DALIP SINGH J. was that of a witness who should state under section 162 of the Code of Criminal Procedure that three persons were beating a man, and should later allege that four persons were beating the same man. I would say with all respect that such statement would be in fact contradictory. It is impossible to state a case in which an omission amounts to a contradiction.

There is apparently no decided case in this High Court but I cannot see that there is any real difficulty in the matter. There is some apparent divergence of view in the Patna High Court. Mr. K. S. Jayarama Ayyar for the petitioner relies on the case of *Iltaf Khan*

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(1) A.I.R. 1932 Lah. 103, 110.

(2) (1927) I.L.R. 9 Lah. 389.

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v. King-Emperor(1) whereas the learned Public Prosecutor relies on the observations of MACPHERSON J. in *Badri Chaudhry v. King-Emperor*(2). In the former case it appears to me (with all respect) that there is a slight confusion of thought. A witness named Mahabir Dubey, who during the trial had given evidence against the accused, had stated in cross-examination that when examined by the police he had said that he had seen the accused that evening. This statement was contradicted by the Sub-Inspector of Police who apparently referred to his record of the statement made by the witness under section 162 of the Code of Criminal Procedure, and found therein no record of any statement by Mahabir Dubey of the fact that he had seen the accused that evening. In such a case as that, the statement of Mahabir Dubey in the witness box that he had seen the accused was not contradicted either by the record of his statement under section 162 or by the evidence of the Sub-Inspector. What the Sub-Inspector contradicted (refreshing his memory no doubt by reading the record he had made under section 162) was *the statement of the witness he had told the police so and so*. It was a contradiction not of his evidence against the accused but of what he had said to the Sub-Inspector. And moreover it was a contradiction not between two statements made by the witness, but between a statement made by the witness and a statement by the Sub-Inspector. For such a purpose as this, the statement under section 162 of the Code of Criminal Procedure cannot be used; it can only be used in order to show that the witness in the box is contradicting something he has said before. It appears to me, with respect, that the reasoning of MACPHERSON J. in *Badri Chaudhry v. King-Emperor*(2) is entirely correct.

(1) (1925) I.L.R. 5 Pat. 346.

(2) A.I.R. 1926 Pat. 20

The evidence in the case now in question is not before me. Mr. K. S. Jayarama Ayyar tells me that certain witnesses appear to have stated to the police merely that all the accused beat some one. In the witness box these witnesses, I am told, have added allegations against particular accused of particular acts. The defence wants to file their statement under section 162 of the Code of Criminal Procedure in order to show that when examined by the police they did not attribute any particular acts to any particular accused. As the learned Public Prosecutor points out, the defence thus wants to use the statement under section 162 of the Code of Criminal Procedure for a purpose not sanctioned by the Code. It is not permissible to use such statements in order to show "development" of the prosecution case; it is only permissible to use them to prove contradictions. In the present case there are no contradictions.

Mr. Jayarama Ayyar then asks how he is to contradict the witnesses when they say that they told the police exactly what they are telling the Court. The answer is simply that he must contradict the witnesses on this point by adducing counter-evidence, exactly in the same way as he would contradict on any other point. He can put questions to the police officer to whom they made the statements under section 162 of the Code of Criminal Procedure or he can cite witnesses, if any, who were present when those statements were recorded. He cannot, however, use the statements themselves.

It is not difficult to understand why the Legislature has restricted the use of such statements to a single purpose. Some of the reasons have been enunciated by Knox J. so long ago as 1894 and most of the language is still appropriate even after the changes introduced

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into section 162 of the Code of Criminal Procedure in 1923—see *Queen-Empress v. Nasiruddin* (1):—
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“Still more extraordinary is a permission given before the case came on for trial by which the accused were granted copies of statements recorded by the police during the investigation. Such statements are recorded by police officers in the most haphazard manner. Officers conducting an investigation not unnaturally record what seems in their opinion material to the case at that stage and omit many matters equally material, and, it may be, of supreme importance as the case develops. Besides that, in most cases they are not experts of what is and what is not evidence. The statements are recorded often hurriedly in the midst of a crowd and confusion, subject to frequent interruption and suggestions from by-standers. Over and above all, they cannot be in any sense termed depositions, for they are not prepared in the way of a deposition, they are not read over to, nor are they signed by, the deponents. There is no guarantee that they do not contain much more or much less than what the witness has said. The law has safeguarded the use of them, and it never can have been the intention of the Legislature that, as in this case, copies of them should have been without question and as a matter of course made over to the accused or their Counsel.”

The learned Sub-Magistrate's view of the provisions of section 162 of the Code of Criminal Procedure is substantially correct. His actual order is not quite accurately worded. It is impossible to “read over” portions alleged to have been omitted; but the learned Sub-Magistrate only means that the witnesses are to be particularly questioned about the statements in their depositions which according to the defence were not made when the police questioned them under section 162 of the Code of Criminal Procedure.

There is no ground for interference in revision.

K.W.R.

(1) (1894) I.L.R. 16 All. 207.

APPELLATE CRIMINAL.

*Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Bardswell.*

SOTHAVALAN ALIAS IRULAN AND ELEVEN OTHERS
(ACCUSED), PETITIONERS,

1932,
December 13.

v.

RAMA KONE AND THREE OTHERS (PROSECUTION WITNESSES
1 TO 4), RESPONDENTS.*

*Indian Penal Code (Act XLV of 1860), sec. 71—Applicability
of—Conviction for offences under ss. 147 and 323,
Indian Penal Code—Separate sentence for each offence—
Legality of.*

Where a number of accused persons are convicted for rioting under section 147, Indian Penal Code, and individually for causing hurt under section 323, Indian Penal Code, it is legal to award a separate sentence for each of the offences and section 71, Indian Penal Code, has no application in such a case. The offence of voluntarily causing hurt or of voluntarily causing grievous hurt can be committed without the commission of the offence of rioting, and, in like manner, rioting can be committed without the commission of the other mentioned offences.

Krishna Ayyar v. Emperor, (1918) 20 CrL. L.J. 145, followed.

Kunnammal Mayan, In re, (1927) 53 M.L.J. 656, and *Bishna v. Emperor*, (1922) 73 I.C. 517, dissented from.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Subdivisional Magistrate of Ramnad, dated 16th January 1932 and passed in Criminal Appeal No. 1 of 1932 (Calendar Case No. 523 of 1931 on the file of the Court of the Taluk Magistrate of Ramnad).

G. Gopalaswami for petitioners.

* Criminal Revision Case No. 162 of 1932.

SOOTHAVALAN v. RAMA KONE. *A. Narasimha Aiyar* for Public Prosecutor (L. H. Bewes) for the Crown.
T. G. Singaravelu for respondents.

Cur. adv. vult.

JUDGMENT.

BARDSWELL J. BARDSWELL J.—The petitioners in this case have been convicted of rioting as punishable under section 147, Indian Penal Code, and of the substantive offence of voluntarily causing simple hurt as punishable under section 323, Indian Penal Code. They have been sentenced in all to three months' rigorous imprisonment each, two months for the rioting and one month for the causing hurt. They have also each of them been fined Rs. 15 for each offence. The only point that has now to be considered is that of whether the two separate punishments were legal.

For the petitioners reliance is placed upon the decision of CURGENVEN J. in *Kunnammal Mayan, In re*(1). In that case the learned Judge has held, though with some hesitation and while admitting that he saw a difficulty in arriving at his conclusion, that when a person is convicted both under section 147 and section 323, Indian Penal Code, he could not be awarded a separate sentence for each of the offences. He has followed a decision, apparently unreported, of KRISHNAN J. in Criminal Revision Petition No. 209 of 1924 and a decision of the Lahore High Court reported as *Bishna v. Emperor*(2). The principle of these decisions is that, where the causing of the hurt is itself the particular form of the force or violence which contributed to the offence of rioting, the one was included as an ingredient of the other. CURGENVEN J. followed this principle and

(1) (1927) 53 M.L.J. 656.

(2) (1922) 73 I.C. 517.

found it difficult to escape the conclusion that to convict SOOTHAVALAN v. RAMA KONE. BARDSWELL J. for voluntarily causing hurt, where the only violence which formed the act of rioting was the hurt itself, offends against the provisions of section 71, Indian Penal Code. A different opinion, however, has been expressed by WALLACE J. in *Anthoni Udaiyan v. Royappudayar*(1). Therein he has pointed out that:—

“Causing hurt and using force are not the same thing and the word ‘force’ does not appear in the definition of ‘hurt’. The use of criminal force is no doubt an ingredient of the offence of rioting and the use of force may be an ingredient in the offence of rescuing cattle, but the force necessary to constitute these offences may fall far short of ‘causing bodily pain’ and, if further force is used which does cause bodily pain, then, in my view, the offences which involve and are complete by mere use of criminal force have been exceeded and that excess constitutes another offence, viz., that of causing hurt or causing whatever more serious form of bodily hurt has been the result.”

With all respect I think that the view thus taken by WALLACE J. is correct; and what he says as to force is equally applicable to violence. The same view has also been taken by a Divisional Bench of this Court in *Krishna Ayyar v. Emperor*(2), a decision which does not appear to have been brought to the notice of either of the learned Judges in *Kunnammal Mayan, In re*(3) and *Anthoni Udaiyan v. Royappudayar*(1). In that case it is remarked:

“It has been well settled that, where the object of an unlawful assembly is to cause hurt, then a member of that unlawful assembly, if he is convicted under section 147, cannot be convicted also under section 323 or 325 read with section 149, except that such of the accused as are proved themselves to have caused hurt in the riot would be rightly convicted of the offence of hurt in addition to the offence of rioting.”

(1) (1927) 53 M.L.J. 653.

(2) (1918) 20 Cr. L.J. 145.

(3) (1927) 53 M.L.J. 656.

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The convictions, therefore, of certain of the accused under sections 147 and 323, Indian Penal Code, were confirmed. With regard to the constructive section 149, Gour's commentary shows that there is a conflict of opinion between the various High Courts, but with that section we are not now concerned, as all the petitioners in this case have been convicted of offences of hurt individually committed. Except in the case of the Lahore Court in *Bishna v. Emperor*(1), there seems to have been no such conflict among the other High Courts as to its being legal to inflict a separate punishment on a rioter, on a substantial conviction under section 323, from that awarded for the offence under section 147. This was held by the Calcutta High Court in *In the matter of the petition of Mohur Mir v. The Queen-Empress*(2) and more recently in *Ram Angutha Singh v. Emperor*(3). There are similar decisions in *Queen-Empress v. Bana Punja*(4), when the matter was considered by a Full Bench, and in *Queen-Empress v. Dungar Singh*(5) and in *Queen-Empress v. Ram Sarup*(6), and in *Queen-Empress v. Dungar Singh*(5) which dissented from a previous decision of that Court to the contrary. None of these cases has been referred to by the learned Judge who decided the case in *Bishna v. Emperor*(1). It is the Allahabad view which has been followed in Calcutta and Bombay. As remarked in *Queen-Empress v. Dungar Singh*(5),

"the offence of voluntarily causing hurt or of voluntarily causing grievous hurt obviously can be committed without the commission of the offence of rioting, and, in like manner, rioting can be committed without the commission of the two other mentioned offences."

(1) (1922) 73 I.C. 517.

(3) (1913) I.L.R. 40 Calo. 511.

(5) (1884) I.L.R. 7 All. 29.

(2) (1889) I.L.R. 18 Calo. 725.

(4) (1892) I.L.R. 17 Bom. 260 (F.B.).

(6) (1885) I.L.R. 7 All. 757 (F.B.).

This is putting in general terms what has been put more particularly by WALLACE J. in the quotation from his judgment given above. Taking this as the correct position as, in my opinion, it should be and as indeed has been found by a Bench of this Court to be settled, section 71, Indian Penal Code, can have no application. I would hold, then, that the petitioners have been properly and legally awarded separate sentences, one for rioting and one for having caused simple hurt.

The sentences cannot be said to be excessive but, seeing that this case has been hanging over the petitioners for over a year, that none of the injuries caused was of a serious character, and that they have already served out about half of their several terms of imprisonment, I do not think it necessary to send them back to jail. Their not being sent back is likely to be more conducive to future harmony between them and the opposite party, and they have had their lesson. I would, therefore, reduce their sentences to rigorous imprisonment for the period already undergone and now set them at liberty, discharging their bail bonds. The sentences of fine and of imprisonment in default should stand as also the order for compensation to prosecution witnesses one to four.

BEASLEY C.J.—I agree.

K.W.R.

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Bardswell.*

1932,
December 8.

SREE CHELIKANI VENKATARAYANIM GARU
(RESPONDENT), APPELLANT,

v.

THE MAHARAJAH OF PITTAPURAM
(APPELLANT), RESPONDENT.*

*Madras Estates Land Act (I of 1908), sec. 26 (3)—“The ryot”—
“Lawful rate”—Meaning of—Tenants at will of ryoti land
in possession thereof paying rent under contract enforceable
at law—Grant of such land at rates of rent lower than those
paid by—Binding nature of, on successor of grantor.*

In 1905 the then landholder, the respondent's predecessor, made a grant of the suit lands to the appellants at rates of rent lower than those paid by the former tenants of those lands. The former tenants were tenants only at will and not having occupancy rights. The rates paid by them were paid under a contract enforceable at law.

Held that the case was covered by section 26 (3) of the Madras Estates Land Act and that under that section the lower rate of rent paid by the appellants under the grant of 1905 was not binding upon the respondent.

The words “the ryot” in section 26 (3) of the Estates Land Act refer to the ryot in possession of the land before the date of the grant who may be an entirely different person to the person to whom the grant was made. The former tenants of the suit lands, even though tenants only at will and not having occupancy rights, were in possession of ryoti land paying rent for that land and they were clearly ryots. The rates of rent paid by them having been paid under a contract enforceable at law they were lawful rates within the meaning of section 26 (3) of the Estates Land Act.

APPEALS under Clause 15 of the Letters Patent against the judgments of MADHAVAN NAIR J., dated 3rd February

* Letters Patent Appeals Nos. 81 to 84 of 1931.

1931, in Second Appeals Nos. 140 to 143 of 1928 respectively preferred against the decrees of the District Court of East Godavari at Rajahmundry in Appeal Suits Nos. 265, 261, 263 and 262 of 1925 preferred against the decrees of the Court of the Deputy Collector of the Headquarters Division, Cocanada, in Land Suits Nos. 80 of 1924 and 1, 7 and 6 of 1925 respectively.

P. Satyanarayana Rao for appellants.

C. Rama Rao for the Advocate-General (Sir A. Krishnaswami Ayyar) for respondent.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—The question which arises in these letters patent appeals is one under section 26 (3) of the Madras Estates Land Act which reads as follows :

“Except as provided by sub-section (1) no rate of rent at which land may have been granted by a landholder shall be binding upon the person entitled to the rent after the lifetime of the landholder if such rate is lower than the lawful rate payable by the ryot before the date of the grant upon the land or upon land of similar description and with similar advantages in the neighbourhood.”

The facts of the case have been very fully set out in the order of MADHAVAN NAIR J. in Second Appeals Nos. 140 to 144 of 1928 calling for a finding from the District Judge upon the question :

“Whether the rates now paid are lower than the lawful rates paid by these ryots on the suit holdings and, if lower, what were the rates that were paid before?”
The learned District Judge's finding is that “the rates now paid are in fact lower than the rates agreed to by these ryots on the suit holdings.”

The position, therefore, is that the tenants of the suit lands prior to the date of the grant to the appellants in 1905 by the respondent's predecessor were, under an agreement with the then landholder,

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BRASLEY C.J.

paying a higher rate of rent than that paid by the appellants.

The respondent claims that under section 26 (3) the lower rate of rent paid by the appellants under the grant in 1905 is not binding upon him. Whether his claim is well-founded must depend upon the construction of that section. The appellants claim that the rate should be that which was being paid by tenants of neighbouring lands and not that actually payable by the former tenants of this land because the latter tenants were tenants at will having no occupancy rights and were therefore not ryots within the terms of section 26; and it is further contended that the words "the ryot" mean the ryot under the Estates Land Act to whom occupancy rights had been granted under the Act, namely, the appellants. These two contentions are really bound up in one another.

As regards the latter contention, the words of the sub-section clearly refer to the ryot in possession of the land before the date of the grant who may be an entirely different person to the person to whom the grant was made. But it is argued that such prior tenants were not ryots at all as the only ryots in the contemplation of the Act are ryots to whom occupancy rights have been granted under the Act. If this contention is right, then it means that section 26 (3) does not provide for the case of a higher rate of rent paid by a tenant prior to 1908. This contention, in my view, cannot succeed. Section 6 of the Madras Estates Land Act reads as follows :

"Subject to the provisions of this Act every ryot now in possession or who shall hereafter be admitted by a landholder to possession of ryoti land not being old waste situated in the estate of such landholder shall have a permanent right of occupancy in his holding; but nothing contained in this sub-section shall affect any permanent right of occupancy that may

have been acquired in land which was old waste before the commencement of this Act."

This section gives the ryots then in possession of ryoti land permanent occupancy rights. The former tenants of the suit lands, even though tenants only at will and not having occupancy rights, were in possession of ryoti land paying rent for that land and they were clearly ryots; and it has not been shown that the rates of rent paid were not lawful. They were paid under a contract enforceable at law and hence were lawful rates. In respect of the suit lands there was no faisal rate fixed for them and there were no faisal rates in competition with contract rates as was the case in *Karuppa Kavundan v. Narayana Chettiar*(1), which is referred to in support of the appellants' case.

There was no faisal rate at all here but only a contract rate. MADHAVAN NAIR J. says in his judgment :

"In my opinion the agreement of the predecessors of the appellants to pay the rents agreed to by them not being shown to be bad in law, or prohibited by it, those rates which they agreed to pay must be considered to be lawful rates."

With that opinion I entirely agree.

For these reasons, these letters patent appeals must be dismissed with costs in Letters Patent Appeal No. 81 of 1931 only.

BARDSWELL J.—I agree with my Lord.

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APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Jackson, Mr. Justice Sundaram Chetti
and Mr. Justice Mockett.

1932,
September
14.

VADLAMANNATI BALA TRIPURA SUNDARAMMA
ALIAS SUNDARAMMA (PLAINTIFF—DECREE-HOLDER),
APPELLANT,

v.

ABDUL KHADAR (DEFENDANT—JUDGMENT-DEBTOR),
RESPONDENT.*

*Indian Limitation Act (IX of 1908), sec. 15—Execution applica-
tion—Dismissal of, for non-payment of batta—Revival—
Conditions.*

The dismissal of an execution application for non-payment of batta is proper and final and such an application cannot be revived. In order to entitle an application to be treated as one in continuation of or to revive a former application there should have been no final disposal or there should have been a wrong dismissal on account of some obstacle which then existed but which was subsequently removed.

No equitable grounds for the suspension of a cause of action can be added to the provisions of the Indian Limitation Act.

APPEALS against the orders of the District Court of Kistna at Masulipatam, dated the 14th August 1928, in Execution Petition No. 12 of 1928 and in Execution Application No. 377 of 1928 in the said Execution Petition No. 12 of 1928 in Original Suit No. 29 of 1918.

N. Sivaramakrishna Ayyar for appellant.—This case has come up before the Full Bench on account of the conflict of opinion between *Lakshminarayana v. Lakshmipathi*(1), on the one side, and *Satyanarayana Brahmam v. Seethayya*(2) and *Sethu Row v. Seethalakshmi Ammal*(3), on the other. *Lakshminarayana v. Lakshmipathi*(1) follows *Pandey Satdeo Narayan v. Srimati Radheykura*(4) and *Satish Mohini Debya*

* Appeals against Orders Nos. 51 and 52 of 1928.

(1) (1927) 53 M.L.J. 520.

(2) (1928) I.L.R. 50 Mad. 417.

(3) (1924) 21 L.W. 716.

(4) (1919) 5 P.L.J. 39.

v. Pabna Bank, Limited(1) and correctly lays down the law. SUNDARAMMA
The test is whether the decree in the collateral suit is tanta-
mount to an injunction within the meaning of section 15 of
the Indian Limitation Act; see Mitra's commentary on the
Limitation Act, sixth edition, pages 1944 to 1948, and
Rustomji's commentary, fourth edition, page 968. Because of
the decree in the collateral suit further proceedings in execu-
tion are "futile" and "unnecessary" ones as contemplated
by *Muthu Korakkai Chetty v. Madar Ammal*(2). See also
Muthuveerappa Chetty v. Adaikappa Chetty(3), *Peer Ammal*
v. Nalluswami Pillai(4) and *Bassu Kuar v. Dhum Singh*(5).
The same principle is stated in a different form in *Nrityamoni*
Dassi v. Lakhan Chunder Sen(6). So long as the collateral
suit was pending the appellant had "good" and "sufficient"
cause for not filing an execution application as contemplated
by the above case and other cases, viz., *Mussumat Raneesurno*
Moyee v. Shooshee Mokhee Burmonia(7) and *Prannath Roy*
Chowdry v. Rookea Begum and others(8). In *Surayya v.*
Venkataratnam(9) time was held to begin on the removal of
the obstacle to execution. To the same effect is *Mangamma*
Nayakuralu v. Ramadasappa Nayanimvary(10). Moreover
the execution application out of which the present appeal has
arisen might be taken as a continuation of the previous
application which was dismissed. Under article 181 of the
Limitation Act the appellant had three years within which to
file the execution application after the removal of the obstruction
and the appellant has done so. In *Sethu Row v. Seethalakshmi*
Ammal(11) the trustee was not a party to the original
proceedings and so time taken by collateral proceedings was
not deducted.

[Reference was also made to Order XXXVI, rule 6, Order
XXI, rule 66, and section 60 (m), Civil Procedure Code; section 6
(a) of the Transfer of Property Act and to the following cases:—
Venkatadri Appa Rao v. Parthasarathi Appa Rao(12), *Qamar-*
ud-din Ahmad v. Jawahir Lal(13), *Raghunath Sahay Singh v.*

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| (1) (1918) 47 I.C. 907. | (2) (1919) I.L.R. 43 Mad. 185 (F.B.). |
| (3) (1920) I.L.R. 43 Mad. 845, 848. | |
| (4) (1930) I.L.R. 54 Mad. 455. | (5) (1888) I.L.R. 11 All. 47, 56 (P.C.). |
| (6) (1916) I.L.R. 43 Cal. 660 (P.C.). | |
| (7) (1868) 12 M.I.A. 244. | (8) (1859) 7 M.I.A. 323. |
| (9) (1923) I.L.R. 47 Mad. 176. | (10) (1924) 48 M.L.J. 563. |
| (11) (1924) 21 L.W. 716. | (12) (1925) I.L.R. 48 Mad. 312, 326 (P.C.). |
| (13) (1905) I.L.R. 27 All. 334 (P.C.). | |

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Ch. Raghava Rao and *V. Krishna Mohan* for respondent.—The execution application was dismissed for non-payment of batta and not as a result of the adverse finding in the collateral suit. It has been properly and finally disposed of. In *Lahimiya v. Mazur Hannisa*(3) it was held that the theory of revival could not be invoked unless the decree in the collateral suit is tantamount to an injunction or stay. To the same effect is *Ram Bharosay v. Sohan Lal*(4). In *Ammathayi Ammal v. Sivarama Pillai*(5) it was held that equitable considerations ought not to be introduced in computing the time for purposes of limitation. *Satyanarayana Brahmam v. Seethayya*(6) lays down the test to be applied, viz., whether there was an impediment to the taking of proceedings to keep the decree alive. *Sethu Row v. Seethalakshmi Ammal*(7) explains the observations in *Bassu Kuar v. Dhum Singh*(8) which is on a line with *Mussumat Runee Surno Moyee v. Shooshee Mokhee Burmonia*(9) and *Muthuveerappa Chetty v. Adaikappa Chetty*(10). *Pandey Satdeo Narayan v. Srimati Radheykura*(11) and *Satish Mohini Debya v. Pabna Bank, Limited*(12) are not applicable because in those cases there were orders prohibiting execution unless certain acts were done. In *Muthu Korakkai Chetty v. Madar Ammal*(13) the language of the third column of article 180 of the Limitation Act was under consideration and to that extent the decision would be binding and not all collateral matters which came up for discussion in the course of the judgment.

[Reference was also made to *Suryanarayana Pandarathar v. Gurunada Pillai*(14), *Raghunandun Pershad v. Bhugoo Lall*(15) and *Raghunath Sahay Singh v. Lalji Singh*(1).]

N. Sivaramakrishna Ayyar in reply :—Under section 15 of the Limitation Act the obstacle contemplated should be to the execution of the decree and not to the presentation of the petition for execution. Though an execution application could

(1) (1895) I.L.R. 23 Cal. 397.

(3) (1926) 95 I.C. 718.

(5) (1924) 48 M.L.J. 74.

(7) (1924) 21 L.W. 718.

(9) (1868) 12 M.I.A. 244.

(11) (1919) 5 P.L.J. 39.

(13) (1919) I.L.R. 43 Mad. 185 (F.B.).

(14) (1897) I.L.B. 21 Mad. 257.

(2) (1880) I.L.R. 5 Bom. 29.

(4) (1924) 82 I.C. 1.

(6) (1926) I.L.R. 50 Mad. 417.

(8) (1888) I.L.R. 11 All. 47, 56 (P.C.).

(10) (1920) I.L.R. 43 Mad. 845.

(12) (1918) 47 I.C. 907.

(15) (1889) I.L.B. 17 Cal. 268.

be presented it could not be fruitfully ordered on account of the collateral decree. If section 15 does not apply, then article 182 will be enough; *Rameshvar Singh v. Homeshvar Singh*(1), *Thakur Prasad v. Abdul Hasan*(2) and *Qamar-ud-din Ahmad v. Jawahir Lal*(3) are cases where the theory of revival has been extended to execution applications which had been dismissed for non-payment of batta. Such an order of dismissal is not a final order and it will amount to a final order only if it amounts to a denial of the right to execute; see *Thakur Prasad v. Fakir-ullah*(4).

Cur. adv. vult.

JUDGMENT.

JACKSON J.—In Execution Petition No. 12 of 1928 the appellant, the mortgagee-decree-holder in Original Suit No. 29 of 1918, Masulipatam, applied to sell the mortgage security. He cited a previous application, dated 2nd October 1922, and claimed to be in time because

“the plaintiff was restrained by an injunction from executing the mortgage decree, and the injunction was dissolved only on 16th August 1927.”

The Court accordingly ordered sale on 5th April 1928 but stayed it upon the respondent judgment-debtor's objection that the execution application was time-barred, and finally by its order, dated 14th August 1928, dismissed the application as barred by limitation. Hence the appeals.

We do not find that the Court had debarred itself from going into the question of limitation by ordering sale. If it had been misled by the appellant into thinking that there was no question of limitation it did right to go into the matter before the execution was

(1) (1920) 40 M.L.J. 1 (P.C.).

(3) (1905) I.L.R. 27 All. 334 (P.C.).

(2) (1900) I.L.R. 23 All. 13.

(4) (1894) I.L.R. 17 All. 106 (P.C.).

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concluded. This disposes of Civil Miscellaneous Appeal No. 52.

The appellant no longer maintains that there was an injunction as originally stated. But she argues that there was a decree, which in its effect was tantamount to an injunction, and which therefore attracted the provisions of section 15, Indian Limitation Act. The exact words of that section applicable to this case are:

"In computing the period of limitation prescribed for any . . . application for the execution of a decree, the . . . execution of which has been stayed by injunction or order, . . . the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded."

Eight months after the appellant obtained her decree certain worshippers impleading both the mortgagor and the mortgagee got it declared that the security of the mortgage was a religious endowment and not the property of the mortgagor in the decree in Original Suit No. 14 of 1920, Sub-Court, Masulipatam, and it is this decree which the appellant asks us to treat as an order staying the execution of her prior decree, until it was set aside on appeal by the High Court on 16th August 1927.

The learned District Judge has found that the petitioner was not restrained or prevented from executing her decree and if she had applied for execution the Court could not have refused to execute.

In our opinion this is correct. Suppose in a similar case the mortgagor was possessed of much property besides the mortgaged property. The decree-holder could put in his application for execution, sell the property with the blot on the title for what it was worth, or have it recorded that the property was legally extinct [see *Chand Mall Babu v. Ban Behari Bose*(1)] and

(1) (1923) I.L.R. 50 Cal. 718.

then apply for a personal decree: and to say that in these circumstances execution has been *stayed*, is to wrest the expression entirely away from its ordinary meaning.

To maintain her argument the appellant must read *stayed* as *inconvenienced*, and it remains to see whether the case-law supports that interpretation. There appears to be no Madras case directly in point. The two Bombay rulings, *Somshikharswami Guru v. Shivappa Mallappa Hosmani*(1) and *Ram Bharosay v. Sohan Lal*(2), run on all fours with the present case and negative the appellant's view. In regard to the institution of suits, not the execution of decrees, it is held in *Satyanarayana Brahmam v. Seethayya*(3) that no equitable grounds for the suspension of a cause of action can be added to the provisions of the Indian Limitation Act and a decree cancelling a promissory note as fraudulent is no stay of a suit upon the note. This judgment does not seem to have been brought to the notice of the Bench in *Lakshminarayana v. Lakshmipathi*(4) and there the ruling is to the exact contrary—that the decision in the collateral suit was in substance one which prevented the filing of a suit upon the note. Two cases are cited by that Bench in support of its view, *Pandey Satdeo Narayan v. Srimati Radheykura*(5) and *Satish Mohini Debya v. Pabna Bank, Limited*(6). In the Patna case the decree-holder was ordered to furnish security for half a lakh before executing his decree, and that order is interpreted as one staying the execution; there is no question of collateral decrees. In *Satish Mohini Debya v. Pabna Bank, Limited*(6) it is also found that there is an order amounting to a stay.

(1) (1923) 76 I.C. 557.

(3) (1926) I.L.R. 50 Mad. 417.

(5) (1919) 5 P.L.J. 39.

(2) (1924) 82 I.C. 1.

(4) (1927) 53 M.L.J. 520.

(6) (1918) 47 I.C. 907.

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"Execution was clearly stayed by the order of 27th May—the Judge struck off the execution case for the present."

Again, there is no question of a collateral decree, so *Lakshminarayana v. Lakshmipathi*(1) seems to stand alone, and of the two contradictory judgments we prefer *Satyanarayana Brahmam v. Seethayya*(2) as correctly stating the law.

In *Muthu Korakkai Ohetty v. Madar Ammal*(3) the question was referred to a Full Bench whether the cause of action for delivery to which article 180, Indian Limitation Act, applies is suspended during the pendency of proceedings for the setting aside of the sale, and this question attracted a general discussion of limitation covering a wide range. On page 208, SADASIVA AYYAR J. found that the sale was not finally approved till the proceedings to set it aside for fraud had terminated, a case very much on all fours with *Baijnath Sahai v. Ramgut Singh*(4), where a revenue sale was held to be finally confirmed after various proceedings. He then enunciates a principle underlying this ruling

"that whenever proceedings are being conducted between the parties *bona fide* in order to have their mutual rights finally settled, the cause of action for an application, the relief claimable wherein follows naturally on the result of such proceedings, should be held to arise only on the date when those proceedings finally settle such rights."

It can hardly be said that *Baijnath Sahai v. Ramgut Singh*(4) and the other case cited, *Mussumot Ranee Surno Moyee v. Shooshee Mokhee Burmonia*(5), lay down any such general proposition. These cases decide as a matter of fact that in certain circumstances a cause of action arose upon a certain date, and it would be very dangerous to proceed as though their underlying

(1) (1927) 53 M.L.J. 520.

(2) (1923) I.L.R. 50 Mad. 417.

(3) (1919) I.L.R. 43 Mad. 185 (F.B.).

(4) (1896) I.L.R. 23 Calc. 775 (P.C.).

(5) (1868) 12 M.I.A. 244.

principle contained a general proposition of statutory force. SUNDARAMMA
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The next case which is cited, *Nrityamoni Dassi v. Lakhan Chunder Sen*(1), requires to be read with care. As stated in the opening sentence it is a general concurrence with the judgment under appeal reported as *Lakhan Chunder Sen v. Madhusudan Sen*(2), a case in which *Mussumat Ranee Surno Moyee v. Shooshee Mokhee Burmonia*(3) and *Prannath Roy Chowdry v. Rookea Begum and others*(4) have been followed. In the latter case it is found on page 357 that it would be an inconsistent course in the Courts to hold that the pendency of a litigation furnished no "good and sufficient cause" for the appellant's not proceeding with his own claim. The words in inverted commas are a quotation from an exception to certain Bengal Regulations referred to on page 253 of this same Vol. VII :—

"But certain exceptions are introduced into those Regulations, amongst others, that the limitation of twelve years is not to apply where the party has been precluded by good and sufficient cause from bringing his suit within that period."

It cannot be said that the series of cases ranging from *Prannath Roy Chowdry v. Rookea Begum and others*(4) to *Nrityamoni Dassi v. Lakhan Chunder Sen*(1) have superimposed upon the Indian Limitation Act some provision which finds no place among its sections. On page 209 of *Muthu Korakkai Ohetty v. Madar Ammal*(5) SADASIVA AYYAR J. restates the principle in these terms :

"A person is not bound to bring an unnecessary suit or to make futile and unnecessary applications during the course of other litigation proceedings for the settlement of the same rights."

(1) (1916) I.L.R. 43 Calc. 660 (P.C.). (2) (1907) I.L.R. 35 Calc. 209.

(3) (1868) 12 M.I.A. 244.

(4) (1859) 7 M.I.A. 323.

(5) (1919) I.L.R. 43 Mad. 185 (F.B.).

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But that seems rather to beg the question. If the application is one which must be made in order to save the bar of limitation it is neither futile nor unnecessary. As observed by SESHAGIRI AYYAR J. in the same case on page 211, the Judicial Committee have held that exemptions not covered by the sections of the Indian Limitation Act should not be imported by Courts to relieve a party from the bar of limitation, and this principle is not overlooked in the six Privy Council cases which he cites including *Nrityamoni Dassi v. Lakhan Chunder Sen*(1). The OFFICIATING CHIEF JUSTICE speaks to the same effect on page 200 :

"It is hardly to be inferred from such observations that the Privy Council intended to lay down any rule other than those mentioned in various sections of the Indian Limitation Act."

In *Satyanarayana Brahmam v. Seethayya*(2) it is also held that whatever view be taken of *Nrityamoni Dassi v. Lakhan Chunder Sen*(1) no equitable grounds for suspension of a cause of action can be added to the provisions of the Limitation Act. *Ammathayi Ammal v. Sivarama Pillai*(3) is to the same effect.

A recent Privy Council case, *Nagendra Nath Dey v. Suresh Chandra Dey*(4), lays down that, though in theory some rule in regard to collateral litigation may be intelligible, when, however, there is no such rule in the Act, the only practical course is to interpret and follow the Act's provisions. We agree and hold that, if the appellant cannot bring herself within the exemptions provided for in the Act, she cannot escape the bar of limitation by pleading in equity an implied order; or a collateral litigation which would render her proceedings futile.

(1) (1916) I.L.R. 43 Cal. 660 (P.C.). (2) (1923) I.L.R. 50 Mad. 417.
(3) (1924) 48 M.L.J. 74. (4) (1932) 63 M.L.J. 329 (P.C.).

It remains to consider whether the execution petition which was dismissed on 16th January 1923 can be treated as revived by the present execution petition so that no question of limitation need arise.

There is no doubt that the execution petition was dismissed because *batta* was not paid, and it is difficult to see how a petition dismissed for that reason can possibly be revived. I have had the advantage of reading the judgment of my learned brother which is about to be delivered on this point, and entirely agree with his conclusion, and the statement of the case-law upon which it is founded.

The appeals therefore must be dismissed with costs.

SUNDARAM CHETTI J.—The appellant in these appeals filed Original Suit No. 29 of 1918 in the District Court, Masulipatam, on a mortgage bond and obtained a preliminary decree for sale of the mortgaged properties on 4th December 1919. The final decree in that suit was passed on 27th March 1922. She filed Execution Petition No. 57 of 1922 on 2nd October 1922 praying for the sale of the mortgaged properties for the realisation of the decree amount. That petition was dismissed on 16th January 1923. In 1919 one Mahomed Yusuff and another filed a suit in the District Court of Kistna at Masulipatam which was subsequently transferred to the Court of the Subordinate Judge, Masulipatam, and numbered as Original Suit No. 14 of 1920, in which the present appellant and also the mortgagors who executed the mortgage deed on which the decree in Original Suit No. 29 of 1918 was passed were also impleaded as defendants. The plaintiff therein contended that the mortgaged properties belonged to a mosque which was a public religious endowment and were inalienable and prayed for a declaration that the mortgage deed was invalid and unenforceable. That suit was decreed on

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15th January 1923 and the declaration sought for was accordingly given. The present appellant who was impleaded as the second defendant in that suit preferred an appeal to the High Court against that decision (Appeal Suit No. 349 of 1923). That appeal was allowed and the plaintiffs' suit brought on behalf of the mosque was dismissed on 16th August 1927. Subsequently, the present application for the execution of the decree in Original Suit No. 29 of 1918 was filed by the decree-holder on 23rd September 1927. The contention of the judgment-debtors is that this application for execution is barred by limitation. The learned District Judge upheld this objection and dismissed the execution petition.

The appellant puts forward several grounds in support of the contention that the present execution application should be held to be not barred by limitation. I propose to deal with one of those contentions and, that is, that the present Execution Petition No. 12 of 1928 filed soon after the High Court decision must be deemed to be one for the revival of the former Execution Petition No. 57 of 1922 which was dismissed on 16th January 1923. In order to apply the principles of law relating to the doctrine of revival, it would be well to ascertain what the exact facts in this case are. In Execution Petition No. 57 of 1922 the prayer was for the sale of the mortgaged properties. On 17th November 1922 notice of sale to the judgment-debtors was ordered fixing the hearing date as 12th December. On the latter date, the judgment-debtors were absent and the notices were found to have been affixed. Finding that the service was not sufficient, the Court ordered fresh sale notice to be taken out by the decree-holder and fixed the hearing date as 16th January 1923. When the petition was taken up for disposal on that

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date it was found that no batta was paid for fresh sale notice as ordered by the Court. On the express ground that no batta was put in, the petition was dismissed on that day without costs. Thus ended Execution Petition No. 57 of 1922. It is true that on 15th January 1923 the judgment in Original Suit No. 14 of 1920 was pronounced by the Subordinate Judge declaring that the mortgage in question was invalid and not binding on the trust. It may be contended with some show of reason that, even in the absence of an injunction restraining the sale of the properties in execution of the mortgage decree in Original Suit No. 29 of 1918, the declaration of the invalidity of that mortgage would be an obstacle to pursue the execution of the mortgage decree by seeking to sell the mortgaged properties. I am not, however, dealing with that point. What is stated in ground No. 13 in the memorandum of appeal in Civil Miscellaneous Appeal No. 51 of 1929 is that Execution Petition No. 57 of 1922 was dismissed on 16th January 1923 in consequence of the judgment in Original Suit No. 14 of 1920, dated 15th January 1923. If this statement is correct, it may very well be contended that the present execution application may be deemed to be one for the revival of the former one which was wrongly dismissed by reason of an obstacle which was subsequently removed and for no fault or neglect of the decree-holder. But, as I have set forth above, the dismissal of Execution Petition No. 57 of 1922, as would appear from the orders thereon, was due to the non-payment of batta for fresh sale notice as ordered by the Court. There is nothing to show that by reason of the adverse decision in Original Suit No. 14 of 1920 the executing Court dismissed that petition on the ground that the properties could not be put up for sale. In the absence of any sort of proof in

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support of the assertion made in ground No. 13 of the appeal memorandum and in the face of the express order of the Court passed on 16th January 1923, the only possible conclusion in this case is that that petition was dismissed on that date on account of the failure of the decree-holder to pay batta for fresh sale notice as ordered by the Court.

Though Order IX and Order XVII, Civil Procedure Code, do not apply to execution proceedings, still the Court has, doubtless, inherent power to dismiss an application for execution when the applicant makes default in the payment of batta which is necessary to put the Court in a position to proceed with the application. That being so, the dismissal of the execution petition on 16th January 1923 on account of the default of the decree-holder due to her own laches was a proper and final disposal of that petition. The principle of law deducible from a long course of decisions seems to be that an application for execution which has been finally and properly dismissed cannot be revived. This principle has been clearly stated in *Suryanarayana Pandarathar v. Gurunada Pillai*(1). In that case the application filed in September 1892 was found to have been properly dismissed, as it was filed in contravention of the previous order of the Court. The fresh application for execution which was filed in October 1895 could not be treated as a renewal of the application filed in September 1892 as the latter application was finally and properly dismissed. The same view has been expressed by RAMESAM J. in *Lahimiya v. Mazur Hannisa*(2) in the following passage :

“ Not unless there was a suspension without any default on her part can the principle of revival of a former execution petition be utilised in favour of the appellant.”

(1) (1897) I.L.R. 21 Mad. 257. (2) (1926) 95 I.C. 718.

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The learned Advocate for the appellant referred us to several decisions in support of his contention, but none of those decisions has proceeded on any ground inconsistent with the principle stated above and all those decisions are clearly distinguishable and cannot help the appellant in this case. Where an execution petition can be deemed to have been not finally disposed of and can be treated as still pending in the eye of law, the subsequent execution application may be treated as one for the continuance of the former one. Where the former execution application was dismissed finally, but for some reason (not due to any default or neglect on the part of the applicant) which subsequently turned out to be untenable, the later execution application would be deemed to be one for a revival of the former one. For all intents and purposes, there is not much difference between revival and continuation of the former application. The same principle however applies in both cases. In *Sasivarna Tevar v. Arulanandam Pillai*(1) it was held that the District Munsif had no legal authority to dismiss the execution petition simply because execution was stayed by the Sub-Court. The words “struck off” were taken to be not a dismissal. In this view, the execution petition was held to be pending in the eye of law and therefore the latter application was treated as one to continue the pending proceedings. The Full Bench decision in *Suppa Reddiar v. Avudai Ammal*(2) is based on the same principle. In that case, the execution petition dated 15th June 1898 and filed by the assignee decree-holder was dismissed on the ground that the assignment of the decree was for the judgment-debtor's benefit, and consequently the petitioner was

(1) (1897) I.L.R. 21 Mad. 262. (2) (1904) I.L.R. 28 Mad. 50 (F.B.).

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not entitled to execute the decree. But in a suit filed by the assignee decree-holder it was declared that the assignment of the decree was not for the benefit of the judgment-debtor. The subsequent execution petition filed by the assignee decree-holder on 24th November 1902 was therefore treated as one to revive or continue the former execution petition which was wrongly dismissed by the Court. In *Chalavadi Kotiah v. Poloori Alimelammah*(1) the dismissal of the execution petition, because execution was ordered to be stayed by another Court, was held to be a wrong order. It was also found that the dismissal of the execution petition was without notice to the parties. That being so, the execution petition was treated as one pending in the eye of law and therefore the later execution petition was treated as one for the continuance of the pending proceedings. The principle relating to revival as stated in this case was approved in *Surayya v. Venkataratnam*(2). That decision does not in any way help the appellant's contention that, even if the former execution petition was rightly dismissed, the fact that there was an obstacle to execution by reason of another decision would itself entitle the applicant to have the later execution petition filed beyond three years treated as one in revival of the former application. It seems to me clear that there should have been no final disposal or there should have been a wrong dismissal on account of some obstacle, which then existed but which was subsequently removed, in order to entitle the applicant to have the later application treated as one in continuation of or to revive the former one.

In *Raghunandun Pershad v. Bhugoo Lall*(3) it was held that the second application could not be deemed to

(1) (1907) I.L.R. 31 Mad. 71. (2) (1923) I.L.R. 47 Mad. 176.
(3) (1889) I.L.R. 17 Cal. 268.

be one for the revival of the first. The interruption to the execution proceedings must have been due to an intermediate order which was afterwards set aside, or the execution proceedings must have been rendered infructuous by some such obstacle, and the interruption to the execution should not have been occasioned by any fault or laches of the applicant. This was held to be the test for applying the principle of revival. To the same effect is the decision in *Raghunath Sahay Singh v. Lalji Singh*(1). The view taken in *Narayan v. Sono*(2), is virtually the same. As the original application of January 1888 was found to have been wrongly dismissed on the ground that a suit for the removal of the obstruction was pending, the later execution application was taken to be one to revive the previous one which had been suspended pending litigation. Much reliance was placed on behalf of the appellant on the Privy Council decision in *Qamar-ud-din Ahmad v. Jawahir Lal*(3). In that case, on the execution application filed in August 1888, execution was allowed to proceed by an order dated 18th December. On 29th November 1889 it was ordered that the case should be struck off the file and the record transferred to the Court of the Collector for execution. On the 23rd December it was ordered that the record be not sent to the Collector's Court as the decree-holder had not made the deposit on account of the transfer. Against the order of 18th December 1888 allowing execution to proceed, an appeal was preferred to the High Court which reversed that order, and in a further appeal to the Privy Council the order allowing execution was restored on 12th December 1894. Then an application for execution was made on 23rd November 1897 which

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—
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(1) (1895) I.L.R. 23 Cal. 397. (2) (1899) I.L.R. 24 Bom. 345.
(3) (1905) I.L.R. 27 All. 334 (P.C.).

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was held to be one to revive a pending execution petition suspended by no act or default of the decree-holder. Their Lordships have clearly held that the order dated 23rd December 1889 was in no sense a final order. It was also held that the interruption to or suspension of execution was not due to any act or default of the decree-holder. In such circumstances the decree-holder was found to be entitled to come again to the Court and ask for the revival or continuance of the former petition.

None of the decisions referred to above can be utilised to justify the appellant's contention pressed for acceptance in this particular case. The present case, according to the facts established, is not one in which the bar of limitation could be got over by invoking the principles governing revival. As was held in *Suryanarayana Pandarathar v. Gurunada Pillai*(1), the former Execution Petition No. 57 of 1922 having been finally and properly dismissed it could not be revived by the present Execution Petition No. 12 of 1928. This being a fresh application for execution, it must be deemed to be barred by limitation under article 182 of the Limitation Act, as it was filed more than three years from the date of the final order passed on the former application, namely, 16th January 1923.

As regards the other points involved in these appeals, I am in entire agreement with the conclusions arrived at by my learned brother in his judgment. I accordingly agree that these appeals should be dismissed with costs.

MOCKETT J. — I have had the advantage of reading the judgments of my learned brothers and I am in complete agreement with the views that they have

(1) (1897) I.L.R. 21 Mad. 257.

expressed on both the points raised in this appeal. I would only add this: section 15 of the Limitation Act is explicit in its terms. In order to call its provisions in aid it must be shown that a suit or application for the execution of a decree has been stayed by an injunction or order. The authorities bearing on the question have been fully discussed at the Bar during the arguments in this appeal. After considering them I do not think that there is any real basis for the view that equitable considerations can be introduced into the very clear provisions of the section. The injunction or order must be express in its terms and I find no room for the suggestion that an application can be stayed by implication. The trend of the Privy Council decisions seems to be to this effect, and in the recent case of *Nagendra Nath Dey v. Suresh Chandra Dey*(1) their Lordships explicitly lay down that

"in construing questions of limitation equitable considerations are out of place."

I am therefore constrained to join in expressing respectful dissent if any of the Indian cases cited lend colour to the doctrine that, although an injunction or order does not in its terms effect a stay, nevertheless it can be said to do so "equitably" or "by implication". I accordingly agree with the order proposed.

G.R.

(1) (1932) 63 M.L.J. 329 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Mockett.

1932,
October 11.

P. RAJAGOPALA GRAMANI (DEFENDANT), APPELLANT,

v.

BAGGIAMMAL (PLAINTIFF), RESPONDENT.*

Indian Trusts Act (II of 1882), ss. 11, 41—Trust deed—Minor beneficiary with vested or contingent interest under—Court—Inherent power of.

When there arises an emergency or a state of circumstances which it may reasonably be supposed was not foreseen or anticipated by the author of the trust and is unprovided for in the trust instrument, and which renders it desirable and perhaps even essential, in the interests of the beneficiaries, that certain acts should be done by the trustees which they themselves have no power to do, and to which the consent of all the beneficiaries cannot be obtained by reason of some not being *sui juris* or not in existence, the Court will exercise its general administrative jurisdiction by sanctioning, on behalf of all parties interested, those acts being done by the trustees.

When an advance under the above-mentioned circumstances was sought out of the estate for the benefit of a minor who is a beneficiary with a vested or contingent interest, the Court exercised its extraordinary jurisdiction and granted a reasonable amount.

APPEAL from the judgment of STONE J., dated 8th August 1932, in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 1879 of 1932 in Civil Suit No. 137 of 1932.

C. Brooke Elliot for appellant.

K. Krishnaswami Ayyangar with *V. S. Rangachari* for respondent.

Cur. adv. vult.

* Original Side Appeal No. 59 of 1932.

JUDGMENT.

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RAMESAM J.—This is an appeal from the decree of our brother STONE J., dated 8th August 1932, in Application No. 1879 of 1932 in Civil Suit No. 137 of 1932. The defendant is the appellant before us. The facts out of which this appeal arises may be briefly stated. One Raju Gramany executed a deed of trust on 1st September 1919 under which he settled his properties upon trust appointing the defendant, who is his son-in-law by his second wife, as trustee. At the time of his death he had three houses and had a fixed deposit for a sum of Rs. 50,000 in the Imperial Bank. He provided that one of the houses shall be utilised for the residence of the members of his family, that is, his wife and his daughters until their marriage. The income of the other houses which is said to be Rs. 80 per month was to be utilised by the trustee for paying taxes in respect of the estate, for repairs and for the expenses of his first wife, Baggiammal, who is the plaintiff in this suit. After her death, the net income was to be paid over to his son Gnanasundaram and after the death of Gnanasundaram it was to be distributed equally between his children. But, if he died issueless, it was to be distributed equally between the daughters. The interest accruing on the fixed deposit in the Imperial Bank was to be spent similarly. Misunderstandings had arisen between the first wife, Baggiammal, and the trustee, and this suit was filed by Baggiammal against the defendant for the purpose of removing him from trusteeship. A notice of motion was taken in this suit for the purpose of obtaining an interlocutory order from the Court directing the defendant to pay (i) Rs. 1,500 required for the nuptial ceremonies of the plaintiff's grand-daughter, that is,

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the daughter of Gnanasundaram, including the amount required for the earlier ceremony when she attained age; (ii) a sum of Rs. 2,000 required for paying off certain creditors from whom she borrowed for the expenses of her suits 268 and 269 of 1931; (iii) a sum of Rs. 1,000 required for paying off the decree-holder in Small Cause Suit No. 2480 of 1931, the plaintiff having borrowed that amount for the marriage expenses of her grand-daughter from one Ratna Bai; and (iv) certain miscellaneous items such as maintenance, etc., amounting to Rs. 1,000. Altogether she applies for the payment of Rs. 6,500.

The duties of the trustee are defined in the deed of trust already mentioned. No provision was made by the settlor for expenses of suits between his wife and the trustee, nor has he provided for the expenses of the marriage and nuptials and other ceremonies connected with his grand-daughter. It is very difficult to say what exactly he intended. Perhaps he intended that the expenses of the marriage and other ceremonies of the grand-daughter were to be defrayed by the wife out of the net income which was to be paid to her, or perhaps it was an oversight on his part. The duties of the trustee are governed by section 11 of the Trusts Act which runs as follows:—

"The trustee is bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation, except as modified by the consent of all the beneficiaries being competent to contract.

Where the beneficiary is incompetent to contract, his consent may, for the purposes of this section, be given by a principal Civil Court of original jurisdiction."

In this case Gnanasundaram's children are both minors and other children may be born who are entitled to take under the trust deed. The Court's consent is therefore necessary. Section 11 is based on the

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well-recognized principles of English law. In *Walker*, *In re. Walker v. Duncombe*(1) FARWELL J. observed:

"The question that I have to consider is whether I can on the true construction of this will authorize the trustees to make any expenditure larger than the sum mentioned in the will. I decline to accept any suggestion that the Court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible. But, in considering what is the true construction of the will, it is open to the Court to ascertain if there be a paramount intention expressed in the will, and, if so, to consider whether particular directions are properly to be read as subordinate to such paramount intention, or are to be treated as independent positive provisions."

Here, there being a paramount intention to benefit the grand-daughter, the question is whether the Court cannot sanction expenses for her marriage and other ceremonies as subordinate to that intention. In *New's case*(2) it was held:

"Where . . . there arises an emergency or a state of circumstances which, it may reasonably be supposed, was not foreseen or anticipated by the author of the trust and is unprovided for by the trust instrument, and which renders it desirable and perhaps even essential, in the interests of the beneficiaries, that certain acts should be done by the trustees which they themselves have no power to do, and to which the consent of all the beneficiaries cannot be obtained by reason of some not being *sui juris* or not yet in existence, the Court will exercise its general administrative jurisdiction by sanctioning, on behalf of all parties interested, those acts being done by the trustees . . .";

and it is said that this principle particularly applies where the estate consists of a business or of shares in a mercantile company. In *Tollemache*, *In re*(3), on appeal from the judgment of KEKEWICH J. on page 457 of the same volume, the Court affirmed the judgment of

(1) [1901] 1 Ch. 879, 885.

(2) [1901] 2 Ch. 534.

(3) [1908] 1 Ch. 955.

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KEKEWICH J. and dismissed the appeal. ROMER L.J. said :

" *New's case*(1) shows how far the Court will go, and beyond what point it will not go."

COZENS-HARDY L.J. observed :

" In my opinion, *New's case*(1) constitutes the high-water mark of the exercise by the Court of its extraordinary jurisdiction in relation to trusts."

In KEKEWICH J.'s judgment at page 457 he enumerated various sub-headings of this extraordinary jurisdiction. The first sub-heading is where an advance was sought out of the capital of the estate for the benefit of a minor who is a beneficiary with a vested or contingent interest. The present case must if at all fall under this heading. The second sub-heading is where a business has got to be continued. The third is where a business is to be sold to a joint stock company. The fourth is where re-construction of a company is contemplated. The fifth is where mortgages have got to be dealt with. As I already said, the further headings do not help the petitioner in this case—vide also Lewin on Trusts, thirteenth edition, pages 319 and 398. Having regard to the principles laid down in the above-cited English cases and the provisions of section 11 of the Trusts Act, we think we may sanction a reasonable amount for the expenses of the consummation ceremony of the granddaughter. But we think the amount sanctioned by the learned Judge is rather too high. We think it is enough to allow Rs. 750 for the coming of age ceremony and for the consummation ceremony, the amount to be distributed according to the discretion of the grandmother. This amount may be raised by a loan in the Imperial Bank or any other Bank on the security of the fixed deposit receipt at a reasonable rate of interest

(1) [1901] 2 Ch. 534.

and the interest and the principal of the loan should be paid off in monthly instalments of Rs. 50 to be deducted out of the monthly payment to the plaintiff from the net income. If before the loan is discharged the plaintiff and Gnanasundara die, the balance should be debited against the interest of the grand-daughter Chandrambal. But, as to the second, third and other items, we are unable to see how these expenses fall within the principles mentioned above.

It is said by the learned Advocate for the respondent that the trustee practically consented to the order of the learned Judge. MR. Brooke Elliot, who appeared before us for the appellant, denies that he ever consented, but, on the other hand, opposed the petition. He however, stated his willingness to obey the directions of the Court. The trustee is of course bound to obey the directions of the Court and a statement to that effect cannot amount to a consent that the plaintiff's application in respect of the various items should be allowed. Even Mr. Krishnaswami Ayyangar does not say that there was any consent that a particular amount should be awarded. Under these circumstances we think that the matter is really left to the Court to decide under section 11 of the Trusts Act. The consent of the other beneficiaries will not be necessary.

We allow the appeal to the extent indicated above. The plaintiff will pay two-thirds of the costs of the trustee to be debited against her monthly allowance in instalments. The trustee will re-imburse himself in respect of his own costs from the interest of the trust estate. The direction to pay the amount to the Advocate will remain.

MOCKETT J.—I agree. I must however add that I am satisfied that, whether there was or was not a

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consent decree in the strict sense, there was no serious opposition to the course adopted by the learned Judge. Previous orders in this trusteeship had been made by several Judges of this Court, all apparently by consent. Now the trustee takes up the correct attitude that the terms of the trust deed must be strictly applied and on that basis informs us that he argued before the learned trial Judge and has now in this appeal through his Counsel addressed learned arguments to us based on the provisions of the Indian Trusts Act and certain decisions of the English Chancery Courts. We must of course accept this assurance. I cannot help thinking that the argument before us was at least a little more emphatic than that addressed to the learned Judge. I do not find in the learned Judge's judgment, which has not been printed and which is very brief, any indication that the question of importance which is now raised was argued before him. I mention this as I was at one time during the course of this appeal of opinion that we ought to send the matter back to the learned trial Judge for decision after argument, but after what Mr. Brooke Elliot has said I concur with my learned brother that as the matter has now been fully argued before us it is better to deal with it here in the interests of saving judicial time.

The facts have been stated by my learned brother and I do not propose to repeat them. It is sufficient to say that in the estate of Raju Gramani deceased, his widow the plaintiff is given a life interest, with remainder over to the settlor's son for life and after his death to his children. The widow Baggiammal is now suing to remove the trustee with whom she is quarrelling. In fact she asks for Rs. 1,500 for the nuptial ceremonies of her grand-daughter, Rs. 2,000 for paying off creditors from whom she borrowed for

the expenses of litigation in 1931 and Rs. 1,000 for paying off a decree-holder. This debt was in respect of money borrowed for the marriage expenses of her grand-daughter and miscellaneous items to the extent of Rs. 1,000. She asks that this money should be advanced out of the capital of the trust property. We are told that this widow is an elderly lady. It must be borne in mind that she has a life interest only. There is no specific provision for maintenance or for raising loans in the trust deed. But section 41 of the Trusts Act would appear to give power to the trustee to do this when necessary. That surely must apply to the case of persons having reversionary interest in the capital. Section 11 of the Act deals with the duties of trustees. It will be seen that they are bound to carry out the purpose of the trust except as modified by the consent of all the beneficiaries being competent to contract or, where the beneficiary being incompetent to contract, the consent of a principal Civil Court of original jurisdiction has been obtained. There is a proviso that nothing in the section requires the trustee to obey any direction when to do so would be impracticable, illegal or manifestly injurious to the beneficiaries. Now it is clear, I think, that to raise Rs. 6,500 out of the capital for the purposes for which it is intended in this case to be used is not within the provisions of the Trusts Act. There has been no consent of the beneficiaries competent to contract and it is not suggested the matter was brought to the learned trial Judge on the basis that this was a matter so beneficial or advantageous to the minor beneficiaries that the formal permission of the Court should be obtained. Section 11 of the Trusts Act would appear to have been founded on the principles which are specifically stated in

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MOCKETT J. *New's case*(1) and I think that the doctrine therein enunciated applies to this country, namely, that "where an emergency or a state of circumstances which, it may reasonably be supposed, was not foreseen or anticipated by the author of the trust and is unprovided for by the trust instrument arises, the Court would exercise its general administrative jurisdiction on behalf of all the parties interested."

As pointed out, *New's case*(1) has been held in England now to

"constitute the high-water mark of the exercise by the Court of its extraordinary jurisdiction in relation to trusts."

The judgment of KIRKWOOD J. in *Tollemache, In re*(2), which is approved by the Court of Appeal in *Tollemache, In re*(3), and which appears to be the leading case on the subject, sets out the grounds on which the extraordinary jurisdiction of the Court would be exercised. I agree with my learned brother that the only payment which has been sanctioned in this case and which can conceivably be brought within that judgment is the amount of the nuptial expenses of the grand-daughter who has a contingent interest in the trust. My learned brother considers that Rs. 750 is adequate for the purpose named and I, of course, agree with him in any estimate of this sort. I also agree with the safeguards which he has named for the protection of the corpus of the trust property against diminution caused by the raising of Rs. 750. I agree that the appeal should be allowed to the extent which this sole payment involves and also with the order proposed as to costs.

Messrs. Short, Bewes & Co.—Attorneys for appellant.

G.R.

(1) [1901] 2 Ch. 534.

(2) [1903] 1 Ch. 457.

(3) [1903] 1 Ch. 955.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

P. K. KRISHNAMURTHY CHETTIAR (THIRD DEFENDANT),
APPELLANT, 1932,
December 1.

v.

K. S. A. S. SATHAPPA CHETTIAR AND TWO OTHERS
(PLAINTIFF AND FIRST AND SECOND DEFENDANTS),
RESPONDENTS.*

Mortgage—Puisne mortgagee paying off earlier mortgage without knowledge of subsequent mortgage—Presumption.

When a puisne mortgagee pays off an earlier mortgage he must be presumed to intend to keep that mortgage alive against all subsequent mortgages, even though he had no knowledge at the time of payment of the existence of subsequent mortgages.

APPEAL against the decree of the Court of the Subordinate Judge of Kumbakonam in Original Suit No. 25 of 1924.

K. Rajah Ayyar and V. Ramaswami Ayyar for appellant.

K. Bhashyam Ayyangar for first respondent.

Second and third respondents were unrepresented.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The third defendant is the appellant. The question for decision in this appeal is whether he is entitled to the right of subrogation to the extent of Rs. 1,181-12-7, the balance of consideration on the first mortgage, which he has paid off.

The facts are these:—The suit property was subject to four mortgages. The first mortgage is dated 20th November 1918. The third defendant has paid off the balance of the mortgage debt, namely, Rs. 1,181-12-7.

* Appeal No. 182 of 1923.

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The second mortgage is dated 22nd April 1921 and the mortgagee under it is the present plaintiff. The third mortgage with which we are not concerned is dated 30th November 1921, and the fourth mortgage dated 18th January 1922 is in favour of the third defendant, the appellant. Under this mortgage he had to pay from out of the consideration the balance of the first mortgage. He paid it on 19th January 1922. At that time he did not know of the existence of the plaintiff's mortgage and when he came to know of it he prosecuted the first defendant for "cheating". In the circumstances the appellant claims that he is entitled to the right of subrogation as against the plaintiff to the extent of the mortgage-debt which he has paid off. The lower Court disallowed the contention. The question has been dealt with in paragraph 11 of its judgment. The learned Subordinate Judge says:

"I do not think that an encumbrancer who in pursuance of the agreement between the mortgagor and the mortgagee pays a portion of the mortgage-money towards a prior mortgage is entitled to priority or subrogation of the prior mortgage rights."

Apparently the learned Judge treated the third defendant as an agent of the mortgagor in paying off the balance of the mortgage-debt and therefore he thought that the payment was on behalf of the mortgagor and not on behalf of himself. This ground of his decision is not tenable at all. In fact Mr. Bhashyam Ayyangar for the first respondent did not base his argument on this principle. His argument is this: that at the time when the payment was made the third defendant did not know of the existence of the plaintiff's mortgage and therefore it cannot be presumed that he intended to keep the first mortgage as a shield against the second mortgage of the plaintiff. It appears to us that the question is a very simple one and

has been decided once for all by the Privy Council in *Gokaldas Gopaldas v. Puranmal Premsukhdas*(1). In that case, their Lordships pointed out that a man having a right to act in either of the two ways, that is, either to extinguish or keep alive a mortgage, shall be presumed to have acted according to his interest. In this case the presumption should be that when the appellant paid off the prior mortgage he intended to keep that mortgage alive against all subsequent mortgages. But Mr. Bhashyam Ayyangar contends that the presumption should be held not to arise because he did not know at that time that the second mortgage existed. But the knowledge of the existence of the second mortgage is not a material consideration in pleading "the presumption", as has been held in *Gangadhara v. Sivarama*(2). In that case the learned Judges referred to the case, *Gokaldas Gopaldas v. Puranmal Premsukhdas*(1), and treated the presumption as a general one, the operation of which is not restricted by the question whether the man who makes the payment knew of the existence of the subsequent mortgage or not. The same conclusion was arrived at in *Andi Thevan v. Nagayasami Chettiar*(3). In *Chidambaram Nadan v. Muni Nagendrayyan*(4) it was held that a payment made by the subsequent mortgagee in discharge of a prior mortgage-debt cannot be considered to be a payment made on behalf of the mortgagor. These three decisions dispose of the ground on which the lower Court's judgment is based, and also the contention urged before us by Mr. Bhashyam Ayyangar. We therefore set aside the decree of the lower Court and declare that the appellant is entitled to get priority over the plaintiff's mortgage to the extent of the balance of the consideration which he has paid off with

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(1) (1884) I.L.R. 10 Cal. 1035 (P.C.). (2) (1884) I.L.R. 8 Mad. 246.
(3) (1927) 55 M.L.J. 389. (4) (1920) 39 M.L.J. 445.

reference to the first mortgage, that is, the sum of Rs. 1,181-12-7 together with interest.

The case will be remanded to the lower Court for passing a final decree giving the appellant priority in the manner indicated above. The appellant is entitled to costs here and in the Court below with respect to the amount on which he has succeeded.

The court-fee will be refunded.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

JUGISTI MAHAPATRO (TRANSFEE DECREE-HOLDER AND PETITIONER), APPELLANT,

v.

KORADA MAGATA PATRO AND EIGHTEEN OTHERS

(ORIGINAL DECREE-HOLDER AND RESPONDENTS AND DEFENDANTS TWO TO FIVE, SEVEN AND SIXTEEN, EIGHTEEN AND TWENTY TO TWENTY-TWO), RESPONDENTS.*

Mortgage suit—Preliminary decree—Appeal from—Withdrawal of—Dismissal with costs—Final decree—Application for—Starting point of limitation for—Indian Limitation Act (IX of 1908), art. 181.

In a case where an appeal against a preliminary decree in a mortgage suit was filed but was withdrawn and dismissed with costs, an application for a final decree made within three years from the date of the order dismissing the appeal is not barred by limitation.

Abdul Majid v. Jawahir Lal, (1914) I.L.R. 36 All. 350 (P.C.), and *Batuk Nath v. Munni Dei*, (1914) I.L.R. 36 All. 284 (P.C.), distinguished.

APPEAL against the orders of the District Court of Ganjam, dated the 9th day of March 1928, in Interlocutory

* Appeal No. 286 of 1930.

Applications Nos. 22 of 1928 and 36 of 1927 in Original Suit No. 7 of 1918.

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S. A. Seshadri Ayyangar for appellant.

C. Sambasiva Rao for sixth, seventh, tenth and twelfth to fifteenth respondents.

First to fifth, eighth, ninth, eleventh and sixteenth to nineteenth respondents were unrepresented.

Cur. adv. vult.

JUDGMENT.

MADHAVAN NAIR J.—I have had the advantage of reading the judgment which my learned brother is going to deliver and I agree with him. As the question involved in the appeal is of some importance, I will briefly record my reasons in support of my conclusion.

MADHAVAN
NAIR J.

This appeal arises out of an application filed by the transferee decree-holder for passing a final decree in a mortgage suit. The facts of this case are not disputed. In Original Suit No. 7 of 1918 on the file of the District Court of Ganjam, which was a suit on a mortgage, a preliminary decree for sale was passed on 12th December 1921 fixing six months for the payment of the decree amount. An appeal against the decree was filed in the High Court—Appeal No. 259 of 1923—by the fifth judgment-debtor. Notice was ordered in the appeal, and some of the respondents were served. At this stage the appeal itself was withdrawn by the appellant and it was dismissed with the costs of those respondents that appeared. The order passed by the High Court runs thus:

“The appeal is withdrawn. It is dismissed with costs. The costs will be proportionate . . .”

This order was passed on 21st January 1924. On 21st January 1927 the transferee decree-holder presented Interlocutory Application No. 36 of 1927 in the

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District Court for a final decree. The question that arises for decision is whether this petition is in time.

Under article 181 of the Limitation Act which is applicable to the case, the period of limitation for applying for a final decree is three years from the time when the right to apply accrues. In the present case, the right to apply accrued on the 12th of June 1922. The time for filing the application for the final decree expired on the 12th of June 1925. Interlocutory Application No. 36 of 1927 presented on 21st January 1927 would therefore be clearly barred by time. But the petitioner argues that, having regard to the fact that an appeal was filed to the High Court against the judgment and decree in Original Suit No. 7 of 1918, that judgment and decree became merged in the final decree of the High Court in Appeal No. 259 of 1923, that limitation runs from 21st January 1924, the date of the final decree, and that since Interlocutory Application No. 36 of 1927 was presented on 21st January 1927, within three years of the High Court's decree, the petition is in time. The respondents argue that, since the appeal filed against the preliminary decree was withdrawn and dismissed without consideration of the merits, it cannot be said that the original decree has been merged in the appellate decree and that therefore the filing of the appeal cannot be availed of by the petitioner for the purpose of getting a fresh starting point for limitation.

The question for determination is whether, in a case where an appeal against a preliminary decree was filed but was withdrawn and dismissed with costs, the time for applying for a final decree would run from the date fixed in the preliminary decree for payment or from the date of the order dismissing the appeal. The learned District Judge relying on a decision of the

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Privy Council in *Abdul Majid v. Jawahir Lal*(1) declined to accept the petitioner's contention and held that the application was barred by time. It is argued for the petitioner that the present case does not fall within the scope of the Privy Council decision and that his application is within time as having been filed within three years of the date of the High Court's decree.

In the appeal before the Privy Council, which also arose out of an application for a final decree, the facts were as follows:—In a suit to enforce a mortgage a preliminary decree for sale was made by the Subordinate Judge on the 12th of May 1890. This decree was confirmed by the High Court on the 8th of April 1893. Against the decree of the High Court an appeal to the Privy Council was admitted, but was dismissed for want of prosecution on the 13th of May 1901. On the 11th June 1909 an application was made to the Subordinate Judge "for an order absolute" to sell the mortgaged properties, in other words, "for an order directing enforcement of the order *nisi* which had been confirmed by the decision of the High Court on the 8th of April 1893". This application was obviously barred under article 179 of the Limitation Act of 1877 (which applied to the case) as having been filed after the expiry of three years from the order of the High Court confirming the decree, which was the final order of the appellate Court; but it was argued before the Privy Council that the decree which was sought to be enforced had been "constructively turned" into a decree of the Privy Council by virtue of the dismissal of the appeal on the 13th of May 1901 and that therefore the period of limitation was twelve years from the

(1) (1914) I.L.R. 36 All. 350 (P.C.).

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 13th May 1901 under article 180 of the Limitation Act of 1877 which corresponds to article 183 of the present Limitation Act. This contention was rejected by their Lordships of the Privy Council with the following observations :

"The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognized authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all. To put it shortly, the only decree for sale that exists is the decree dated the 8th of April 1893, and that is a decree of the High Court of Allahabad. The operation of this decree has never been stayed and there is no decree of His Majesty in Council in which it has become merged. The period of limitation applying to the enforcement of it at all material times was therefore a period of three years. The respondents' right is therefore barred by limitation."

The same conclusion was reached by their Lordships of the Privy Council in *Batuk Nath v. Munni Dei*(1) which was also a case where the appeal before His Majesty in Council was dismissed as the appellant or his agent had not taken any effective steps for prosecution. The observations of their Lordships quoted above from *Abdul Majid v. Jawahir Lal*(2) were quoted by their Lordships in *Sachindra Nath Roy v. Maharaj Bahadur Singh*(3). These observations, says the respondents' learned Counsel, make it clear that in their Lordships' opinion the decree of the lower Court cannot be considered to have become merged in the decree of the appellate Court unless the appellate Court dealt judicially with the matter in the suit, in other words, heard it on the merits. If this is the basis of the decision in

(1) (1914) I.L.R. 38 All. 284 (P.C.). (2) (1914) I.L.R. 38 All. 350 (P.C.).
 (3) (1921) I.L.R. 49 Cal. 203 (P.C.).

Abdul Majid v. Jawahir Lal(1) it must follow that the judgment and decree in Original Suit No. 7 of 1918 in the present case cannot be said to have become merged in the order of the High Court as that order did not deal with the subject-matter of the appeal on its merits, since the appeal was withdrawn by the appellant. But the appellant seeks to distinguish the decision in *Abdul Majid v. Jawahir Lal*(1) on the ground that what was decided in that case was that there was formally no appeal before the Privy Council, that therefore there was no decree of the Privy Council to which article 183 of the Limitation Act would apply, and that the same reasoning should not be applied to the present case inasmuch as there was an appeal formally before the Court and that appeal was finally disposed of by an order of the High Court. According to the appellant's contention, where an appeal lay and that appeal was disposed of by an order, that order will amount to a final order in which the original order appealed against gets merged except as in the case dealt with by the Privy Council which was a case of dismissal for default. He would confine the operation of the decision in *Abdul Majid v. Jawahir Lal*(1) strictly to cases which have been dismissed for default of prosecution and not to cases like the present one in which the appeal was formally brought before the Court but was withdrawn and dismissed. The question is whether this distinction sought to be drawn by the appellant's Counsel can be maintained.

I find it somewhat difficult to make up my mind on this point, but, after giving my best consideration, I am inclined to accept the appellant's contention. At first sight it may appear, if I may say so with very great respect, that the reasoning of their Lordships, that for

(1) (1914) I.L.R. 38 All. 350 (P.C.).

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a judgment of the lower Court to become merged in the judgment of the appellate Court the order of the appellate Court should deal judicially with the matter of the suit, would apply equally to cases where an appeal has been dismissed for want of prosecution as well as to cases where, as in the one before us, the appeal was formally withdrawn and dismissed and an order was drawn up dismissing it with costs. But having regard to the circumstances in which the observations were made, I do not think this is a correct interpretation of their Lordships' judgment. In that case their Lordships decided that the dismissal of an appeal by His Majesty in Council for want of prosecution does not give a fresh starting point of limitation under article 180 of the Limitation Act of 1877 and that the limitation ran from the order of the High Court confirming the decree which was the final order of the appellate Court. The observations so strongly relied upon by the respondents that

"the order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from."

were made by their Lordships to meet the argument that the order of the Privy Council must be taken to have constructively turned the decree that was sought to be enforced into a decree of the Privy Council. That was all. Their Lordships' observations do not in any way relate to an order referred to in clause 2 of article 179, though at first sight it may appear that in their Lordships' view such an order should also be one dealing judicially with the merits of the appeal. But this point—the nature of the final order within the meaning of clause 2—cannot be said to have been inferentially decided as the existence of such an order does not seem to have been an essential part of the

argument, for the real point urged was that there was, what was alleged to be, a decree of the Privy Council and that article 180 of the Limitation Act applied to the case; and then, their Lordships pointed out that, in the circumstances referred to, the order passed by them dismissing the appeal for want of prosecution cannot be said to be a judicial order. If it is to be understood that in their Lordships' view that the order referred to in clause 2 of article 179 should also be an order dealing judicially with the merits of the appeal, then the decision in *Peria Kovil Ramanuja Peria Jeeyangar v. Lakshmi Doss*(1) of this Court may have to be reconsidered. In that case, a second appeal was filed against the lower appellate Court's decree but that was withdrawn and the High Court passed the following order:

"The appellant's vakil having applied for permission to withdraw the appeal, it is ordered that this appeal be and hereby is dismissed; and it is further ordered that the appellant do pay to the respondent his costs of this second appeal."

The Full Bench decided that

"where a second appeal is preferred and an order is made by the Court to which the appeal is preferred which has the effect of finally disposing of the appeal, time runs from the date of such order; and it makes no difference that such second appeal was withdrawn by the appellant."

This case is very much like the one before us; though the second appeal was not disposed of on the merits, time for limitation was calculated from the date of the appellate order as it had the effect of finally disposing of the appeal. In my opinion what was laid down by their Lordships of the Privy Council in *Abdul Majid v. Jawahir Lal*(2) was only this: viz., that in

(1) (1906) I.L.R. 30 Mad. 1 (F.B.).

(2) (1914) I.L.R. 36 All. 350 (P.C.).

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that case the order passed by their Lordships cannot be considered to be a judicial order passed on appeal because the appeal itself for the reason stated in their Lordships' judgment never came up for disposal by their Lordships and therefore the period of limitation should not be calculated from the date of the order passed in appeal within the meaning of article 183 of the Limitation Act. The other decision of the Privy Council reported as *Batuk Nath v. Munni Dei*(1) does not carry the matter much further. In that case, as the appellant had not taken effectual steps for the prosecution of the appeal presented to His Majesty in Council, the Registrar under rule 5 of the Order in Council dismissed the appeal for non-prosecution. It was held by their Lordships of the Privy Council that

"such a dismissal for want of prosecution is not the final decree of an appellate Court within the meaning of article 179, clause 2, of Schedule II of the Indian Limitation Act (1877) from which the period of limitation can be reckoned under that article in support of the application for the execution of a decree."

The true scope of these two decisions of the Privy Council has been pointed out in *Raghu Prasad Singh v. Jadunandan Prasad Singh*(2). See also the decision in *Gohur Bepari v. Ram Krishna Shaha*(3). It follows from what I have said above that the observations in *Abdul Majid v. Jawahir Lal*(4) relied on by the learned Counsel for the respondents should be strictly confined to cases where the appeals are dismissed for want of prosecution and should not be applied to a case like the one before us where the appeal was formally brought before the Court for disposal and was finally disposed of by an order dismissing it with costs. In such a case, in my opinion, the order of the lower

(1) (1914) I.L.R. 36 All. 284 (P.C.). (2) (1920) 6 P.L.J. 27.
(3) (1927) 46 C.L.J. 111. (4) (1914) I.L.R. 36 All. 350 (P.C.).

appellate Court supersedes the order of the Court appealed against and time begins to run under article 181 from the date of the order passed in appeal. In *Venkayya v. Sathiraju*(1) it was held that an application for a final decree for sale under Order XXXIV, rule 5, Civil Procedure Code, is governed by article 181 of the Limitation Act and the starting point, in cases where there has been an appeal from the preliminary decree, is the date of the appellate decree whether the latter confirmed or varied the preliminary decree. I think the same should be the decision in the present case also, notwithstanding the fact that the appeal was withdrawn and dismissed without a consideration of the merits. In my opinion, the observation referred to in *Abdul Majid v. Jawahir Lal*(2) cannot be said to apply to a case like the one now under consideration.

In this connection the following observation of the learned Judges in *Sahu Nandlal Saran v. Sahu Dharam Kirti Saran*(3) may also be referred to with advantage. In that case it was held that

"where an appellate decree either affirms, modifies or reverses the decree of the trial Court, the period of twelve years under section 48 of the Code of Civil Procedure, should begin from the date of the decree of the appellate Court, but where it has been held that no appeal lay, the order disposing of the so-called appeal will not amount to a decree and therefore the period of limitation, in such a case, should be counted from the date of the original decree and not from the date of the (dismissal of the) so-called appeal."

After referring to the decisions of the Privy Council in *Abdul Majid v. Jawahir Lal*(2) and in *Sachindra Nath Roy v. Maharaj Bahadur Singh*(4) and pointing out that the case before them was stronger "because in the Privy Council case an appeal did lie and had been properly

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(1) (1921) I.L.R. 44 Mad. 714. (2) (1914) I.L.R. 36 All. 350 (P.C.).
(3) (1925) 24 A.L.J. 465. (4) (1921) I.L.R. 49 Cal. 203 (P.C.).

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preferred" while in the case before them no appeal lay at all and the proceedings did not terminate in an order dealing judicially with the matter in the suit, the learned Judges observed as follows:—

"The converse proposition, though it is not necessary for us to decide this, would also seem to be in conformity with the spirit of section 2, with the decision of their Lordships of the Privy Council, and with Indian judicial authority, viz., where an appeal lay and that appeal was disposed of by an order, that order will amount to a decree except as in the case dealt with by their Lordships of the Privy Council (a case of dismissal for default) and in other special cases where it is expressly declared by section 2 that the order shall not amount to a decree."

For the above reasons I think it must be held that an order passed by a decree dismissing the appeal with costs, notwithstanding the fact that the appeal was withdrawn by the appellant, should be held to be an order finally disposing of the appeal superseding the order of the Court appealed against and that for the purpose of the present case, time begins to run from the date of the order of the High Court, and therefore Interlocutory Application No. 36 of 1927, the application for passing of the final decree, is not barred by limitation. I would, therefore, allow the appeal with costs. The result is that the petition will be disposed of by the lower Court on the merits. The court-fee on the appeal memorandum will be refunded.

JACKSON J. JACKSON J.—The present point for determination is whether a mortgagee decree-holder who obtained his preliminary decree on 12th December 1921, is within time when applying for a final decree on 21st January 1927, because an appeal against that preliminary decree was withdrawn and dismissed on 21st January 1924. It is pleaded that the preliminary decree became merged in the appellate decree, upon the date of which the

right to apply accrued, and therefore the application is within time.

Although under the Code of Civil Procedure (Order XLI, rule 5) an appeal shall not operate as a stay of proceedings under a decree, yet if there is an appeal against the preliminary decree there is no conclusive decree under which the decree-holder can proceed.

"The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties. When an appeal has been preferred it is the decree of the appellate Court which is the (final) decree in the cause."

Jowad Hussain v. Gendan Singh(1). The "final" which I have bracketed means of course conclusive; it is not the antithesis of preliminary.

So far there is no difficulty; time runs from the appellate Court decree. But then the question has arisen: What if the appellate Court does not decree?

The Allahabad High Court attempted to get over this difficulty by ruling that whenever the appellate Court dismisses an appeal, it passes a decree; *Abdul Majid v. Jawahir Lal*(2). But the special case under its consideration—where the Privy Council had recommended His Majesty to dismiss the appeal for non-prosecution—was taken up on appeal to the Privy Council which pronounced as follows:—

"The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognized authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all. . . there is no decree of His Majesty in Council in which the preliminary decree has become merged."

(1) (1928) I.L.R. 6 Pat. 24 (P.C.). (2) (1910) I.L.R. 33 All. 154 (F.B.).

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Abdul Mujid v. Jawahir Lal(1). Then comes the question, Is a dismissal upon withdrawal also a mere recognition that the appellant has not complied with requisite conditions, or is it a decree?

Although the withdrawal of an appeal is mentioned in Order XLI, rule 22 (4), the Code nowhere lays down the procedure of the Court upon such withdrawal, and any consequent dismissal must presumably be under section 151, Civil Procedure Code.

In Bombay it may not be the practice to dismiss; for in *Patlogi v. Ganu*(2), the High Court appears simply to have permitted withdrawal; and such permission was held not to be a decree.

This ruling is considered by a Full Bench of our Court in *Peria Kovil Ramanuja Peria Jeeyangar v. Lakshmi Doss*(3), where it is held that time runs from the date of an order which has the effect of finally disposing of an appeal.

The Full Bench does not say whether in its opinion an order of dismissal consequent upon a withdrawal is a decree.

The determining factor would seem to be whether or no the Court has in the terms of section 2, Civil Procedure Code, "expressed an adjudication" or in the terms of the Privy Council ruling has "dealt judicially with the matter".

The exact order of dismissal runs thus:

"The appeal is withdrawn. It is dismissed with costs. The costs will be proportionate to the interests of the sixth and seventh respondents who appear by Counsel"

No doubt if the Court had been so disposed it might simply have recorded "Leave granted to withdraw",

(1) (1914) I.L.R. 36 All. 350 (P.C.).

(2) (1890) I.L.R. 15 Bom. 370.

(3) (1906) I.L.R. 30 Mad. 1 (F.B.).

and then the appellant would be in the same position as if he had not appealed at all; but when the Court went further and considered the award and distribution of costs it is difficult to see how it has not expressed an adjudication and therefore passed a decree. How are the costs recoverable except under the decree of the High Court?

If the principle applicable to non-compliance of conditions is extended to withdrawal, it may lead to deplorable results.

A mortgagee obtains a preliminary decree, which becomes inconclusive by reason of an appeal being lodged. Then if preliminary conditions are not complied with, in all human probability, although the decree-holder is thrown back upon the original date of his decree, he will be within three years, and may not have much cause to complain that the unjustifiable action of his judgment-debtor in preferring an infructuous appeal has deprived him of several months to which the statute entitled him. But suppose the preliminary conditions are duly complied with, and the appeal comes on for hearing, and then the appellants withdraw. Then the decree-holder may find himself time-barred; for in these days an appeal may well be pending over three years. No doubt in such circumstances the Court might refuse withdrawal; but it is startling to consider that the perfectly normal and natural order of the Court "Withdrawn. Dismissed. Costs to respondents." would have the effect of unsuiting the respondents as barred by limitation.

But apart from this *reductio ad absurdum*, in my opinion the order "Dismissed with costs" is a decree, and time runs from that order.

I should allow this appeal with costs to appellant.

G.R.

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APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Mockett.

1932,
September
20.

MUTHUKUMARA SATHAPATHIAR (RESPONDENT),
APPELLANT,

v.

SIVANARAYANA PILLAI AND ANOTHER (APPELLANT AND
HIS LEGAL REPRESENTATIVE), RESPONDENTS.*

*Hindu Law—Joint family—Member of—Alienation by—Share
on partition to which alienee entitled—Share as at date of
alienation or share as at date of suit for partition.*

The defendant was an alienee from a brother in a Hindu joint family and by virtue of the alienation the defendant got into possession of a certain parcel of land. The rest of the joint family property was dissipated, and then the plaintiff, the other brother, sued for partition of that parcel.

Held that the plaintiff was entitled to take the family property as existing on the date of his suit and to recover one-half from the defendant.

A member of a Hindu joint family cannot by way of alienation part with more than he has got. The interest of the alienee fluctuates, subject to the exception recognized by a long series of cases that it does not become extinct on the death of the alienor. When the alienee compels partition his right to the property must be worked out as on the date of the suit for partition and not as from the date of the alienation.

Decision of the Full Bench in *Rangasami v. Krishnayyan*, (1890) I.L.R. 14 Mad. 408 (F.B.), preferred to that of the Full Bench in *Chinnu Pillai v. Kalimuthu Chetti*, (1911) I.L.R. 35 Mad. 47 (F.B.).

Even if the view in *Chinnu Pillai v. Kalimuthu Chetti*, (1911) I.L.R. 35 Mad. 47 (F.B.), that the share ceases to fluctuate from the date of the alienation is accepted, the hotchpot should not be taken as that which existed on the date of the alienation.

* Letters Patent Appeal No. 29 of 1927.

APPEAL under Clause 15 of the Letters Patent against the judgment of DEVADOSS J. in Second Appeal No. 255 of 1924 preferred against the decree of the Court of the Additional Subordinate Judge of Tinnevely in Appeal Suit No. 171 of 1923 (Appeal Suit No. 1256 of 1922, District Court of Tinnevely) preferred against the decree of the Court of the District Munsif of Tinnevely in Original Suit No. 420 of 1920.

K. Rajah Ayyar and *V. Ramaswami Ayyar* for appellant.

T. M. Ramaswami Ayyar for respondents.

Cur. adv. vult.

JUDGMENT.

JACKSON J.—The facts are set forth in the judgment under appeal and need not be restated in detail. JACKSON J.

The defendant is alienee from a brother in a Hindu joint family and by virtue of the alienation defendant got into possession of a certain parcel of land. The rest of the joint family property was dissipated, and then plaintiff, the other brother, sued for partition of this parcel. The District Munsif dismissed his suit. The Subordinate Judge decreed him a moiety. A single Judge of this Court again dismissed the suit, and plaintiff appeals under the Letters Patent.

The parties agree that at the time of the alienation the defendant purchased the right to compel partition of the brother's share as it then stood. The plaintiff reads this as meaning that one-half was purchased, and from the property existing at the time of the partition suit defendant can take that half. The defendant would read into it something more, that he purchased not only the right to the fractional share, but the right to divide the family property as it stood on the date of alienation. Put mathematically it may be said that

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plaintiff concedes that defendant has $\frac{1}{2}$, and defendant claims $x/2$.

It is a question which as the authorities abundantly show cannot be decided by pure law or logic.

That alienations of a coparcener's share are inconsistent with Hindu Law is laid down by the Privy Council in *Suraj Bunsî Koer v. Sheo Persad Singh*(1), referred to by WHITE C.J. in *Chinnu Pillai v. Kalimuthu Chetti*(2), and SANKARAN NAIR J. on page 56.

But it was held that in equity a person who had parted with his money should receive something in exchange, and therefore in *Deendyal Lal v. Jügdeep Narain Singh*(3), the alienee was given a right limited to compelling the partition which his debtor might have compelled had he been so minded before the alienation of his share took place.

In *Hardi Narain Sahu v. Ruder Perakash Misser*(4) the Privy Council interprets this in the sense that "only that passed which the father, the person against whom the decree was obtained, had." A very natural proposition, if one may say so, that a man cannot sell more than he has got. "Not the share in the property, but the right which the father would have to a partition."

Of course this right to a partition terminates upon death; and a coparcener always holds the right subject to this contingency. So, if the decree-holder literally bought only what his vendor had, he bought the right of partition subject to this contingency; and, when his vendor died, he would have no right at all.

That seems to be hard logic, and in *Suraj Bunsî Koer v. Sheo Persad Singh*(1) the alienee was allowed

(1) (1879) I.L.R. 5 Calc. 148, 166 (P.C.).

(2) (1911) I.L.R. 35 Mad. 47, 52 (F.B.).

(3) (1877) I.L.R. 3 Calc. 198, 209 (P.C.).

(4) (1883) I.L.R. 10 Calc. 626, 635-6 (P.C.).

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the right even after the death of the alienor. "In Madras", the Privy Council observes on page 173, "the mortgage executed by the alienor in his lifetime might operate after his death as a valid charge", and in the Bengal case under consideration it holds that the execution proceedings had gone so far as to constitute a valid charge which could not be defeated by death before the actual sale.

If this is so, it is a clear departure from the dictum that an alienor could only sell what he had. He had a right subject to the contingency of death, and he sold a right not subject to the contingency of his death.

This difficulty was pressed upon the referring Judges in *Rangasami v. Krishnayyan*(1), and they thought that in logic the alienee would be subject to all contingencies such as births diminishing his alienor's share, and his alienor's death obliterating that share. They referred to a Full Bench the question "to what share in the property is the plaintiff entitled". The Full Bench held that the purchaser takes an uncertain and fluctuating interest. It did not decide what would be the effect of death, but observed *obiter* that because the interests carved out at the sale vest in the purchaser at once, the subsequent death of the vendee cannot divest the interest which has once vested. On this line of reasoning the other subsequent contingencies such as births into the coparcenary might, it may be thought, have been treated as not affecting the vested interest; however the Full Bench held that the alienated share is affected by subsequent births, and is to be reckoned with reference to the joint family as it stands at the time of the suit for partition and not as it stood at the time of alienation.

(1) (1891) I.L.R. 14 Mad. 408, 410 (F.B.).

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In *Hardi Narain Sahu v. Ruder Perakash Misser*(1) the family consisted of father, mother, and minor son. The father alienated his share and then made over his interest to his son who sued the alienee for possession.

The Calcutta High Court treating it as a suit for partition decreed that the minor, the mother, and the father's alienee should each have one-third. The alienee appealed claiming a half. It is not quite clear upon what he based this plea but apparently (page 633) Mr. Doyne on his behalf, while conceding that the mother would in Bengal be entitled to one-third on partition, argued that before partition she only had a maintenance right, and probably claimed that the alienee had carved out interests at the sale which would vest in him at once, the language of the *obiter* upon death in the Madras Full Bench case. The Privy Council quoted (pages 635-6) the passage already cited from *Deendyal Lal v. Jugdeep Narain Singh*(2) "only that passed which the father had" and also quoted "so long as Bhagwa lived the alienee had an interest in the property which entitled him to demand a partition", and it then proceeds:

"The interest which is purchased is not, as Mr. Doyne argued, the share at that time in the property, but it is the right which the father, the debtor, would have to a partition, and what would come to him upon the partition being made. That is the answer to Mr. Doyne's argument that the father was entitled to a half."

Then it seems to have been suggested that in any case the Calcutta High Court did wrong to decree partition, and the rights of a second son who had been born into the family should be considered. The Privy Council agreed that the decree was not proper, but the person appealing was the alienee, not the minor, and,

(1) (1883) I.L.R. 10 Calo. 626 (P.C.). (2) (1877) I.L.R. 3 Calo. 198 (P.C.).

as the decree for partition gave him a more favourable decree than he may have been entitled to, and as no one was urging that he should have less than what the decree gave him (there was no cross-appeal), there was no ground for altering it.

The question whether the alienee's suit was maintainable after the alienor's death came directly before our Court in *Aiyyagari Venkataramayya v. Aiyyagari Ramayya*(1). DAVIES J. was inclined to follow *Rangasami v. Krishnayyan*(2) to its logical conclusion, holding that death was a contingency operating on the purchaser's fluctuating interest. BENSON J. thought that the point was decided by authority. They referred the question whether the suit was maintainable to a Full Bench. WHITE C.J. AND MOORE J. agreed with BENSON J. that there was authority for an affirmative answer, and preferred simply *stare decisis*. BHASHYAM AYYANGAR J. took the opportunity to traverse the whole question, and expressed the opinion that *Rangasami v. Krishnayyan*(2) was wrongly decided.

He quotes (page 705) the definition of the alienee's right in *Deendyal's case*(3), which has also been quoted above, and puts into his own italics the words "before the alienation of his share takes place". There does not seem to be any warrant for this special emphasis. In this case there was no question of fluctuating interest, and the sentence might have stopped with "compelling the partition which his debtor might have compelled" without injury to its sense. Even if "before the alienation of his share" has special significance, which I doubt, at most it is a mere *obiter* on a question not discussed in the case, and upon which it would be most dangerous to build.

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(1) (1902) I.L.R. 25 Mad. 690 (F.B.). (2) (1891) I.L.R. 14 Mad. 408 (F.B.).
(3) (1877) I.L.R. 3 Calo. 198, 209 (P.C.).

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BHASHYAM AYYANGAR J. next discusses *Suraj Bunsu Koer v. Sheo Persad Singh*(1) and then *Hardi Narain Sahu v. Ruder Perakash Misser*(2), which he summarizes in this manner (page 709):—

“During the pendency of the suit another son was born to the judgment-debtor and it was contended before the High Court that a share should be allotted to such son also . . . The High Court overruled this contention . . . The case was carried in appeal to the Privy Council by the purchaser . . . the decision of the Privy Council proceeds on the footing that neither the birth of the second son nor the death of the mother affected the share to which the purchaser became entitled.”

As I have shewn above the Privy Council, so far from making this the footing or basis of its decision, absolutely declined to go into the matter.

Lastly BHASHYAM AYYANGAR J. notices *Madho Parshad v. Mehrban Singh*(3) where the Judicial Committee ruled in unequivocal terms that the death of the alienor Zalim renders it impossible to order partition and charge his divided share with the money paid him by the alienee. But this was distinguished by the Full Bench as referring only to the Mitakshara Law obtaining in Oudh.

Then on page 713 BHASHYAM AYYANGAR J. gives it as his opinion that the actual decision in *Rangasami v. Krishnayyan*(4) “is opposed to the principle on which the above decisions of the Privy Council proceed.”

But as pointed out above *Deendyal Lal v. Jugdeep Narain Singh*(5) is only applicable if emphasis is given to special words, and *Hardi Narain Sahu v. Ruder Perakash Misser*(2) is not applicable at all. If *Suraj Bunsu Koer v. Sheo Persad Singh*(1) is authority for the

(1) (1879) I.L.R. 5 Cal. 148 (P.C.). (2) (1883) I.L.R. 10 Cal. 626 (P.C.).
(3) (1890) I.L.R. 18 Cal. 157 (P.C.). (4) (1891) I.L.R. 14 Mad. 408 (F.B.).
(5) (1877) I.L.R. 3 Cal. 198 (P.C.).

proposition that death does not affect the alienee's right, that proposition is not founded there on any principle, but emphasis rather is laid on the peculiar circumstances of that case where execution had proceeded almost up to sale.

However, when the question of fluctuation came directly before the referring Judges in *Chinnu Pillai v. Kalimuthu Chetti*(1) they declined to accept the authority of *Rangasami v. Krishnayyan*(2), and, thinking that the doubts entertained by BHASHYAM AYYANGAR J. were well founded, they referred to a Full Bench the question, whether the mortgagee of a Hindu is entitled to proceed against the share of a son subsequently born, in family property mortgaged by him. A Bench of five Judges was constituted so that if necessary it might overrule the Bench of four which decided *Rangasami v. Krishnayyan*(2). But unfortunately one of these five dropped out and the Bench as finally constituted only contained four.

WHITE C. J. quotes (page 52) with approval the view of the referring Judges in *Rangasami v. Krishnayyan*(2), but says that it is a position which the Full Bench declined to accept. But as he shows immediately afterwards the Full Bench did accept the position so far as to rule that the purchaser takes an uncertain and fluctuating interest. What they did was to modify this rule by suggesting *obiter* two exceptions. Where the fluctuation has worked out to the benefit of the alienee by his alienor's share increasing on the death of other members of the coparcenary, and where the share might seem to be obliterated by the alienor's death.

The learned CHIEF JUSTICE then points out, as I have observed above, that the argument for excepting death

(1) (1911) I.L.R. 35 Mad. 47 (F.B.). (2) (1891) I.L.R. 14 Mad. 408 (F.B.).

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might serve to except any fluctuation. He next refers to *Aiyyagari Venkataramayya v. Aiyyagari Ramayya*(1) which settled, for this presidency, that death is an exception, and concludes:

"It seems to me that when once it is held that the death of the alienor does not create any right of survivorship to the other coparceners, it follows almost as a necessary corollary that the quantum of interest which vests in the alienee is not affected by subsequent changes in the number of coparceners."

This is good logic; but it is equally good logic to say that if the alienor only sells what he has got and no more, it follows as a necessary corollary that the interest of the alienee fluctuates. We start with the principle "only that passed which the alienor had." We recognize an arbitrary exception that death does not diminish the alienee's right; then we make the exception itself the principle, and turning round at that point, conclude that something passed which the alienor had not got. A vicious circle. Either view is rational, but it is impossible to pick out one of them as exclusively based either on law, or on logic.

BENSON J. accepted and treated as the principal part of his judgment the description of *Hardi Narain Sahu v. Ruder Perakash Misser*(2) given by BHASHYAM AYYANGAR J. in *Aiyyagari Venkataramayya v. Aiyyagari Ramayya*(1).

MUNRO J. confined himself to a simple affirmative. SANKARAN NAIR J. pointed out that in sheer logic if one fluctuation such as death could not affect the alienee's right, then no fluctuation would affect it. The question was not dependent on Hindu Law. In equity *Aiyyagari Venkataramayya v. Aiyyagari Ramayya*(1) should be approved, and in equity the alienee should not be given more than he had at the time of the alienation. It is

(2) (1902) I.L.R. 25 Mad. 690 (F.B.). (2) (1883) I.L.R. 10 Cal. 626 (P.C.).

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more consistent with equitable principles to hold that the purchaser gets the share which his vendor was entitled to at the time of alienation rather than that he gets a fluctuating share and he reaches the same conclusion as I have reached, that there is no final decision on the point to be found in the Privy Council cases. So it is held by this Bench that the alienee's share does not fluctuate, but is to be reckoned as from the date of the alienation. Four Judges therefore have held that the share does, and four have held that it does not fluctuate.

In this state of the law the respondent contends that *Ohinnu Pillai v. Kalimuthu Chetti*(1) and *Ramasami Aiyar v. Venkatarama Ayyar*(2) authorize him to work out a partition as on the date of the alienation. *Ramasami Aiyar v. Venkatarama Ayyar*(2) merely makes what was condoned in *Hardi Narain Sahu v. Ruder Perakash Misser*(3) a rule of practice, allowing Courts to decree partition in a suit for recovery of possession; and has no bearing upon the theoretical problem.

The appellant relies upon *Manjaya v. Shanmuga*(4) where the recognized law is clearly stated, and BAKEWELL J. points out that the right of the alienee is *in personam* and not *in rem*. This judgment would have afforded useful material for answering Mr. Doyne in *Suraj Bunsu Koer v. Sheo Persad Singh*(5) and meets the theory that the share is something more material than a mere fraction.

In *Subba Goundan v. Krishnamachari*(6) it is held that a purchaser has only an equity as against the other members of the coparcenary to work out his interests by a suit for general partition. It is not suggested

(1) (1911) I.L.R. 35 Mad. 47 (F.B.). (2) (1923) I.L.R. 46 Mad. 815.
(3) (1883) I.L.R. 10 Cal. 626 (P.C.). (4) (1913) I.L.R. 38 Mad. 684.
(5) (1879) I.L.R. 5 Cal. 148 (P.C.). (6) (1921) I.L.R. 45 Mad. 449, 460.

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that his equity extends to working out a partition as from the date of the alienation; nor indeed do I find this suggested anywhere except in the judgment under appeal. DEVADOSS J. thinks it well settled by *Chinnu Pillai v. Kalimuthu Chetti*(1) that the time at which the share of the alienating brother should be determined is the date of the alienation. I agree so far as the bare amount of the share, the fraction, is concerned. But in that case it was never considered that the hotchpot should be taken as that which existed on the date of alienation. That question was never raised. Then his Lordship cites *Ramasami Aiyar v. Venkatarama Ayyar*(2) without showing it to have greater import than I have found it to have. So that in effect this judgment is simply based upon what the learned Judge thinks would be equitable, and considering the state of the law, no other basis is possible.

It remains for us to see if we agree with this view of equity.

In my opinion the most equitable and logical view of this vexed question is that the alienor cannot part with more than he has got; that is a basic principle which I can understand and I should have been quite prepared to hold that as the right of the alienor becomes extinct upon his death, the right of the alienee becomes extinct also. However the contrary opinion is founded upon a long series of cases and I agree with the Full Bench in *Aiyyagari Venkataramayya v. Aiyyagari Ramayya*(3) that even at that date it was too late to think of upsetting it.

So the contingency of death stands as an arbitrary exception to the rule that the right is fluctuating.

(1) (1911) I.L.R. 35 Mad. 47 (F.B.).

(2) (1923) I.L.R. 46 Mad. 815.

(3) (1902) I.L.R. 25 Mad. 690 (F.B.).

But I see no reason to import other exceptions, and prefer the decision of the four Judges in *Rangasami v. Krishnayyan*(1) to the decision of the four Judges in *Chinnu Pillai v. Kalimuthu Chetti*(2). The former decision is logical, and quite equitable, for the alienee has only himself to thank if by delaying his right to compel partition he find his security diminished.

Holding this view I find no basis for the proposition that when he does compel partition the alienee's right to the property must be worked out as from the date of the alienation. And even if I agreed with *Chinnu Pillai v. Kalimuthu Chetti*(2) that the share ceases to fluctuate from the date of alienation, I should not be prepared to go further and say that there must be a hotchpot hooked to the same date. Such a theory would be very cumbersome to work out in practice, for the Court might have to take into account transactions which had long passed beyond the memory of the parties. It is troublesome enough dealing with the present day actualities of a partition suit. I therefore hold that the appellant is entitled to take the family property as existing on the date of his suit.

This restores the decree of the Subordinate Judge and the appeal is allowed with costs of both appeals in this Court.

MOCKETT J.—I entirely agree. I would only add that on a close examination of the cases cited there does not appear to be an exact authority covering the point which we have had to consider.

I concur with the view of my learned brother that equity is best served by taking the property of the family as it stands at the date of the partition suit.

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APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.

1932,
August 5.

PONNU CHETTIAR (PETITIONER), APPELLANT,

v.

SAMBASIVA AYYAR AND ANOTHER (RESPONDENTS),
RESPONDENTS.*

*Receiver—Mortgage—Simple mortgage—Suit to enforce—
Receiver in—Order appointing—Effect of—Income of
property over which receiver appointed—Mortgagor's right
in—Money decree against mortgagor—Purchaser in execu-
tion of, of right, title and interest of mortgagor in property
over which receiver appointed—Right of, to income of pro-
perty realized by receiver—Leave of appointing Court to
execute decree against receiver—Effect of.*

The effect of an order appointing a receiver in a suit to enforce a simple mortgage is to deprive the mortgagor of his right to deal with the income of the property over which the receiver is appointed. The mortgagor cannot defeat the order by assigning the profits to a third party, and a purchaser of the mortgagor's right, title and interest in the property, over which the receiver is appointed, in execution of a money decree obtained by him against the mortgagor is no more entitled than the mortgagor to the income of the property realized by the receiver. The fact that the Court appointing the receiver granted the purchaser leave to execute his decree against the receiver and to implead the receiver as a party to the execution proceedings does not invest the purchaser with any special rights.

Per REILLY J.—A simple mortgagee in this country cannot by getting a receiver appointed in the course of a suit enlarge his security or enlarge his rights to the prejudice of third parties, who have already acquired rights in the equity of redemption. A receiver appointed in such a case in this country is, like a receiver appointed in other cases, appointed for the protection of the property for the benefit of all the parties to the suit in

* Appeal against Order No. 445 of 1928.

accordance with their respective rights, as they may eventually be established.

APPEAL against the order of the Court of the Subordinate Judge of Mayavaram, dated 21st September 1928 and made in Execution Application No. 220 of 1928 in Original Suit No. 55 of 1924.

K. V. Sesha Ayyangar for appellant.

K. Bhashyam and *R. Viswanadhan* for respondents.

JUDGMENT.

VENKATASUBBA RAO J.—This appeal raises a question as regards the effect of the appointment of a receiver in a suit to enforce a simple mortgage. The appellant obtained a money decree against one Ganapathia Pillai in Original Suit No. 78 of 1923 (District Munsif's Court, Mayavaram) and in execution of that decree attached certain properties. To enforce a mortgage executed by the aforesaid Ganapathia Pillai, the respondents filed Original Suit No. 55 of 1924 (Mayavaram Sub-Court) and obtained an appointment of a receiver over the mortgaged properties, which included those already attached. Thereupon, the appellant applied in the mortgage suit for leave to execute his decree against the receiver. Not only was that request complied with, but leave was also granted to him to implead the receiver as a party to the execution proceedings. Thereafter, in execution of the money decree, the attached properties were put up for sale and purchased by the decree-holder himself, that is, the appellant. The sale was in due course confirmed. The appellant attempted to take possession and the respondents then made several applications to the Court, one being to restrain the appellant from taking possession, the second, to implead him as a party to their mortgage suit, and the third, to continue the receiver as

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against him, after so making him a party. All the applications were granted. The appellant took the matters to the High Court but without success. Pausing here for a moment, the effect of the High Court's order was to negative the appellant's right to possession. The rest of the story may be briefly told. The respondents obtained in their suit a mortgage decree, brought the mortgaged properties to sale, and some third party purchased them. Till the date of this sale, the receiver had realized a certain amount as income from the properties and paid the amount into Court. As I have said, some of these properties the appellant had previously purchased. He applied to the lower Court for payment out to him of that part of the amount paid by the receiver into Court, attributable to properties purchased by him, on the ground that the ownership of the income is incidental to the ownership of the property. When he made this application, the sale in favour of the third party referred to above had not been confirmed and the receiver's appointment was still in force. The lower Court having rejected his application, he has filed the present appeal.

A preliminary point has been taken that no appeal lies. This objection cannot, in our opinion, prevail. The appellant was, as I shall show, impleaded as a party to the mortgage suit. The question of substance is, to whom does the fund in Court belong, to the respondents or to the appellant? If the appellant were a stranger, it would have been open to him to assert his title to the money by a claim proceeding under Order XXI, rule 58, but he having been a party, the question would be one under section 47, Civil Procedure Code, and the preliminary objection must on that ground be overruled.

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Now coming to the merits, on the facts that I have stated, the point to be decided lies in a very small compass. What was the state of affairs on the date the appellant purchased the properties? The effect of the order appointing the receiver was to deprive the mortgagor of his right to deal with the income. It was in order to safeguard the respondents' position that the receiver was appointed. The mortgagor could not defeat the order by assigning the profits to a third party. Could he have, for instance, by private transfer, assigned the income to the appellant? Of course, not. What the appellant purchased was no more than the right, title and interest of the mortgagor. But the latter himself had no right to dispose of the income. The order operated to take away that right, which, otherwise, he would have possessed.

"The order appointing a receiver operates as an injunction to restrain the judgment-debtor from himself receiving the monies over which the receiver is appointed." ; see *Marquis of Anglesey, In re* (1). It is then obvious that no private transferee from him could have acquired a valid right to the income and it follows that the appellant who was a purchaser of his right at a Court-sale stands in no better position.

Mr. Sesha Ayyangar, for the appellant, contends that, as his purchase was with the Court's leave, it vested in his client a right over the income. This argument seems to me utterly untenable. It is well-established that, without an application for such relief, no person can proceed against a receiver. The appellant therefore chose the only course open to him, that of obtaining the previous permission of the Court which made the appointment. Had he not obtained such permission, he would have been guilty of contempt and

(1) [1903] 2 Ch. 727.

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I fail to see how the Court's order, allowing execution against the receiver, could be said to have invested the appellant with any special rights.

The question was raised in the course of the argument, in what circumstances would a Court in India be justified in granting a receiver in a simple mortgage suit? This is not relevant to the point we have to decide and I shall refrain from expressing any opinion upon it; but I may point out that the notion is utterly wrong, that in England those mortgagees only as are entitled to immediate possession obtain an appointment of a receiver. This idea seems to underlie some of the decisions cited before us and, with great respect, is the very reverse of the truth. A mortgage in England may be either *legal* or *equitable*, and, before the passing of the Judicature Acts, the general right of a legal mortgagee was to take possession and not to come for a receiver. When he had the legal right to enter into possession, why should he be granted the equitable relief? The English Courts therefore held that the appointment of a receiver at the instance of a legal mortgagee was not a matter of course; whereas, in the case of an equitable mortgagee, this right was specially conferred on him, *on the ground that he had no means of taking possession*. (Kerr on Receivers, ninth edition, pages 32 to 35.) This, of course, is not the law to-day. Under the present practice, receivers are as freely appointed at the instance of legal mortgagees as in cases in which the mortgagees have only an equitable interest. (See Kerr on Receivers, page 37, and Fisher on Mortgages, seventh edition, page 359.) I am referring to this subject only to correct the misapprehension to which I have adverted. I may also draw attention to another fact, namely, that the term "equitable mortgage" in the English law is of much wider

import than under the Transfer of Property Act. This fact is sometimes overlooked and confusion has arisen. An equitable mortgage might be of several kinds and one of them was by deposit of title-deeds. (Halsbury's Laws of England, Vol. XXI, page 74.) To the last-mentioned subdivision alone, the term is by common usage applied in India. The question often arose in England, in what cases a receiver would be granted at the instance of a subsequent encumbrancer (an equitable mortgagee in the eye of the law) as against the first encumbrancer (the legal mortgagee); see Kerr on Receivers, pages 32 to 44. With that question we are not directly concerned, but the law in England seems to be that the prior encumbrancer is not entitled to rents received by the receiver previous to his giving notice that he claims them as against the receiver. Ordinarily, an order appointing a receiver preserves the rights of prior encumbrancers, but, if it does not, a first mortgagee is not entitled to rents collected by a receiver previous to the former's application to take possession. (See Fisher, page 374; Kerr, pages 36 to 38 and 193 and 194.) As I have said, we are not here concerned in what cases a Court in India will appoint a receiver, but, when an appointment is made, the English Courts have held the receiver's right to rents already collected prevails even as against a prior encumbrancer, a person with paramount rights. As authority for this proposition, I may further refer to *In re Metropolitan Amalgamated Estates, Limited*. *In re Fair Weather v. The Company*(1). The principle of the rule is this. Though a mortgagee under his mortgage is entitled to possession, it is of the nature of the transaction that, till he demands possession or enters into receipt of the rents and profits, the

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(1) [1912] 2 Ch. 497.

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mortgagor should remain in possession and such possession is rightful (Halsbury's Laws of England, Vol. XXI, page 157).

It has been urged that a Court in India will not appoint a receiver unless the mortgagee makes out that he has eventually a right to a personal decree against the mortgagor. With this subject, again, we are not here concerned, but it may be pointed out that, in this case, a personal decree was eventually passed and that it has not even now been fully satisfied.

Mr. Sesha Ayyangar next relies upon certain cases, such as, *Dickinson, In re*(1), *In re Potts. Ex parte Taylor* (2) and *Pearce, In re. The Official Receiver, The Trustee, Ex parte*(3), and argues that the fund in question belongs to his client, as the effect of the order appointing the receiver is not to create a lien in favour of the mortgagees. But what he overlooks is that these cases deal with special provisions of the Bankruptcy Act. Under the Statute, the property of the debtor vests in the receiver and the exception is made in favour of secured creditors. The discussion turned upon who were secured creditors? As Lord Esher M.R. points out in *In re Potts. Ex parte Taylor*(2),

"the Bankruptcy law is not the common law of England; it is an enacted law and all the rights under it are determined by statute and by nothing else."

In view of these cases, it is doubtful whether the decision of MADHAVAN NAIR J in *Maharajah of Pittapuram v. Gokuldoss Goverdhandoss*(4) is correct or not, for the claimant, whose right was negated by the learned Judge, was the Official Assignee; but with that I am not concerned.

Marquis of Anglesey, In re(5), already cited, on which Mr. Bhashyam Ayyangar, for the respondents relies, is

(1) (1889) 22 Q.B.D. 187.

(2) [1883] 1 Q.B. 648.

(3) [1919] 1 K.B. 351.

(4) (1931) 1 L.R. 51 Mad. 505.

(5) [1903] 2 Ch. 727.

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more in point. It decides that a receivership order obtained by a judgment-creditor over a judgment-debtor's share of an estate prevents the latter from dealing with it to the prejudice of the former and it also prevents any subsequent mortgagee or judgment-creditor from gaining priority by means of a stop order or charging order.

In the result, the appeal is dismissed with costs.

REILLY J.—I agree. As my learned brother has pointed out, the arguments in this case, which has occupied us a considerable time, have ranged over a much wider field than was really necessary. It was argued for the plaintiff-mortgagees that by reason of the order appointing a receiver, which they obtained in the course of their suit on simple mortgages, they got a special right to have their mortgage-debts satisfied out of the income of the mortgaged property, which might be collected by the receiver, and that the receiver must be treated as a receiver appointed for their benefit alone. That was contended on the strength of various English decisions. Mr. Bhashyam Ayyangar for the plaintiffs states that he also relies upon *Rameshwar Singh v. Chuni Lal Shaha*(1). In that case the learned Judges, dealing with a simple mortgage, certainly went all the way necessary to support Mr. Bhashyam Ayyangar's contention. They said:

"Our attention has been invited to the case of *Penney v. Todd*(2), where it was ruled that the possession of a receiver in a mortgage suit was *prima facie* for the benefit of the party who had obtained the appointment. On this principle it has been argued that the receiver who was appointed at the instance of the first mortgagee holds the property for his benefit alone and is bound to make over to him the entire income for the satisfaction of his dues. In our opinion, this contention is clearly well-founded."

(1) (1919) 1 L.R. 47 Cal. 418.

(2) (1878) 26 W.R. (Eng.) 502.

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That statement of opinion was adopted by MADHAVAN NAIR J. in *Maharajah of Pittapuram v. Gokuldoss Goverdhandoss*(1) and applied to a mortgage by deposit of title-deeds. We are not here concerned with a mortgage by deposit of title-deeds or any of the incidents of such a mortgage. I venture to say with the very greatest respect that in regard to a simple mortgage the statement adopted by the learned Judges of the Calcutta High Court as the law of this country appears to me to be anything but well-founded. Certainly it was not a safe proposition to base upon a statement in the indirect report of *Penney v. Todd*(2), where VICE-CHANCELLOR MALINS is represented as having made a remark of a general nature in regard to receivers appointed at the instance of equitable mortgagees in England. The interest of *Penney v. Todd*(2) really consists, not so much in that general remark of the learned VICE-CHANCELLOR, as in the qualifications of the general remark of which that case is an instance. But, if I may say so, it appears to me a very dangerous thing to quote English decisions in mortgage cases in this country without the very greatest care. There are many great differences between the law of mortgages in this country and the law of mortgages in England, which is a very difficult and complicated subject. If we use English decisions on mortgage questions without the very greatest care, they are far more likely to befog us than enlighten us. Indeed indiscriminate citing of English decisions in mortgage cases in the Courts of this country appears to me one of the surest roads to confusion. And to say that it has been decided in a certain case in England that a mortgagee has a certain right and therefore a simple

(1) (1931) I.L.R. 54 Mad. 565.

(2) (1878) 26 W.R. (Eng.) 502.

mortgagee in this country has a similar right is a very obvious instance of *non sequitur*. When we are dealing with the results of appointing a receiver in a mortgage suit in this country on a simple mortgage, there are many distinctions between the law of this country and the law of England which it is profitable to remember. A legal mortgagee in England has always had the right to get possession on the mortgagor's default, unless by some special provision that is excepted; a mortgagee by deed in England before the Law of Property Act of 1925 had a right himself to appoint a receiver, and that right has been re-stated in the Law of Property Act; an equitable mortgagee in England who applies for the appointment of a receiver, if interest has fallen into arrears, can get an appointment almost of course, and he can also realize the mortgage-debt due to him in certain circumstances by getting a receiver appointed as an ordinary remedy; a mortgagee in England can pursue all his remedies at once. None of those statements applies to a simple mortgagee in this country. In this country there is no doubt that a simple mortgagee, who has brought a suit to enforce his mortgage, can in special circumstances get a receiver appointed—for instance, if the mortgagor by his act or default is destroying the mortgage-security or allowing it to be destroyed. But the appointment of a receiver has to be justified by special circumstances. It is not one of the ordinary remedies of a simple mortgagee. Mr. Sesha Ayyangar for defendant 9, the appellant before us, has suggested that in this country on the application of a simple mortgagee a receiver should never be appointed unless the mortgagee has still a personal remedy on his debt against his mortgagor. Speaking for myself I think there is a good deal to be said for that contention, if we include in

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"personal remedy" the remedies provided by sections 65, 66 and 68 of the Transfer of Property Act. However it is unnecessary to express any decided opinion on that question in this case. But I do not think there is any reason to doubt that a simple mortgagee in this country cannot by getting a receiver appointed in the course of a suit enlarge his security or enlarge his rights to the prejudice of third parties, who have already acquired rights in the equity of redemption. Nor do I see any reason to doubt that a receiver appointed in such a case in this country is, like a receiver appointed in other cases, appointed for the protection of the property for the benefit of all the parties to the suit in accordance with their respective rights, as they may eventually be established.

But in this case Mr. Sesha Ayyangar has to go a great deal farther than that before he can succeed. A receiver has been appointed in this suit, to which Ponnu Chetty, Mr. Sesha Ayyangar's client, was made a party as defendant 9. The receiver was originally appointed before defendant 9 was brought into the suit; but his appointment was continued after defendant 9 was impleaded, and the appeal against that order has been dismissed. After the appointment of the receiver I do not think there can be the least doubt that the mortgagor as a person bound by that order had no right to do anything to destroy the effect of that order. The receiver had the right and the duty to collect the income of the property. The mortgagor was bound by that order and could not collect or enjoy the income of the property. What was suggested at one stage by Mr. Sesha Ayyangar was that, although the mortgagor could not collect or enjoy the income of the property himself, he could nullify the order appointing the receiver by transferring some right in him to some

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other person. That appears to me to be in itself an extraordinary proposition. No doubt the order appointing the receiver did not destroy such rights as the mortgagor had in the property. No doubt he could still sell some interest in the equity of redemption to a third party. But, as he had been prohibited by the appointment of the receiver from enjoying or collecting the income of the property, how could he transfer any immediate right to enjoy or collect it to a third party? Even apart from the decisions which my learned brother has quoted, showing that it is well-recognized in England that a judgment-debtor cannot deal with property for which a receiver has been appointed so as to defeat the order appointing the receiver or prejudice a judgment-creditor at whose instance the order has been obtained, on principle how can the position be otherwise?

But in the end Mr. Sesha Ayyangar, as I understand him, does not go quite so far as to say that after the appointment of the receiver the mortgagor could at once turn round and defeat that order by himself selling his equity of redemption to a third party. What he contends more reasonably is that with the consent of the Court that could be done even after the appointment of the receiver. What happened in this case was, not that the mortgagor directly sold to defendant 9, but that defendant 9, who had a money decree against the mortgagor, bought the equity of redemption in execution of his decree. The fact that he was a Court-auction purchaser instead of a private purchaser does not justify any contention that the consent of the Court to the transfer of the right to the income may be implied in the Court-auction or in any of the proceedings in connection with it. It happens that in this case the auction in which defendant 9 bought was in the same Court in which

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the mortgagee's suit was pending. The same Court appointed the receiver and conducted the Court-auction in which defendant 9 bought such interest as he could buy from the mortgagor. The receiver was quite properly brought on record in the proceedings in execution of defendant 9's decree. Mr. Sesha Ayyangar suggests that we must take it that the Subordinate Judge consented to defendant 9 buying in the Court-auction the whole of the equity of redemption, including the right to possession and the right to collect the income of the property from the date of his purchase. Now why should we infer anything of the sort? Oddly enough the receiver, who was a Vakil of the Subordinate Judge's Court, raised no objection to the auction-sale and did not assist the Court by putting forward any contention but merely said, as the record shows, that he left the matter to the Court. I think it would have been better if he had tried to be of more assistance to the Court. But how can we reasonably suppose that the Subordinate Judge consented to such a sale as would nullify and defeat the order appointing a receiver, which he had himself made and which was still in force in his Court? When he decided that defendant 9 was entitled to bring some interest of the mortgagor to sale in execution, that does not imply that he decided that what could be brought to sale was the equity of redemption including the right to possession and the right to the income. There was undoubtedly a right in the mortgagor, which could be sold without interfering in any way with the effect of the order appointing the receiver and which might in certain circumstances, if the mortgage-debt had been cleared off, have turned out to be a very valuable right. Subject to the mortgage and to any decree or order in the suit upon it the equity of redemption was put up for sale. The Subordinate Judge allowed

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that to be done; but I see no reason whatever to say that in so doing he gave any implicit permission to sell anything more than what the mortgagor but for defendant 9's attachment in execution could have transferred at that time. Without the consent of the Court after the appointment of the receiver the mortgagor obviously could not have collected the income of the property; he could not have transferred the right to collect the income of the property; and defendant 9 could not have bought anything which the mortgagor could not have sold. Accepting for the purpose of this case Mr. Sesha Ayyangar's suggestion that the fund collected by the receiver from the mortgaged property is not in any way charged or ear-marked for the benefit of the mortgagee in the first instance, we have to remember that these proceedings arise out of the application of defendant 9 to withdraw part of that fund on the ground that it represents the income from the date of his purchase. It is not necessary to decide in this case whether the plaintiffs would eventually have a right to draw that money. But it is clear I think that defendant 9 had no basis for his claim upon the fund at the time he made it, i.e., while the receiver's appointment was still in force. Mr. Sesha Ayyangar contends that under section 8 of the Transfer of Property Act the income belongs to defendant 9 from the date of his purchase. So it would, if his vendor had a right to transfer it to him. But in the circumstances it is impossible, as my learned brother has pointed out, to say that he had that right while he was under the prohibition of the order appointing the receiver. The decision of the learned Subordinate Judge was therefore correct, and this appeal should be dismissed with costs.

A.S.V.

APPELLATE CIVIL.

*Before Mr. Justice Madhavan Nair.*1932,
September 7.DWARAMPUDI BASIVIREDDI (MINOR) BY MOTHER
AND GUARDIAN MANIKYAM (RESPONDENT), APPELLANT,

v.

GADI KAMARAJU AND TWO OTHERS (PETITIONERS),
RESPONDENTS.**Mortgage—Immovable property and crops that may grow upon it—Mortgage of—Decree for sale on the basis of, authorizing decree-holder to sell mortgaged property—Sale of crops in execution of—Fresh suit for the purpose—Necessity.*

Where the decree in a suit to enforce a mortgage of immovable property and the crops that may grow upon it states that the decree-holder may realize his decree by sale of the mortgaged property, the decree-holder is entitled to have the crops sold in execution of the decree and need not bring a separate suit for the purpose.

Once a decree for sale of the property has been passed, the distinction that part of the mortgaged property is movable and part is immovable is altogether effaced.

APPEAL against the order, dated 10th March 1927, of the Court of the Subordinate Judge of Narasapur in Appeal No. 127 of 1926, preferred against the order, dated 10th April 1926, of the Court of the District Munsif of Narasapur in Execution Petition No. 60 of 1926 in Original Suit No. 296 of 1924.

G. Lakshman for appellant.

Ch. Raghava Rao for respondents.

JUDGMENT.

The point for determination in this civil miscellaneous second appeal is whether the decree-holder in Original Suit No. 296 of 1924 is entitled to take the

* Appeal against Appellate Order No. 218 of 1927.

amount in deposit in preference to the decree-holder in Original Suit No. 410 of 1918.

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The decree-holder in Original Suit No. 410 is the appellant before this Court. In Original Suit No. 296 the first respondent obtained a mortgage decree. The subject-matter of the mortgage was immovable property and the crops that may grow on it. The decree stated generally that the decree-holder may realize his decree by sale of the mortgaged property. To that decree the present appellant was a party as he also held a mortgage over the same property. He was the third defendant in the suit. Before the execution of the mortgage decree the present appellant obtained a money decree and brought the standing crops on the property to sale. The mortgagee decree-holder then put in an application stating that the amount brought into Court should be utilized towards the discharge of his decree. His prayer was that the deposit amount may be transferred to his mortgage suit and that meanwhile the said amount may be attached and prevented from being paid to others.

It is undoubted law that a mortgage of movable property is valid, and a decree can be passed in enforcement of that mortgage. The learned District Munsif held that inasmuch as the mortgage was of movable property the decree-holder's right was not to take steps to sell it, but to enforce the lien which alone he has on the movable property by obtaining a decree for money in a subsequent suit and as the procedure which the decree-holder has resorted to was unwarranted in law, he dismissed his application. In appeal the learned Subordinate Judge set aside the order of the District Munsif and ordered execution to proceed.

In this second appeal Mr. Lakshman has again emphasized the point on which the decision of the

BASIVIREDDI District Munsif is based, i.e., his contention is that
KAMARAJU. without obtaining a separate personal decree no execution can be proceeded with against the movable property. What he states is that a separate suit should be instituted and it is only after obtaining a decree for money that any execution can be taken. In my opinion this contention cannot be accepted. Once a decree for sale of the property has been passed, the distinction that part of the mortgaged property is movable and part is immovable is altogether effaced. There is a decree for sale of the mortgaged property including the movable as well as the immovable property and as the decree gives the decree-holder the right to sell, I think without resorting to a separate suit the mortgaged property can be brought to sale. Otherwise the position will lead to this complication. Having once obtained a decree for the sale of the property movable though it may be, he cannot execute that decree unless he obtains another decree in respect of the same property. A suit for the same relief in those circumstances cannot lie.

There is no direct authority on this point in any decision of this High Court, but a decision in *Mahamaya Debi v. Haridas Haldar*(1) lends support to the conclusion arrived at by the appellate Court. There, there was a mortgage of intangible property and a decree for foreclosure was passed. The learned Judges held that such a decree could be passed and executed. Relying on that decision the learned commentator, Sir D. F. Mulla in his Civil Procedure Code says: "A mortgagee of chattels is entitled to foreclosure quite as much as a mortgagee of immovable property." If a mortgagee of chattels is entitled to foreclosure quite as much as a

(1) (1914) I.L.R. 42 Cal. 455.

mortgagee of immovable property, I do not see any reason why a mortgagee of movable property is not entitled to a right of sale quite as much as a mortgagee of immovable property.

In this case there is a further difficulty. The present appellant was a party to the decree in the mortgage suit. Even assuming, as is argued on his behalf, that there was only a lien declared by the decree as regards the movable property, still, being a party to the decree, his rights can only be subject to this lien and he cannot be heard now to say that his rights should be recognized first, and that the rights of the decree-holder in the mortgage suit should be recognized only later.

In these circumstances I think the order of the lower Court is right and this civil miscellaneous second appeal is dismissed with costs.

K.W.R.

APPELLATE CIVIL.

Before Mr. Justice Bardswell.

KARUPPAYA NADAR (PETITIONER), PETITIONER,

v.

PONNUSAMI NADAR AND ANOTHER (RESPONDENTS),
RESPONDENTS.*

1932,
October 19.

Injunction—High Court—Power to grant injunction independently of the Code of Civil Procedure—Appeal or revision from case in mofussil Court—Power in.

A mofussil Court cannot grant an injunction otherwise than in accordance with the provisions of Order XXXIX of the Code

* Civil Miscellaneous Petition No. 4878 of 1932.

KARUPPAYYA v. PONNUSAMI. of Civil Procedure. Under Clause 21 of the Letters Patent, the High Court, dealing as appellate or revisional authority with a case coming from a mofussil Court, can only apply such law or equity and rule of good conscience, as would be applied by that mofussil Court; that is, it can only grant an injunction in respect of such a case in accordance with the provisions of Order XXXIX, Civil Procedure Code. It is only while acting in the exercise of its ordinary original civil jurisdiction that the High Court has powers, under its general equity jurisdiction, to grant an injunction independently of the Code of Civil Procedure.

PETITION praying that the High Court will be pleased to issue an injunction restraining the respondents from executing the decree in Original Suit No. 57 of 1931 on the file of the Court of the Subordinate Judge of Ramnad at Madura, pending Civil Revision Petition No. 991 of 1932 presented to the High Court to revise the order of the Court of the Subordinate Judge of Ramnad at Madura, dated 8th July 1932, and made in Interlocutory Application No. 170 of 1932 in the said Original Suit No. 57 of 1931.

K. S. Champakesa Ayyangar for petitioner.

Watrap S. Subrahmanya Ayyar for respondents.

Cur. adv. vult.

ORDER.

The petitioner is the defendant in Original Suit No. 57 of 1931 on the file of the Principal Subordinate Judge of Ramnad at Madura. A decree was passed against the petitioner *ex parte*. He then applied for the setting aside of that decree and it was ordered that it should be set aside if he gave security for the suit amount and costs within three weeks. The order as to this was passed on 12th March 1932 and a draft security bond was filed on 15th March 1932. The report of the Amin as to the sufficiency of the security was not received within the three weeks' time allowed for

furnishing security, and so an application (Interlocutory Application No. 170 of 1932) was made for extending the time but, after notice had been given to the other side, the learned Subordinate Judge held, on 8th July 1932, that the security had not been furnished within the time allowed and that it was not competent for him to extend the time, and dismissed the application. In the meantime, according to the petitioner's affidavit, the Amin had reported that the security offered was sufficient. Against this order on Interlocutory Application No. 170 of 1932 the petitioner has come up on revision.

The petitioner at first filed Civil Miscellaneous Petition No. 3428 of 1932, praying for stay of execution of the decree in Original Suit No. 57 of 1931 pending the disposal of the revision petition. This petition I am dismissing because there was no appeal against, or even petition for revision of, the decree in that suit. Subsequently the present petition has been filed, praying for an injunction restraining the respondents-plaintiffs from executing the decree in the said suit pending disposal of the revision petition.

It is objected that no injunction can be granted in this case. It is not a case that falls under either rule 1 or rule 2 of Order XXXIX, Civil Procedure Code, and it has been held by this Court in *Varadacharyulu v. Narasimhacharyulu*(1) and *Ayyaperumal Nadar v. Muthuswami Pillai*(2) that the High Court has no power to grant an injunction under its inherent powers in cases not governed by Order XXXIX. These decisions I have myself recently had occasion to follow in Civil Miscellaneous Petition No. 3349 of 1932. That this is a correct view of the law, as far as it is contained in the

(1) (1925) 23 L.W. 85.

(2) (1927) 26 L.W. 889.

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Civil Procedure Code, is not denied by the learned Advocate for the petitioner, but he contends that, apart from the Code, this Court has extraordinary powers of granting injunctions, which powers it derives from the Supreme Court. He relies on the decision of CURGENVEN J. in *Govindarajulu Nayudu v. Imperial Bank of India, Vellore*(1). In that case the learned Judge, in dealing with a prayer for an injunction to restrain from the execution of a decree during the pendency of an appeal against an order of the Subordinate Judge of Vellore, held that the High Courts possess, over and above the powers which they enjoy under the Civil Procedure Code, an equitable jurisdiction, derived from the old Supreme Court, to issue an injunction in appropriate cases and are not bound by the terms of the Code in issuing such injunction. For the respondents it is urged that the learned Judge has not considered the provisions of the Letters Patent to which, indeed, as far as can be seen from his decision, his attention was not drawn. Emphasis is now laid on those provisions. It is only under Clause 19 of the Letters Patent that a Chartered High Court can administer the law and equity that would have been applied by such High Court if the Letters Patent had not been issued, and the cases in which it can apply such law or equity are cases arising in the exercise of its ordinary original civil jurisdiction. By Clause 20, in the exercise of its extraordinary original civil jurisdiction, it can apply to a case the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein; while under Clause 21, which governs the case under notice, it has to apply to any case that comes before it in the exercise

(1) (1931) 35 L.W. 168.

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of its appellate jurisdiction of which revisional jurisdiction forms a part, the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case. Now, if a High Court cannot grant an injunction under the terms of the Civil Procedure Code otherwise than in accordance with Order XXXIX, it is certain that neither can a mofussil Court do so; and it is also certain that no mofussil Court exercises powers derived from the Supreme Court. If, then, the High Court deals, as appellate or revisional authority, with a case coming from a mofussil Court, it can only apply such law or equity and rule of good conscience as would be applied by that mofussil Court, and from this it follows that it can only grant an injunction in respect of such a case in accordance with the provisions of Order XXXIX.

CURGENVEN J. has referred in *Govindarajulu Nayudu v. Imperial Bank of India, Vellore*(1) to two Calcutta cases, *Rash Behary Dey v. Bhowani Churn Bhose*(2) and *Mungle Ohand v. Gopal Ram*(3), respectively. But in each of those cases the Calcutta High Court, when it held that it had powers under its general equity jurisdiction, to grant an injunction independently of the Code of Civil Procedure, was acting in the exercise of its ordinary original civil jurisdiction. The learned Judge has also referred to *Periakaruppan Chettiar v. Ramasami Chettiar*(4) which was decided by a divisional bench of this Court. In that case the learned Judges held that the Chartered High Courts have power to restrain by injunction a party from prosecuting a suit in a foreign Court (though within the British Empire), but they have not, as far as I understand the decision, held that such

(1) (1931) 35 L.W. 168.

(3) (1906) I.L.R. 34 Cal. 101.

(2) (1906) I.L.R. 34 Cal. 97.

(4) (1928) 27 L.W. 418.

KARUPPAYYA v. PONNUSAMI. power can be used in the exercise of appellate or revisional jurisdiction in cases arising from Courts in the mofussil, and they certainly did not make use of such a power. What happened was that they doubted whether such a power could be exercised by a subordinate Court, and then, dealing with the facts of the case, which was one that came before them on an appeal from a Subordinate Judge, on the assumption that a subordinate Court had such power, held that the Subordinate Judge was not warranted in making use of it. The result was that an injunction which the Subordinate Judge had granted was discharged, the petition praying for it being dismissed. In these circumstances I do not think that the decision is an authority for the High Court's having power to grant an injunction in a case that comes before it, on appeal or revision, from a subordinate Court in the mofussil. Were it such an authority, I should, of course be obliged to follow it. I would note that none of the decisions to which it has referred as to the High Court having authority, outside what is provided for in the Civil Procedure Code, to grant an injunction, has to do with cases in which the High Court was not exercising its ordinary original civil jurisdiction. Two of them are the decisions in *Rash Behary Dey v. Bhowani Churn Bhose*(1) and *Munje Chand v. Gopal Ram*(2), to which I have already referred. Another is that in *Uderam Kesaji v. Hyderally*(3), in which, however, reliance was placed not only on powers inherited from the Supreme Court but also on inherent powers, with which I am not now concerned in the face of what is the view of this High Court in that connection. Another is *Mulchand Raichand v. Gill & Co.*(4), and another is

(1) (1906) 1 L.R. 34 Calo. 97.
(3) (1908) 1 L.R. 33 Bom. 469.

(2) (1906) 1 L.R. 34 Calo. 101.
(4) (1919) 1 L.R. 41 Bom. 283.

Tikamchand Santokchand v. Santokchand Singhi(1), KARUPPAYYA v. PONNUSAMI. which again is a decision of the Calcutta High Court. All these decisions have to do with cases in which a High Court was acting in the exercise of its ordinary original civil jurisdiction.

The other case referred to in *Govindarajulu Nayudu v. Imperial Bank of India, Vellore*(2) is *Singaravelu Mudali v. Balasubramania Mudali*(3) in which the decision was by a single Judge, but in that case the injunction was found by the learned Judge to be one that could be brought within the terms of Order XXXIX, rule 2, and his other remarks were not necessary for the decision of the petition that was then before him. Nor has the learned Judge dealt with the provisions of the Letters Patent.

My conclusions are that there is no authority of this Court on the subject now before me which I am bound to follow and that, in the light of Clause 21 of the Letters Patent, of which I find no discussion in any decision of this Court that has been brought to my notice, this is not a case in which this Court can grant an injunction. The petition is, therefore, dismissed with costs.

K.W.R.

(1) (1920) 59 I.C. 218.

(2) (1931) 35 L.W. 168.

(3) (1926) 24 L.W. 421.

PRIVY COUNCIL.

J.O.*
1933,
March 14.

THE OFFICIAL ASSIGNEE OF MADRAS, APPELLANT,

v.

KRISHNAJI BHAT, RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Insolvency—Property held on trust—Fund properly invested in insolvents' business—Charge on assets—Following trust fund—Indian Trusts Act (II of 1882), ss. 63, 66—Presidency-towns Insolvency Act (III of 1909), sec. 52, sub-sec. 1 (a).

In 1919 a sum of Rs. 10,000 was left in the hands of a firm of jewellers for investment in their business at a fixed rate of interest in the name of the respondent, to whom the Rs. 10,000 was to be paid on his attaining twenty-one years. In 1925 the members of the firm were adjudicated insolvents under the Presidency-towns Insolvency Act, 1909. By section 52, sub-section 1 (a), of that Act, property held in trust by an insolvent is excluded from the divisible assets. It had been admitted that the transaction of 1919 constituted a trust in favour of the respondent, and it was not alleged that the Rs. 10,000 had not been invested in the business, or that it had been lost, or ceased to exist before the insolvency.

Held, that the assets of the firm vested in the Official Assignee subject to a charge for the Rs. 10,000 in favour of the respondent. The right of a beneficiary to follow a trust fund does not depend upon whether the fund has been properly or improperly disposed of.

Pennell v. Deffell, (1853) 43 E.R. 551, and *In re Hallett's Estate*, (1879) 13 Ch. D. 696, applied.

Judgment of the High Court, *The Official Assignee of Madras v. Krishnaji Bhat*, (1929) 59 M.L.J. 718, affirmed.

APPEAL (No. 67 of 1931) from a decree of the High Court in its appellate jurisdiction (December 6, 1929), affirming a decree of the Court in its original jurisdiction (August 18, 1926).

* Present:—Lord BLANESBURGH, Sir GEORGE LOWNDEN and Sir DINSHAH MULLA.

The respondent brought a suit in the High Court against eight defendants, who constituted a joint Hindu family carrying on business as jewellers under the firm name T. R. Tawker & Sons. Before the trial the defendants were adjudicated insolvents under the Presidency-towns Insolvency Act, III of 1909, and the appellant, the Official Assignee, was joined as a defendant and filed a written statement; the original defendants did not appear at the trial.

The question arising on the appeal was whether, in the circumstances stated in the judgment of the Judicial Committee, the respondent was entitled to a charge upon assets in the hands of the appellant, those assets consisting of the proceeds of sale of stock amounting to about Rs. 22,000.

The appellate Court (REILLY and CORNISH JJ.) affirming the decision of the trial Judge (KUMARASWAMI SASTRI J.) held that the respondent was entitled to a charge for Rs. 10,000 and certain interest.

REILLY J. said that at the trial the existence of a trust was admitted but no wrongful disposal of the trust fund had been shown, nor any wrongful mixing of the trust property with other property such as would make section 66 of the Indian Trusts Act apply. That being so, could the plaintiff get a charge? He could do so under section 63 of that Act if he could trace the trust property into the assets in the hands of the Official Assignee. Upon a consideration of English cases referred to in the present judgment, the learned Judge held that the Rs. 10,000 had been sufficiently traced to the assets and that the plaintiff was entitled to a charge thereon. CORNISH J. delivered judgment to the same effect. The appeal is reported as *The Official Assignee of Madras v. Krishnaji Bhat*(1).

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DeGruyther K. C. and Sidney Smith for the appellant.—Although the original defendants by their written statement appear to admit that there was a trust they did not admit that they were the trustees, and the appellant by his written statement denies that there was a trust. If there was a trust, the trustee was Sadasiva Tawker, not the firm, some of the members of which were minors. He was authorized to invest the fund in the business and upon its insolvency the only right of the appellant was to prove, in the name of the trustee, for the debt.

[Lord BLANESBURGH.—As the Rs. 10,000 was invested with the firm in the name of the respondent, the firm held as trustees for him.]

Even so the fund was to be used in the business which consisted of buying and selling goods and at the date of the adjudication the fund could not be traced into the existing assets; *James Roscoe (Bolton), Limited v. Winder*(1).

[Sir GEORGE LOWNDES.—It was not shown that the assets of the firm ever fell below Rs. 10,000 in value.]

In any case the investment not being a disposition contrary to the terms of the trust, or wrongful, neither section 63 nor section 66 of the Indian Trusts Act gives the respondent a right to a charge upon the assets. The appellate Court relied upon observations in *Pennell v. Deffell*(2) and *In re Hallett's Estate*(3), but in both these cases the disposition of the fund had been unauthorized. If the English authorities support the view that there is a right to a charge although the investment was in accordance with the terms of the trust, they go further than the Indian Trusts Act, and to that extent do not apply. The judgment in the present case was considered in *Nagappa Chettiar v. Official Assignee of Madras*(4) and was not followed; the Court there followed *Official Assignee of Madras v. Krishnaswami Naidu*(5), which supports the appellant. [Reference was made also to *Ex parte Hardcastle*(6); *In re Sykes*(7); Williams on Bankruptcy, fourteenth edition, page 242; Lewin on Trusts, thirteenth edition, page 930.]

(1) [1915] 1 Ch. 62.

(3) (1879) 13 Ch. D. 696.

(5) (1909) I.L.R. 33 Mad. 154.

(7) [1909] 2 Ch. 241.

(2) (1853) 43 E.R. 551.

(4) (1931) 60 M.L.J. 355.

(6) (1881) 44 L.T. 523.

Dunne K. C. and Narasimham for the respondent.—That the insolvents were trustees of the fund for the respondent was admitted at the trial, and is clear from the terms of the receipt given by the firm. By section 52, sub-section 1 (a), of the Presidency-towns Insolvency Act, property held in trust was excluded from the divisible assets vesting in the Official Assignee under section 17. The only question, therefore, is whether the Rs. 10,000 can be traced into the assets of the firm. Expenditure by the firm is to be regarded as having been made first out of its assets not affected by the trust; *In re Hallett's Estate*(1). As it is not suggested that the assets ever fell below Rs. 10,000 in value, the Rs. 10,000 are necessarily to be found in the existing assets. In *James Roscoe (Bolton), Limited v. Winder*(2) the mixed fund into which the trust fund had been paid had become exhausted at one period save as to a sum of £39. The beneficiary there was held entitled to a charge upon the £39. The case therefore supports the respondent so far as it is not distinguishable. In the present case the insolvents were themselves the trustees and the trust fund was properly invested in their business. It is not really a case of a disposition of the fund by the trustees or an improper mixing with their own funds. The respondent has not to rely upon either section 63 or 66 of the Indian Trusts Act. That Act is not exhaustive of all the rights attaching to a trust. It is not correct to say that the decision in the present case was not followed in *Nagappa Chettiar v. Official Assignee of Madras*(3); the Court agreed with the principles applied, but rightly distinguished the case upon the facts. [Reference was made also to *Official Assignee, Madras v. Minakshi Vidyasalai Sangam*(4).]

DeGruyther K.C. in reply.—The case last mentioned was one of wrongful mixing of a trust fund with the trustees' funds and section 66 of the Act therefore applied.

The JUDGMENT of their Lordships was delivered by

SIR GEORGE LOWNDES.—On the 5th October 1919, one T. Sivasankar Bhat, the father of the respondent, instructed his uncle Sadasiva Tawker by letter to invest in his firm T. R. Tawker & Sons a sum of Rs. 10,000 lying with the firm, such investment to be

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(1) (1879) 13 Ch. D. 696.

(3) (1931) 60 M.L.J. 355.

(2) [1915] 1 Ch. 62.

(4) (1929) I.L.R. 52 Mad. 919.

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made in the name of the respondent, who was then a minor, the money to be handed over to him on attaining 21, and the interest in the meanwhile to be paid to the father. On the 22nd October following the firm gave him a receipt in the following terms :

"Received from Mr. T. Sivasankar Bhat, the sum of rupees ten thousand only through Mr. T. Sadasiva Tawker, as fixed deposit in the name of his minor son T. Krishnaji Bhat as per instructions contained in Mr. Sivasankar Bhat's letter, dated 5th instant, carrying interest at 9 per cent per annum.

"Rs. 10,000.

T. R. TAWKER & SONS."

The interest was duly paid to the end of 1923, when apparently the firm, which carried on business as jewellers in Madras, got into difficulties.

On the 22nd November 1923 a suit was instituted in the name of the minor against the members of the firm, alleging that they were trustees of the fund and claiming their removal from the trust and the appointment of new trustees in their place, with a direction to hand over to the latter the Rs. 10,000. The defendants put in a written statement by which in effect the trust was admitted, but the suit was charged as premature inasmuch as the plaintiff was still a minor and no breach of trust had been committed.

In January 1925, while the suit, which was filed on the original side of the Madras High Court, was still pending, the defendants were adjudicated insolvents, and the present appellant as the Official Assignee in whom their estate and effects were vested was brought on the record. He filed a written statement putting the plaintiff to the proof of the factum and validity of the trust and denying that the plaintiff was entitled to any preferential claim over other creditors.

The suit came to trial in August 1926. The insolvents did not appear, and the principal question

debated was as to the plaintiff's right to preferential payment out of a sum of about Rs. 22,000 which had been realized by the appellant by sale of a portion of the stock in trade.

The trial Judge affirmed the plaintiff's claim and made a decree declaring his right to be paid out of the Rs. 22,000 in the hands of the appellant with Rs. 1,949 for interest, and ordering the appellant to bring these sums into Court to be held to the credit of the plaintiff.

The Official Assignee appealed and the decree was confirmed. A further appeal is now brought to His Majesty in Council on a certificate that a substantial question of law is involved. The respondent is now of full age and is personally represented before the Board.

It was suggested before their Lordships that the transaction of October 1919 did not constitute a trust at all but a mere deposit in respect of which the respondent would only be entitled to rank with the other creditors. Their Lordships are however unable to accept this contention. No issue on this question was raised at the trial, and it is clear that the trust was admitted by the defendants both before the original Court and in the appellate Court, and apparently also in the printed case of the appellant. In their Lordships' opinion therefore the appeal must be dealt with on this basis and the only possible question is whether the trust fund can be found in the assets of the trustee firm which have come to the appellant.

The trial Judge held on the evidence that the trust fund could be traced into the stock from the sale of which the Rs. 22,000 was realized. The learned Judges of the appellate Court were not satisfied that this was established, but they thought that the investment of the trust money in the general assets of the business

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was sufficient to give the respondent a charge upon the sale proceeds in the hands of the appellant, and in their Lordships' opinion the conclusion to which they came was right.

Under section 52 (1) (a) of the Presidency-towns Insolvency Act, 1909, property held by an insolvent on trust for any other person is excluded from the assets divisible among the creditors. The Rs. 10,000 was received by the insolvent firm for investment in their business and there is no suggestion that it was not so invested in fact. Nor is it suggested that there were any assets of the business which were not taken over by the appellant. If it was there when the Official Assignee came in, what he took was a mixed fund only part of which was divisible among the creditors, the Rs. 10,000 being in his hands as much the property of the respondent as it was before the insolvency. There was no allegation that it had been lost or ceased to exist before the insolvency. If this had been proved the case might possibly have been different; see *James Roscoe (Bolton), Limited v. Winder*(1). Their Lordships offer no opinion upon this question as the necessary facts have not been pleaded or put in evidence and the burden of proving them would clearly be upon the appellant.

Assuming then that the whole assets of the business, including the Rs. 10,000 as invested in it, passed into the hands of the appellant on the insolvency, their Lordships think that they so passed subject to any charge in favour of the respondent to which they may have been subject before the insolvency.

Much argument was expended in the lower appellate Court and before the Board on the doctrine of following

(1) [1915] 1 Ch. 62.

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trust funds, and it seemed to be suggested that though, if the fund in the present case had been improperly employed in the business of the trustees, the beneficiary would be entitled to a charge upon the whole of the assets (see section 66 of the Indian Trusts Act, 1882), no such right could be accorded to him if the employment of the funds in this way was in pursuance of the terms of the trust. Their Lordships think there is no substance in this contention. In the words of Sir GEORGE JESSEL [*In re Hallett's Estate*(1)],

"there is no distinction, therefore, between a rightful and a wrongful disposition of the property, so far as regards the right of the beneficial owner to follow the proceeds."

In their Lordships' view the passages quoted by the learned Judges of the appellate Court from the well-known judgment of TURNER L.J. in *Pennell v. Daffell*(2) are directly in point, and show the length to which the modern doctrines of equity have gone in this direction. Their Lordships would in particular refer to the following passage in the judgment:

"It is, I apprehend, an undoubted principle of this Court, that as between *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust."

So too Lord ELLENBOROUGH in *Taylor v. Plumer*(3), speaking of property entrusted to a factor, says:—

"It makes no difference in reason or law into what other form, different from the original, the change may have been made . . . for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such."

(1) (1879) 13 Ch.D. 696, 709.

(2) (1853) 43 E.R. 551, 553.

(3) (1815) 105 E.R. 721, 726.

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In the present case once it was admitted that the Rs. 10,000 was a trust in the hands of T. R. Tawker & Sons to be invested in their business and was so invested, it must be taken to have remained a part of the assets of that business and to have been there at the date of their insolvency, the beneficiaries being entitled at all times to a charge upon such assets in the hands of the firm. Upon the insolvency the assets passed to the appellant but passed subject to the charge.

For these reasons their Lordships are of opinion that the judgment of the appellate Court in Madras was right and that this appeal should be dismissed and they will humbly advise His Majesty to this effect. The appellant must pay the costs of the respondent before this Board.

Solicitors for appellant: *H. S. L. Polak & Co.*

Solicitors for respondent: *T. L. Wilson & Co.*

A.M.T.

APPELLATE CIVIL.

*Before Mr. Justice Ramesam and Mr. Justice Pakenham
Walsh.*

SRI SRI SRI RATHNAMALA PATTAMAHADEVI,
ZEMINDARINI OF MANDASA, PETITIONER,

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v.

THE RYOTS OF THE MANDASA ZAMINDARI,
RESPONDENTS.*

Certiorari—Madras Estates Land Act (I of 1908), Ch. XI—Proceedings of Board of Revenue under—Writ of certiorari in respect of—Issue by High Court of—Jurisdiction—Grounds—Irregularity of procedure if and when one of—Sec. 172 of Madras Estates Land Act—Revision of record by Board itself—Jurisdiction—Irregularity of procedure or—Writ of certiorari in respect of—Sec. 173 (3) (d) of Madras Estates Land Act—Rent settled under secs. 168 to 171—Correctness of—Civil suit impugning—Maintainability of—Sec. 171—Appeal under—Hearing of parties in—Failure—Effect—Record of rights under Chapter XI of Madras Estates Land Act—Lands included in, whether pannai or not—Failure to enquire into question of—Writ of certiorari in respect of.

The High Court has power, in proper cases, to issue a writ of *certiorari* in respect of proceedings of the Board of Revenue under Chapter XI of the Madras Estates Land Act.

Per RAMESAM J.—An executive body can sometimes discharge a judicial function and an executive act may also partake of a judicial character. As regards the functions of the Revenue Officer under Chapter XI of the Madras Estates Land Act, though the main purpose is to carry out an executive act, namely, the preparation of the record of rights including settlement of rent, parts of them undoubtedly are of a judicial character so as to make those functions acts of a tribunal. The determination of those portions of the record in a judicial manner is ancillary and necessary for the main

* Civil Miscellaneous Petitions Nos. 6459 of 1931, 5155 of 1930, 2310 of 1931 and 2074 of 1932.

ZAMINDARINI executive work of preparing the record of rights including
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Per PAKENHAM WALSH J.—The settlement of rents, whether in the first instance by the Revenue Officer or finally by the Board of Revenue, is an act deciding disputes between the parties and also imposing liabilities and it is therefore liable to be interfered with by a writ of *certiorari*.

Every action of an executive officer under Chapter XI of the Madras Estates Land Act is not, however, liable to be interfered with in *certiorari*.

Held by RAMESAM AND PAKENHAM WALSH JJ.—The High Court will not issue a writ of *certiorari* on the ground of an irregularity of procedure on the part of the Board of Revenue, unless it is satisfied that that irregularity has led to some substantial injury.

Per RAMESAM J.—The phrase “direct the revision” in section 172 of the Madras Estates Land Act cannot enable the Board to proceed to revise the record itself but can only mean that it should direct the revision by some other officer. The “some other officer” revision by whom is to be directed can only be the Revenue Officer who made the original settlement. It cannot mean the confirming authority under section 170 or the superior revenue authority which hears appeals relating to objections made under section 169.

Where the Board of Revenue, after dismissing an appeal under section 171 of the Madras Estates Land Act, took up the matter of its own motion and passed an order reducing the rate of rent by three annas in the rupee throughout, *held* that there was an irregularity of procedure on the part of the Board of Revenue.

Per PAKENHAM WALSH J.—The Board of Revenue does not exceed its jurisdiction when under section 172 it revises the record of rights itself instead of sending back the record of rights to the Revenue Officer for revision.

Held by RAMESAM AND PAKENHAM WALSH JJ.—Where the Board of Revenue, after dismissing an appeal under section 171 of the Madras Estates Land Act, took up the matter of its own motion under section 172 and passed an order reducing the rate of rent by three annas in the rupee throughout, *held* that, even if the Board of Revenue had no power under section 172 to revise the record itself and could only send it to the Revenue

Officer for revision, no substantial injury could result from the irregularity in the procedure and therefore a writ of *certiorari* ought not to be issued.

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The Board will order the revision on certain lines and the Settlement Officer will have no choice except to follow the directions laid down by the Board. Consequently for all practical purposes the record will be made in accordance with the directions of the Board. Therefore the difference between revising the record itself and ordering its revision is largely formal.

Per RAMESAM J.—*Quære* whether a new rate of rent fixed by the Revenue Officer under section 168 or 169, or the amendment made by the confirming authority under section 170, or by the Board, if any, under section 171, of the Madras Estates Land Act, can be questioned before the Civil Court in a suit brought under section 173 (3) (d) of the Act.

Per PAKENHAM WALSH J.—*Semble* a suit cannot be brought in the Civil Court under section 173 (3) (d) on the ground that the rent settled under sections 168 to 171 was not correct. The words “rent lawfully payable at the time the record is being prepared” in section 165 (e) of the Act cannot possibly mean the fair rent subsequently to be settled by the Revenue Officer.

Held by RAMESAM AND PAKENHAM WALSH JJ.—Disposing of an appeal by the Board under section 171 of the Madras Estates Land Act without hearing the parties is not *ultra vires* or bad for illegal exercise of jurisdiction.

All *pannai* lands are excluded from the Madras Estates Land Act and no record of rights under Chapter XI of the Act can be made with regard to them. When a question arises as to whether certain lands are *pannai* or not, the Board of Revenue must adjudicate upon it, and, if the lands are found to be *pannai*, they ought to be excluded from the record of rights. Failure to enquire into the question is failure to exercise jurisdiction vested under Chapter XI of the Act which justifies the issue of a writ of *certiorari*. It is no adjudication merely to say conditionally that *pannai* lands should be exempted.

CIVIL MISCELLANEOUS PETITION No. 6459 of 1931, praying that, in the circumstances stated in the affidavit filed

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therewith, the High Court will be pleased in the exercise of its inherent powers and under sections 106 and 107 of the Government of India Act and under Clause 7 of the Letters Patent to issue a writ of *certiorari* and to call upon the Board of Revenue to submit the records relating to the preliminary order of the Board of Revenue, dated 27th October 1925, and final order of the Board, dated 17th December 1925, revising under section 172 of the Madras Estates Land Act the settlement of rent made by the Special Revenue Officer, Ganjām District, on the 18th day of August 1923, and to quash the said proceedings of the Board of Revenue.

Civil Miscellaneous Petition No. 5155 of 1930, praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased in the exercise of its inherent powers and under Clauses 2 and 7 of the Letters Patent and under sections 106 and 107 of the Government of India Act to issue a writ of *certiorari* and to call upon the Board of Revenue, Land Revenue and Settlement, to submit the records in Miscellaneous No. 1801, dated the 19th June 1930, in Appeals Nos. 2 and 3 of 1928 and 11 to 13 of 1929 and to quash the proceedings as having been passed without jurisdiction.

Civil Miscellaneous Petition No. 2310 of 1931 praying that, in the circumstances stated in the affidavit and memorandum of grounds filed in Civil Revision Petition No. 761 of 1931 on the file of the High Court, the High Court will be pleased to issue a writ of *certiorari* and to call upon the Board of Revenue, Land Revenue and Settlement, to submit the records in Resolution Miscellaneous No. 1801, dated 19th June 1930, and to quash the proceedings as having been passed without jurisdiction.

Civil Miscellaneous Petition No. 2074 of 1932 praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* and to call upon the Board of Revenue, Madras, to submit the records in Appeal No. 1 of 1929 on its file and to quash the proceedings of the Board of Revenue in Resolution Miscellaneous No. 1801 of 1930, dated 19th June 1930, as having been passed without jurisdiction.

S. Varadachariar and *K. S. Champakesa Ayyangar* for petitioner in Civil Miscellaneous Petition No. 6459 of 1931.

Government Pleader (P. Venkataramana Rao) for Board of Revenue, Land Revenue and Settlement, in Civil Miscellaneous Petition No. 6459 of 1931.

S. Varadachariar for *A. Swaminatha Ayyar* for petitioner in Civil Miscellaneous Petition No. 5155 of 1930.

Government Pleader (P. Venkataramana Rao) for first respondent, and *K. S. Krishnaswami Ayyangar*, *K. S. Champakesa Ayyangar* and *Watrap S. Subramanya Ayyar* for other respondents, in Civil Miscellaneous Petition No. 5155 of 1930.

K. Rajah Ayyar and *V. Ramaswami Ayyar* for Petitioners in Civil Miscellaneous Petition No. 2310 of 1931.

A. Swaminatha Ayyar for first respondent and *Government Pleader* for second respondent in Civil Miscellaneous Petition No. 2310 of 1931.

Watrap S. Subramanya Ayyar for petitioners in Civil Miscellaneous Petition No. 2074 of 1932.

A. Swaminatha Ayyar for first respondent and *Government Pleader (P. Venkataramana Rao)* for second respondent in Civil Miscellaneous Petition No. 2074 of 1932.

Cur. adv. vult.

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RAMESAM J.—These are two applications for the issue of writs of *certiorari* in respect of certain proceedings of the Board of Revenue under Chapter XI of the Madras Estates Land Act. In Civil Miscellaneous Petition No. 6459 the petitioner is the Zamindarini of Mandasa in the Ganjām District. In Civil Miscellaneous Petition No. 5155 the petitioner is the Zamindar of Seitur in the Ramnad District. Connected with the latter petition are Civil Miscellaneous Petitions Nos. 2310 of 1931 and 2074 of 1932 in which the petitioners are different sets of tenants in the Zamindari of Seitur. In all the petitions the first important point that arises for decision is whether a writ can be issued in respect of proceedings passed by the Board of Revenue under Chapter XI of the Madras Estates Land Act.

The Zamindarini of Mandasa had previously filed Civil Revision Petition No. 192 of 1926 to the High Court in connection with the same matter. At the time when the revision petition was filed, that is, on 17th December 1925, there was a decision of DEVADOSS and WALLER JJ. which held in *Valluri Narasimha Rao v. The Ryots of Peddamamidipalli*(1) that a revision petition lies under section 115, Civil Procedure Code, against a proceeding of the Board of Revenue under Chapter XI of the Act. The remedy by way of revision being open to the present petitioner according to the then existing decision, she could not then apply for a writ of *certiorari*. While Civil Revision Petition No. 192 of 1926 was pending in the High Court, a Full Bench of this Court, consisting of PHILLIPS, ODGERS and VENKATASUBBA RAO JJ., held in Civil Revision Petition No. 1027 of 1924 on 12th April 1928 that no such revision lay.

(1) (1925) I.L.R. 49 Mad. 499.

But that decision, *Raghunadha Patro v. Govinda Patro*(1), had not been reported in the authorized series and Civil Revision Petition No. 192 came on for hearing before WALLACE and THIRUVENKATACHARIAR JJ. They doubted the correctness of the decision in *Raghunadha Patro v. Govinda Patro*(1) and referred the matter to a larger Full Bench. Civil Revision Petition No. 192 then came on for disposal before a Full Bench of five Judges, *Rajah of Mandasa v. Jagannayakulu*(2), and it was held by the majority that no such revision petition lay against proceedings of the Board of Revenue under Chapter XI. The very next day the Zamindarini of Mandasa filed the present application for a writ of *certiorari*. In these circumstances I do not think the application ought to be refused on the ground of delay if it ought to be granted otherwise.

It has been strenuously argued by the respondents in these petitions that the Board of Revenue in carrying out the provisions of Chapter XI of the Estates Land Act is an executive authority and does not act judicially and therefore no writ can be issued against them. Strong reliance was placed upon the judgment of REILLY J. in *Rajah of Mandasa v. Jagannayakulu*(2) with which my Lord the CHIEF JUSTICE and myself concurred. The conclusion of REILLY J. is expressed thus:

“ My conclusion therefore is that the Revenue Officer when making a settlement of rents under Chapter XI of the Act is not a Civil Court. From this it follows . . . that the Board of Revenue when directing the revision of his proceedings under section 172 is also not a Civil Court, and therefore that this Court cannot revise . . . ”

In the course of the judgment giving reasons for this conclusion the learned Judge was considering only

(1) (1928) 55 M.L.J. 798 (F.B.). (2) (1931) 63 M.L.J. 450 (F.B.).

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the question whether the Revenue Board was a Civil Court and not the question whether the Board was such an authority to which a writ of *certiorari* could be issued. Whatever description the learned Judge applied to the Board of Revenue, and undoubtedly at some places he described it as an executive authority, it was always in contrast to a Civil Court. In paragraph 4 he stated that the proper way to approach the question was to ascertain whether the Legislature intended the Revenue Officer to discharge those functions as an executive officer or as a Court. At the end of paragraph 5 he expresses the conclusion that up to section 167 the Revenue Officer was acting as an executive officer. Then taking up sections 168 to 171 he stated the contention for the petitioner that he then becomes a Civil Court. In paragraph 6 he refers to *Nilmoni Singh Deo v. Taranath Mukerjee*(1) for the characteristics of a Civil Court and winds it up by saying:

"We are certainly not in the sphere of ordinary civil rights which can be pursued in the absence of special legislation in a Civil Court."

In paragraph 8 he observes that the landholder or ryot is often asking for something which no Civil Court could give. In paragraph 9 he says: "Here we are far removed from any possible conception of a Civil Court." In paragraph 10, after describing the procedure prescribed for effecting alterations of the record, the learned Judge puts the question "Was ever a Civil Court so treated by the Executive Government?" In paragraph 11 he says that the reliefs include reliefs which no Civil Court could grant. Then he says that the procedure prescribed would be nothing less than scandalous in a Civil Court, and "on the other hand,

(1) (1882) I.L.R. 9 Calc. 295 (P.C.).

if the work of the settlement officer is done as an executive officer, there is nothing really surprising or unnatural or unreasonable in the procedure." In paragraph 13 he observes that

"to proceed from that assumption to the conclusion that the Legislature intended to create a travesty of a Civil Court with jurisdiction and procedure, not only unlike those of any Civil Court ever heard of, but foreign to the very conception of a Civil Court, is . . . unjustifiable."

I think I have given sufficient number of quotations from the learned Judge's judgment for showing that he was trying to establish that the Revenue Officer and the Board of Revenue are not Civil Courts and in one or two places he also certainly observed that the Revenue Officer was an executive officer.

There are other quotations which I might extract for the same purpose, but I think these are enough. It is sought to infer from these extracts that the Board of Revenue is not such an authority as would justify the issue of a writ of *certiorari*. I have concurred with the judgment of REILLY J. and I have no desire to recede from the position I have taken in that judgment. But to attribute to me a decision that a writ of *certiorari* cannot be issued to the Board of Revenue acting under Chapter XI would be to attribute to me what I had not in my mind at all. ANANTAKRISHNA AYYAR J. expressly touched upon this matter and made the following remarks:

"Decisions relating to writ of *certiorari* are not of any direct use here. I am not here concerned with the question whether a writ of *certiorari* would lie only against proceedings of a Court of Justice. It would seem that the category of bodies against which a writ of *certiorari* can be issued is wider than that of Courts of Justice."

He then refers to the judgment in *Rex v. Electricity Commissioners*(1). It seems to me that the fallacy in

(1) [1924] 1 K.B. 171.

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the argument which seeks to infer from REILLY J.'s judgment that the Board of Revenue is not such a tribunal as to justify the issue of a writ of *certiorari* consists in the assumption that an executive body could never discharge a judicial function and an executive act may not also partake of a judicial character. Now, coming to Chapter XI, up to section 167, it may be that the functions are purely executive. But, when we come to section 168, it deals with the settlement of a fair and equitable rent; the executive act of settlement may also be said to partake of a judicial character. One has only to look at clause 2 which speaks of *determining* the rates of rent and to clause 4 which refers to the duty of the Revenue Officer to *satisfy himself* that the amount of rent even when agreed upon between the landlord and tenant is *fair and equitable*. Section 169 (2) refers to "any party aggrieved" and provides that entries shall not be revised until reasonable notice is given to the *parties concerned to appear and be heard in the matter*. Section 170 (2) also provides that no entry shall be amended, or omission supplied, until reasonable notice has been given to the *parties concerned to appear and be heard in the matter*. In my opinion, though the main purpose of the functions of the Revenue Officer is to carry out an executive act, namely, the preparation of the record of rights including settlement of rent, parts of them undoubtedly are of a judicial character so as to make those functions acts of a tribunal. The determination of those portions of the record in a judicial manner is ancillary and necessary for the main executive work of preparing the record of rights including settlement of rents. The conception of an executive officer occasionally having to discharge duties of a judicial nature in the course of carrying out his executive functions is not new and occurs very frequently in Indian

enactments. A Registrar has got to register documents. This is generally a mechanical act. It is purely an executive function; but, where the genuineness of a will presented to him for registration is contested, he has got to examine the witnesses for both the parties and decide the question of genuineness and then proceed to register or refuse to register it as the case may be. Here, though the final act is an executive act, for the purpose of the final act he has to discharge a judicial function and yet it is held that a Registrar of documents is not a Court. An Inam Commissioner enfranchising inams is in general carrying out executive functions; but a question as to the ownership of a certain inam or in whose name it should be enfranchised may arise, and in deciding the actual ownership he may have to discharge a judicial function, though the decision will again result in an executive act, namely, enfranchisement. It is unnecessary to give further examples in view of the English cases to which I shall presently refer and which seem to be conclusive on the matter.

In *Rex v. Woodhouse*(1) the question was discussed by the Court of Appeal. There the question arose under the Licensing Act of 1904. It seems to me that the work of issuing licences to alehouses is less judicial than deciding a rate of rent between landlord and tenant. At page 512, VAUGHAN WILLIAMS L J., referring to an earlier case decided by BULLER J., says:

"The reporter seems by his note to doubt whether the decision in that case went beyond deciding that a *certiorari* would not lie to return a ministerial act."

He then observed:

"I ask myself, therefore, the question whether the licensing justices in granting or refusing a licence do a judicial

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

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act. In my opinion the grant or refusal of such a licence is a judicial act, and the judgment of Lord HALSBURY in *Sharp v. Wakefield*(1) seems to be an authority for this view; for he says . . . that 'an extensive power is confided to the justices in their capacity as justices to be exercised judicially, and discretion means, when it is said that something is to be done within the discretion of the authorities, that that something was to be done according to the rules of reason and justice.' "

At page 513, he then observed :

"It is impossible to read under the title '*certiorari*' in Burn's Justice of the Peace the list of the cases in which a writ of *certiorari* has been granted and the grounds for granting it without seeing that in practice a *certiorari* has issued in cases in which it is impossible to say that there was a Court and a '*Lis*'."

Provided that the Board of Revenue is required to do something under Chapter XI of the Estates Land Act according to the rules of reason and justice, the mere fact that it is not a Court does not matter. At page 534, FLETCHER MOULTON L.J. discusses the question. He says :

"It is frequently spoken of as being applicable only to 'judicial acts' but the cases by which this limitation is supposed to be established show that the phrase 'judicial act' must be taken in a very wide sense including many acts that would not ordinarily be termed 'judicial'."

He then proceeds to give examples. One is the case of poor rates to be settled by the Poor Law Commissioners. Another is the case of appointment of constables by Justices. He then says :

"The procedure of *certiorari* applies in many cases in which the body whose acts are criticised would not ordinarily be called a Court, nor would its acts be ordinarily termed 'judicial acts'. The true view of the limitation would seem to be that the term 'judicial act' is used in contrast with purely ministerial acts."

(1) [1891] A.C. 173.

Can a settlement of rent between landlord and tenant be said to be a purely ministerial act? If a licence can be refused for no ground, it would be a ministerial act; but if it can be refused only on certain proper grounds, it becomes a judicial act in a wider sense of the term. The act of settling rent is an *a fortiori* case. In *Board of Education v. Rice*(1) the question came up before the House of Lords. The question arose in respect of a decision of the Board of Education, a body which must be described as far less judicial than the Board of Revenue in determining the rates of rent. Lord LOREBURN, at page 182, observed that the Board of Education are not bound to treat their enquiry

"as though it were a trial; they have no power to administer an oath, and need not examine witnesses; they can obtain information in any way they think best always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

It is true that REILLY J. in the Full Bench judgment observed that the Revenue Officer may act upon his own experience. But the mere fact that such information can be used cannot make the act less a judicial act after these observations of Lord LOREBURN. Lord LOREBURN then says :

"But if the Court is satisfied that the Board have not acted judicially in the way I have described, . . . then there is a remedy by mandamus and *certiorari*."

In *Rex v. Electricity Commissioners*(2), the decision quoted by ANANTAKRISHANA AYYAR J. in the Full Bench judgment, ATKIN L.J. discusses the matter at page 204. At page 205, he says :

"But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would

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(1) [1911] A.C. 179.

(2) [1924] 1 K.B. 171.

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not be recognized as, Courts of Justice. Wherever any body of persons having legal authority, to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

Can it be said that the Board of Revenue is not a body of persons having legal authority to determine "questions affecting the rights of subjects"? Is not determination of rent a matter affecting the rights of subjects? ATKIN L.J. then gives examples. The first is fixing a rate for the repair of a county bridge and the case of Poor Law Commissioners prescribing the constitution of a Board of guardians in a parish. He also refers to *Board of Education v. Rice*(1), the case of the Board of Education, and the case under the Licensing Act. The actual case before him was a case relating to the duties of Electricity Commissioners. Here again I may observe that it is a body far less judicial than the Board of Revenue in determining the question of rent. In *Frome United Breweries Co. v. Bath Justices*(2), Lord ATKINSON quotes from the oft-quoted judgment of MAY C.J. in the Irish case of *Reg. (John M'Evoy) v. Dublin Corporation*(3). There the corporation made illegal payments and then imposed a borough rate to make up the deficiency. It was held that a writ of *certiorari* will lie. MAY C.J. observed:

"It is established that the writ of *certiorari* does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connection the term 'judicial' does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances and imposing liability or affecting the rights of others."

(1) [1911] A.C. 179.

(2) [1926] A.C. 586.

(3) (1878) 2 L.R. Ir. 371.

Here I pause and observe that certainly the Board of Revenue in settling the rent is doing an act with competent authority upon consideration of facts and circumstances and imposing liability or affecting the rights of others. This definition of MAY C.J. was approved by PALLES C.B. in two subsequent cases and Lord ATKINSON quotes the opinion of MAY C.J. with approval. The actual case before him was a licensing case in respect of breweries and Lord ATKINSON says that the case before him resembled the case in *The Queen v. London County Council*(1) where there was a question of licence for music and dancing. The case in *Rea v. Minister of Health*(2) related to a writ of prohibition to the Minister of Health. Lord HEWART C.J. quotes with approval the judgment in *Rea v. Electricity Commissioners*(3) where it was pointed out that both the writs are on the same footing. The case in *Shell Co. of Australia v. Federal Commissioner of Taxation*(4) is a case from Australia. It was very much relied on before the Full Bench and ANANTAKRISHNA AYYAR J. has dealt with it in his judgment. At page 296, Lord SANKEY observed:

"The authorities are clear to show that there are tribunals with many of the trappings of a Court which, nevertheless, are not Courts in the strict sense of exercising judicial power."

Within the meaning of this observation we can certainly say that the Board of Revenue is not a Court; but can we say that it is not even a tribunal? At page 297, the Lord CHANCELLOR enumerates some negative propositions. He says:

"(i) A tribunal is not necessarily a Court in this strict sense because it gives a final decision. (ii) Nor because it hears witnesses on oath. (iii) Nor because two or more contending parties appear before it between whom it has to decide.

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(1) [1892] 1 Q.B. 180.

(3) [1924] 1 K.B. 171.

(2) [1929] 1 K.B. 819.

(4) [1931] A.C. 275.

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 RAMESAM J. (iv) Nor because it gives decisions which affect the rights of subjects. (v) Nor because there is an appeal to a Court. (vi) Nor because it is a body to which a matter is referred by another body."

RAMESAM J. He then refers to *Rex v. Electricity Commissioners*(1). The reference shows that these negative propositions were stated for the purpose of showing that the tribunal which he was discussing, namely, the Board of Review, was not a Court in the strict sense of the term. By quoting these negative propositions it was not meant to say that they were not a tribunal in any sense of the term. In that particular case it was contended that the constitution of the Board of Review was such as to contravene section 71 of the Constitution of Australia which applied to Courts in the strictest sense so-called and it was held that the Board of Review was not a Court and section 71 of the Constitution was not contravened. But all this does not involve any decision that the Board of Review is not even a tribunal and I do not see how this case can be relied on by anybody for the purpose of showing that the Board of Review is not a tribunal in a loose sense. The observations at page 298 are still more pertinent :

"An administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court, strictly so-called."

The Revenue Officer and the Board of Revenue may remain purely administrative authorities, but still they are administrative tribunals and may have to act judicially in at least some portions of their work. The next sentence also shows the same thing :

"Their Lordships find themselves in agreement with ISAACS J. where he says: 'There are many functions which are either inconsistent with strict judicial action . . . or are consistent with either strict judicial or executive action.'"

(1) [1924] 1 K.B. 171.

Lower down they observe :

"They (Board of Review) are another administrative tribunal which is reviewing the determination of the Commissioner who admittedly is not judicial, but executive."

After the English decisions I have examined above, in my opinion it is unnecessary to examine the Indian decisions on writs of *certiorari* cited before us, viz., *Venkataratnam v. Secretary of State for India*(1), *Muniswami Chetty v. Board of Revenue, Madras*(2) and *Venkata Narasimha Rao Bahadur v. The Municipal Council of Narasaraopet*(3). There is nothing in any of these decisions which is inconsistent with the position I have laid down above. The learned Government Pleader appearing for the Board of Revenue relied on the use of the word "non-judicial" in ODGERS J.'s judgment in the Full Bench case already mentioned, *Raghunadha Patro v. Govinda Patro*(4). ODGERS J. was not considering a question of writ of *certiorari*; he must have used the word "non-judicial" in the sense of not strictly judicial. If he meant more, I do not agree with him. But I do not think he meant anything more than what I have said. In my opinion, therefore, provided the case is a proper case for issuing a writ, there is no objection in issuing a writ of *certiorari* in respect of proceedings of the Board of Revenue under Chapter XI of the Estates Land Act.

Having come to the conclusion that we have got power to issue a writ, the next question that arises is whether the facts of the particular cases before us justify the issue of such a writ. I first take up the case of the Zamindarini of Mandasa. In that case the Board of Revenue, after dismissing an appeal under section 171, took up the matter of its own motion on the suggestion of His Excellency under section 172 and passed an order

(1) (1929) I.L.R. 53 Mad. 979.

(3) (1931) 60 M.L.J. 280.

(2) (1930) I.L.R. 55 Mad. 137.

(4) (1928) 55 M.L.J. 798 (F.B.).

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reducing the rate of rent by three annas in the rupee throughout. On the merits of the case we cannot say how far this has prejudiced the zamindarini. We must assume at least that it was done by the Board fairly and impartially with a view to arrive at what is a fair and equitable rate between the landlord and tenant. It is just possible in the case of an individual holding that such reduction may not be justified; but apart from such a suspicion it must be taken until the contrary is shown that the result arrived at is fair and equitable. The complaint made before us by the petitioner is that under section 172 the Board has no power to alter the record of rights itself, but it can only direct the revision of the record of rights or any portion of it by the Revenue Officer. It seems to me that the phrase "direct the revision" cannot enable the Board to proceed to revise the record itself but can only mean that it should direct the revision by some other officer. The "some other officer" revision by whom is to be directed can only be the Revenue Officer who made the original settlement. It cannot mean the confirming authority under section 170 or the superior Revenue authority which hears appeals relating to objections made under section 169 (which happens to be the Board by the rules of the Local Government). Undoubtedly, therefore, I agree with the petitioner that there has been an irregularity of procedure. But should we issue a writ of *certiorari* merely because of an irregularity of procedure without any further inequitable consequences appearing on the face of the order? If the Board had merely passed an order giving reasons for some reduction to the extent of three annas in the rupee and then directed the revision by the Revenue Officer in the light of the observations made by the Board, in the main the same result would have been arrived at in revision by the Revenue Officer.

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Certainly it could not have made a substantial difference. Therefore, unless we are satisfied that the irregularity led to some substantial injury, I do not think we ought to issue a writ. It is complained that, whereas if it come to the Revenue Officer there will be a right of suit before a Civil Court under section 173 of the Act, there is no such right of suit to question the order made by the Board itself. In the first place, this result is not very clear. Under section 173 (3) (d) the only ground relating to rent in the civil suit is that any entry made under clauses (e) and (j) of section 165 is incorrect. But this entry relates to "rent lawfully payable at the time the record is being prepared" and how it has been fixed. It does not look as if a new rate of rent fixed by the Revenue Officer under section 168 or 169, or the amendment made by the confirming authority under section 170, or by the Board, if any, under section 171, can be questioned before the Civil Court. I do not wish to express any final opinion on the matter and it must be taken that these criticisms are only tentative. On the other hand it may be said that no purpose can be achieved by giving a right of suit before a Civil Court to question the rate of rent payable at the time the record is being prepared and not the rate of rent fixed as fair and equitable under sections 163 to 171. This is no doubt a pertinent consideration and, if this interpretation is correct, undoubtedly the zamindar is deprived of such a right of suit by the Board acting itself under section 172 and not sending it back to the Revenue Officer. But, while on the one hand I am unable to decide between the two possible interpretations, I am also doubtful whether we should issue a writ for the purpose of correcting an irregularity of procedure so as to result in giving the zamindar a fresh remedy without being

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satisfied on the merits that some kind of interference on our part is called for. On the whole, therefore, I am of opinion that no writ ought to be issued in the case of the Zamindarini of Mandasa. But, having regard to the irregularity of procedure adopted by the Board, I would dismiss the petition without costs.

I now come to the case of the Zamindar of Seitur. In this matter the complaint does not relate to section 172 but only to 171. There was an appeal under section 171. On this appeal an order was passed by the Board of Revenue (Mr. Cotton) laying down certain principles and sending the case back to the Revenue Officer. The Revenue Officer "expressed a difficulty in working out the rents in accordance with the principles enunciated by the Board". Except a statement to that effect in the subsequent order of the Board we have no other paper on the record showing exactly what he did. However, on his expressing the difficulty, the Board (Mr. Souter) then proceeded to fix the rents on the basis of the information available on the record. It does not appear that Mr. Souter proceeded to fix the rents on the principles stated by Mr. Cotton. A perusal of his order shows that there are new matters introduced in his order which were not the subject of the proceedings before Mr. Cotton, particularly the matter referred to in paragraph 3 of Mr. Souter's order relating to illegal cesses, cartage and merchants' profits. Mr. Souter did not hear the parties again before passing his order and it is possible that some injustice might have been done to the zamindar in fixing the amount to be deducted on account of illegal cesses without hearing him. Mr. Varadachariar strenuously contended that an appeal ought not to be disposed of without hearing the parties. The language of section 171 is in very strong contrast to that of sections 169,

170 and 172, and a proviso similar to the provisos in these three sections does not appear in section 171. I am unable to agree with the contention of Mr. Varadachariar that disposal of an appeal under section 171 by the Board without hearing the parties is *ultra vires*, or bad for illegal exercise of jurisdiction. It is true that it is desirable to hear the parties when not merely one or two trivial points but a question relating to the rate of rent in regard to a whole zamindari consisting of eight villages and the amount of cess that ought to be deducted on the ground of illegality arises in appeal. But merely on this ground I do not think we would be justified in issuing a writ. Perhaps the Legislature may suitably amend section 171 and bring it into a line with the other sections. But there is another matter in this case which requires our interference. Some of the tenants have filed a petition for a writ, Civil Miscellaneous Petition No. 2074. Their case is that certain lands whose extent is 84 acres and 24½ cents in Kovilur village were granted to them by a registered document, dated 12th July 1895, on the footing of *pannai* lands on a permanent favourable rate of rent. Under section 185 of the Estates Land Act any document showing that lands were let out by the zamindar as *pannai* lands ought to be considered whenever the question whether a land is *pannai* or *ryoti* arises. Regard should be had to such a fact and the fact cannot be ignored. The ryots say that they spent large sums of money for reclaiming the lands. All *pannai* lands are excluded from the Estates Land Act and no record of rights under Chapter XI can be made with regard to them. The Revenue Officer who made the record of rights took them into consideration. He however made a note that the rent was fixed by agreement between the zamindar and tenants and he fixed a rate which is practically the

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same as the rate fixed in Exhibit A. Notices were issued to the tenants, but they did not appear to object as they were satisfied with the rate of rent fixed by the Revenue Officer and the mere name of the lands, whether *ryoti* or *pannai*, did not matter to them. But in the revised rolls published under section 169 these lands were shown at an enhanced rate of rent. The ryots appealed to the Board of Revenue under section 171 and Mr. Cotton in his first order observed :

“ All reference to *pannai* lands which may be given out for cultivation at the proprietor's discretion should be definitely excluded from the settlement record.”

He intended that the Revenue Officer to whom the matter went back should enquire into the question of *pannai* lands and if any lands are found to be *pannai* lands he should exclude them from the record. But, as I have already mentioned, the Revenue Officer did not act upon Mr. Cotton's order, and Mr. Souter's order makes no reference to *pannai* lands at all. It is conceded by all the parties in this case that if the lands are *pannai* they ought to be excluded. It is contended by the zamindar and the other tenants that hereafter it may be shown by the petitioners in Civil Miscellaneous Petition No. 2074 that the lands are really *pannai* and if so the record of rights as finally made by the Board would not apply to them. But surely this is highly irregular. The very object of Chapter XI of the Act is to settle and make definite the rights of parties and we cannot have entries in such a record which are contingent in their operation, that is, which will have one effect if the entries are found in one way hereafter and another effect if the facts are found in another way. Such an entry is most undesirable in a record of rights. If the question arose as to whether certain lands are *pannai*, the fact must be found whether they are so or

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not and if they are found to be *pannai* they ought to be excluded from the record of rights. Failure to enquire into this question is failure to exercise jurisdiction vested under Chapter XI which justifies the issue of a writ according to all the English cases. It is not clear that only the petitioners in Civil Miscellaneous Petition No. 2074 suffered by this erroneous entry. It may be that the entry is *ultra vires* and may not bind them and it may be that it is open to them to show hereafter in some other proceedings that the entry is *ultra vires*. But the rent on the other lands having to be fixed on an average so as not to make substantial reduction in the income of the zamindar on the whole, which was the principle adopted by Mr. MacEwen, the Revenue Officer, and Mr. Souter, it seems to me that the rate of rent due to the zamindar on the rest of the lands in the zamindari might have been fixed lower than the proper rate on account of the erroneous enhancement in the rent of the lands claimed to be *pannai*. If the rent on *pannai* lands is reduced correspondingly the rents on the other lands or some of them may have to be enhanced if the total payable to the zamindar is not to be diminished. I do not say this ought to be done. All that I say is, it may have to be done on the principles accepted by Mr. MacEwen and Mr. Souter. So that, in my opinion a writ ought to be issued quashing the whole proceedings, the main object of the writ being to enable the Board to again enquire into the question of *pannai* lands and then make the consequential reduction in the case of the other lands if they think it proper to do so. I may here observe that, there being a justifiable complaint by the zamindar that he was not heard about the proportion of the rates which may be said to be illegal and, having regard to the argument that if he had been heard he would be

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able to show that only a small portion of the rent should be reduced on account of illegal cesses, and that only in some villages, the Board may well hear the zamindar on such a point as the whole case is again open before them. But beyond this suggestion, I cannot say anything more. A writ will issue accordingly.

The petitioners in Civil Miscellaneous Petition No. 2074 will get their costs in this petition. The other parties will bear their own costs.

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PAKENHAM WALSH J.—These petitions relate to two orders of the Board of Revenue, the first in connection with the Mandasa Estate in Ganjām District and the second in connection with the Seitur Estate, Ramnad District.

Mandasa Estate.—On a settlement of the Mandasa Estate appeals were filed to the Board of Revenue under section 171, Estates Land Act, against the Special Revenue Officer's order but were dismissed as out of time. Subsequently the ryots waited on His Excellency the Governor when he was touring in the Ganjām District for a review. This request was forwarded to the Board of Revenue who, after notice, acting under section 172, revised the settlement.

A preliminary objection had been raised before the Board that they had no such power. This was overruled by Mr. T. Raghavayya, Commissioner of Land Revenue and Settlement, by his order, dated 27th October 1925, and his successor, Mr. MacMichael, subsequently revised the rates by his order, dated 17th December 1925, in the manner narrated by my learned brother. The Rajah of Mandasa invoked the aid of the High Court in revision in Civil Revision Petitions Nos. 192 and 1109 of 1926. At the time those revision petitions were filed, DEVADOSS and WALLER JJ. had held

in *Valluri Narasimha Rao v. The Ryots of Peddamamidi-palli*(1) that the High Court had revisional power over the order of the Board of Revenue on appeals filed under section 171 of the Estates Land Act. They followed *Ramaswami Goundan v. Kali Goundan*(2), but that was not a case under Chapter XI. But on 12th April 1928 a Full Bench of three Judges held by a majority of two in *Ragunadha Patro v. Govinda Patro*(3) that the High Court had no revisional power either under section 115 of the Code of Civil Procedure or under section 107 of the Government of India Act to revise orders passed by the Board of Revenue under Chapter XI of the Estates Land Act or under section 205 of that Act. That case concerned a matter falling under section 205 only but the two majority Judges, PHILLIPS and ODGERS JJ., answered also the question relating to Chapter XI in the negative. The dissenting Judge, VENKATASUBBA RAO J., declined to answer the question so far as it related to Chapter XI. When the matter therefore came before WALLACE and THIRUVENKATACHARIYAR JJ. they referred it to a Full Bench. It has now been held by a Full Bench of five Judges, SUNDARAM CHETTI J. dissenting, in *Rajah of Mandasa v. Jagannayakulu*(4) that the High Court has no power to interfere in revision with a decision of the Board of Revenue under Chapter XI. That decision related to revisional power only. The present petitioners seek to invoke the power of the High Court under a writ of *certiorari*. This matter was alluded to by ANANTA-KRISHNA AYYAR J. in the Full Bench case but merely to say he was not concerned with it. Of the petitions before us, Civil Miscellaneous Petition No. 6459 is by

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(1) (1925) I.L.R. 49 Mad. 499.
(3) (1928) 55 M.L.J. 798 (F.B.).

(2) (1918) I.L.R. 42 Mad. 310.
(4) (1931) 63 M.L.J. 450 (F.B.).

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the zaminlarini of Mandasa against the ryots of the zamindari and relates to the order passed by the Board of Revenue under section 172.

Seitur Estate.—The second order of the Board with which we are asked to interfere in revision is one of Mr. Souter, Commissioner of Land Revenue, on 19th June 1930, under section 171, on certain appeals preferred from the orders of the Settlement Officer deputed to settle the Seitur Estate. The facts leading up to this order are as follows:—

The Special Settlement Officer, Mr. MacEwen, carried out under section 163 a settlement of rents for the eight villages comprising the Seitur zamindari. He submitted his order to the Collector of Ramnad for confirmation. The latter returned it for revision. Meanwhile certain appeals had been preferred to the Board under section 171. These came before Mr. C. W. E. Cotton, the Commissioner of Land Revenue and Settlement. He passed proceedings on 21st October 1929 returning the Special Settlement Order for revision on certain lines. The Special Settlement Officer reported that he found difficulty in working out the settlement on the lines indicated. Accordingly Mr. Souter who had succeeded Mr. Cotton took the matter up and passed final orders himself settling certain rates.

With that order we are asked to interfere by writ of *certiorari*. The petitions connected with it are Civil Miscellaneous Petition No. 5155 of 1930 by the zamindar and Civil Miscellaneous Petition No. 2074 of 1932 by certain of the ryots who claim that lands which they hold are *pannai* and were therefore wrongly included in Mr. Souter's order. Civil Miscellaneous Petition No. 2310 of 1931 is a petition by certain ryots for stay of the Board's order.

As there is a common question involved in all the petitions with regard to the power of the High Court to interfere by a writ of *certiorari* in proceedings of the Board under Chapter XI, all the petitions have been heard together. I agree with my learned brother that we should not refuse to entertain them merely on the ground of the delay in their presentation, which is due to the change in the view of the law.

Two questions fall to be decided:

1. Has the High Court power to interfere by a writ of *certiorari* in proceedings under Chapter XI?
2. If so, should we interfere in either of these cases?

With regard to the first question, as we are dealing with only one aspect of Chapter XI, namely, the settlement of rents, I would prefer to confine my decision solely to the matter of rent settlement. In favour of our power of interference by *certiorari*, Mr. Varadachari argues that the settlement of rents is a matter deciding a dispute between the landholder and the ryots and imposing obligations on the subject, and that, although, according to the ruling of the Full Bench, the Settling Officer is not a Court, yet he acts judicially. The learned Government Pleader, Mr. Venkataramana Rao, on behalf of the Board of Revenue argues that the whole scheme of Chapter XI is to make the procedure under it a purely executive function, that the record of rights prepared under sections 164 to 167 can be undertaken, if the Local Government thinks fit, without any request from anyone, and that under section 166 (2) the only force of the publication of such a record of rights is that it shall be presumed to be correct until the contrary is proved [Section 167 (3)]. Proceeding to the settlement of rents, he points out that under section 168 it may be made on the application of the

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landholder or of the holders of not less than one-fourth of the total extent of the holdings. It may therefore be made without any request on the part of the ryots, and, even when it is made on the request of the latter, it may be against the wishes of three-fourths of them. There need be no dispute between the parties at all with regard to the rents fixed. The Revenue Officer under section 168 (4) may even settle a different rent as fair and equitable from that agreed upon by the parties themselves. So he argues that the discretionary power of the Revenue Officer is unlimited. Some of these powers have been enumerated in the judgment of REILLY J. who says :

"He can use the presumption that the existing rent is fair and equitable; but, if something comes to his notice or is disclosed by his experiments which proves that it is not so, he must proceed on such material as he may find available. If some ryots prove that their rents are inequitable, he cannot refuse to apply the result to other similar cases merely because the ryots concerned take no part in the proceedings."

It would even seem that contracts or decisions of Courts settling the rates will not necessarily bind the Revenue Officer in the matter of fixing a fair and equitable rent. The confirming officer, the District Collector, may sit in his office miles away and confirm the settlement without giving any of the parties concerned an opportunity of being heard. Hence Mr. Venkataramana Rao argues that none of the parties have any rights at all to be adjudicated upon and that in fact the transaction is a great act of State such as the Inam Settlement has been described by the Privy Council to be, and he quotes BHASHYAM AYYANGAR J. in *Madathapu Ramaya v. The Secretary of State for India*(1).

(1) (1903) I.L.R. 27 Mad. 386, 396.

In reply to this Mr. Varadachari points out that it is not necessary that there should be a "lis" in order to make the matter one in which a writ of *certiorari* can be issued; vide *Rea v. Woodhouse*(1). He also points out that, though a settlement of rents might be conducted without any "lis", yet in these particular cases there certainly was a "lis" or dispute between the zamindar and the tenants.

I cannot accept the contention of the learned Government Pleader that neither the zamindar nor the ryots have got any rights and that the Settling Officer's act is therefore a pure act of State. The question whether a settlement between the Government and its own ryots is an act of State need not be discussed here but even in that case BHASHYAM AYYANGAR J. remarked in *Madathapu Ramaya v. The Secretary of State for India*(2):

"An assessment which is prohibitive and manifestly in excess of what the land may produce is clearly *ultra vires* of Government and such action of the executive is not exempted from the jurisdiction of the Civil Courts."

In a zamindari, as stated by REILLY J., the *rajabhagam* which the State is entitled to collect from the ryots represents the traditional Government share of the produce of the land which, if there was no zamindar, would be collected by the Government direct. This *rajabhagam* Government by the Permanent Settlement has left the right of collecting to the zamindar who in return pays the Government *peishcush*. Now, if the contention of the learned Government Pleader be correct, it would be open to the Settling Officer to say that the ryots need pay no rent at all or a ridiculously small one to the zamindar, but the latter would still continue to be liable to pay *peishcush* to Government while he could not collect the amount of *peishcush* from

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

(2) (1903) I.L.R. 27 Mad. 386, 396.

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the ryots. This extreme case shows that the argument that neither party has got rights to be decided is untenable.

There have been several dicta as to the cases in which a writ of *certiorari* will lie. One of those most frequently quoted is that of MAY C.J. in *Reg. (John M'Evoy) v. Dublin Corporation*(1), which is mentioned by my learned brother and which I need not therefore repeat. As stated by him it was quoted with approval by PALLES C.B. in *In re Local Government Board. Ex parte Kingstown Commissioners*(2) and later by Lord ATKINSON in *Frome United Breweries Co. v. Bath Justices*(3). As to the meaning of "acting judicially" the learned Government Pleader drew our attention to the definition of "judicial power" quoted in *Shell Co. of Australia v. Federal Commissioner of Taxation*(4), as given by GRIFFITH C.J. in *Huddart, Parker & Co. v. Morehead*(5), who says :

"I am of opinion that the words 'judicial power' as used in section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

Mr. Venkataramana Rao argues that because the Board of Review was held in that case not to have exercised the judicial power of the Commonwealth in reviewing the decision of the Commissioner of Taxation therefore the Settlement Officer in the present case or, to be more correct, the Board of Revenue was not

(1) (1878) 2 L.R. Ir. 371.

(3) [1926] A.C. 588, 602.

(2) (1885) 16 L.R. Ir. 150.

(4) [1931] A.C. 275, 295.

(5) (1909) 8 C.L.R. 330, 337.

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acting judicially. This argument, however, ignores the difference between "judicial power" and "acting judicially". What was defined in that case was "judicial power" and not "acting judicially". The matter at issue there was whether the Board of Review exercised the judicial powers of the Commonwealth. If it did, under section 71 of the Constitution the tenure of office by its members other than a life tenure (subject to the power of removal contained in section 72) was illegal and as the tenure was not for life it followed that the Board of Review was not exercising the "judicial power" of the Commonwealth. The distinction between this and an administrative tribunal acting judicially is clearly seen from the passage at page 298 quoted by my learned brother. Certain negative propositions mentioned on page 207 have also been quoted by him and I need not repeat them. I agree with him that when ODGERS J. in the Full Bench case, *Raghunatha Patro v. Govinda Patro*(1), used the word "non-judicial" at page 810 he was distinguishing the executive function under Chapter XI from those of a Court. If otherwise, I would agree with my learned brother in dissenting from him. As to the varied sorts of cases in which it has been held that a writ of *certiorari* will lie my learned brother has fully enumerated them. I may perhaps however note some cases quoted on the other side. In *Sri Ishwarananda Bharathi Swami v. The Board of Commissioners for Hindu Religious Endowments, Madras*(2) it was held that, in an application to a District Court under section 84 (2) of the Madras Hindu Religious Endowments Act in respect of a decision arrived at by the Board on the question whether an institution was a mutt or temple within the

(1) (1928) 55 M.L.J. 798. (F.B.).

(2) (1932) 63 M.L.J. 254.

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meaning of the Act, the jurisdiction of the Court is not restricted to that of an appellate or revisional tribunal. This merely amounts to saying that the Board is not a Court. *In re Mrs. Besant*(1) was a case of security for a printing press. A remark of ABDUR RAHIM J. at page 976 may perhaps be quoted. He says:

"Our attention has been drawn to many English cases in which writs of *certiorari* have been issued by the King's Bench in England. In some of them it looks as if the line of differentiation between judicial and administrative acts is very faint. But, whether any particular function was of a judicial character or not in those cases depended on the provisions of the particular statutes concerned and no good purpose would be served by reviewing them."

In that case the keeper of the press was liable under the law to give security and the action of the Chief Presidency Magistrate calling for such security was held to be purely executive and not capable of being interfered with by writ of *certiorari*.

Venkata Narasimha Rao Bahadur v. Municipal Council of Narasaraopet(2) was a case of mere record in a minute book by the Chairman of a Municipal Council of the result of a poll as declared by the Presiding Officer. In *Desi Chettiar v. Chinnasami Chettiar*(3) it was held that the act of a President in conducting a scrutiny of nominations to the new electoral roll was purely a ministerial Act. I hold therefore that in the present case the settlement of rents, whether in the first instance by the Revenue Officer or finally by the Board of Revenue, was an act deciding disputes between the parties and also imposing liabilities. It was therefore liable to be interfered with by a writ of *certiorari*. So I agree with my learned brother that the first question must be answered in the affirmative in the

(1) (1916) I.L.R. 39 Mad. 1164.

(2) (1930) 33 L.W. 497.

(3) (1928) 56 M.L.J. 162.

present case but I should like to guard myself against saying that every action of an executive officer under Chapter XI is liable to be interfered with in *certiorari*.

Turning now to the merits, it has to be seen whether the orders appealed against are so beyond the jurisdiction of the Board or so contrary to justice that the writ should be issued. I take first the *Mandasa case* (Civil Miscellaneous Petition No. 6459). I have already indicated how the Board came to pass a revised rate of rent under section 172. They gave notice and heard the parties before doing so, so that there is no objection to their conduct under this head. But the argument is that all they were entitled under section 172 to do was to send back the record of rights for revision and not to revise it themselves. The section runs:

"The Board of Revenue may, in any case, on application or of its own motion, direct the revision of any record of rights, or any portion of a record of rights, at any time within two years from the date of final publication under sub-section 2 of section 166 or, if there has been a settlement of rent under section 168, two years from the date of republication under sub-section 3 of section 170 but not so as to affect any order passed by a Civil Court under section 173:

Provided that no such direction shall be made until reasonable opportunity has been given to the parties concerned to appear and be heard in the matter."

It is pointed out that section 176 states that, subject to the provisions of section 173, all rents settled under sections 168 to 170 and entered in a record of rights finally published under section 166, or settled under section 171, shall be deemed to have been correctly settled and to be fair and equitable rent within the meaning of the Act. This section does not mention section 172.

Section 173 which gives the right of suit in certain cases to a person aggrieved by a settlement of record

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prepared under sections 168 to 171 similarly does not mention section 172. But section 179 says :

“No suit shall be brought in any Civil Court in respect of any order directing the preparation of a record of rights under this chapter, or in respect of the framing, publication, signing or attestation of such a record or of any part of it, or, save as provided in section 173, for the alteration of any entry in such a record of rent settled under sections 168 to 172.”

Here we find section 172 mentioned, but it seems clear that, as section 173 does not provide for a suit against a revision under section 172, this section (179) will not provide one. The sections of this chapter, as has been remarked more than once, are extremely difficult to construe and several of these difficulties have been noticed in the Full Bench judgment. In the present case the appeals filed in the Board of Revenue under section 171 were dismissed as time-barred and doubtless the result of the revision by the Board under section 172 is that a party may be deprived of a right of suit which he would have had under section 173, the time for institution being six months from the date of final publication of the record of rights under sub-section 3 of section 170 or six months from the date of disposal of the appeal. While section 172 gives the Board of Revenue two years from the date of the final publication under sub-section 2 of section 166 or, if, there has been a settlement of rent under section 166, two years from the date of republication under sub-section 3 of section 170, an order passed by a Civil Court under section 173 is no doubt expressly exempted from interference by a revisional order of the Board under 172, but parties who had no grievance under the original order or whose grievance had been redressed in appeal under section 171 might find themselves, if aggrieved by a revisional order under section 172, time-barred in the matter of bringing a suit under 173 and in any case

appear to have no right of suit against the order of revision under section 172. It is argued that this result could not have been intended whereas, if we understand the words “direct the revision of any record of rights” to mean that the record has got to be sent back to the Revenue Officer, in which case there will be fresh opportunities of objection and appeal, this disability is removed. On this point I think that, unless this reading of the section is the only possible one, we should not interfere on a mere hypothetical construction or hold that the Board exceeded its jurisdiction. The interpretation of section 172 suggested has no doubt attractions, but I find some difficulty in reconciling it with the proviso to section 172 which runs :—

“No such direction shall be made until a reasonable opportunity has been given to the parties concerned to appear and be heard on the matter.”

If the Board has determined that the record must be revised the parties could not raise any intelligible objection to the mere sending of it back to the Revenue Officer for this purpose ; and it seems hardly likely that the Board should waste its time in hearing objections to the proposed revision itself when the parties will have a fresh opportunity of raising all objections in filing appeals when the record is sent back for revision. The section read with sections 176 and 179 is undoubtedly obscure and I am not prepared to hold that the Board exceeded its jurisdiction.

Another aspect of the matter as noticed by my learned brother is this :—Assuming the power of the Board is only to order the revision, they will order it along certain lines. The Settlement Officer will have no choice except to follow these directions laid down by the Board of Revenue. Consequently for all practical purposes the record will be made in accordance with

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the directions of the Board of Revenue. Therefore the difference between revising the record itself and ordering its revision is largely formal.

In this connection may perhaps be mentioned another difficult matter as to what precisely is the scope of the suit which can be brought under section 173 (3) (d) which states that one of the grounds on which a suit can be filed is that an entry made under clause (d) of section 165 is incorrect. Does this mean that a suit can be brought against the fair rent settled by the Revenue Officer under section 168, or by the Board on appeal under section 171? This matter was discussed by REILLY and ANANTAKRISHNA AYYAR JJ. in the Full Bench case, though it was not necessary for them to give a final decision on it, nor have we got to do so. REILLY J. held that a suit could be brought on the ground that the rent settled under sections 168 to 171 was not correct. He held that otherwise an aggrieved person having merely a right to contest the rent lawfully payable at the time the record is being prepared, that is to say, the rent for the previous year gains a mere barren privilege. ANANTAKRISHNA AYYAR J. was inclined to take the opposite view though he says that he should have been glad to be able to arrive at the conclusion that the rate of rent fixed under Chapter XI could be challenged in the Civil Courts. I do not agree with REILLY J. that the power to challenge by the suit the rent entered in the record of rights as payable at the time the record is being prepared, that is, the rent for the previous year, is altogether a barren privilege because the landlord might have to sue for rent, say for the fasli prior to the settlement of the fair rent. Under section 167 (3) every record of right published shall be evidence of the matter referred to in such entry and shall be presumed to be correct until the contrary is

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proved. It may be material for the landlord to dispute the correctness of this entry in a civil suit and therefore rebut the presumption which arises from it when he sued for the rent of a previous fasli. To my mind the words of section 165 (e) are very clear and I do not see how the rent lawfully payable at the time the record is being prepared can possibly mean the fair rent subsequently to be settled by the Revenue Officer. In this matter I would agree with ANANTAKRISHNA AYYAR J., but I cannot say that I share his feeling as to the desirability that the rate of fair rent fixed under Chapter XI should be the subject of trial by a Civil Court.

REILLY J. himself states that no Court without special legislation could give the Zamindar or the tenant anything but the lawful rent if they filed a suit. A Civil Court could not disregard contracts or decisions of Courts and proceed to act on its own knowledge and on other evidence not admissible in a Court of law, or reject a rent agreed on by both parties. It seems to me that it would be setting the Civil Court an impossible task to call on it to determine the fair rate of rent and this is a further reason for reading the words of section 165 (e) in their natural sense. Therefore, although the power of the Board of Revenue to revise under section 172 the settlement of rent at a time when a suit under section 173 will be barred may deprive the party of some remedy by way of suit under section 173, it will, in my opinion, be only the deprivation of a minor remedy. In any case it is not for the Courts to re-write the Act. I agree with my learned brother that no writ of *certiorari* should be issued in regard to Mandasa Zamindari. I do not disagree with his order as regards costs in that case.

Turning now to the merits of the Seitur case, this is not an order of the Board of Revenue under section 172

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but an order passed on certain appeals under section 171. To understand the position it is necessary to give a short account of what happened. The Settlement Officer, Mr. M. MacEwen, found widely different rates being paid on similar lands in the Seitur village. To quote the first order dated 12th October 1928 he says:

"The Zamindari accounts reveal a most extraordinary jumble of rates for both wet and dry lands. Practically every ayacut contains both cash rent lands and waram lands and the cash rates show the most incongruous variation."

He continues:

"This state of affairs is due partly to years of litigation resulting in a wide diversity of rents fixed by different Courts at different times. It is also due in part, in my opinion, to the very haphazard business methods employed in years gone by in fixing the rents. I asked the present manager if he could explain the system under which rents were arrived at fifteen and twenty years ago; he confessed his inability to do so; and I am led to assume that the previous landlords took just as much as the tenants would give them. A further complication, the most embarrassing of all—as far as Settlement work is concerned—is that in many cases wet lands have been granted at favourable rates. In some cases this favourable treatment was due to personal friendship, in some cases it was reward for services rendered and in the majority of cases it was in consideration of premiums paid to the landlord."

Then he goes on to say:

"One of the main virtues of a settlement of rents is the standardising of the rates by which the ryot knows exactly where he stands, and varying charges are directly opposed to the fundamental idea of a settlement. Nor can I entertain the objection that the systematic blocking of wet lands is wrong. I have shown in paragraph 3 above that the existing wet rents are hopelessly erratic. The only method of dealing with this jumble is to treat alike lands that are alike in situation and fertility."

As I understand his order, he proceeds in the case of wet lands to take the total amount now paid for lands under each ayacut and to work up to that amount

by grouping the lands with reference to their fertility, position, etc.

When this order went up to be confirmed, the Collector, Mr. Macqueen, remarked:

"I take the section [i.e., section 168 (2)] to mean therefore that the Revenue Officer must accept the existing rent or rate of rent as fair and equitable; only if it is proved that it is not so can he proceed to fix it with reference to the considerations which are mentioned in the Act as being proper to the fixing of a rent. No desire to produce order out of chaos will justify the Revenue Officer in interfering with existing rents unless it is proved that they are not fair and equitable."

He therefore sent back the record for revision on these lines. Meanwhile there had been appeals to the Board which, after notice, came up before Mr. Cotton for hearing. He passed proceedings on 21st October 1929. While stating that the award had been worked out with great care he remarked that, as regards wet lands, it was

"obnoxious to criticism by the assumption that before fixing rents for the various descriptions of lands and for individual fields or group of fields it is necessary to ascertain as accurately as the circumstances permit the existing aggregate rent-roll under each tank in terms of cash and approximate the financial results of the settlement thereto."

Then he says:

"A settlement of rents is not identical with a commutation suit or series of commutation suits, and Government have held that in a settlement of rents it is not essential to deal with each individual field separately. The clubbing of fields into groups or blocks under each ayacut followed by the Revenue Officer in the present case has therefore much to commend it provided that he does not lose sight of the fact that until the contrary is proved the existing rent of each field is fair and equitable. Where there are widely varying rates for adjoining fields of the same fertility and in the same ayacut it is obvious that some revision is inevitable but the new rate to be applied uniformly should be fixed without reference to, and independently of, the effect of its adoption upon the total rental of the block."

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He sent back the award for revision. The Settlement Officer appears to have felt difficulty in carrying out the instructions and finally Mr. Souter, who succeeded Mr. Cotton, took the whole matter up and settled the rates by his order dated 6th June 1930. As I understand them, Mr. Souter's main lines of procedure were that he deducted from the aggregate rent-roll certain illegal cesses and, instead of taking the rent under the ayacut of each tank as the standard, he classified the tanks themselves, as Government tanks are classified under various classes, 3, 4, and 5 and imposed similar rates for lands under similar irrigation sources. The objection raised before us to this order of Mr. Souter is that it departs from and contradicts the order passed by Mr. Cotton and that it was passed without notice to the parties. Taking the last objection first, the question arises as to whether any notice is necessary before an appeal under section 171 is decided by the Board of Revenue. It is most significant that, while section 169 has a special proviso that no entry in the record under section 168 should be revised by the Revenue Officer until reasonable notice shall be given to the parties to appear and be heard in the matter, and in the case of the confirming officer, the District Collector, section 170 has a proviso that no entry shall be amended or omission supplied until reasonable notice is given to the parties concerned to appear and be heard and, while under section 172 no direction to revise shall be made by the Board of Revenue unless a reasonable opportunity be given to the parties concerned to appear and be heard in the matter, there is no such proviso in section 171. The omission cannot be otherwise than deliberate.

Mr. Varadachari admits that it must have been deliberately omitted. He argues, however, that it is

mere justice at least to give notice to the party. In this connection the case in *Local Government Board v. Arlidge*(1) is instructive. It is clear from that case that a party is not entitled, where the decision is by a public body, to know which officer of the Board actually decided the appeal. He is not entitled to be heard in person before the deciding body, but Mr. Varadachari argues that, though it was only held in that case that he had no right of personal hearing, yet he had a right to put in his written argument. That precise point was not in question there. The procedure was entirely different from that with which we are concerned. Section 17 of the House and Town Planning Act, 1909, authorises a local authority to make a closing order. This is an *ex parte* order and against it the party aggrieved has a right to appeal to the Local Government Board as also against a refusal by the local authority to determine or end that *ex parte* order. The law requires that on receipt of such appeal the Local Government must first hold a public open inquiry. In that particular case when this inquiry was held the appellant appeared before it. Subsequently he claimed that he was entitled to a copy of the report of the officer conducting the inquiry and that he was also entitled to be personally heard by the Government Board before his appeal was dismissed. Both these claims were negatived. In such a case the appeal is by a person who has not yet been heard as the original order was *ex parte*; and it is rather noticeable that, under this decision, while he has a right to be heard in person before the officer conducting the inquiry, he has not got this right before the Local Government Board which gives the final decision. It would be obviously opposed to

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(1) [1915] A.C. 120.

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justice that a person should be adversely affected by an *ex parte* order without an opportunity of being heard against it. Under Chapter XI the aggrieved person has the right, when the officer publishes a preliminary record for the estate, of being present in person and raising all his objections. He has a further right to be present and object when the fair rent is settled. The appeal therefore to the Board of Revenue is not one against an *ex parte* order but against a decision arrived at after full hearing of all persons affected. We have been shown no ruling which states that any public body is bound to send notice in such cases, i.e., in an appeal against a decision passed after the party has had an opportunity of being heard against the order. *Kumara-swami v. Muniratna*(1) is quoted by Mr. Venkataramana Rao in this connection. But it is not perhaps decisive in the absence of full particulars (vide column 2, middle of page 525).

Even assuming that Mr. Souter's order is contradictory to that passed by Mr. Cotton, I would not hold that, merely because of the absence of notice, the order passed by Mr. Souter was one beyond his jurisdiction because even Mr. Cotton was not bound to give notice to the parties though he did so.

Then it is argued that Mr. Cotton's order being a final one on the appeals, it was not open to Mr. Souter to pass subsequently another final order. But Mr. Cotton's order only laid down certain general principles on which the revision was to be made. The Settlement Officer found it difficult to understand how this revision should be carried out and accordingly Mr. Souter took up the matter and did it himself. In my opinion Mr. Cotton's order was not a final one.

(1) (1932) M.W.N. 524.

But can it even be said that Mr. Souter's order did in fact contradict that of Mr. Cotton? With every desire to understand it, Mr. Cotton's order appears to me to lay down two contradictory principles. He held that the whole award was wrong because the standard taken was the aggregate rent under each tank. He recognized that the principle of clubbing adopted by the Revenue Officer was permissible but then said that the Revenue Officer must not lose sight of the fact that, until the contrary is proved, the existing rent of each field is fair and equitable. This last direction appears to me necessarily to involve that the mere fact that adjacent fields of equal fertility pay widely varying rents is not *per se* any reason for departing from the presumption that the existing rent of each field is fair and equitable. It must be remembered that the Revenue Officer had distinctly reported that the manager could assign no reason for the difference of rates. Under such circumstances, where the difference of rates could not be traced to any particular reason, this principle obviously means that the differences of fertility, etc., should not be any reason for altering the "lawful rate" in existence. But in the very next sentence Mr. Cotton says :

"Where there are widely varying rates for adjoining fields of the same fertility and in the same ayacut, it is obvious that some revision is inevitable."

That appears to me to be in contradiction to the principle already laid down. And I am fortified in this view by the fact that the Settlement Officer found great difficulty in carrying out what he was called upon to do. When Mr. Souter in these circumstances took up the matter himself and disposed of it on his own lines, can it be said that his order was contradictory of an order which does not appear itself to be entirely consistent?

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Two departures from Mr. Cotton's order are alleged before us: (1) Mr. Souther held that the total rent under the settlement should be more or less equal to the rent lawfully due to the proprietor, while Mr. Cotton held that there was no necessity to ascertain the aggregate rent-roll under each tank and approximate the financial results of the settlement thereto. (2) Mr. Souther disallowed "illegal cesses" about which Mr. Cotton had said nothing.

To take the latter point first, "illegal cesses" we are now told were amongst the matters appealed against so that the question had to be decided even if Mr. Cotton had failed to do so. It is quite possible that when Mr. Cotton said that the aggregate rent-roll under each tank was not to be made a standard he meant that as this might include illegal cesses it was a wrong standard. Anyhow I am not clear that Mr. Souther's disallowance of illegal cesses is in contradiction to Mr. Cotton's orders. As regards the first point, Mr. Souther seems to me by classifying the tanks and assessing the lands with reference to the class of tanks they are under to have complied, at least formally, with the principle that the aggregate rents under each ayacut was not to be assumed as correct.

No doubt Mr. Souther held that the total rent under settlement should be "more or less equal to the rent lawfully due to the proprietor". As noted above he qualified this by first deducting illegal cesses, but, in any case, in a zamindari of this sort, where the reasons for the existing unequal rates of rent for lands of the same fertility could not be ascertained, the principle insisted on by Mr. Cotton that the lawful rent should be regarded as correct till the contrary was shown, would in practice lead to the total rent fixed under the Settlement being more or less equal to the aggregate of the rents

"lawfully payable". The same result would therefore be reached by both methods. When Mr. Souther further found that Mr. Cotton had also laid down the principle that where there were widely varying rates for adjoining fields of the same fertility under the same ayacut some revision was inevitable, I do not see how he can be held to have departed from Mr. Cotton's order by attempting the best solution he could find of a very difficult problem. There is, however, one particular matter, in which I agree with my learned brother that his order is liable to revision under the *certiorari* rule. This is in the matter of the appeal by certain ryots that these lands were *pannai* lands and therefore should not have been included in the rent settlement. In regard to this Mr. Cotton in his order, paragraph 2 (G), posed the question "whether *pannai* should be excluded from the Settlement" and his answer is "*pannai* lands should be excluded from the Settlement"; but he did not decide whether there were *pannai* lands or not. Mr. Souther did not specifically answer the question but the lands were entered in the list of lands whose rent was settled under section 168 with the result that, instead of holding as ryots at a fixed permanent rate of Rs. 10 per acre, with no extra charge for a second crop, the ryots were assessed at a rent of Rs. 14 per acre with a liability to pay a further rate for a second crop. In this case we have the rather peculiar position that the Zamindar is now contending that these were *ryotwari* lands while the tenants are maintaining that they are *pannai* lands. It is argued that the tenants, not having objected to the Revenue Officer's notice describing their lands as *ryotwari* lands, are not at liberty to contend that they are *pannai* lands. It is to be observed, however, that, as in that order the rent was left at Rs. 10 per acre, there was no reason why the ryots

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should object to that notice. In fact their position would be better as *ryotwari* tenants with that rent than as tenants of *pannai* lands. The lease deed put forward by them is of 1895, so that the presumption under section 185 of the Act is not applicable. However, we have not here to say whether the claim put forward that the lands are *pannai* lands is substantiated or not. The fact which entitles us to interfere by writ of *certiorari* in this matter is that the question as to whether the lands were *pannai* or not was distinctly raised before the Board of Revenue and had to be adjudicated upon. It was no adjudication merely to say conditionally that *pannai* lands should be exempted. Though the lands were claimed to be *pannai* yet in the final order, without any specific adjudication on the point, the fair rent was settled as if they were *ryoti* lands. Consequently the Board of Revenue failed to exercise a jurisdiction in this matter which it was bound to exercise. On this point I agree with my learned brother that that part of Mr. Souter's order which renders the land liable to assessment must be set aside and, for the reasons given by him, this will entail setting aside Mr. Souter's orders about the other lands also, since the rates fixed for other lands are dependent on the inclusion of those lands which may have to be excluded as not falling under Chapter XI. I agree also that the petitioners in Civil Miscellaneous Petition No. 2074 should get their costs while the other parties will bear their own costs.

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APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.

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KONAMMAL AND ANOTHER (FIRST PLAINTIFF AND FOURTH
SURETY—RESPONDENTS), RESPONDENTS.*

Principal and surety—Discharge of surety—Time given to principal debtor—Effect of—Reservation of right to proceed against surety—Exception in case of—Compromise arrangement between creditor and principal debtor—Time if given to principal debtor by—Judicial act—Time given by—Surety if not discharged in case of—Consent order if a judicial act—Surety bond—Compromise if excluded by

The principle that the granting of time without the consent of the surety to his principal discharges the surety is subject to the exception that, if, though time is granted by the creditor to the principal debtor by agreement with him, nevertheless under that agreement the creditor's right to proceed at once against the surety is reserved, then the surety is not discharged.

Even if by agreement there is an explicit release of the principal debtor by his creditor, when that is combined with a reservation of the creditor's right to proceed against the surety, that does not discharge the surety. The effect of such an agreement with such a reservation is that the principal debtor agrees that the liability of the surety shall continue with the corollary that the right of the surety to exact his remedy in turn from the principal debtor also continues.

Pending an appeal by the defendant against a decree for possession of a jagir, the plaintiff was allowed to execute the decree on her furnishing security. A security bond was thereupon executed by four sureties, whereby they undertook that the plaintiff would restore the jagir which she had taken delivery of in execution, that she would act according to the decree of the appellate Court, that she would pay whatever

* Appeal against Order No. 294 of 1930.

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amount she was liable to pay in accordance with the appellate decree in connection with the said jagir, and that, if she committed default in so paying, the amount that she was liable to pay might be realized from the property given by the bond as security. The sureties further undertook, in the event of the property given as security not being enough, to discharge personally whatever was eventually decided to be due in connection with the decree to be made in respect of the jagir, if the plaintiff failed to pay it.

The appeal was allowed, and the defendant got back the jagir in question by way of restitution. He then applied also by way of restitution for payment of mesne profits. But without any inquiry by the Court he and the plaintiff entered into an arrangement whereby the profits were fixed at Rs. 20,000 (the amount claimed being Rs. 33,000) and it was agreed that the defendant should receive towards that amount Rs. 9,000 odd standing to the credit of the plaintiff in Court, that the balance of Rs. 10,000 odd should be paid by the plaintiff within a period of two months and that in default the defendant should take execution proceedings against the property offered as security by the sureties. The agreement then went on to say: "All reliefs which the petitioner (defendant) prays for in this petition have been settled by the aforesaid arrangement." One of the sureties, A, was not a party to the above arrangement. An order was made by the Court embodying the said arrangement.

On an application by the defendant for the recovery from A of the balance due under the said arrangement and the order based thereon,

Held that the consent order gave time to the plaintiff to pay the balance of the amount fixed for mesne profits without any reservation of the defendant's right to proceed against the surety in the meantime and that therefore the surety was discharged.

Per VENKATASUBBA RAO J.—Whether a compromise as such is or is not excluded by the terms of a surety bond is a question of fact in each case. In the present case a compromise was not excluded by the terms of the security bond, and the surety was bound by the order based on the compromise, although the compromise had been entered into without his knowledge.

Per REILLY J.—*Quære* whether the rule about a surety being discharged when time is given to his principal debtor

does not apply when that is done by a judicial act with the consent of the creditor.

Where there is a compromise, which on the face of it is a perfectly lawful compromise, between the creditor and the principal debtor and all that the Court has to do is to accept the compromise and make an order accordingly, the order so made, though with the consent of the creditor, cannot be said to be a "judicial act" in the above sense.

The consent order had not the effect of releasing the plaintiff, the principal debtor. The provision that "all reliefs which the petitioner prays for in this petition have been settled by the aforesaid arrangement" cannot be interpreted as meaning that the plaintiff was released.

APPEAL against the order of the District Court of South Arcot, dated the 27th day of January 1930 and made in Civil Miscellaneous Petition No. 288 of 1929 in Miscellaneous Petition Register No. 736 of 1924 in Original Suit No. 13 of 1916.

K. V. Sesa Ayyangar for appellant.

C. S. Venkatachariar for respondents.

JUDGMENT.

VENKATASUBBA RAO J.—This is an appeal against the order refusing to make the surety, the respondent (Anganna Reddi), liable in execution. The facts may be briefly stated. A lady by name Konammal obtained a decree against one Annadana Jadaya Goundar for possession of a jagir, and an appeal was preferred by the latter to the High Court. Konammal was allowed to execute the decrees pending the appeal on her furnishing security. A security bond was thereupon executed by four sureties, including the respondent, Anganna Reddi. The material portion of that bond runs thus:—

"We hereby undertake that the first plaintiff (Konammal) will restore the jagir which she had taken delivery of in execution, that she will act according to the decree of the appellate

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Court, that she will pay whatever amount she is liable to pay in accordance with the appellate decree in connection with the said jagir, that if she commits default in so paying, the amount that she is liable to pay may be realized from the properties hereby given as security."

In the appeal Goundar succeeded and got back from Konammal the jagir in question by way of restitution. Then he applied also by way of restitution for payment of mesne profits. But without any inquiry by the Court, Goundar and Konammal entered into a private arrangement as to the claim to the mesne profits. To this proceeding the surety, Anganna Reddi, was not a party. The amount claimed in respect of mesne profits was Rs. 33,000, but by the arrangement the profits were fixed at Rs. 20,000 and it was agreed that Goundar should receive towards this amount Rs. 9,000 odd standing to the credit of Konammal in Court and that the balance of Rs. 10,000 odd should be paid by Konammal within a period of two months. In default (then follow the important words) "Goundar should take execution proceedings against the immovable properties which were offered as security by the sureties." The agreement then goes on to say: "All reliefs which the petitioner prays for in this petition have been settled by the aforesaid arrangement." An order was made by the Court on the 10th September 1926 embodying this compromise. It is alleged by Goundar that towards the amount due under the order, namely Rs. 10,000 odd, one of the sureties subsequently paid Rs. 5,000, and he now claims in execution the balance of Rs. 5,000 odd against Anganna Reddi, the respondent. It is not disputed, though the instrument is not happily worded in this respect, that the claim to mesne profits by way of restitution is covered by its terms.

Anganna Reddi contends that the claim made by Goundar in respect of mesne profits was an extravagant

one and that the compromise and the order based thereon were collusive and fraudulent. Whether it is open to Anganna Reddi to raise this plea in these proceedings is a question which does not arise in the view I have taken.

Three points have been urged by Anganna Reddi, the surety, who contends that his liability under the surety bond has become extinguished. First, he says that the order made not being after contest but by consent, he is not bound by it. There is no force in this contention. The true test is whether a consent order is excluded by, or is outside the scope of, the surety bond. As held in *Appunni Nair v. Isack Mackadan*(1), in the absence of any special stipulation in that behalf, there is no ground for limiting the liability only to a decree passed after contest. The same case points out that, if there has been collusion between the plaintiff and defendant in obtaining the decree, the surety is not without remedy. The same view was taken in *Haji Ahmed v. Maruti Ramji*(2). The learned Judges observe, whether a compromise as such is or is not excluded by the terms of a surety bond is a question of fact in each case. As a compromise was not in terms excluded from the surety bond, they held that the surety was bound by the compromise, although it had been entered into without his knowledge. In this Bombay case, *Appunni Nair v. Isack Mackadan*(1) was approved and followed. This view receives support also from *Jia Bai v. Joharmull Bothra*(3). In that case RANKIN C.J. considers at length *Tatum v. Evans and others*(4), a decision cited for the contrary position, and points out how it is clearly distinguishable. The agreement there was the

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(1) (1919) I.L.R. 43 Mad. 272.
(3) (1932) 36 C.W.N. 749.

(2) (1930) I.L.R. 55 Bom. 97.
(4) (1885) 54 L.T. 336.

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result of an elaborate arrangement embracing a great many different matters, and it would be impossible to hold that the surety, when he entered into the bond, bound himself in the expectation that such an arrangement would be made. In other words, the question in each case is, would the terms of the bond reasonably warrant that the arrangement come to by consent was or was not within the contemplation of the parties? Some cases where a different view has been taken have been cited to us; and I do not think it necessary to refer to them. This contention of Mr. Venkatachari, the surety's Counsel, must be overruled.

Secondly, it is argued for the surety that under the consent order the principal debtor having been discharged, his own obligation has become extinguished. Under the order quoted above, on Konammal failing to pay the balance of Rs. 10,000 odd in two months, the creditor's remedy is confined to proceeding against the surety; in other words, the creditor has abandoned his remedy against the principal debtor. It is on the strength of this clause that the contention has been put forward that the surety's liability has become extinguished. But Mr. Sessa Ayyangar, the learned Counsel for Goundar, urges that there is a well-recognized exception to the rule that the surety is released when the principal debtor is discharged and that on the facts of this case it is the exception and not the rule that applies. This argument is clearly well-founded. The rule of law that the discharge of the principal debtor necessarily carries with it the release of the surety is founded on this principle; it would be a fraud on the principal debtor for the creditor to release him from liability, if the latter were then able to proceed against the surety, who in his turn might sue the principal debtor and thus render the alleged release

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nugatory; Halsbury's Laws of England, Vol. XV, section 1056. See also *Sami Aiyar v. Ramaswami Chettiar*(1). But, if the deed releasing the principal debtor itself contains a reservation of remedies against the surety, the release is reduced to a mere covenant not to sue; see Halsbury's Laws of England, Vol. XV, same section. The rule as well as the exception are very clearly stated in the following passage in Rowlatt on Principal and Surety, second edition, page 260:

"The doctrine under which a surety is discharged by an agreement on the part of the creditor either not to sue, or to give time to the principal debtor, resting as it does upon the principle that otherwise a fraud would be committed upon the principal, does not apply if it is made a condition of the agreement that the rights of the creditor to sue or receive the money from the surety are reserved; for in that case the principal takes the indulgence upon the footing that he must continue exposed to a claim at the instance of the surety, and the arrangement becomes one the observance of which does not involve the suspension of any right of the surety. The surety is therefore not discharged."

The principle is this: If a creditor agrees to discharge the principal debtor, it would be a breach of the agreement so entered into for the creditor to pursue his remedy against the surety, for the latter would in his turn enforce his remedy against the principal debtor and thus the creditor's agreement to discharge would be rendered inoperative; but if the very agreement to discharge the principal debtor contains a reservation of rights against the surety, the agreement cannot operate as an absolute release, for the obvious reason that the principal debtor has notice that the creditor's remedies against the surety are preserved and that the latter's right of recourse against him is not extinguished. The

(1) (1922) 44 M.L.J. 171, 177.

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following passage from White and Tudor expresses this idea very clearly and concisely :—

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"A release, with a reservation of rights against the sureties, operates as a covenant not to sue between the creditor and the debtor and does not release the sureties. And language importing an absolute release may be construed as a covenant not to sue the principal debtor, when that intention appears, leaving the debtor open to any claim of relief at the instance of his sureties."

White and Tudor's Leading Cases in Equity, Vol. II, page 544.

See also *Murugappa Mudaliar v. Munusami Mudali*(1) and the notes to section 135 of the Indian Contract Act in Pollock and Mulla's Commentaries. In this case there is such a contract for reserve against the surety, and it is the exception and not the rule that applies. I cannot therefore accept Mr. Venkatachari's contention that the surety's liability became extinguished on this ground.

But the third contention of Mr. Venkatachari, the one accepted by the lower Court, must prevail. By the terms of the order passed on the arrangement come to by consent, Konammal was given two months' time for the payment of the balance of the amount declared to be due. For the surety it is contended that this giving of time has had the effect of discharging him. Can this compromise be regarded as having been within the contemplation of the surety when he executed the security bond? He agreed under it to pay whatever amount might be found due; that is to say, the payment became due on the date it was in due course ascertained. It was held in *Mahomedalli Ibrahimji v. Lazmibai*(2) that a compromise providing for the payment of the decretal amount by instalments had the effect of

(1) (1919) 33 M.L.J. 131, 144.

(2) (1929) 1 L.R. 54 Bom. 118.

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discharging the surety, the test laid down being, is the compromise consistent with the obligations which the surety had undertaken to discharge?

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KEMP A. C. J. observes :

"His (surety's) rights against the debtor are prejudiced by this compromise, and, I think, it can fairly be said that such a compromise was not one which was contemplated by him when he entered into the suretyship."

There are observations in the judgment of KEMP A.C.J. to the effect that the very fact that the decree was one passed on consent had the effect of releasing the surety. I have already said that I take a different view on this point, but I agree that, if an arrangement provides for postponed payment or for the amount being paid by instalments, the surety is discharged from his obligation. *Abdul Gafur v. Mannalal*(1) and *Kunj Lal v. Batuk Prasad*(2) support this view. The observations of RANKIN C.J. in *Jia Bai v. Joharmull Bothra*(3), already cited, are *obiter*. In an old English case, *Bowfield v. Tower*(4), heard by four Judges, the headnote runs thus :—

"If a plaintiff accepts from the principal defendant a cognovit whereby he gives him time for payment by instalments, he thereby discharges the bail, unless they are parties to the arrangement."

GIBBS J. observes :

"I was of Counsel in the cause in the Court of King's Bench in which it lately was ruled, that by giving a cognovit payable by instalments, the bail were discharged, by analogy to the cases where a creditor, by giving time to the principal, discharges the surety."

The principle that a contract by a creditor to give time to the principal debtor discharges the surety is well-recognised. The reason of the rule is this:

(1) A.L.R. 1927 Cal. 239.

(2) (1929) 120 I.C. 552.

(3) (1932) 36 O.W.N. 749.

(4) (1812) 4 Taunt. 456; 128 E.R. 405.

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the surety is entitled at any time to require the creditor to call upon the principal debtor to pay off the debt or himself pay off the debt and when he has paid it off he is at once entitled to sue the principal debtor; and, if the creditor has bound himself to give time to the principal debtor, the surety cannot do either the one or the other of these things until the time so given has elapsed; see *Rouse v. Bradford Banking Company*(1) and *White and Tudor's Leading Cases in Equity*, Vol. II, page 539.

Mr. Sesha Ayyangar argues that in this case also the rule does not apply, as there is a contract for reserve against the surety. The question is, is there any reservation of rights as contended? If the arrangement, which said that Konammal was given two months' time, had also provided that Goundar could proceed against the surety in the meantime, there would then have been a reservation and Mr. Sesha Ayyangar's contention would have been right. But the consent order, far from containing any such reservation, says in terms that only in the event of Konammal failing to pay within the two months, the surety could be proceeded against. The facts of the present case bring it within the rule as to the giving of time and not the exception relating to the reservation of rights. I must uphold therefore the third contention of the surety, and, agreeing with the lower Court, hold that he is not liable.

In the result, the appeal fails and is dismissed with costs.

REILLY J.

REILLY J.—I agree that we must uphold the learned District Judge's order for the reason given by him, that by the consent order made between plaintiff 1,

(1) [1894] 2 Ch. 32.

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Konammal, and defendant 1 on the 10th September 1926 time was given to Konammal to pay the balance of the Rs. 20,000 fixed for mesne profits and that therefore the surety was discharged. The learned District Judge has said that this is so under section 135 of the Contract Act. Mr. Sesha Ayyangar is right in contending that section 135 of the Contract Act does not apply to this case. This is not a case to which the provisions of the Contract Act directly apply. But sections 133, 134 and 135 of the Contract Act and some of the following sections embody equitable principles which have long been established in England, and I have no doubt that a surety can claim the protection of those principles in such proceedings as these. So long ago as 1795 in *Rees v. Berrington*(1) a creditor gave time to the principal debtors, and, when they did not pay in the time so given, instituted an action against the surety: the surety preferred a bill in the Court of Chancery praying for an injunction that the action should be stayed, and Lord LOUGHBOROUGH L.C. held that he was clearly entitled to such an injunction on the ground that his rights had been interfered with behind his back by granting time to the principal debtors. That principle—that the granting of time without the consent of the surety to his principal discharges the surety in such a case—has been reiterated very many times. But, as Mr. Sesha Ayyangar pointed out, there is one exception to it. If, though time is granted by the creditor to the principal debtor by agreement with him, nevertheless under that agreement the creditor's right to proceed at once against the surety is reserved, then, as pointed out by PAGE WOOD V.C. in *Webb v. Hewitt*(2), the surety is not discharged, the

(1) (1795) 2 Ves. Jun. 540; 30 E.R. 765.

(2) (1857) 3 K. & J. 438; 69 E.R. 1181.

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reason being obviously that the creditor may proceed at once against the surety and the surety in his turn may proceed at once against the principal debtor. Mr. Sesha Ayyangar suggests this is such a case. In the consent order made on the 10th September 1926 it is provided that the balance of Rs. 10,000 shall be paid to the petitioner, i.e. defendant 1, by Konammal within a period of two months—in default the petitioner shall take execution proceedings against the immovable property charged as security. Mr. Sesha Ayyangar urges that we should interpret that as meaning that, although defendant 1 was not to proceed against the principal debtor, Konammal, for two months, his right to proceed against the surety at once was reserved. In my opinion it is impossible to interpret the order in that way. The order gives two months' time to Konammal and provides, not that defendant 1 may at once proceed against the security, but that he may proceed against the security in default of payment by Konammal within those two months. It is clear therefore, I think, that the right of the creditor to proceed at once against the security or the surety in spite of time being given to the principal debtor was not reserved in this case, and the exception to the rule in regard to granting time to the principal debtor does not apply here.

Mr. Sesha Ayyangar however contends that in this case there was no extension of time, there was really no giving of time at all to Konammal. It is quite true that we have not in this case a definite time fixed by contract, which was afterwards extended. But does that take this case out of the rule about the giving of time? What the sureties undertook in this case was to discharge out of the property which they gave as security and, if that was not enough, to discharge personally

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whatever was eventually decided to be due in connection with the decree to be made in respect of the jaghir, if Konammal failed to pay it. That must mean that they undertook to pay what she might be found liable to pay and to pay it when she was found so liable. I do not think it is possible to attach any other reasonable meaning to their undertaking. In this particular case it was found and settled by the consent order on the 10th September 1926 that what she was liable to pay was Rs. 20,000, out of which Rs. 9,900 was to be paid from money which she had deposited in Court. But, instead of her being made liable to pay the balance at once, she was given by the consent order—that is in effect by the creditor, defendant 1—two months' time to pay it. It is impossible I think to suggest seriously, when the matter is fully considered, that the sureties were not injuriously affected by that postponement, by the allowing of two months to Konammal after her liability had been finally fixed, provided that the order meant in effect, as I have no doubt it meant, that the sureties or their property could not be proceeded against for the balance during those two months and they in turn could not proceed against Konammal during those two months. It is obvious that during those two months Konammal would be at liberty to secrete any movable property or to make away with her property in other manners, if she wished to do so. And there has been an allegation in this case that she did during that time draw Rs. 4,000 from Court and put it away somewhere. That allegation has not been proved; but at any rate it illustrates the way in which the sureties' interests might be very seriously affected by Konammal being given two months' time, as she was in this case.

There is one other point taken by Mr. Sesha Ayyangar, to which I may refer. He quoted an Irish

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case, *Provincial Bank v. Cussen*(1), as an authority to show that the rule about a surety being discharged when time is given to his principal debtor does not apply when that is done by a judicial act with the consent of the creditor. Now that, if I may say so, is not either fully or accurately the effect of that case. But I do not think it necessary to discuss that case at length because it arose in connection with Bankruptcy proceedings, where obviously very different considerations apply. And moreover the order, which was made on the 10th September 1926 in this case, though made with the consent of the creditor, was not in my opinion a "judicial act" in the sense suggested by Mr. Sesha Ayyangar in connection with this Irish case. There was a compromise between the two parties concerned and on the face of it a perfectly lawful compromise. All that the Court had to do was to accept the compromise and make an order accordingly. There was in no sense an adjudication between the parties. There is really not much meaning in calling that a "judicial act", nor do I think it of any use to try to show that for that reason the order so made was not one to which the principles in regard to the discharge of a surety, which we have been discussing in this case, apply.

That is really sufficient for the disposal of this case, as we uphold the decision of the learned District Judge on this objection of the surety. But, as my learned brother has mentioned, another question has been argued before us at considerable length. Among the objections raised in the surety's counter-statement in the District Court was one to the effect that, as Konammal was released altogether by the consent order of the 10th September 1926, the surety was thereby discharged. Oddly enough at first sight, the learned District Judge

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in enumerating the three points actually pressed before him at the hearing of the case does not mention that objection at all. It was suggested by Mr. Venkatachari for the surety that the learned Judge was mistaken in supposing that the surety did not intend to press that point in the case. Certainly the learned District Judge does not say that the point was given up; but he does not enumerate it among the points pressed before him, and he says nothing whatever about it in his judgment. It was a point for serious discussion, if the surety thought fit to press it, though, as we have found, he could succeed on a narrower point. The words of the consent order have already been quoted in part. On the face of it the order provides that Konammal should pay the balance of Rs. 10,000 within two months and that in default of her so doing defendant 1 should take execution proceedings against the immovable property offered as security by bringing it to sale in pursuance of the charge created over it. But after that there is another sentence, which it is suggested is of considerable importance, namely "All reliefs which the petitioner prays for in this petition have been settled by the aforesaid arrangement." It is urged that, taking those three provisions together, Konammal was entirely released if she did not happen to pay within the two months, and the result of that would be that the surety must have been discharged. Now, it must be noticed that the order contains no explicit release of Konammal. If there is a release, we have to find it by implication. And on the other hand there is an explicit statement that in default of payment by Konammal defendant 1 is to proceed in execution against the property charged as security. In the absence of any explicit release of Konammal and in the face of the definite statement that defendant 1 is to proceed against

(1) (1886) 18 L.R. Ir. 382 (C.A.).

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the property given as security I cannot interpret the provision that "all reliefs which the petitioner prays for in this petition have been settled by the aforesaid arrangement" as meaning that Konammal was released. On the other hand we have here something even more than a reservation of the right to proceed against the security in spite of the supposed release. Even if the language of the order was clearly in its literal meaning a release of Konammal, nevertheless, if a right to proceed against the charged property or against the surety was reserved, then the surety would not be discharged. Here we have something even more serious against the surety, namely an explicit statement that defendant 1 is to proceed against the charged property. As my learned brother has pointed out, even if by agreement there is an explicit release of the principal debtor by his creditor, when that is combined with a reservation of the creditor's right to proceed against the surety, that does not discharge the surety. The effect of such an agreement with such a reservation is that the principal debtor agrees that the liability of the surety shall continue with the corollary that the right of the surety to exact his remedy in turn from the principal debtor also continues. There are many authorities for that, such as *Kearsley v. Cole*(1), *Bateson v. Gosling*(2) and *Oragoe v. Jones*(3). The principle behind both the rule regarding the granting of time to the debtor and the rule regarding the release of the debtor is the same. If by agreement between the creditor and the principal debtor without the surety's consent the surety's right of recourse against the principal debtor is destroyed or impaired or interfered with, then the surety's liability goes and the surety is discharged. But the reservation

(1) (1846) 16 M. & W. 128; 153 E.R. 1128.

(2) (1871) L.R. 7 C.P. 9.

(3) (1873) L.R. 8 Exch. 81.

to the creditor of a right to proceed against the surety in either class of cases prevents the discharge of the surety, as with the reservation the surety's right of recourse against the principal debtor also is preserved. In this case we cannot find, when we examine the matter carefully, that Konammal was released by the consent order of the 10th September 1926; and, even if part of the wording of the order had implied that, the provision regarding execution against the security would make the release ineffective. That very probably explains why this particular point was not urged with any persistence before the learned District Judge.

But the other point remains, that time was given to Konammal and thereby the surety was discharged.

I agree that this appeal should be dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Curgenven and Mr. Justice Sundaram Chetti.

PEDDA VENKATAPATHI (FIRST PLAINTIFF), APPELLANT,

1933,
January 18.

v.

GANAGUNTA BALAPPA AND TWO OTHERS (DEFENDANTS),
RESPONDENTS.*

Malicious prosecution—Suit for damages for—Absence of reasonable and probable cause—Enquiry in respect of—Duty of Civil Court—Judgment of Criminal Court acquitting plaintiff—Effect and value of.

In a suit for damages for malicious prosecution the Civil Court should undertake an independent enquiry before satisfying itself of the absence of reasonable and probable cause.

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and the judgment of the Criminal Court acquitting the plaintiff can be used only to establish the fact that an acquittal has taken place as a fact in issue in the civil suit and not to ascertain the grounds upon which the acquittal proceeded or the views of the trying Magistrate upon the evidence.

Mohammad Daud Khan v. Jia Lal, (1929) 116 I.C. 852, considered. *Gulabchand Gopaldas v. Chunnilal Jagjivandas*, (1907) 9 Bom. L.R. 1134, and *Shubraji v. Shams-ud-din*, (1928) I.L.R. 50 All. 713, followed.

APPEAL against the decree of the District Court of Anantapur in Original Suit No. 15 of 1924.

K. Srinivasa Rao for appellant.

T. R. Arunachalam for respondents.

JUDGMENT.

CURGENVEN J.—The first plaintiff appeals against the dismissal of his suit filed for damages for malicious prosecution against the first defendant, now respondent, and two others. The case arose out of a disturbance which took place on the 12th September 1922 at Malyavantham village, Dharmavaram Taluk, Anantapur District. Consequent upon that disturbance the first defendant filed a complaint, Exhibit V, before the police on the 13th September. The purport of that complaint was that the village Madigas were holding a festival on that evening and that in consequence of certain conduct of the complainant's which had caused annoyance to them they came in a body to his house and made trouble there. The first plaintiff is himself the son-in-law of the first defendant and, it was alleged, identified himself with the action of the Madigas and while the disturbance was proceeding fired a shot with a revolver which injured one Venkaramappa, examined in the present case as the third witness for the defendant. Accordingly, the first plaintiff was made the first accused and other persons to the number of seventeen

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were also included. The police took up the case and presented a charge sheet, alleging that acts of rioting and an attempt to murder were committed in the course of the occurrence, and the case was tried by the Deputy Magistrate of Gooty. That officer discharged a number of the accused but framed a charge against the first plaintiff and one other of the accused. By way of defence the former then set up an *alibi* which he sought to establish by examining a number of witnesses. The version which these witnesses supported was that on the day of the occurrence the first plaintiff left the village about the middle of the day to go to Dharmavaram, visited the Taluk office, where he did some business in his capacity as Village Munsif, and then went on to the railway station where he met his brother who came from Anantapur by the mail train and himself proceeded to Anantapur by the opposite mail train, leaving Dharmavaram at about 2-30 a.m. He had some legal business in Anantapur and accordingly went as early as 5 a.m. to the house of his pleader Mr. Adimurthi Rao. The learned Deputy Magistrate accepted this evidence and acquitted the plaintiff, whereupon this suit for damages was filed.

There has been some discussion in this case as to what lies on the plaintiff to prove and what use can be made of the judgment of the Criminal Court. The Privy Council have in *Balbhaddar Singh v. Badri Sah*(1) now made it clear what the several elements are which in a case of this description have to be satisfied. Besides the fact of the prosecution and of its termination in favour of the plaintiff it has to be shown that the prosecution was instituted against him without any reasonable and probable cause and that it was due to a malicious

(1) (1926) 51 M.L.J. 42 (P.C.).

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intention. This pronouncement has been somewhat curiously construed in the judgment of a single Judge of the Allahabad High Court which has been drawn to our attention, *Mohammad Daud Khan v. Jia Lal*(1). The learned Judge would appear to think that some presumption arises from the mere fact that the plaintiff has been acquitted by the Criminal Court in cases where there is no scope for surmise and where evidence was given by the defendant of what he actually saw. I think that this case goes a good deal further than the usually accepted position, which is not affected by the Privy Council judgment, that it lies upon the Civil Court itself to undertake an entirely independent enquiry before satisfying itself of the absence of reasonable and probable cause. Indeed I am unable to agree that our Evidence Act justifies an examination of the judgment of the Criminal Court in order to ascertain the grounds upon which the acquittal proceeded and the views taken by the trying Magistrate of the evidence. Under section 43 of the Evidence Act it appears to me that that judgment can be used only to establish the fact that an acquittal has taken place as a fact in issue in the civil suit. I know of no provision of the Act which will justify the Civil Court in taking into consideration the grounds upon which that acquittal was based, and upon this point I am in agreement with *Gulabchand v. Chumilal*(2) and *Shubрати v. Shams-ul-din*(3) in the view that there is no such provision. The clear and straight issue in the present case, which must be decided before we can find absence of reasonable and probable cause, is whether the respondent was deliberately making a complaint which was in substance false when he alleged that the appellant took part in

(1) (1923) 11 L.C. 832.

(2) (1907) 9 Bom. L.R. 1134. (3) (1923) L.L.B. 50 All. 713.

the disturbance and fired the shot which injured the third witness for the defendant, and the appellant must establish the falsity of this complaint by disproving it before he can be entitled to damages.

[His Lordship discussed the evidence and proceeded as follows:—]

It is not as though the statements of these witnesses who speak to the first plaintiff's movements stood by themselves and can be estimated independently of the other features of the case. We have to bear in mind that a very serious charge involving the accusation of an attempt to murder had been made against the plaintiff and he evidently regarded it as so serious, whether it were true or false, that he took the extreme measure of evading arrest by flight. In such circumstances there must always be the greatest temptation to procure false evidence of absence from the scene, and experience unfortunately tends to show that apparently respectable persons can be induced to come forward for this purpose. The question I have asked myself in listening to this case is whether the evidence is of such unexceptionable quality as to render wholly unacceptable the explanation that its origin was due to this cause, and I can only say that I am not convinced that the answer must be in the negative. It is certainly singular that so much evidence should have been available to prove precisely what the plaintiff was doing at the exact time of the alleged occurrence; and another consideration is this, whether if he had available at hand such a considerable body of true evidence to prove his absence from the scene he would have persuaded himself to abscond from arrest and not have in some manner disclosed the fact that he was in a position to adduce this evidence. On this general ground I am satisfied that it would be quite unsafe to base a decree

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for damages for malicious prosecution upon the circumstances of a case of this nature and I would accordingly confirm the decree and dismiss the appeal with costs.

SUNDARAM CHETTI J.—I agree with the judgment of my learned brother and I have nothing more to add.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

1933,
January 25.

KOPPULA KOTAYYA NAIDU AND TWO OTHERS
(DEFENDANTS ONE TO THREE), APPELLANTS,

v.

CHITRAPU MAHALAKSHMAMMA (PLAINTIFF),
RESPONDENT.*

Fraud—Benami transfer for effecting—Fraud carried out—Party to fraud, if can take advantage of fraud in defence and disclose the real nature of the transfer—Test to be applied—In pari delicto potior est conditio possidentis—Scope of the maxim.

A person who has conveyed property benami to another for the purpose of effecting a fraud on his creditors cannot, when the fraud has been effected, set up the benami character of the transaction by way of defence in a suit by the transferee for possession under the conveyance.

The above dictum laid down in *Kamayya v. Mamayya*, (1916) 32 M.L.J. 484, approved on the principle of *stare decisis*.

APPEAL against the decree of the District Court of Kistna at Masulipatam in Original Suit No. 4 of 1926.

P. Somasundaram for appellants.

Oh. Raghava Rao for respondent.

Cur. adv. vult.

* Appeal No. 7 of 1927.

JUDGMENT.

MADHAVAN NAIR J.—Defendants 1 to 3 (father and two sons) are the appellants. The suit property originally belonged to the first defendant and the fourth defendant had a mortgage over it. From the evidence it appears that a portion of it belonged to one Sitayya Naidu, another son of the first defendant, but no such distinction has been made in the suit and it is not necessary to refer to it any further. At a revenue sale on 8th May 1918 the property was purchased by the fourth defendant for Rs. 762 in the name of his clerk. The case of the appellants is that this purchase by the fourth defendant was benami for themselves, the main object of the benami sale being to defeat an anticipated claim for partition from one Ranganayakulu Naidu, the son of the first defendant's brother. Though the property was sold, admittedly the appellants continued in possession; but according to the fourth defendant it was thenceforward as his tenants whereas the appellants contend that it was because the real title vested in them. Later on, six acres out of this property were sold by the fourth defendant to the first defendant's daughter Chittamma for Rs. 1,000. The appellants allege that this sale was for the purpose of reimbursing Chittamma for the money which she lent for the purchase at the auction. Ranganayakulu brought a suit, Original Suit No. 42 of 1922, for partition and recovery of a half-share of the family properties. That suit was directed against the present suit property and another twenty acres sold to one Chelamayya. In that suit the contention was raised by the plaintiff that the sale of the suit land to the fourth defendant was benami, but this was denied by the present defendants. After some evidence had been taken in the suit it was compromised on 25th January 1924, as a result of which

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Ranganayakulu Naidu received seven acres, five acres of which form portion of the suit property. Subsequently, on 5th August 1924, the fourth defendant sold the remaining property to the plaintiff for Rs. 4,000 under the sale deed, Exhibit H, and the present suit was instituted by her for recovery of the property from the defendants.

Defendants 1 to 3 denied that the fourth defendant had any title to the suit property as it was purchased by him benami for themselves. The plaintiff disputed the benami purchase contending that the fourth defendant purchased it for himself. It was also contended by the plaintiff that in the circumstances of the case it was not open to defendants 1 to 3 to raise the plea that the property was purchased benami by the fourth defendant. The second issue in the case related to these contentions. The learned District Judge upheld the contention of the appellants that the property was purchased benami for them by the fourth defendant, but he declined to give effect to this finding because he held that the first defendant defrauded Ranganayakulu of some portion of the suit property by setting up the false plea that the property belonged to the fourth defendant as a result of the auction purchase. Having been party to a plea of fraud which was successfully carried out, the learned Judge came to the conclusion that it was not open to defendants 1 to 3 to raise the contention that the purchase of property by the fourth defendant at the auction sale was benami for them. It was held in *Kamayya v. Mamayya*(1) that a person who has conveyed property benami to another for the purpose of effecting a fraud on his creditors cannot, where the fraud has been effected, set up the benami character of the transaction by way of defence in a suit by the

(1) (1916) 32 M.L.J. 484.

transferee for possession under the conveyance. Following this decision the learned Judge decreed the claim of the plaintiff.

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On behalf of the appellants Mr. Somasundaram, accepting the finding that the purchase by the fourth defendant was benami for the appellants, argues that no fraud was committed by them in Original Suit No. 42 by raising the plea that the fourth defendant became the owner of the land by the auction purchase, and that even if a fraud has been committed, since both the fourth defendant and the appellants were parties to the fraud, the lower Court should have dismissed the plaintiff's suit. The latter argument raises the question whether *Kamayya v. Mamayya*(1) was correctly decided. Mr. Raghava Rao on behalf of the respondent, besides supporting the judgment of the lower Court on the ground on which it is based, argues further that the learned Judge should have held that the purchase by the fourth defendant at the revenue sale was not benami for the appellants but it was for himself. Thus the points arising for consideration in this appeal are (i) whether the purchase of the suit property at the revenue auction by the fourth defendant was benami for the appellants; (ii) whether, by raising the plea that the property was sold to the fourth defendant at the revenue sale, the defendants as a matter of fact defrauded Ranganayakulu, the plaintiff in Original Suit No. 42 of 1922; and (iii) whether, in the event of our upholding the findings of the District Judge, effect should not be given to the decision in *Kamayya v. Mamayya*(1).

Point i.—On this point, as already stated, the learned District Judge after a very detailed and careful consideration of the entire evidence came to the conclusion that the purchase of the property by the fourth

(1) (1916) 32 M.L.J. 484.

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defendant was benami for the first defendant. We see no reason to differ from his conclusion. [His Lordship discussed the evidence and proceeded:]

Point ii.—On this point also we must accept the learned Judge's conclusion. [His Lordship discussed the evidence, found that he (first defendant) set up a false claim intending to defraud Ranganayakulu and that the latter had to accept by way of compromise a good deal less than what he claimed in the suit and concluded as follows:—] On the whole, we agree with the learned Judge that the plea of the first defendant in Original Suit No. 42 of 1922 was intended to defraud the plaintiff in that suit and he was without doubt defrauded.

Point iii.—The next question is whether it is open to the defendants to plead their own fraud as a defence to the present action. The plaintiff as having purchased the property from the fourth defendant may be treated as being in the same position as the fourth defendant for deciding this point. Mr. Somasundaram argues that the appellants and the fourth defendant having been parties to a fraud which has been carried out, the maxim *in pari delicto potior est conditio possidentis* will apply and that the plaintiff's suit should be dismissed. But in *Kamayya v. Mamayya*(1) it has been held that even though the plaintiff may have been a party to the fraud the defendant will not be permitted to plead his own fraud as a defence to an action against him. The test given in the case is that that party must fail who first has to allege the fraud in which he participated. It is clear, if we apply this test in this case, the appellants must fail. The appellants argue that the decision in *Kamayya v. Mamayya*(1) is wrong, that it has not been approved of in other Courts and that before deciding this case we must take the opinion of a Full Bench on

(1) (1916) 32 M.L.J. 484.

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the question whether *Kamayya v. Mamayya*(1) has been correctly decided. In this connection our attention has been invited to the very recent decision in *Qadir Baksh v. Hakam*(2). As may be seen from that judgment, the law seems to have been differently construed in other Courts. But, so far as our own Court is concerned, the decision in *Kamayya v. Mamayya*(1) has been consistently followed in a series of decisions. *Kamayya v. Mamayya*(1) was a decision by WALLIS C.J. and COUTTS TROTTER J. as he then was. This decision was followed by SCHWABE C.J. and COUTTS TROTTER J. in *Parthasarathy Reddiar v. Kandaswami Mudaliar*(3) and was again followed in *Ramaswami Naicker v. Alamelu Ammal*(4) by COUTTS TROTTER and RAMESAM JJ. *Pachayammal v. Devanaimmal*(5) is the next decision of this Court where *Kamayya v. Mamayya*(1) was followed by WALLER J. This decision is interesting as in it the view now urged by Mr. Somasundaram was specifically put before the learned Judge and the Calcutta decision in *Raghupati v. Nrishingha*(6) in support of it was also brought to his notice. The Lahore case had not then been decided. Though he was aware that there was a considerable body of authority in favour of the view that the defendant is entitled to show the real nature of the transaction as against a confederate in the fraud, the learned Judge still preferred to follow the decision in *Kamayya v. Mamayya*(1) as in his view the principle embodied in that decision was more effective in minimising fraud than the other view. In this connection attention may be drawn to the following observations:

"The question is one of public policy, and I think that public policy will be best served by following the rule that a man should not be allowed to plead his own fraud. As

(1) (1916) 32 M.L.J. 484.
(3) (1923) 45 M.L.J. 181.
(5) (1925) 22 L.W. 313.

(2) (1932) I.L.R. 13 Lah. 713 (F.B.).
(4) (1923) 46 M.L.J. 298.
(6) (1922) 36 C.L.J. 491.

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Sir LAWRENCE JENKINS showed in the Bombay case, it is the rule 'which will be most apt to deter persons from frauds of this kind'. It is the fraudulent grantor, who expects to extract the entire or the main benefit from the fraud. And if he realised that the law will give him neither a remedy nor a defence against his confederate, the temptation to commit the fraud will be minimised."

The decision in *Kamayya v. Mamayya*(1) by the then CHIEF JUSTICE and himself was followed by COURTS TROTTER J. after he became Chief Justice in *Subbaraya Chetty v. Subbaraya Chetty*(2). *Palepu Narayanamurthi v. Komali Chandrayya*(3) by WALLER J. is the latest decision of this Court on this point. In that case also *Kamayya v. Mamayya*(1) was followed. Having regard to this strong current of authority in our Court in support of the decision in *Kamayya v. Mamayya*(1) and the absence of any conflict of views, we do not think we will be justified in referring it for a fresh consideration before a Full Bench. Following *Kamayya v. Mamayya*(1) we would therefore hold that in the circumstances of the case it is not open to the appellants to plead their own fraud as a defence to the plaintiff's suit.

The appeal therefore fails and must be dismissed with costs. The Government will be entitled to realise their costs from the appellants. The memorandum of objections is for costs only. It is dismissed with costs.

JACKSON J.

JACKSON J.—I agree that there should be no departure from the rule of law set forth so clearly in *Kamayya v. Mamayya*(1). This may involve some divergence from the law as understood in Northern India, but the Madras practice in my opinion accords with what should be the public policy of this Presidency. In fact so far from extending the scope of benamidars, by allowing them first to cheat their victim and then come again into

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Court with the story that the previous case was false, I should prefer to see benami transactions altogether forbidden, and I consider that this Presidency, whatever may be the condition of the less literate parts of India, is now ripe for such legislative action. The treatment of this question by the Civil Justice Committee of 1924-25 was most unfortunate. All the members of the Committee were agreed as to the evils of the benami system, which it denounced in terms both forcible and true. But three of the members considered that the proposed legislation (preventing any plea short of fraud that the documentary evidence of title is a sham) should not be introduced unless it resulted in the abandonment of the practice within a reasonably short time. Apparently the dissident members envisaged Indians still putting property under fictitious titles and pleading that they had never heard of the new law. Such a fear would be quite groundless in this Presidency, and if that fear were removed, the Committee was prepared unanimously to recommend the abolition of benami transactions. It is unnecessary to detail the advantages of such a measure which are fully set forth in the Committee's report. But apart from the resultant benefits to public morality—restricted scope for perjury when registered documents are regarded as conclusive evidence, restraint upon excessive borrowing in the hope of concealing assets, and restraint upon inordinate rates of interest in the knowledge that assets may be concealed—there is a practical advantage which in these times cannot be ignored. Under the present system a greater number of suits is being admitted than can possibly be decided within a reasonable time; and financial stringency precludes the increase of Courts. The remedy must therefore lie in restricting the field of litigation, and that can best be

(1) (1916) 32 M.L.J. 484.

(2) (1926) 24 L.W. 500.

(3) (1927) 26 L.W. 67.

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done by making the creation, assignment or extinction of title still more dependent upon registered documents, to the exclusion of oral evidence.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Burn.

1933,
January 18.

SAVUDI KARUPPANAN AMBALAM (ACCUSED—
APPELLANT), PETITIONER,

v.

GURUSWAMI PILLAI AND ANOTHER (COMPLAINANTS),
RESPONDENTS.*

Code of Criminal Procedure (Act V of 1898), sec. 517—Accused charged alternately for offences of theft or receiving stolen property—Accused acquitted—Property found to be stolen—Order regarding disposal of.

An accused person was charged under section 379, Indian Penal Code, with having committed theft of two bulls, or, alternately, under section 411, Indian Penal Code, with having received stolen properties. The Magistrate, whilst finding that the property had been stolen, acquitted the accused on the ground that he was a *bona fide* purchaser, and directed the bulls to be returned to the respective owners.

Held that the bulls ought to be returned to the accused, there being no special circumstances to depart from the usual rule that, where a person accused of theft is acquitted and claims as his own the property seized from him by the police and alleged to have been stolen, it should be restored to him in the absence of special reasons to the contrary.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to

* Criminal Revision Cases Nos. 717 and 718 of 1932.

revise the judgment of the Court of the District Magistrate of Madura in Criminal Appeals Nos. 3 and 4 of 1932 (Calendar Cases Nos. 145 and 146 of 1932 on the file of the Court of the Second-class Magistrate of Madura Taluk).

F. S. Vaz for petitioner.

K. V. Sesha Ayyangar for respondents.

Public Prosecutor (L. H. Bewes) for the Crown.

JUDGMENT.

These cases are precisely similar. The Sub-Magistrate found that the petitioner (the accused in both cases) was not guilty of the offence of theft or of dishonestly receiving stolen property (sections 379 or 411, Indian Penal Code). He found in fact that the petitioner had purchased both the bulls for fair prices and without any reason to suppose them to be stolen property. Nevertheless he ordered the bulls to be returned to Meenammal and Pandia Muppan whom after enquiry he considered to be the owners. He was satisfied, he says, that the bulls had been stolen, though he does not say whence, by whom, or when.

The general rule in such cases is that, where a person accused of theft is acquitted and claims as his own the property seized from him by the police and alleged to have been stolen, it should be restored to him in the absence of special reasons to the contrary. This is the principle generally recognized in this Court; vide *Vaiyapuri Chetty v. Sinniah Chetty*(1). In the present case the learned Sub-Magistrate has not given any reason for departing from this principle. He appears to have thought that the decision of the question of ownership was sufficient to justify an order to

(1) (1930) 59 M.L.J. 901.

ARUPPANAN v. URUSWAMI. return the property to the owner. This is extremely unsound as has been explained by RANKIN C.J. in *Sattar Ali v. Ajzul Mahomed*(1). The Criminal Courts ought not to be used to short circuit the Civil Courts in this way. When it appears that the petitioner bought the animals honestly, the question whether he or the former owners is, or are, now entitled to them should be left to be decided by the Civil Court. It is not a question into which the Criminal Court should enter.

Since it is clear that the learned Sub-Magistrate has overlooked the fundamental principle that, when property is seized from a person who is afterwards acquitted of stealing it, the property should ordinarily be returned to that person, he cannot be said to have exercised his discretion in a judicial manner. I therefore set aside his order and direct that the bulls be returned to the petitioner from whom the police took them.

K.W.R.

(1) (1923) I.L.R. 54 Cal. 284.

Handwritten signature/initials

PRIVY COUNCIL.

KUMARAVELU CHETTIAR AND OTHERS, APPELLANTS,

v.

J.C.*
1923,
April 11.

RAMASWAMI AYYAR AND OTHERS, RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Res judicata—Representative suit—Former suit without permission of Court—Code of Civil Procedure (Act V of 1908), sec. 11, expl. (vi); O.I, r. 8.

In a representative suit instituted under Order I, rule 8, of the Code of Civil Procedure, 1908, the decision in a former suit does not operate as *res judicata* by force of section 11, explanation (vi), unless the former suit was instituted in compliance with the above rule (formerly section 30 of the Code of 1877), namely, by permission of the Court, the Court giving notice as therein prescribed to all persons interested.

There is possibly an exception where the former suit having been litigated *bona fide* on behalf of the plaintiff and others with a common right, the omission to comply with the rule has been inadvertent, and no injury therefrom has been sustained by the plaintiff in the second suit.

In the present case, as the former suit was instituted in November 1877 without the permission of the Court, and moreover was not instituted or conducted as a representative suit, no *res judicata* arose in the second suit.

Baiju Lal Parbatia v. Bulak Lal Pathuk, (1897) I.L.R. 24 Cal. 385, 390, and *Srinivasa Chariar v. Raghava Chariar*, (1897) I.L.R. 23 Mad. 28, 32, approved. *Gopalacharyulu v. Subbamma*, (1919) I.L.R. 43 Mad. 487, considered.

Judgment of the High Court, *Sonachallam Pillai v. Kumaravelu Chettiar*, (1927) I.L.R. 51 Mad. 128 (F.B.), reversed.

APPEAL (No. 62 of 1930) from a decree of the High Court (November 16, 1927) reversing a decree of the Subordinate Judge of Tuticorin (March 17, 1923).

The suit was instituted in 1919 by the appellants, suing as representatives of the Vaniyas (oilmongers) of

* Present: Lord BLANESBURGH, Lord MACMILLAN and Sir JOHN WALLIS.

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Tiruchendur for a declaration of their right to worship in the inner shrine of a Hindu temple at Tiruchendur; the defendants-respondents, who were trustees and servants and others connected with the temple, were sued as representatives of all persons similarly interested. The permission of the Court was obtained under Order I, rule 8, of the Code of Civil Procedure to the representative nature of the suit.

The sole question for determination upon the present appeal was that raised by issue 5, namely, whether the decision in a suit instituted in 1877 operated against the plaintiffs as *res judicata*. The facts as to that earlier suit and the material provisions of the Code appear from the present judgment.

The Subordinate Judge granted the declaration prayed for. He held that the suit was not barred by *res judicata*. He said that there was nothing to show that the plaintiffs in the earlier suit had obtained permission under section 30 of the Code of 1877 to sue in a representative capacity, and in his opinion the scope of the earlier suit was not the same as that of the present suit; moreover it was not litigated *bona fide* within the meaning of section 11, explanation (vi), of the Code of 1908.

On appeal to the High Court the learned Judges (KUMARASWAMI SASTRI and DEVADOSS JJ.) found in relation to the suit of 1877 (1) that no permission was applied for orally or in writing, or was granted expressly or impliedly, under section 30 to sue on behalf of all the Vaniyas interested, (2) that the suit was brought to assert not merely the title of the plaintiffs, but also the right of the Vaniyas to enter the shrine, and the relief asked for was not personal to the plaintiffs but one common to all Vaniyas and (3) that the suit was *bona fide*. The learned Judges, being of opinion that in

those circumstances there was a serious conflict of authority whether the present suit was barred by *res judicata*, referred to a Full Bench the question set out in the present judgment.

The opinion of the Full Bench was delivered by RAMESAM J., PHILLIPS Offg. C.J. and BEASLEY J. concurring, and is reported as *Sonachallam Pillai v. Kumaravelu Chettiar*(1) to the effect that explanation (vi) of section 11 was not controlled by Order I, rule 8.

On the appeal again coming before KUMARASWAMI SASTRI and DEVADOSS JJ., they considered further the suit of 1877, and concluded as follows:—

“ We have no hesitation in holding that the Subordinate Judge who tried the suit not only allowed the suit to proceed in a representative capacity but considered and decided the case with regard to the right of all the Vaniyas represented by the plaintiffs. The result of this finding is that the present suit is barred by *res judicata*.”

Accordingly the appeal was allowed and the suit dismissed.

Upjohn K.O. and Narasimham for appellants.—The present suit was not barred by *res judicata*. The suit of 1877 was instituted without the permission of the Court under the Code; moreover it was not, and did not purport to be, on behalf of the whole Vaniya community. It was brought to assert the individual rights of the plaintiffs and to recover damages for an alleged infraction of them. The fact that the plaintiffs claimed the right as Vaniyas did not make the suit one of a representative character. In any case section 30 of the Code of 1877, now Order I, rule 8, of the Code of 1908, embodied the only procedure by which a suit can be brought as a representative suit so as to bind persons not on the record; necessary safeguards

(1) (1927) I.L.R. 51 Mad. 128 (F.B.).

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as to notices to parties interested are provided thereby. The plaintiffs not having obtained permission, the suit was not a *bona fide* litigation for themselves and others within explanation (vi) of section 11 of the Code, and the decision operated as *res judicata* only as against the actual parties and their privies. It is conceded that there may be cases not within section 30 (or Order I, rule 8) which are within the explanation. [Reference was made to *Thanakoti v. Muniappa*(1), *Srinivasa Chariar v. Raghava Chariar*(2) and *Baiju Lal Parbatia v. Bulak Lal Pathuk*(3) and also to section 32 of the Code of 1877.]

DeGruyther K.C. and *Sidney Smith* for respondents.—The suit of 1877 was rightly held to have been a *bona fide* litigation in respect of a private right claimed in common by the plaintiffs for themselves and others and therefore within explanation (vi) to section 11 of the Code of 1908. The fact that the plaintiffs individually claimed damages for an infraction of their right did not prevent the suit being a representative suit; it was treated by the trial Judge and the parties as a suit of that kind. The law in India before 1877 recognized, as did the law in England, that plaintiffs could sue to establish a right enjoyed by the plaintiffs in common by themselves and other persons of a specified class; *Narayanappa v. Ramalingam*(4). Section 30 of the Code of 1877 and Order I, rule 8, introduced a procedure which is merely permissive and in any case applies only where the other persons are numerous. If explanation (v) of section 13 of the Code of 1877 had been intended to be confined to cases in which the leave of the Court had been obtained it would have so provided; moreover if that was the intention the explanation was unnecessary.

(1) (1885) I.L.R. 8 Mad. 496.
(3) (1897) I.L.R. 24 Cal. 385, 390.

(2) (1897) I.L.R. 23 Mad. 28, 32.
(4) (1896) 3 M.H.C.R. 228.

[Reference was made to *Rangamma v. Narasimhachariyulu*(1), *Gopalacharyulu v. Subbamma*(2), *Dhunput Singh v. Paresh Nath Singh*(3), *Muhammad Amir v. Sumitra Kuar*(4) and *Shankarlal v. Dakor Temple Committee*(5).]

Upjohn K.C. replied.

The JUDGMENT of their Lordships was delivered by LORD BLANESBURGH.—At Tiruchendur in the Tinnevely District, there is a temple dedicated to Subrahmanya-swami described by the appellants as a public temple of classic fame and great antiquity, open to and attended by all non-Panchama, non-polluting, Hindus from all parts of India, of all sects, including the appellants' "community of the Vaniya Vaisyas". In the suit, out of which this appeal arises, the appellants "for themselves and as representatives of all members of Tiruchendur Vaniya Vaisyas" set up a right to worship in the Inner Mayil Mahamantapam of the temple. The defendants were the trustees of the temple, certain sthanikars and servants under the control of the trustees and three members of the Vellala community of Tiruchendur. They were sued "for themselves, and as representatives of all persons similarly interested in the subject-matter of the suit". The suit was filed under Order I, rule 8, of the Code of Civil Procedure—a rule to which full reference must later be made, and the claim of the plaintiffs was resisted by all the defendants on grounds set forth in detail in the written statement of the trustees. These comprised answers on the merits, with a separate defence of *res judicata*. The claim was barred, so it was alleged, by a decree pronounced in 1878 in a suit representative in character and seeking the same relief.

LORD
BLANES-
BURGH.

(1) (1916) 31 M.L.J. 26. (2) (1919) I.L.R. 43 Mad. 487.
(3) (1893) I.L.R. 21 Cal. 180. (4) (1914) I.L.R. 38 All. 424.
(5) (1925) 28 Bom. L.R. 309.

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This defence, along with all the other answers made by the written statement, was repelled by the learned Subordinate Judge of Tuticorin, who, on the 17th March 1923, after a very elaborate judgment dealing with all the issues raised, decreed the suit. The respondents appealed to the High Court at Madras. In that Court the learned Judges found it convenient to deal with the plea of *res judicata* as one preliminary to all the others, and after full argument they came to the conclusion that it had been established. As, however, the course of decisions throughout India had not been uniform on the point at issue, they thought it well to refer the question of *res judicata* to the Full Court for decision. There, the same view was taken of the plea, and with an intimation to that effect the case was remitted to the learned Judges by whom the appeal had so far been heard, to pronounce upon the question whether the former suit had in fact, in its trial, been treated as a representative suit for the benefit of all Vaniyas so as to be fit to be decisive of the present case.

This question having later been answered in the affirmative by the learned Judges, it became unnecessary for them to go into any of the other issues raised on the appeal, which accordingly, by decree of the 16th November 1927, was allowed and the suit dismissed. Hence the plaintiffs' present appeal to His Majesty in Council, upon which, it is agreed, that the only questions in *hoc statu* open for determination are the two which have by the High Court been decided in favour of the respondents. Whether the litigation is to proceed further or not will become clear after it has been ascertained whether the views of the High Court on these two questions are or are not well-founded.

It will appear, as the case develops, that the decision must finally be rested on a proper appreciation of the

provisions of the Code of Civil Procedure with reference to representative suits, due regard being had to the conditions, if any such there be, which must be observed, if a decree in such a suit is to be binding on persons not actually parties or privies thereto. It will accordingly be convenient at the outset to trace the legislative history of representative suits.

Prior to the Code of 1877 such suits, although not unknown in India, were not the subject of legislation. With reference to them, the practice followed by the Courts there did not, apparently, differ, in substance, from that which had, for at least a century, obtained in the Court of Chancery in England. This practice, as described by LORD MACNAGHTEN in *Bedford (Duke of) v. Ellis*(1), is copiously referred to in the judgment of the High Court, and need not be further elaborated now. It will suffice, as an illustration of the corresponding practice in India, to draw attention to a judgment of the Madras High Court pronounced in the year 1866 in the case of *Narayanappa v. Ramalingam*(2). There, in the first of the two suits, the plaintiffs had been 54 inhabitants of a village who claimed against 67 inhabitants of an adjoining village a revision or alteration of the boundaries between the two. The second suit, the subject of the report, was one by other villagers claiming the same relief against the adjoining village, and therein it was held that the two villages had each been effectually represented in the first suit and that the inhabitants of both were, in substance, parties to the earlier litigation, which was of a public nature dealing with a claim in which all had a common interest. In these circumstances the decree in the earlier suit was a bar to the claim being again litigated.

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(1) [1901] A.C. 1.

(2) (1866) 3 M.H.C.R. 226.

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The Court emphasised the fact that convenience, where community of interest existed, required that a few out of a large number of persons should, under proper conditions, be allowed to represent the whole body, so that in the result all might be bound by the decree, although some only of the persons concerned were parties named in the record. In the absence of any statutory provisions on the subject, the Courts in India it would seem, prior to 1877, assumed the task and duty to determine in the particular case whether, without any real injustice to the plaintiffs in the later suit, the decree in the first could properly be regarded as an estoppel against the further prosecution by them of the same claim.

In the seventies of the last century the subject was dealt with by legislation both in England and in India—in England, to refer to its legislation first, by Order XVI, rule 9, to the Judicature Act, 1873. The effect of that rule in relation to representative actions was, in substance, to introduce into all the Divisions of the High Court the practice which prior to the Act had obtained in the Court of Chancery. But, as was pointed out by FLETCHER MOULTON L.J. in *Markt & Co., Limited v. Knight Steamship Company Limited*(1), in extending the procedure to all Divisions of the Court, the rule also formulated it, and the question whether the enactment accurately or otherwise expressed the previous practice of the Court of Chancery became accordingly little more than academic.

A similar observation may, perhaps, with equal appositeness, be applied to the corresponding Indian legislation on the subject to which attention will presently be directed.

(1) [1910] 2 K.B. 1021, 1088.

The English Order XVI, rule 9, which has remained unaltered until now, is in the following terms :—

“Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a Judge to defend in such cause or matter, on behalf, or for the benefit, of all persons so interested.”

A passing reference to the English practice under that rule in regard to two matters may be helpful here. First, it has been deemed essential that in a representative action the class of persons on behalf of whom relief is sought should be clearly defined. In the interests of precision it is expected that the class shall be so defined in the writ [see e.g. *Markt & Co., Limited v. Knight Steamship Company, Limited*(1)] but the gist of the requirement is that, as the judgment in such an action is binding on all the members of the class represented, it is of the essence that the range of the estoppel be defined somewhere on the face of the proceedings. Again in England if the action is properly brought by plaintiffs as members of a class having a common interest to vindicate the rights of the class, it will be no objection that they may have added a claim in respect of some matter in which they say they have been wronged in their individual capacity [*Bedford (Duke of) v. Ellis*(2)]. But, all the same, it remains true that if the plaintiffs' claim is substantially one for damages for an alleged wrong to themselves individually, the suit is not held to be representative in the true or effective sense of the term.

In India representative suits were made the subject of legislation in the Code of Civil Procedure of 1877 by provisions clearly based on the English precedent, but with modifications introduced of definite—even of

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(1) [1910] 2 K.B. 1021, 1034.

(2) [1901] A.C. 1.

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compelling—significance in relation to the very question here under consideration.

These provisions, contained originally in section 30 of the Code of 1877, are now to be found in Order I, rule 8, of the Code of 1908, in the terms following:—

“(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service, or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule 1 may apply to the Court to be made a party to such suit.”

The effect of this enactment standing alone appears to their Lordships to be as little open to doubt as is its purpose. As in 1873 had happened in England, it formulates in 1877 for India the former exception to the general principle that all persons interested in a suit shall be parties thereto. It is an enabling rule of convenience prescribing the conditions upon which such persons when not made parties to a suit may still be bound by the proceedings therein. For the section to apply the absent persons must be numerous; they must have the same interest in the suit which, so far as it is representative, must be brought or prosecuted with the permission of the Court. On such permission being given it becomes the imperative duty of the Court to direct notice to be given to the absent parties in such of the ways prescribed as the Court in each case may require: while liberty is reserved to any represented person to apply to be made a party to the suit.

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The direction of all these matters, in striking contrast to the English rule, is placed in the hands of the Court, and the obtaining of the judicial permission and compliance with the succeeding orders as to notice are, as it seems to their Lordships, quite clearly the conditions on which the further proceedings in the suit become binding on persons other than those actually parties thereto and their privies. In their Lordships' view the position under section 30 is correctly and clearly stated by AMEER ALI J. in *Baiju Lal Parbatia v. Bulak Lal Pathuk*(1), where he says:

“The effect of section 30 . . . is that, unless such permission is obtained by the person suing or defending the suit, his action has no binding effect on the persons he chooses to represent.”

“If the course prescribed by section 30 is not followed in the first case, the judgment does not bind those whose names are not on the record,” is another correct statement of the position; see *Srinivasa Chariar v. Raghava Chariar*(2).

It is convenient now to examine the decree which has been found to be a bar to the present suit. It is one by which the Subordinate Judge of Tuticorin, on the 19th June 1878, dismissed Original Suit No. 14 of 1877. It was affirmed by the High Court at Madras on the 28th April 1879 in Appeal Suit No. 73 of 1878.

The records of the suit appear to have been destroyed under the rules for the destruction of documents, and the nature and details of the litigation can now only be gleaned from public copies of the plaint, of the judgment and decree of the Subordinate Judge, and of the judgment of the High Court on appeal, all produced by one of the respondents.

(1) (1897) I.L.R. 24 Cal. 385, 390. (2) (1897) I.L.R. 23 Mad. 28, 32.

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From these documents it appears that the suit followed upon an unsuccessful magisterial prosecution of the plaintiffs for alleged criminal trespass into the Tiruchendur temple on the 8th of February 1876. In the suit, the complaint, which before the magistrate had been a trespass on the part of the accused, became the illegal ejection of the plaintiffs from the temple. The suit was commenced on the 8th of November 1877. The Code of 1877 had come into force on the 1st of October previously. The proceedings were accordingly regulated by section 30, although it may well have been, as is now pointed out by the High Court, that the pleaders at Tuticorin had not yet become familiar with the provisions of the section.

The plaintiffs were four Vaniyas (three of them members of a family of the village of Venkataramapuram), and a fellow casteman of Thattamadam. It was they who had been prosecuted for trespass. No one from Tiruchendur was added as plaintiff. Nor was this omission accidental, because, as appears from the judgment of the Subordinate Judge, it had been matter of complaint by the plaintiffs that none of the Tiruchendur people would give evidence in their favour, and that even their own castemen of that place would not come forward through fear of the defendants. In other words, the plaintiffs did not even suggest that they were then representing Tiruchendur Vaniyas in any sense. But it is on behalf of these Vaniyas alone that the present suit is brought. At the very outset, therefore, it becomes more than doubtful whether these local Vaniyas, the only appellants here, were in any way interested or concerned in the earlier litigation. The difficulty, it will be seen, increases and becomes more general on further examination.

A mere perusal of the plaint in the suit is enough to produce the impression that it was to obtain redress for the unjust and forcible exclusion of the plaintiffs from the temple on the aforesaid 8th February 1876 that the suit was really launched. For that exclusion, exemplary damages assessed at Rs. 5,200 are claimed by the plaintiffs individually. The order and description of the defendants lend colour to this view. Defendants 1 to 7, servants apparently of the temple, are alleged to have been the actual aggressors: defendant 8, the manager, and defendants 9 to 11, dharmakartas of the temple, are alleged to have permitted and connived at the aggression, while the claim against all the eleven is purely individual and in no sense representative. It is true that, following upon the charge of personal aggression, there is an allegation that the defendants since its date had been obstructing the entire community of the Vaniyas including the plaintiffs from crossing the outside compound of the temple and entering in. It is true also that there are elsewhere in the plaint references to Vaniyas generally and that by the original prayer, as now correctly translated by the learned Subordinate Judge, the right asserted was "the right of the Vaniya caste including the plaintiffs and others", and was expressed in terms which are in substance the same as those in the present suit. Nevertheless the impression persists, if the pleading be read as a whole, that it was the rights or wrongs of the individual plaintiffs which were in contest, and that the position of members of the Vaniya caste generally came under notice only for the reason that it was as Vaniyas that the plaintiffs had suffered any wrong at all at the defendants' hands. The language of representation is nowhere used, and the conclusion that the relief claimed was really individual is strongly confirmed by the

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remaining records of the suit still extant. There is, first, the decree of the 19th June 1878. It begins with "Particulars of the Claim" in the words following:—

"This suit has been brought for the recovery of Rs. 5,200 as 'exemplary damages', for a declaration that plaintiffs are entitled to enter into the Subrahmanyaswami temple at Tiruchendur for worship at the spots marked A and B in the plan of the temple, Exhibit A, and for the issue of a permanent injunction restraining defendants from causing any obstruction to their doing so."

This decree is an official document issued by the authority of the Court. In it there is not from its beginning to its end the slightest hint that any persons other than the plaintiffs and defendants named as parties are interested in or affected by it. So also, in his judgment, leading to the decree, the learned Subordinate Judge describes the plaintiffs' claim in the following similar terms:—

"Plaintiffs are 'Vaniyas or oilmongers'. They went, on the 8th February, to the . . . temple . . . to perform a certain vow, and, while engaged in performing it, defendants 1 to 7 (the servants of the temple) turned them out of the temple on the ground that they had transgressed the limits prescribed for the admission of their caste people, and then prosecuted them for criminal trespass before the Sub-Magistrate. That officer convicted them of the offence laid to their charge, but the Head Assistant Magistrate on appeal quashed the conviction. And now plaintiffs seek the recovery of the sum of Rs. 5,200 'as exemplary damages' from defendants 1 to 7 and defendants 8 to 11, the manager and trustees of the temple, and pray for a declaration that they and their family are entitled to make their worship at the spots marked A and B in the plan of the temple, Exhibit A, and for a permanent injunction restraining defendants from causing any obstruction to their doing so."

More colourless upon this point, but still pointing to the same conclusion, is the judgment of the 28th

April 1879 of the High Court on appeal. There the learned Judges say:—

"We think the reasons assigned by the Judge who passed the decree dismissing the plaintiffs' suit are satisfactory to show that plaintiffs have not made out the right they claim."

Nor is the omission of all reference to representation a mere question of form. Their Lordships bear in mind that section 30 is an enabling enactment. It in no way debars a member of a community from maintaining a suit in his own right, although the act complained of may also be injurious to the whole community. This, in the view of the Board, is the very privilege which the plaintiffs in the earlier suit were exercising.

Further, with reference to that suit their Lordships have regard to the finding of both Courts in India—a finding made with emphatic assurance by the High Court—and one so important in each aspect of this appeal that they quote it textually:—

"We are satisfied," say the learned Judges, "that no permission was applied for orally or in writing, and that no permission was granted expressly or impliedly, under section 30 corresponding to Order I, rule 8, Civil Procedure Code, to the plaintiffs to sue on behalf of or for the benefit of all the Vaniyas interested, along with the plaintiffs, to worship in the Tiruchendur temple as alleged by the plaintiffs."

In the result, with all these converging considerations in mind, their Lordships are in agreement with the learned Subordinate Judge that the original suit, at all events by the date of the decree, had become one from which every trace of representation was eliminated: that the decree of dismissal was as it bears to be a decree *inter partes* only: and that if the plaintiffs had, by the learned Subordinate Judge, been held entitled to judgment, they would have obtained from him, at the most, the individual order in the terms which, as

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he stated, they were then claiming. Further, their Lordships, at this stage of the case, are much impressed by the fact that section 30 was never invoked. Its provisions may have been only dimly appreciated by the pleaders in November 1877, but it cannot be assumed that they were not familiar to the learned Judge by June 1878, and to the High Court by April 1879, and it is preferable to conclude that they were in no way referred to because on the true view of the case as presented to both Courts the suit was not one to which they had any application.

The learned Judges of the High Court hold the view that the earlier suit was, and was conducted as, a representative suit governed by section 30, but they do not, as their Lordships very respectfully think, face fully the difficulties in the way of that conclusion. Their view that the reference to "family" in the quoted passage from the judgment of the learned Subordinate Judge is a slip for "community" is not, in the face of the contemporaneous decree, one to be safely accepted: the omission of all reference to representation cannot properly be regarded as a mere question of form, and, in the result, their Lordships, if it were necessary, would be prepared to hold that this plea of *res judicata* had not been made good for the simple reason that the original suit is not shown by the respondents to have been a representative suit at all.

But, even if it be assumed that the original suit was a representative suit governed by section 30, but one which was prosecuted without leave of the Court and with no notice given of its institution, either as required by the section or at all, then the very serious question arises whether the decree in such a suit is brought within section 13, explanation (v), of the Code of 1877, which deals with the plea of *res judicata*. The section,

with the addition of the words printed in square brackets and inserted for the first time in 1908, has now become section 11, explanation (vi) of the present Code. It is as follows:—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

Explanation VI:—

"Where persons litigate, *bona fide*, in respect of [a public right or of] a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

Based upon that enactment, the question with reference to this defence of *res judicata*, referred by the High Court to the Full Bench, was, as interpreted by the Full Bench, as follows:—

"Is explanation (vi) to section 11 controlled by Order I, rule 8, of the Civil Procedure Code, so as to prevent a subsequent suit filed with leave under Order I, rule 8, by two or more members of the community who claim a right in common to them and the other members of the community, and seek to enforce it on behalf of themselves and the community, being *res judicata* by reason of a decision given after *bona fide* contest in a previous suit filed without leave under section 30, Civil Procedure Code, 1877, by some other members of the community claiming the same right and seeking to enforce it on behalf of the community?"

The question, of course, as has been already shown, is based upon assumptions in regard to the "previous suit", which their Lordships do not accept, but its object and meaning will, perhaps, be best appreciated by the answer returned which, shortly stated, was, that explanation (vi) is not controlled by Order I, rule 8,

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and if a Court allows a suit to which the rule applies to proceed in a representative capacity for the benefit of numerous parties all these parties will be bound by the decree, if the contest leading to it were *bona fide*, even although the procedure prescribed by the rule was in no respect followed. The far-reaching importance of this pronouncement of the Full Bench, couched as it is in general terms, will at once be recognised. It introduces into section 11, with explanation (vi)—itself an enactment of adjective law only—a result which attaches to the explanation the effect of new substantive law in that it clothes with all the binding force as against them of a *res judicata* a decree in a representative suit which, apart from the explanation, has no binding effect upon the persons therein expressed to be represented. A pronouncement which has this result is not one to be accepted readily, and their Lordships believe it to be mistaken.

Before considering it critically, however, it will be convenient to recall the circumstances in which, in the Code of 1908, the words “a public right or of” were added to the explanation. The addition, it will be found, throws light upon the question at issue.

In the Code of 1908 there was introduced, for the first time, a provision—section 91—by virtue of which the Advocate-General or two or more persons, with his consent in writing, might, in the case of public nuisance, institute a suit, though no special damage had been caused, for a declaration and injunction, and for such other relief as might be appropriate to the circumstances of the case. If the plea of *res judicata* was to apply to the decree in such a suit, some addition to explanation (vi) seemed to be called for. The addition of the words “a public right or of” in the place where they are found was apparently regarded as sufficient

for that purpose, because it is everywhere accepted that the enactment therein of section 91 was the only reason for their insertion in the same Code of 1908.

Their Lordships will presently advert to the light thrown upon the explanation as a whole by the introduction of these words.

The view of it taken by the Full Bench, however, purported to be based rather upon authority and upon certain general considerations than upon its actual wording. And here their Lordships doubt whether any representative authority can be found broad enough to cover the present case, while with the general considerations invoked they are not in sympathy. As to authority they are impressed by the fact that even before the Code of 1908 there were several decisions—*Thanakoti v. Muniappa*(1) may be selected as typical—in which the view was taken that if what may be called an Order I, rule 8, suit was to have the benefit of the explanation the conditions of the rule must have been complied with fully. While in other cases in which it might superficially be supposed that the opposite view had been taken it will be found that the question at issue was not so much whether, where none of the conditions of the rule had been complied with, the benefit of the explanation could be extended to the decree in a suit expressly within the terms of the rule—which is the present case—as whether to bring the decree within the explanation, the conditions of the rule had not to be observed even in a suit which, while within the words of the explanation, was not within the words of the rule at all. And the result of the decisions has shown that the explanation is not confined to cases covered by the rule but extends to include any

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(1) (1885) I.L.R. 8 Mad. 496.

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litigation in which, apart from the rule altogether, parties are entitled to represent interested persons other than themselves. Nor are their Lordships impressed by the general principles upon which apparently the Full Bench relied. First of all the learned Judges in ignoring the conditions imposed by the rule seem to have discounted altogether the requirements as to notice thereby made so prominent. The observance of these requirements, their Lordships hold to be essential. They constitute the nearest available substitute when dealing with numerous persons, scattered it may be throughout India, for the personal service upon a defendant required in the case of an ordinary suit. It is no more permissible to dispense with the one requirement than with the other if the person in view is to be bound by the decree. It may indeed be the case that in some representative suits, however far-reaching the notice, absent persons will have only a chance of knowing that litigation affecting their interests is on foot. But of that chance they are not to be deprived. It will be as good a chance as the Court can give, and they are entitled to rely on the due discharge by the Court of its duty in this matter—one of the most responsible with which it could be entrusted.

And the fact that in very many instances the notice directed will not achieve its full purpose and that many persons concerned may remain in ignorance of the proceedings may well have prompted the further condition of the explanation that the decree in such a suit to be binding on absent persons must follow a *bona fide* litigation. This condition the Full Court seem to regard as the panacea for all irregularity. In their Lordships' judgment it is not so to be read. *Bona fide* litigation will not excuse the neglect of statutory conditions. If the litigation be not *bona fide* the most

complete observance of these conditions will not give to the decree the force of a *res judicata*.

In their Lordships' view the difficulty in associating the explanation with the rule is occasioned only by the generality of the words of the rule, and that difficulty, as they think, is removed by the addition to the explanation made in 1908.

So far as mere words are concerned it probably would have to be agreed that a suit in respect of a public nuisance brought by any member of the public would be a litigation "in respect of a public right". When, however, it is found that such a litigation where no special damage has been sustained is only authorised under the Code if it be instituted with the consent in writing of the Advocate-General, is it to be said that the benefit of the explanation is to be extended to a decree in such a suit where no such consent has been obtained, the necessity for it having been, perhaps, overlooked? The answer must, it seems, be in the negative; but, although the instance is more striking, the same principle must, their Lordships think, apply to a decree in a representative suit properly so-called, when, in view of the provisions of the Code in that behalf, "no persons interested in such right other than the persons litigating are affected by the decree". While however their Lordships are of opinion that the conclusion they have reached on this important question is justified even on the wording of the explanation, they are by no means unconscious of the difficulties pointed out by the High Court of Madras in *Gopalacharyulu v. Subbamma*(1) and they would not exclude the possibility of a decree being within the benefit of the explanation where the litigation having been *bona*

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fide the omission to comply with the conditions of the rule has been inadvertent, and no injury from the omission has been sustained by the plaintiff in the second suit. But it is, their Lordships think, imperative to have it recognised that the burden upon a defendant seeking a ruling to that effect is heavy indeed. No encouragement should, they think, be offered to litigants, if they would obtain the full benefit of Order I, rule 8, to be careless in securing full compliance with the conditions of the rule both in the letter and in the spirit.

On the whole case accordingly their Lordships have reached the conclusion that the learned Subordinate Judge was right in holding that the defence of *res judicata* had not been established.

This appeal therefore should be allowed, and the case be remitted to the High Court with a direction to dispose on the merits of the defendants' appeal from the decree of the 17th March 1923.

And their Lordships will humbly advise His Majesty accordingly.

The appellants are entitled to their costs of this appeal, and of the appeal to the High Court as from the day when it was opened. The remaining costs of that appeal already incurred, and all further costs thereof hereafter to be incurred, will be dealt with by the High Court when disposing finally of the appeal.

Solicitors for appellants: *H. S. I. Polak & Co.*

Solicitors for respondents: *Douglas Grant & Dold.*

A.M.T.

INCOME-TAX REFERENCE.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Cornish and Mr. Justice Bardswell.

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THE COMMISSIONER OF INCOME-TAX, MADRAS,
RESPONDENT.*

Indian Income-tax Act (XI of 1922), sec. 60—Notification issued under—If can deal with income-tax or super-tax alone—Government of India Notification, Finance Department (Central Revenues) No. 21, dated 12th October 1929—Necessity for and object of—If extends to super-tax.

Government of India Notification, Finance Department (Central Revenues) No. 21, dated the 12th October 1929, does not extend to super-tax. Under section 60 of the Income-tax Act (XI of 1922) the Government of India can, by notification, deal with income-tax and super-tax; but it does not necessarily follow that the Government of India cannot exempt, reduce in rate or otherwise modify income-tax alone or super-tax alone. The Government of India in issuing a notification under section 60 therefore have power to exclude super-tax.

Necessity for the above-mentioned notification and its object explained.

UNDER section 66 (3) of the Indian Income-tax Act (XI of 1922).

R. Kesava Ayyangar for assessee.—The construction put by the Commissioner on the notification is wrong and the assessee is entitled to succeed as regards super-tax also. The notification in question has been issued under section 60 of the Income-tax Act. That section uses the word "income-tax". The assessment in the present case is one made under section 34 read with section 23 of the Act, i.e., escaped assessment. In section 34 also the word used is income-tax. Section 55 refers to super-tax. Super-tax, under that section, is merely

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additional duty of income-tax. Income-tax in the Act includes super-tax also by virtue of the definition of super-tax in section 55 and of section 60 under which the notification has been issued and also section 34 under which action has been taken in the present case. The word income-tax in the notification must have the same meaning as it has in the Act; see section 20 of the General Clauses Act (X of 1897) as to the meaning of words in a notification issued under power given by a statute. The Government's power to issue a notification in regard to super-tax is derived from section 60 which uses only the word "income-tax". The Commissioner's view, in so far as it is based on the fact that in some other notifications the word "super-tax" has been used, would, if correct, lead to the conclusion that Government has no power to issue notifications in regard to super-tax. [Instruction issued pursuant to the notification referred to.] There is an inconsistency between the notification and the instruction. The instruction is really in consonance with the provisions of the Act. Section 25 of the Act makes a distinction between two classes of assessee:—(1) persons who carried on business under the Act of 1918 and discontinued it subsequently, and (2) persons who did not carry on business under the Act of 1918 but commenced business thereafter.

M. Patanjali Sastri for Commissioner of Income-tax.—The notification in question was issued in respect of income-tax alone. The reason for giving the exemption in respect of income-tax is as follows:—Under the Act of 1918 the basis of assessment was the amount of income in a particular year, i.e., income in the year of assessment itself. But, as it is impossible to ascertain the income of the assessment year in the course of the year itself, the income of the previous year was taken as a tentative basis for a provisional assessment. Then when the next year came the income of the previous year was ascertained and a final assessment was made by reference to the actual income and the necessary adjustments were made. Under the present Act the income of the previous year is made the basis of assessment for the ensuing year and the assessment so made is the final assessment. The old Act ceased to be in force in 1922 but this adjustment provision was kept alive for a year; see section 68 (repealed). Thus the actual income of 1921–22 suffered income-tax twice. The Legislature tried to remedy this injustice by providing that the income of the year

in which the business is discontinued shall not be payable; see section 25 (3) of the present Act. Under it the profits of the year in which the business is discontinued go free, i.e., profits in the hands of the firm. Under section 14 (2) (b) a partner is liable to be taxed in respect of his share of the profits of the firm if the firm itself has not been taxed. The result of that provision would be to make taxable what would not be taxable under section 25 (3). To obviate this inconsistency and consequent injustice the notification in question was issued in respect of income-tax alone. As regards super-tax it was always imposed on the basis of the previous year's income, i.e., even under the old Act. Hence there was no necessity for any such notification in case of super-tax, i.e., no necessity for any equitable adjustment as in the case of income-tax. Section 25 (3) was not intended to be applicable to super-tax though its language is wide enough to include it. Vide Sundaram's Law of Income-tax in India, third edition, pages 775–6, as regards the difference between income-tax and super-tax. The word income-tax in section 60 (1) no doubt includes super-tax but that is not because the word in that section by itself connotes super-tax. It does so by virtue of section 58 being read with the provisions of section 60. In the other sections also referred to by the other side income-tax includes super-tax but that again is only by virtue of the provisions of section 58 and not by reason of the word income-tax therein connoting super-tax. If income-tax in the Act would itself include super-tax, such a provision as section 58 would have been unnecessary.

R. Kesava Ayyangar in reply.—If the argument of the other side were sound there would have been no necessity for a notification in the circumstances of the present case. The income in question in the present case is not the income of the previous year but of the year previous to that. That income would not be taxable under section 3, the charging section. Section 25 (3) applies only to cases where the income of the firm is chargeable but has escaped taxation. Section 14 is inapplicable to the facts of the present case.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—The petitioner is the manager BEASLEY C.J. of a Hindu undivided family carrying on banking

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business at Alagapuri in the Ramnad district and at Minhla and Sitkwin in Burma. Up to December 1928 he had been a partner with P. L. S. M. Muthukaruppan Chettiar, Karaikudi, in a firm known as "C. T. A. M. Minhla," and in another firm known as "C. T. A. S. M. Sitkwin"; but in December 1928 these two partnerships were dissolved and the petitioner and his former partner started independent concerns of their own in both those places. A question arose as to whether the partners were successors in respect of these concerns to the businesses formerly carried on at these places by the before-mentioned partnerships. After an appeal the Commissioner of Income-tax, Burma, held that no succession had taken place. In the meantime the Income-tax Officer, Karaikudi, had made an additional assessment on the petitioner under section 34 including in his assessment his share of the profits of the firms on the footing that a succession had taken place and he levied both income-tax and super-tax. On appeal to the Assistant Commissioner, in view of the decision of the Commissioner of Income-tax, Burma, the petitioner's assessment to income-tax was cancelled but his assessment to super-tax was upheld. On an application under section 33 to the Commissioner of Income-tax, Madras, for cancellation of the assessment to super-tax the Commissioner of Income-tax declined to cancel the assessment.

The petitioner's claim that the assessment to super-tax must be cancelled is based upon Government of India Notification, Finance Department (Central Revenues) No. 21, dated the 12th October 1929, which it is contended exempts the assessee not only from liability to pay income-tax in respect of the profits and gains, the subject of this reference, but also super-tax thereon.

The question for our consideration is:

"Whether upon the facts of this case the assessee is liable to be assessed to super-tax upon the income exempted by Government of India Notification, Finance Department (Central Revenues) No. 21, dated the 12th October 1929."

The Government of India Notification referred to reads as follows:—

"In exercise of the powers conferred by section 60 of the Indian Income-tax Act, 1922 (XI of 1922), the Governor-General in Council is pleased to direct that no income-tax shall be payable by an assessee in respect of such part of the profits or gains of a firm which has discontinued its business, profession or vocation, as is proportionate to his share in the firm at the time of such discontinuance if tax has at any time been charged on such business, profession or vocation under the Indian Income-tax Act, 1918 (VII of 1918), or if an assessment has been made on the firm in respect of such profits or gains under sub-section (1) of section 25 of the Indian Income-tax Act, 1922 (XI of 1922);

Provided that such part of the profits or gains shall be included in computing the total income of the assessee."

It is contended on behalf of the assessee that the words "income-tax" in the notification comprise income-tax and super-tax, that section 60 refers to "income-tax" and that even if the Government of India intended to apply the notification only to income-tax to the exclusion of super-tax it would be *ultra vires* because section 58 of the Indian Income-tax Act, which excepts certain sections of the Act from application to the charge, assessment, collection and recovery of super-tax, does not except section 60. It is further contended that throughout the Act the words "income-tax" mean both income-tax and super-tax. With regard to the contention that by reason of section 58 of the Act the Government of India in issuing a notification under section 60 have no power to exclude super-tax, in my opinion, there is no real substance in that contention. It is quite true that under section 60 the

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Government of India can, by notification, deal with income-tax and super-tax but it does not necessarily follow that the Government of India cannot exempt, reduce in rate or otherwise modify income-tax alone or super-tax alone. What has to be considered here is what really was intended by the notification. Taking the words "income-tax" by themselves without any consideration of the reasons which make such a notification necessary, I agree with the assessee's contention that ordinarily the words "income-tax" should be taken to include super-tax as well. But Mr. Patanjali Sastri on behalf of the Income-tax Commissioner argues that under the Indian Income-tax Act of 1918 the basis of assessment was the income of the year of assessment and that since of course it could not be really known until the end of the year what that income was a provisional assessment was made and adjustment was made later when the actual income was known and then a final assessment was made. In 1922 the basis was altered and assessment made on the income of the previous year but by section 68 of the Act which is now no longer in operation the old basis of assessment was kept alive for one year. This resulted in a double assessment. When the adjustment system was abandoned on the passing of the Act of 1922, it was agreed that one final adjustment should be made in the year 1922-23; and both a final assessment or adjustment under the old system (retained, as before-mentioned, for one year under section 68) and an assessment under the new system were made on the income of the year 1921-22. This resulted in the assessments which had been a year behind (so far as final assessments were concerned) being brought up abreast of the income again. Since that is the position, it is clear that provision had to be made as regards the assessment of

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business, professions or vocations on which tax was at any time charged under the provisions of the Income-tax Act of 1918 and which were or might be discontinued. These are provided for in section 25 (3). Super-tax has always been in a different position because, ever since it was imposed in 1917-18, it has always been assessed on the previous year's income and so was always a year behindhand and not abreast of income. The effect therefore of section 25 (3) is that in the case of income-tax the business, profession or vocation which is discontinued has been assessed for the number of years of its existence. If it has been in existence for ten years, it has been assessed in respect of the income of those ten years. But with regard to super-tax, as it has always been a year behindhand, it has only been assessed on nine years' income. Hence it is that a distinction is drawn by the income-tax authorities between the two taxes and the argument addressed to us that the notification does not cover both. What then is the necessity for the notification? Section 25 (3) leaves in an unsatisfactory position an assessee who is a member of an undivided Hindu family in respect of the profits and gains which he receives as such member of any firm which have been assessed to income-tax as are proportionate to his share in the firm. It is pointed out that, notwithstanding section 25 (3), section 14 (2) (b) might still render such profits and gains liable to income-tax since section 14 (2) (b) deals with the profits and gains of a firm which have been assessed to income-tax and, since it might have been contended by the income-tax authorities that as the firm is free from assessment by reason of section 25 (3) and the assessee will on that account not be able to bring himself within the provisions of section 14 (2) (b), the notification was made necessary in order to protect

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such an assessee. This explanation in my opinion is the correct one and it is clear that it is intended by the notification to put the assessee in the same position as regards exemption as that occupied by the assessee in section 25 (3); and in my view neither an assessee in section 25 (3) nor the assessee here is entitled to claim that the notification extends to super-tax as well as income-tax. I am further confirmed in this opinion by the proviso to the notification which reads as follows:—

“Provided that such part of the profits or gains shall be included in computing the total income of the assessee.”

It is conceded here by the assessee that the profits and gains are included for the purpose of arriving at the appropriate rate of income-tax. I cannot see why the proviso is limited merely to that purpose. I think it follows that it is also for the purpose of ascertaining whether the income is sufficient to make it chargeable to super-tax. I would, therefore, for the reasons I have given, answer the question referred to us in the affirmative. The assessee must pay Rs. 250, costs of the Commissioner of Income-tax.

CORNISH J.—I agree.

BARDSWELL J.—I agree.

A.S.V.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Ramesam, Mr. Justice Anantakrishna Ayyar
and Mr. Justice Cornish.

KALAGARLA SANKARA MAHADEVA SETTY
(PETITIONER), APPELLANT,

1933,
January 5.

v.

KALAGARLA SANYASAYYA (RESPONDENT),
RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 145, cl. (c)—Judgment-debtor paying decree amount in Court—Surety bond filed in suit under orders of Court thereafter—Principal committing default—Order for execution against surety—Maintainability of, under sec. 145, cl. (c).

In a suit on a mortgage bond a decree was passed and the judgment-debtor deposited the decree amount in Court. On an application by the guardian of the minor plaintiff to withdraw the amount from Court, the Court ordered that the amount may be withdrawn and, after deducting the expenses, the remaining amount should be invested in Government promissory notes and deposited in Court and the same should remain in Court till the plaintiff attained his majority. Security was demanded for the due performance of the above-mentioned conditions by the guardian. A surety bond was executed and the amount was allowed to be withdrawn by the guardian who committed default. On an application taken out by the plaintiff after he attained majority for an order directing the surety to deposit the said sum in Court,

held that section 145 of the Code of Civil Procedure applied and an order for execution could be made against the surety.

Kurugodappa v. Soogamma, (1917) I.L.R. 41 Mad. 40, distinguished.

APPEAL against the order of the District Court of Vizagapatam, dated 8th December 1928, in Execution Application No. 321 of 1928 in Original Suit No. 3 of 1913.

* Appeal against Order No. 296 of 1929.

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SANYASATTA. The appeal originally came on for hearing before JACKSON and MOCKETT JJ., who made the following ORDER :—

Kurugodappa v. Soogamma(1) seems to cover the case but, as at present advised, we do not see how *Kurugodappa v. Soogamma*(1) can be reconciled with the plain language of section 145. The case should be heard, we think, by a Full Bench.

B. Satyanarayana for appellant.

Y. Suryanarayana and *Kasthuri Seshagiri Rao* for respondent.

The JUDGMENT of the Court was delivered by RAMESAM J. RAMESAM J.—In this case there is no order by the Court granting leave to the next friend to receive any property on behalf of a minor. Order XXXII, rule 6, does not therefore apply. In this respect the case differs from the decision in *Kurugodappa v. Soogamma*(1).

The question still arises whether section 145 does not apply to the case. Clauses (a) and (b) do not apply. But we think clause (c) applies. It is true that the judgment-debtor has paid the money due from him under the decree into Court and there is no further dispute between the two parties to the suit. But until the money deposited by the judgment-debtor was finally disbursed, there can be “a proceeding consequent” on a suit.

The application by the next friend, in which the order of the Court for converting the money into Government promissory notes was made, is such a proceeding. We think that the conclusion of the learned Judges in *Kurugodappa v. Soogamma*(1) depended on the fact that that was a proceeding under Order XXXII, rule 6, and the observations must be

(1) (1917) I.L.R. 41 Mad. 40.

confined to the actual facts of the case. We are of opinion that section 145 applies and an order for execution against the surety may be made. In *Ko Maung Gyi and others v. Daw Tok*(1) there was no suit or proceeding consequent on the suit.

We reverse the order of the Court below and remand the matter for fresh disposal according to law. The appellant will have costs of this appeal. Costs in the Court below will abide the result.

G.R.

APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Bardswell.

APPAJI REDDIAR (RESPONDENT), APPELLANT,

v.

THAILAMMAL (PETITIONER), RESPONDENT.*

Letters Patent (Madras), cl. 15—Judgment—Appeal—Appellant deceased in—Legal representative of—Order directing respondent to be brought on record as—Not a judgment and not an appealable order.

An order directing the respondent in an appeal to be brought on the record as the legal representative of the deceased original appellant is not an appealable order, because it is not a judgment which finally settles the rights of parties but has the effect of allowing litigation which is proceeding to further proceed to a final adjudication.

LETTERS PATENT APPEAL preferred to the High Court under clause 15 of the Letters Patent against the order of JACKSON J., dated 28th November 1929 and made in Civil Miscellaneous Petition No. 5009 of 1928 in Appeal

(1) (1928) I.L.R. 6 Bang. 474.

* Letters Patent Appeal No. 4 of 1930.

APPAJI
v.
THAILAMMAL. No. 299 of 1927 (Original Suit No. 18 of 1925, Sub-Court, Cuddalore).

N. S. Srinivasa Ayyar for appellant.

K. Bhashyam Ayyangar and T. R. Srinivasan for respondent.

JUDGMENT.

BEASLEY C.J. BEASLEY C.J.—This is a letters patent appeal from an order of JACKSON J. The question raised here is whether that order which was one ordering the respondent in this appeal to be brought on the record as the legal representative of the deceased original appellant is an appealable order or not. In my view, it is not. Applying the test applied by WHITE C.J. in *Tuljaram Row v. Alagappa Chettiar*(1) this is certainly not an appealable order. That test has so often been referred to and I do not propose to restate it here. I may however summarise my reasons for saying that this is an order which is not appealable. An order to be appealable must of course be a judgment within the meaning of clause 15 of the Letters Patent. In my view, this is not a judgment which finally settles the rights of parties but has the effect of allowing litigation which is proceeding to further proceed to a final adjudication. The facts of the case here are that the deceased original appellant filed this appeal and whilst it was pending died. Then an application was made to bring on record the respondent as her legal representative. The question as to whether or not the respondent was the legal representative of the deceased original appellant depended upon the genuineness or otherwise of a will. That was a matter which came before our learned brother. He first of all considered whether the will was

(1) (1910) I.L.R. 35 Mad. 1.

a genuine one or not and, having found that it was genuine, he brought upon the record the respondent, the person who by the will was established to be the legal representative of the deceased original appellant. What was the effect of the order? Upon the death of the original appellant the appeal would have abated if within the period allowed for doing so no legal representative of the deceased original appellant had been brought on the record. The result would have been that if no application had been made the appeal would have abated and the judgment of the lower Court would have stood in favour of the appellant here. The effect of the order made by our learned brother is that the final adjudication upon this matter is not stopped by the death of the deceased original appellant. On the contrary the order makes it possible for an adjudication upon the matter under the appeal. I am clearly of the opinion that the cases quoted on behalf of the appellant here, namely, *Kyroom Bee v. Administrator-General of Madras*(1) and *Sarat Chandra Sarkar v. Maihar Stone and Lime Co., Ltd.*(2), are of no application here at all. Those cases dealt with the position of suits which had already abated and the question was whether an order setting aside the abatement was an order which was appealable or not. The reason for deciding that the order was appealable was because by reason of the abatement of the appeal the respondent had acquired a valuable right and that the order setting aside the abatement had the effect of depriving the respondent of that valuable right. Hence it was held that there should be an appeal from such an order. That is not this case at all. For the reasons I have given, in my view, the preliminary objection taken by Mr. K. Bhashyam

(1) (1915) 2 L.W. 948.

(2) (1921) I.L.R. 49 Calc. 62.

APPALI is a sound one and I must hold that there is no appeal
v. THAILANMAL. from such an order as in this case.

This letters patent appeal must, therefore, be dismissed with costs.

BARDSWELL J.—I agree.

A.S.V.

APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Bardswell.

1933,
February 24.

MODALI ADEMMA (PETITIONER), PETITIONER,

v.

LANKA VENKATA SUBBAYYA AND ANOTHER (RESPONDENTS
2 AND 3), RESPONDENTS.*

*Decree—Transmission for execution—Jurisdiction of transferee
Court to entertain application for execution—Receipt of
copy of decree by it not a condition of.*

The transfer of a decree to another Court for execution dates from the date when the order of transfer is made, and, when once the order of transfer is made, the Court to which the decree is transferred has jurisdiction to entertain applications for execution even though a copy of the decree has not been received by it.

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 Markapur, dated 30th October 1928, in Execution Petition No. 267 of 1928, in Small Cause Suit No. 326 of 1916 on the file of the Court of the District Munsif of Kanigiri.

Kasturi Seshagiri Rao for petitioner.

L. S. Veeraraghava Ayyar and M. V. Venkatesan for respondents.

* Civil Revision Petition No. 734 of 1929.

JUDGMENT.

BEASLEY C.J.—This civil revision petition raises an interesting question of practice. It has been put before us by our learned brother KRISHNAN PANDALAI J. on account of a conflict of opinion of two single Judges, one of KRISHNASWAMI AYYAR J. in *Arimuthu Chetty v. Vyapuripandaram*(1) and the other of JACKSON J. in *Nanjunda Chettiar v. Nallakaruppan Chettiar*(2). Our learned brother KRISHNAN PANDALAI J. was inclined to agree with the earlier decision.

The question is, when does an order of transfer of a decree take effect so as to enable the Court to which the decree is transferred to entertain applications for execution? This is a matter of some importance in some cases; and it is so in this case because, if the view in *Arimuthu Chetty v. Vyapuripandaram*(1) is to prevail, then the petitioner's application for execution was not barred by limitation; and, in my view, the question of limitation has an important bearing in coming to a decision upon this point. In *Arimuthu Chetty v. Vyapuripandaram*(1) the view expressed is that, even though a copy of the decree has not been received by the executing Court, the decree-holder is entitled to apply to that Court for execution. JACKSON J. in *Nanjunda Chettiar v. Nallakaruppan Chettiar*(2) takes the contrary view. In the former case KRISHNASWAMI AYYAR J. says:

"I am not at all sure, having regard to the provisions of rules 6, 7 and 8 of Order XXI, that the Court to which a decree is sent for execution is authorised to execute it before a copy of the decree is received; but I think there is force in the contention that, when once an order is made sending a decree to another Court for execution, that by itself is sufficient to entitle the decree-holder to apply to the Court to which the decree is sent for execution."

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(1) (1911) I.L.R. 35 Mad. 588, 590. (2) (1928) 27 L.W. 423; 55 M.L.J. 120.

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JACKSON J. considers that, as the Court to which the decree is sent for execution has no authority to execute it until it is received, it has no authority to entertain the application for execution. In my opinion, the two things do not necessarily go together. For one thing, a judicial order dates from the time when the order is made and therefore the transfer of a decree to another Court for execution dates from the date when the order of transfer is made. There is another matter to be considered in this connection and it is this, that, if the view taken in *Nanjunda Chettiar v. Nallakaruppan Chettiar*(1) is the correct one, then the following position will arise: The decree-holder after the order of transfer is once made by the Court passing the decree cannot thereafter apply to that Court for execution. That Court has finished with the matter and by its order of transfer has transferred the decree to another Court. In the meanwhile what is the decree-holder to do? It may take some days to transmit the decree and the record and during that time what is to become of the rights of the decree-holder? He has no rights at all which he can avail himself of if the correct view is that taken by JACKSON J. in *Nanjunda Chettiar v. Nallakaruppan Chettiar*(1). They are in a state of suspense and, during the interval between the despatching of the decree by the transferring Court and the receipt of it by the executing Court, the decree-holder is powerless to do anything. That may bring with it the following unfortunate result. The decree-holder has a period of time given to him during which to execute his decree and after that time has expired he is barred by limitation. It seems to me that, if the executing Court cannot entertain an application by a

(1) (1928) 27 L.W. 423.

decree-holder for execution until the receipt of the decree, and the order for transfer has been passed two or three days previously, the period of limitation given to a decree-holder is thereby reduced; because although within time at the date of the order of transfer he may be out of time at the date of the receipt of the decree by the executing Court and I know of no case where a period of limitation once given to a person can be abridged, though there are numerous cases where the period is extended. This seems to me to answer this question. In my opinion, the view taken in *Arimuthu Chetty v. Vyapuripandaram*(1) is the correct one. That being so, this civil revision petition must be allowed with costs.

BARDSWELL J.—I agree.

A.S.V.

(1) (1911) I.L.R. 35 Mad. 588, 590.

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APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Bardswell.

1933,
February 14.

KONDEPATI AYYANNA (PLAINTIFF-FIRST RESPONDENT),
APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,
REPRESENTED BY THE COLLECTOR OF KISTNA, AND FIVE OTHERS
(DEFENDANTS 1, 2 AND 4 TO 7—APPELLANT AND
RESPONDENTS 2 TO 6), RESPONDENTS.*

Madras Irrigation Cess Act (VII of 1865), sec. 1 (b) as amended by Amending Act (V of 1900)—Water-cess—Liability for—Test—Reservoir—Meaning of—Government village—Lands of, irrigated by channel taking off from natural stream maintained by Government—Surplus water of, flowing into zamindari villages by distribution channels or by drainage from lands of Government village and there stored in small ponds or natural depressions—Liability for cess for use of.

The plaintiffs were the owners of lands situated in a zamindari village, C, which adjoined a Government village, A, the lands of which were irrigated from a channel which took off from a natural stream which was maintained by Government. The surplus water of the lands of village A flowed into village C either by distribution channels or by drainage from the lands of village A and were then stored in what were either small ponds or mere natural depressions.

Held that the Government was entitled to levy water-cess for the use of that water by the plaintiffs.

What has to be decided is not whether the water belongs to Government but whether it comes from a river or stream that belongs to Government. In the present case, as the water came from a channel which admittedly belonged to Government while that channel took off from a stream maintained by Government at a part where that stream flowed through

* Letters Patent Appeals Nos. 42 to 51, 93 to 96 and 108 of 1929 and 11 of 1930.

Government land, it might be taken as "belonging to Government" in the sense given to those words in *Secretary of State for India v. Subbarayudu*, (1931) I.L.R. 55 Mad. 268 (P.C.); and the natural ponds and depressions in which the water was stored were reservoirs within the meaning of section 1 (b) of the Irrigation Cess Act.

Observations of VENKATASUBBA RAO J. in *Syed Hyder Ali Sahib v. Secretary of State for India in Council*, Second Appeals Nos. 1519 and 1529 of 1927, as to the nature of the question arising under the Irrigation Cess Act, approved.

APPEALS, under clause 15 of the Letters Patent, against the judgments of PHILLIPS J. in Second Appeals Nos. 360, 363, 365, 366, 367, 370, 371, 373, 374, 376, 361, 362, 372, 375, 378 and 368 of 1924 and 1762 of 1926 preferred against the decrees of the Court of the Subordinate Judge of Kistna at Ellore in Appeal Suits Nos. 438, 441, 443, 444, 445 and 448 of 1922, 17, 27, 28 and 30 of 1923, 439 and 440 of 1922, 18, 29 and 29 of 1923, 446 of 1932 and 442 of 1922 preferred against the decrees of the Court of the District Munsif of Kovvur in Original Suits Nos. 758, 754, 764, 760, 757, 762, 755, 756, 765, 753, 759, 769, 766, 767 and 767 of 1920, 29 of 1917 and 772 of 1920.

S. Varadachariar and V. Suryanarayana for appellants.

Government Pleader (P. Venkataramana Rao) for respondents.

Cur. adv. vult.

JUDGMENT.

BARDSWELL J.—The suits under appeal have had a long history. The plaintiffs, who are ryots in the Gundepalli Zamindari, brought them for a declaration that the first defendant, who is the Secretary of State represented by the Collector of Kistna, is not entitled to levy water tax on the lands cultivated by them, for a refund of such tax already collected for three faslis

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and for other reliefs. The trial Court and the first appellate Court found in their favour but, on second appeal, OLDFIELD and SESHAGIRI AYYAR JJ. held that the suits had not been properly dealt with and remanded them for fresh disposal on issues that were then framed. After the remand the first two Courts again both found for the plaintiffs but, on second appeal, PHILLIPS J. dismissed the suits. These letters patent appeals are against his decision.

The lands of the plaintiffs are situated in the village of Chodavaram, a Zamindari village. That village adjoins the Government village of Ananthapalli the lands of which are irrigated from a channel known as the Ananthapalli channel. That channel takes off from the Yerrakalva a natural stream which is maintained by Government. The surplus water of the Ananthapalli lands flows into Chodavaram either by distribution channels or by drainage from the Ananthapalli lands and is then stored in what are either small ponds or mere natural depressions. The question that arises is whether or no the Government is entitled to levy a charge for the use of this water by the appellant-plaintiffs.

It is a matter of the interpretation of section 1 of Madras Act VII of 1865. In that Act as originally passed section 1 ran as follows :

“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 to levy, at pleasure, on the land so irrigated, a separate cess for the use of the water, which cess shall be additional to any land assessment that may be leviable on the said land as unirrigated or punja; 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.”

By an amending Act, V of 1900, this section down to the words “constructed by Government” became clause (a) of section 1, and there was introduced a new clause (b) which runs thus :

(And also) “whenever water by direct or indirect flow or by percolation or drainage from any such river, stream, channel, tank or work from or through adjoining land irrigates any land under cultivation or flows into a reservoir and is thereafter used for irrigating any land under cultivation, and (in the opinion of the Revenue Officer empowered to charge water-cess, subject to the control of the Collector, the Board of Revenue and the Government) such irrigation is beneficial to, and sufficient for the requirements of, the crop on such land ;” after which follows the rest of the original section with some modification that does not now concern us. The part of clause (b) about the opinion of the Revenue Officer, etc., as to the irrigation being beneficial was introduced by Madras Act VIII of 1914, and there is no question here of the opinion not having been expressed or of its being one that can be questioned in a Court of Law. The question is simply one of whether, allowing that the irrigation was beneficial, a charge for the use of the water can be made.

As has been pointed out by PHILLIPS J., what has to be decided is not whether the water belongs to Government but whether it comes from a river or stream that belongs to Government. In this case it comes from the Ananthapalli channel which admittedly belongs to Government while that channel takes off from the Yerrakalva at a part where that stream flows through Government land, so that it has to be taken as “belonging to Government” in the sense given to those words in the Privy Council decision in *Secretary of State for India v. Subbarayudu*(1). In *Secretary of State for India v. Swami Naratheeswarar*(2)

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(1) (1931) I.L.R. 55 Mad. 268 (P.C.).

(2) (1910) I.L.R. 34 Mad. 21.

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there is a decision by a Bench of this Court in a case where water flowed from what was admittedly a Government source into a taruvai (sheet of water) of which two-fifths belonged to the plaintiff, an inamdar, while the rest belonged to Government. The portion of the taruvai owned by the inamdar was the deeper portion and he was compelled to raise wet crops on dry lands because so much water came into the taruvai from the Government source as to cause it to overflow. In spite of this and in spite of the fact that some of the water in the taruvai was rain water, it was held that he was liable to pay the water-cess under section I (b). PHILLIPS J. has followed this decision but Mr. Varadachari contends that it is no longer good law. He refers to the Full Bench decision in *Chinnappan Chetty v. The Secretary of State for India*(1), but, as has been pointed out in the judgment on second appeal, the question then for consideration was that of whether, when a river flows first through ryotwari tracts, then through a zamindari and then again through a Government village, it was not a river belonging to Government at the place where it passes through the zamindari. This is not such a case. In *Rayudu v. Secretary of State for India*(2) RAMESAM J. has suggested a doubt as to the correctness of the decision in *Secretary of State for India v. Swami Naratheeswarar*(3) in the following passage which has been quoted by PHILLIPS J.—

“One might concede that where water from the Government source directly irrigates the inam, the inam is certainly liable to pay water-cess, but where the water from the Government source naturally flows into a tank or stream within the inam and then the water is used for irrigation it is only natural rights that are being enjoyed and therefore the inam is not liable for water-cess.”

(1) (1919) I.L.R. 42 Mad. 239 (F.B.). (2) (1927) I.L.R. 50 Mad. 961.
(3) (1910) I.L.R. 34 Mad. 21.

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So far, however, as these remarks refer to tanks they appear to be contrary to the language of section 1 (b) which expressly makes liable to charge water which flows from a Government source into a reservoir and is thereafter used for irrigating any land under cultivation. A tank is certainly a reservoir and the natural ponds and depressions in which water is stored in the cases now under notice would equally come under that category. As has been pointed out by VENKATASUBBA RAO J. in an unreported decision, *Syed Hyder Ali Sahib v. The Secretary of State for India in Council*, to which RAMESAM J. was himself a party, in Second Appeals 1519 and 1529 of 1927 :

“The Irrigation Cess Act provides that, when water of a certain description is used for irrigating any land, it shall be lawful for the Government to levy cess for such water. The Act is not concerned with the question whether the water has or has not become the property of the person using it.”

I do not find anything in *Secretary of State for India v. Subbarayudu*(1) that has any bearing upon what appears to be the plain meaning of section 1 (b) as to water that flows into a reservoir from a Government source whether by direct or indirect flow, percolation or drainage. The Privy Council decision in the *Utlam case*(2) has no bearing on this particular point. The tax, then, which has been imposed on the appellant-plaintiffs for the use of water would appear to be correct and in accordance with section 1 (b) of Madras Act VII of 1865 unless it can be shown that their case falls under the first proviso, to which I have now to refer.

That proviso runs thus :

“Provided that, where a Zamindar or Inamdar or any other description of landholder not holding ryotwari settlement is by virtue of engagements with the Government entitled to

(1) (1931) I.L.R. 55 Mad. 268 (P.C.). (2) (1917) I.L.R. 40 Mad. 886 (P.C.).

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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."

In their plaints the plaintiffs have set up mamool rights in accordance with a definite arrangement and "the immemorial usage". The definite arrangement or agreement of 1843 which was set up has been found against, but the learned Subordinate Judge, on first appeal after the remand, has held that in the circumstances the presumption of a lost grant could be reasonably inferred. PHILLIPS J. has remarked that only before the Subordinate Judge, when the suits had reached their fifth Court, was the theory of a lost grant raised, and that it was a new theory which could not be allowed to be taken at so late a stage. It certainly does not appear to have been taken when the suits first came before this Court on second appeal as the issues that were then framed raised the question of whether the plaintiffs were entitled to irrigation free of charge on any of three grounds;

(a) the agreement of 1843,

(b) any agreement entered into at the Permanent Settlement,

(c) by virtue of any easement.

The agreement of 1843 has, as stated already, been found against, while the plaintiffs have not and could not base their claim on any sanad at the time of the Permanent Settlement, as at that time the upper village of Ananthapalli did not belong to Government, but was included in the Nuzvid Zamindari. The right of easement has been found against on first appeal though the trial Court held that that right had been established. PHILLIPS J. has accepted the view of the learned Subordinate Judge as to this without comment. Mr. Varadachari contends that at any rate the matter of long

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user has to be considered and that this has been set up in the plaint, while in the written statement of 9th January 1915 there has been a denial of customary right. In making the denial the written statement urged that the allegations in the plaint on the subject were very meagre, the reference being to what is stated in the plaint as to the claim of the plaintiffs being based on the "arrangement and the immemorial usage". It is also pointed out that the District Munsif who first tried the suits found that the plaintiffs were entitled to free irrigation in respect of the suit lands as they had cultivated them from time immemorial and had not extended their area of cultivation. It cannot, therefore, be said that the point of the plaintiffs having obtained right from long user was taken and considered only at a late stage of the suits. Mr. Varadachari argues that from the fact of long user which has certainly gone on for sixty years and more, it should be taken that there was at least an implied engagement by the Government for the appellant-plaintiffs to have the use of the water. He has referred in this connection to *Secretary of State for India in Council v. Maharajah of Bobbili* (1) and *Secretary of State for India v. Subbarayudu* (2), but neither of these decisions is upon facts corresponding to those now under notice. The former was a case of water being taken from a channel part of which flowed through the land of a Zamindar whose right to take water from that part of it which flowed through his land was in question. The latter was one of taking water from a river by a party having riparian rights. In the former case, too, it was found that the former owners of the Palakonda Zamindari, to whose position the Government had succeeded, had

(1) (1919) I.L.R. 43 Mad. 529.

(2) (1931) I.L.R. 55 Mad. 268 (P.C.).

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agreed to the taking of water from the channel through five sluices by the Zamindar of Bobbili whose right so to take water was in question in the suit. Here there has been no such agreement. As has been pointed out by the Subordinate Judge who decided the first appeal, the agreement, Exhibit A, which the plaintiffs set up and which he did not find to be genuine, was not between one Zamindar and another, but between the Kapus and the Karnams of one village and the Zamindar of the other. Even if Exhibit A were genuine what was agreed to by the Kapus and Karnams could not bind their Zamindar, neither could it bind the Government which succeeded to his position; while the fact that the plaintiffs have set up this agreement of 1843 implies that there had been nothing in the way of an engagement prior to that year. Is there anything in the circumstances from which it can be inferred that there has been an implied engagement at any later time? I think not. For one thing it is very doubtful whether the charge could have been made under section 1 of Act VII of 1865 and before the addition of section 1 (b) by Act V of 1900, in which case during the period from 1865 to 1900 the Government in not imposing the tax was not foregoing the making of a charge which it was entitled to make. Certainly it was only by the introduction of section 1 (b) that its right to make the charge was made clear and the tax appears first to have been imposed in fasli 1321, that is, 1911-12. And further, as is shown in paragraph 7 of the first appellate judgment, there has not been a continuous and consistent use of the water by the plaintiffs or their predecessors by the aid of which they could raise their crops and which could be deemed beneficial. In some years there has been insufficient water for the raising of crops and in some years there has been an excess of

it. When such is the case I do not see how there can be either an implied engagement or the acquisition of an easement. Nor is it a case of natural flow. It is a matter of water over-flowing from higher lands to lands lying lower down. The supply of water is precarious and, when, in the circumstances, the plaintiffs cannot be held to have obtained any prescriptive right, they cannot insist on its coming down in any sufficient quantity to enable them to raise crops or even on its coming down at all. It is not at all the case of water flowing naturally down a river or stream or any naturally formed watercourse. Mr. Varadachari has referred us to illustration (j) to section 7 of the Indian Easements Act but that does not seem to have any application to the circumstances of this case.

In my view the decision of the learned Judge under appeal is correct. These appeals must, therefore, be dismissed with costs.

BEASLEY C.J.—I agree.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Mockett.

IN RE NUKALA VENKATANANDAM AND TWO OTHERS
(APPELLANTS), PETITIONERS.*

1932,
October 5.

Court Fees Act (VII of 1870), sec. 7 (iv) (f)—Partnership—Accounts of—Appeal relating to—Valuation of, for purposes of court-fee—Appellant's right to give his own valuation—Amount ultimately found due to appellant larger than amount of valuation—Laying of additional court-fee in case of—Procedure for.

In an appeal relating to the accounts of a partnership the appellant, whether plaintiff or defendant, can give his own

* Civil Miscellaneous Petition No. 3403 of 1932.

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valuation under section 7 (iv) (f) of the Court Fees Act and pay court-fee on it. If the appellate Court after the hearing and consideration of the appeal comes to a conclusion in favour of the appellant in respect of a far larger amount than what he has paid court-fee for, the proper thing would be to post the case for orders and direct the appellant to pay additional court-fee and not to issue the judgment and decree until he does so.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to amend the value of the appeal (Appeal No. 156 of 1932 preferred to the High Court against the final decree, dated 22nd December 1931 in Original Suit No. 9 of 1922 on the file of the Court of the Subordinate Judge of Cocanada) at Rupees five thousand five hundred (Rs. 5,500) and to accept the court-fee of rupees four hundred and forty-seven and annas seven (Rs. 447-7-0) paid already as correct.

P. Somasundaram for petitioners.

K. Subba Rao for Government Pleader (*P. Venkata-ramana Rao*) for Government.

Cur. adv. vult.

ORDER.

RAMESAM J.—The question arising for decision in the above civil miscellaneous petition relates to court-fees in a partnership suit. The facts of the case are as follows:—A suit was filed in the Subordinate Judge's Court of Cocanada for dissolution of partnership, for settlement of accounts and for recovery of such amounts as may be due to the plaintiffs. Under section 7 (iv) (f) of the Court Fees Act, the plaintiff tentatively valued his plaint at Rs. 7,500. A decree was passed on 22nd December 1931 under which defendants 3 to 5 were directed to pay certain sums of money with interest at six per cent from 1st April 1924. The defendants 3 to 5 filed the present appeal on 26th April

1932. In the memorandum of appeal the valuation is stated to be Rs. 12,770-6-0 and the court-fee thereon Rs. 847-7-0, but the court-fee actually paid was only Rs. 447-7-0. In the affidavit filed on behalf of the appellants it is stated that the valuation was calculated according to the old practice and was stated to be Rs. 12,770-6-0. But, as the first appellant had not the money with him at the time, it was filed on a court-fee of Rs. 447-7-0 with the idea of supplying the deficient court-fee afterwards. Both according to the affidavit and on the face of the appeal memorandum, the appeal was filed on the deficient court-fee and the office ought to have returned the papers for supplying the deficit; but by some oversight the office did not return the papers. The appeal was numbered as Appeal No. 156 of 1932. From one point of view it may well be said that the appellants may as well have kept quiet. But there is the apprehension that when the appeal comes on for hearing the matter will be noticed by the opposite side or by the Court and the appellants would naturally be called upon to supply the deficit court-fee. The first appellant therefore not wishing to wait until then and desiring to put the matter on a proper legal basis filed the present petition. He now wishes to revise the valuation in such a way that the court-fee already paid would be adequate until the hearing of the appeal. It may be that after the hearing of the appeal he may have to pay more court-fees if he succeeds in respect of an amount larger than the amount for which the court-fee he has now paid, namely Rs. 447-7-0, suffices, that is, Rs. 5,500. In the affidavit it is stated that they were expecting the papers to be returned so that they may correct the valuation and re-present the papers. But unfortunately the papers were not returned.

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If the only valuation which is possible for the appeal is Rs. 12,700, then, of course, he cannot do this. But it is contended on the footing of the Privy Council decision in *Faizullah Khan v. Mauladad Khan*(1) that even in an appeal relating to the accounts of a partnership a tentative valuation can be given by the appellant under section 7 (iv) (f) of the Court Fees Act. In that case the plaintiff filed a suit on a valuation of Rs. 3,000, but the first Court gave a decree against him for Rs. 19,991. The plaintiff filed an appeal in which he paid court-fees on the said sum of Rs. 19,991. But in the memorandum of appeal he prayed that the decree against him should not only be vacated but that he should also get a decree for Rs. 3,000. The Privy Council held that the amount actually paid is good enough for covering both the reliefs. In the judgment Lord SHAW said:

"Their Lordships find no reason for treating that payment either as upon an under-value or a split value. Their Lordships think, with much respect to the Judicial Commissioner, that it was a mistake to treat the payment of Rs. 975 as a fee made only on the amount of the decree passed against the appellants. That amount, as already stated, may be not only in full but largely in excess of the true sum of relief at which a sound valuation could in the present circumstances be said to reach and it covered the appeal as a whole, including that sum on the one hand and a much smaller figure of Rs. 3,000 on the other."

The view apparently taken by their Lordships is that the appellant can pay court-fee on a notional valuation as in the first Court. Even if some of the sums in respect of which he was appealing are definite amounts, the actual court-fee he pays should be supposed to cover any actual sums decreed and any uncertain sums in respect of which relief is sought. That this is

(1) (1929) I.L.R. 10 Lah. 737 (P.C.).

the view taken by their Lordships is clear from the observations of Lord TOMLIN in the course of the argument reported in *Faizullah Khan v. Mauladad Khan*(1), and quoted by PAGE C.J. in *C. K. Ummar v. C. K. Ali Ummar*(2) as follows:—

"In section 7 the amount of the fee is to be computed, in suits for accounts, according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. If, therefore, the appellant values the relief in the memorandum of appeal and pays a fee thereon, that is the amount of fee properly payable. Of course if the appellant recovers more, he pays the extra fee under section 11 of the Act. But you cannot complain that the amount valued in the memorandum of appeal is not the proper amount. In suits for accounts it is impossible to say at the outset what exact amount the plaintiff will recover. The Legislature, therefore, leaves it open to him to estimate the amount. That is the scheme of the Act."

According to the view of the Privy Council, the appellant, whether plaintiff or defendant, can give some valuation and one cannot complain that the amount in the memorandum is not the proper amount, the reason being that in suits for accounts it is impossible to say at the outset what exact amount the plaintiff will recover, and they apply this principle to appeals also. The question that arises is, if appellants can file their appeals on any valuation they like and pay court-fees on it and the whole case can be heard on such payment, and if, as the result of the hearing of the appeal, they can succeed for a much larger amount than the amount for which they paid court-fees, can it not be said that the Crown has been deprived of the court-fee properly due and, if so, how is this amount to be recovered. Lord TOMLIN referred to section 11 of the Act, but it seems to me that section 11 may not give adequate remedy to the Crown, for section 11 refers to execution and, before the decree-holder seeks execution,

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(1) (1929) 31 Bom. L.R. 841, 842 (P.C.).

(2) (1931) I.L.R. 9 Rang. 185, 183 (F.B.).

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he must pay the court-fee. But suppose the party settled the matter privately and the decree-holder had not to seek execution, would not the Crown be deprived of the proper court-fees in such a case? Section 11 no doubt furnishes one method but, for the protection of the interests of the Crown, it is necessary to indicate what the proper practice should be. If the appellate Court after the hearing and consideration of the appeal comes to a conclusion in favour of the appellant in respect of a far larger amount than what he has paid court-fees for, the proper thing would be to post the case for orders and direct the appellant to pay additional court-fee and only then the judgment should be delivered and the decree should be allowed to be drawn up. I think this protects the Crown's interests properly. Under section 149 of the Code of Civil Procedure the Court has got the power to direct the payment of court-fees at any stage of the case and this is expressly relied on by Lord SHAW at page 743 in *Faizullah Khan v. Mauladad Khan*(1). In the present appeal the appellant does not want any refund of his court-fee. He simply wants permission to re-state his valuation tentatively at Rs. 5,500 so that the court-fee actually paid may be enough and so that no objection can be taken to the hearing of the appeal afterwards. He himself would have done this, if the appeal papers had been returned; but they were not. In the view taken in the Privy Council decision we direct the valuation to be amended tentatively at Rs. 5,500, but, as already mentioned, it must be understood that when the appeal is heard and he succeeds to a larger amount, unless the court-fee is paid, the judgment and decree ought not to be issued.

In view of the decision of the Privy Council no purpose is served by referring to the earlier decisions.

(1) (1929) I.L.R. 10 Lah. 737 (P.O.).

In the case of appeals against a preliminary decree only, the Madras High Court held that where a defendant appeals he should pay on the tentative valuation of the plaintiff in the first Court, but the Privy Council decision seems to imply that the defendant can give his own tentative valuation in appeal. This is the way how the Privy Council decision with Lord TOMLIN's observations are construed by PAGE C.J. in *O. K. Ummar v. O. K. Ali Ummar*(1) and I agree with his view. He points out that the same view was taken by the Allahabad High Court in *Chunni Lal v. Sheo Charan Lal, Lalman*(2), but that was before the Privy Council decision. It is unnecessary to refer to the decision of BANKIN C.J. in *Kantichandra Tarafdar v. Radharaman Sarkar*(3) in which no reference was made to the Privy Council decision nor could it be, for the report could not have reached India at the time the case was heard. I may add that an appellant, whether defendant or plaintiff, is in the position of a plaintiff in appeal at least in suits for taking accounts of a partnership and in partition suits. In such suits it has been held that every party is in the position of a plaintiff—vide *Tirumedi Adeyya v. Cheluhwin Venkatregadu*(4) and *Ramamurthi v. Surampalli Reddy* (5). In the first of the above cases the defendant actually paid court-fee on the footing that his position is analogous to that of the plaintiff. In the latter case it was observed that the effect of the plaintiff being allowed to withdraw was to allow defendants 8 to 10 to become plaintiffs in his stead.

The valuation of the appeal for the present will be regarded as Rs. 5,500.

MOCKETT J.—I agree.

A.B.V.

(1) (1931) I.L.R. 9 Rang. 165 (F.B.).

(2) (1925) I.L.R. 47 All. 758.

(3) (1929) I.L.R. 57 Calo. 483.

(4) (1914) M.W.N. 155.

(5) (1920) 12 L.W. 563.

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APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.

1932,
October 25.

HIS HOLINESS LAKSHMINDRA TIRTA SWAMIYAR
(THIRD RESPONDENT), APPELLANT,

v.

THE PRESIDENT OF THE BOARD OF COMMISSIONERS
FOR THE HINDU RELIGIOUS ENDOWMENTS,
MADRAS, AND SEVEN OTHERS (PETITIONER AND RESPONDENTS
1, 2 AND 4 TO 8), RESPONDENTS.*

*Madras Hindu Religious Endowments Act (II of 1927), sec. 70—
Order under—Appeal from—Competency of—Notice under
section—Service of, on managing or executive trustee—
Sufficiency of.*

The words “as if a decree had been passed” in section 70 of the Madras Hindu Religious Endowments Act attract to the order the whole procedure in execution and with it the right of appeal.

Though section 70 of the Madras Hindu Religious Endowments Act refers to “the trustee” as the person on whom notice is to be served, the true intention is that the institution of which he is trustee shall be served. The question in each case therefore is whether the institution has been properly served. When by usage one of several trustees acts as the managing or executive trustee, notice served on such trustee must be deemed to be proper notice to the institution.

APPEAL against the order of the District Court of South Kanara, dated the 28th day of July 1930, and made in Religious Endowment Petition No. 8 of 1929.

B. Sitarama Rao for appellant.

Government Pleader (P. Venkataramana Rao) for first respondent.

Cur. adv. vult.

* Appeal against Order No. 420 of 1930.

JUDGMENT.

VENKATASUBBA RAO J.—Mr. Venkataramana Rao has raised an objection *in limine* that the appeal is incompetent. The material words of section 70 of the Madras Hindu Religious Endowments Act are :

“The Court shall, on the application of the President of the Board of Committee, recover the amount *as if a decree had been passed* for the amount by the Court against the religious endowment concerned.”

Mr. Venkataramana Rao contends that the effect of the section is merely to prescribe the mode of execution and that only such provisions as relate to the method of procedure become by force of this section applicable. We see no reason for adopting this very narrow construction. When the duty to execute an order of an outside body is entrusted to a judicial tribunal, it is difficult to conceive that its function is merely to perform an executive act; and, when the words employed are wide enough to include the exercise of judicial powers, there is less reason to hold that the Court does not possess them. In construing similar words occurring in section 40 of the Revenue Recovery Act, 1864, “as if the purchased lands had been decreed to the purchaser”, a Bench of this Court held that the intention of the Legislature was to place the purchaser in the position of a decree-holder and that he is therefore entitled to such remedies as are open to decree-holders in execution proceedings; *Gnana Sambanda Pandara Sannadhi v. David Nadar*(1). The learned Judges in that case followed a previous decision to the same effect in the unreported case, Appeal against Appellate Order No. 27 of 1889. *Sambasiva Mudaliar v. Panchanada Pillai*(2) approves of the decision in *Gnana Sambanda*

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(1) (1904) 14 M.L.J. 433.

(2) (1907) I.L.R. 31 Mad. 24.

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Pandara Sannadhi v. David Nadar(1) although the actual decision in the case relates to a different point. This view has the support also of *E. D. Sasson & Co. v. Shivji Ram*(2) and *Krishnaji Shridhar v. Mahadeo Sakharam*(3). In *Mathura Prasad v. Sheobalak Ram*(4) the question arose under the Co-operative Societies Act, and Mr. Venkataramana Rao relies upon it as supporting his contention. It is sufficient to observe for the present that we cannot regard it as a direct authority on the question raised.

It is next contended that it must be shown that an order made in execution falls within section 47 of the Code of Civil Procedure before an appeal can lie from it and that the section by its very terms excludes orders made in a proceeding of this kind. It would be contrary to the spirit of the provision conferring on the Civil Court the power to execute to construe the word "suit" in section 47 in its literal and strict sense. We must hold that the words in section 70 of the Madras Hindu Religious Endowments Act "as if a decree had been passed" attract to the order the whole procedure in execution and the right of appeal provided under section 47 of the Code of Civil Procedure. The preliminary objection is therefore overruled.

As regards the appeal itself, Mr. Sitarama Rao contends that the order of the Religious Endowments Board can operate as a decree only if the statutory conditions are satisfied, and urges that in this case the requirement of the section regarding the service of the notice has not been fulfilled. In the case of this institution, it is alleged that there are eight trustees (heads of eight mutts) and that each of them by rotation acts for a period of two years. The notice under section 70

(1) (1904) 14 M.L.J. 433.
(3) (1921) I.L.R. 46 Bom. 128.

(2) A.I.R. 1929 Lah. 228.
(4) (1917) I.L.R. 40 All. 89.

was served upon the active or executive trustee then in office, and Mr. Sitarama Rao maintains that, as it was not served upon the whole body of trustees, the order sought to be executed has not acquired the force of a decree. No doubt section 70 refers to "the trustee" as the person on whom notice is to be served; but the true intention is not that the trustee should be served, but the institution of which he is the trustee. The funds that are liable under the section are the funds of the institution, and what is intended is that no proceedings should be taken against it before a proper notice is served on it. The trustee is mentioned in that section as the person who represents that institution. The question in each case therefore is, has the institution been properly served or not? When by usage one of several trustees acts as the managing or executive trustee, the notice served on such trustee must be deemed to be a proper notice as against the institution.

The appeal fails and is dismissed with costs of the first respondent.

REILLY J.—I agree.

A.S.V.

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APPELLATE CIVIL.

Before Mr. Justice Krishnan Pandalai.

ARUMUGHA MUDALIAR (SECOND DEFENDANT—
FIRST RESPONDENT), PETITIONER,

v.

VENKATACHALA PILLAI AND TWO OTHERS.
(PLAINTIFFS 1 TO 3—APPELLANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Suit under—Subject-matter—Suit land and not the amount of debt—Proper method of valuation—Court Fees Act (VII of 1870), sec. 7 (v)—Value for purposes of jurisdiction—Madras Civil Courts Act (III of 1873), sec. 14—Not confined to suits mentioned in sec. 3 of the Suits Valuation Act (VII of 1887).

In a suit brought under Order XXI, rule 63, of the Code of Civil Procedure by an unsuccessful claimant for a declaration that the suit land was not liable to be attached in execution of a decree obtained against his vendor by a third party, *held*, that, even assuming that in such a suit the subject-matter was the suit land and not the amount of the debt for which it was attached in execution, the value of the land for the purposes of jurisdiction was not its market-value but its value computed according to section 7 (v) of the Court Fees Act. There is nothing in the Suits Valuation Act which prevents the application of section 14 of the Madras Civil Courts Act which declares that when the subject-matter of a suit is land the proper method of valuing it for purposes of jurisdiction is under section 7 (v) of the Court Fees Act.

Section 14 of the Madras Civil Courts Act is not confined to suits mentioned in section 3 of the Suits Valuation Act.

PETITION under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Cuddalore in Civil Miscellaneous Appeal No. 2 of 1931 (Civil Miscellaneous Appeal No. 3 of 1931 on the file of the District Court

of South Arcot, at Cuddalore) preferred against the order of the Court of the District Munsif of Cuddalore, dated the 9th day of October 1930, and made in Original Suit No. 962 of 1923.

K. Balasubramania Ayyar for petitioner.

N. K. Mohanarangam Pillai for respondents.

JUDGMENT.

This petition affords a good example of the regrettable delays to which litigation has now become subject owing to questions of court-fee and jurisdiction having become a common feature in the subordinate Courts which take years for their determination. In this case the suit was of a common enough kind and was brought in 1928. At the end of 1932 it remains still to be decided which is the proper Court to try it. The plaintiff had bought some property from the second defendant and his mother for Rs. 3,700. The first defendant obtained a decree for Rs. 1,170 in 1927 against the second defendant alone and attached that property. The plaintiff preferred a claim in execution which was dismissed. Within the year allowed for a suit he brought this suit impleading the decree-holder, first defendant, and the judgment-debtor, the second defendant. In the plaint he set out these facts as affording the cause of action and prayed (here the trouble begins) (1) to cancel the order dated 6th October 1928 on the claim petition; (2) to declare the plaintiff's title to the property under his sale deeds; (3) to raise the attachment; and (4) for a permanent injunction against the execution being continued to sale. It will be observed that, although the plaintiff made four prayers, the substance of the whole matter was that his property had been illegally attached and he wanted that to be avoided; all else was mere words.

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The first and third prayers mean the same thing that the plaintiff wanted the claim order avoided. The fourth prayer is the consequence of that and the second is incidental to it. In this suit the plaintiff paid a court-fee of Rs. 10 under Schedule II, article 17, of the Court Fees Act. That this was right there is now no question. The matter is set at rest by the decision of the Privy Council in *Phul Kumari v. Ghanshyam Misra*(1), a very similar case in which their Lordships point out that in spite of unnecessary prayers the substance of the suit should be looked at to determine what the court-fee payable is.

But the question was raised as to the proper Court for purposes of jurisdiction which was to try this suit. One would have thought at this distance of time that there can be no arguable question on such a matter. But not only has it been argued but, while the District Munsif held following *Narayanan Singh v. Aiyasami Reddi*(2) that he had no jurisdiction to entertain the suit because the value for purposes of jurisdiction is according to him the market-value of the property which is more than Rs. 3,000 as the plaintiff admittedly bought it for Rs. 3,700, the learned Subordinate Judge in appeal held following *Krishnasami Naidu v. Somasundaram Chettiar*(3) that the value for jurisdiction is the amount of the debt Rs. 1,170; that even if it be considered to be the value of the property it was not more than one-half of Rs. 3,700, the market-value, viz., Rs. 1,850, as a result of the Madras amendment to section 7, clause (iv)(c) of the Court Fees Act; but that in his view the value of the land should be computed for purposes of jurisdiction according to section 7, clause (v),

(1) (1907) I.L.R. 35 Calo. 202 (P.C.). (2) (1915) I.L.R. 39 Mad. 602.
(3) (1907) I.L.R. 30 Mad. 335 (F.B.).

of the Court Fees Act, i.e., at 10 times the assessment, in which case the whole value would be less than Rs. 3,000.

In this Court learned Counsel for the petitioner has addressed a very able argument that the view of the Munsif is right. He certainly has one or two decisions which would seem to support by parity of reasoning his argument that in a suit like this, which must be deemed a declaratory suit respecting land, the proper value for purposes of jurisdiction is the full market-value of that land and not either the value as determined under section 7, clause (v), of the Court Fees Act or half the market-value according to the Madras amendment to section 7, clause (iv) (c). The decisions he relies upon are *Vasireddi Veeramma v. Butchayya*(1) and *Chalasamy Ramiah v. Chalasamy Ramaswami*(2) which it relies on and follows. On the other hand the respondents' learned Advocate argues that the Subordinate Judge's view is right and that the value for purposes of jurisdiction in the present suit is the amount of the debt Rs. 1,170 and even if the subject-matter is taken to be the land its value should be computed as prescribed by section 14 of the Madras Civil Courts Act which adopts the valuation in section 7, clause (v), of the Court Fees Act for purposes of jurisdiction in all cases where the subject-matter of the suit is land, houses or gardens.

Now if this suit were really of the same nature as that in *Vasireddi Veeramma v. Butchayya*(1) or *Chalasamy Ramiah v. Chalasamy Ramaswami*(2) I should be bound by them, because they are Bench decisions. But *Vasireddi Veeramma v. Butchayya*(1) was a suit to establish the validity of an adoption and not one in

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(1) (1926) I.L.R. 50 Mad. 646.

(2) (1912) 13 I.C. 903.

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which the subject-matter was land. The Court held that the properties which might accrue to the adopted person were not the subject-matter of the suit, but only the adoption itself. The grounds of the decision are entitled to very great weight but the decision itself was on the point just stated, viz., that in a suit to establish an adoption, section 14 of the Madras Civil Courts Act, which relates only to cases where land is the subject-matter, is not applicable. Similarly in *Chalasamy Ramiah v. Chalasamy Ramaswami*(1) the suit was one for partition of lands of which the plaintiff was in joint possession and what was held was that in such a suit the plaintiff was entitled to place his own valuation for the purposes of jurisdiction. Although there were observations as to the effect of section 14 of the Civil Courts Act in that case also, they were for purposes of that decision that the plaintiff was entitled to value the relief for purposes of jurisdiction as he liked.

It appears to me that in the suit before me, even if it is governed by *Narayanan Singh v. Aiyasami Reddi*(2) and not by *Krishnasami Naidu v. Somasundaram Chettiar*(3), all that it leads to is that the subject-matter is the land and not the debt. The plaintiff's land was attached, his claim thereto was dismissed, and he wants that summary decision set aside. Assuming that in such a suit the subject-matter is the land concerned in the claim order, section 14 of the Madras Civil Courts Act is explicit when it declares that "when the subject-matter of any suit or proceeding is land, a house or garden, its value shall, for purposes of jurisdiction conferred by that Act, be assessed in the manner provided by the Court Fees Act of 1870, section 7,

(1) (1912) 13 I.C. 903.

(2) (1915) 1 I.L.R. 39 Mad. 602.

(3) (1907) I.L.R. 30 Mad. 335 (F.B.).

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clause (v).” In my opinion those words are imperative and clear. But it is said that that section is applicable only in classes of suits referred to in section 3 of the Suits Valuation Act, viz., suits governed by section 7, clauses (v), (vi) and (x) (d), of the Court Fees Act; that is, suits for possession of land, pre-emption, and specific performance of an award. This method of interpreting this section is adopted by inference from the effect of section 6 of that Act. It says that, when rules under section 3 are made for the territories under the administration of the Madras Government, section 14 shall stand repealed as regards this presidency. A fallacy lurks in this inference because the effect of section 4 of the Suits Valuation Act which is material in this connection is left out. That section says that when rules for valuing land have been made under section 3 the same value shall be applicable as a maximum in suits relating to land or an interest in land falling within section 7, clause (iv), or Schedule II, article 17. Now the suits relating to land in section 7, clause (iv), are in sub-clauses (b), (c), (d) or (e). Clause (b) deals with suits for partition, (c) with declaratory suits where consequential relief is prayed, (d) for injunction and (e) for a right to some benefit not otherwise provided for to arise out of land. In these suits and suits falling like the present one under Schedule II, article 17, relating to land, the valuation according to the rules made under section 3 are to be adopted but as a maximum. This is to prevent over-valuation of such suits. In suits for partition, declaration or injunction in respect of land or for some benefit to arise out of land not otherwise provided for, it would be necessary to value the land and it would be also necessary to value the interest involved, and in such cases the section provides that the valuation of land under rules made under section 3 shall be adopted as a maximum. The effect of this

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section on section 6 is that if rules are made under section 3 the valuation thereby prescribed will be applicable also to the suits mentioned in section 4 and then the need for section 14 of the Civil Courts Act ceasing to exist that section shall stand repealed. Therefore it seems to me incorrect to say that section 14 of the Civil Courts Act refers only to suits mentioned in section 3 of the Suits Valuation Act.

The present is a suit falling within Schedule II, article 17, of the Court Fees Act which is expressly mentioned in section 4 of the Suits Valuation Act as a class to which the valuation under section 3 will apply. Therefore if the subject-matter of the suit is land, not only is there nothing in the Suits Valuation Act which prevents the application of section 14 of the Civil Courts Act to this suit, but that section requires that the proper method of valuing land for purposes of jurisdiction is under section 7, clause (v), of the Court Fees Act. This view of section 14 is fortified by a decision in *Narayanan Nair v. Cheria Kathiri Kutty*(1) where it was held that the valuation therein prescribed is applicable to suits for pre-emption which are governed by section 7, clause (vi).

Reliance was placed for the petitioner on the decision in *Narayanan Singh v. Aiyasami Reddi*(2) and by the other side on the Full Bench decision in *Krishnasami Naidu v. Somasundaram Chettiar*(3). It seems to me that the principle of the Full Bench decision has been upheld by the Privy Council in *Phul Kumari v. Ghanshyam Misra*(4) that it is the substance and object of the suit which should be regarded and not the words and also that where the debt is less than the value of the property it is the former that determines the value of the suit to the plaintiff. But in *Narayanan Singh v.*

(1) (1918) I.L.R. 41 Mad. 721.

(2) (1915) I.L.R. 39 Mad. 602.

(3) (1907) I.L.R. 30 Mad. 335 (F.B.).

(4) (1907) I.L.R. 35 Cal. 202 (P.C.).

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Aiyasami Reddi(1) emphasis was laid on the words of the various prayers, which, it was thought, took the case out of the category of cases dealt with by the Full Bench. In the Full Bench case which was decided at a time when the Munsif's jurisdiction was only Rs. 2,000, it was held that a suit to avoid a claim was not a suit to obtain a declaration of title to the property but one for getting rid of the effect of the order disallowing the claim and ought to be valued for purposes of jurisdiction at the amount for which the property was attached when such amount is less than the value of the property which was more than Rs. 2,000. In *Narayanan Singh v. Aiyasami Reddi*(1) a distinction was made that where the judgment-debtor is party to the claim order and there is a distinct prayer for declaration of title to the property it is the value of that property which determines the jurisdiction. This distinction has no bearing on the present case because assuming that it is the value of the property which does determine the jurisdiction the Munsif would still have jurisdiction. [The remark in *Narayanan Singh v. Aiyasami Reddi*(1) that the Full Bench decision does not refer to the Privy Council decision in *Phul Kumari v. Ghanshyam Misra*(2) must be due to an oversight as the former was the earlier.] The only point in dispute is how the property is to be valued, whether on the market-value or under section 7, clause (v), of the Court Fees Act. I have given grounds for thinking that the latter is the correct view. The learned Judge's order was therefore right in either view and this petition must be dismissed with costs.

K.W.R.

(1) (1915) I.L.R. 39 Mad. 602.

(2) (1907) I.L.R. 35 Cal. 202 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Krishnan Pandalai.

NAVAMANI NADAR AND ANOTHER (PLAINTIFFS),
PETITIONERS,

v.

VEDAMANICKA NADAR AND THREE OTHERS (DEFENDANTS
1, 2 AND NIL), RESPONDENTS.*

Limitation Act, Indian (IX of 1908), arts. 116 and 111—Suit based on contract of indemnity—Article applicable—Sale subject to mortgage—Authority to vendee to discharge mortgage—Vendee's default—Suit by mortgagee—Purchase by third party of mortgaged property—Suit by purchaser for damages from vendor and mortgagee—Contract of indemnity—Suit based on—Art. 116—Applicability of—Recovery of damages—Basis of calculation.

Plaintiff mortgaged certain properties to B and subsequently sold to the defendant by a registered sale deed on 28th April 1919 some of the properties included in the mortgage deed. Out of the consideration for the sale a portion was reserved with the defendant to pay off the mortgage in favour of B. As the defendant did not pay B, the latter brought a suit on his mortgage impleading both plaintiff and defendant and recovered the amount due to him by sale of the entire mortgaged properties. The sale took place on 29th October 1926. Plaintiff brought the present suit on 4th December 1926 for recovery of damages suffered by him by reason of the defendant's default in paying off B.

Held, that the basis of the suit was the contract of indemnity implied in the defendant's agreement in the sale deed to pay off B and could be held to be broken only when the plaintiff actually suffered loss, i.e., on 29th October 1926 when the plaintiff's property was sold; that the suit was governed by article 116 of the Indian Limitation Act and not by article 111; and that it was not barred.

* Civil Revision Petition No. 1495 of 1927.

Held further, that the plaintiff could recover only the loss actually sustained by him, and not the entire amount reserved with the defendant as a portion of it was also to release from the mortgage the property sold to the defendant.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Tuticorin in Small Cause Suit No. 2266 of 1926.

G. Jagadisa Ayyar for T. L. Venkatarama Ayyar for petitioners.

A. Swaminatha Ayyar for L. S. Veeraraghava Ayyar for respondents.

Cur. adv. vult.

JUDGMENT.

The question in this petition is one of limitation. The suit was dismissed by the learned Subordinate Judge of Tuticorin on the ground that it was barred under article 111 of the Limitation Act as one for unpaid purchase-money personally from the purchaser, brought more than three years after the date of sale. The facts are as follows. The plaintiff's father sold to the defendant on 28th April 1919 for Rs. 500 a portion of the property which had been mortgaged by the vendor to a third party prior to the sale. The consideration of Rs. 500 was made up as follows :

"Rupees 312 being the amount reserved with you (purchaser) in order that you (purchaser) may redeem the hypothecation executed by me; Rs. 88 received in cash and Rs. 100 to be paid before the Registrar, total Rs. 500."

The purchaser paid Rs. 188 and took possession of the property. He did not pay the amount of the hypothecation to the third party who therefore brought a suit in 1924 impleading the mortgagor-vendor and purchaser-defendant and having obtained a decree sold the whole of the mortgaged property in execution on 29th October 1926 including the property which was in

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the possession of the mortgagor as well as that which was sold to the defendant. This suit was brought on the 4th of December 1926 for Rs. 738-0-7 made up of Rs. 312 with interest thereon.

The lower Court relied upon *Chunilal v. Bai Jethi*(1) in support of its view that article 111 governs the case, and distinguished the decision in *Seshachala Naickar v. Varadachariar*(2) which pointed out that where a contract to sell is embodied in the deed of sale the article applicable would be article 116. I think article 111 has no application to the present case. That article governs suits for unpaid purchase-money payable to or to the order of the vendor under an agreement to sell and, as the third column shows, is independent of rights arising by the deed of sale because the *terminus a quo* is the date fixed for completing the sale or the date of acceptance of the title, whichever is later. The present suit is not brought on any agreement to sell; nor, on the terms of the sale deed, which we may suppose contains the terms of the agreement to sell, is the amount sued for payable to or to the order of the vendor. *Chunilal v. Bai Jethi*(1) related to a parol sale of the year 1890 when the Transfer of Property Act had not been extended to the Bombay Presidency. The sale was for cash to be paid to the vendor, but, instead of paying cash, the purchaser signed an acknowledgment in the vendor's account book. It was held that the sale was completed and the title accepted more than three years before the suit. In the first place there was no registered sale deed in that case and in the second the whole of the consideration was payable in cash to the vendor. As pointed out in *Seshachala Naickar v. Varadachariar*(2), where the contract to sell is embodied in a registered deed of sale, the

(1) (1897) I.L.R. 22 Bom. 846.

(2) (1901) I.L.R. 25 Mad. 55.

unpaid vendor can rely upon article 116 which allows six years from the date of breach. But the difficulty in the present case is that even six years from the date of the sale deed will not save the suit. It is therefore argued that the date of breach in a case where the purchaser undertakes in the sale deed to pay part of the purchase-money to the vendor's creditors, secured or unsecured, is not the date of the sale deed but some later date, which is put in some cases as a reasonable time after the sale deed, in others as the date of demand and refusal, and in still others as the time when the vendor is himself compelled to pay the creditors whom the purchaser has defaulted to satisfy. Another line of reasoning which favours the postponement of the date of bringing a suit by the vendor is that, where the purchaser agrees in a registered deed of sale to satisfy a mortgage debt or other debt of the vendor with part of the purchase-money, there is implied in that agreement an agreement to indemnify the vendor against losses which may be caused by action taken by the creditors on the default of payment by the purchaser, and such an agreement to indemnify is broken only when the vendor is compelled to pay the creditors himself or his property is sold.

It is curious that no decision of our own Court directly dealing with this topic was cited. In *Raghu-natha v. Sadagopa*(1), it was held that in a transfer (of two decrees), the consideration for which was that the transferee should pay the transferor's creditors, the transferor could sue the transferee for the money, even though the transferor himself had not paid off the creditors, on the transferee's default to do so within a reasonable time, but that the suit can only be for the

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(1) (1911) I.L.R. 36 Mad. 348.

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consideration for the sale which the vendee failed to pay but not for any further damages which the vendor had not actually sustained. This implies that where the vendor has actually sustained further damages, by having to pay the creditors himself or by having his property sold, he is entitled to recover the damages actually sustained. I do not consider this decision as prohibiting a suit for the damages actually sustained after it has been sustained, if it is reasonable to infer that a contract of indemnity is to be implied in the circumstances.

There are however decisions of other Courts more to the point. In *Raghubar Rai v. Jaij Raj*(1), a case like the present except that the vendor had not in fact himself paid the secured creditor whom the purchaser had undertaken to pay, it was held that it was not necessary for the vendor to have paid the creditor before bringing the suit and that as no time was fixed in the sale deed for the payment of the mortgage money limitation began to run from the date of the execution of the deed. This view however was dissented from in *Ram Ratan Lal v. Abdul Wahid Khan*(2) where the vendor had been compelled to pay a mortgage debt himself and it was held that limitation in respect of the vendor's suit against the purchaser will not begin to run until he has been compelled to pay. *Makun Lal v. Bhola Rai*(3) was a case where the vendor's unsecured creditors had to be paid off by the purchaser and it was held that the vendor could recover the unpaid money within six years from the date of the sale deed. *Ammanibai v. Anant*(4) was a case in which the vendor's creditors had recovered the money from the vendor on the purchaser's default to pay. The sale was in 1912;

(1) (1912) I.L.R. 34 All. 429.
(3) A.I.R. 1931 All. 419.

(2) (1927) I.L.R. 49 All. 603.
(4) (1930) 33 Bom. L.R. 136.

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the vendor was compelled to pay the same debt in 1921. The vendor's suit against the purchaser was brought in 1924, i.e., within three years of the actual payment but twelve years after the sale deed. It was held that the article applicable was article 116 and that time began to run when the plaintiff actually suffered the loss, which was the date when the purchaser's agreement became impossible of performance by reason of the payment by the vendor himself. *Ram Rachhya Singh Thakur v. Ragunath Prasad Misser*(1) is a case which adopts the same reasoning. It was held that the *terminus a quo* was not the date of the execution of the sale deed but the date on which the contract was deemed to have been broken, namely the date when either there was a repudiation of the liability under it or when the contract had become impossible of performance on account of the vendor's debt having been satisfied and also that the measure of compensation to be awarded is the amount of the debt with interest.

It occurs to me that it is necessary to distinguish claims of two kinds which may arise in this connection. A vendor may reserve part of the purchase-money with the purchaser entirely for payment of the vendor's debts in the payment of which the purchaser has himself no primary interest. These may be unsecured creditors of the vendor for which the vendor alone is liable or secured creditors of the vendor where the security is other than the property sold. On the other hand such a reservation may be for payment of debts in which the purchaser as owner of the property purchased becomes solely primarily interested. It may be to pay off a previous mortgage covering only the property sold. In this case, except by way of the

(1) (1929) I.L.R. 8 Pat. 860.

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vendor's personal liability for any deficiency that may arise on the mortgage, the purchaser subject to the mortgage becomes the only person interested in the payment. If he does not pay, the previous mortgage debt will be realised from his own property and no one else's. It is difficult to see how in such a case, except where the vendor is proceeded against on his personal liability, he can bring a suit if the purchaser fails to pay off the mortgage on the property which he has bought. But the reserved portion of the price may be, as it is in this case, to pay off a mortgage which covers not only the property bought but also some other property which the vendor is entitled to be freed from the mortgage by the payment undertaken by the purchaser. In such a case the vendor is entitled to see that by the purchaser's default the mortgaged property left with him is not endangered. In brief, the suits which a vendor is entitled to bring for the reserved amount against the purchaser before himself paying the amount or suffering some other damage are cases in which he alone is entitled to benefit by the payment. But where, as in this case, the benefit of the payment of the reserved amount accrues partly to the purchaser himself and only partly to the vendor, it is not possible for the vendor to sue the purchaser for the whole amount reserved. In such cases he can only sue for the portion of the amount the non-payment of which is likely to affect him, and this can only be properly determined when he has either made the payment himself or has suffered some other damage by the purchaser's default.

The basis of the suit in such a case is the contract of indemnity which the agreement in the sale deed implies and can be held to be broken only when the plaintiff has actually suffered loss. I am therefore of opinion

that the limitation in this case began to run when the plaintiff's property was sold on the 29th October 1928, and therefore the suit was not barred.

Another point depending upon this and following from it is the amount which the plaintiff is entitled to recover. As the plaintiff is not entitled to recover the whole of the Rs. 312 because a portion of it was also to release the property sold to the defendant from the mortgage, he can recover only the loss actually sustained by him. What it is has yet to be ascertained. The decree of the lower Court is therefore set aside and the suit remanded for retrial and disposal according to law. The petitioners must have their costs in this Court from the counter-petitioners.

K.W.R.

APPELLATE CIVIL.

Before Mr. Justice Curgenvven.

MEDARAMETLA KOTAYYA (PETITIONER); PETITIONER,

v.

NIDAMANURU YELLAMANDA AND OTHERS-(RESPONDENTS),
RESPONDENTS.*

*Madras Hindu Religious Endowments Act (Act II of 1927), sec.
44—Scope of—Temple service inam—Endowment, not a
“charge on the property.”*

Under section 44 of the Madras Hindu Religious Endowments Act the Court has no power to make an order in respect of services to a temple which are remunerated by a service inam.

The phrase “merely a charge on property” in section 44 necessarily connotes a liability to make a payment in some shape or form to the institution, and probably a payment the extent of which is more or less fixed or ascertainable. In the

* Civil Revision Petitions Nos. 1544 of 1928 and 693 of 1930.

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KOTAYYA v. YELLAMANDA. case of an inam land no such payment is in question, nor indeed does there exist any charge to secure it.

Semble: a service inam held by a temple servant falls within the definition of "endowment" under section 9 (11) of the Madras Hindu Religious Endowments Act.

PETITIONS 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 Guntūr, dated 17th September 1929 and made in Original Petition No. 51 of 1928.

V. S. Narasimhachariar for petitioner.

S. Narayana Rao for respondents.

JUDGMENT.

In the more recent of these two petitions the question has been raised whether section 44 of the Madras Hindu Religious Endowments Act will enable the Court to make an order in respect of services to a temple which are remunerated by a service inam. In the earlier petition this point was not specifically raised, but, if it has to be answered in the negative in the one, clearly I should not be justified in interfering with the learned Judge's order on the merits in the other. The facts alleged are that the respondents, who are temple pipers having service inams, refused to perform service from the year 1922 and that the trustee, who is the petitioner, was obliged to obtain and pay for the services of other pipers, and the sums so paid he wishes to recover under section 44. The material part of section 44 provides that where an endowment for the performance of a service connected with a temple consists merely of a charge on property and there is failure in the due performance of the service, the trustee may require the person in possession of the property to pay the expenses incurred in causing the service to be performed otherwise. With this has to be

read the definition of "endowment" under section 9 (11) of the Act. An endowment includes (I am going to quote only the relevant portion) "property given or endowed for the performance of any service connected with the temple". Ordinarily speaking the word "endowment", I think, is restricted to property the title to which vests in the institution endowed. But this definition is very wide and I am not prepared to say that a service inam held by a temple servant would not fall within it. But under section 44 the endowment is to be of a peculiar nature, namely, merely charge on property. The learned District Judge has held that the endowment in the present case consists of something else than a mere charge on property. There undoubtedly exist instances in which the endowment is clearly in the nature of a charge and a charge only, that is to say, where otherwise ordinary land is made subject to such a charge, the proceeds of which are to be paid by the holder to the institution. In the present case no payment to the institution has to be made at all, and the land simply forms the emoluments of the person liable to perform the service. I think that the phrase "merely a charge on the property" necessarily connotes a liability to make a payment in some shape or form to the institution, and probably a payment the extent of which is more or less fixed or ascertainable. In the case of an inam land no such payment is in question, nor indeed does there exist any charge to secure it. I conclude therefore that, whatever other remedies may be open to the trustee, he cannot proceed under section 44 of the Hindu Religious Endowments Act. In these circumstances I cannot revise the orders of the lower Courts and I dismiss the revision petitions with costs, pleader's fee only in Civil Revision Petition No. 693 of 1930.

K. W. R.

APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Bardswell.

1933,
February 23.

DEGAPUDI PULLA REDDI (PETITIONER), APPELLANT,

v.

RABALA PATTABHIRAMI REDDI AND TWO OTHERS
(RESPONDENTS), RESPONDENTS.*

Limitation Act, Indian (IX of 1908), sec. 18—Scope of—Execution sale—Confirmation of—Setting aside of—Application by judgment-debtor under O. XXI, r. 90, and ss. 47 and 151 of Code of Civil Procedure for—Applicability of sec. 18 of Limitation Act to—Fraud alleged not of decree-holder but of auction-purchaser.

The words of section 18 of the Limitation Act are sufficiently wide to include any person whose fraud has kept from the knowledge of another person his right to institute a suit or make an application.

Held, accordingly, that section 18 of the Limitation Act applied to an application put in by a judgment-debtor under Order XXI, rule 90, and sections 47 and 151 of the Code of Civil Procedure to set aside the confirmation of an execution sale even where the fraud alleged was not of the decree-holder but of the auction-purchaser.

APPEAL against the order of the District Court of Nellore, dated the 17th day of December 1930 and made in Execution Application No. 215 of 1928 in Original Suit No. 22 of 1924.

P. V. Rajamannar for appellant.

B. Somayya for respondents.

JUDGMENT.

BEASLEY C.J. BEASLEY C.J.—The facts out of which this appeal arises are as follows:—The judgment-debtor is the appellant and a decree in Original Suit No. 22 of 1924 which was a suit upon a promissory note was passed against him. His property was brought to sale in

* Appeal against Order No. 241 of 1931.

execution of the decree and was purchased by the third respondent in the sale held on 11th July 1927. It is alleged that this purchase by the third respondent was benami for respondents 1 and 2, the decree-holders. On the 13th August 1927, the sale was confirmed and then on the 9th July 1928 the appellant under Order XXI, rule 90, and sections 47 and 151, Civil Procedure Code, put in an application to set aside the confirmation of that sale. This application had to be made within thirty days and clearly, but for section 18 of the Limitation Act, if it is to be applicable to this case, was barred. The appellant alleged that his application was not barred by reason of the fact that he only discovered the fraud within the thirty days of the making of the application and that under section 18 of the Limitation Act time does not run until the fraud is discovered. Hence the appellant alleged that his application to set aside the confirmation of the sale was not barred.

The question before us now is whether section 18 of the Limitation Act applies to the case where a person alleges the fraud not of a decree-holder but of some other person, a party to the sale, such as the auction-purchaser here. In the lower Court the application was dismissed *in limine* because the Court held that section 18 of the Limitation Act does not apply to auction-purchasers. Upon this point there has been no decided case at all except *Azizannessa v. Dwarika Prosad Boral*(1), a decision of a Bench of the Calcutta High Court consisting of CHOTZENBERG and GRAHAM JJ. In that case this question directly arose. Beyond that decision there is no decision at all upon the point although in *Mohendro Narain Chaturaj v. Gopal Mondul*(2), *Kailash Chandra Halder v. Bissonath Paramanic*(3) and *Nabinchandra Halder v. Bapin Chandra Halder*(4)

(1) (1924) 88 I.C. 745.

(3) (1896) 1 C.W.N. 67.

(2) (1890) I.L.R. 17 Calo. 769.

(4) (1925) 87 I.C. 555.

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BEASLEY C.J.

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BEASLEY C.J.

there are observations which support the argument put forward on behalf of the appellant before us to-day. But since in those cases this question exactly did not arise, they are mere observations although very useful ones. So far as this High Court is concerned, there is no reported decision upon the question. What we have got to consider here is whether the words of section 18 of the Limitation Act are sufficiently wide to include any person whose fraud has kept from the knowledge of another person his right to institute a suit or make an application. The words of the section are :

“ Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, . . . the time limited for instituting a suit or making an application (a) against the person guilty of the fraud or accessory thereto, . . . shall be computed from the time when the fraud first became known to the person injuriously affected thereby.”

If the words of the section are to be followed, then any person whose fraud has kept from another person the knowledge of his right to institute a suit or make an application is within the provisions of that section. There has been no discussion of the merits of the case in the lower Court. But it seems to me that, if the appellant here is able to show that the auction-purchaser in this case committed such a fraud as brought about the circumstances which appear in the first part of the section, then his application to have the confirmation of the sale set aside is not barred because time would run only from his discovery of such fraud. For these reasons, this appeal must be allowed with costs and the case remitted to the lower Court for disposal according to law.

BARDSWELL J.—I agree.

A.S.V.

PRIVY COUNCIL.

AMBU NAIR (SINCE DECEASED), APPELLANT,

v.

KELU NAIR (SINCE DECEASED), RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Estoppel—Mortgage—Right to redeem—Mortgagee approbating and reprobating.

In 1912 a mortgagee sued on a simple mortgage, joining as a defendant the assignee of the equity of redemption of an earlier usufructuary mortgage, and praying that in default of payment the property should be sold and applied thereto either subject to the usufructuary mortgage or free from it, as the Court thought fit. A decree was made for sale subject to the usufructuary mortgage. The assignee of the equity, having paid off the decree, sued to redeem the usufructuary mortgage. The mortgagee contended that by the terms of a compromise decree of 1899 redemption could be effected only by execution of the decree, and that under article 181 of the Limitation Act that remedy was barred at the expiration of three years from the date of the decree.

Held, that the terms of the compromise decree did not appear to show an intention that the remedy by execution should alone be open to the mortgagor, and that the mortgagee was estopped from contending that it did so, as in the suit of 1912 he had recognized that the right to redeem was then subsisting, and thereby had obtained payment under the simple mortgage; he could not both approbate and reprobate the existence of the right.

Decree of the High Court, (1929) I.L.R. 53 Mad. 805, affirmed on a different ground, but without disagreeing with the judgments in the High Court.

APPEAL (No. 5 of 1931) from a decree of the High Court (October 3, 1929) affirming a decree of the Sub-ordinate Judge of South Kanara (August 16, 1924).

The respondent (since deceased), as purchaser of the equity of redemption of a usufructuary mortgage

J.C. *
1933,
April 10.

* Present: Lord BLANESBURGH, Lord MACMILLAN and Sir GEORGE LOWNDERS.

AMBU NAIR v. KELU NAIR. of 1892, instituted in 1921 a suit for redemption. The rights of the mortgagor and mortgagee had been the subject of a compromise decree made in 1899, and the mortgagees contended that under that decree redemption could be effected only by execution of the decree which, as had been held, was barred by the Indian Limitation Act, 1908, Schedule I, article 181.

The material facts appear from the judgment of the Judicial Committee.

The High Court, affirming the trial Judge, directed redemption. The learned Judges (KUMARASWAMI SASTRI and PAKENHAM WALSH JJ.) held that the compromise decree did not put an end to the relationship of mortgagor and mortgagee, which carried the right to redeem, but perpetuated it; if the decree was to be construed as excluding the right to redeem otherwise than by execution proceedings, that would be a clog upon the equity of redemption, and therefore unenforceable. Upon the latter point reference was made to the judgments in *G. & J. Kreglinger v. New Patagonia Meat and Cold Storage Company Limited*(1) in the House of Lords, passages from which have since been applied by the Board in an Indian appeal, namely, *Mehrban Khan v. Makhna*(2). The appeal to the High Court is reported at (1929) I.L.R. 53 Mad. 805.

DeGruyther K.C. and *Narasimham* for appellant.—The rights of the mortgagor and mortgagee under the mortgage of 1882 were embodied in the compromise decree of 1899, and by section 47 of the Code of Civil Procedure they could be determined only in execution proceedings, which were barred by article 181 of the Limitation Act. The present case cannot be distinguished from *Hari Ravji Chiplunkar v. Shapurji Hormasji Shet*(3). The decision in *Sri Raja Papamma Rao v.*

(1) [1914] A.C. 25.

(2) (1930) I.L.R. 11 Lah. 251 (P.C.); L.R. 57 I.A. 168.

(3) (1886) I.L.R. 10 Bom. 461 (P.C.); L.R. 13 I.A. 66.

Sri Vira Pratapa Ramachandra Raju(1), relied on by the High Court, is distinguishable as there was no decree which could be executed. Although a mortgage cannot by its terms fetter the right to redeem given by section 60 of the Transfer of Property Act, 1882, that section provides that the right can be extinguished by the act of the parties. The law in that respect is the same in India as in England. Upon the suit to enforce the mortgage of 1882 it was competent to the parties to enter into a compromise, one term of which was that the right of redemption should be exercised only by execution of the compromise decree. The proceedings in the suit of 1912 do not estop the appellant from contending that the compromise decree had that effect, because there was no representation made by him and acted on by the respondent so as to make section 115 of the Indian Evidence Act apply: *Gopee Lall v. Mussamat Chundraolee Buhoojee*(2), *Fatimatulnissa Begum v. Sunder Das*(3), and *Mitra Sen Singh v. Janki Kunwar*(4).

Appa Row and *Nambyar* for respondent were not called upon.

The JUDGMENT of their Lordships was delivered by Sir GEORGE LOWNDES.—The only question in this appeal is whether the respondent is entitled to redeem a certain mortgage. If this right, which has been affirmed by both Courts in India, is exercisable, it is not disputed that the decree passed by the Subordinate Judge on the 16th August 1924 is correct.

The mortgage in question was dated the 8th December 1892, and was executed by members of the Beloor Meloor tarwad in favour of the appellant. On the 13th September 1897, the appellant brought a suit on the mortgage which was compromised, and a decree dated the 2nd January 1899 was passed in accordance with the compromise. The terms of this decree were in effect that the mortgagors should pay to the appellant

(1) (1896) I.L.R. 19 Mad. 249 (P.C.); L.R. 23 I.A. 32.

(2) (1872) L.R. I.A. Supp. Vol. 131.

(3) (1900) I.L.R. 27 Calc. 1004 (P.C.); L.R. 27 I.A. 103.

(4) (1924) I.L.R. 48 All. 728 (P.C.); L.R. 51 I.A. 326.

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within three years a sum of Rs. 31,000, together with a yearly rent in kind: that in default of payment of the Rs. 31,000, or of the rent, the appellant should be entitled to obtain, by process of execution, possession of the property, and to retain the same as usufructuary mortgagee, the mortgagors having the right to redeem in any year thereafter on payment of the Rs. 31,000, and to obtain delivery of the property "by taking out execution".

No rent was paid and in March of the following year possession was taken by the appellant under the decree. It is not disputed that the appellant remained in possession as mortgagee, but it is said that the mortgagors' only remedy was by execution of the compromise decree, and that remedy is long since barred.

On the 7th December 1901, the appellant made a further advance of Rs. 1,675 to the mortgagors on the security of a simple mortgage of the same properties.

On the 20th December 1909, the equity of redemption of the mortgagors was sold in execution of a money decree which had been passed against them in other proceedings and was purchased by one Subbaraya Kamthi, who, on the 22nd April 1913, assigned his rights to the respondent.

On the 18th September 1912, the appellant sued on the simple mortgage of the 7th December 1901. He joined as defendants the *karnavan* of the mortgagor *tarwad* and Subbaraya Kamthi, who was described as having purchased the equity of redemption subject to the mortgage in suit and to the usufructuary mortgage for Rs. 31,000, which obviously meant the mortgage under the compromise decree. The prayer of the plaint was for payment of the sum due under the simple mortgage and that in default the property should be

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sold and the sale proceeds "applied in payment of what may be found due to the plaintiff subject to or free from previous usufructuary mortgage in favour of the plaintiff's *tarwad*, as the Court deems fit."

On the 22nd November 1912, a decree was passed in this suit in favour of the appellant providing for sale, in default of payment, subject to the usufructuary mortgage, and a final decree for sale on these terms was made on the 12th September 1914.

On the 17th December 1918, after two separate applications had been made by the appellant for sale of the property, the respondent applied to pay off the decree in right of his assignment from Subbaraya Kamthi. In his petition, of which notice was given to the appellant, he referred to the decree as having been passed subject to the payment of the Rs. 31,000 due under the compromise decree of January 1899, and made it clear that his object in making the payment was to redeem the earlier mortgage. By consent of both parties the sum claimed as due under the simple mortgage, which amounted to Rs. 6,115-12-0, was brought into Court and was paid out to the appellant on the 18th December 1918, in full satisfaction of the decree.

The respondent then applied in execution of the compromise decree to redeem the usufructuary mortgage. His application was resisted by the appellant as out of time. It was rejected on this ground by the Subordinate Judge and his decision was confirmed on appeal, the Courts holding that the remedy by execution was barred on the expiry of three years from the date of the decree, *i.e.*, in January 1902.

The respondent then instituted the suit out of which the present appeal has arisen praying for redemption,

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and was met by the plea that his only remedy was in execution, and that this remedy had already been held to be time-barred.

This contention was rejected by both Courts in India. Upon an examination of the authorities they came to the conclusion that the remedy by suit was still open to the respondent. The Subordinate Judge was also of opinion that having regard to the proceedings in the suit on the simple mortgage the appellant was estopped from asserting the contrary. The learned Judges of the High Court came to no specific conclusion on the question of estoppel, basing their judgment on other grounds, but they affirmed the facts upon which the Subordinate Judge had relied. They say :

“ It is clear therefore from these proceedings that in 1912, i.e., about twenty years after Exhibit A, the deed of mortgage, and over twelve years after the *rajinama* decree, the mortgagee treated the first mortgage as subsisting and got a decree on the second mortgage on that basis.”

In the event a decree was passed by the Subordinate Judge in the respondent's favour on the 16th August 1924 providing for redemption on the terms therein set out, and this was affirmed in the High Court by the dismissal of the appeal.

Their Lordships, while not disagreeing with the view taken by the learned Judges of the High Court, are of opinion without going further into this question that the defence raised by the appellant was not open to him. On the terms of the compromise decree of 1899 they think that it was not the intention of the parties that the remedy by execution should alone be open to the mortgagors. Seeing that it would, as the Courts have held, be barred after three years, such a construction would manifestly defeat the main object of the compromise which was to leave the mortgagors

in possession for three years, and if after the expiry of that period the mortgage debt was not paid to allow the appellant to take possession, and again if and after he had so done to entitle the mortgagors to redeem. That the appellant understood this to be the intention is clear from the proceedings in the suit on the simple mortgage, which was based upon the right of redemption being still alive ; the prayer of the plaint would on the face of it have allowed both mortgages to be paid off on a sale. It is, their Lordships think, equally clear that it was upon the same understanding that the respondent came in and paid off the decree in this suit, and that the appellant accepted the payment. On no other view of the facts could he have realised the decretal amount.

Having thus, almost in terms, offered to be redeemed under the usufructuary mortgage in order to get payment of the other mortgage debt, the appellant, their Lordships think, cannot now turn round and say that redemption under the usufructuary mortgage had been barred nearly seventeen years before he so obtained payment. It is a well accepted principle that a party cannot both approbate and reprobate. He cannot, to use the words of HONYMAN J. in *Smith v. Baker*(1),

“ at the same time blow hot and cold. He cannot say at one time that the transaction is valid, and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another say it is void for the purpose of securing some further advantage.”

See also *per* Lord KENYON C.J. in *Smith v. Hodson*(2) where the same expression is used.

It is objected for the appellant that this view of the case is not admissible inasmuch as no estoppel was

(1) (1873) L.R. 8 C.P. 350, 357.

(2) (1790) 2 Sm. L.C. 13th Edn. 140, 146.

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pleaded and no issue was framed with regard to it. It is clear, however, that the question was raised before the trial Judge and that the appellant had a sufficient opportunity then of meeting it. Nor is it suggested now that there are any other material facts which could have been proved had the issue been formally raised. Their Lordships therefore think that this objection has no weight.

For the reasons given they think that this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Hy. S. L. Polak & Co.*

Solicitor for respondent: *Harold Shephard.*

A.M.T.

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Bardswell.*

1933,
March 14.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,
REPRESENTED BY THE COLLECTOR OF TANJORE
(NIL), PETITIONER,

v.

RAGHUNATHAN AND TWO OTHERS (PLAINTIFFS),
RESPONDENTS.*

*Court-fee—Order in favour of plaintiff in regard to—Revision
against—Competency of, under sec. 115 of Code of Civil
Procedure or sec. 107 of Government of India Act—
Government not a party to suit—Revision by—Right of.*

Neither under section 115 of the Code of Civil Procedure nor under section 107 of the Government of India Act has the High Court power to interfere in revision with an order in regard to court-fee which is in favour of the plaintiff.

* Civil Revision Petition No. 1260 of 1932.

Quære—Whether, in view of the fact that Government was not a party to the suit, a revision petition presented by it against an order in regard to court-fee was at all competent.

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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 Kumbakonam, dated 17th November 1931 and made on Checkslip No. 1285 of 1931 in Original Suit No. 31 of 1931.

P. V. Rajamannar for Government Pleader (*P. Venkaturamana Rao*) for petitioner.

R. Kuppuswami Ayyar for respondents.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—This petition is against a decision of BEASLEY C.J. the Subordinate Judge of Kumbakonam holding that the court-fee paid on the plaint was sufficient. It is a petition presented by Government.

A preliminary objection is taken as to the maintainability of this petition either under section 115 of the Code of Civil Procedure or section 107 of the Government of India Act. It is argued that, where an order in regard to court-fees happens to be in favour of the plaintiff, the High Court will not interfere by way of revision; and, on the other hand, it is contended by the learned Government Pleader that, following the decision of a Bench of this High Court in *Kulandaivelu Nachiar v. Ramaswami Pandia Thalavan*(1), the High Court has the power to revise such an order. Turning to that decision, it will be seen that in that case the lower Court passed an order directing the plaintiff to pay additional court-fees on an erroneous view of the court-fee payable and refused to proceed with the suit unless

(1) (1927) I.L.R. 51 Mad. 664.

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such sum was paid. A preliminary objection was taken as to the maintainability of the revision petition on the ground that an appeal would lie against an order dismissing the suit if the court-fee was not paid. This contention the Bench was unable to uphold being of the view that, where a Judge on an erroneous view of the court-fee payable refuses to proceed with the suit until the proper court-fee is paid, he fails to exercise the jurisdiction as the party is entitled to have his case tried if he paid the court-fee; and *Sudalimuthu Pillai v. Peria Sundaram Pillai*(1), a decision of KRISHNAN J., was referred to with approval. In the latter case it was held that, in cases in which trial Courts wrongly order payment of court-fee over and above what was paid on the plaint, it has been the practice of the Madras High Court to interfere with the order in revision, without leaving the aggrieved party to the cumbrous remedy of filing an appeal after the plaint is rejected for non-payment of the amount directed to be paid, the question really being one of jurisdiction as the plaint has to be rejected if the stamp duty is not paid. There are other cases of this High Court on the same point taking a similar view. The reason for interfering in revision in those cases was that it was a question of jurisdiction, that is to say, a refusal to exercise jurisdiction. Those cases are, however, clearly distinguishable from another decision of this High Court, namely, *Muhamad Ellaiyas v. Rahima Bee*(2). In that case the lower Court held that the court-fee paid by the plaintiff on his plaint was correct and VENKATASUBBA RAO J. held that such an order as that is not revisable though an order that the court-fee paid on the plaint is wrong is revisable. As he points out at page 304, where the

(1) (1924) 48 M.L.J. 514.

(2) (1928) 56 M.L.J. 302.

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order is unfavourable to the plaintiff it may result in great hardship to him and the interests of justice may demand that the High Court should at once rectify the error without waiting till the suit is finally decided and an appeal is then filed. But, if the lower Court's order which is favourable to the plaintiff happens to be wrong, there is another remedy open, which is quite adequate, as the mistake can be corrected by the appellate Court under section 12 of the Court Fees Act. It is quite true that in that case the petitioner was the defendant and that, as is pointed out in the judgment in that case, where an order in regard to court-fee happens to be in favour of the plaintiff it does not mean that it is against the defendant though it may operate to the detriment of the revenue. In this case, the petitioner, as already stated, is the Government and it is argued by the learned Government Pleader that this fact distinguishes this case from *Muhamad Ellaiyas v. Rahima Bee*(1). I am, however, unable to agree that that distinction alters the position if that decision was correct which, in my view, it clearly was. It is difficult to see how this petition can be presented at all by Government, seeing that Government is not a party to the suit, and I have considerable doubt as to whether such a petition as this can be presented by Government. But, in any case, in my opinion, that is immaterial. The same view as that taken by VENKATASUBBA RAO J. was taken in *Falkner v. Mirza Mohomed Syed Ali*(2). In that case it was held that, when a Court holds that the plaintiff's valuation is correct, it does not commit such an error of law as to entitle the High Court to interfere under section 115, Civil Procedure Code, because it cannot be

(1) (1928) 56 M.L.J. 302.

(2) (1924) 28

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said that the Court has exercised a jurisdiction not vested in it or has failed to exercise a jurisdiction vested in it. There is another case to which reference must be made, namely, *Kattiya Pillai v. Ramaswamia Pillai*(1), a decision of VENKATASUBBA RAO AND REILLY JJ., holding that the High Court can interfere in revision against an order relating only to a question of court-fee if the order is unfavourable to the plaintiff but that it will not interfere if the order is favourable to the plaintiff. In that case there was not only a question of the court-fee but of the valuation of the suit under section 11 of the Suits Valuation Act. In such a case as that the High Court has a revisional jurisdiction even though the order is favourable to the plaintiff. The reason for the distinction appearing in that case is that in the latter case it was a question of the Court's jurisdiction to entertain the suit. No case has been referred to where this High Court or any other High Court has held that, where a favourable decision has been given as regards court-fee to the plaintiff, the High Court will exercise its revisional powers. I am clearly of the opinion that in such cases the High Court has no power of revision either under section 115, Civil Procedure Code, or under section 107 of the Government of India Act. This civil revision petition must, therefore, be dismissed with the costs of the respondents.

BARDSWELL J.—I agree.

A.S.V.

(1) (1929) 58 M.L.J. 394.

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Bardswell.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 1933,
REPRESENTED BY THE COLLECTOR OF KISTNA January 23,
DISTRICT (RESPONDENT), APPELLANT,

v.

KOCHERLAKOTA SUBBA RAO (APPELLANT),
RESPONDENT.*

*Madras Hereditary Village-offices Act (III of 1895),
sec. 23 (1) proviso—Hereditary karnam—Suspension of—
Collector's order of, on appeal from Revenue Divisional
Officer's order of dismissal—Second appeal to Board of
Revenue against—Competency of—Dismissal of karnam in
revision—Jurisdiction of Board of Revenue—Madras
Regulations (I of 1803), sec. 5 ; (II of 1806) and (VI of
1881)—Effect—Suit by karnam for declaration of invalidity
and ultra vires nature of order of Board of Revenue—
Maintainability—Consequential relief—Prayer for—Neces-
sity—Specific Relief Act (I of 1877), sec. 42—Exhaustive
of declaratory suits if.*

The dismissal of a karnam, who had a hereditary right to the office, by the Revenue Divisional Officer was on appeal modified by the Collector to one of suspension. A second appeal presented by the karnam to the Board of Revenue was entertained by it and it set aside the Collector's order of suspension and restored the original order of dismissal. In a suit filed by the karnam for a declaration that the order of the Board of Revenue was invalid and *ultra vires*,

Held that the order was passed without jurisdiction and was *ultra vires* and that the suit, though for a mere declaration, was maintainable.

In view of the proviso to section 23 (1) of Madras Act III of 1895, the karnam had no right of appeal, and the Board should not have entertained his appeal. It had no authority to dismiss a karnam in revision in circumstances such as those

* Letters Patent Appeal No. 142 of 1929.

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in the present case. Section 5 of Madras Regulation I of 1803 gives to the Board no punitive powers over village officers, and it had no power to dismiss a karnam in revision either under Regulation II of 1806 or under Regulation VI of 1831.

In the circumstances of the case the plaintiff must be held to be suing as a person entitled to a legal character and the suit was therefore maintainable.

Section 42 of the Specific Relief Act is not exhaustive of declaratory suits.

APPEAL under Clause 15 of the Letters Patent against the decree of WALLACE J. in Second Appeal No. 202 of 1926, preferred to the High Court against the decree of the Court of the Subordinate Judge of Masulipatam in Appeal Suit No. 20 of 1925 (Appeal Suit No. 54 of 1924, Sub-Court, Ellore) preferred against the decree of the Court of the District Munsif of Kovvur in Original Suit No. 699 of 1922.

Government Pleader (P. Venkataramana Rao) for appellant.

T. R. Venkatarama Sastri and A. Satyanarayana for respondent.

Cur. adv. vult.

JUDGMENT.

BARDSWELL J. **BARDSWELL J.**—The appellant is the Secretary of State. The respondent was the karnam of a village in the Kistna District. He was dismissed on 4th October 1921 by the Revenue Divisional Officer of Ellore for having got appointed as talayari a young boy whom he made use of as his own servant. On appeal the District Collector, on 2nd December 1921, modified his punishment to one of suspension for a year. He then, very ill-advisedly, presented a second appeal to the Board of Revenue. He had, in fact, no right of appeal as under the proviso to section 23 (1) of Madras Act III of 1895 there can be a second appeal to the Board, on a matter of punishment, only in the case of a dismissal of a

village officer. None the less the appeal was entertained by the Board which, apparently without hearing the present respondent, set aside the Collector's order of suspension and restored the original order of dismissal. The respondent then filed Original Suit No. 699 of 1922 in the Court of the District Munsif of Kovvur praying for a declaration that the order of the Board of Revenue was invalid and *ultra vires*. The District Munsif granted a decree as prayed for but on appeal the Principal Subordinate Judge of Masulipatam dismissed the suit, holding that the Board of Revenue had acted in the legitimate exercise of revisional powers which it derived from section 5 of Madras Regulation I of 1803. On Second Appeal (No. 202 of 1926), WALLACE J. has restored the decision of the District Munsif, holding that section 5 of Regulation I of 1803 did not give to the Board the power of revision which the first appellate Court had found that it possessed thereunder; neither did the Board have any inherent power, outside the Acts and Regulations, to interfere with and enhance the order of suspension which had been passed by the District Collector in this case. He has also held, in agreement with the two lower Courts, that the suit was maintainable.

That there was no right of appeal is conceded and cannot, indeed, be disputed in the face of the plain language of the proviso to section 23 (1) of Madras Act III of 1895. The Board of Revenue should not, therefore, have entertained the respondent's appeal. It is, however, contended by the learned Government Pleader that the Board was in fact acting in the exercise of its revisional powers, though it did not in any way indicate that it was so doing, and that it got such powers from section 5 of Regulation I of 1803 which section has never been abolished. WALLACE J. has dealt

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with that contention in his judgment and I would, with all respect, express myself as in entire agreement both with the conclusion which he has come to and the reasons that he has given therefor. Section 5 of Regulation I of 1803 runs thus:—

“The Board of Revenue have had, and are hereby declared to have, authority to superintend and control all persons employed in the executive administration of the public revenue, all Zamindars or proprietors of land paying revenue, and all farmers, securities, ryots or other persons concerned in, or responsible for, any part of the revenue of Government, as far as the said superintendence and control may relate to the executive administration of the revenue under the regulations now enacted, or to be hereafter enacted.”

As has been pointed out by WALLACE J., the section gives to the Board no punitive powers over village officers but such power is given to it by section 33 of the same Regulation, which empowers it to

“punish neglect in the Subordinate Officers of Revenue according to the powers vested in them for that purpose.”

Under Regulation XXIX of 1802 it was laid down that karnams could only be dismissed from their offices by the sentence of a Court of judicature. Power to dismiss karnams was given to the Board of Revenue by section 7 (3) of Regulation II of 1806, while by Regulation VI of 1831 the power theretofore exercised by the Board of Revenue over karnams in ryotwari tracts was transferred to Collectors subject to the approval of the Board, and by Act II of 1869 section 7 (3) of Regulation II of 1806 was repealed. Finally there came Madras Act III of 1895, in which there is no mention of any revisional power being vested in the Board of Revenue, while its appellate powers in matters of punishment are stated as being those of hearing first appeals against punitive orders passed by the District Collector in the first instance and second appeals in the circumstances already noted. It is argued for the

the Chandrika that an adoption by a widow is prohibited. In section I, verse 31, the Dattaka Chandrika expressly quotes the text of Vasishta :

“Let not a woman either give or receive a son unless with the assent of her husband.”

In verse 32 he proceeds to say that where there is no prohibition the assent is implied and for this purpose he relies on the text of Yagnavalkya. This text of Yagnavalkya and this interpretation by the Dattaka Chandrika are accepted in Bombay, among the Numbudris of Southern India and so on ; vide *Vasudevan v. The Secretary of State for India*(1). Anyhow, it is clear that Dattaka Chandrika expressly contemplates adoption by a widow, and it always refers to an adoptive father by describing him as “*prathigrahithri*”. It is clear that the word is not used in its etymological sense but in a general sense; vide verses 14 to 17 of section III. The learned Advocate-General then argues that the Privy Council have decided the case in *Annapurni Nachiar v. Forbes*(2) in the way they did because of the word “*prathigrahithri*” in the texts. I will now examine this contention. First I take up the judgment of the High Court in *Annapurni Nachiar v. Collector of Tinnevely*(3). At page 281 BEST J. says :

“It is difficult to understand why he should have no discretion in selecting one of his wives to join with him in making an adoption during his lifetime.”

Again at page 282 :

“The fact that adoptions under the Hindu Law are for the benefit of the man and can be made independently of any wife does not appear to be a circumstance from which it can be inferred that the man is not at liberty to select one of several wives to be the receiving mother of the boy to be adopted.”

(1) (1887) I.L.R. 11 Mad. 157, 168.

(2) (1899) I.L.R. 23 Mad. 1 (P.C.).

(3) (1895) I.L.R. 18 Mad. 277.

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At page 283 SHEPHARD J. says :

"It was conceded by Mr. Bhashyam Iyengar that the act of adoption, inasmuch as it concerns the husband, may be performed independently of his wife. Her consent is unnecessary. Nevertheless she, if she is the only wife, undoubtedly comes to be regarded as mother of the adopted son and her parents come to be regarded as his maternal grand-parents, (Dattaka Mimamsa, Section VI, Verse 50). To those parents of the adoptive mother he presents oblations. Generally, his position in the family is assimilated to that of a natural-born son. In the case supposed, that of an adoptive father with one wife, the law itself designates the adoptive mother and no difficulty arises."

The whole of this passage is against the appellant's contention. The use of the word "nevertheless" shows that, even where the wife has not consented, she becomes the mother of the adopted son, and the following sentence of the learned Judge shows she becomes the mother, not because she participates, which is, *ex hypothesi*, not the case, but the law designates her, and the law does it because he has got to be assimilated to the natural-born son. The learned Judge then proceeds to discuss the cases of several wives. He then refers to the case of *Kasheeshuree Debia v. Greesh Chunder Lahoree*(1). The judgment in that case shows that the ground of the decision was that Kali Kant adopted the boy as son of the second wife, Mon Mohini. At page 286 the learned Judge says :

"There is no inconsistency between the recognized principles of the law with regard to adoption and the position that one of several wives may be selected as the adoptive mother. The maintenance of this position does not militate against, but is rather in consonance with, the principle that the adoption is made solely for the benefit of the husband. It cannot be denied that a Hindu having two wives may confer on any one of them an authority to take a child in adoption after his death, nor can it be doubted that the selected widow

(1) (1864) W.R. Sup. Vol. 71.

would alone and to the exclusion of her co-widows have discretion in the matter ; (II Strange's Hindu Law, page 91)."

Finally at page 287 the learned Judge says :

"Because a certain mode of designating the adoptive mother fails it does not follow that no other exists."

And he states his conclusion as follows :

"It is sufficient to hold that, where the husband has associated one wife with him in adopting a child, that wife is to be deemed mother of the child."

I think all the quotations I have made from the judgments show that the basis of the High Court's judgment in favour of the successful widow in that case is not that she actually received the boy but that the husband had associated her with himself in the act of adoption and in that manner selected her out of his wives for becoming the adoptive mother. Now, when we examine the decision of the Privy Council in *Annapurni Nachiar v. Forbes*(1), the same point emerges. The facts and authorities being mentioned up to page 8, the deciding passage is to be found at page 9 :

"Again it seems not to be doubted that a man may authorize a single one of several wives to adopt after his death, or that she would on adoption stand in the place of the natural mother."

thus agreeing with SHEPHARD J. who relies on the same analogy. Then we have :

"If he can do that, it would be very capricious to deny him the power of selecting a single wife to join with him in his lifetime in adopting a boy, with the same effect on her relations with that boy . . . It certainly is a reasonable law that the head of a family should be able to take action likely to prevent disputes between his widows relative to adoption and the consequences of it. To unite one wife with himself is one way."

Here again it is clear that the *ratio decidendi* of the judgment of the Privy Council is not that the

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respondent was the receiving mother but that she was associated by the husband. There is no reference to the word "*prathigrahihri*" in the texts nor any reliance on that word as a reason for the conclusion. No doubt, it happens to be an accident that, where the husband associates the wife with himself in the act of adoption, probably there might be some receiving by the wife also. But this is a pure accident. This is clear from the fact that in the whole ceremonial relating to adoption which is elaborately described in Baudhayana Smrithi [the whole of this part of the Smrithi being referred to by Mr. Mayne at length in the argument before the Privy Council which is fully reported in *Annapurni Nachiar v. Forbes*(1)], we do not find any part allotted to the wife in the ceremony. In my opinion, nothing can be clearer for showing that the word "*prathigrahihri*" in the texts is used merely in the sense of adoptive mother. In the course of the argument at page 240 of *Annapurni Nachiar v. Forbes*(1) Mr. Jardine who appeared for the respondent happened to mention that the etymological meaning of the word translated by Mr. Sutherland as "adopting mother" was "receiving mother". Lord HOBHOUSE immediately remarked :

"I do not know whether there is any essential difference between the two."

Mr. Jardine then said :

"I do not wish to press it unduly."

All this shows that it is not on that word but on the fact of association that the decision turned. In my opinion, the decision of the Privy Council is only an authority for saying that, where there are more than one wife, the fact of a wife being associated may be made a ground for choosing that wife out of the several wives ; and PHILLIPS J. was right in saying, at page 946

(1) (1899) 9 M.L.J. 209, 212 (P.C.).

in *Sundaramma v. Venkatasubba Ayyar*(1), that there appears to be no authority for the position that the wife does not become the adoptive mother unless she actually receives the boy. This is not the conclusion of either the High Court or the Privy Council in deciding the *Uthumalai case*(2). The Advocate-General relies on the decision in *Gunamani Dasi v. Debi Prosanna Roy Chowdry*(3). The judgment of SHAMS-UL-HUDA J. clearly shows that the wife was living at the time of the adoption and therefore he held that she must be regarded as the adoptive mother. I do not think this decision helps the appellant.

Lastly the Advocate-General relies on Sarkar's Law of Adoption and Hindu Law. At page 200 of his Law of Adoption, Sarkar observes :

"When the adopter is a widower it might be said that his deceased wife's ancestors will be the maternal ancestors of the adopted son."

But, while repeating the same statement at page 419-D, he seems not to quite agree with the view at page 419-E. In his Hindu Law, at page 249, sixth Edition, (page 234, fifth edition), he again repeats the statement :

"It might be that the deceased wife of the adopter will be the adoptive mother, and her relations, the maternal relations, of the adopted son."

But at page 250 he discusses the question whether a wife who is living and has not consented becomes a mother. He seems to be inclined not to accept the view that she becomes the adoptive mother. It is to be noted that this has nothing to do with the case of a widower. Whatever may be the views of Mr. Sarkar Sastri, these views have all been considered in *Sundaramma v. Venkatasubba Ayyar*(1), and I think PHILLIPS J.

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(1) (1928) I.L.R. 49 Mad. 941.

(2) (1899) I.L.R. 23 Mad. 1 (P.C.); 9 M.L.J. 209.

(3) (1919) 23 C.W.N. 1038, 1040.

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was justified in saying that to some extent they were contradictory. As against this, I may refer to Justice Banerjee's Law of Marriage and Stridhana, page 371, third edition :

"An adopted son may become affiliated to a woman either by being taken in adoption by her husband in association with her, or by being taken by the husband alone, the child nevertheless becoming a child of the wife according to the reason stated in the Dattaka Mimamsa in the passage quoted above or by being taken by the husband, etc."

The passage of Dattaka Mimamsa in the above is section I, verse 22. The learned author then says :

"In the first two cases, the adopted son would of course be regarded as a son of the woman. But in the last case the question arises whether the adopted son is to be regarded as a son of the woman herself or merely as the son of a co-wife."

Thus there is not the slightest doubt as to what the opinion of Mr. Justice Banerjee on this matter is and how he would construe Dattaka Mimamsa, section I, verse 22. The learned Advocate-General would have it that the meaning of Dattaka Mimamsa, section I, verse 22, is that the adopted boy becomes the son of the wife though she did not participate in the adoption only in a general loose sense, i.e., in the same sense as the son by one wife may be said to be the son of a co-wife. Whatever may be the exact meaning of the text, it has always been applied for holding that a non-assenting wife or a deceased wife would be the mother of the boy adopted by the husband alone. I have considered all the arguments of the learned Advocate-General. There is one matter which I wanted to keep to the last. He relied on what purports to be an article in 9 Madras Law Journal (journal portion) pages 229 to 245. This article was cited before PHILLIPS and MADHAVAN NAIR JJ. and was considered by them. PHILLIPS J. was of opinion that this article concedes the case of a single wife. The reference to a passage from Justice Banerjee's Law

of Marriage and Stridhana, page 242, supports the learned Judge's statement. But apart from all this, I am bound to make one observation which was not known to PHILLIPS J. It is conceded on all hands that the author of this article was Mr. V. Bhashyam Iyengar, afterwards a Judge of this Court. The article appears in the same volume which reports the *Uthumalai case*(1). The expressions in the article such as "opposite side", "our contention", etc., show that this was probably the memorandum of Mr. Bhashyam Iyengar prepared for the use of his Counsel in arguing the *Uthumalai case*(1) before the Privy Council and not a discussion of an abstract question of law by a jurist. I have given every weight to the argument of such an eminent lawyer as Sir V. Bhashyam Iyengar. But, in the circumstances stated, I am not able to give a higher weight than that, nor certainly the weight due to the opinion of a great jurist, which undoubtedly he was, but not in this article. I am of opinion that the judgment of PHILLIPS and MADHAVAN NAIR JJ. in *Sundaramma v. Venkatasubba Ayyar*(2) is correct and that the appeal ought to be dismissed with costs.

ANANTAKRISHNA AYYAR J.—I agree. Pandi Ayyangar alias Thirumalayappa Ayyangar died in 1890 leaving behind him his widow Pichai Ammal and his daughter Kothai Ammal. Kothai Ammal was married to Duraisami Ayyangar. Kothai Ammal died in 1900 and Pichai Ammal in 1923. Kothai Ammal was the only wife of Duraisami, he not having married anybody else either before or after Kothai Ammal's death. In 1910 Duraisami adopted Alwar. On the death of Pichai Ammal (the widow of Thirumalayappa) in 1923 the reversionary heirs of Pandi alias Thirumalayappa

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(1) (1899) I.L.R. 23 Mad. 1 (P.C.); 9 M.L.J. 209 (P.C.).

(2) (1926) I.L.R. 49 Mad. 941.

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claimed to redeem a mortgage created by Thirumalayappa. Alwar, the adopted son of Duraisami, claimed that he was the heir of Thirumalayappa's property and that the plaintiffs—the reversionary heirs of Thirumalayappa—had no right to the estate of Thirumalayappa, which, according to Alwar's contention, vested in Alwar on the death of Thirumalayappa's widow in 1923. Alwar's contention was that, when he was adopted by Duraisami in 1910, he (Alwar) became the adopted son of Duraisami's only wife Kothai Ammal (deceased) and that, as the daughter's son of Thirumalayappa, he (Alwar) was entitled to succeed to Thirumalayappa's estate in preference to Thirumalayappa's divided distant agnates. Both the lower Courts upheld Alwar's claim, and in the second appeal preferred by the plaintiffs the question for decision is whether, on adoption of Alwar by Duraiswami, Alwar became the adopted son of Kothai Ammal also.

This exact question was considered by PHILLIPS and MADHAVAN NAIR JJ. in the case reported as *Sundaramma v. Venkatasubba Ayyar*(1) and the learned Judges upheld the contentions of the adopted son, holding that the adopted son of a Hindu whose only wife had died before the adoption became the son of that wife so as to inherit as such to the relations in her father's family. It is argued on behalf of the plaintiffs (appellants) that that decision requires reconsideration, and that is the only point for decision in this second appeal.

After hearing the arguments of the learned Advocate-General who appeared for the appellants before us, I have come to the conclusion that the view taken in *Sundaramma v. Venkatasubba Ayyar*(1) is correct.

(1) (1926) I.L.R. 49 Mad. 941.

Though the rights of an adopted son to succeed to the lineal heirs of the adoptive father was recognized early, in course of time his rights to succeed to the collateral heirs of the adoptive father as well as the collateral heirs of the adoptive mother, though disputed at one time, have now been firmly established. The Privy Council in *Nagindas Bhagwandas v. Bachoo Hurkissondas*(1) agreed with the statement of Hindu Law made by MITTER J. in *Uma Sunkar Moitra v. Kali Komul Mozumdar*(2) to the following effect:

"According to Hindu Law, an adopted son occupies the same position, and has the same rights and privileges in the family of the adopter, as the legitimate son, except in a few specified instances, which have been clearly and carefully noted and defined by writers on the subject of adoption. The theory of adoption depends upon the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adopter's family, as if he were born in it."

The decision in *Uma Sunkar Moitra v. Kali Komul Mozumdar*(2) was affirmed by the Privy Council in *Kali Komul Mozumdar v. Uma Sunkar Moitra*(3).

The learned Advocate-General did not dispute the above general proposition; but he argued that it is only that wife of the adopter who is alive at the time of the adoption and who actually receives the boy in adoption that could be said to be "the receiving mother" of the adopted son, and, consequently, "the adoptive mother" of the adopted son, and that it is only with reference to the properties of the relations of such adoptive mother that the adopted son succeeds; and he laid great emphasis on the expression "*prathigrahitriyamatha*" occurring in Dattaka Mimamsa, part

(1) (1915) I.L.R. 40 Bom. 270, 288 (P.C.).

(2) (1880) I.L.R. 6 Cal. 256, 259, 260 (F.B.).

(3) (1883) I.L.R. 10 Cal. 232 (P.C.).

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VI, verse 50. He argued that the expression has not been properly translated in some of the earlier translations and decisions, and that the expression meant "the receiving mother". He drew attention to the fact that in the present case Kothai Ammal had died in 1900, i.e., ten years prior to the adoption of Alwar by her husband Duraisami, that she could not therefore associate herself with her husband in the act of Alwar's adoption and could not "receive" the adopted son at the time of the adoption. It was argued therefore that Kothai Ammal could not be the adoptive mother of Alwar, and consequently Alwar could have no rights to Kothai Ammal's father's (Thirumalayappa's) properties on the death of Thirumalayappa's widow, Pichai Ammal. Certain decisions were also relied on in support of these arguments.

It was admitted (and it could not be disputed at this time) that the adoption of Alwar by Duraisami was quite valid under Hindu Law, as it has been settled that a Hindu widower having no sons could make a valid adoption. In fact, it has been decided that a Hindu bachelor could make a valid adoption; see *Rungama v. Atchama* and *Atchama v. Ramanadha*(1), *Annapurni Nachiar v. Collector of Tinnevely*(2), *Chandrasekharudu v. Bramhanna*(3) and *Tulshi Ram v. Behari Lal*(4). If the adoption of Alwar by Duraisami was valid, then Alwar must be taken to have all the rights which an *Aurasa* son of Duraisami would have. That would follow from the decision of the Privy Council already quoted; *Nagindas Bhagmandas v. Bachoo Hurkissondas*(5). It has also been decided that a Hindu who has no son is entitled to make an adoption without

(1) (1846) 4 M.I.A. 1.

(3) (1869) 4 M.H.C.R. 270.

(2) (1895) I.L.R. 18 Mad. 277.

(4) (1889) I.L.R. 12 All. 328, 353.

(5) (1915) I.L.R. 40 Bom. 270 (P.C.).

associating his wife in the act of adoption; and, even when his wife is against the adoption, a Hindu husband without a son is entitled to make an adoption. As observed by Mayne, in his Hindu Law,

"adoption is a religious act which a Hindu is entitled to perform, and the text of Bodhayana describing the ceremonies relating to adoption makes it clear that the wife has really no necessary part at all in the functions. Without associating his wife and even against her wishes, a Hindu could perform the ceremony of adoption and make a valid adoption."

This is also not disputed; but it is argued that, though the adoption of Alwar would be valid, Alwar should be taken to have only his adoptive father (Duraisami) and relations on his (adoptive father's) side, but no adoptive mother, and consequently no relations on the adoptive mother's side. Here again, it is admitted that, on a valid adoption being made, the adopted son is cut off from all relationship with his natural parents both on his natural father's side and on his natural mother's side, and that his relationship is thereafter only with reference to his adoptive father's and his adoptive mother's sides. But it was pressed before us by the learned Advocate-General that it does not follow that an adopted son should have an adoptive mother necessarily. He instanced the case of a bachelor making an adoption, in which case he pertinently pointed out that the adopted son, while losing all relationship on his natural father's and mother's sides, gets instead only relationship on his adoptive father's side, and that he has no adoptive mother, nor relations on the adoptive mother's side. This proposition in the case of a bachelor making an adoption not being controvertible, he asked why any surprise should be expressed for want of an adoptive mother when adoption is made by a widower. He further re-enforced his argument by mentioning the case of a Hindu having

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a plurality of wives living but making an adoption only in conjunction with one of them,—in which case that particular wife only is the adoptive mother, and the remaining wives of the adoptive father are only step-mothers of the adopted son; *Annapurni Nachiar v. Forbes (Uthumalai Case)*(1). He also put the case of a widower making an adoption after—say—two of his wives had died in succession, and asked which of the deceased wives should be taken to be the adoptive mother of the boy. He also instanced the case of a widower or bachelor marrying a plurality of wives after adoption, and asked which wife should be taken to be the mother of such an adopted boy. He also relied on certain observations of the Privy Council in the case reported as *Annapurni Nachiar v. Forbes*(1) and on *Narasimha v. Parthasarathy*(2), *Gunamani Nasi v. Debi Prasanna Roy Chowdry*(3), *Debi Prasanna Roy Chowdhry v. Harendra Nath Ghose*(4), *Narain Dat v. Gopal Das*(5) and *Veeranna v. Sayamma*(6). He very strongly relied on the statements contained in Sarkar Sastri's book on Adoption, and also on Dattaka Mimamsa.

An unsigned article in 9 Madras Law Journal 229 (*Journal portion*) by a very learned and erudite lawyer of this Presidency was also read *in extenso* as supporting the arguments advanced by the learned Advocate-General.

On the side of the respondents their learned Advocate argued that, when once the validity of Alwar's adoption was conceded, Alwar's connection with the relations of his natural father and natural mother ceased, and Alwar became connected with the relations of Duraisami, his adoptive father, and Kothai Ammal (Duraisami's only wife); that, whatever apparent difficulties

there might exist in cases where the adoptive father had several wives, no such difficulty could exist when the adoptive father had only one wife. It was argued that the expression "*prathigrahithriyamatha*" occurring in the Dattaka Mimamsa does not really mean "receiving mother" in the sense of the woman who actually received the boy in adoption; that the expression in its context only means "adoptive mother" (whatever the literal meaning of the expression might be); that the context shows that the contrast there drawn is between the relations on the side of the natural father and natural mother of the boy with the relations on the side of the adoptive father and adoptive mother; that the text only declared that the adopted son lost his relationship with the kindred of his natural father and natural mother and instead got the relationship through the adoptive father and the adoptive mother, and while losing his connection in the family in which he was born he got relationship in the family into which he was adopted; that "receiving by the wife" of the adopter was not necessary according to Hindu Law; that an adopter's wife has no place in the performance of any religious ceremonies or in accepting the boy in adoption; that a Hindu husband could ignore his wife in making an adoption and could make a valid adoption by himself alone and even against the wishes of his wife; that decisions have held that, even in the case of a plurality of wives, the test for finding out the adoptive mother of the boy is not to see which of the wives actually received the boy in adoption but to ascertain the intentions of the husband as to which wife should be associated with him in the adoption and who should be the adoptive mother; that the expression "*prathigrahitru*" has also been used in relation to the deceased husband to whom his widow makes an adoption, thus

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(3) (1919) 23 C.W.N. 1038. (4) (1910) I.L.R. 37 Cal. 863.
(5) (1915) 33 I.C. 361. (6) (1928) I.L.R. 52 Mad. 393.

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making it clear that the expression does not mean that the husband "received" the boy in adoption, since, in the case put, he was dead at the time and adoption was made after his death by his widow. It was also argued that in cases of plurality of wives, if a husband should make an adoption without expressing any intention as to which of his wives should be the adoptive mother, there are certain principles which would enable the Court to decide which wife should be the adoptive mother, in case all the wives could not be the mothers of the adopted son, having regard to the observations of the Privy Council in *Narasimha v. Parthasarathy (Medur case)* (1). It was finally argued that, whatever difficulties might exist in the other cases put by the learned Advocate-General, there could not be any doubt or difficulty in a case like the present when the widower had only one wife. It was also stated that, according to the nature of things, a boy should have both a father and a mother, and that an adopted son also should have an adoptive father and also, *if possible*, an adoptive mother. Because an adopted son could not have an adoptive mother in the case of an adoption by a bachelor, and there would be an anomaly in that respect, it was argued that the anomaly should not be carried further to the case of a widower who had only one wife.

It is now necessary to examine the arguments carefully.

The strongest argument advanced on behalf of the appellants is based on the expression *prathigrahitriyamatha*, literally "receiving mother", used in Dattaka Mimamsa, section VI, placitum 50, and Dattaka Chandrika, section III, placitum 17. I proceed to quote the same:

(1) (1913) I.L.R. 37 Mad. 193 (P.C.).

Section VI, placitum 50.—"The forefathers of the (*prathigrahitriyamatha*) adoptive mother only are also the maternal grandsires of sons given, and the rest; for the rule regarding the paternal is equally applicable to the maternal grandsires (of adopted sons)"—Setlur's translation.

In Dattaka Chandrika, section III, placitum 17.—"But the absolutely adopted son presents oblations to the father and the other ancestors of *prathigrahitriyamatha* (literally, receiving mother) only."

Emphasis is laid on the expression "*prathigrahitriyamatha*", literally (receiving mother). But the text shows that what the author is there discussing is that, after an absolute adoption (*Suddha Dattaka* not *Dvayamushyayana* adoption), the relationship of the adopted son with the relations of his natural father and natural mother ceases, and after adoption, his relationship is *only* with the relations of his adoptive mother. The word "*eva*" clearly brings out the antithesis between the two sets of relations discussed therein. This remark applies to section VI, placitum 50, and section III, placitum 17, quoted above. The context also shows that the authors are not there considering what acts should be done by the wife of the adopter to bring about the result of her being the adoptive mother of the boy. It is nowhere laid down, so far as our attention was drawn, that the wife of the adopter should actually receive the boy in order to validate the adoption. In fact, section I, placitum 22, of Dattaka Mimamsa, is clear that an adoption is complete by the very act of adoption by the husband. It is there specifically stated that, by virtue of the superiority of the husband, by his mere act of adoption the filiation is complete. The argument is put thus:

"If the case stands thus, then, the assent of the wife is requisite for the husband also; for the purpose would be the same. This, if alleged, is wrong, for in consequence of the superiority of the husband, by his mere act of adoption, the

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filiation of the adopted as son of the wife is complete, in the same manner as her property in any other thing accepted by the husband."

Mayne's Hindu Law, section 150, mentions Vasishta's text and also the texts of Saunaka and Baudhayana, containing the rituals of adoption. When an adoption is made by the husband, it is not necessary, to give validity to the adoption, that his wife or any of his wives should be present or should take part in the adoption. Adoption is primarily a religious ceremony performed with a view to save the parent from the hell called "*puṭh*". No doubt very important legal consequences also follow an adoption. No part is, by the texts, assigned to the wife when the adoption is made by the husband, though in practice a man generally associates himself with his wife or some one of his wives when making an adoption. It is not right to say that non-association of a wife with the husband when the husband makes the adoption would invalidate the adoption. In fact, Dattaka Mimamsa, section I, placitum 22, would seem to make the matter absolutely clear that the husband could make the adoption without associating his wife with him in the act, or even against her will.

If that be so, the meaning to be attached to the expression *prathigrahitri ya matha* in placitum 50 and placitum 17 referred to, is, not its literal meaning of "receiving mother", but "adoptive mother". In fact, that (adoptive mother) is the rendering given by many learned translators of this expression. This would be made clear when it is noted that, even with reference to an adoption made by a widow to her husband, the husband is spoken of as *prathigrahitru*. See Dattaka Mimamsa, section VI, placitum 49:

"The *Sakha* or peculiar branch of the vedas is that of the adopter only (*Prathigrahitheva*)."

It may be stated that Dattaka Mimamsa does not permit adoption by a widow, but similar expressions are used in Dattaka Chandrika also, which permits adoption by a widow, and the husband to whom adoption is made by a widow is called *Prathigrahitru*.

The inference sought to be drawn from the use of the word *prathigrahitri ya matha* by the learned Advocate-General is in my opinion not warranted. The expression seems only to mean "adoptive mother" and not the woman who actually "received" the boy.

The decision of the Privy Council in the *Uthumalai case*(1) does not support the extreme contention urged on behalf of the appellants that the expression in question means only the "receiving mother". The Privy Council does not give that meaning to the expression in that judgment. On the other hand, what they say is that various modes were open to the husband to indicate which of his wives was to be the adoptive mother of the boy, and they state that "to unite one wife with himself in adoption is one way". Their Lordships do not say that it is only by receiving the boy at the ceremony of adoption that the particular wife of the adopter could become adoptive mother. In fact, they approve of the decision of the Bengal High Court in the case reported as *Kasheeshuree Debia v. Greesh Chunder Lahoree*(2), where it was held that

"the husband by the will and various acts was proved to have adopted Saroda as the son of his second wife Monmohini and that consequently the plaintiff's claim as mother of the adopted son was invalid."

The test proposed before us of "receiving" the boy was not laid down as the only test to be applied, either in *Kasheeshuree Debia v. Greesh Chunder Lahoree*(2) or in the *Uthumalai case*(1).

(1) (1899) I.L.B. 23 Mad. 1 (P.O.).

(2) (1864) W.R. Sup. Vol. 71.

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It was open to the husband to indicate which of his wives was to be the adoptive mother; that particular wife need not necessarily have been present at the ceremony; for various reasons she might not have been able to be present at the function. Nor is it necessary for her to actually receive the boy at the time to become his adoptive mother. Of course, if a husband actually joins one wife with him, to the exclusion of others, in the actual act of adoption, then that is certainly one mode of indicating the adoptive mother; but certainly there could be other modes of bringing about that result, as is clear from the decision of the Privy Council.

No doubt, Sarkar Sastri in his book on Adoption seems to support the view put forward by the learned Advocate-General, though there are other passages in his book which would seem to indicate the other way. But on the particular question before us two other learned authors have held views contrary to that of Sarkar Sastri. See Bhattacharyya's Hindu Law, second edition, page 151 (third edition, volume I, page 357) where the learned author remarks as follows:—

"There is no text to render the consent of the wife absolutely necessary for the validity of an adoption made by the husband . . . The sanction of the husband makes the son adopted by a female the son of the husband also; Dattaka Mimamsa, section I, placita 21 and 22. But in the case of an adoption by the husband, the child taken becomes, by his act, the son of his wife also, except when the ceremony is performed in conjunction with another wife . . . Nanda Panditya says:—'only the forefathers of the mother that accepts in adoption are also the maternal grandsires of sons adopted and the rest'; Dattaka Mimamsa, section VI, placitum 50. In (this) passage, the word 'eba' (only) is meant to exclude the paternal ancestors of the natural mother. But it can be taken also to exclude the paternal ancestors of the adoptive mother's co-wives."

Dr. Gooroodass Banerjee also seems to take the same view as Bhattacharyya, see pages 129 and 356 of the second edition of Justice Banerjee's Hindu Law of Marriage and Stridhana, and at page 371 of the third edition:

"An adopted son may become affiliated to a woman either by being taken in adoption by her husband in association with her; or by being taken by the husband alone, the child nevertheless becoming a child of the wife according to the reason stated in the Dattaka Mimamsa in the passage quoted above, section I, placitum 22."

The decision of this Court in the *Uthumalai case*(1), which was confirmed by the Privy Council in the case reported as *Annapurni Nachiar v. Forbes*(2), also supports the respondent's contention. BEST J. says as follows in the course of his judgment, at page 281:

"The rule enunciated in Dattaka Mimamsa, section VI, verse 50, and Dattaka Chandrika, section III, verse 17, to the effect that the 'forefathers of the adoptive mother only are also the maternal grandsires of the sons given' differentiates between the adoptive and natural mothers, and not between an adoptive mother who actually joins in the ceremony of adoption and her co-wives."

SHEPARD J. in the course of his judgment in the same case observes at page 283 as follows:—

"It was conceded by Mr. Bhashyam Ayyangar, and there can be no doubt, that the act of adoption inasmuch as it concerns the husband alone may be performed independently of his wife. Her consent is unnecessary. Nevertheless she, if she is the only wife, undoubtedly comes to be regarded as mother of the adopted son and her parents come to be regarded as his maternal grand-parents. (Dattaka Mimamsa, section VI, verse 50). To those parents of the adoptive mother he presents oblations. Generally, his position in the family is assimilated to that of a natural-born son. In the case supposed, that of an adoptive father with one wife, the law itself designates the adoptive mother and no difficulty arises."

(1) (1895) I.L.R. 18 Mad. 277.

(2) (1899) I.L.R. 23 Mad. 1 (P.O.).

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These observations help the respondent's contention. With reference to the use of the expression "adoptive mother" in the texts this is what SHEPARD J. says:

"The expression 'adoptive mother' used in the verses cited above from Dattaka Chandrika and Dattaka Mimamsa is not used in reference to the case of several mothers; and evidently no distinction is intended to be drawn between the wife who has taken part in receiving the child and any other wife."

Again, at page 287, the learned Judge says:

"The institution of adoption requires that the son adopted should be deemed the son of the person who has taken him. It is only consistent with this theory that the wife of the adoptive father, if there happens to be one, should also be deemed the mother of the boy. But in the case of several wives, the theory does not require that they all should be deemed to be his mothers. We are invited to consider the case in which a husband has made an adoption independently of both his wives and to answer the question which would then arise. The case is not one which is likely to happen, and it seems to me sufficient to say that, because a certain mode of designating the adoptive mother fails, it does not follow that no other exists."

Because an adopted son could not have an adoptive mother in the case of adoption by a bachelor, it does not follow that he should have no adoptive mother when a widower who married only once makes an adoption. From what has been said above, it would seem that the only wife of the adopter would be the mother of the adopted son rather than the adopted son should not have any mother in his adopted family. The argument based on the translation "receiving mother" is, to say the least, inconclusive, and whatever assistance might be derived from the circumstance that one of several wives joined with the adopter in the actual act of adoption or received the boy in adoption, in deciding which of several co-wives should be taken to be the mother of the adopted son in such cases, no such difficulty arises

in a case like the present, namely, the adoption by a widower who married only once. In the case of plurality of wives, several tests have been indicated to find out the intention of the husband as to which of the wives should be the mother of the adopted son. In the absence of any indication by the husband himself, just as associating one wife with him in the act of adoption or otherwise declaring who is to be the mother, it may be that the seniormost wife—*Dharmapathni*—might be held to be the mother. If some wives be dead but others living, other circumstances might have to be considered. We have not to decide those cases on the present occasion. But the circumstance that there may be difficulties in other cases is no ground by itself for holding that, in a case like the one before us, the adopted son should have no adoptive mother at all.

Then it was said that adoption itself is a fiction, opposed to facts and nature, and that the respondent's arguments would introduce "a fiction on a fiction". I am unable to agree with this contention. The question is: "What exactly is the fiction with reference to an adoption, its exact extent and incidence?" While the exact extent of the fiction has to be considered in such cases, I do not see how "a fiction on a fiction" is introduced here.

As regards the cases quoted, no case dissenting from the decision of this Court reported as *Sundaramma v. Venkatasubba Ayyar*(1) has been cited to us.

In *Gunamani Dasi v. Debi Prosanna Roy Chowdry*(2) SHAMS-UL-HUDA J. observed at page 1041 as follows:—

"It is not necessary in this case to consider the effect of an adoption by a husband alone without the concurrence of any of his wives. I feel no doubt that in this case the adoption was both by Durgadass and Gunamani. At the time of the

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(1) (1926) I.L.R. 49 Mad. 941.

(2) (1919) 23 C.W.N. 1038, 1041.

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adoption Annapurnamma's mother was dead but Gunamani was alive, and it is only natural to suppose that she did take part in the adoption."

On those facts, no exception could be taken to that decision.

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Narain Dat v. Gopal Das(1) refers to a case where the wife of the adopter did not consent to the adoption, and the question was whether she could be taken to be the adoptive mother of the boy. It was admitted that the adoption was valid. The question is not discussed whether any consent on the part of the adopter's wife is necessary at all in law to validate an adoption. The case before us is not the case of a wife who objected to the adoption, and it is not necessary to say more about that case.

Cases might arise where a person having married only once, he and his wife were anxious to have a particular boy adopted, and, before effect could be given to the same, the wife died. The husband, to give effect, so to speak, to the last wishes of his wife, and also from pious motives, makes an adoption. There does not seem to be anything against the position that, in those circumstances, she should be taken to be the mother of the adopted son. I may state that in my experience I have come across instances (rare no doubt) in which a woman in the position of Kothai Ammal in the present case has been treated as the adoptive mother, and transactions entered into on that basis. I am not, of course, saying that that should be taken by itself in any way to be conclusive on the question of law that has to be decided in the present case.

The article in 9 Madras Law Journal (Journal portion, page 229) by one who signed as "jurisprudence" but whose identity is well known and who was a very

learned and acute lawyer and afterwards a Judge of this High Court, was read *in extenso* by the learned Advocate-General as explaining his line of argument in this case. The weight due to the opinion on a legal question of this kind of such a learned lawyer would undoubtedly be very great; but it is very probable that the Madras Law Journal only published, in the form of an article, "a memorandum of arguments" prepared by that learned lawyer for use of respondent's Counsel in England in connexion with the hearing of the *Uthumalai case*(1). The article itself contains ample indications of the occasion for preparing it. The expressions, "the opposite view", "our contention", "the question now at issue", etc., would seem to indicate the purpose for which the memorandum of arguments was prepared. The Privy Council gave its decision in July 1899, and the memorandum was evidently published as an article in the Madras Law Journal in its issue of July 1899 for the learning it discloses, after the decision of the case by the Privy Council. Moreover, the article does not bear the name of the writer. These circumstances have to be kept in view in giving due weight to the positions taken up in the article. So far as theoretical arguments are concerned, weight should undoubtedly be attached to the considerations mentioned in the article. But one should not forget that there are no clear indications therein that they represent the real opinion of the learned writer on the points dealt with in the memorandum.

I made these remarks because the article in 9 Madras Law Journal was read to us *in extenso* as representing arguments which the learned Advocate-General himself wanted to advance in support of his

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position in the present case, and the article has also been referred to in the judgment in *Sundaramma v. Venkatasubba Ayyar*(1).

Even in this article it is stated at page 231 as follows:—

“If he had an only wife and she did not join in the adoption, she, no doubt, would, notwithstanding that she did not join in the act of adoption, become the mother of the adopted son and entitled to succeed as such (vide Dattaka Mimamsa, section I, verse 22).”

This is contrary to the decision in *Narain Dat v. Gopal Das*(2). So far as the point for decision in the present case is concerned, it would seem that the view expressed therein is in favour of the present respondent's contention in the case before us, and PHILLIPS J. took it to be so. The article is concerned mainly with cases where there are plurality of wives, and directly with a case where the adopter associated himself with one of his wives in the act of adoption as was the case in the *Uthumalai case*(3).

Having regard to the decisions of Courts, an adopted son should be treated, as much as possible, as similar to a natural-born son so far as the family in which he is adopted is concerned (subject to such distinctions with reference to quantum of share, etc., specified in Hindu Law texts), and the adopted son's rights to succeed both lineally and collaterally with reference to his adoptive father's and mother's lines are concerned have been established; the difficulty to find an adoptive mother when a bachelor makes an adoption does not present itself in the case of an adoption made by a widower who married only once. Having regard to the position of a Hindu wife with reference to an adoption by her husband, it is clear that her consent is

not necessary to validate the adoption, and, even in spite of her express dissent, an adoption by the husband would be perfectly valid. The main arguments advanced by the appellants, based upon the meaning of the expression “*prathigrahitri ya matha*”, that “receiving mother” only would be the mother of the adopted son, is not, in my opinion, tenable. The context in the texts as well as other portions where the same expression occurs in the books make it reasonably clear that, before the wife of an adopter could become the adoptive mother of the boy, it is not necessary that she should in fact have joined with the husband and received the boy in adoption. Whatever difficulties might arise in cases of plurality of wives, and whatever might be the tests that will have to be applied to solve the question in such cases, it seems to me that the solution is comparatively easy, and, more or less a natural one, in the present case. Two learned Judges of this Court (PHILLIPS and MADHAVAN NAIR JJ.) have decided this very question in favour of the respondent's contention, and I am not satisfied from the arguments advanced before us by the learned Advocate-General that the decision of these two learned Judges is open to question.

In my opinion, the decision in *Sundaramma v. Venkatasubba Ayyar*(1) lays down the law correctly, and the second appeal should be dismissed with costs.

CORNISH J.—I agree. The appellants' case mainly rests upon the construction put by Sarkar Sastri on the words in Nanda Pandita's Dattaka Mimamsa translated “adoptive mother”. If that foundation is not a sound one, I think that the appellants' case must fail. Admitting that the words “adoptive

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(1) (1928) I.L.R. 49 Mad. 941.

(2) (1915) 33 I.C. 861.

(3) (1899) I.L.R. 23 Mad. 1 (P.C.).

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mother" may equally be rendered "adopting mother", or, more literally, "receiving mother", it is a wide jump therefrom to the conclusion that a wife who has not joined with her husband in the adoption cannot be deemed to be the adoptive mother of the boy, with the consequence that he has no maternal ancestors in his adoptive family. Sarkar himself puts forward his view rather as a theory than as a definite opinion. In his Tagore Law Lectures on the Law of Adoption he says at page 214:

"Although Nanda Pandita appears to intimate that a boy so adopted (i.e., by the husband alone) becomes also a son to the wife, yet it must not be supposed that a son adopted without the concurrence, or against the will, of the wife acquires all the rights of a son to her . . . In order that affiliation may be complete, it *appears* to be necessary that the wife should join in adopting a son."

This view, be it noted, is not stated to be in conformity with any custom or practice governing adoption or the adopted son's rights; and no case is cited in support of it. In *Uma Sunker Moitro v. Kali Komul Mozumdar*(1) MITTER J. delivering the judgment of a Full Bench concludes his examination of the passages in Nanda Pandita by observing as follows:—

"The author here, quite irrespective of the chapter and verse of the Rishis whom he quotes, supports his position on general grounds, and says that there is no difference between an adopted son and a legitimate son in respect of his relationship to his adoptive 'father's family, etc.', which words evidently, according to the author, indicate his (the adopted son's) relationship to the ancestors of his adoptive mother."

The position accepted by the Full Bench, without any qualification depending on the wife's concurrence in an adoption made by her husband, was that adoption affiliates the adopted boy as completely as if he had

been born in his adoptive family. It is settled, too, that an adoption by the husband without his wife's consent or concurrence is valid; see Mayne's Hindu Law, ninth edition, page 146, and the judgment of SHEPHARD J. in *Annapurni Nachiar v. Collector of Tinnevely*(1). In these circumstances, it must, I think, be said of Sarkar's view that, while it provides Counsel with valuable material for an argument, it is not shown to be so founded on principle or practice as would justify a Court in accepting it as law. If affiliation is independent of the wife's consent to the adoption, there seems no more reason for saying that relationship does not exist between the adopted son and the deceased wife of his adoptive father when the adopter is a widower than for denying relationship between the adopted son and any other deceased member of his adoptive family. It is true that only one wife of the adoptive father can fill the position of mother of the adopted son; *Narasimha v. Parthasarathy*(2). And a difficulty might possibly arise where the adoptive father has married two wives, and both have died before the adoption, in deciding which of them was the mother and which the step-mother of the adopted son. But the present case is not complicated by any question of that sort.

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(1) (1895) I.L.R. 18 Mad. 277. (2) (1913) I.L.R. 37 Mad. 199 (P.C.)

(1) (1880) I.L.R. 6 Cal. 256 (F.B.).

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APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Curgenven.

1932,
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AKSHAYALINGAM PILLAI (PETITIONER—FIRST
DEFENDANT), PETITIONER,

v.

AVAYAMBALAMMAL AND SIXTEEN OTHERS (RESPONDENTS
2 TO 6, LEGAL REPRESENTATIVES OF FIRST PLAINTIFF AND
RESPONDENTS 11 TO 22—DEFENDANTS 6 TO 17), RESPONDENTS.*

Specific Performance—Decree for—Enforcement of—Defendant's right of—Vendor and purchaser—Purchaser—Suit for specific performance by, against vendor and subsequent alienees from him with notice—Decree in—Enforcement by vendor of, against will of subsequent alienees—Specific Relief Act (I of 1877), sec. 35 (c).

The decree in a suit for specific performance of a contract to sell immovable property brought by a purchaser against his vendor and alienees from him of different portions of the property with notice of the contract provided, *inter alia*, that the plaintiff was to deposit a certain amount in Court within a specified period, that on deposit the vendor on his behalf and on behalf of his sons and of the subsequent alienees from him was to execute and register a conveyance in respect of their respective properties, the deed of conveyance being joint or several according as the plaintiff desired, and that the plaintiff was to get possession of the properties with mesne profits as from the date of deposit of the money.

The plaintiff made no attempt to carry the decree into effect. The vendor presented a petition praying for a final order in conformity with the preliminary decree already passed in the suit. He expressed his willingness to perform his part of the contract, and applied that the plaintiff should be directed to bring the purchase-money into Court. The subsequent alienees from the vendor did not join him in making that application. The vendor urged that the Court should execute the conveyance on their behalf and that the plaintiff should be called on to bring in the full price.

* Civil Revision Petition No. 1112 of 1929.

Held that, in the circumstances of the case, the vendor was not entitled to the relief prayed for by him and the only remedy open to him was to have the contract rescinded.

The vendor could not enforce the decree as regards his share only. He could not compel the subsequent alienees from him against their consent to join in the conveyance. However the equities might stand between them and the plaintiff, it would be repugnant to all principles of equity that the vendor should enforce the decree against their interests and without their consent, thereby depriving them of the title which he had himself conveyed to them.

Per VENKATASUBBA RAO J.—A decree for specific performance operates in favour of both parties and the defendant therefore can also enforce specific performance.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908) praying the High Court to revise the order of the Court of the Subordinate Judge of Mayavaram, dated the 6th day of November 1928 and made in Interlocutory Application No. 344 of 1926 in Original Suit No. 70 of 1923.

C. A. Seshagiri Sastri for petitioner.

K. S. Desikan, R. Somasundaram Ayyar, K. S. Venkatramani, V. V. Chowduri and G. S. Venkatarama Ayyar for respondents.

Cur. adv. vult.

JUDGMENT.

VENKATASUBBA RAO J.—An important question has been raised as to the right of a defendant after judgment in a suit for specific performance.

The facts which gave rise to the application made in the lower Court, so far as they are relevant to the present purpose, may be briefly stated. The plaintiff-purchaser obtained in Original Suit No. 70 of 1923 (that was the suit in which the application was made) a decree for specific performance of the contract referred to in the pleadings, to sell immovable property. The

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first defendant was the vendor under the contract, and defendants 7, 8 and 13 are alienees of different portions of the property from the first defendant with notice of the contract. On the 31st March 1926 the following decree was made by the Subordinate Judge's Court of Mayavaram :—

"That the plaintiff do deposit in Court within six months from this date Rs. 5,500 with interest at 11 annas per cent per mensem from 17th December 1913 to date of deposit.

That on deposit the first defendant on his behalf and on behalf of his sons, defendants 2 to 5, and defendants 7, 8 and 13 do execute and register a conveyance in respect of their respective properties in the plaint (less the items adjudged as lost to the plaintiff by reason of the finding on issue 16); that the deed of conveyance shall be joint or several according as the plaintiff desires and that all costs in connection with the execution and registration of conveyance shall be borne by the plaintiff.

That the plaintiff do get possession of the properties with mesne profits to be determined in execution as from the date of deposit of the money, defendants 1, 7 and 8 and 13 being severally liable for mesne profits according to the extent of property held by each.

That defendants 7, 8 and 13 do have a charge on the money in deposit according to their respective stake on the properties as per their sale deeds obtained by them or their predecessor, their remedies being left to be enforced in future proceedings; and

That the plaintiff do pay first defendant Rs. 304-8-0 on account of his costs of the suit and the plaintiff and the other defendants do bear their own costs of the suit as noted below."

It will be noticed that this decree is in some respects somewhat curious. By the time the decree was made, nearly thirteen years had elapsed from the date of the contract, and the plaintiff is directed by the decree to bring into Court the purchase-money with interest from

17th December 1913, the date of the contract. While the plaintiff was thus made liable for interest for over thirteen years, there was no corresponding liability imposed on the defendants, who remained in possession of the property, for mesne profits, as under the decree they were made liable only from the date of the deposit. Another curious feature is, that the amount payable to the defendants-alienees was left to be determined in future proceedings. It was felt, it is stated, that this judgment bore harshly on the plaintiff, but, as he had died even before it was pronounced, his legal representatives were unable to file an appeal. The amount which under the decree the plaintiff was directed to pay was found to be in excess of the value of the property, and no attempt was therefore made by his representatives to carry the decree into effect. The first defendant, finding it to his advantage to enforce this decree, presented a petition to the lower Court in the following terms:

"that this Hon'ble Court be further pleased to pass a final order in conformity with the preliminary decree already passed in the suit, so as to enable him to reap the fruits of the preliminary decree."

By this petition the first defendant stated that he was willing to carry out his part of the contract, and applied that the plaintiff's representatives should be directed to bring the purchase-money into Court. Defendants 7, 8 and 13, it must be noted, did not join the first defendant in making this application. The stand taken by the latter in the lower Court was that the plaintiff was bound to pay in return for the land in his possession which he was prepared to convey the proper proportion of the price. But the contention in that form has been abandoned in this Court, the first defendant's case now being, that on behalf of the dissenting

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defendants the conveyance should be executed by the Court and that the plaintiff should be called on to bring in the full price. The learned Subordinate Judge, holding that the only remedy open to the applicant is to have the contract rescinded under section 35 (c) of the Specific Relief Act, made the following order :

"It seems to me, therefore, that the only final order which can be passed on this application is that the plaint contract, dated 17th December 1913, evidenced by Exhibit D, be rescinded and determined. I accordingly pass the said order." It is against this order that the revision petition has been directed.

A question of general importance has been argued whether, when a decree for specific performance is made, it operates in favour of both parties, so that the defendant also can have it carried into effect. It is argued on the one hand that the defendant to the action does not enjoy the same privilege as the plaintiff, that, as regards the relief he can obtain in the suit itself, section 35 (c) of the Specific Relief Act prescribes a remedy and that he cannot obtain any other or further relief in the action than what is provided by that section. It is contended on the other hand that the decree in the suit enures for the benefit of both and each of the parties can after judgment claim specific performance. The question is, which of these two views is correct? The Specific Relief Act, it has been pointed out, is based on the rules and practice of the English Law in relation to the doctrine of specific performance; *Ardeshir Mama v. Flora Sassoon*(1). Their Lordships of the Judicial Committee have interpreted the sections of this Act, both as to substantive law and practice, in the light of the principles recognized by the English Courts. If there is an express divergence, then the Act will be strictly

(1) (1928) I.L.R. 52 Bom. 597 (P.C.).]

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adhered to, whatever be the English Law (*ibid.*, page 623). It seems to be well settled under the English practice that a decree for specific performance operates in favour of both parties. The usual form of a decree is to declare that the agreement ought to be specifically enforced without stating that it shall be so enforced at the instance of the plaintiff only. The form given in Seton on Decrees runs thus :

"Declare that the agreement in the pleadings mentioned ought to be specifically performed and carried into execution and order and adjudge the same accordingly."—seventh edition, Vol. III, pages 2136 and 2137.

In India also this view was taken in some cases—*Karim Mahomed Jamal v. Rajooma*(1) and *Bai Karima-bibi v. Abderehman*(2). In a recent case the point was discussed at great length by RANKIN C.J. who, after an elaborate examination of the authorities, came to the same conclusion; *Herambachandra Maitra v. Jyotish-chandra Singha*(3). In England a suit for specific performance is not deemed to come to an end by the passing of the decree. In Chapter IV of Fry's standard work on Specific Performance he discusses the various reliefs that may be obtained after judgment. The right to these reliefs is not possessed by the plaintiff alone. The learned author says :

"It may and not infrequently does happen that after judgment has been given for the specific performance of a contract, some further relief becomes necessary, in consequence of one or other of the parties making default in the performance of something which ought under the judgment to be performed by him or on his part; as, for instance, where a vendor refuses or is unable to execute a proper conveyance of the property, or a purchaser to pay the purchase-money. The character of the consequential relief appropriate to any particular case will of course vary according to the nature of the subject-matter of the

(1) (1887) I.L.R. 12 Bom. 174.

(2) (1922) I.L.R. 46 Bom. 990.

(3) (1931) I.L.R. 59 Calc. 501.

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contract and the position which the applicant occupies in the transaction; but in every case the application must, under the present practice, be made only to the Court by which the judgment was pronounced."—Section 1170, sixth edition; and then again:

"There are two kinds of relief after judgment for specific performance of which either party to the contract may, in a proper case, avail himself."—Section 1171.

Then he goes on to describe at some length the various kinds of reliefs that are open to a vendor and those open to a purchaser. The nature of the relief depends upon whether the applicant is the vendor or the purchaser, not upon whether he is the plaintiff or the defendant. The chapter deals with varieties of reliefs, and some of them may probably not apply to India, the law and practice here being in some respects different; but there is no reason why the principle, which has been accepted by the English Courts, should be departed from in this country. The Specific Relief Act is defective in this respect, and we should turn for guidance to the English practice on the subject. Let us take the case where the defendant happens to be the purchaser. The plaintiff, who has obtained judgment, makes default. What then is the defendant's position? He is prepared to pay the purchase price and otherwise observe the decree, but, on the hypothesis that it does not enure for his benefit, he cannot compel the plaintiff to execute the conveyance. There is no provision in the Specific Relief Act which such a defendant can invoke. The decisions say that the plaintiff may obtain in certain circumstances an extension of the time originally granted. When then can the defendant feel that he is absolved from the contract? How long is he to keep ready in his hands the purchase-money? It cannot be that the intention of the law is that a defendant-purchaser should be subject to this

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unmerited hardship. Therefore in the case of a defendant-purchaser at any rate, there being no provision in the Specific Relief Act, we must necessarily turn to the recognized English practice in that respect. Next, is there anything to show that, where the defendant is the vendor, the remedy provided by the Act is exhaustive? I may observe first, that section 35 applies to both the plaintiff-vendor as well as the defendant-vendor and is not confined to the latter case only. Supposing a vendor as plaintiff obtains a decree for specific performance but finds that the defendant is impecunious and cannot pay the purchase-money, why should it not be open to him to have the contract rescinded under that section? And secondly, the words "in the same case" in the final paragraph refer to the case mentioned in clause (c). I agree with the view taken on this point in *Kurpal Hemraj v. Shamrao Raghunath*(1), and by TIRUVENKATACHARIAR J. in *Mahommadalli Sahib v. Abdul Khadir Saheb*(2). The opening paragraph of the section refers to the "following cases"; then three cases follow, case (c) being one of them. The words "in the same case" in the final clause of case (c) must therefore refer to that particular case. And further, why should it be assumed that a departure from the English Law is intended and the relief is restricted to the contingency mentioned in the penultimate clause, namely, where the purchaser is in possession? A contrary opinion has been expressed by Collett in his Specific Relief Act (see fifth edition, page 282), and there is a dictum of KEMP J. to the same effect in *Chaturbhuj v. Kalyanji*(3), but I must express my respectful dissent from this view. Section 35 thus, in my opinion, applies to both the plaintiff-vendor

(1) (1922) I.L.R. 47 Bom. 589.

(2) (1927) 59 M.L.J. 351, 357.

(3) A.I.R. 1927 Bom. 239.

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and the defendant-vendor, and it enables them to have the contract rescinded in the very action in which the decree for specific performance was made. But is that any reason for holding that the other remedies open to them under the English Law are denied to them under the Act? We cannot overlook that the word used in the final clause of section 35 is "may" and not "shall". It therefore seems to me that a defendant, whether he be purchaser or vendor, must after judgment be in a position to require specific performance from the opposite party in the same action. If the principle on which the rule of mutuality is founded be accepted, the remedies open to the plaintiff after judgment must be equally available to the defendant and the varied nature of the remedies is set forth, as already noticed, by Fry in his work. Thus, the right of rescission recognized in section 35 (c) of the Specific Relief Act is not confined to a vendor, whether plaintiff or defendant, but must be equally open to a purchaser, it being immaterial whether he appears in the action as plaintiff or defendant. That the principle of reciprocity is not limited to the enforcing of the decree by requiring specific performance is the effect of the observation of SCHWABE C.J. in *Abdul Shaker Sahib v. Abdul Rahiman Sahib*(1). The learned Chief Justice gives a rough summary of the remedies enumerated by Fry, as they obtain in the English system, and assumes that they are equally available to either party in this country. This in my opinion is the necessary result of the acceptance of the dual principle recognized in the English Law; first, that the passing of the decree does not terminate the suit but that various reliefs may be obtained after judgment in the action itself (according to SCHWABE C.J. the

decree is in the nature of a "preliminary decree"), and secondly, that the decree enures not only for the benefit of the plaintiff but also of the defendant. Mr. Seshagiri Sastri suggested (though on the facts of this case it was not necessary for him to take up this position) that, in regard to limit of time, applications by a defendant to enforce the decree would be governed by the provisions of the Limitation Act. It is sufficient to point out that this does not seem to be the true principle on which relief is granted to either party; but this subject I need not pursue further.

I have so far assumed that the decree that is passed has followed the proper form, i.e., that it directs the contract to be specifically enforced—the words being wide enough to apply to the plaintiff as well as the defendant. If as in the present case the decree has not followed that form, it is a matter of detail whether the Court before granting relief to the defendant would insist upon the decree being in the first instance amended. In any case it would be advisable for the Courts to follow the English form in framing specific performance decrees and further by way of caution to insert, as suggested by SCHWABE C.J., some such words as "further consideration reserved" at the end of the decree.

In the result, the contention of Mr. Seshagiri Sastri that a defendant can enforce specific performance is in my opinion well-founded. But the question still remains, can the first defendant in the circumstances of this case obtain such a relief? The plaintiff is neither in law nor under the decree bound to take a conveyance of the first defendant's share alone. Can the latter then compel defendants 7, 8 and 13 against their consent to join in the conveyance? They were not, it must be noted, parties to the contract, but the Court,

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(1) (1922) I.L.R. 46 Mad. 148.

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giving effect to a rule of equity, held that they were bound at the instance of the plaintiff. The first defendant in violation of his contract with him alienated parts of the property to these defendants. As against the plaintiff, no doubt, they may have no equities, but surely the first defendant cannot be allowed to perpetrate a double wrong. His conduct towards the plaintiff was wrongful, and he now invokes the aid of the Court to undermine the position of the alienees to whom he professed to pass a good title. The lower Court by way of affording a relief to him rescinded the contract under section 35, and in my opinion he is not entitled to any higher or further relief.

I may mention that almost at the close of the case it was intimated to us that the thirteenth defendant had died subsequent to the appeal and his legal representatives had not been brought on the record. This, in the view I have taken, is immaterial.

In the result, the civil revision petition is dismissed with costs.

CURGENVEN J. CURGENVEN J.—I agree that this civil revision petition should be dismissed, but I would like briefly to put my reasons for that view in my own words.

Accepting the general proposition that a decree for specific performance may be enforced by the defendant where the plaintiff has not chosen to give effect to it, and even regarding the decree in the present case, in spite of its actual form, as amenable to such treatment, I have not been persuaded that, in such circumstances as the present, the Court would be bound to comply with the first defendant's (petitioner's) request. The agreement to sell was in 1913, and nearly six years later, in 1919, the first defendant parted with certain portions of the property to the seventh, eighth and thirteenth defendants. They were aware of the agreement, but

it seems to have been represented to them that the plaintiff had no intention of carrying it out. Now, since the first defendant cannot enforce the decree so far only as his own property is concerned, enforcement must entail deprivation, at his instance, of the property which these defendants acquired from him. However the equities may stand between these persons and the plaintiff, it appears to me repugnant to all principles of equity that the first defendant should now enforce the decree against their interests and without their consent, thereby depriving them of the title which he had himself conveyed to them. Had he himself sued the plaintiff for specific performance after making these alienations, I do not think that any Court would have given him a decree; and I am loth to believe that, now that the plaintiff has a decree, the first defendant may get indirectly what he could not get directly and the Court has no discretion to refuse to give it operation at his instance. Such enforcement may not technically amount to execution, but it appears to me that, where only one of several defendants applies, there must necessarily be a power in the Court such as, in execution, is supplied by Order XXI, rule 15, Civil Procedure Code, to safeguard the interests of the remainder. Were this not so, it would have been open to this petitioner to dispose of all but a few cents of the property and yet compel the unwilling holders of the remainder, not to speak of the equally unwilling plaintiff, to become parties to a sale. I do not think that, even had we in this case strictly to administer the law, the doctrine of the reciprocal enforceability of decrees for specific performance would need to be applied in so unqualified a manner. *A fortiori* it follows that this petition for revision must be dismissed.

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APPELLATE CIVIL.

*Before Mr. Justice Madhavan Nair.*SORIMUTHU PILLAI AND TWO OTHERS (DEFENDANTS—
PETITIONERS), APPELLANTS,

v.

MUTHUKRISHNA PILLAI (RESPONDENT), RESPONDENT.*

*Civil Procedure Code (Act V of 1908), O. XXI, r. 92—
Confirmation of sale—Duty of Court—Subsisting decree—
Necessity of—Sec. 47, Civil Procedure Code—Second
Appeal—Contest between auction purchaser and judgment-
debtor—Sec. 65 and O. XXI, r. 94, Civil Procedure
Code.*

Under Order XXI, rule 92, of the Code of Civil Procedure, where no application is made under rules 89, 90 or 91 to set aside a valid sale, the Court is bound to confirm the sale and cannot refuse to do so on the ground that there was no subsisting decree at the time of the confirmation or on any other ground; for the language of the rule is imperative.

History of section 65 and Order XXI, rule 94, discussed. A person who impeaches the validity of a sale cannot file an application under Order XXI, rule 89. The deposit of the decree amount under clause (b) of Order XXI, rule 89, of the Code of Civil Procedure is obligatory even in a case in which the decree, in pursuance of which the sale sought to be set aside was held, has been set aside prior to the date of the application.

A second appeal lies where the question is one relating to execution and is one in which the decree-holder and judgment-debtor are adversely interested though the actual contest is between the auction-purchaser and the judgment-debtor.

APPEAL against the petition to revise the order of the Court of the Subordinate Judge of Tuticorin, dated 23rd February 1931 and made in Appeal No. 166 of 1930, preferred against the order of the Court of the District Munsif of Tuticorin, dated 12th November 1930

* Appeal against Appellate Order No. 85 of 1931 and Civil Revision Petition No. 1367 of 1931.

and made in Execution Application No. 1341 of 1930 in Original Suit No. 12 of 1928.

S. Ramaswami Ayyar for appellants.

A. Swaminatha Ayyar for respondent.

Cur. adv. vult.

JUDGMENT.

This civil miscellaneous second appeal arises out of a petition filed by the defendants in Original Suit No. 12 of 1928 under sections 47, 151 and Order XXI, rule 89 of the Code of Civil Procedure, in which they asked either that the Court should not confirm the auction sale held in execution of the decree against them or that the Court should set aside the sale under Order XXI, rule 89, Civil Procedure Code, for which they deposited five per cent of the purchase-money.

The property was sold in two lots; one lot was purchased by the decree-holders themselves who were respondents 1 and 2 to the petition, and the other lot was purchased by the third respondent. The lower Courts refused to confirm the sale so far as the first lot was concerned as the purchasers were the decree-holders themselves, but, with regard to the third respondent to the petition, who is a stranger auction-purchaser, the Court dismissed both the prayers in the petition. It is against this order that the present civil miscellaneous second appeal and civil revision petition have been filed. The third respondent to the petition, the stranger auction-purchaser, is the only respondent in this Court.

The facts necessary for understanding the contentions of the parties are these: Against the decree passed in the suit the petitioners preferred an appeal. During the pendency of the appeal, the decree-holders, i.e., respondents 1 and 2 to the petition, brought the properties of the petitioners to sale in execution of

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the decree and themselves purchased the first lot as already stated, while the second lot was purchased by the third respondent. The sale was held on the 3rd October 1930. On the 16th October 1930, the appellate Court allowed the appeal and dismissed the suit. The present petition was filed by the petitioners on the 27th October 1930, i.e., after the dismissal of the suit by the appellate Court and before the confirmation of the sale.

On behalf of the appellants it is urged that since the decree has been set aside by the appellate Court there is no jurisdiction for the Court to confirm the sale. In the event of the sale being confirmed the petitioners request the Court to set aside the sale and for that purpose they have deposited five per cent of the purchase-money. It will be observed that under Order XXI, rule 89, Civil Procedure Code, those who desire to have the sale set aside should in addition to the five per cent make a deposit for payment to the decree-holder. This has not been done in this case because the petitioners contend that there is no necessity for making the deposit as the decree had been set aside on the date of petition. The respondent contends that under the present Code the existence of a decree is not necessary for the confirmation of the sale and that the petition for setting aside the sale cannot be entertained unless the petitioners comply with the conditions of Order XXI, rule 89, by making all the necessary deposits mentioned therein which admittedly they have not done. The respondent raises also a preliminary objection that no second appeal lies: but the appellant has filed also a civil revision petition. I shall deal with the preliminary objection later.

The question to be decided with reference to the first prayer of the appellants in the petition is, whether the decree under which the sale took place should still

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be subsisting at the time of the confirmation, for the sale to be confirmed. The argument on this point has mainly centred round the provisions of section 65 and Order XXI, rule 94, of the present Code of Civil Procedure and of the corresponding provisions in the previous Codes. Section 65 of the present Code runs as follows:

"Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute."

Order XXI, rule 94, of the Code is in these terms:

"Where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute."

These provisions have taken the place of section 316 of the Code of 1882 which was as follows:

"When a sale of immovable property has become absolute in manner aforesaid, the Court shall grant a certificate stating the property sold and the name of the person who, at the time of sale, is declared to be the purchaser. Such certificate shall bear the date of the confirmation of the sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before: provided that the decree under which the sale took place was still subsisting at that date."

It will be observed that the first part of section 316 of the Act of 1882 is now represented by Order XXI, rule 94, Civil Procedure Code, with some slight alterations and its second part is represented by section 65 with important alterations. There are two important differences between section 65 of the present Code and the corresponding portion of section 316 of the Code of 1882. One difference is that under the present section 65 the property vests in the purchaser from the

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time when the property is sold and not from the time when the sale becomes absolute as under the old section. The other difference is that the statement in the old section that the property vests in the purchaser from the date of the certificate and not before was subject to a proviso "that the decree under which the sale took place was still subsisting at that date". This proviso is omitted in section 65 of the present Code. The question is whether the dropping out of the proviso introduces any substantial change in law.

Mr. Ramaswami Ayyar argues that the omission of the proviso in section 65 does not introduce any change in the law, that the existence of the decree has been always a necessary condition to give jurisdiction to the Court to confirm the sale, that without a decree there can be no justification for the confirmation of the sale, that the principle is a general rule of jurisprudence that has always been recognized in the Civil Procedure Codes, that, that being so, the Legislature thought that it was unnecessary to state it specifically and therefore dropped it out in the new Act of 1908. According to him, even before the proviso was enacted the rule contained in it was the law, that it was introduced only to settle some doubts that had arisen in the Bombay Courts, that when it was discovered by the Legislature that that had been the law always it omitted the proviso in the new Code, so that it is not right to say that the law has been now altered by its omission. Having regard to the arguments of Mr. Swaminatha Ayyar which I shall presently refer to, Mr. Ramaswami Ayyar also contends that there is no connexion between the proviso and the time when the property vests in the purchaser.

Mr. Swaminatha Ayyar's arguments may be summarised as follows : (a) Title to property vested in the

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purchaser from the date of the certificate under section 316 of the Act of 1882; in order that title may start from that date it is a necessary preliminary that there should be a subsisting decree at that date and this was the reason why the Legislature introduced the proviso "that the decree under which the sale took place should be subsisting at that date". If the decree did not subsist at the date of the certificate then the purchaser will not get any title to the property. According to the law contained in this section the existence of the decree at the date of the sale will not be enough to vest title to the property in the purchaser, for the title starts from the date of the certificate and not from the date of the sale. (b) Under the present Code the title to the property vests in the purchaser when the sale becomes absolute from the time when the property is sold and not from the date when the sale becomes absolute, and so, it will be sufficient to give title to the purchaser if there is a subsisting decree at the date of the sale. The existence of a decree at the date when the sale becomes absolute being thus unnecessary, it is argued that the proviso was dropped in the present Code and therefore the sale can be confirmed even though there is no subsisting decree at the date of the confirmation. According to this argument there is thus an intimate relation between the necessity for the existence of the decree and the time when the property vests in the purchaser. This argument is met by Mr. Ramaswami Ayyar—as already stated—by saying that even before the Act of 1882 the rule was that the title to the property vested in the purchaser from the time of the sale, and notwithstanding that law the existence of the rule contained in the proviso was then recognized. (c) Another part of Mr. Swaminatha Ayyar's argument has reference to Order XXI, rule 92, Civil Procedure

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Code, which says that where no application has been made under rule 89, 90 or 91, or where such application is made and disallowed, the Court shall make an order confirming the sale. It is argued that the language of the rule is *imperative* and that if after a sale, no application has been made to set it aside as in the present case, then the Court is bound to confirm the sale and cannot refuse to do so on the ground that the decree has been set aside and does not exist or on any other ground.

I shall first consider the history of the "proviso" and then examine whether there is any necessary connexion between the rule contained in it and the time when the property becomes vested in the purchaser, and lastly deal with the argument based on Order XXI, rule 92, Civil Procedure Code.

In this connexion we need not go earlier than Act VIII of 1859. The first part of section 256 of the Act of 1859 says that

"no sale of immovable property shall become absolute until the sale has been confirmed by the Court . . ."
Section 259 states that

"after a sale of immovable property shall have become absolute in manner aforesaid, the Court shall grant a certificate to the person who may have been declared the purchaser at such sale, to the effect that he has purchased the right, title, and interest of the defendant in the property sold, and such certificate shall be taken and deemed to be a valid transfer of such right, title, and interest."

Section 260 states that

"the certificate shall state the name of the person who at the time of sale is declared to be the actual purchaser . . ."

The proviso appearing in section 316 of the Act of 1882 did not find a place in any one of the above sections of the Act of 1859. Section 314 of the Act of

1877 corresponds with the first part of section 256 of Act VIII of 1859. Section 316 of the Act corresponds with section 259, and the first part of section 260 of Act VIII of 1859. In the Act of 1877 also, we do not find the proviso appearing in section 316 of the Act of 1882. This proviso was introduced for the first time by section 49 of Act XII of 1879 which amended section 316 of the Act of 1877. After amendment the section ran as follows :

"When a sale of immovable property has become absolute in manner aforesaid, the Court shall grant a certificate stating the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear the date of the confirmation of the sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before: provided that the decree under which the sale took place was still subsisting at that date."

This amended section appears in the same form and language without any change as section 316 in the Act of 1882. To complete the history, the proviso was omitted and section 316 was split up into section 65 and Order XXI, rule 94, in the Act of 1908 as already mentioned.

Mr. Ramaswami Ayyar's argument already noticed is that though the proviso was first introduced by Act XII of 1879 the principle underlying it was recognized by the Courts of Law even before that date (under the Act of 1859) and that the amendment by introducing the proviso was only stating a principle that was already recognized and that, when this was found to be so later, the proviso was dropped out as an unnecessary provision, that therefore no change in the law has taken place, and that even now, the existence of a decree is absolutely necessary for the confirmation

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of a sale. To support this contention in all its entirety the appellants will have to show not only that the principle of the proviso was recognized even before the amendment of the Act of 1877 but also that there was no necessary relation between the time when the title to property became vested in the purchaser and the rule contained in the proviso; or in other words, that even before the amendment when the principle of the proviso was used to be freely recognized and given effect to, the title to the property of the auction-purchaser used to relate to the date of the sale. The first part of the argument is sought to be supported by a decision of the Bombay High Court in *Basappa bin Malappa Aki v. Dundaya bin Shivalingaya*(1) and the second part is made to rest on a decision of the Calcutta High Court in *Bhyrub Chunder Bundopadhyaya v. Soodamini Dabee*(2). The former decision was under the Act of 1877 before its amendment by Act XII of 1879 which introduced the proviso to section 316 of the Act of 1877. In that case "plaintiff's title to certain land in dispute was derived from the purchaser at a Court sale under a decree which was reversed in appeal subsequently to the sale, but before it had been confirmed." It was held that

"the Court, which had made the decree, ceased, from the moment of the reversal, to have jurisdiction to take any further steps to execute the decree",

and that the confirmation of the sale would confer no title. In the course of the judgment the learned Judge pointed out that

"a purchaser is bound to satisfy himself as to the jurisdiction of a Court to order a sale, and this obligation continues until the sale is completed." (Page 541).

It is argued that in this decision even without any enactment of a proviso like the one in section 316

(1) (1878) I.L.R. 2 Bom. 540.

(2) (1878) I.L.R. 2 Calc. 141.

the principle was recognized and given effect to under the Act of 1877 and that it was on account of this decision the Legislature enacted the proviso by the Amending Act XII of 1879. In this connection my attention was invited to the Report of the Select Committee that considered the Bill to amend the Civil Procedure Code, 1877. Therein the Committee stated:

"We have also altered section 316 so as to make it clear that the title to the property sold vests from the date of the certificate only when the decree under which the sale took place was still subsisting at that date. This will preclude the doubt which has, we understand, arisen in Bombay, where a certificate was granted to an auction-purchaser in ignorance of the fact that the decree under which the sale took place had been previously reversed on appeal."

Mr. Ramaswami Ayyar's contention that the principle underlying the proviso in question was recognized by Courts even before the amendment may be conceded on the strength of this decision: but the question is, what was the law that prevailed then regarding the time when the property sold vested in the auction-purchaser. Mr. Ramaswami Ayyar would say that at that time also the law was that when property was sold in auction the purchaser's title to it commenced from the date of the sale. To this argument Mr. Swaminatha Ayyar responds that there was no settled law on that point during the operation of the Acts of 1859 and 1877 and so, when the Legislature decided to recognize the existence of the principle of the "proviso" by introducing the amendment, it at the same time stated clearly the law relating to the time when the title of the auction-purchaser would commence, with the result that we find in section 316 the law was stated to be this, that the title to the "property sold shall vest in the purchaser from the date of such certificate and not before, provided that the decree under which the sale

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took place was still subsisting at that time", thus establishing an intimate relation between the time when the property vests and the condition laid down in the proviso. The question is which view is right. In support of his contention Mr. Ramaswami Ayyar relied on the Full Bench decision in *Bhyrub Chunder Bundo-padhya v. Soodamini Dabee*(1). The facts of the case are thus stated in the headnote :

"The defendant became a purchaser at an execution-sale of a share of certain property, of which the plaintiff held another share partly as Zemindar and partly as Putnidar: the sale took place in September 1872, but the defendant did not obtain possession until confirmation of the sale in May 1873. Between the date of the sale and the confirmation a considerable sum became due for Government revenue on the whole property and to prevent its being sold the plaintiff paid the whole of the revenue due. In a suit to recover the proportion due in respect of the share purchased by the defendant, it was held, that, on confirmation of the sale, the share purchased by the defendant must be considered to have vested in her from the date of the sale; and, therefore, she was liable for the amount of Government revenue in respect of her share which became due between the date of the sale and its confirmation."

It may appear at first sight that this decision supports Mr. Ramaswami Ayyar's view, but the true scope and significance of the decision is thus explained in Mr. Broughton's Commentaries on the Civil Procedure Code of 1877 (see page 453):

"The case was referred to a Full Bench, because the decisions were conflicting upon the point whether the title of the auction-purchaser under a decree relates back to the date of sale [see *Kalee Dass Neogee v. Hur Nath Roy Chowdhry*(2)] or merely takes effect from the date of confirmation [see *Beepin Beharee Biswas v. Judoonath Hazrah*(3)], and it will be observed that this was not decided *except for the purpose of the particular suit*." (The italics are mine.)

(1) (1876) I.L.R. 2 Cal. 141 (F.B.). (2) (1884) W.R. Sup. Vol. 279.
(3) (1874) 21 W.R. 367.

This commentary puts the matter beyond any doubt. On the question under consideration there was no settled law under the Act of 1859 and the decision cannot be said to lay down a proposition of law applicable to all the cases. The same must be considered to be the position under the Act of 1877 also, for, as I have shown, the relevant provisions under both the Acts are similar and in neither of the Acts do we find any such *specific* statement of law regarding the time when the title to the property vests in the auction-purchaser as we find in section 316 of the Act of 1877 after the amendment in 1879—which was repeated as section 316 of the Act of 1882—and in the present Act of 1908. By section 49 of the amending Act of 1879 it was enacted that the title of the auction-purchaser to the property would start from the date of the certificate and, in order that it may be so, formal recognition was given to the principle that there must be a decree in existence at the time of the certificate; and then the proviso came to be enacted as a necessary condition upon which would depend the commencement of the title of the auction-purchaser; and, when the law on the latter point was altered, there was no need for the existence of the proviso and so it was dropped out from the new Code. This I think is the true history of the proviso in question, and read in this light I cannot agree with the contention of Mr. Ramaswami Ayyar that the omission of it in the present Code does not indicate any change in the law. On the other hand, from what I have said it follows that the argument of the respondent, that on account of the omission of the proviso it is no longer necessary for the confirmation of the sale that the decree should be subsisting at the time of the confirmation, should be accepted.

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The next argument of the respondent's learned Counsel is that having regard to the language of Order XXI, rule 92, Civil Procedure Code, the reversal of the decree after the sale but before confirmation cannot be relied on as a ground by the appellant for asking the Court not to confirm the decree. Order XXI, rule 92 provides that

"where no application is made under rules 89, 90 or 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute."

The language of this rule is imperative, and when no application under rules 89, 90 or 91 has been made, as in the present case, after sale, it is the duty of the Court to confirm it. Under this rule, the act of confirmation of sale should follow automatically after sale has taken place when no such application as is referred to in rule 92 was made or when such application was made and disallowed. The present case admittedly does not fall under the exceptions mentioned in this rule. The reversal of the decree is not mentioned in the rule as one of the grounds for refusing to confirm the sale. This interpretation of Order XXI, rule 92, is supported by the decision of the Privy Council in *Seth Nanhelal v. Umrao Singh*(1). In that case it was held :

"Once a sale has been duly effected, it is not competent to the decree-holder and the judgment-debtor to get rid of it by merely asserting that the decree has been adjusted or satisfied out of Court."

In holding so, their Lordships of the Privy Council relied solely on Order XXI, rule 92, and the interpretation of the language thereof. In the course of their judgment the following observations occur :

"When once a sale has been effected, a third party interest intervenes and there is nothing in this rule to suggest

(1) (1930) 60 M.L.J. 423 (P.C.).

that it is to be disregarded. The only means by which the judgment-debtor can get rid of a sale, which has been duly carried out, are those embodied in rule 89 . . . That this is so is, in their Lordships' opinion, clear under the wording of rule 92, which provides that in such a case (i.e., where the sale has been duly carried out), if no application is made under rule 89 'the Court shall make an order confirming the sale and thereupon the sale shall become absolute'." (page 429)

It may be observed that their Lordships made no reference to cases under rule 90 or 91 referred to in rule 92 as these had no application to the case before them. To the same effect is the decision of the Full Bench of the Nagpur Court reported in *Shankar v. Jawaharlal*(1). The learned Judges in that case held that the private satisfaction of a decree certified in Court after sale of immovable property has been held and before the confirmation is ordered does not extinguish the decree and prevent the Court from confirming the sale where a third person has purchased the property *bona fide* at the auction sale. The judgment in that case discusses the question in all its detail. One of the grounds of the judgment is based on Order XXI, rule 92. The learned Judge, KINKHEDE A.J.C., states that

"the provisions of rule 92 are imperative and the Court cannot refuse to confirm the sale unless the requirements of rule 89 or 90 are strictly complied with." (page 897)

In the course of the judgment the same observation is repeated in a somewhat different language thus :

"The provisions of sub-rule (1) of rule 92 of Order XXI, Civil Procedure Code, also are peremptory. They cast an imperative duty on the executing Court to make an order confirming the sale unless the conditions specified in rules 89, 90 or 91 were fulfilled. Sub-rule (2) lays down the conditions under which alone the Court is permitted to make an order setting aside the sale." (page 898)

(1) (1923) 111 I.C. 895 (F.B.).

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Later on the learned Judge observed as follows :—

“ If the Legislature had desired to refuse confirmation and veto the purchaser's rights on any grounds other than those mentioned in rules 89, 90 or 91 of the Order, there was nothing to prevent it from providing for such a contingency in the Code. If it had intended to leave him to the mercy of the decree-holder and judgment-debtor by enabling them to defeat his rights and even to oust the Court's jurisdiction, by a private pact of their own, formed behind the purchaser's back, the Code would have expressly provided for the exercise of such a right. In my opinion the very absence of any such provision in the Code for vetoing or negating the purchaser's rights under the Court sale, itself constitutes the strongest proof of the absence of any such intention.” (page 899)

Mr. Ramaswami Ayyar tries to distinguish the case on the ground that it relates to a case of the private satisfaction of the debt by adjustment outside the Court. But having regard to the imperative language of the provision contained in Order XXI, rule 92, the distinction is meaningless; and the reversal of the decree and the adjustment of it outside the Court stand so far as the language of rule 92 is concerned on the same footing; because, barring the cases mentioned in that rule, the Court cannot recognize, once a sale is held, any other ground for refusing to confirm it. This case is interesting because it deals also with the argument of Mr. Ramaswami Ayyar that I have already dealt with, viz., that by the “dropping out the proviso” in the present Code no change in the law has been made by the Legislature, and that even under the present Code the subsistence of a decree at the time of the confirmation of the sale is a necessary condition for the sale being confirmed. Regarding this argument the learned Judge, KINKHEDE A.J.C., observed as follows :—

“ If the intention of the Legislature had been to make the acquisition of title by the auction-purchaser contingent upon

the decree being a subsisting decree at the date of the confirmation, there was no point in deleting the words to that effect from section 316 of the old Civil Procedure Code when section 65 of the new Code was in its stead enacted. All that appears to be necessary under the Code from the point of view of third party purchasers is that, to give them a good title at the date when the sale is held, the decree must be a subsisting decree. If that decree ceased to exist at the date of the sale there is no debt to recover and, therefore, the Court loses its jurisdiction to sell the judgment-debtor's property, and consequently every sale held under such circumstances must be treated as a nullity.”

To show that confirmation of a sale can be refused on grounds other than these mentioned in rule 92, and therefore impliedly it can be refused if there was no subsisting decree at that time, and that therefore the argument based on the language of Order XXI, rule 92, should not be accepted, the learned Counsel for the appellants has drawn my attention to cases under section 47, Civil Procedure Code, mentioned in Mulla's Civil Procedure Code at page 160 under the heading: “ A judgment-debtor may seek to set aside a sale on grounds other than those mentioned above”, the grounds “mentioned above” being (i) on deposit under Order XXI, rule 89, (ii) for material irregularity under Order XXI, rule 90, and (iii) for fraud under Order XXI, rule 90. The significance of most of these cases can be explained with reference to their special facts; but I shall deal with four cases as the learned Counsel specially emphasized their importance in support of his contention. These cases are *Sahdeo Pandey v. Ghasiram Gyawal*(1), *Rajagopala Ayyar v. Ramanujachariar*(2), *Raghava Chariar v. Murugesu Mudali*(3) and *Ariatullah v. Sashi Bhusan Hazrah*(4). *Sahdeo Pandey v. Ghasiram Gyawal*(1) and *Rajagopala Ayyar v. Ramanujachariar*(2)

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(1) (1893) I.L.R. 21 Calo. 19.
(3) (1923) I.L.R. 46 Mad. 583.

(2) (1923) I.L.R. 47 Mad. 288 (F.B.).
(4) (1919) 55 I.C. 547.

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may be dealt with together. The facts show that in these two cases the sale was held without giving notice to the judgment-debtor as required under the Code. It was held that such a sale was a *nullity* and therefore should be set aside. These are instances of cases where the Court held that in law there was no sale at all. To such a class of cases Order XXI, rule 92 will not apply, cases to which that rule relates being only cases of valid sale "where no application is made under rules 89, 90 or 91, or where such application is made and disallowed." In *Raghava Chariar v. Murugesa Mudali*(1) it was held that the Court has inherent power to refuse to confirm the sale on the ground that it was misled in fixing the reserve price. This also may be treated as a case, having regard to the fact that the Court was misled into passing an order for sale, where there has been no valid sale. In *Ariatullah v. Sashi Bhusan Hazrah*(2) it was held that "a sale in execution of a decree for an amount in respect of which there was no decree existing at the time is illegal, and the Court would be justified in refusing to confirm it." This was also a case where there was no valid sale as there was no decree justifying the sale at the time when it was held. To cases of this kind Order XXI, rule 92, will not apply. This is clearly pointed out by the learned Judges in their order. They stated:

"We do not think that that is contemplated by Order XXI, rule 92. Order XXI, rules 89, 90, 91 and 92 pre-suppose a valid decree under which the sale is held, and the first three rules provide for setting aside the sale, and rule 92 says that if there be no application for setting aside the sale, or such an application is made and disallowed, the sale shall be confirmed. Rule 92 does not affect the power of the Court to refuse to confirm a sale, or make it compulsory to confirm the sale when the Court finds that the sale is held under a decree which did not authorize the sale."

(1) (1923) I.L.R. 48 Mad. 583.

(2) (1919) 55 I.O. 547.

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None of these cases can therefore help the appellants. Having regard to the decision of the Privy Council in *Seth Nanhelal v. Umrao Singh*(1) I must hold that under Order XXI, rule 92, Civil Procedure Code, where no application is made under rules 89, 90 or 91 to set aside a valid sale, the Court is bound to confirm the sale and cannot refuse to do so on the ground that there was no subsisting decree at the time of the confirmation or on any other grounds; for the language of the rule is imperative.

For the above reasons the first prayer in the appellants' petition asking the Court to refuse to confirm the sale on the ground that the decree was reversed in appeal has to be disallowed. In this connection I may draw attention to the opinion expressed in Mulla's Civil Procedure Code which supports this view. At page 218 of the ninth edition of the book the learned author expresses the following opinion referring to section 316 of the Code of 1882:

"On referring to section 316 of the Code of 1882 (page 213) it will be observed that it contained a proviso the effect whereof was stated to be that a sale could not be confirmed if, at the time of application for confirmation, the decree under which the sale was effected has ceased to be a subsisting decree. That proviso has not been reproduced in the present section. Under the present section therefore a sale held in execution of a decree may be confirmed, in any event where the purchaser is a third party, though the decree has been reversed before confirmation of the sale. See Order XXI, rule 92 (1), and note the words, 'the Court shall make an order confirming the sale'."

In an earlier page, at 214, referring to the omission of the proviso to section 316 when dealing with section 65 of the present Code it is stated "that it is therefore no longer necessary that the decree should be subsisting

(1) (1930) 60 M.L.J. 423 (P.C.).

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at the time of the confirmation of sale." The opinion of Sir Dinshah Mulla is therefore against the contention of the learned Counsel for the appellant. It is but fair to say here that Mr. Nandlal in his Commentaries on the Code of Civil Procedure takes a different view. He says that the omission of the proviso does not introduce any change in the law.

I shall now deal with the alternative prayer for setting aside the sale contained in the appellants' petition. The appellants ask the sale to be set aside on the contingency of the Court confirming it. There are various objections in granting this alternative prayer. It has been held in *Raghu Ram Pandey v. Deokali Pande*(1) that a person who impeaches the validity of the sale cannot file an application under Order XXI, rule 89, Civil Procedure Code. In that judgment it is pointed out that

"when the payment is made under rule 89, the person making the payment must accept the validity of the sale. He cannot make a payment under Order XXI, rule 89, and at the same time challenge the validity of the sale. A payment under rule 89 must be an unconditional payment"

This case has been followed in this Court in *Kummakutty v. Neelakandan Nambudri*(2). There is a still more serious objection to the grant of the appellants' alternative prayer. The appellants have deposited only five per cent of the purchase-money for payment to the purchaser. Under Order XXI, rule 89, Civil Procedure Code, if the appellants wish to set aside the sale they should deposit not only five per cent of the purchase-money but also should make a deposit of the sum mentioned in clause (b) for payment to the decree-holder. This has admittedly not been done by them in this case. They refuse to make this deposit because they say that the

(1) (1927) I.L.R. 7 Pat. 30.

(2) (1930) 59 M.L.J. 893.

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decree has been set aside and that therefore the decree-holder is not entitled to get any amount. But that consideration cannot in any way affect their obligation to deposit the amount under the rule. This really shows the inconsistency of the alternative prayers contained in the appellants' petition. For, in an application under Order XXI, rule 89, the petitioners cannot be heard to say that the sale which they seek to set aside is invalid and, unless they are permitted to do this, they cannot be absolved from the statutory duty of depositing the amount mentioned in sub-clause (b) of clause 1. Those who impeach the sale, as already pointed out, cannot apply under Order XXI, rule 89. It has been held in *Karunakara v. Krishna*(1) that

"a judgment-debtor who wishes to take advantage of the provision under Order XXI, rule 89, must strictly comply with the same, by paying all the amounts as directed by the rule"

The two cases relied on by the learned Counsel for the appellants—*Vedala Lakshminarasimha Charyulu v. Pacha Lakshmiamma*(2) and *Lakshmi Ammal v. Sankaran Nair*(3)—which show that it is not necessary to make all the payments mentioned in sub-clauses (a) and (b) to clause 1 of Order XXI, rule 89, have been distinguished in this case. The learned Judges state that *Lakshmi Ammal v. Sankaran Nair*(3) only decides that, where a decree-holder had agreed to give up a portion of the decree amount, he was not entitled to insist upon the deposit or payment of the full amount mentioned in the proclamation of sale. About the case of *Vedala Lakshminarasimha Charyulu v. Pacha Lakshmiamma*(2), they point out that "in that case an agreement by the decree-holder to set off a portion of the decree

(1) (1915) I.L.R. 39 Mad. 429.

(2) (1912) M.W.N. 758.

(3) (1913) 24 M.L.J. 205.

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amount was held to amount to payment." It is clear that these two cases do not show that the payment required under Order XXI, rule 89, need not be made. The present case does not fall within the scope of either of these decisions. The decision in *Subbayyan v. Thoppai Muthayyan*(1) accepts the strict view of Order XXI, rule 89, held in *Karunakara v. Krishna*(2). The same view of Order XXI, rule 89, is entertained by the Bombay High Court also. In *Manaji Kuverji v. Aramita*(3), it was laid down :

"The provisions of Order XXI, rule 89, are a concession allowed to judgment-debtors, and they must be strictly complied with in order to enable the judgment-debtor to obtain the advantage of the concession."

This decision was followed in *Dattatraya v. Jagannath*(4). In this connection my attention was drawn by Mr. Swaminatha Ayyar to the decisions in *Tirumal Rao v. Syed Dastaghiri Miyah*(5) and *Chundi Charan Mandal v. Banke Behary Lal Mandal*(6) also. These also support the view contended for by the respondent. As the appellants have not deposited all the amounts required under Order XXI, rule 89, Civil Procedure Code, the alternative prayer asked for in their petition cannot be granted. In the result, both the prayers of the appellants have to be refused.

I shall now deal with the preliminary objection raised by the respondent that no second appeal lies. The objection is not of much importance as the appellants have filed a civil revision petition also, and if the lower Court's order is wrong this Court may well interfere with it under section 115, Civil Procedure Code, as the question involved is without doubt a

(1) (1921) 42 M.L.J. 71.

(3) (1921) I.L.R. 46 Bom. 171.

(5) (1898) I.L.R. 22 Mad. 286.

(2) (1915) I.L.R. 39 Mad. 429.

(4) A.I.R. 1920 Bom. 215.

(6) (1899) I.L.R. 25 Calc. 449 (F.B.).

question of jurisdiction, namely, whether the Court has jurisdiction to confirm a sale when the decree on which the sale is based has been reversed in appeal subsequent to the sale and before its confirmation. But the respondent presses the preliminary objection for another reason, and it is this, namely, that if I hold that there is no second appeal and therefore deal with the case as a civil revision petition, then my order will be final and not be subject to any further appeal; but if I deal with the case as a second appeal then the order passed by me will be subject to a Letters Patent Appeal provided I give permission to file an appeal. This technical advantage which he hopes to get is of course dependent upon the assumption that the appellants' case is going to be dismissed. If the appellants succeed, then the preliminary objection will certainly react against the respondent. However, as the question has been raised, I will deal with it.

If the appellants' petition to the lower Court is to be considered as one under Order XXI, rule 89, then it is clear that there is only one appeal under the Code against the order that may be passed upon it, and against the appellate order only a revision under section 115, Civil Procedure Code, can be filed and not a second appeal. But the appellants have filed their application under section 47, Civil Procedure Code, also. It is argued by the respondent that the contest being between the judgment-debtors and the auction-purchaser, having regard to the Full Bench decision in *Veyindramuthu Pillai v. Maya Nadan*(1), which holds that a stranger-auction-purchaser is a representative of the judgment-debtor, it must be held that the question does not arise between "parties to the suit" and that

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(1) (1919) I.L.R. 43 Mad. 107 (F.B.).

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therefore one of the conditions for the application of section 47, Civil Procedure Code, lacking, the petition does not lie under that section. At first sight this objection seems to be insurmountable, but, having regard to the explanation put upon the Full Bench decision by a Bench of this Court subsequently, this objection has to be overruled. The scope of the Full Bench decision has been discussed in detail by KRISHNAN J. in *Jainulabdin v. Krishna Chettiar*(1), where the learned Judge pointed out that the Full Bench after holding that the stranger-auction-purchaser is a representative of the judgment-debtor went further and held on the authority of the Privy Council decision in *Prosunno Kumar Sanyal v. Kalidas Sanyal*(2) that

"irrespective of any question of the representative character of the auction-purchaser-applicant, section 47, Civil Procedure Code, should be applied to his case where the question raised is one relating to execution, and is one in which the decree-holder and the judgment-debtor are adversely interested."

The learned Judge ends his discussion of the question with this observation:

"The Full Bench, as I understand them, held that the condition in section 47, Civil Procedure Code, that the question should be one 'arising between the parties' is satisfied by the question being one of a nature in which the parties to the suit are adversely interested, though the person actually raising it in any particular case against one party may not be the representative of the other party. In fact they gave an extended meaning to these words."

AYLING J. concurred with the opinion of KRISHNAN J. stating that he was not prepared to dissent from his view though he was inclined to think that the Full Bench judgment extended the applicability of section 47, Civil Procedure Code, to a degree hardly suggested by the wording of the section. In this case there can

(1) (1921) 41 M.L.J. 120.

(2) (1892) I.L.R. 19 Calo. 683 (P.O.).

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be no doubt that the question for decision is one of a nature in which the decree-holder and the judgment-debtors are adversely interested and it therefore follows that the petitioners' application would fall under section 47, Civil Procedure Code; and if so, an appeal against the first Court's order will lie to the appellate Court and against that Court's order a second appeal will lie to this Court, the order passed on an application under section 47 being in the nature of a decree. As against this contention of the appellants based on the interpretation of the Full Bench judgment as given in *Jainulabdin v. Krishna Chettiar*(1), Mr. Swaminatha Ayyar has called my attention to the decision in *Yagnasami Ayyar v. Chidambaranatha Mudaliar*(2), where it was held by ABDUR RAHIM J., who was a party to the Full Bench decision, and ODGERS J., subsequent to the Full Bench decision in *Veyindramuthu Pillai v. Maya Nadan*(3), that a question arising for decision between the judgment-debtor and auction-purchaser does not fall under section 47 and the decision thereon is not appealable. The judgment is a short one and the Full Bench decision is not discussed in it, nor does it refer to the later decision of this Court in *Veyindramuthu Pillai v. Maya Nadan*(4), referred to by KRISHNAN J. in his judgment. For these reasons I am inclined to accept the decision in *Jainulabdin v. Krishna Chettiar*(1) in preference to the decision in *Yagnasami Ayyar v. Chidambaranatha Mudaliar*(2). Mr. Swaminatha Ayyar draws my attention to a decision of mine where I upheld the preliminary objection and dismissed the civil miscellaneous appeal on the strength of the Full Bench decision in *Veyindramuthu Pillai v. Maya Nadan*(3). But no attempt was made before me to distinguish the

(1) (1921) 41 M.L.J. 120.

(2) (1920) 13 L.W. 15.

(3) (1919) I.L.R. 43 Mad. 107 (F.B.).

(4) (1919) I.L.R. 43 Mad. 696.

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Full Bench decision, nor was my attention invited to the decision in *Jainulabdin v. Krishna Chettiar*(1). The appellant's learned Counsel in that case accepted the preliminary objection and I therefore dismissed the second appeal. For the above reasons I would hold that in the present case a civil miscellaneous second appeal would lie.

In the result both the civil miscellaneous second appeal and the civil revision petition are dismissed, but the respondent will get his costs only in the civil miscellaneous second appeal.

K.W.R.

(1) (1921) 41 M.L.J. 120.

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Bardswell.*

MUNISAWMI GOUNDAN (PLAINTIFF), PETITIONER,

1933,
February 10.

v.

KUTTI MOOPPAN AND TWO OTHERS (DEFENDANTS 2 TO 4),
RESPONDENTS.*

*Hindu Law—Father—Promissory note executed before, but kept
alive by an acknowledgment made after, partition by—
Son's liability on.*

A Hindu son is liable for a debt on a promissory note executed by his father before partition and kept alive by an acknowledgment made by the father after partition.

Peda Venkanna v. Sreenivasa Deekshatulu, (1917) I.L.R. 41 Mad. 136, distinguished.

Subramania Ayyar v. Sabapathy Aiyar, (1927) I.L.R. 51 Mad. 361 (F.B.), relied upon.

PETITION under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Vellore, dated the 9th day of December 1927 in Small Cause Suit No. 379 of 1927.

Kasturi Seshagiri Rao and V. Kachapeswara Ayyar for petitioner.

A. Viswanatha Ayyar and A. Ramaswami Ayyar for respondents.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—The suit out of which this petition BEASLEY C.J. arises was for Rs. 200 balance of principal and interest

* Civil Revision Petition No. 1031 of 1928.

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BEASLEY C.J. under a promissory note, dated the 27th May 1918, executed by the first defendant, the father of defendants 2 to 4 in the suit. There are three endorsements on the promissory note, dated the 21st May 1921, 1st July 1922 and 5th December 1924, made by the first defendant. These endorsements are relied upon by the plaintiff as saving the suit from the bar of limitation. The first defendant did not defend the suit and the second and fourth defendants raised the plea that the family had become divided twenty years ago. If they had succeeded in showing that division twenty years ago, clearly no question would have arisen as regards their liability because the promissory note would have been executed by the first defendant after that division. The learned District Munsif has found that at any rate by 1922 the defendants had become divided and, although he does not find the exact date of the division, it must be taken that in his view the family became divided after the execution of the promissory note. The learned District Munsif found that defendants 2 to 4 were not liable because, although the debt had been incurred before the partition, the promissory note in respect of that debt was acknowledged after partition; and in support of that view he referred to *Peda Venkanna v. Sreenivasa Deekshatulu*(1), where it was held that a Hindu son is not liable during his father's lifetime on a promissory note executed by his father after partition in renewal of a note executed by the father before partition. Following this decision he held that the first defendant would have no authority to make any payment or endorse such payment on the promissory note on behalf of his sons. I do not think that *Peda Venkanna v. Sreenivasa Deekshatulu*(1) is any

(1) (1917) I.L.R. 41 Mad. 136.

authority upon the latter point. In that case a promissory note had been executed by the father of the other defendants before partition, and, as before stated, after partition, the father executed the suit promissory note in renewal of the prior promissory note. WALLIS C.J., on page 142, states that the father had no authority from the son to renew the note after partition. KUMARASWAMI SASTRI J., the other member of the Bench, at page 143, states:—

“In the case of renewal by the father alone after partition of a note executed before partition the case is much stronger as I can see no equity in allowing a Hindu father to renew and keep alive a debt (increased by the addition of interest and principal at each renewal) so as to throw upon the son the duty of paying it out of properties that fall to his share. The renewed note must in my opinion be treated as a new obligation incurred after partition.”

In the Full Bench case of *Subramania Ayyar v. Sabapathy Aiyar*(1), which held (COUTTS TROTTER C.J. and SRINIVASA AYYANGAR J. dissenting) that a simple creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons after a *bona fide* partition between the father and the sons, ANANTAKRISHNA AYYAR J., after a careful review of the authorities touching this question, at page 410, states that the trend of judicial decisions has been to the effect, amongst others, that, if the cause of action for the suit be not the original debt incurred before the partition but a promissory note executed by the father alone after partition though in renewal of a promissory note executed by him before partition, the sons are not liable to any extent if the suit be based on the renewed promissory note only. That opinion is in conformity with the observations of WALLIS C.J. and KUMARASWAMI SASTRI J. in *Peda Venkanna v. Sreenivasa Deekshatulu*(2).

(1) (1927) I.L.R. 51 Mad. 361 (F.B.).

(2) (1917) I.L.R. 41 Mad. 136.

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Neither *Peda Venkanna v. Sreenivasa Deekshatulu*(1) nor *Subramania Ayyar v. Sabapathy Aiyar*(2) is any authority for the view that sons are not liable for a debt on a promissory note executed by the father before partition and after partition kept alive by endorsement of part-payment of the debt made by the father having the effect of course of keeping the debt alive. In *Subramania Ayyar v. Sabapathy Aiyar*(2) it is quite clear that ANANTAKRISHNA AYYAR J. was referring to a suit not on the original debt but a suit based on a renewed promissory note and in *Peda Venkanna v. Sreenivasa Deekshatulu*(1) also that was the position. The two positions, in my opinion, are quite distinct. If, as *Subramania Ayyar v. Sabapathy Aiyar*(2) decides, sons are liable after partition for the original debt of the father incurred before partition, then the fact that the debt has been acknowledged by the father, in my view, does not alter the position. The suit in such a case is on the original debt for which the sons are liable. But in the case of a renewed promissory note the suit is not upon the original debt at all but upon the renewed promissory note and I can see nothing which can take away from a father his authority from his sons to make a payment during the period of limitation in respect of a debt incurred by him. It is another matter altogether to wipe out the original debt and substitute therefor another debt. Therefore upon this point, in my opinion, the learned District Munsif was wrong, but it is only fair to say that when he gave judgment he had not before him the judgment in *Subramania Ayyar v. Sabapathy Aiyar*(2), which was delivered in the same month and which of course not being then

(1) (1917) I.L.R. 41 Mad. 136.

(2) (1927) I.L.R. 51 Mad. 261 (F.B.).

reported was not referred to in the arguments of Counsel. For these reasons, in my opinion, this petition must be allowed with costs.

BARDSWELL J.—I agree.

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INCOME-TAX REFERENCE.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Cornish and Mr. Justice Bardswell.

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LTD., MADRAS (ASSESSEE), PETITIONER,

1933,
January 5.

v.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
RESPONDENT.*

Indian Income-tax Act (XI of 1922), ss. 8 and 10—Government of India Notification, dated 25th August 1925, under sec. 60 of the Act—Exemption from income-tax given by—Scope of—Investment in Government securities—Interest derived by Co-operative Bank from—Applicability of exemption to—Bye-law of Bank making purchase and sale of Government Promissory Notes one of its main objects—Effect.

The exemption from income-tax given by the Notification of the Government of India, dated 25th August 1925, is to the profits made by a Co-operative Bank from its business of a Co-operative Bank. The interest derived by a Co-operative Bank from its money invested in Government securities cannot be regarded as part of the profits of its business *qua* such Bank and is not exempt from tax. The fact that a bye-law of the Bank makes the purchase and sale of Government Promissory Notes one of its main objects does not alter the position.

Per BEASLEY C.J.—When an assessee is under a section of the Income-tax Act assessable to income-tax, it is for him to show that he has been exempted.

Per CORNISH J.—The bye-law making the purchase and sale of Government Promissory Notes one of the main objects

* Original Petition No. 44 of 1932.

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of the Bank is to empower the Bank to deal in Government Promissory Notes as part of its business. Any profits made by the Bank from the purchase and sale of these securities on its own account or as broker for a constituent would be profits from the business of the Bank and exempt from tax under the notification. But an investment in Government Promissory Notes of money lying idle in the Bank cannot be deemed to be one of the declared objects of the Bank.

Per BARDSWELL J.—The exemption in the notification is meant as an encouragement to the employment of as much capital as possible for the financing of Co-operative Societies and to extending the scope of co-operation. The investing of money in Government securities does not further the cause of co-operation.

Under section 66 (3) of the Indian Income-tax Act XI of 1922.

M. Subbaraya Ayyar for petitioner.

M. Patanjali Sastri for Commissioner of Income-tax.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J. BEASLEY C.J.—The question referred to us is as follows:—

“Whether on the finding that investment in Government securities forms a necessary part of the business of the assessee, the sum of Rs. 56,810 forms the ‘profits of any Co-operative Society’ within the meaning of the Notification of the Government of India, dated 25th August 1925.”

The notification referred to exempts from income-tax

“the profits of any Co-operative Society other than the Sanikatta Salt Owners’ Society in the Bombay Presidency for the time being registered under the Co-operative Societies Act (II of 1912) or the dividends or other payments received by the members of any such society on account of profits.”

The assessee invests large sums received by them in Government securities and the income derived from

such investments has been assessed to income-tax. The main objects of the Society, as set out in its bye-laws, are (1) to collect funds for financing Co-operative Societies, (2) to serve as the Provincial Apex Bank for the province of Madras, (3) to purchase and sell Government Promissory Notes and (4) to carry on general business of banking not repugnant to the provisions of the Co-operative Societies Act and the rules framed thereunder for the time being in force. The Society derives its income (1) from interest on the loans and advances made mainly to Central Banks and depositors, (2) from interest on investments in Government securities, (3) from interest on deposits and (4) from commission and fees. The money used to purchase Government Promissory Notes is the money collected by the Society in excess of the money required to finance Central Banks and depositors. The assessee claims that the dividends received from investments in Government securities are the profits of the Society and are therefore under the Government of India Notification exempt from payment of income-tax. This claim is based upon the contention that the purchase and sale of Government Promissory Notes is part of the business of the Society and that the Assistant Commissioner of Income-tax has found that such investment is a necessary part of the business of the Society. The bye-laws of the Society were amended on the 21st December 1929 by the inclusion of object 3 to bye-law No. 1, namely, “to purchase and sell Government Promissory Notes”. It is argued that the purchase and sale of Government Promissory Notes, therefore, is a part of the business of the assessee and that the profits derived from such purchase and sale are the profits of the Society. With regard to this argument, the interest derived from such securities must, of course, be taken

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as an item of receipt in arriving at the Society's profits and gains from the business, but it does not, however, follow from this that the interest is a profit of the Society.

It is contended by the Commissioner of Income-tax that interest on Government securities has always to be taxed under section 8 of the Indian Income-tax Act, whereas the profits of a business have always to be taxed under section 10 of the Act, and that it is the latter profits alone that are exempt under the notification. The Indian Income-tax Act in section 6 states the heads of income chargeable to income-tax as follows:—

- | | |
|------------------------------|----------------------------|
| (i) Salaries. | (iv) Business. |
| (ii) Interest on securities. | (v) Professional earnings. |
| (iii) Property. | (vi) Other sources. |

In respect of these the tax is payable on (i) under section 7, on (ii) under section 8, on (iii) under section 9, on (iv) under section 10, on (v) under section 11 and on (vi) under section 12. Thus all the six sources of income are dealt with by separate sections. Section 8, as before mentioned, provides for the taxation of "Interest on securities" and there is no other section which does; and it has been the custom ever since 1904, when the exemption of profits similar to those contained in the Government Notification came into force, to interpret the exemption as it has been in this instance; and it is argued that the observations of Lord MACNAGHTEN in the *Commissioners for Special Purposes of Income-Tax v. Pemsel*(1) bear usefully upon this case. They are as follows:

"I cannot help reminding your Lordships, in conclusion, that the Income-tax Act is not a statute which was passed once for all. It has expired, and been revived, and re-enacted over and over again; every revival and re-enactment is a new Act.

(1) [1891] A.C. 531, 591.

It is impossible to suppose that on every occasion the Legislature can have been ignorant of the manner in which the tax was being administered by a department of the State under the guidance of their legal advisers, especially when the practice was fully laid before Parliament in the correspondence to which I have referred ("Charities", 1865). It seems to me that an argument in favour of the respondent might have been founded on this view of the case. The point of course is not that a continuous practice following legislation interprets the mind of the Legislature, but that when you find legislation following a continuous practice and repeating the very words on which that practice was founded, it may perhaps fairly be inferred that the Legislature in re-enacting the statute intended those words to be understood in their received meaning. And perhaps it might be argued that the inference grows stronger with each successive re-enactment."

There is nothing new in the exemption contained in the Government Notification. For years, the practice has been to interpret "profits" as not including interest on Government securities. Since 1904 such interest has always been taxed under section 8 and it is difficult to imagine that Government's latest notification was intended to alter that practice. When an assessee is under a section of the Income-tax Act assessable to income-tax, it is for that person to show that he has been exempted; and, in my view, the assessee here has failed to show that it was the intention of Government to exempt such interest. The mere fact that the bye-laws of the Society have recently been amended making the purchase and sale of Government Promissory Notes one of its main objects does not, in my view, alter the position. It is conceded that for years this Society has, even in the absence of such a bye-law, been investing its surplus collections in Government securities and that the interest received has been assessed to income-tax. An attempt was made recently by this Society to challenge that position in Original Petition No. 202 of 1928 reported as *Commissioner of Income-tax, Madras v. Madras*

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Central Urban Bank, Limited, Mylapore(1). There the meaning of the same notification had to be considered by a Full Bench of which I was myself a member. In that case, under orders of Government, the Society was bound to keep 40 per cent of its total liability under call deposits in a liquid or fluid form and instead of keeping these fluid assets in their safe or till it kept them in as nearly a fluid form as possible in Government securities upon which as in the present case they received interest. It was claimed by the Society that this was a part of the business of the Bank and that unless this interest was received the activities of the Bank would be seriously handicapped, exactly the same contention as has been put forward here, and it was held that this investment in Government securities was not a part of the business of the Bank but that such investment fell under section 8 of the Act. In the course of the judgment reference is made to some English decisions, two of which were relied upon here by Mr. Subbaraya Ayyar for the assesses, viz., *Norwich Union Fire Insurance Co. v. Magee*(2) and *Liverpool and London and Globe Insurance Company v. Bennett*(3). In the former case the Company besides carrying on business in the United Kingdom carried on business in America and elsewhere. The laws of the United States in reference to the carrying on of insurance business there required the maintenance of a reserve fund there and in order to provide that reserve fund investments were made and interest earned. It was clear that the business of insurance could not be carried on in America without those investments being made there and it followed that the interest on those investments necessarily made for the purpose of the trade was part of

(1) (1928) I.L.R. 52 Mad. 610 (S.B.).

(2) (1896) 3 T.C. 457.

(3) [1913] A.C. 610; 6 T.O. 327.

the gains of that trade. As appears from the judgment in that case the Company did not invest in those foreign securities for the sake of investment or for the sake of making profit by those investments but for the sake of having a fund invested in America to answer the requirements of the American Law. In the latter case the Company carried on business at home and abroad. As in the former case, by the laws of certain of the foreign countries in which it conducted its business the Company was required to deposit with the Governments of those countries certain sums of money and to invest those sums in accordance with the local laws. The Company also voluntarily invested certain other sums. It was held that interest on both classes of investments was assessable as being part of the business. As is observed in the judgment of the Full Bench, HAMILTON J. held that the voluntary investments were not for the sake of investments but for the sake of having a fund abroad readily realizable to meet the liabilities of their business and that the making of the investments was just as much part of their mode of conducting the business as the taking of risks and in the event of the current account at the bank being insufficient to meet the liabilities all the investment funds might have to be called upon at some time or other. The object of the investment was to extend the business, so the making of them was part of the business. This, the Full Bench held, clearly distinguished *Liverpool and London and Globe Insurance Company v. Bennett*(1) from the case before them. The Full Bench judgment goes on as follows:—

“It seems to me impossible, at least without a great deal more information than has been presented to us, to say that

(1) [1913] A.C. 610; 6 T.C. 327.

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these investments of more or less amounts for a longer or shorter time on the part of the Bank in order to prevent their fluid assets from lying absolutely idle in their coffers formed part of the business of the Bank. It seems to me that they are in the same position as any private person who with a large credit balance in his private account desires to put it into a remunerative form which shall at the same time be readily realizable and therefore invests for shorter or longer periods in Government paper.”

and further :

“The obligation on the Bank to keep 40 per cent of its total liabilities in a fluid form is in consequence of an administrative order of Government and does not oblige them, although it may permit them, to invest the fund at all, and it seems to me that, as they are to hold the fund in readiness to meet some particular liability which is specified, it cannot be said to be part of their business as a Bank to invest these liquid assets in the interval.”

It seems to me that no new facts are present now. The Society has continued to do that which it was then doing. No one suggests that the purchase and sale of Government Promissory Notes by the Society was, before the amendment of its bye-laws, *ultra vires* and, in my opinion, the amendment does not in the least alter the position as it was at the time of the Full Bench decision already referred to.

For these reasons, in my opinion, the question referred to us must be answered in the negative. The assessee must pay the costs of the Commissioner of Income-tax, Rs. 250.

CORNISH J. — I am of the same opinion. I think there is no real substantial distinction between this case and *Commissioner of Income-tax, Madras v. Madras Central Urban Bank, Limited, Mylapore*(1). The exemption from income-tax given by the Notification is

to the profits made by the petitioner from its business of a Co-operative Bank. Unless, therefore, the interest derived by the Bank from its money invested in Government Promissory Notes can be regarded as profits from the business carried on by the Bank it will not be exempt from tax. The petitioner relies on Rule 1 of the bye-laws which states that one of the main objects of the Bank is “to purchase and sell Government Promissory Notes”. Taking this to mean that the Bank has been empowered to deal in Government Promissory Notes as part of its business, I should say that any profits made by the Bank from the purchase and sale of these securities on its own account or as broker for a constituent would be profits from the business of the Bank and exempt from tax under the Notification. But in the case before us nothing else appears except that the Bank has invested part of its funds in Government Promissory Notes and derived interest therefrom. If there was no opportunity of employing the money by lending it out to Central Banks (which is by Rule 12 of the bye-laws declared to be the primary purpose for which the Bank’s funds are to be utilized), or by lending it to shareholders or constituents of the Bank (which the Bank is authorized to do by Rule 13), the prudent course would undoubtedly be to invest the money in some easily realizable security. But there is nothing peculiar to the business of banking in taking this course. As a matter of construction of the bye-laws I hardly think that an investment in Government Promissory Notes of money lying idle in the Bank can be deemed to be one of the declared objects of the Bank. The petitioner having failed to shew that the investment was made for carrying out some purpose for which the Bank has been founded, the only ground, as it seems to me, on which the

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(1) (1928) I.L.R. 52 Mad. 640 (S.B.).

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interest from the investment might be held to be profits from the business disappears.

BARDSWELL J.—I agree that the interest derived by a Co-operative Bank from its investments in Government securities is not to be regarded as part of the profits of its business *qua* such Bank. I would take it that the exemption is meant as an encouragement to the employing of as much capital as possible for the financing of Co-operative Societies and to extending the scope of co-operation. The investing of money in Government securities does not further the cause of co-operation but is only a means of keeping from lying idle funds that cannot immediately be used for such a purpose.

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APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Ramesam, Mr. Justice Anantakrishna Ayyar and Mr. Justice Cornish.

1933,
January 18.

M. N. NAGENDRAN CHETTIAR (PETITIONER—
AUCTION-PURCHASER), APPELLANT,

v.

LAKSHMI AMMAL (RESPONDENT), RESPONDENT.*

Mortgage—Several mortgages on the same property—Decrees on the several mortgage bonds in suits in which other mortgagees were not parties—Suit for possession without impleading all parties interested—Priority of purchase—Priority of possession.

Where immovable property is mortgaged without possession to one person and thereafter a second mortgage without possession is created over the same property by the mortgagor in

* Appeal against Appellate Order No. 182 of 1931 and Appeal against Order No. 481 of 1930.

favour of another person and each of the mortgagees files a separate suit to realize money due on his mortgage without impleading all the other persons interested except the mortgagor and in execution sales different persons become purchasers, when a dispute is raised in execution proceedings or in a separate suit for possession *simpliciter* as to who is entitled to possession,

held that, in a case not affected by the doctrine of *lis pendens*, priority of date of purchase of the mortgagor's right to possession gives priority of title to possession, until the rights of parties are worked out in a proper suit to which all persons interested are parties.

APPEAL against the order of the District Court of Trichinopoly, dated the 5th day of October 1931, and made in Appeal No. 184 of 1931 preferred against the order of the Court of the Subordinate Judge of Trichinopoly, dated the 7th day of July 1931, and made in Execution Application No. 250 of 1931 in Original Suit No. 12 of 1928 on the file of the Court of the Subordinate Judge of Dindigul and appeal against the order of the Court of the Subordinate Judge of Madura, dated the 1st day of March 1930, and made in Execution Application No. 747 of 1929 in Execution Petition No. 101 of 1928 in Original Suit No. 13 of 1919 on the file of the Court of the Subordinate Judge of Mayavaram.

T. M. Krishnaswami Ayyar and *B. R. Chakravarthi* for appellant.—The rights of a puisne mortgagee are unaffected by a suit by the prior mortgagee in which he (puisne mortgagee) is not a party. One such right is a right to bring the mortgaged property to sale for the realization of the mortgage debt. If that right is unaffected, his right to put the purchaser at the sale in possession of the property should be unaffected. Similarly the purchaser of the equity of redemption stands on the same footing as a puisne mortgagee if he is not made a party to the suit filed by the mortgagee against the mortgagor. Moreover the right of a puisne mortgagee to redeem a prior mortgage should not be misunderstood as an obligation. He cannot be

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compelled to do so. The observations in *Chinnu Pillai v. Venkatasamy Chettiar*(1) are contrary to the decisions in *Venkatanarasammah v. Ramiah*(2), *Nanackchand v. Teluckdye Koer*(3), *Dirgopal Lal v. Bolakee*(4), *Muhammad Usan Rowthan v. Abdulla*(5) and *Kutti Chettiar v. Subramania Chettiar*(6). So the appellant is the person who is entitled in law to possession. [Reference was also made to the following cases: *Chandramma v. Seethan Naidu*(7), *Ramanadhan Chetti v. Alkonda Pillai*(8), *Rangayya Chettiar v. Parthasarathi Naickar*(9), *Venkatasubbarayudu v. Nagamma*(10), *Sukhi v. Ghulam Safdar Khan*(11) and *Chinnaswami v. Darmalinga*(12).]

T. R. Venkatrama Sastri and *M. S. Vaidyanatha Aiyar* for respondent.—All the relevant cases are discussed in *Chinnaswami v. Darmalinga*(12). In *Muhammad Usan Rowthan v. Abdulla*(5) the correct view is pointed out.

[Counsel was stopped.]

Cur. adv. vult.

JUDGMENT.

RAMESAM J.

RAMESAM J.—The facts out of which this second appeal arises may be stated as follows: The respondent, Lakshmi Ammal, obtained a deed of maintenance from her deceased husband's brothers in 1918 under which a house was charged with the payment of maintenance to her. The owners of the house also executed a second mortgage on it in 1922. As the maintenance was not paid up to the year 1927, Lakshmi Ammal filed a suit, Original Suit No. 454 of 1927, without making the second mortgagee a party and obtained a decree. In execution of the decree she was appointed receiver on 27th January 1930 for realization of the profits of the house and appropriating the same towards her decree.

(1) (1915) I.L.R. 40 Mad. 77.

(3) (1879) I.L.R. 5 Cal. 285.

(5) (1900) I.L.R. 24 Mad. 171.

(7) (1930) 61 M.L.J. 318.

(9) (1896) I.L.R. 20 Mad. 120.

(11) (1921) I.L.R. 43 All. 463 (P.C.).

(2) (1879) I.L.R. 2 Mad. 108.

(4) (1879) I.L.R. 5 Cal. 289.

(6) (1809) I.L.R. 32 Mad. 485.

(8) (1895) I.L.R. 18 Mad. 500.

(10) (1929) 59 M.L.J. 39.

(12) (1932) I.L.R. 56 Mad. 115.

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She got possession of the house in April 1930. The second mortgagee filed a suit on his mortgage, Original Suit No. 12 of 1928, without making Lakshmi Ammal a party and obtained a decree and got the property sold. It was purchased by Nagendran Chetty, the appellant before us, on 28th January 1931. He sought to obtain possession of the property but was resisted by the respondent. The appellant applied to the District Munsif under Order XXI, rule 97, Civil Procedure Code, for the removal of the respondent's obstruction. The application was allowed by the District Munsif. There was an appeal to the District Judge of Trichinopoly. The District Judge allowed Lakshmi Ammal's appeal. Nagendran Chetty filed this second appeal. When the case came on for disposal before MADHAVAN NAIR J., he referred the matter to a Bench of two Judges. When the case accordingly came on before JACKSON and MOCKETT JJ., it was thought there was some conflict between *Chinnu Pillai v. Venkatasamy Chettiar*(1) and *Chinnaswami v. Darmalinga*(2), and they referred the matter to a Full Bench. The case accordingly came on before us.

The first point to be noticed in the case is that the question now between the parties is,—who is entitled to possession until a regular suit is filed in which the two mortgage rights are brought face to face and can be worked out? The plaintiff-receiver in the first suit was the first mortgagee and is also entitled to possession by reason of the order of the Court appointing her a receiver for realization of the mortgage amount. The purchaser in execution of the decree in the second suit stands in the shoes of the second mortgagee. By the general law a second mortgagee is entitled to redeem

(1) (1915) I.L.R. 40 Mad. 77.

(2) (1932) I.L.R. 56 Mad. 115.

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the first mortgagee. The first mortgagee, before selling the property, ought to afford an opportunity to the second mortgagee to redeem the first. Only after such an opportunity is given and not utilised can the first mortgagee sell the property free of both the mortgages for the realization of the mortgage debt. Similarly the second mortgagee in suing on his mortgage might have impleaded the first mortgagee either offering to redeem the mortgage, or asking for the sale of the property subject to the mortgage, or praying for sale of the property free of both mortgages and a direction that the prior mortgagee's debt be first paid off and the amount due to himself be paid out of the balance. Unfortunately the second mortgagee was not a party in the suit of the first mortgagee and the first mortgagee was not a party in the suit of the second mortgagee. Thus, up to now there has been no suit in which the two mortgagees, or persons who stand in the position of the mortgagees, have been brought face to face so as to enable them to work out the rights under the mortgages according to the principles of law applicable to successive mortgages. Such a suit has yet to be filed. The question in this case is—who, in the meanwhile, i.e., until such a suit settles the dispute between the parties finally, is entitled to possession? Prior to the decrees, the mortgagors were the persons entitled to possession, the mortgagees being only simple mortgagees. By the order of appointment of Lakshmi Ammal as receiver she has got a right to possession from January 1930 and the mortgagors' right to possession has passed to her. By the sale in execution of the second mortgage decree in January 1931 the mortgagors' right to possession, if any, that remained in them passed to Nagendran Chetty; but, as already mentioned, the mortgagors' right to possession had

already passed to Lakshmi Ammal by the earlier order of January 1930. Applying our mind only to the right to possession and not to the priority of the mortgages, it is thus seen that no right to possession passed to Nagendran Chetty because at the time of the sale the mortgagors had no right to possession, it having already passed to Lakshmi Ammal. So far, I have stated the effect of the proceedings without reference to any of the authorities. The second mortgagee's right is not extinguished. His right is not affected by the first mortgagee's suit to which he was not a party. He still therefore has got a right to redeem the first mortgagee and realise by sale the amount of both the mortgages, or without redeeming he may obtain a decree for sale and a direction that after such amount as is due to the first mortgagee is paid the balance should be paid towards his own debt. These rights of his are not affected. Nor does any discussion about such rights arise in the present proceedings which are confined merely to the right to possession.

I will now examine the authorities. In *Venkatanarasammah v. Ramiah*(1) there were two mortgages in 1864 and 1868. The suit on the first mortgage was in August 1871. The exact date of the suit on the second mortgage does not appear. It was also in the year 1871. The first purchaser was in the suit on the first mortgage. The learned Judges held that he was the person entitled to possession. KEERNAN J. observed that this would be so until the rights of the mortgagees are worked out in a later suit. INNES J. expressed no opinion on this matter and seemed to doubt whether the second mortgage is still on foot and capable of being enforced. As will appear from later authorities this

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doubt of INNES J. was not justified. The second mortgagee's right is not lost because he is not a party to the first mortgagee's suit. In *Ohinnu Pillai v. Venkatasamy Chettiar*(1) SRINIVASA AYYANGAR J. thus refers to INNES J.'s observations :

"The other learned Judge, though he did not express any final opinion, thought that the second mortgagee's right was practically extinguished. Nobody now contends that the latter view is correct."

I agree with these observations of SRINIVASA AYYANGAR J. The second mortgagee's right was certainly not extinguished in that case. The only point before their Lordships was the right to possession, and as to that their decision was that the first purchaser was entitled to possession. The doubt of INNES J. regarding the right of the second mortgagee to realize his mortgage amount was not necessary as the point did not arise. In *Nanack Chand v. Teluckdye Koer*(2) there were two mortgages dated July 1868. Each mortgagee filed a suit. In one of the suits the property was sold on 28th June 1869. In the other suit the sale was on 24th September 1872. The learned Judges held that the person who purchased in 1869 was entitled to possession, and the priority of the mortgages need not be considered. In *Dirgopal Lal v. Bolakee*(3) there were two mortgages in the year 1868. In execution of the second mortgagee's decree the property was purchased on 22nd April 1870. In execution of the first mortgagee's decree the purchase was on 29th April 1870. It was held that the purchaser in execution of the second mortgagee's decree was entitled to possession. His possession was no doubt subject to the first mortgage right which was in the purchaser in

(1) (1915) I.L.R. 40 Mad. 77, 89. (2) (1879) I.L.R. 5 Cal. 285.
(3) (1879) I.L.R. 5 Cal. 289.

execution of the first mortgage suit; but until proper proceedings to enforce it are taken, the purchaser of 22nd April 1870 was entitled to possession. The ground of the judgment is thus stated :

"As this is a suit for possession, we consider that the party who first purchased the mortgagor's interest and obtained possession is entitled to retain possession as against the other."

Both these decisions were by GARTH C.J. and PRINSEP J. The decision in *Venkatanarasammah v. Ramiah*(1) was not referred to in them. But all the three decisions are in accord with each other. In *Venkata v. Kannam*(2) there was first a mortgage of 30th March 1863 without possession and a second mortgage of 8th July 1865 with possession. In the suit by the first mortgagee on his mortgage the second mortgagee was not a party. The purchaser in the sale that followed, it was held, was not entitled to eject the second mortgagee who had a right to possession by reason of his possessory mortgage, but the priority between the two mortgages could be worked out in a subsequent suit. This case is peculiar in that one of the mortgages was a usufructuary mortgage and itself gave right to possession. In *Rangayya Chettiar v. Parthasarathi Naickar*(3) there were two mortgages. The first mortgagee obtained a decree without making the second one a party. It was held by SHEPHARD and SUBRAMANIA AYYAR JJ. that the second mortgagee was entitled to a decree for sale subject to the right of the representatives of the first mortgagee if the purchaser did not elect to redeem. In a later case, *Muhammad Usan Rowthan v. Abdulla*(4), SHEPHARD J. pointed out

(1) (1879) I.L.R. 2 Mad. 108. (2) (1882) I.L.R. 5 Mad. 184.
(3) (1896) I.L.R. 20 Mad. 120. (4) (1900) I.L.R. 24 Mad. 171.

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that the language used in *Rangayya Chettiar v. Parthasarathi Naickar*(1) was open to exception. He observed :

"The point actually decided had regard solely to the sufficiency of the decree made in favour of the second mortgagee."

There is no question in that case as to the first mortgagee's right to possession and the decree did in fact completely protect the rights of the first mortgagee who had bought. In the last-mentioned case, *Muhammad Usan Rowthan v. Abdulla*(2), the first mortgagee obtained a decree without making the second one a party. He purchased in execution sale and transferred his right of possession to a stranger. The second mortgagee afterwards brought another suit and obtained a decree for sale subject to the assignee's rights. The land was sold and was purchased by the second mortgagee. It was held that the assignee from the purchaser in the first mortgage suit was entitled to possession. SHEPHARD J. pointed out that the case was similar to *Venkatanarasammah v. Ramiah*(3) and to the two decisions, *Nanack Chand v. Teluckdye Koer*(4) and *Dirgopal Lal v. Bolakee*(5), and that these are distinguishable from *Venkata v. Kannam*(6). He criticised the language of his own judgment in *Rangayya Chettiar v. Parthasarathi Naickar*(1) and explained it. The facts of *Ramanadhan Chetti v. Alkonda Pillai*(7) resemble those of *Dirgopal Lal v. Bolakee*(5). The second mortgagee who purchased the property in execution of his own decree was the earlier purchaser, the date of his sale being 29th January 1889, while the sale in execution of the first mortgagee's decree was on 27th September 1889.

(1) (1896) I.L.R. 20 Mad. 120.

(3) (1879) I.L.R. 2 Mad. 108.

(5) (1878) I.L.R. 5 Calo. 289.

(2) (1900) I.L.R. 24 Mad. 171.

(4) (1878) I.L.R. 5 Calo. 265.

(6) (1882) I.L.R. 5 Mad. 184.

(7) (1896) I.L.R. 18 Mad. 500, 502.

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It was held that the former was entitled to possession. The decision in *Akatti Moidin Kutty v. Chirayil Ambu*(1) is similar to that in *Ramanadhan Chetti v. Alkonda Pillai*(2) the first purchase being in execution of the decree on the second mortgage. In *Kutti Chettiar v. Subramania Chettiar*(3) it was held that the purchaser in the first sale was entitled to possession and that the purchaser in the second sale took nothing. The purchaser in the second sale was not entitled to possession. The actual suit being for possession he was not entitled to a decree. But it was also observed that the rights of the second mortgagee were unaffected by the sale held in execution of the prior decree to which he was not a party but that those rights cannot be enforced in a suit for possession but only in a suit for redemption or for sale. The decisions in *Venkatanarasammah v. Ramiah*(4) and *Nanack Chand v. Teluckdye Koer*(5) were again approved and it was held that

"not the dates of the mortgages but of the several purchases have to be considered in deciding the right to possession."

In *Mulla Vittil Seethi v. Achuthan Nair*(6) the rights of a second mortgagee who was not made a party to the suit on the earlier mortgage were very much discussed. It was observed that his rights were not affected by such a suit. Substantially this is correct. His right to recover his mortgage money, his right to have an opportunity of redeeming the earlier mortgage or selling the property subject to the rights of the first mortgagee always remains. It may not be strictly right to say that his rights are not in any way affected at all by the earlier suit. There might be some difference in

(1) (1902) I.L.R. 28 Mad. 486.

(3) (1909) I.L.R. 32 Mad. 485.

(5) (1879) I.L.R. 5 Calo. 265.

(2) (1895) I.L.R. 18 Mad. 500, 502.

(4) (1879) I.L.R. 2 Mad. 108.

(6) (1911) 21 M.L.J. 213 (F.B.).

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the kind of remedy that is open to him after the first suit resulting in a purchase, but in the main his rights are not substantially affected. The actual case is one where the second mortgagee was entitled to possession and in this respect it resembled the decision in *Venkata v. Kannam*(1). The next case I have got to refer to is the decision in *Chinnu Pillai v. Venkatasamy Chettiar*(2). The learned Advocate for the appellant, Mr. Krishnaswami Ayyar, contended that this case was in his favour and that, as a result of the observations in this case, the decisions in *Venkatanarasammah v. Ramiah*(3), in the two cases, viz., *Nanack Chand v. Teluckdye Koer*(4) and *Dirgopal Lal v. Bolakee*(5), and in *Muhammad Usan Rowthan v. Abdulla*(6) and *Kutti Chettiar v. Subramania Chettiar*(7) should be regarded as erroneous. There may be here and there expressions in the judgment which seem to support this contention of the learned Advocate. But if one carefully considers the facts of the case and the question in dispute with reference to which the observations were made, I do not think his contention can be upheld. In that case there were three mortgages. The purchaser in execution of a decree obtained without making the third mortgagee a party held the rights of the two earlier mortgagees. The third mortgagee then filed a suit making the purchaser in execution of the earlier decree a party. Thus, in this case we have not got a suit of the later mortgagee without making the person interested in the rights of the earlier mortgagees a party as in all the other suits. The actual question in the suit was not one of right to possession but one relating to the form of the decree

(1) (1882) I.L.R. 5 Mad. 184.

(2) (1915) I.L.R. 40 Mad. 77.

(4) (1879) I.L.R. 5 Calc. 265.

(6) (1900) I.L.R. 24 Mad. 171.

(3) (1879) I.L.R. 2 Mad. 108.

(5) (1879) I.L.R. 5 Calc. 269.

(7) (1909) I.L.R. 32 Mad. 485.

for the mortgage amount claimed by the third mortgagee, whereas, in all the other cases discussed, a further suit between the persons entitled to the mortgage interests was contemplated as the only one which can solve the priorities between the mortgagees, and the actual suit in the decision involved only the right to possession. In the case of *Chinnu Pillai v. Venkatasamy Chettiar*(1) the actual suit was the suit relating to the mortgage amount and not a right to possession. The Subordinate Judge gave a decree that the property should be sold free of all mortgages but the purchaser who had the right of the prior mortgagees in him must be paid the amount due to him and only out of the balance should the plaintiff get the decree for the amount due to him, i.e., the decree he passed recognized the priority of the purchaser-defendant and the actual decree given was one subject to the rights of the purchaser-defendant. Only the form of the decree is not one directing a sale subject to the rights of the earlier mortgages but one directing a sale free of all mortgages, and the priority of the mortgages was to be worked out on the sale proceeds. The defendant (purchaser in the earlier suit) filed the second appeal to the High Court. His contention was that the plaintiff should first redeem him and was not entitled to a decree for sale in the manner granted by the Subordinate Judge. A little examination of the merits of such a contention would show that it was unfounded. The property was either enough to pay the two earlier mortgages and would leave a balance for the third mortgage or it was not. The appellant's apprehension was that the property may not be enough for his two mortgages. So he thought that the best contention he could put forward was that the plaintiff should redeem

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(1) (1915) I.L.R. 40 Mad. 77.

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his two mortgages and thus ensure his recovery of the whole amount due to him without running the risk of the property being sold for an amount inadequate for his two mortgages. But surely there is no justice in such an attempt. If the property is inadequate to pay the two mortgages there is no reason why the third mortgagee should pay him an amount larger than the value of the property. But if, on the other hand, the property is really worth more than the amount of the first two mortgages but there is an apprehension that it may not fetch its proper value in court sale, all that the appellant has to do is to bid at the sale up to the proper price so as to recover the whole of the amount due to him. If the bids exceed the amount due to him he can stop further bidding. Either way, whether he or another is the purchaser, once the bids passed beyond the amounts due to him, the payment of his own debt was ensured and he could have no grievance against the decree actually passed. His insisting on a redemption by the plaintiff could not in any way be supported. It was with reference to such a contention against the actual decree by the Subordinate Judge that all the remarks in that judgment were passed. That decision was not a decision to the effect that the plaintiff in that case was entitled to a decree for sale of the property subject to the prior mortgages. That was not the decree passed by the Subordinate Judge and upheld by the High Court. The casual remark at page 80 relied on by the learned Advocate for the appellant is as follows:—

“The learned pleader for the appellant says, that if we decide that the plaintiffs are entitled to a decree for sale subject to the previous mortgages, he is content to leave the decree as it is.”

This is different from saying that the Court was prepared to pass a decree for sale subject to the prior

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mortgages and the case lays down no such proposition. In all such cases if there had not been the accident of a prior suit and a prior purchase the second mortgagee's right may take three shapes. If nobody representing the first mortgagee's interest was made a party to the suit, he can get a decree for sale which as a matter of fact would afterwards be only subject to the rights of the first mortgagee or any one representing him. But if either the first mortgagee or a purchaser in execution of the first mortgagee's suit was a party to the second mortgagee's suit, then he can get a decree (i) for redemption and a further sale or (ii) for a sale free of the mortgages with a direction to pay off the prior mortgages and to recover his own amount out of the balance. In such a suit, with the purchaser as a party, a decree for sale subject to the first mortgage is not open on account of the accident of the prior purchase. But this is not the same as saying that the second mortgagee's rights are affected. The right to recover his mortgage amount is still unaffected. But out of the three possible remedies involving differences in matter of procedure, two are still open but not the third. This only concerns the form of the decree and his rights are still remaining unaffected. Equities of the situation require that the other two remedies are still remaining open to him but not the particular form of sale subject to the earlier mortgage. The learned Advocate for the appellant suggested that *Venkatanarasimham v. Ramiah*(1) was dissented from in this case. There is no such thing. The observations of INNES J. in his judgment raising the question whether a second mortgagee's right was totally extinguished or subsisted for being worked out in a later suit were dissented from. The learned Judge, SRINIVASA AYYANGAR J., sums up his

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propositions at the end of the judgment. In paragraph 7 it is said that the second mortgagee

"can bring his own action for sale making the mortgagor a party if there had been no sale in the first mortgagee's suit,"—

This is unexceptionable. Then it is said—

"or if there had been a sale making the purchaser a party in his capacity of the ultimate owner of the equity of redemption; and the purchaser in the second mortgagee's execution sale gets a good title to the property."

These remarks are not made with reference to the right to possession but with reference to the mode of working out the mortgage itself and nothing was said in this paragraph as to his getting a decree for sale subject to the earlier mortgages. The actual decree was for sale free of all the mortgages. The actual decision in the case was perfectly correct and any other remarks which seem to support the appellant must be taken with reference to the facts of the case and cannot be taken to overrule the long catena of cases beginning with *Venkatanarasammah v. Ramiah*(1) and ending with *Kutti Chettiar v. Subramania Chettiar*(2). In that case the purchaser, who stood also in the position of the purchaser of the mortgagor's right besides standing in the shoes of the earlier mortgagees, might, if he liked, have offered to redeem the plaintiff's mortgage and sought a decree for sale to recover the amount of all the three mortgages, but this of course did not suit him. He wanted the plaintiff to redeem him, but the plaintiff could not be so compelled. The last decision is in *Chinnaswami v. Darmalinga*(3) (WALLER and KRISHNAN PANDALAI JJ.), which also examines the earlier decisions and is substantially to the same

(1) (1879) I.L.R. 2 Mad. 108.

(2) (1909) I.L.R. 32 Mad. 485.

(3) (1932) I.L.R. 56 Mad. 115.

effect as indicated by me. The suit in *Sukhi v. Ghulam Safdar Khan*(1) was not a suit for possession but was a suit in which the relative rights of all the mortgagees were being worked out and it was held that the person who obtained a foreclosure decree on the first mortgage without making the later mortgagees as parties could use his mortgage as a shield. It is substantially in accord with all the decisions I have examined. In my opinion, leaving aside *Rangayya Chettiar v. Parithasarathi Naickar*(2) which was doubted by SHERNARD J. himself, all the decisions I have examined, including that in *Chinnu Pillai v. Venkatasamy Chettiar*(3), are consistent and there is no conflict between them, provided we remember the particular right in question in each case and that the remarks in each judgment were made with reference to that particular right. In some of these judgments language is used for instance that the second purchaser in the second suit purchased nothing. This would not be strictly accurate. He did purchase something. What is meant by "nothing" is that he did not get the right to possession as against the earlier purchaser, but as against the mortgagor he purchased something. But that incomplete something has got to be worked out in a later suit. The decision in *Chandramma v. Seethan Naidu*(4) does not help the appellant as the suit was for possession, and to attempt to amend it into one to work out the mortgage was refused. I doubt the correctness of the decision in *Venkatasubbarayudu v. Nagamma*(5). In my opinion, all the other decisions are in accord. The decisions, *Venkatanarasammah v. Ramiah*(6), *Nanack Chand v. Teluckdye Koer*(7) and *Dirgopal Lal v. Bolakee*(8), have

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(1) (1921) I.L.R. 48 All. 469 (P.C.).

(3) (1915) I.L.R. 40 Mad. 77.

(5) (1929) 59 M.L.J. 39.

(7) (1879) I.L.R. 5 Cal. 265.

(2) (1898) I.L.R. 20 Mad. 120.

(4) (1930) 61 M.L.J. 316.

(6) (1879) I.L.R. 2 Mad. 108.

(8) (1879) I.L.R. 5 Cal. 269.

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never been disapproved and are good law. The appeal fails and ought to be dismissed with costs.

After the respondent's maintenance decree is satisfied the appellant is entitled to possession, but we think it will be subject to the respondent's charge for future maintenance.

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ANANTAKRISHNA AYYAR J.—The main question of law that arises for decision in these two appeals is the same, and it is this. When immovable property is hypothecated to one person (first mortgagee) and thereafter a second (puisne) mortgage (without possession) is created over the same property by the mortgagor in favour of a third person (second mortgagee), and each of the mortgagees files separate suits to realize money due on his mortgage by sale, making the mortgagor only party to the suits, and in execution sales two different persons become purchasers, when a dispute is raised in execution proceedings or in a separate suit for possession *simpliciter*, which of the purchasers is entitled to such possession, before the rights of parties are worked out in a proper suit to which all persons interested are parties?

Both the mortgages are simple mortgages (hypothecations without possession). In the first mortgagee's suit to recover money by sale, the second mortgagee was not made a party, but only the mortgagor. Similarly, in the second mortgagee's suit to recover money by sale, the first mortgagee was not made a party, but only the mortgagor. Each of the mortgagees obtained a decree in his suit, and, in execution sale, separate persons became the auction-purchasers in each.

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In the appeals before us, the question was raised in execution proceedings as to which of the auction-purchasers was entitled to possession. The auction-sales by Court were held on different dates. There is no question of *lis pendens* in these appeals. The question is, which of the auction-purchasers is entitled to possession in the circumstances?

In one of the suits, in execution proceedings, a receiver was appointed with a view to realize the decree amount by taking possession of the properties and applying the income thereof towards the decree amount. As possession was taken in execution, we may take it that, from the legal point of view, the substantial question for decision in the two appeals is the same.

Both the mortgages were simple mortgages. Under section 58 of the Transfer of Property Act the right of a simple mortgagee, so far as the mortgaged property is concerned, is to have the mortgaged property sold and the proceeds of the sale applied so far as may be necessary in payment of the mortgage amount due to him. See also section 67. A simple mortgagee as such has no right to possession of the mortgaged property, but his right is only a right of sale of the said property. There being no question of *lis pendens* raised in these appeals, it seems to me that, in answering the question, the definition of simple mortgage and the exact rights of a simple mortgagee with reference to the mortgaged property should be kept in view.

In *Sri Raja Papamma Rao v. Sri Vira Pratapa H. V. Ramachandra Razu* (1) Lord HOBHOUSE, in delivering the judgment of the Privy Council, made these observations at page 254:

"If indeed the matter were new, it might reasonably be argued that the terms of a simple mortgage justify usufructuary

(1) (1896) I.L.R. 19 Mad. 249 (P.O.).

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possession; but long practice, now embodied in a statute, has settled that the remedy of the mortgagee is a judicial sale."

In *Vyapuri v. Sonamma Boi Ammani*(1) SRINIVASA AYYANGAR J. observed as follows:—

"In Roman Law there was, it seems, in later times, no distinction between a *pignus* and *hypotheca*, and in both forms of mortgage the mortgagee was entitled to the possession of the mortgaged property. In *pignus* the possession was given to the mortgagee at the time of the transaction, while in *hypotheca* the mortgagee was entitled to obtain possession after the debt became due. [Hunter's Roman Law, pages 436 and 447 (Remedies), Salkowski's Roman Law at page 485, and Mackledy's Roman Law at page 285.] It is instructive to note that Lord HOBHOUSE thought that, except for long practice and the Transfer of Property Act, it might be reasonably argued that a simple mortgagee in India is entitled to usufructuary possession under the terms of his contract after the mortgage debt became due."

Under the Transfer of Property Act a simple mortgagee is not entitled to possession of property, but his right is to have the mortgaged property sold with a view to have the mortgage debt discharged. If all persons interested in the mortgaged property or the right of redemption be made parties to a suit on a mortgage, the Court could pass the appropriate decree working out the rights of all persons interested. Unfortunately, in spite of facilities afforded by registration of documents, it often happens that the first mortgagee files his suit making his mortgagor only party to that suit, leaving out the puisne mortgagee or the purchaser of the equity of redemption. Similarly, a puisne mortgagee in his suit often makes only the mortgagor a party but not the purchaser of the equity of redemption; and though the puisne mortgagee is not bound to make the prior mortgagee party to such a suit, it is clear that a further suit on the prior mortgage would be inevitable. The expense

(1) (1915) I.L.R. 39 Mad. 811, 826 (F.B.).

and inconvenience incurred by making all subsequent mortgagees, and purchasers of the equity of redemption, parties to the suit should be taken to be nothing when compared with the trouble that otherwise invariably arises subsequently. As observed in Jones on Mortgages, Vol. II, paragraph 1395:

"It is in many cases a matter of much expense and inconvenience to join as parties all the subsequent incumbrancers, but it is much more expensive and inconvenient to omit any."

One cannot impress too much on the litigants in India the importance of the above observation.

I am not suggesting that a suit filed by the first mortgagee without impleading the subsequent incumbrancers, etc., should be dismissed on that ground. That is not what the Civil Procedure Code provides for. Whether the first mortgagee was personally aware of the existence of the subsequent incumbrances or not (see Ghose on Mortgages, Vol. II, page 933), "his ignorance cannot affect the right of any person interested in the equity of redemption", and a decree obtained by him would not prejudicially affect the rights of the subsequent incumbrancers who were not parties to his suit, though it will no doubt bind the persons who are actually parties to the decree. In such cases, the question arises whether the first purchaser in point of time is or is not entitled to have and retain his possession till a proper suit is instituted—to which he is made a party—to adjudicate on the rights of all the persons interested. Similar questions have arisen for decision in this and other Courts.

But before I go into the decisions I should state that to my mind the principle is very clear. A simple mortgagee has no right to possession. The right to possession remains in the mortgagor who is entitled to

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deal with the same in any way he likes. He may create a subsequent usufructuary mortgage in favour of another and give him possession; or, the mortgagor may sell the equity of redemption to a stranger and put him in possession. In all these cases, the person who gets possession pays consideration for the same, just in the same way as the prior simple mortgagee has paid consideration for acquiring an interest in the property as simple mortgagee. The rights of persons thus in possession could not be prejudiced by the conduct of the prior simple mortgagee in filing a suit to recover money by sale of the properties, to which suit such persons in possession were not made parties. The right of the simple mortgagee to have a decree for sale is not in any way enlarged by his omission to make persons in possession parties to the suit. A person's rights could not be enlarged by an omission made by him; nor could any person take advantage of a default or omission made by him. Questions of *lis pendens* apart, it seems clear, on principle, that a person who has acquired a right to possession on the date of a simple mortgagee's suit could not in any way be prejudiced regarding that right by the result of a decree or proceedings in that suit to which he was not party. Such a person could not be compelled to redeem such prior mortgage or subsequent purchaser in execution of such mortgagee's decree. The rights conferred by the prior mortgage should, in such circumstances, be worked out, as against such persons in possession, only by a fresh suit for sale, if it be otherwise maintainable.

In decided cases, one finds general expressions used by learned Judges in discussing rights of parties with reference to mortgage suits, which are likely to lead to confusion if some stray sentences from such judgments

be sought to be taken as laying down the law irrespective of the other sentences in such judgments, the facts of the case, and the actual decision in the suit. One will have to see what the actual decision was, and what exact contentions were in fact put forward by the contending parties; also, who had possession and how the same was acquired and when, and the nature of the proceedings in which possession was taken. If these and other relevant circumstances are ascertained and kept in view, it seems to me that almost all the decisions [except *Venkatasubbarayudu v. Nagamma*(1) by one learned Judge] that were quoted to us could be reconciled. I am far from saying that there are not observations in some of the judgments which, taken by themselves, would not be too wide; further there are some observations which are quite *obiter* with reference to points not necessary for the actual decision in such cases. But the various decisions themselves seem to be generally reconcilable with one another and in accordance with sound legal principles, and, in my view, the law of mortgages, relating to the point now under consideration, should be taken to be well settled so far as our Courts are concerned.

I now proceed to consider the important decisions to which our attention was drawn.

In *Venkatanarasammah v. Ramiah*(2) (decided before the Transfer of Property Act) the first mortgagee became purchaser in execution of his decree in a suit to which the second mortgagee was not a party. As the date of sale under which the first mortgagee purchased was prior to the sale under which the second mortgagee claimed possession, it was held that the earlier purchaser was entitled to possession, subject to

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(1) (1929) 59 M.L.J. 39.
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(2) (1879) I.L.R. 2 Mad. 108.

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the substantial rights of the parties being worked out in a proper suit. To the actual decision of the learned Judges in that case, no exception could be taken; but there are observations in the course of the judgment which are open to objection. One of the learned Judges went so far as to observe whether the defendant's mortgage was still on foot and capable of being enforced,—being apparently of opinion that the defendant's mortgage right, if still existing, was barred of any further remedy,—though the other learned Judge simply remarked that the Court could not give effect to the defendant's mortgage in that suit, but must leave the defendant to assert his rights on foot of it as he may be advised.

In the Indian Law Reports, Calcutta Series, there are two cases relevant to the question, one, *Nanack Chand v. Teluckdye Koer*(1), and the other, *Dirgopal Lal v. Bolakee*(2), both by GARTH C.J. and PRINSEP J. The learned Judges held that in such cases no question could arise as to which mortgage was prior in point of time, observing that the real question that has to be decided was which of the parties could prove a prior title to possession. In one of those cases both the mortgages bore the same date, and in the other case, the second mortgagee was the first purchaser in point of time.

In *Ramanadhan Chetti v. Alkonda Pillai*(3) the first purchaser was held entitled to obtain possession, subject to the rights of parties being adjudicated in a proper suit. The learned Judges, BEST and SUBRAMANIA AYYAR JJ., observed as follows at page 502:—

“For the purposes of this suit, the fact that, by reason of plaintiff's purchase of the plaint land, the mortgagor's interest therein had ceased to exist prior to the defendant's

(1) (1879) I.L.R. 5 Calc. 265.

(2) (1879) I.L.R. 5 Calc. 269.

(3) (1895) I.L.R. 18 Mad. 500.

purchase is sufficient for holding that plaintiff is entitled to the declaration and injunction asked for in his plaint.”

Similarly, in *Muhammad Usan Rowthan v. Abdulla*(1) SHEPHARD J. observed (BODDAM J. concurring):

“These cases are plainly distinguishable from the case in which the second mortgagee has taken possession under his mortgage. It stands to reason that the right to possession so obtained cannot be affected by the result of a suit on the first mortgage, in which the mortgagee in possession was not made a party.”

And later on:

“It is a necessary consequence of framing a decree in the manner in which the decree now being executed has been framed that further litigation should ensue. Practically the question we have to decide is who shall take the first step in that litigation? In my view, it is the respondents who must take the first move, since the appellant was in possession under a title prior to that acquired by the respondents.”

There the second mortgage was one with possession and the second mortgagee was not made a party to the first mortgagee's suit. It was held that the first mortgagee was not entitled to dispossess such a second mortgagee in possession in execution proceedings.

In *Akatti Moidin Kutty v. Chirayil Ambu*(2) the learned Judges held that in such cases priority must be determined, not by reference to the dates of the mortgage documents, but according to the dates of the sales.

Entholi Kizhakkikandy Kanaran v. Vallath Koyil Unnooli(3) was a case decided by BODDAM and MILLER JJ., where the first mortgagee had not made the subsequent purchaser of the equity of redemption in possession of the properties a party to his suit, and it was held that the auction-purchaser in the first mortgagee's suit was not entitled to sue for possession *simpliciter*,

(1) (1900) I.L.R. 24 Mad. 171, 174.

(2) (1902) I.L.R. 26 Mad. 488.

(3) (1907) I.L.R. 30 Mad. 500.

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as all that passed to him at the Court sale in such a suit was the right of the first mortgagee as a simple mortgagee.

Similarly, in *Kutti Chettiar v. Subramania Chettiar*(1) it was held by WHITE C.J. and ABDUR RAHIM J. that the interests of the judgment-debtor passed to the purchaser at the first sale, and the purchaser at the second sale of the judgment-debtor's interest in the property took nothing, as the judgment-debtor had then no saleable interest in the property, and that the suit filed by the purchaser in the second sale simply to recover possession was not maintainable.

In *Chandramma v. Seethan Naidu*(2) I had to consider practically the same question. The first mortgagee filed a suit against the mortgagor only, without making the purchaser of the equity of redemption who was in possession of the property a party to the suit. It was held that the auction-purchaser could not dispossess such purchaser of the equity of redemption in similar circumstances. The case was similar to the one in *Entholi Kizhakkikandy Kanaran v. Vallath Koylil Unnooli*(3). After discussing the rights of parties in such cases, the Court (REILLY J. and myself) held that the auction-purchaser's suit in such cases should not be one simply to recover possession, but should be one to enforce the first mortgage. That principle applies to the present case also. The question has been recently discussed by WALLER and KRISHNAN PANDALAI JJ. in *Chinnaswami v. Darmalinga*(4). The earlier cases are noticed *in extenso*, and the same result has been arrived at by the learned Judges. To the same effect is the decision of a Full Bench of five learned Judges of the Allahabad High Court reported as *Hargu Lal Singh v.*

(1) (1909) I.L.R. 32 Mad. 485.
(3) (1907) I.L.R. 30 Mad. 500.

(2) (1930) 61 M.L.J. 316.
(4) (1932) I.L.R. 56 Mad. 115.

Gobind Rai(1), the facts of which were similar to the facts in *Entholi Kizhakkikandy Kanaran v. Vallath Koylil Unnooli*(2) and *Chandramma v. Seethan Naidu*(3).

The reference to the Full Bench on the present occasion has been caused because of a contradiction between *Chinnaswami v. Darmalinga*(4) and *Chinnu Pillai v. Venkatasamy Chettiar*(5). On going through the judgment in *Chinnu Pillai v. Venkatasamy Chettiar*(5), I find that there were three mortgages in that case and that the third mortgagee—the plaintiff in the later suit—was not joined as a party to the earlier suit on the second mortgage. The first defendant was the mortgagor. In execution of the second mortgagee's decree, the property was purchased by the second defendant, who also redeemed the first mortgage (on which also a suit evidently had been brought and a decree obtained). The second defendant contended that the plaintiff's only remedy was to redeem the first two mortgages which were then vested in him (the second defendant). The lower Court held that the properties should be sold free of all mortgages and that the proceeds of the sale should be applied first in payment to the second defendant of the amounts due under the first two mortgages, and the balance, if any, should be applied towards the discharge of the third mortgage held by the plaintiff. Against that decree the second defendant (who, as already stated, represented the first mortgagee and also the rights of the auction-purchaser in the second mortgagee's suit) preferred an appeal to the High Court. The appeal was dismissed. No objection could be taken to the actual decree passed in that case. No doubt in the course of a very long

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(1) (1897) I.L.R. 19 AH. 541 (F.B.). (2) (1907) I.L.R. 30 Mad. 500.
(3) (1930) 61 M.L.J. 316. (4) (1932) I.L.R. 56 Mad. 115.
(5) (1915) I.L.R. 40 Mad. 77.

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discussion contained in the judgment, there are certain observations which, taken apart from the facts of the case, would be too wide and dubious, if not open to objection. But, as already remarked, the observations of the learned Judges—especially in such mortgage suits—should be taken along with the facts of the cases, keeping in mind, who was in possession of the property and under what right, and also the decrees actually passed in such cases. The learned Judges, while in their turn criticising the decision in *Venkatanarasammah v. Ramiah*(1) and *Venkatagiri v. Sadagopachariar*(2), have themselves made certain observations rather too wide—unless those are taken with the facts of the case and the actual decision thereon.

The Full Bench decision in *Mulla Vittil Seethi v. Achuthan Nair*(3) is in favour of the view we are inclined to take, and is in consonance with the actual decision in the several cases quoted above. The facts of the case, *Mulla Vittil Seethi v. Achuthan Nair*(3), resemble the facts of the cases in *Entholi Kizhakkihandy Kanaran v. Vallath Koyil Unmooli*(4) and *Chandramma v. Seethan Naidu*(5). The Full Bench held that the first mortgagee who purchased the property in execution of a decree on his mortgage was not entitled to a decree for possession against the puisne mortgagee with possession who was not impleaded in the first mortgagee's suit.

In *Het Ram v. Shadi Ram*(6), (*Hetram's case*), the Privy Council observed:

"As their Lordships have already indicated, the second mortgagee, not having been made a party, was not affected by the decree made in the (first mortgagee's) suit of 1892."

(1) (1879) I.L.R. 2 Mad. 108.

(3) (1911) 21 M.L.J. 213 (F.B.).

(5) (1930) 61 M.L.J. 318.

(2) (1911) 22 M.L.J. 129.

(4) (1907) I.L.R. 30 Mad. 500.

(6) (1918) I.L.R. 40 All. 407, 410 (P.O.).

As already remarked, a simple mortgage does not confer on the mortgagee the right to possession of the property but only a right of sale thereof. The right to possession remains in the mortgagor who is entitled to transfer possession to anybody he likes in spite of the fact that he has created thereon simple mortgages already. The person to whom such possession is transferred may be a second usufructuary mortgagee or the purchaser of equity of redemption from the mortgagor after the simple mortgage, or a purchaser in Court sale might have obtained possession in execution of a money decree to which the mortgagor was a party. Such a decree might be a mere money decree, or it may be a decree for sale passed at the instance of a simple mortgagee, whether he be the first simple mortgagee or a puisne mortgagee. The purchaser of the mortgagor's rights in such cases would be entitled to be put into possession of the property. He has purchased such right to possession for valuable consideration; and that being so, he could not be deprived of such possession except by proceedings properly taken by such mortgagee or later purchaser in a suit properly brought for proper relief, making such purchaser in possession party to the same. It is elementary law that a person's rights could not, ordinarily, be affected by proceedings to which he was not party. The mortgagor could not represent such person in possession in proceedings instituted after such person had acquired the right to possession. Questions of *lis pendens* apart, the person who first acquired the right to possession—that is, first in point of time, in proceedings to which the mortgagor was a party if the acquisition was by virtue of Court proceedings, or privately from the mortgagor if the same be effected outside Courts—would be entitled to have and also to

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retain such possession, till a proper suit is instituted by the mortgagee concerned (or the auction-purchaser in his suit) after making also such person in possession party to the same. It is not right to say that the right of the person thus entitled to, or actually in, possession is only to redeem the prior mortgage. No doubt such a person would be entitled to redeem the prior mortgage, but he could not be compelled to do so (as if that was the only thing he was entitled to), if, having regard to the value of the property and the amount of the prior mortgage, he should not think it profitable or worth his while to do so. A simple mortgagee, whether he be the first mortgagee or puisne mortgagee, could not take advantage of his own omission in making persons in possession of the property, parties to his suit; nor could he contend that the right of such a person in possession is only to redeem the prior mortgage. A simple mortgagee's right is *prima facie* one to have the mortgaged property sold. Such a mortgagee does not acquire higher or further rights by filing (what may be called for the present purpose) an ineffective suit by omitting to make persons entitled to possession and puisne mortgagees parties to the same. Such a result could not be avoided by the plea of want of notice, on the part of the prior mortgagee, of the subsequent transactions relating to the property. Equity of redemption and right to possession are valuable "rights in rem", and persons who have properly acquired such rights could not be prejudiced in their legal rights simply because the prior simple mortgagee had not personal knowledge or notice of the same. Cases of choses in action might be different.

In some of the cases the second mortgage was a usufructuary mortgage with possession; see *Muhammad*

Usan Rowthan v. Abdulla(1). It is clear that such second mortgagee could not be dispossessed by the auction-purchaser in the first mortgagee's suit when he was not made party to such suit. In other cases, both the mortgages were simple mortgages, but the second mortgagee sued first and obtained a decree, and in the auction-sale the mortgagor's right to possession was purchased by a third person as the auction-purchaser. When such auction-purchase was made prior in point of time to the sale held in execution of the first mortgagee's decree, it was held that the first auction-purchaser was entitled to, and also to retain, possession. The same result was arrived at when the first auction-purchase was made in execution of the first mortgagee's suit, but emphasis was laid on such auction-sale being prior in point of time to the auction-sale held in execution of the second mortgagee's suit. It is expressly mentioned that the priority in the date of the mortgage does not matter, but that the deciding factor is the priority in the date of sale which carries with it the right to possession. I need not repeat that, in the present case, there is no complication caused by the application of the doctrine of *lis pendens* to these suits.

This is the view expressed by Dr. Rash Behari Ghose in his "Law of Mortgages in India"; see fourth edition, pages 621 and 622:

"The first mortgagee, or auction-purchaser in the suit filed by the first mortgagee, could in such circumstances only call for the sale of the property, if he is not redeemed by the persons left out in such suit; he would be entitled to a first charge on the proceeds to the extent to which the purchase-money was applied in payment of the mortgage debt". (page 621).

(1) (1900) I.L.R. 24 Mad. 171.

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And at page 623, the learned author expressly states:

"I may here observe in passing that as between two rival purchasers outstanding equity of redemption is determined by the priority, not of the respective mortgages, but of the respective sales."

Having regard to the actual decisions in *Venkatanarasammah v. Ramiah*(1), *Chinnu Pillai v. Venkatasamy Chettiar*(2) and *Chinnaswami v. Darmalinga*(3), I am not able to find "any contradiction in principle" in the said decisions. I hold that the purchaser whose purchase is earliest in point of time is entitled to retain possession in such cases, and that the rights of a simple mortgagee, who omitted to make a subsequent puisne mortgagee or a subsequent usufructuary mortgagee or a subsequent purchaser of the equity of redemption, party to his suit, should be worked out in a suit for sale to be instituted by him or his representative in interest.

In this view, it follows that the civil miscellaneous appeal should be dismissed with costs.

In the civil miscellaneous second appeal, it is necessary to observe that as soon as the decree, in execution of which the receiver was appointed, is satisfied, the auction-purchaser (appellant before us) would be entitled to possession, since no absolute right to possession (but only a qualified right to possession) passed away from the mortgagor before the subsequent auction-purchase by the appellant. The auction-purchase of the appellant in Civil Miscellaneous Second Appeal No.182 of 1931 will have effect, subject to the other decree being satisfied. The decree-holder's right of charge in respect of maintenance for the subsequent

period will not be affected. No such distinction occurs in the other Civil Miscellaneous Appeal No. 481 of 1930 before us.

Subject to these observations, both the civil miscellaneous appeal and the civil miscellaneous second appeal are dismissed with costs.

CORNISH J.—If the appellant here was suing to enforce his rights, acquired by purchase, of puisne mortgagee against the respondent as the prior encumbrancer, *Chinnu Pillai v. Venkatasamy Chettiar*(1) would be applicable. In that case it was held that, where a prior mortgagee has sued for sale without impleading the puisne mortgagee and the property has been sold in execution, the puisne mortgagee is entitled to sue for a sale of the mortgaged property (the purchaser being made a party) free of all mortgages, the prior mortgage first being paid out of the sale proceeds. But the case with which we are called upon to deal has not reached that stage; it is one of proceedings in ejectment under Order XXI, rule 97, Civil Procedure Code. The appellant, the purchaser of the property at a sale in execution of the mortgage-decree, complained that he had been resisted by the respondent in obtaining possession of the property. By rule 99 of that Order the Court is directed, if satisfied that the resistance is occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account, to dismiss the application. I cannot imagine a stronger instance of a *bona fide* claimant resisting dispossession than the respondent. She had been put in possession by the Court as receiver in execution of her decree against the judgment-debtors in enforcement of a charge created by them in her

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(2) (1915) I.L.R. 40 Mad. 77.

(3) (1932) I.L.R. 58 Mad. 115.

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favour upon the property. Her charge, her decree, and her possession were severally anterior in date to the mortgage, the mortgage-decree, and the appellant's purchase under that mortgage. The appellant was not a purchaser from a person in possession of the property. Possession, at the time of his purchase and before it, was with the respondent. These facts are, in my opinion, quite sufficient to negative appellant's claim to eject the respondent. There is a string of cases commencing with *Venkatanarasammah v. Ramiah*(1) which have confirmed the principle that, where the competition for possession is between purchasers under mortgages of different dates upon the property sold, priority of date of purchase gives priority of title to possession. This principle appears to me to be unshaken by the criticism made in *Chinnu Pillai v. Venkatasamy Chettiar*(2) upon some of those cases. The Court, in *Chinnu Pillai v. Venkatasamy Chettiar*(2), was not commenting upon the soundness of the principle, but upon certain expressions in the judgments under criticism. There is nothing in the judgment opposed to the claim of the respondent in this appeal to remain in possession. I agree that the appeals should be dismissed.

G.R.

(1) (1879) I.L.R. 2 Mad. 108.

(2) (1915) I.L.R. 40 Mad. 77.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Cornish.

SWAMINATHA ODAYAR, MINOR, REPRESENTED BY HIS
MOTHER, MEENAKSHI (SECOND DEFENDANT), APPELLANT,

1932,
December 2.

v.

K. S. NATESA IYER (PLAINTIFF), RESPONDENT.*

*Negotiable Instrument—Promissory note—Minor—Guardian of
—Execution by, for necessary purposes—Liability.*

A guardian of a minor cannot impose a liability upon the minor by executing a promissory note on his behalf even for necessary purposes.

Distinction between the liability arising from an ordinary debt and that arising from a debt secured by a negotiable instrument pointed out.

Zemindar of Polavaram v. Maharaja of Pittapuram, (1930) I.L.R. 54 Mad. 163, distinguished. *Meenakshisundaram Chetty v. Ranga Ayyangar*, (1931) 35 L.W. 397, dissented from.

APPEAL against the decree of the Court of the Subordinate Judge of Tanjore in Original Suit No. 41 of 1925.

A. V. Viswanatha Sastri, R. Gopalaswami Ayyangar and *S. Ramanuja Ayyangar* for appellant.

S. Panchapakesa Sastri for respondent.

JUDGMENT.

REILLY J.—This suit, as I understand it, is a suit on a promissory note and upon nothing else. The cause of action in the plaint is stated to be the promissory note, Exhibit B. The fact that earlier in the plaint some of the previous history is recited does not affect, so far as I can see, the basis of the suit as brought by

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the plaintiff. The opening words of the learned Subordinate Judge's judgment make it quite clear that he understood this to be a suit upon the promissory note; and that is shown also by the form of the only issue in the suit: "Is the plaint promissory note true, supported by consideration and binding on defendants 2 to 8?"

Exhibit B is a promissory note payable to order, dated the 27th of November 1923, and executed by defendant 1 for himself and as guardian of defendant 2 in renewal of a previous note, Exhibit A, dated the 13th of November 1921, by the same parties. In Exhibit A it is stated that the purpose for which the debt is incurred is "family and litigation expenses". The learned Subordinate Judge has made a decree against defendant 1 for the whole amount, Rs. 17,000 and odd, and against defendant 2's property for Rs. 2,455 only. Defendant 2, who is still a minor, appeals against the decree, so far as it is against him.

Defendant 2 is the natural son of defendant 1 but was adopted by defendant 1's deceased paternal uncle. It appears that they belonged to a very wealthy family in the Tanjore district, their property being worth altogether many lakhs, we are told. In respect of that family property a partition suit was instituted by one of the members of the family in 1919 after disputes about the property had been the subject of proceedings in Criminal Courts. That partition suit was eventually tried by the Subordinate Judge of Kumbakonam as Original Suit No. 22 of 1924. In this suit the learned Subordinate Judge has made defendant 2 liable for Rs. 2,455 because he finds that amount shown in Exhibit E, a costs list in Original Suit No. 22 of 1924, as the expenses incurred by defendant 1 and his sons and defendant 2 and defendant 1's brother in that suit.

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On that basis the learned Subordinate Judge has come to the conclusion that it is shown that litigation expenses had to be incurred on behalf of defendant 2 and to that extent but no further the promissory note can be held binding on defendant 2's property.

Apart from the fact that, as Mr. Gopalaswami Ayyangar for defendant 2 represents, the costs list, Exhibit E, relates not only to defendant 2 but to other parties in the partition suit, and therefore it does not show that the whole of the Rs. 2,455 had to be incurred as expenses in that suit for defendant 2, I think there are two sufficient reasons why this appeal must be allowed. The first appears to me to be really a superfluous reason; and I mention it only because it has been the subject of considerable argument before us. As Mr. Gopalaswami Ayyangar has urged, there is no real evidence establishing any necessity for borrowing money from the plaintiff for defendant 2. The plaintiff does not rely upon any supposed inquiries made by him to justify his claim; but he sets out to prove necessity. Now defendant 2 admittedly had a share, and a very valuable share, in the large family property I have mentioned. But in the partition suit a question was raised whether he had been adopted by his great-uncle. If he had been adopted, as was established in the suit and not disputed in appeal, then he was entitled to either a fourth or a fifth share in the whole family property; if he had not been adopted, he was still entitled to a very valuable share as the son of defendant 1. His interests had to be guarded in that suit: but there is nothing to show that it was necessary to borrow money in order to guard his interests. It appears that defendant 1 had been in possession of the very valuable family estates for at least two years before the partition suit was instituted; and, when once

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that suit was instituted, a receiver was appointed, who held possession of the whole family property during the long history of the suit. There is nothing whatever to show that defendant 2's interest in the family property, whatever it was, whether as the adopted son of his great-uncle or as the son of his father, was not quite enough to meet any expenses necessary on his account in the partition suit. And, after that suit had been instituted, there is evidence to show that the parties to the suit drew large amounts from the receiver for their respective purposes. There is nothing whatever to show that any expenditure required to guard defendant 2's interests in that suit could not have been met by money obtained from the receiver, if an application had been made to the Court for that purpose. For the plaintiff it is urged defendant 1 must have had accounts for the period when he was managing the family property, and those accounts are not produced. But quite apart from any accounts there is no reason whatever to doubt that plenty of money was available to guard the interests of defendant 2 before the partition suit was instituted, and any money necessary for his purposes in that suit would no doubt have been readily granted by the Court, if an application that the receiver should advance money for the purpose had been made. It is clear I think that the allegation that there was necessity to incur any such debt as this on the date of Exhibit A for any legitimate purpose of defendant 2 has not been made out.

Secondly and fundamentally it appears to me clear that the plaintiff cannot have any remedy on this promissory note against defendant 2. I may remark that defendant 1 was not the legal or legally appointed guardian of defendant 2. Defendant 2 had been adopted by his great-uncle. Both his great-uncle and his

great-uncle's wife had died; but that would not make his natural father, defendant 1, again his legal guardian. Under Hindu law the natural guardians of a minor are only his parents, and defendant 1 was legally no longer defendant 2's father after defendant 2's adoption. Defendant 1 was no more than what is often called a *de facto* guardian, that is a person who arrogates to himself the charge of a minor's person or property. In the partition suit it appears he was on record as defendant 2's guardian *ad litem*; but that would give him no additional right to incur debts on defendant 2's behalf. And, apart from defendant 1's actual position in relation to defendant 2 as *de facto* guardian or as guardian *ad litem*, how can any guardian impose a liability upon a minor by executing a promissory note on his behalf? If a promissory note is to effect anything, it must create an unconditional personal liability. How can any guardian impose an unconditional personal liability upon a minor? An agent can impose such a liability upon his principal, if his act is in effect the act of his principal; but a guardian is not the agent of his ward, however his guardianship arises. Mr. Panchapagesa Sastri has referred us to *Ramajogayya v. Jagannadhin*(1) and *Zamindar of Polavaram v. Maharaja of Pittapuram*(2) as authorities showing that a debt incurred on behalf of a minor for necessary purposes of the minor or a covenant to pay a debt so incurred can be enforced against the minor's property; but those cases were not concerned with promissory notes. It is true that the principle of those cases has been applied in *Meenakshisundaram Chetty v. Ranga Ayyangar*(3) to a promissory note executed by the legal guardian of a minor in the name of the minor.

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(1) (1918) I.L.R. 42 Mad. 185. (2) (1930) I.L.R. 54 Mad. 163.
(3) (1931) 35 L.W. 397.

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But with very great respect I may point out that the learned Judges dealt with the case on the principles applicable to a debt incurred on behalf of a minor for necessary purposes without considering the special features of a promissory note. An essential feature of a promissory note is that the promise to pay is unconditional. And a negotiable instrument is intended to be one which can pass from hand to hand, bearing its meaning on its face, as itself the basis and evidence of a money claim. Any qualification of the promise in a promissory note, such as that it is only to be enforced against a minor if necessity binding on the minor can be shown, is wholly foreign to the idea of a negotiable instrument. So far as I can see, no guardian can by executing a promissory note in the name of a minor impose an unconditional personal liability on the minor. It is unnecessary now to consider whether it might be possible for a legal or legally appointed guardian of a minor regarded as a separate entity to impose a personal liability on himself in that capacity by executing a promissory note in that capacity with the result that in that capacity he could be made to pay what was due on the note from his ward's estate. That question does not arise in this case. Nor is it necessary for us to consider whether, if better evidence had been produced by the plaintiff, he might have been able in an appropriate suit to enforce liability against defendant 2's property for the debt out of which this promissory note originally arose. This is not such a suit.

In my opinion the plaintiff can get no relief against defendant 2 in this suit upon the promissory note, Exhibit B, and therefore this appeal should be allowed with costs in both Courts and the plaintiff's memorandum of objections should be dismissed with costs.

CORNISH J.—I agree. Plaintiff has chosen to sue upon the promissory note and not upon the consideration; and the only liability under the note is the personal liability of the first defendant. If the suit had been on the consideration the case might have been different. It might then have been contended that, if it was shown that the money was borrowed for purposes which under the Hindu Law rank as a necessity binding on the minor, the plaintiff would be entitled to be subrogated to the first defendant's rights against defendant 2. No necessity has been shown for the first defendant's borrowing the money from the plaintiff on behalf of defendant 2. Assuming that the first defendant as guardian *ad litem* wanted money for maintaining the second defendant's claim in the suit, the proper person for him to apply to was the receiver in the suit. The estate was a rich one; and if money was required the receiver could have furnished it to him on the directions of the Court. The plaintiff was not ignorant of this. He says in his evidence that a receiver had been appointed in the partition suit and that he was in possession of the property.

G.R.

APPELLATE CIVIL.

*Before Mr. Justice Krishnan Pandalai and
Mr. Justice Curgenvven.*

1933,
January 5.

R. A. VENKATATHIRISAMI NAIDU AND THREE OTHERS
(SECOND RESPONDENT AND LEGAL REPRESENTATIVES
OF FIRST RESPONDENT), PETITIONERS,

v.

R. V. KASTHURIRANGA APPASWAMI NAIDU
(APPELLANT), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 110—Subject-matter of appeal—Value of—Post-plaint interest if included in—Plaintiff's appeal—Defendant's appeal—Distinction.

A plaintiff cannot insist upon the award of post-plaint interest as something to which he possesses a legal right. The award of such interest and the rate at which it is to be awarded are both left to the discretion of the Court under section 34 of the Code of Civil Procedure. Such interest cannot, therefore, in any strict legal sense, be deemed to be part of the plaintiff's claim against the defendant, or part of "the subject-matter in dispute on appeal to His Majesty in Council" within the meaning of section 110 of the Code of Civil Procedure. If the plaintiff's suit is dismissed by the High Court on appeal, the maximum value to be attached to his appeal to the Privy Council is the value of his suit as stated in the plaint and accepted by the trial Court; and it can make no difference whether that Court allowed the claim in whole or in part or dismissed it altogether. Interest accruing subsequent to the institution of the suit cannot be included in ascertaining the "amount or value of the subject-matter in dispute on appeal to His Majesty in Council".

* Civil Miscellaneous Petition No. 4323 of 1932.

Difference in this respect between the positions of a plaintiff and of a defendant pointed out.

PETITION praying that in the circumstances stated therein the High Court will be pleased to grant leave to the petitioners therein to appeal to His Majesty in Council against the judgment of WALLACE and KRISHNAN PANDALAI JJ., dated 19th April 1932 and passed in Appeal No. 179 of 1926 preferred against the decree of the Court of the Subordinate Judge of Tinnevely in Original Suit No. 32 of 1924.

S. Ramaswamy Ayyar for petitioners.

K. S. Sankara Ayyar for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by CURGENVEN J.—This is an application under section 110 of the Code of Civil Procedure for permission to appeal to His Majesty in Council. The suit was brought on behalf of minor plaintiffs against the defendant, as executor under their father's will, for an account of his management of the estate. The valuation of the relief claimed was over Rs. 10,000, so that the case fulfils the first condition prescribed by the section, that "the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards". We are asked to hold that the second condition is also satisfied, that "the amount or value of the subject-matter in dispute on appeal to His Majesty in Council" is the same sum or upwards.

The decision of this point depends upon whether the plaintiffs, who are the petitioners, are entitled to include in their reckoning interest accruing subsequent to suit. The Court of first instance gave a decree which, after correction of an error, amounted to

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Rs. 3,859-14-10. This sum was the subject-matter of the defendant's appeal to this Court, and the plaintiffs presented a memorandum of objections claiming, in addition to it, a sum disallowed by the trial Court which, after deducting a certain amount given up, stood at Rs. 2,118-0-8. The result of this Court's decree was that the whole of the plaintiffs' claim was disallowed, and they were found liable to pay the defendant Rs. 173-7-11. The plaintiffs now desire to appeal to the Privy Council in respect of the three sums above-specified, totalling Rs. 6,151-7-5, and to the amounts of the two former they claim to add a sum of Rs. 5,072-10-10, being interest from 31st January 1918, when payment, it is said, was due from the defendant, up to 19th April 1932, the date of this Court's decree. If this course is permitted, the value of the appeal will be well above Rs. 10,000, viz., Rs. 11,224-2-3. If interest accruing subsequent to the institution of the suit is to be excluded, the value will be below the appealable minimum.

The learned Advocate for the petitioners puts his case in this way: if the plaintiffs had fully succeeded both in the appeal and in the memorandum of objections before this Court, they would have obtained a decree which, with interest at six per cent up to the date of that decree, would have exceeded Rs. 10,000; and from this decree the defendant could have appealed to the Privy Council. It must follow that the plaintiffs, who have been denied the whole of this sum, have equally a right of appeal, since it would be inequitable and anomalous to withhold from the one a right which would, in the converse case, have been conceded to the other.

It is no doubt true that the value of a defendant's appeal is the amount of the decree of this Court, and

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that where interest up to its date is included the appellant is entitled to a certificate if the whole sum thus composed reaches the minimum figure of ten thousand rupees. That was decided by the Privy Council in *Gooroopersad Khoond v. Juggutchunder*(1), a case followed by their Lordships in *Bank of New South Wales v. Owston*(2). But it does not necessarily follow that the converse proposition, as it is sought to apply it to a plaintiff's appeal, is true. The only case to which our attention has been drawn as directly deciding this point against a plaintiff is *Ram Kumar v. Muhammad Yakub*(3). Apparently the decision in Moore's Indian Appeals was not cited before that Bench, but only the *New South Wales* case, which the learned Judges distinguished on the ground that whereas the law of New South Wales gives a decree-holder a statutory right to interest, in this country the grant of it is discretionary to the Court. Such a ground for distinction would not, of course, apply to the case in Moore's Indian Appeals, which proceeded upon no more than the fact that the decree comprised interest, and not upon any question of the decree-holder's right to claim it. We think that the real difference upon which the Allahabad Bench might have based its judgment is that, as here, they had in question a plaintiff's and not a defendant's appeal. A defendant must appeal against the whole decree standing against him. A plaintiff can do no more than appeal against the dismissal of his claim, as that claim stood at the date of his suit. The distinction is observed in assessing appeals of either kind to court-fees, a plaintiff who appeals against the dismissal of his suit, as has been held in *Srinivasa Row*

(1) (1880) 8 M.I.A. 183.

(2) (1879) 4 App. Cas. 270.

(3) (1920) I.L.R. 42 All. 445.

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v. *Ramasawmi Chetti*(1) and *Vithal Hari Athavle v. Govind Vasudeo Thosar*(2), not having to include in his valuation interest accruing subsequent to suit, whereas a defendant must appeal against the whole decree, including any such subsequent interest. The real ground for this difference is that whereas a defendant has to get rid of any sum, whether principal or interest, decreed against him, a plaintiff cannot insist upon the award of post-plaint interest, as something to which he possesses a legal right. Its grant is, under section 34 of the Code of Civil Procedure, discretionary to the Court, which may, if it thinks fit,

"order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree."

It is to be observed that not only is the question whether or not to award interest, but also the question at what rate to award it, left to the Court's discretion. It has, it is true, become in practice the rule to adopt the rate of six per cent per annum, but nowhere is that rate prescribed, and there is nothing in law to prevent any Court from awarding some other rate. In 1860, as we see from *Gooroopersad Khoond v. Juggutchunder*(3), the Court rate was twelve per cent; in the *New South Wales* case it was eight per cent. The most then that a plaintiff-appellant can urge in support of his claim to include post-plaint interest at six per cent in his valuation is that he is proceeding upon the assumption that a practice which considerations of convenience tend to make uniform would be observed in his case in the event of his success. And it must follow that, since there is no rule of law enabling him to enforce the

(1) (1900) 10 M.L.J. 144.

(2) (1892) I.L.R. 17 Bom. 41.

(3) (1860) 8 M.I.A. 166.

award of interest, it cannot, in any strict legal sense, be deemed to be part of his claim against the defendant, or, to employ the language of section 110, Civil Procedure Code, part of "the subject-matter in dispute on appeal to His Majesty in Council". If the plaintiff's suit is dismissed by this Court on appeal, the maximum value to be attached to his appeal to the Privy Council is the value of his suit as stated in the plaint and accepted by the trial Court; and it can make no difference whether that Court allowed the claim in whole or in part or dismissed it altogether.

For these reasons we conclude that no appeal such as the plaintiffs propose to prefer will lie, and it is unnecessary to decide the further question raised, whether or not that part of this Court's decree which affirms the decree of the trial Court should be disregarded. We dismiss the petition with costs.

A.S.V.

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APPELLATE CIVIL.

Before Mr. Justice Curgenvven and Mr. Justice
Sundaram Chetti.

1933,
March 6.
NAGAR DAMODARA SHANBHOGUE (PLAINTIFF),
APPELLANT,

v.

CHANDAPPU PUJARY AND THIRTY OTHERS (DEFENDANTS
1 TO 3 AND 5 TO 32), RESPONDENTS.*

Mortgage—Usufructuary mortgage deed—Personal covenant if contained in—Lease of mortgaged property granted to members of mortgagors' family—Rent arrears due in respect of—Charge created on mortgaged property in respect of—Mortgagee's right to enforce, regardless of time and mode of redemption stipulated for.

The material portion of an usufructuary mortgage deed was as follows:—

"As we represented to you that there is some extra income in the property till the term stated here below, you should give us credit to a sum of Rs. 6,625 from the principal amount and you have agreed thereto out of concession to us. Deducting the said sum of Rs. 6,625, on payment (when paid) in one lump sum on the Kalavadhi Vishu Sankramana of Dundubhi year (1922-23) of the balance of Rs. 4,000 as also any arrears of rent that may remain due with your consent from any member of our family who may take the property on rent from you on the responsibility of the property, you shall receive the same and make over the property and documents as also the receipts which you obtain from the creditors. If we fail to pay the aforesaid amount on the due date as stated above, thereafter, unless we pay on Kalavadhi Vishu Sankramana of any year, we have no right to ask you to receive the amount and surrender possession during any other time of any year, and from the date of default on the due date until we discharge all rights under this deed, you shall not only enjoy the properties but shall also be entitled to appropriate the

* Appeal No. 223 of 1926.

income towards the interest due to you on the principal amount and we shall have no right to claim any excess income from you. If you do not consent to allow any arrears of rent against the members of our family, this deed shall be no bar to your right of recovering the same on the responsibility of the said properties. If in addition to the aforesaid sum of Rs. 1,500 left in amanath with you to pay the aforementioned creditors, any excess sum is found due to them and is paid by you, the excess so paid, and if the assessment be enhanced at the time of the survey, the sum so enhanced also, together with interest at eight per cent per annum from the respective dates of payment we are liable to pay on the responsibility of the *ildarwar* property (property mortgaged usufructually), and we shall pay at the time of the final discharge of the amounts under this deed (when the accounts in respect of this deed are finally settled) the said sum also."

Held that, on the true construction of the mortgage deed, there was no personal covenant to pay the balance of the mortgage money so as to entitle the mortgagee to sue for sale of the mortgaged property for the realization of that amount.

Held further that, as regards the arrears of rent due in respect of the leases granted to the members of the family, the mortgagee was entitled to enforce the charge created on the mortgaged property in respect of those arrears unfettered by the restrictions contained in the deed as to the time and mode of redemption.

APPEAL against the decree of the Court of the Subordinate Judge of South Kanara in Original Suit No. 8 of 1924.

B. Sitarama Rao and K. P. Sarvothama Rao for appellant.

K. Y. Adiga and K. Srinivasa Rao for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by
SUNDARAM CHETTI J.—Plaintiff is the appellant. He sued for the recovery of a sum of Rs. 37,065-9-11 by sale of the mortgaged properties on the strength of an usufructuary mortgage-deed, Exhibit A, which,

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according to the plaintiff's contention, contains a personal covenant to pay, whereby he is enabled to sue for the sale of the mortgaged properties, though the mortgage deed is styled as an usufructuary mortgage. The learned Subordinate Judge dismissed the suit by reason of his findings on issues III and IV. On a construction of the terms of the mortgage deed, he has held that there was no personal covenant to pay the mortgage amount and the suit for sale of the mortgaged properties is not therefore maintainable. This is the main question argued in this appeal.

The suit mortgage deed, Exhibit A, is an unduly long document and a full translation of it is given in the judgment of the lower Court. For the purpose of deciding the point at issue, the following extract from the document would suffice :

"As we represented to you that there is some extra income in the property, till the term stated here below, you should give us credit to a sum of Rs. 6,625 from the principal amount and you have agreed thereto out of concession to us. Deducting the said sum of Rs. 6,625, on payment (when paid) in one lump sum on the Kalavadhi Vishu Sankramana of Dundubhi year (1922-23) of the balance of Rs. 4,000 as also any arrears of rent that may remain due with your consent from any member of our family who may take the property on rent from you on the responsibility of the property, you shall receive the same and make over the property and documents as also the receipts which you obtain from the creditors. If we fail to pay the aforesaid amount on the due date as stated above, thereafter, unless we pay on Kalavadhi Vishu Sankramana of any year, we have no right to ask you to receive the amount and surrender possession during any other time of any year, and from the date of default on the due date until we discharge all rights under this deed, you shall not only enjoy the properties but shall also be entitled to appropriate the income towards the interest due to you on the principal amount and we shall have no right to claim any excess income from you. If you do not consent to allow any arrears of rent against the members

of our family, this deed shall be no bar to your right of recovering the same on the responsibility of the said properties. If, in addition to the aforesaid sum of Rs. 1,500 left in amanath with you to pay the aforementioned creditors, any excess sum is found due to them and is paid by you, the excess so paid, and, if the assessment be enhanced at the time of the survey, the sum so enhanced also, together with interest at eight per cent per annum from the respective dates of payment we are liable to pay on the responsibility of the *ildarwar* property (property mortgaged usufructually), and we shall pay at the time of the final discharge of the amounts under this deed (when the accounts in respect of this deed are finally settled) the said sum also."

This deed was executed on 11th September 1892 and it is specifically stated in the body of the deed that possession of the properties was handed over to the mortgagee on *saphildarwar* (usufructuary mortgage pure and simple). A period of thirty years is fixed for redemption, and, by reason of the enjoyment of the properties by the mortgagee for that period, the entire interest due on the principal sum of Rs. 10,625 for the said period of thirty years and also a portion of the principal amount, namely, Rs. 6,625, must be taken to have been paid off. At the end of that period, the balance of principal remaining due is only Rs. 4,000. Provision is also made in this deed for the grant of portions of the mortgaged property on lease to any member of the family of the mortgagors and the arrears of rent remaining due are also payable along with the balance of the principal amount on the specified date at the end of the thirty years term. In the case of an usufructuary mortgage, there must be delivery of possession to the mortgagee coupled with an authorization to retain such possession until repayment of the mortgage money and receive the rents and profits in lieu of interest or in part-payment of the mortgage money. An usufructuary mortgagee, as such, has no

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right to institute a suit for sale of the mortgaged property, but must only continue to enjoy the same till redemption. If, in such a mortgage-deed, there is an express personal covenant to pay the money, apart from words merely indicating the time and the mode of redemption, a suit for sale may be instituted, but not otherwise. Even to sue for the mortgage money under section 68 of the Transfer of Property Act, it must be shown that by the terms of the deed the mortgagor has bound himself to repay the same. So far as the claim for the recovery of the balance of principal, namely, Rs. 4,000, is concerned, we are unable, on a proper construction of the terms contained in the deed, to read any personal covenant to pay the same. Any such covenant should be clear and unconditional in the undertaking to pay.

Several decisions were cited on either side in the course of the arguments and we find that each case turns upon the construction to be placed on the particular wording of the document. The usufructuary mortgage deed which was considered in *Luchmeshar Singh v. Dookh Mochan Jha*(1) contained a clause:

"Having paid the principal money in the month of Chait 1297, we shall take back the document and the land."

The learned Judges held that

"such a provision is merely what is generally known as a proviso for redemption which fixes the minimum time within which the mortgagor can redeem."

In respect of an exactly similar clause contained in an usufructuary mortgage deed, our High Court held that it did not amount to a personal covenant to pay; *Hakeem Patte Muhammad v. Shaik Davood*(2). The same view was held in a later case on the construction

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of an almost similar provision; *Rengayya Pillai v. Narasimma Iyengar*(1). In another case decided by the Calcutta High Court, where the covenant was "when I or my heirs shall pay, I shall take back this deed and enter on the land", it has been held that this does not amount to a personal covenant to pay, but it is only a conditional statement which would not entitle the mortgagee to insist on giving up possession and recovering the money by sale of the property. The terms of the clause in the deed in question in the present case relating to the payment of the balance of the mortgage money are in our opinion very similar to the clauses which were the subject of consideration in the cases referred to above.

The cases relied on by Mr. Sitarama Rao for the appellant are in our opinion distinguishable from the present. In the mortgage deeds dealt with in *Ramayya v. Gururva*(2) and *Udayana Pillai v. Senthivelu Pillai*(3), there was a clear and unambiguous personal covenant to pay. In the latter case, the covenant ran as follows:—"On the expiry of the term I shall pay the said Rs. 200 and redeem the lands." In the former case, it is worded thus: "It is settled that we should pay the principal amount to you in three instalments within this period." Such being the wordings of the clauses, there was no difficulty in holding that there was a personal covenant to pay. In those deeds there was a further clause that in default of such payment the mortgagee should continue to enjoy the property in the aforesaid manner till redemption. In view of the fact that there was a clear and unequivocal personal covenant to pay the money, as an independent provision, the

(1) (1897) I.L.R. 24 Cal. 677.

(2) (1915) I.L.R. 39 Mad. 1010.

(1) (1918) M.W.N. 872.

(2) (1893) I.L.R. 14 Mad. 232.

(3) (1896) I.L.R. 19 Mad. 411.

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learned Judges held that the effect of the subsequent clause for continuance of enjoyment in case of default in such payment was not to nullify the previous covenant to pay on a certain day. These decisions would be authorities in favour of the plaintiff's contention in the present case, if Exhibit A does contain a clear and unconditional personal covenant to pay as in those cases. Not only is such a personal covenant to pay absent in Exhibit A, but there is also a provision that, in case of default in the redemption of the mortgage on the due date at the expiry of the term, the mortgagee should continue in possession and enjoyment of the property appropriating the income towards the interest due on the balance of the principal amount. As observed by the lower Court, this provision is presumably for the benefit of the mortgagee because he has the advantage of enjoying the entire mortgaged property in lieu of interest due on only a portion of the principal sum, namely, Rs. 4,000. This may sound something like a penal provision in case of default in the payment of the entire mortgage money at the end of the stipulated term of thirty years. In the Full Bench case of *Sivakami Ammal v. Gopala Savundram Ayyan*(1) the clause was :

"I shall pay you the said mortgage amount of Rs. 3,000 in Chithrai Kalavadhi of the year 1883 and take back this deed of mortgage with possession."

This was held to be a clause containing a covenant to pay. Even in the later Full Bench case of *Kangaya Gurukul v. Kalimuthu Annavi*(2) the clause was almost similar :

"Thereafter on the 30th Panguni, Bhava year, causing the aforesaid Rs. 200 to be paid (on paying the aforesaid Rs. 200) we shall (redeem) or (recover back) our land."

(1) (1893) I.L.R. 17 Mad. 131 (F.B.). (2) (1903) I.L.R. 27 Mad. 526 (F.B.).

These decisions do not materially help the appellant in this case. One other decision relied on by him is *Rangaswami Aiyangar v. Veeraraghavachari*(1). This seems to be in support of his contention rather than the other decisions. The particular clause from which the personal covenant to pay was inferred is as follows :—

"Having paid the amount of the principal by 7th July 1917, having endorsed on this deed, I shall enjoy the said land."

But in Exhibit A there are no words such as "we shall take back and enjoy the lands", "we shall redeem and take back the lands." What is stated therein is, that on payment of the balance of the principal money the mortgagee should receive it and make over the property to the mortgagors. That is only a proviso for redemption in which the duty of the mortgagee after redemption of the mortgage is expressly specified.

On a careful consideration of the specific terms in Exhibit A, we agree with the view of the lower Court and hold that there is no personal covenant to pay the balance of the mortgage money so as to entitle the plaintiff to claim the relief, namely, sale of the mortgaged property for the realization of this amount.

So far as the arrears of rent due in respect of the leases granted to the members of the family are concerned, there is, no doubt, a provision in the deed that those sums are also payable along with the balance of the principal amount at the time of redemption. But there is a further definite clause which clearly entitles the mortgagee, irrespective of such a provision, to recover those arrears on the responsibility of the mortgaged property. It means that he can enforce the charge created on the property in respect of those arrears of rent unfettered by the restrictions contained

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(1) (1923) 48 M.L.J. 56.

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in this deed as to the time and mode of redemption. The mortgaged properties having been made security for the recovery of those arrears of rent under this deed, there is no bar to the enforcement of the charge in the present suit by asking for the sale of those properties.

The amount of arrears of rent together with interest at twelve per cent per annum claimed by the plaintiff as per schedule B is Rs. 22,030-7-4. We may first dispose of the question as regards the claim for interest. There is no provision in Exhibit A for payment of any interest on the arrears of rent, though there is specific provision for payment of interest at eight per cent per annum on two other items of debt. No contract for the payment of interest on arrears of rent is set up in the plaint. That being so, the claim for interest is clearly unsustainable and must be disallowed. If the amount of interest is eliminated from the claim, what is due for arrears of rent alone is Rs. 12,547-15-0. The learned Subordinate Judge has found that the particulars of the arrears of rent as given in schedule B are correct, except as to the value of rice given therein. The quantities of rice which remained due as arrears of rent are mentioned in that schedule and they are in conformity with the settlement made by the several defendants showing the quantities of rice which remained due to the plaintiff as arrears of rent. It is said that there are some inaccuracies in the accounts when compared with the lease deeds and receipts. This is not clearly made out, though there was some cross-examination of the plaintiff on this point. It is unlikely that, when the lessees chose to settle the accounts with the mortgagee, they would have subscribed their signatures in token of such settlement without satisfying themselves as to the correctness of the figures mentioned therein. As

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regards the prices of rice claimed by the plaintiff as noted in schedules B-1 to B-10, the lower Court has made a deduction of ten annas per mura, and subject to this deduction the prices noted therein have been allowed. We accept that finding. The plaintiff would therefore be entitled to Rs. 12,547-15-0 less the sum calculated at ten annas per mura on the total quantity of rice due as arrears of rent, namely, Rs. 1,122-8-0.

It is urged on behalf of the respondents that the arrears of rent due by the several members of the family could not be made a legitimate charge on the mortgaged property. The lower Court is of this opinion and seems to proceed on the footing that the leases provided for in the mortgage deed, Exhibit A, should be those taken by any member of the family as representing the whole family. But there is nothing in the terms of the mortgage deed to restrict the nature of the leases contemplated in the mortgage deed in the aforesaid manner. The intention, as would appear from the whole trend of the mortgage deed, is that the mortgagee should lease out different portions of the mortgaged property to several members of the family, as such a course would be convenient for maintaining themselves out of the usufruct, at the same time paying rent to the mortgagee which would represent the interest due to him on the principal amount. Under the mortgage deed, the whole of the mortgaged property is made responsible for the realization of the arrears of rent due by any member of the family in respect of the lease taken by him. Such an arrangement appears to have been brought about in the interests of all the members of the family without prejudice to the rights of the mortgagee. We cannot therefore regard the charge created in respect of the arrears of rent as not binding on the family of the mortgagors as a whole. Moreover,

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this very mortgage deed having been found to be valid and binding on the whole family in the former suit, which was brought by some of the present defendants and others in which the mortgagee was arrayed as one of the defendants, it is not now open to the defendants to re-open the question of the validity and binding character of this mortgage by setting up a plea which might and ought to have been set up in the former suit. (Vide Exhibits B and B-1.) The learned Subordinate Judge has found on issue I that the question of the validity of the plaint mortgage is *res judicata* by reason of the former decision, but failed to give due effect to that finding when dealing with this objection, which is after all one of the grounds on which the validity and binding character of the mortgage can be questioned. We hold that the former decision operates as a bar to the trial of this particular ground of objection set up for invalidating the mortgage. Even on the merits, this objection seems to be futile for the reasons already set forth.

There are two other items of the claim as per schedules C and D. The amount of Rs. 6,729-4-1 is claimed to be due to the plaintiff on account of the enhanced assessment paid from time to time together with interest as provided for in the mortgage deed. A sum of Rs. 2,305-14-6 is claimed on account of the payments made in excess of Rs. 1,500 towards the discharge of prior debts. The particulars for this claim are set forth in schedule D. The lower Court has found the amount claimed in schedules C and D to be correct and due to the plaintiff. But, according to the terms of the mortgage deed, these sums are payable to the mortgagee at the time of redemption by the mortgagors when the final account should be taken. For the reasons already stated, we hold that there is no distinct personal covenant to pay these sums and therefore the plaintiff

has to continue in possession till the mortgage is redeemed by payment of these sums as also the sum of Rs. 4,000 which is the balance of principal still due. The present suit brought for the recovery of these sums by sale of the mortgaged properties is not sustainable.

In the result, the appeal is partly allowed and a decree is given in plaintiff's favour for a sum of Rs. 11,425-7-0 (on account of the arrears of rent claimed in schedule B) with subsequent interest thereon at six per cent per annum from the date of suit till the date fixed for payment and also proportionate costs in both the Courts, and thereafter with interest at six per cent per annum on the aggregate amount. Time for payment is four months from this date. In case of default in payment the mortgaged properties will be sold subject to the usufructuary mortgage lien of the plaintiff under Exhibit A. Liberty is reserved to him to bring a portion only of the mortgaged properties to sale for the realization of this decree amount free from such usufructuary mortgage lien. The respondents' costs in both the Courts, proportionate on the value of the claim disallowed, should be paid by the plaintiff.

A.S.V.

DAMODARA
v.
CHANDAPPU
PUJARY.
—
SUNDARAM
CHETTI J.

APPELLATE CIVIL.

Before Mr. Justice Krishnan Pandalai.

SUBBA NAICKER (PLAINTIFF), APPELLANT,

v.

SOLAIAPPA NAICKER AND FOUR OTHERS (DEFENDANTS
2, 3 AND 5 TO 7), RESPONDENTS.*

1933,
March 2.

Lunatic—Alienation by lunatic found such by inquisition—Invalidity of—Rule as to—Applicability of, to a case arising from the mofussil—Alienation made at a time when lunacy did not exist—Plea of—Permissibility—Order in lunacy—Conclusive nature of.

An alienation by a lunatic who has been found such by inquisition is entirely null and void, and it is not open to the alienee to show that at the time of the alienation the lunacy did not exist. This rule is applicable in India, as well to a case arising from the mofussil as to a case arising under the Indian Lunacy Act.

An order in lunacy, although it is not a judgment which is conclusive against the world as one of the judgments enumerated in section 41 of the Evidence Act, is still relevant and binding upon the parties thereto and those who claim under them just like any other judgment of a Civil Court. It is not therefore open to the lunatic to contend that the order finding that he was a lunatic on the date of the order was incorrect and a subsequent alienee from him is in the same circumstances.

APPEAL against the decree of the Court of the Subordinate Judge of Tuticorin in Appeal Suit No. 70 of 1927 preferred against the decree of the Court of the District Munsif of Tuticorin in Original Suit No. 175 of 1925.

T. V. Muthukrishna Ayyar and A. Swaminatha Ayyar for appellant.

S. Ramaswami Ayyar and R. Krishnaswami Ayyangar for respondents.

* Second Appeal No. 1743 of 1928.

JUDGMENT.

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NAICKER.

This suit was brought on a mortgage dated 10th August 1917 by the plaintiff as assignee from the mortgagee, the sixth defendant. Defendants one to three are the mortgagors. The fourth defendant since deceased was the father of the mortgagee and the fifth defendant is the son-in-law of the fourth defendant. The questions in dispute in this case arose from an order by the District Judge of Tinnevely adjudging the sixth defendant a lunatic by an interim order dated 28th October 1919 which was confirmed after security given on 16th January 1920 by which the fourth defendant, his father, was appointed guardian of the person and manager of the property of the sixth defendant. The assignment by sixth defendant of the mortgage was dated 11th June 1923, i.e., some three and a half years after the order in lunacy and while it was still in force. The sixth defendant soon after the assignment, i.e., on 17th July 1923, applied to have the order against himself set aside and it was set aside on 31st August 1923 on the ground that he had ceased to be insane.

The dispute in the case was based upon two contentions. First, the fifth defendant contended that the same mortgage right had been assigned to him by the deceased fourth defendant acting as the guardian of his lunatic son in March 1919 and that therefore the sixth defendant was himself incompetent to assign it a second time. This assignment both the lower Courts have rejected as affording any valid defence because the fourth defendant was not authorised to transfer the property of his son even though the latter were a lunatic because at the time of the alleged assignment he had not been appointed manager of the property and in fact had not even applied to be so appointed.

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The other defence of the mortgagors, defendants one to three, was that the plaintiff's assignment gave him no right to sue because it was executed at a time when the lunacy order was in force and when the management of the lunatic's property was entrusted to the fourth defendant who was appointed manager by the Court. On this question the District Munsif has really not said anything definite because he did not consider the question in that way. But he seemed to have considered that the order in lunacy was itself incorrect because it appeared to him to have been procured to defeat a suit brought against the sixth defendant by a creditor on a promissory note. On that ground he held that the sixth defendant was never really insane and that therefore the plaintiff's assignment was valid. As to this, however, although an order in lunacy is not a judgment which is conclusive against the world as one of the judgments enumerated in section 41 of the Evidence Act, it is still relevant and binding upon the parties thereto and those who claim under them just like any other judgment of a Civil Court. On that ground, to put it at the lowest, it is not open to the sixth defendant now to contend that the order finding that he was a lunatic on the date of the order was incorrect and the plaintiff who claims by a subsequent alienation of the sixth defendant's property is in the same circumstances. The plaintiff being therefore bound by the order as far as it goes, the real question is how far it does go? On the one hand the appellant says that in spite of the order it is open to a subsequent alienee from a lunatic so found on inquisition to show that at the time of the alienation the lunacy did not exist. On the contrary the respondents contend that a subsequent alienee is not entitled to give such proof because the alienation by the lunatic who has been found such by inquisition

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is of no effect whatever as the management of the property is by Court entrusted to the hands of the manager. This is really the only question in the appeal although several matters have been extensively argued. On this point there seems to be no Indian authority directly in point. The cases of *Debi Charan v. Raghuber Dayal*(1), *Bishambarnath v. Parbati*(2) and *Court of Wards v. Kupulmun Sing*(3) which were cited are really of no use to the point. But English authority is clear and conclusive. In *Walker (A Lunatic so found)*, *In re*(4) the Court of Appeal held:

"When a person has been found lunatic by inquisition, so long as the inquisition has not been superseded, but continues in force, he cannot, even during a lucid interval, execute a valid deed dealing with or disposing of his property."

"The Court will not recognize such a deed even by directing proceedings to be taken to try the question of its validity or to perpetuate testimony as to the state of the lunatic's mind when it was executed, but will treat the deed as entirely null and void."

All the authorities on the subject were there cited in argument and are dealt with by the Lords Justices. This conclusion was arrived at even though VAUGHAN WILLIAMS L.J. said:

"We should have been glad if we could have found a means of according such powers (removing restrictions from lunatics dealing with their property in their lucid intervals) consistently with the protection of lunatics; but we have not been able to find any such means."

And COZENS-HARDY L.J., citing Lord COKE, said:

"And therefore after the office found thereof, the alienation, gift, etc., of him who is *non compos mentis* are in equal case with the alienation or gift of an idiot."

He referred to the authorities which were cited to show that an issue as to the state of mind of the lunatic

(1) (1912) 16 I.C. 885.

(3) (1873) 10 Ben. L.R. 364.

(2) (1918) 52 I.C. 609.

(4) [1905] 1 Ch. 160.

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when the deed in question was executed might be set down for trial and explained that in every one of them the deed in question had been executed before, not after, inquisition found.

"It cannot be right that the Crown, or the committee who represents the Crown", (here the Court), "should have the control and management of the lunatic's estate, and at the same time that she should have power to dispose of her estate as she thinks fit."

This case was followed in *In re Marshall. Marshall v. Whateley*(1). Learned Counsel for the appellant has stated that he is not aware of any authority to the contrary. Such being the state of the authorities in England I am unable to see why the law should be different in the exercise of lunacy jurisdiction under the Indian Lunacy Act. This case no doubt arises from the mofussil and the authority of the Act is not traceable to the law which the Supreme Court began to administer on its establishment. The only remark possible upon the decisions I have referred to is that they refer to a system of law which had its origin in the Lord Chancellor's jurisdiction over lunatics and the jurisdiction of the mofussil Courts over lunatics is entirely dependent upon Indian Legislation. But I see no sufficient ground in this circumstance not to apply the rule enunciated in the English decisions. On this ground the plaintiff's suit was rightly dismissed. The second appeal must be dismissed with costs.

A.S.V.

(1) [1920] 1 Ch. 284.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.

S. AYYASWAMI AYYAR (PETITIONER), APPELLANT,

1932,
October 18.

v.

SIVAKKIAMMAL (RESPONDENT), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 145—Policy underlying—Sureties not personally liable—Applicability of section to such cases—Appealability of orders of Court against such sureties.

Section 145 of the Code of Civil Procedure, 1908, applies only to cases where sureties have made themselves personally liable. But even where sureties have not made themselves personally liable, the Courts possess a general power in regard to executing orders made against sureties, and in such cases, having regard to the decision of the Privy Council in *Raj Raghubar Singh v. Jai Indra Bahadur Singh*, (1919) I.L.R. 42 All. 158 (P.C.), and the policy underlying section 145, the sureties' remedy by way of appeal subsists.

APPEAL against the order of the Court of the Subordinate Judge of Madura, dated the 1st March 1930, in Execution Application No. 747 of 1929 (Execution Petition No. 101 of 1928) in Original Suit No. 13 of 1919, Subordinate Judge's Court, Mayavaram.

K. V. Sessa Ayyangar for appellant.

C. A. Seshagiri Sastri for respondent.

The ORDER of the Court was delivered by VENKATASUBBA RAO J.—Mr. Seshagiri Sastri for the respondent takes an objection *in limine* that the present appeal is incompetent. The point to be decided is, whether an appeal lies against the order in question. The facts may be briefly stated.

VENKATA-
SUBBA RAO J.

* Appeal against Order No. 481 of 1930.

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 AYYAR
 v.
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 —
 VENKATA-
 SUBBA RAO J.

One Chellammal executed a deed of mortgage in favour of Sivakkiammal, the respondent. In a suit (Original Suit No. 13 of 1919 on the file of the Mayavaram Sub-Court), subsequently brought by Chellammal's husband, Ramachandra Ayyar, against Ayyaswami Ayyar the appellant, Ramachandra Ayyar was appointed receiver. He was directed to furnish security, and Chellammal executed on 24th July 1917 a security bond in favour of the Court creating a charge over the property already mortgaged to Sivakki. Sometime later, Chellammal executed another mortgage in favour of one Ramaswami Ayyangar. Sivakki then filed a suit on foot of her mortgage (Original Suit No. 239 of 1922 on the file of the Munsif's Court, Madura). At that time she alleges she was not aware of the security bond executed in favour of the Mayavaram Sub-Court. Naturally, while she impleaded Ramaswami Ayyangar as a party, she did not add as defendant any person claiming an interest under the security bond in question. Even if she was aware of the security bond, she would have had a difficulty in deciding as to whom she should add as a party, the charge having been created in favour of the Court. Sivakki in due course obtained a decree, brought the property to sale and on 1st February 1926 purchased it herself in Court-auction and, in October following, she was put in possession. Subsequently Ayyaswami Ayyar instituted proceedings in Original Suit No. 13 of 1919 against the surety, Chellammal, obtained an order against her and got it transferred to the Madura Munsif's Court for execution. To those proceedings Sivakki was not a party. The order was executed, the charged property was brought to sale and Ayyaswami Ayyar himself purchased it in Court-auction some time after 30th July 1928. Then, finding that the property was in the possession of Sivakki, he moved

the Court, complaining of her obstruction, to remove her from the property, and the lower Court has made an order rejecting the application. The present appeal is from that order.

Mr. Seshagiri Sastri for the respondent contends that the order against the surety cannot be deemed to be one under section 145 of the Code of Civil Procedure. The order was for the sale of Chellammal's immovable property, and the section applies only where a surety has made himself personally liable. If section 145 does not apply, the learned Counsel contends that Chellammal cannot be deemed to be a party to the suit (Original Suit No. 13 of 1919) within the meaning of section 47. It is true that to the proceeding in question section 145 does not apply, and we must regard that the order against the surety was made, not under the terms of that section, but under the general power which the Judicial Committee has held the Courts possess in regard to executing orders made against sureties; *Raj Raghubar Singh v. Jai Indra Bahadur Singh*(1). But the very judgment of the Judicial Committee shows that what was contemplated was an order in the suit itself (see page 167), and the implication is that the surety was dealt with as if he was a party to the suit. Section 145, while it prescribes a remedy against the surety also provides for the surety's remedy by way of appeal. When their Lordships of the Judicial Committee held that there was power outside section 145 to proceed against the surety, they could not have intended to deprive him of the remedy which he would have had had the proceedings been taken under section 145. Their Lordships point out that the surety was not a party to the suit at the stage of the fixation

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(1) (1919) LL.R. 42 All. 158 (P.C.).

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of mesne profits, that is to say, before the execution commenced. But, having regard to their Lordships' decision and the policy underlying section 145, we must hold that it was not intended that the surety's rights should in this respect be abridged.

The only other point bearing on the preliminary objection is whether Sivakki is the representative in interest of Chellammal. Sivakki by reason of her purchase became the assignee of Chellammal's equity of redemption. This has not been seriously disputed.

In the result, we must disallow the preliminary objection.

The questions raised in the appeal itself are similar to those raised in Civil Miscellaneous Second Appeal No. 182 of 1931*, which a Bench has suggested may be heard by three Judges. Subject to the orders of the Chief Justice it appears to us convenient that this appeal should be heard by the same Bench of three Judges.

G.R.

* [The Opinion of the Full Bench in Civil Miscellaneous Second Appeal No. 182 of 1931 and in this Civil Miscellaneous Appeal appears at pages 845 to 878 herein.]

APPELLATE CRIMINAL.

Before Mr. Justice Burn.

ARUNACHALA ASARI (COUNTER-PETITIONER), PETITIONER,

1933,
 April 27.

v.

ANANDAYAMMAL (PETITIONER), RESPONDENT.*

*Criminal Procedure Code (Act V of 1898), sec. 488—Scope of
 —Ordinary conjugal rights—Whether sec. 488 includes.*

In a wife's application for maintenance under section 488 of the Criminal Procedure Code, the husband offered maintenance in his house provided she lived in a separate room and did not associate with the other family members. The lower Court upheld the wife's refusal to accept maintenance on such conditions, and ordered the maintenance prayed for. Objection to such order being taken on revision,

Held, that section 488 of the Code had nothing to do with ordinary conjugal rights, as "maintenance" means nothing more than appropriate food, clothing, and lodging, and that the wife had no sufficient grounds for refusing the offer, as she could not claim to be treated "as a 'wife'" under section 488.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subdivisional First-class Magistrate of Salem, dated 31st day of October 1932 and made in Miscellaneous Case No. 53 of 1932.

K. S. Jayarama Ayyar and R. Sundaralingam for petitioner.

Public Prosecutor (L. H. Bewes), T. Krishnaswami Ayyangar and S. K. Narasimhachari for respondent.

* Criminal Revision Case No. 24 of 1933.

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ORDER.

I cannot see that section 488 of the Criminal Procedure Code has anything to do with ordinary conjugal rights; it deals with "maintenance" only and I see no reason why maintenance should be supposed to include anything more than appropriate food, clothing and lodging.

On the facts of this case it is clear that the husband has offered to give his wife maintenance in his house but he wants her to live in a separate room and not to associate with the other members of his family. She has refused this offer and in my opinion she has no sufficient grounds for refusing. She cannot claim under section 488 of the Code of Criminal Procedure to be treated "as a wife"; she can only claim to be maintained on a scale appropriate to her station in life.

The order for payment of separate maintenance is therefore unsupportable, and I set it aside.

K.W.R.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Ramesam, Mr. Justice Anantakrishna Ayyar
and Mr. Justice Cornish.*

M. PARAMASIVAN PILLAI (PETITIONER), APPELLANT,

v.

A. V. R. M. S. P. S. RAMASAMI CHETTIAR
(THIRD RESPONDENT), RESPONDENT.*

1933,
January 20.

Civil Procedure, Code of (Act V of 1908), O. XL, r. 1—Receiver—Appointment of, on application by simple mortgagee who had lost personal remedy against mortgagor—Letters Patent (Madras), Cl. 15, if controlled by sec. 104 of the Code of Civil Procedure.

Even in a case where no personal relief subsists against the mortgagor and his properties, the Court has jurisdiction to order the appointment of a receiver in the suit of a simple mortgagee.

Section 104 of the Code of Civil Procedure does not control Clause 15 of the Letters Patent and as such an appeal lies from the judgment of a single Judge of the High Court in an appeal preferred under Order XLIII, rule 1, clause (s), of the Code of Civil Procedure.

Case-law on both the above points reviewed.

APPEAL under Clause 15 of the Letters Patent against the judgment of KRISHNAN PANDALAI J., dated the 21st day of September 1932, and made in Appeal Against Order No. 375 of 1931 preferred to the High Court against the order of the Court of the Subordinate Judge of Tuticorin, dated the 16th day of October 1931, in Interlocutory Application No. 346 of 1931 in Original Suit No. 43 of 1929.

K. S. Ramabhadra Ayyar for respondent.—This appeal is incompetent. Having regard to the provisions of section 104 (2) of the Code of Civil Procedure no further appeal lies from the

* Letters Patent Appeal No. 59 of 1932.

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judgment in an appeal preferred under Order XLIII, rule 1, of the Code. Under section 103 of the Government of India Act the Judges of the High Court derive power to decide cases sitting alone or in Benches of two or more Judges. To the same effect is clause 36 of the Letters Patent (Madras). The amendments of 1919 and 1928 curtailed the powers of the High Court.

[ANANTAKRISHNA AYYAR J.—Are not *Muthuvaian v. Periasami Iyen*(1) and other cases following it against your submission?]

The case of *Piari Lal v. Madan Lal*(2) is directly in point.

[RAMESAM J.—The Madras High Court has been taking a view different from that of the Allahabad High Court in this matter; see *Chappan v. Moidin Kutti*(3). In *Dhanaraju v. Balakissendas Motilal*(4) it was held that when there is a conflict between the Code and the Letters Patent the latter should prevail. We are against you on this point.]

K. V. Sessa Ayyangar and *R. Viswanadhan* for appellant.—Under Order XL, rule 1, of the Code of Civil of Procedure, a Court is entitled to appoint a receiver whenever it is “just and convenient”. In the case of property mortgaged, if the mortgagor is guilty of waste or if the property deteriorates and there are heavy arrears of interest, the Court generally allows the application for the appointment of a receiver. Section 96 of the Transfer of Property Act puts the equitable mortgagee and simple mortgagee on the same footing. In *Khoo Joo Tin v. Ma Sein*(5) a receiver was appointed on the application of an equitable mortgagee. See also *Maharajah of Pittapuram v. Gokuldoss Goverdhandoss*(6) and the observations in *Khubsurat Koer v. Saroda Charan Guha*(7) and *Venkata Rajah Gopala Surya Row Bahadur v. Basivi Reddi*(8). In *Ethirajulu Chetti v. Rajagopalachariyar*(9) a receiver was appointed at the instance of a simple mortgagee; see also *Vibhuda Priya v. Lakshmindra*(10). In *Weatherall v. Eastern Mortgage Agency Co.*(11) and in *Venkata Rajah Gopala Surya Row Bahadur v. Basivi Reddi*(8) the personal remedy was barred,

(1) (1903) 13 M.L.J. 497.

(3) (1898) I.L.R. 22 Mad. 68 (F.B.).

(5) (1928) I.L.R. 6 Bang. 261.

(7) (1911) 14 C.L.J. 526.

(9) (1928) I.L.R. 52 Mad. 979.

(11) (1911) 13 C.L.J. 495.

(2) (1906) I.L.R. 39 All. 191.

(4) (1929) I.L.R. 52 Mad. 563 (F.B.).

(6) (1931) I.L.R. 54 Mad. 565.

(8) (1914) 29 M.L.J. 457.

(10) (1927) I.L.R. 50 Mad. 497 (P.C.).

nevertheless a receiver was appointed. In *Manindra Chandra v. Suniti Bala Debi*(1) the Court held that in a foreclosure suit before foreclosure is ordered it had power to appoint a receiver when the security is insufficient. The property is security for the debt. If the interest is in arrears it is just and reasonable that a receiver should be appointed to collect the income to keep down interest. In *Jaikissondas Gangadas v. Zenabai and Kazi Mahomed Miya Dada Miya*(2) it was held that the Indian High Courts possess the same powers with regard to the appointment of a receiver as are possessed and exercised by the Courts in England under the Judicature Act. [Reference was made to Kerr on Receivers, 1930 edition, page 35; Alderson on Receivers, pages 607 and 618; Halsbury's Laws of England, Vol. 24, page 396, section 751; Fisher on Mortgages, seventh edition, page 359; Coote on Mortgages, ninth edition, page 958.]

K. S. Ramabhadra Ayyar for respondent.—When the preliminary decree was passed the appellant gave up his right to have a personal decree. After the preliminary decree is passed the procedure prescribed in Order XXXIV of the Code should be faithfully followed. There is no provision in Order XXXIV for the appointment of a receiver between the stage of preliminary decree and that of final decree. Order XL has no application to proceedings during this stage. Inasmuch as the appellant has given up his right to have a personal decree, he cannot apply under Order XXXIV, rule 6. His only right is to bring the property to sale and be satisfied with the proceeds of sale; see *Makhan Lal v. Mushtaq Ali*(3). Equitable execution by way of appointment of receiver is an exceptional relief and ought not to be given when executing mortgage decrees. Order XXI, rule 11, read with section 51, of the Code makes it clear that no receiver could be appointed when a money decree is passed unless the decree itself directs that a receiver should be appointed. In *Shridevi Amma v. Valia Narayan*(4) it was held that a simple mortgagee had no right to have a receiver appointed. Some cases have followed the English cases and held that a receiver could be appointed at the instance of one holding an equitable mortgage or a mortgage by deposit of title deeds. The principle underlying

(1) A.I.R. 1926 Cal. 1006.

(3) (1927) 100 I.O. 735.

(2) (1890) I.L.R. 14 Bom. 481.

(4) A.J.R. 1929 Mad. 20.

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[ANANTAKRISHNA AYYAR J.—This Court has always dissented from that case.]

The cases decided by this Court require reconsideration.

[Reference was made to *Holmes v. Millage*(2), *Wills v. Luff*(3) and *Musammatt Brij Indar Kuar v. Thakur Jai Indar Bahadur Singh*(4).]

K. V. Sesha Ayyangar.—Order XXXIV does not exhaust all the remedies of a mortgagee. It is controlled by the other provisions of the Code.

Cur. adv. vult.

JUDGMENT.

RAMESAM J.—This is a Letters Patent Appeal against the order of our brother KRISHNAN PANDALAI J. in Civil Miscellaneous Appeal No. 375 of 1931. When the appeal came on for admission before our brothers REILLY and VENKATASUBBA RAO JJ., while admitting it they directed it to be posted before a Bench of three Judges on the ground that the appeal raised a very important question on which conflicting views were expressed.

The facts of the case are as follows: The first defendant executed a deed of mortgage in favour of one Krishna Pillai on 30th May 1924 for Rs. 20,000. The present first plaintiff is his brother, the second and third plaintiffs and the seventh defendant are his nephews and the fourth plaintiff is his grand-nephew. Krishna Pillai died, and in the family arrangement entered into after his death the mortgage document fell to the share of the plaintiffs and the seventh defendant. The second defendant is the undivided brother of the first defendant. The property that was originally mortgaged was the *othi* right in the suit properties created in favour of first defendant by one Dathaprakasam Pillai but after

(1) (1917) 43 I.O. 533.
(3) (1888) 38 Ch. D. 197.

(2) (1893) 1 Q.B. 551.
(4) (1932) 53 M.L.J. 658 (P.O.).

the suit mortgage, i.e., on 28th November 1928, defendants 1 and 2 purchased the whole proprietary right in the properties. The third defendant is the son of the purchaser of the properties from defendants 1 and 2 under a sale deed dated 23rd February 1929. Under the sale deed he was directed to pay Rs. 24,500 towards the suit debt. He offered to pay the said amount in complete discharge of the mortgage but the plaintiffs refused to accept it on the ground that more was due to them with the result that the amount remained unpaid. On the 29th September 1930 a preliminary decree was passed in favour of the plaintiffs for Rs. 20,000 with interest at the rate of thirteen and a half per cent per annum from the date of the plaint which amounted to nearly Rs. 37,000. In August 1931 the plaintiffs applied for the appointment of a receiver of the suit properties on the ground that the properties were scarcely enough for discharging the decree and that there was no other means of realising the decree amount. The Subordinate Judge passed an order holding that this was a fit case for the appointment of a receiver and directed the receiver to take possession of the properties from 1st November 1931. There was an appeal to the High Court by the third defendant and it was followed by an application for the stay of the order of the Subordinate Judge. The order was stayed on the appellant giving security. The matter came on before our brother KRISHNAN PANDALAI J. who reversed the order of the Subordinate Judge on 21st September 1932. This Letters Patent appeal comes on before us in due course.

The Subordinate Judge found that after the purchase by the third defendant nothing was paid to the plaintiffs. He disbelieved the third defendant's story that the plaintiffs refused to receive the amount on account of

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dissensions among themselves. He observed that there was a prior application for the appointment of a receiver during the pendency of the suit and that it was dismissed, but he thought that this circumstance did not matter as at the time of the present application a much larger amount was due to the plaintiffs than at the time of the earlier application. It also appeared that the value of the hypotheca was going down day by day. The third defendant also relied on the fact that the plaintiffs gave up their right to get a personal decree against the mortgagors but the Subordinate Judge thought that that circumstance did not matter. On appeal our brother KRISHNAN PANDALAI J. observed:

"If this appeal depended on the above or similar considerations which affect receiver applications in ordinary simple mortgage suits, I should have no hesitation in confirming the order of the learned Judge."

He referred to *Khubsurat Koer v. Saroda Charan Guha*(1) and *Rameshwar Singh v. Chuni Lal Shaha*(2) referred to with approval in *Maharajah of Pittapuram v. Gokuldoss Goverdhandoss*(3). He finally concluded thus:

"I am satisfied that the likelihood is that the property will not be enough for the mortgage debt and that the appellant realising this is trying to delay the realisation of the debt as long as possible as it is profitable for him to do so. On the merits I am against the appellant."

But he thought he ought to allow the appeal on the ground that the plaintiffs having given up their right to personal remedies against the mortgagors the application for the appointment of a receiver amounted to an attempt to get through the machinery of a receiver what they had given up. He therefore allowed the appeal.

Mr. Ramabhadra Ayyar for the respondent took two preliminary objections to the hearing of this appeal.

(1) (1911) 14 O.L.J. 526.

(2) (1919) I.L.R. 47 Calo. 418.

(3) (1931) I.L.R. 54 Mad. 565.

First he relied on the fact that the property has since been brought to sale and purchased by the decree-holder and therefore this appeal is infructuous and is merely academic. To this the appellant replies that the receiver not having been allowed to take possession of the property in accordance with the order of the Subordinate Judge he is entitled to the profits of the property for the interval between the order of appointment and the purchase by him in auction and if he succeeds in this appeal he can recover it by realising the security furnished by the third defendant. There is no reply to this argument of the appellant. And though it is a pity that this appeal which has taken considerable time has to be heard solely for the purpose of settling the dispute about the profits for about a year, still we cannot refuse to hear the appeal as the learned Judges who referred the appeal observed that the point involved was an important one.

Secondly, Mr. Ramabhadra Ayyar contended that under Order XLIII, rule 1, the order of KRISHNAN PANDALAI J. was final and no Letters Patent appeal lay against his order. This question was the subject of consideration by several Judges of this Court under the old Code and, though at one time a different rule prevailed [vide *Vasudeva Upadyaya v. Visvaraja Thirthasami*(1)], after the Full Bench decision in *Chappan v. Moidin Kutti*(2), which was a decision of six Judges and where all the prior cases were considered, and the later case of *Muthuwaian v. Periasami Iyen*(3), the practice of this Court has been uniformly to hold that the Civil Procedure Code does not control the clause of the Letters Patent. That principle has been applied in

(1) (1897) I.L.R. 20 Mad. 407.

(2) (1898) I.L.R. 22 Mad. 68 (F.B.).

(3) (1903) 13 M.L.J. 487.

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other decisions of this Court, for example, *Dhanaraju v. Balakissendas Motilal*(1). It is true that the Allahabad High Court has been always following a different rule both under the new Code and under the old Code, but the practice of this Court has been different. There is nothing in the language of the new Code to show that the Legislature intended to lay down a principle different from that in the old Code.

The preliminary objections are overruled.

Coming to the merits of the case, the earliest decision of this Court on this matter is that of *Arunachellam Chettiar v. Manicka Varaher Desikar*(2). The question was not elaborately examined in that case. The matter next came up for discussion before OLDFIELD and SADASIVA AYYAR JJ. in *Venkata Rajah Gopala Surya Row Bahadur v. Basivi Reddi*(3). OLDFIELD J. referred to the English cases. He pointed out that in *In re Pope*(4) it was said that a Court of Equity would not grant a receiver where the party applying had a legal right to possession; an equitable mortgagee could get a receiver but a legal mortgagee could not before the Judicature Act. It would now seem that in England after the Judicature Act even a legal mortgagee can get a receiver. He referred to some decisions under the Code of 1882 and distinguished them on that ground. The present Order XL, rule 1, uses language much wider than the language of the old Code, the words "just and convenient" being adopted from the Judicature Act. Then after referring to the case of *Arunachellam Chettiar v. Manicka Varaher Desikar*(2) he relied on *Weatherall v. Eastern Mortgage Agency Co.*(5), *The Eastern Mortgage and Agency Company, Limited v.*

(1) (1929) I.L.R. 52 Mad. 563 (F.B.).

(2) (1909) 8 M.L.T. 238.

(3) (1914) 29 M.L.J. 457.

(4) (1886) 17 Q.B.D. 743.

(5) (1911) 13 C.L.J. 495.

Rakea Khatun(1) and *Kubsurat Koer v. Saroda Charan Guha*(2). In the first two cases the Court held that default in payment of interest justified the appointment of a receiver. In *Kubsurat Koer v. Saroda Charan Guha*(2) the appointment of a receiver was refused on the ground that there was a decree for foreclosure but the Court said that, if it had been for sale and if it had been established that the security was not sufficient to satisfy the judgment debt, a receiver would have been appointed almost as a matter of course, especially if there was default in payment of interest. The other learned Judge, SADASIVA AYYAR J., held that, as under that particular decree the right of the mortgagee to proceed against the other properties was barred, it was not a fit case for the appointment of a receiver for rents and profits. It does not appear that the learned Judge meant to lay down any general rule of law that where a decree for sale has been obtained on a simple mortgage no receiver should be appointed or even where the personal remedy against the mortgagor did not exist there should never be a receiver. The learned Judge's language seems to indicate that on the particular facts of that case he thought it was not a fit and proper case for the appointment of a receiver.

In the present case the third defendant purchased the property with knowledge of the prior mortgage of the plaintiffs and obviously it was intended that he should discharge the mortgage debt due to them. Unfortunately there seems to have been a mistake in calculation, because the vendors said only Rs. 24,500 was due, and asked the vendee to pay the amount, who offered only that amount, but it turned out that more was due to the plaintiffs, and, if his purchase of the

(1) (1912) 16 C.W.N. 997.

(2) (1911) 14 C.L.J. 526.

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property was to completely enure to his benefit, it was the vendee's duty to pay off the whole of the prior mortgage debt. An arithmetical error on the part of the vendor does not justify the debt being allowed to remain unpaid and from that date up to this the fact remains that not even interest was paid and the debt still remains unpaid. Under these circumstances the mortgagees having primarily to look to the mortgaged property as security and the mortgagors and the third defendant having intended that the third defendant should pay off the debt, it is futile to urge in this case that the mortgagees having given up their personal remedy against the mortgagors, that should be a circumstance against the appointment of a receiver. In my opinion that circumstance has no bearing on the question whether a receiver should be appointed for the property now in the hands of the third defendant, he having undertaken the payment of the debt.

In *Ethirajulu Chetti v. Rajagopalachariyar*(1) the whole question was examined by KUMARASWAMI SASTRI J. and the learned Judge came to the conclusion that a receiver could be appointed on the application of a simple mortgagee and all the earlier English and Indian decisions were elaborately discussed.

In *Maharajah of Pittapuram v. Gokuldoss Goverdhan-doss*(2) this decision was followed by MADHAVAN NAIR J. It is true that MADHAVAN NAIR J.'s judgment is distinguishable as pointed out by TERRELL C.J. in *Nrisingha Charan v. Rajniti*(3). The actual question before him was not whether a receiver should be appointed but whether a receiver having been previously appointed at the instance of the mortgagee the rents and profits should be applied for his benefit; but the fact still

(1) (1928) I.L.R. 52 Mad. 979.

(2) (1931) I.L.R. 54 Mad. 565.

(3) A.I.R. 1932 Pat. 360.

remains that the learned Judge agreed with the earlier decision of KUMARASWAMI SASTRI J.

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In *Rameshwar Singh v. Chuni Lal Shaha*(1) also the same view was taken, though that case may be distinguished just as the decision of MADHAVAN NAIR J. was distinguished on the ground that there was a prior order for the appointment of a receiver.

The decision in *Khoo Joo Tin v. Ma Sein*(2) is also in favour of the same view but, as that decision is based upon an earlier ruling of the Burma Chief Court by which the learned Judges held themselves to be bound, it is unnecessary to refer to it any further.

The decision of our brothers, VENKATASUBBA RAO and REILLY JJ., in *Ponnu Chettiar v. Sambasiva Ayyar*(3), in which some of these cases are referred to was also a case where the appointment of a receiver had been previously obtained. REILLY J. made observations in that judgment warning against the danger of relying on English decisions on mortgages and applying them to India. I agree that the English decisions ought to be used with great caution. There are observations in that judgment to the effect that a simple mortgagee can obtain the appointment of a receiver only in cases where the personal remedy subsists. The point did not arise in the case.

Two decisions which are opposed to the series of authorities referred to above may now be mentioned. One is *Gobind Ram v. Jwala Pershad*(4), a decision of RICHARDS C.J. and BANERJI J. It was held that a simple mortgagee cannot obtain the appointment of a receiver and that the mortgagor is entitled to remain in possession until the property was sold. The other is a recent decision of TERRELL C.J. and FAZL ALI J. in

(1) (1919) I.L.R. 47 Cal. 418.

(2) (1928) I.L.R. 6 Rang. 261.

(3) (1932) I.L.R. 56 Mad. 546.

(4) (1917) 43 I.C. 533.

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Nrisingha Charan v. Rajniti(1) already referred to. In the first of these cases the underlying idea was that the right to the appointment of a receiver depended on the right to obtain possession. Now it is true, as has been observed in some of these cases, the right of a simple mortgagee is primarily to proceed against the secured property and not against the other properties of the mortgagor unless there is a personal remedy. If the personal remedy is lost, there is no right to proceed against the other properties of the mortgagor. It is also true that a simple mortgagee is not entitled to possession of the mortgaged property as a mortgagee. But where a mortgagee seeks to obtain the appointment of a receiver he does not proceed against the other properties of the mortgagor but wants to proceed against the mortgaged property itself. The underlying idea in the opposite view is that, the profits of the property not being mortgaged, the mortgagee is really trying to proceed against property other than the mortgaged property. But if the idea is carefully examined it seems to me there is a fallacy. In the first place the mortgagee never seeks to obtain possession for himself. Secondly the attempt to place the property in the hands of the receiver is really proceeding against the property so as to utilize it for the discharge of the debt. Now, profits of property are an accession to the property and proceed out of it. When the property is taken from the hands of the mortgagor and placed in the hands of the receiver, the receiver has to get it cultivated and derive income from it and that income has to be utilized for the benefit of the mortgagee. It is not that the fruits of the mortgagor's labour bestowed on his land are to be taken away from him. If the crops on the mortgaged

property were raised by him, it may be said that is proceeding against property other than the mortgaged property. But where the property itself is taken away from his hands and is kept in the receiver's hands who has to make arrangements for its being cultivated and ultimately get profits from it, the whole proceeding is a proceeding against the mortgaged property.

The matter can be looked at from another point of view. If a decree is promptly passed and the property is sold, the amount realized by the sale goes to the benefit of the mortgagee and from the time he receives the amount he gets interest on it. But instead of the sale promptly following the suit if there is delay, during all the time the sale is delayed the mortgagor will be enjoying the profits of the property which would have been enjoyed by the mortgagee in the shape of interest on the mortgage money if there had been an early sale. The profits of the property correspond to the interest on the money when once it is sold and converted into money; and wherever the mortgagor does not keep down the interest, he is really enjoying the profits of the property which in one sense represent the property which would have belonged to the mortgagee but for the delay. Anyhow it is not correct to say, where the attempt is to realize the debt secured out of the profits of the property and appropriate it towards the mortgage debt, it is the same as proceeding against other property. For these reasons I am not able to agree with the decision in *Gobind Ram v. Jwala Pershad*(1). The reasoning of TERRELL C.J. in the Patna decision proceeds on a somewhat different line. His judgment proceeds on the ground that an equitable mortgagee's right to get a receiver appointed was based on his right to be

(1) (1917) 43 I.O. 533.

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put by the Court into the position of a legal mortgagee. In the first place the passages in Coote on Mortgages, where the position of an equitable mortgagee is discussed, show that, unless there is an express covenant for getting possession under certain circumstances, the equitable mortgagee is not entitled to possession, and it would not be correct to say that the English decisions allowing a receiver to be appointed in the case of an equitable mortgagee depended on his right to possession. On the other hand the observations in *In re Pope*(1) show that the appointment of a receiver in the case of an equitable mortgage was based on just the opposite ground. It is because an equitable mortgagee is not entitled to possession it was said that a receiver should be appointed, and it was refused in the case of a legal mortgage. Whatever may be the position of an equitable mortgagee under English law, an equitable mortgagee under Indian law is merely a creature of the Transfer of Property Act. Under the Transfer of Property Act an equitable mortgagee has no right to possession. His only right is to obtain a decree for sale. I am not aware of any decision where it has been held that an equitable mortgagee is entitled to ask and demand possession of the mortgaged property. I am therefore unable to concur with the statement of TERRELL C.J.:

"The same difference therefore between a simple mortgagee under Indian Law and a legal mortgagee under English Law exists between a simple mortgagee and an equitable mortgagee."

Far from there being such a difference, at least in the matter of obtaining possession, a simple mortgagee and an equitable mortgagee seem to stand on the same footing. In both, the mortgagee is not entitled to

possession and it is on the consideration that a mortgagor who continues to enjoy the property without paying down the interest from out of the profits of the property may be said to be from an equitable point of view committing a breach of his undertaking, and where there are other circumstances such as the property being insufficient, that Courts have to proceed to appoint receivers in the case of equitable mortgages. The Madras and Calcutta cases appointing receivers in the case of equitable mortgages cannot be distinguished on the ground suggested by TERRELL C.J. The other learned Judge, FAZL ALI J., agrees with the conclusion and has based his reasons on the ground that the case before him was not a fit one for the appointment of a receiver. He said nothing on the right of a simple mortgagee or an equitable mortgagee. For these reasons, with great deference, I am unable to agree with the Allahabad and Patna decisions referred to above and agree with the large current of authority in favour of the appointment of a receiver even in the case of a simple mortgage. The decision in *Rajah Satrucherla Gangaraju v. Rajah of Jeypore*(1) is a case where the Judges thought that, on the facts, it was not a case for the appointment of a receiver of property other than the mortgaged property and lays down no proposition of law. Of course I must not be understood as saying that a simple mortgagee is entitled to the appointment of a receiver as a matter of course. During the pendency of the suit there may be questions about the proof of the document itself, and even after the decree the circumstances may not be such as to entitle him to such an appointment. Where interest is allowed to accumulate into heavy arrears and the security becomes

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(1) (1886) 17 Q.B.D. 743.

(1) (1925) 23 L.W. 650.

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inadequate thereby, I should say that such a case may be a fit one for the appointment of a receiver. Again where a defendant-mortgagor or a purchaser from him undertakes to pay the interest during the pendency of the suit and until the property is brought to sale, the appointment of a receiver ought to be refused. But where a person in the position of the third defendant in this case has not paid any amount for several years towards the mortgage debt and where, as has been found by the Subordinate Judge and KRISHNAN PANDALAI J., there are no merits in favour of the appellant, that would be a fit case for the appointment of a receiver.

The learned Advocate for the respondent relied on on a case in 62 Madras Law Journal, page 35 (short notes)—an interlocutory order of CURGENVEN J. But that case merely illustrates what I said. In that case the learned Judge directed that the interest should be paid regularly and observed that no receiver should be appointed so long as that direction was obeyed.

A decision of myself and JACKSON J., *Shridevi Amma v. Valia Narayan*(1), was referred to as showing that a simple mortgagee has no right to the appointment of a receiver. What we meant in that case was that he has no absolute right to insist on the appointment of a receiver and not that if the circumstances were such the Court may not exercise the discretion in appointing a receiver. We simply decided in that case that no appeal lay and we were trying to show that there was no hardship by so holding. That case does not help the respondent.

In my opinion a simple mortgagee is not disentitled to obtain the appointment of the receiver, if the other circumstances are such as to justify it, merely on the

(1) A.I.R. 1929 Mad. 20.

ground that no personal remedy subsists to proceed against the other properties of the mortgagor. The appointment of a receiver is only a mode of execution (section 51 of the Code)—to be used, no doubt, with caution and sound judicial discretion. It was ordered by the Judicial Committee in a simple money decree; *Vibhuda Priya v. Lakshmindra*(1). Why should the simple mortgagee be in a worse position than the holder of a money decree? If it is said that he has taken property as security, what about the case when it has become insufficient? I would therefore allow this appeal with costs before us and KRISHNAN PANDALAI J. The costs will be assessed on the amount of Rs. 1,600 (vide Civil Miscellaneous Petition No. 31 of 1933), i.e., the appellant will get the minimum fee.

ANANTAKRISHNA AYYAR J.—This Letters Patent Appeal has been preferred against the decision of KRISHNAN PANDALAI J. in Civil Miscellaneous Appeal No. 375 of 1931, in which, though the learned Judge held on the merits that a case for the appointment of a receiver had been made out, yet he reversed the order of the Subordinate Judge of Tuticorin appointing a receiver in respect of the property which was the subject-matter of the mortgage suit, on the ground that the Court had no jurisdiction to appoint a receiver since the plaintiffs had given up the right to personal relief against the mortgagor.

The first defendant executed a simple mortgage on 30th May 1924 for Rs. 20,000 in favour of the joint family represented by the plaintiffs in the suit. The mortgagor sold the equity of redemption to the third defendant on 23rd February 1929. The suit was instituted on 6th September 1929 to recover the amount

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(1) (1927) I.L.R. 50 Mad. 497 (P.C.).

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due on the mortgage. As interest had not been paid for a long period, the amount due on the date of the preliminary decree on 29th September 1930 in respect of principal and interest came to nearly Rs. 37,000. On 14th August 1931, an application (Interlocutory Application No. 346 of 1931) was filed by the plaintiffs to have a receiver appointed in respect of the mortgaged properties. The application was made on the grounds, among others, that the value of the suit properties was going down day by day, that the present value of the suit properties was not sufficient to meet the decree amount, that interest had not been paid for years, and that the third defendant, who had undertaken in the sale deed taken by him from the mortgagor to pay off the plaintiffs' mortgage and also to pay interest to the plaintiffs, had not done so but was trying to prolong litigation with a view to enjoy the income of the properties for as long a period as possible. The mortgaged properties consisted of a compound and twenty houses in Tuticorin yielding a gross annual rent of Rs. 2,316 and a net income of about Rs. 1,300. The Subordinate Judge of Tuticorin appointed a receiver by his order dated 16th October 1931. The learned Subordinate Judge did not place any reliance on the other allegations made in the petition that the third defendant had not been making any repairs to the property but was allowing them to deteriorate. On the grounds that the price of the properties had greatly deteriorated after the date of the mortgage, that interest had not been paid for several years, that the properties if sold were not likely to realise anything like the amount due to the plaintiffs, and that the third defendant, who had undertaken in the deed of sale executed by the first defendant in his favour on 23rd February 1929 to discharge the plaintiffs' mortgage and also pay interest to the plaintiffs, had not

done so, but was enjoying all the income of the properties himself, the learned Subordinate Judge came to the conclusion that it was a fit case for the appointment of a receiver to collect the rents and deposit the same in Court as it was "just and convenient" in the circumstances to do so.

The third defendant preferred Civil Miscellaneous Appeal No. 375 of 1931 to the High Court against the order of the learned Subordinate Judge appointing a receiver. KRISHNAN PANDALAI J. who heard the appeal, after noticing the circumstances of the case, came to the conclusion that a case for the appointment of the receiver was made out, provided the Court had jurisdiction to pass such an order. The learned Judge observed as follows:—

"If this appeal depended on the above or similar considerations which affect receiver applications in ordinary simple mortgage suits, I should have no hesitation in confirming the order of the learned Subordinate Judge. If the decree is for sale and if it be established that the security is not sufficient to satisfy the judgment debt, a receiver will be appointed as a matter of course, especially if there has been default in payment of interest. I am satisfied that the likelihood is that the property will not be enough for the mortgage debt, and that the appellant realising this is trying to delay the realisation of the debt as long as possible as it is profitable for him to do so. On the merits, I am against the appellant."

Finding however that the plaintiffs had given up their rights to personal remedy against the mortgagors and are therefore not entitled to proceed against their other properties for any deficiency that may arise on the sale, the learned Judge came to the conclusion that in such circumstances the Court had no jurisdiction to appoint a receiver, as it would amount to allowing the plaintiffs through the machinery of a receiver to take what they have given up and are not legally entitled to get. Accordingly, the learned Judge allowed the appeal and

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dismissed the application of the plaintiffs. The plaintiffs have preferred this Letters Patent Appeal against the learned Judge's decision.

A preliminary objection was taken by the learned Advocate for the respondent (third defendant) that, having regard to the provisions of section 104, Civil Procedure Code, no further appeal lay from the judgment of the learned Judge in an appeal preferred under Order XLIII, rule 1, clause (s), Civil Procedure Code. He argued that only one appeal lay against the order passed by the Subordinate Judge, under Order XLIII, rule 1, clause (s), Civil Procedure Code, but that no further appeal lay from an order passed in such an appeal, having regard to the provisions of section 104 (2), Civil Procedure Code. The appeal before us was preferred under the provisions of Clause 15 of the Letters Patent of this High Court.

The question whether an appeal lies under Clause 15 of the Letters Patent against the judgment of a single Judge of the High Court passed on an appeal preferred to the High Court under Order XLIII, Civil Procedure Code (corresponding to section 588 of the earlier Code), has been the subject of discussion in some cases in this Court. The decision of BODDAM and BHASHYAM AYYANGAR JJ. in *Muthuvaien v. Periasami Iyen*(1) is directly against the contention raised by the respondent before us. The learned Judges, after noticing the reasoning of the Full Bench of this High Court in the case reported as *Chappan v. Moidin Kutti*(2), of the Privy Council decision in *Hurrish Chunder Chowdhry v. Kalisunderi Debi*(3) and of the decision of a Bench of this Court in *Sabhapathi Chetti v. Narayanasami Chetti*(4), came to the conclusion that the provisions of the Letters Patent

(1) (1903) 13 M.L.J. 497.

(3) (1882) I.L.R. 9 Cal. 482 (P.C.).

(2) (1898) I.L.R. 22 Mad. 68 (F.B.).

(4) (1901) I.L.R. 25 Mad. 555.

prevailed, and that an appeal lay from the judgment of one Judge of the High Court in such cases. It was remarked that the prohibition contained in the Code of Civil Procedure related only to the entertainment of a further appeal by another Court of a higher grade in such cases, and that the provisions of the Letters Patent conferring a right of appeal from the judgment of one Judge of the High Court to the same Court were not in any way interfered with by the provisions of the Code of Civil Procedure. That view has been accepted all along in this Court, though the Allahabad High Court would seem to be of a different opinion; *Sri Kishen v. Ishri*(1) and *Piari Lal v. Madan Lal*(2). See also the decision of the Full Bench in *Dhanaraju v. Balakissendas Motilal*(3), where it was held that the procedure to be adopted by the High Court in the case of an equal division of opinion among the Judges of the High Court in an appeal preferred to it under the Code of Civil Procedure is governed by the Letters Patent and not by the Code of Civil Procedure.

Having considered the provisions of section 588 of the old Code on the one hand, and section 104 and Order XLIII of the present Code on the other, I do not think that there is any sufficient ground for holding that the decision in *Muthuvaien v. Periasami Iyen*(4) should not govern judgments passed under the present Code of Civil Procedure by a learned Judge of this Court in an appeal preferred under Order XLIII, Civil Procedure Code. I have no hesitation in overruling the preliminary objection. The matter has been fully discussed in the decisions already cited, and I do not propose to say anything more on the point.

(1) (1892) I.L.R. 14 All. 223.

(3) (1929) I.L.R. 52 Mad. 563 (F.B.).

(2) (1916) I.L.R. 39 All. 191.

(4) (1903) 13 M.L.J. 497.

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The substantial question in the appeal is whether the Court has jurisdiction, in a case where personal relief against the mortgagor and his other properties has been given up by the mortgagee, to order the appointment of a receiver in the suit of a simple mortgagee. The preliminary decree passed by the lower Court on 29th September 1930 no doubt contains a statement that the mortgagees had given up their right to personal relief against the other properties of the mortgagor. The mortgage sued on is dated 30th May 1924 and the suit was filed on 6th September 1929, i.e., within six years from the date of the mortgage, and therefore it is rather difficult to understand the circumstances under which the plaintiffs' pleader gave up the plaintiffs' right to personal relief against the other properties of the mortgagor; but, in the face of the statement above referred to in the preliminary decree dated 29th September 1930 passed in this case, we must take it that the recital in the decree is correct. The question therefore is whether the order passed by the Subordinate Judge appointing a receiver over the mortgaged properties was passed without jurisdiction, having regard to the fact that the plaintiffs had given up their right to personal relief against the mortgagors and their other properties.

It must be taken to be settled law in this Court at present that, though a simple mortgage does not carry with it right to possession and though a simple mortgagee's remedy is only by way of sale of the mortgaged property, yet the Court has jurisdiction, in a suit brought by a simple mortgagee to recover money, to appoint a receiver in a proper case. The decision of KUMARASWAMI SASTRI J. in *Ethirajulu Chetti v. Rajagopalachariyar*(1) has made that position clear,

(1) (1928) I.L.R. 52 Mad. 979.

after reviewing the earlier authorities on the point. The learned Judge notices the provisions of Order XL, rule 1, Civil Procedure Code, and also of section 503 of the Code of 1882. The learned Judge came to the conclusion that, whether the mortgagee was or was not entitled to possession, he may invite the Court to appoint a receiver if the demands of justice require that the mortgagor should be deprived of possession. While observing that it is impossible to lay down a hard and fast rule enumerating the circumstances under which alone the Court will appoint a receiver in respect of property subject to a simple mortgage, the learned Judge held that, where, on account of circumstances created either by the conduct of the mortgagor or connected with the state of the property, the mortgagee is likely to sustain loss not foreseen by him at the time he took the simple mortgage, the Court will have jurisdiction to appoint a receiver to take possession of the property for the benefit of the mortgagee. In the case before the learned Judge the default of the mortgagor in paying the interest and the fall in value of the mortgaged property were taken by the learned Judge to be facts constituting it "just and convenient" that a receiver should be appointed.

The decision in *Ethirajulu Chetti v. Rajagopalachariyar*(1) has been followed in numerous cases in this Court, though learned Judges have always made it clear that under the Indian Law it is not one of the ordinary remedies of a simple mortgagee who has filed a suit on his mortgage to have a receiver appointed as a matter of course in respect of the mortgaged properties, but that the Court would appoint a receiver only in special circumstances when it considered it "just and convenient" to do so. It is not necessary at present to refer

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to the earlier cases where the law to the same effect has been laid down by Courts in India; see *Arunachellam Chettiar v. Manicka Varaher Desikar*(1), *Ghanashyam Misser v. Gobinda Moni Dasi*(2), *Weatherall v. Eastern Mortgage Agency Co.*(3), *Rameshwar Singh v. Chuni Lal Shaha*(4), *Musstt. Khubsurat Kuer v. Saroda Charan Guha*(5), *The Eastern Mortgage and Agency Company, Limited v. Rakea Khatun*(6) and *Jaikissondas Gangadas v. Zenabai and Kazi Mahomed Miya Dada Miya*(7). The wording of section 503 of the Code of 1882 relating to the appointment of a receiver was different from the wording of Order XL, rule 1, of the present Code. Under the present Code the Court could appoint a receiver if it appears to it to be "just and convenient" to do so. No doubt

"the Court could not order the removal from the possession or custody of property any person whom any party to the suit has not a present right so to remove."

But the jurisdiction of the Court to appoint a receiver under the present Code is very wide. That discretion, though very wide, should be exercised on well-established principles of law, and not simply according to the whim and caprice of individual Judges.

In my view, the circumstance that a simple mortgagee in India under the provisions of the Transfer of Property Act is not entitled to possession of the mortgaged property even on default of payment of the mortgage money [see the observations of Lord HOBHOUSE in *Sri Raja Papamma Rao v. Sri Vira Pratapa H. V. Ramachandra Razu*(8) to the effect that

"if indeed the matter were new, it might reasonably be argued that the terms of simple mortgage justify usufructuary

(1) (1909) 6 M.L.T. 238.

(3) (1911) 13 C.L.J. 495.

(5) (1911) 16 C.W.N. 128.

(2) (1902) 7 C.W.N. 452.

(4) (1919) I.L.R. 47 Cal. 418.

(6) (1912) 16 C.W.N. 997.

(7) (1890) I.L.R. 14 Bom. 431.

(8) (1896) I.L.R. 19 Mad. 249, 254 (P.O.).

possession; but long practice, now embodied in a statute has settled that the remedy of the mortgagee is a judicial sale."]

does not necessitate the conclusion that the Court has no jurisdiction to appoint a receiver over the mortgaged properties in a suit brought to enforce the simple mortgage, should it consider "just and convenient" to do so. No doubt a simple mortgagee is not entitled to possession. His only right is to have a sale of the mortgaged properties; but when the object of the suit is to have sale of the mortgaged properties, but, owing to inevitable delay in litigation the same could not be ordered at once, and other circumstances such as those found in the present case exist, it does not follow that the Court could not order the appointment of a receiver in such a case if it considered it just and proper to do so. It is only regarding the property which was mortgaged to the plaintiff that the Court appoints a receiver in such a case. The circumstance that the right of the mortgagee to have personal relief against the mortgagor and his other properties has been given up, or has become barred by limitation, or does not exist in particular cases, is no ground by itself to hold that the Court has no jurisdiction to appoint a receiver in such cases. The order appointing a receiver affects only the mortgaged property which is the subject of the suit, and not any other property of the mortgagor. The delay in litigation could not always be imputed to the plaintiff; it is well known that defendants also in several cases contribute to the delay in the disposal of the suit. As a matter of fact, in the present case, it is found by the learned Judge of this Court, and also by the Subordinate Judge, that the third defendant has allowed interest to accumulate and is only anxious to continue in possession for as long a period as possible with the sole view of enjoying the income of the properties, thus causing prejudice to the plaintiffs.

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It is admitted that in case of waste, or destruction of the mortgaged property, or when revenue or head-rent is not paid, the Court has jurisdiction to appoint a receiver over the mortgaged property. But does this exhaust the jurisdiction of the Court to appoint a receiver in mortgage suits, though those would undoubtedly be cases in which Courts would more readily appoint a receiver?

In discussing the question, one must keep separate two questions: (1) Whether the Court has jurisdiction, and (2) Whether the Court should in a particular case appoint a receiver in the exercise of its jurisdiction.

Prima facie, if the Court could appoint a receiver over the mortgaged property in some cases in a suit on a simple mortgage, it would surely indicate that the Court has jurisdiction to appoint a receiver over the mortgaged property as such; and the other question whether in a particular case it would make the order or not would be one dependent entirely on the particular circumstances of that case. We should not mix the two questions, especially when one of them relates to the very existence of jurisdiction in such a suit in certain circumstances.

As already stated, the question is not whether the plaintiff has a strict legal right to have a receiver appointed in such a case as the one before us. Even in a case where there was a specific agreement between the parties that on the happening of a particular event one of the parties was entitled to have a receiver appointed, the Court held that it was entirely a matter of discretion with Courts whether a receiver should be appointed in any particular case or not. It therefore seems to me that it is attacking the problem from a wrong end to say that because a simple mortgagee is not entitled to possession, therefore the Court has no jurisdiction to appoint a receiver; that because right to personal

relief is given up, therefore the Court has no jurisdiction to appoint a receiver in respect of the mortgaged property.

I agree with the learned Judges of this Court who have often remarked that in cases of mortgages Courts in India should be very careful before implicitly following English decisions passed with reference to mortgage-law in force in England. In England, a simple mortgagee is entitled to take possession of the mortgaged properties on the mortgagor's default to pay the mortgage-debt at the stipulated period. Being in a position to take possession of the mortgaged property, English Courts were reluctant at one stage to appoint a receiver at the instance of a simple mortgagee. As remarked by Dr. Ghose in his *Law of Mortgages in India*, fourth edition, Vol. I, page 590,

"the position of a mortgagee in possession is so full of peril that no mortgagee except under the strongest pressure should assume possession, and certainly never when he could get a receiver. For, by means of appointing a receiver, mortgagees are able to obtain the advantages of possession without its draw-backs."

Under the Law of Property Act, 1925, a simple mortgagee could apply for the appointment of a receiver. An equitable mortgagee in England had always the right to apply for the appointment of a receiver as a matter of course. The law in India is different. While it is open to the Courts in suits by simple mortgagees, and also in suits by equitable mortgagees, to appoint a receiver over the mortgaged property, there is no such thing as a *right* on the part of the said mortgagees for the appointment of a receiver in such cases. In India, in such cases, receivers are not appointed as a matter of course. Even when the income, rent and profits of the property have been expressly included in the simple mortgage as security

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for the mortgage debt, the mortgagee is not entitled, as of right, to have a receiver appointed. The case will be the same when the right of personal relief against the mortgagor and his other property is still subsisting. The appointment of a receiver is not a matter of right on the part of the mortgagee. The above circumstances would ordinarily work in favour of such appointment, in conjunction with the other facts of the case. Special circumstances have always to be proved before the Court could come to the conclusion that it is "just and convenient" in that particular case to have a receiver appointed over the mortgaged properties. If, on the other hand, it is proved to the Court's satisfaction that it is "just and convenient" to appoint a receiver, there is nothing in any provision of law to which our attention was drawn, nor any decision binding on us, that prevents the Court from making such an order. In the various cases decided by Courts in India referred to above, I do not find any reference made to personal relief against the mortgagor being available as a necessary condition for such appointment.

In *Ponnu Chettiar v. Sambasiva Ayyar*(1) the learned Judges had not to decide, and in fact did not decide, that a receiver could be appointed only when the personal remedy against the mortgagor was available, and that is specially noted by one of the learned Judges.

The only direct decision of this Court on this point in which the question is discussed is that reported as *Venkata Rajah Gopala Surya Row Bahadur v. Basivi Reddi*(2). In that case OLDFIELD J. was of opinion that

"the Court has power to appoint a receiver of mortgaged property where a decree for sale is passed on a simple mortgage though the personal remedy is barred by limitation."

(1) (1832) I.L.R. 56 Mad. 546.

(2) (1914) 29 M.L.J. 457.

SADASIVA AYYAR J., on the other hand, would seem to have been of a different opinion, though at page 463 that learned Judge says that "he has come to the conclusion that this is not a fit case for the appointment of a receiver."

The decision in *Rajah Satrucherla Gangaraju v. Rajah of Jeypore*(1) does not discuss the question of jurisdiction of the Court, but having regard to the facts of that case the learned Judges "saw no reason to appoint a receiver for property which is not the subject-matter of the suit", and "which descended to the mortgagor after the mortgage suit was filed as reversioner to the estate of a minor." The decision turned on the facts of the case only.

The circumstance that the mortgagee's right to proceed personally and against the other properties of the mortgagor is not available, is, in my opinion, no bar to the Court appointing a receiver over the mortgaged property (as distinct from the non-mortgaged property). Execution of such decrees could be stayed either by means of injunctions issued in other suits or as a result of appeal. Though it is open to Courts in such cases to impose terms before granting injunction or staying execution, *prima facie*, the jurisdiction of the Court over the subject-matter of the litigation before it should not, except for cogent reasons, be held to have been taken away from it. Whether the mortgagee could proceed against the other property of the mortgagor, or not, it is essential that the mortgagee should be protected in the matter of his proceeding against the very property mortgaged, which is the subject-matter of the suit.

I have already referred to the circumstance that the mortgagee, in the case of a simple mortgage in India,

(1) (1925) 23 I.W. 650.

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is not entitled to possession of the mortgaged property. It follows that the mortgagor could deal with the right to possession of such property even after creating a simple mortgage over the said property. Till a suit is instituted, it would be open, ordinarily, to the person who has acquired right to possession of the property to appropriate the income of the mortgaged property for his sole benefit. That proposition is not disputed. But when a suit is instituted by a simple mortgagee for the sale of the mortgaged property with a view to realise the mortgage debt, then the argument relating to possession loses force. It cannot be denied that in a proper case it is open to the Court in execution of a mortgage decree to direct that, instead of the mortgaged property being sold at once, a receiver should be appointed to collect the rents and profits of the mortgaged property, so that, if the decree amount could be paid within a reasonable time, the sale of the mortgaged property might be avoided. The argument urged on behalf of the third defendant in the present case would, if logically pressed, deprive the Court of jurisdiction to do so. I would therefore hesitate before accepting the third defendant's contention which would lead to such a result. Again, his contention, if logically applied, would deprive the Court of jurisdiction to appoint a receiver over the mortgaged property by removing a person in the position of the third defendant, a subsequent purchaser of the equity of redemption, from possession of the same, because, even if personal relief against the mortgagor be available, it would be available only as against properties and right that vested in the mortgagor on the date on which the receiver is appointed, and in a case where the mortgagor had already parted with (for value) his right to possession of the property in favour of a third

person (like the third defendant in this suit), the Court could not deal with the right to possession of the mortgaged property, which *ex hypothesi* had left the mortgagor and passed to a third person in the position of the third defendant before us. The third defendant's argument based on the non-existence of right to personal relief against the mortgagor would seem logically to lead to the conclusion that, even when right to personal relief subsists, the Court would have no jurisdiction to appoint a receiver, since right to possession had passed to the purchaser of the equity of redemption and did not remain in the mortgagor on the date of the suit. The same argument of the third defendant would also lead to the conclusion that, in such a case, a Court could not appoint a receiver over the mortgaged property even by its decree in the suit. That argument, in my opinion, ignores the distinction between the mortgaged property and "non-mortgaged property"; the jurisdiction to appoint a receiver would always subsist in the case of the mortgaged property—the subject-matter of suit—, whereas it would not exist with reference to non-mortgaged property in a case where the personal remedy is not available. But when a similar argument was advanced before the very same learned Judge, KRISHNAN PANDALAI J., in Civil Miscellaneous Appeal No. 493 of 1931, decided on 1st November 1932, that learned Judge (as I understand the judgment) over-ruled the contention, and, in my opinion, rightly. The learned Judge observed that the act of the mortgagor in selling the equity of redemption could not deprive the Court of its jurisdiction to appoint a receiver and that by transferring possession to a stranger a mortgagee could not be baffled. This last argument, in my view, really takes away the bottom from the respondent's contention.

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It has been held that a Court has jurisdiction, in a suit filed by an equitable mortgagee in India to recover money due on the equitable mortgage, to appoint a receiver over the mortgaged property. An equitable mortgagee in India has no right to possession of the mortgaged property. If the Court has jurisdiction in the case of an equitable mortgage to appoint a receiver over the mortgaged property, it should surely have jurisdiction to appoint such a receiver in the suit of a simple mortgagee in India. The Court has complete jurisdiction over the subject-matter of the suit, and if the Court could sell the mortgaged property, it should also have jurisdiction to appoint a receiver over the same. In the circumstances, I think, it is for the third defendant to satisfy us that the Court has no jurisdiction to appoint a receiver in such a case. He has not only not satisfied me that it is so; but, for reasons already given, it seems to me that the Court has got jurisdiction in the matter.

With great respect, I am not able to agree with the observations of the learned Chief Justice of the Patna High Court in *Nrisingha Charan v. Rajniti*(1) regarding the rights of an equitable mortgagee in India to demand possession of the mortgaged property. In my opinion, there is no difference in this respect between a simple mortgage and an equitable mortgage in India, and neither of the said mortgages carries with it any right to demand possession in India. The other learned Judge in the Patna case did not discuss the question of law, but held on the evidence that no case for appointment of a receiver had been made out in that case. In Ghose on Mortgages, third edition, page 597 (note 1), and fifth edition, page 632 (a), the learned author states as follows:—

“It should be noticed that the Court may appoint a receiver at the instance of the mortgagee where the action is

for foreclosure or sale, if there is reason to suspect that the security is insufficient or if the interest is in arrear.”

In *Jaikissondas Gangadas v. Zenabai*(1), a case decided under the Code of Civil Procedure of 1882, SARGENT C.J. and TELANG J. held that

“the High Court possesses the same powers with regard to the appointment of a receiver as are possessed and exercised by the Courts in England under the Judicature Act.”

The learned Judges observed that when it was “just and convenient” to do so, a receiver could be appointed by the Court. That was not the test laid down in section 503 of the Code of 1882, but the learned Judges applied that test. Under the present Code of Civil Procedure, Order XL, rule 1, the test of “just and convenient” has been expressly enacted for guidance in appointing receivers in suits. Therefore, the ruling in *Jaikissondas Gangadas v. Zenabai* (1) is rather useful for decisions of cases that arise under the present Code of Civil Procedure. At page 435 of *Jaikissondas Gangadas v. Zenabai*(1), the learned Judges stated as follows:—

“Now in the present case, we think, it is ‘just and convenient’ that a receiver should be appointed. There are exceptional circumstances here. The mortgage debt is for a very large amount. The value of the property is said to be insufficient to cover the debt, and there is a large sum owing for arrears of interest. It is, therefore, a case in which a receiver is desirable, and we think he ought to have been appointed by the decree made by the Court below.”

For these reasons, I have come to the conclusion that the Court has jurisdiction, in a proper case, to appoint a receiver in respect of mortgaged properties in a suit filed by a simple mortgagee to realise his debt from the mortgaged properties, and that appointment of a receiver is only a mode of realising such security in the case of a simple mortgage.

(1) (1890) I.L.R. 14 Bom. 431.

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As a learned Judge has agreed with the Subordinate Judge on the merits that, if the Court has got jurisdiction in this matter, the order appointing a receiver was justified by the circumstances, it follows that the Letters Patent Appeal must be allowed and the decision of the Subordinate Judge restored with all costs in the High Court.

CORNISH J.

CORNISH J.—In the determination of the question before us not much assistance, I think, is to be got from English rules and precedents. The reasons for the rule for appointing a receiver for the benefit of a legal mortgagee or of an equitable mortgagee in England (see Kerr on Receivers, pages 32, 35, and Coote on Mortgages, Vol. II, page 823) do not stand good for the appointment of a receiver in favour of an Indian simple mortgagee; but that argument does not exclude the possibility of a receiver being appointed on behalf of a simple mortgagee. The power in India to appoint a receiver by way of execution is conferred on the Courts by the Civil Procedure Code, and it is a mistake, in my opinion, to treat it as if it must be dependent upon English equitable rules.

The remedy of the simple mortgagee is a judicial sale of the mortgaged property; *Sri Raja Papamma Rao v. Sri Vira Pratapa H. V. Ramachandra Razu*(1). That is his legal remedy. In the absence of any clear rule to the contrary, why is he not to be entitled to crave as auxiliary to his legal remedy the equitable remedy provided by Order XL, rule 1, of the appointment of a receiver? Order XL, rule 1, is available unless we hold with the view taken in *Makhan Lal v. Mushtaq Ali*(2) that Order XXXIV shuts out any recourse to Order XL, rule 1. But that ruling finds no support in any of the

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decisions of this High Court or in the Bengal and Bombay High Courts relating to the appointment of a receiver in mortgage suits, and I am not prepared to follow it. Order XL, rule 1, is expressed in general terms. It empowers the Court to appoint a receiver of any property whenever it appears to the Court to be "just and convenient". If the question had to be decided simply on the language of Order XL, rule 1, I would say that if the Court was satisfied that justice and convenience required the appointment of a receiver for the benefit of a simple mortgagee the rule was sufficiently wide to sanction the appointment. There is a considerable weight of authority on the side of this interpretation. The cases are summarized by KUMARASWAMI SASTRI J. in *Ethirajulu Chetti v. Rajagopalachariyar*(1) and the conclusion he arrived at was that in the case of a simple mortgage, if the circumstances warranted it, the Court had power to appoint a receiver. With that conclusion I agree.

KRISHNAN PANDALAI J., from whom this appeal comes, appears to have been guided in his decision very largely by the observations of SADASIVA AYYAR J. in *Venkata Rajah Gopala Surya Row Bahadur v. Basivi Reddi*(2). With due deference, I think that what SADASIVA AYYAR J. said in that case was in favour of the Court's power to appoint a receiver, though in the particular circumstances he thought that a receiver should not be appointed. He began by expressing the opinion that the existence of a right in the plaintiff to receive rents and profits was not an indispensable pre-requisite for the exercise of the Court's power to appoint a receiver. That amounted to an opinion that the equitable remedy in favour of a simple mortgagee had no relation to a right to enter

(1) (1896) I.L.R. 19 Mad. 249 (P.C.).

(2) (1927) 100 I.C. 735.

(1) (1928) I.L.R. 52 Mad. 979.

(2) (1914) 29 M.L.J. 457.

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into possession of the mortgaged property, a right which a simple mortgagee has not got. He then proceeded to reject the suggestion that the words "any property" in Order XL, rule 1, meant exclusively the property the subject of the suit, i.e., the property subject to the mortgage. And he concluded by holding in the special circumstances of the case (*inter alia*, the personal remedy against the mortgagor was apparently barred) that "it was not a fit case for the appointment of a receiver." The power to appoint is given to the Court by Order XL, rule 1, and is independent of anything done by the mortgagee. It may be that the circumstance of the mortgagee having given up his personal remedy against the mortgagor, as he is alleged to have done in the case before us, or of his having allowed it to become barred by lapse of time, might weigh with the Court in considering whether the equitable remedy should be given to the mortgagee. Those are matters which might influence the Court's discretion; but I fail to see how they could possibly control the Court's power.

It is admitted that the present case is a proper one for a receiver to be appointed, and I think that the Court had power to make the appointment.

G.R.

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APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Bardswell.

BAIJNATH KARNANI (PLAINTIFF), APPELLANT,

v.

VALLABHADAS DAMANI (DEFENDANT), RESPONDENT.*

Indian Limitation Act (IX of 1908), art. 117—Foreign judgment—Final judgment of Court of First Instance of foreign Court—Appeal therefrom in foreign Court—Confirming judgment of appellate Court—Suit on the foreign judgment in British Indian Court—Starting point of limitation for—'Judgment' in art. 117—Meaning of.

On 9th July 1924 a judgment and decree were passed by the Court of first instance in Bikanir, a foreign State, where all the provisions of the Code of Civil Procedure are applied and the decisions of the Indian High Courts followed. On 24th March 1925 the said judgment and decree were confirmed on appeal by the High Court of Bikanir. On 12th March 1931 a suit was filed upon this foreign judgment in Madras.

Held that the starting point of limitation is the date of the decree of the appellate Court of Bikanir and not the date of the decree of the original Court of Bikanir and that, inasmuch as the suit in Madras was filed within six years from the said date, the suit was not barred.

Held further that "judgment" in article 117 of the Indian Limitation Act means "decree".

APPEAL from the judgment and decree of STONE J., dated the 17th day of November 1931, in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 136 of 1931.

T. R. Venkatarama Sastri and V. Varadaraja Mudaliyar for appellant.

S. Doraiswami Ayyar for respondent.

Our. adv. vult.

JUDGMENT.

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BEASLEY C.J.—This is an appeal from a judgment of STONE J. and the point to be decided is : Where in a foreign State there is a suit and in that suit a judgment is given and from that judgment appeal is made, which appeal is dismissed, is the “judgment in that suit” the judgment of the Court of first instance or is it the judgment of the appellate Court for the purposes of the Limitation Act?

The suit under appeal is brought to enforce a judgment given in the State of Bikanir. The first Court's decree there was appealed from and the appeal was dismissed by the appellate Court. If the appellant here, the plaintiff in the suit, is to take as the date for his cause of action the date of the decree in the Court of first instance, then his suit is barred by limitation. If he is to take the date as that of the appellate Court's decree then his suit is not barred by limitation.

This is a very interesting point and, as STONE J. remarks, it is strange that there are no direct decisions upon this point although it must have arisen in India many times before. STONE J. has rightly, in my opinion, held that in article 117 of the Limitation Act “judgment” means “decree”. He has taken the view that the starting point of limitation was the decree in the first Court and accordingly dismissed the suit as being barred by limitation. It is contended here that he was wrong. In this case we are dealing with a judgment given in the State of Bikanir where it is conceded that all the provisions of the Code of Civil Procedure are applied and the decisions of the Indian High Courts followed ; and, in my view, the difficult question before us is made more simple on that account. It is conceded that a foreign judgment and a municipal judgment are upon an entirely different basis. A foreign judgment

cannot be executed and it is merely a cause of action and the judgment is regarded as creating a debt between the parties to it and it is said that the debt so created is a simple contract debt, the liability of the defendant arising on an implied contract to pay the amount of the foreign judgment. There is no merger of the original cause of action and it is therefore open to the plaintiff to sue either on the foreign judgment or on the original cause of action on which it is based ; and it is argued on behalf of the respondent that, as a foreign judgment is a mere cause of action or a right gained by the plaintiff by reason of his decree, the starting point of limitation is the date upon which he obtains that right, and that this cannot be affected by reason of the pendency either of an appeal or the supervention of a decree of an appellate Court confirming the lower Court's decree ; and in aid of this argument, amongst other things, it is pointed out that, when a decree has been obtained, steps to execute the decree may be taken and execution of it had during the pendency of an appeal, unless those steps are stayed. In my opinion the latter test, although there is a great deal to be said for the argument which adopts it, is not the real test. What has got to be found is, what is the final decree which has been obtained by the plaintiff in the suit ; and it is quite clear that in order to enforce the judgment of a foreign Court that judgment must be a final one ; and indeed that is conceded by the learned Counsel for the appellant and the respondent. In *Nouvion v. Freeman*(1) which was an action brought upon a foreign judgment for the recovery of a debt it was held that, if the judgment does not finally and conclusively (subject to an appeal to a higher Court)

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(1) (1889) 15 App. Cas. 1.

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settle the existence of the debt so as to become *res judicata* between the parties, such an action cannot be brought. In that case their Lordships had before them what was described as a "remate" judgment of a Spanish Court and in accordance with the laws of Spain this "remate" judgment when it was "executive" or summary, as it was, could not be regarded as *res judicata* and their Lordships accordingly held that, since such a judgment as that does not finally and conclusively establish the debt, no suit upon it could be brought in England. Lord HERSCHELL in dealing with the finality and conclusive nature of the judgment upon which an action may be maintained in the English Courts when such judgment is pronounced by a foreign Court at page 9 says:

"My Lords, I think that in order to establish that such a judgment has been pronounced it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties."

Lord WATSON on page 13 says:

"In order to its receiving effect here, a foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher Court; but it must be final and unalterable in the Court which pronounced it; and if appealable the English Court will only enforce it, subject to conditions which will save the interests of those who have the right of appeal."

This case, it is urged on the respondent's behalf, shows that when once a decree has been obtained even though that decree may be the subject of an appeal, a suit may be brought upon it in a foreign Court to enforce it. For the appellant, however, it is argued that it does not necessarily follow that, where an appeal has been presented which results in a decree of the appellate Court dismissing the appeal, a fresh starting point of limitation is not given thereby, it being conceded that

the foreign judgment sued upon must be final and conclusive. Since this question, in my view, has got to be decided upon a consideration of the cases which lay down the law as to the finality of a decree in this country, I propose to refer to some of those quoted in the course of the arguments; and I will first of all deal with those decisions which consider the effect of the passing of an appellate decree. The first of these is *Luchmun Persad Singh v. Kishun Persad Singh*(1), a Full Bench decision. There it was held that, although an order of the Privy Council may confirm a decree of the Court below, that order is the paramount decision in the suit; and that any application to enforce it is, in point of law, an application to execute the order and not the decree which it confirmed. The next case is *Noor Ali Chowdhuri v. Koni Meah*(2) where it was held that the only decree of which execution could be taken was the appellate decree and not the original decree. In the judgment in that case a Madras decision is referred to, namely, *Arunachellathudayan v. Veludayan*(3), in which SCOTLAND C.J. said:

"Whether that decree be in affirmance or reversal or modification of the decree appealed from, it becomes the final decree in the suit, and therefore the decree enforceable by execution." In *Kailash Chandra Bose v. Girija Sundari Debi*(4) it was held that the appellate decree supersedes the original decree. At page 929 JENKINS C.J. says:

"The decree in that suit was in the Court of first instance against the widow, and it may be that this decree, had there been no appeal, would have been binding as against the reversioner, even though the mortgage was created by the lady herself. That is a point on which I express no opinion at this stage, because I do not think it is necessary, and I reserve my opinion until occasion arises for its decision. But whatever may have been the effect of that decree, had it stood by itself, it

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(1) (1882) I.L.R. 8 Calc. 218 (F.B.).
(3) (1870) 5 M.H.C.R. 215.

(2) (1886) I.L.R. 13 Calc. 18.
(4) (1912) I.L.R. 39 Calc. 425.

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was superseded by the decree passed on appeal. The decree of the Court of first instance could not in the circumstances be pleaded as *res judicata*"

He relied on *Noor Ali Chowdhuri v. Koni Meah*(1) as showing that, where there is a decree on appeal which confirms the decree against which the appeal is made, it is the appellate decree to which regard must be had and that the appellate decree superseded the original decree. He further points out that, where an appellate Court dismisses an appeal under the provisions of the Code, the proper course is, as is provided by the Code, to confirm, vary or reverse the decree against which the appeal is made and not merely to dismiss the appeal. In Dicey's Conflict of Laws, fourth edition, page 454, it is stated that the test of finality is the treatment of the judgment by the foreign tribunal as a *res judicata*. In India and in Bikanir a decree of the first Court which is taken on appeal to an appellate Court is not *res judicata*. In *Sheosagar Singh v. Sitaram Singh*(2), a decision of the Privy Council, Lord MACNAGHTEN states :

"To support a plea of *res judicata* it is not enough that the parties are the same and that the same matter is in issue. The matter must have been 'heard and finally decided'. If there had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea. But the appeal destroyed the finality of the decision. The judgment of the lower Court was superseded by the judgment of the Court of appeal."

This decision, in my view, affords the strongest support to the appellant's contention before us. The first Court's decision was superseded by the judgment of the appellate Court and its finality destroyed by the appeal. It seems to me that the judgment sued upon cannot be the judgment the finality of which has been

destroyed by the appeal and which has been superseded by the judgment of an appellate Court and that it is only the latter judgment which is sued upon. [See also *Abdullah Ashgar Ali Khan v. Ganesh Dass*(1), another decision of the Privy Council.] In *Uhengalvala Gurraju v. Madapathiy Venkateswara Row*(2) it was held that a judgment pending appeal or for which the appeal time has not expired is only a provisional judgment and does not operate as *res judicata*. *Balkishan v. Kishan Lal*(3) is to the same effect. Another decision of the Privy Council is *Annamalai Chetty v. Thornhill*(4) where it was held that a decree from which an appeal lies and has in fact been taken is not final between the parties so as to form *res judicata*. The judgment of COZENS-HARDY L.J. in *Huntley (Marchioness of) v. Gaskell* (5) is relied upon by the respondent. At page 667 he says :

"It is urged that the judgment of the Scotch Court of Session is not a final judgment ; but when the word 'final' is used, as I think it is in some authorities with reference to judgments, that does not mean, I apprehend, a judgment which is not open to appeal but merely 'final' as opposed to 'interlocutory'. A judgment is, in my opinion, not the less an *estoppel* between the parties to the action because it may be reversed on appeal to the House of Lords."

I have already expressed the view that this question falls to be decided not by the English decisions upon this question but by the decisions of the Indian Courts and of the Privy Council and no case in this Court or the Privy Council has been referred to by Mr. Doraiswami Ayyar in the course of his able argument on behalf of the respondent which, in my opinion, supports his argument. *Juscurn Boid v. Pirthichand*

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(1) (1883) I.L.R. 13 Calo. 13.
(2) (1897) I.L.R. 24 Calo. 616, 626 (P.C.).

(1) (1917) I.L.R. 45 Calo. 442 (P.C.).
(2) (1916) 30 M.L.J. 379. (3) (1883) I.L.R. 11 All. 148.
(4) (1931) 61 M.L.J. 420 (P.C.). (5) [1905] 2 Ch. 656.

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Lal Choudhury(1), a decision of the Privy Council, relied upon by him is clearly distinguishable from the cases on the other side by reason of the fact that the article of the Limitation Act there in question was article 97 "for money paid upon an existing consideration which afterwards fails". A period of three years is given from the date of the failure. The lower Court held that there had been a failure of consideration. This order was confirmed on appeal and nevertheless it was held that time commenced to run from the date of the lower Court's decree because it was upon that date that consideration failed. This case is of no force when article 117 comes to be considered. In my view, applying the test of *res judicata* and the decisions referred to in support of the appellant's argument, STONE J.'s judgment was erroneous and it follows that the decree must be set aside and the appeal allowed with costs, both here and in the trial Court.

BARDSWELL J. BARDSWELL J.—The suit under appeal was brought by the plaintiff for a decree for the enforcement of a foreign judgment in his favour against the defendant for the sum of Rs. 7,858-10-3 with interest and costs. The foreign judgment was that of the State of Bikanir. A judgment and decree in favour of the plaintiff for Rs. 7,284-14-3 were passed by the High Court of Bikanir in exercise of its original jurisdiction on 9th July 1924 and confirmed by an appellate Bench of the same High Court on 24th March 1925. The suit under appeal was filed in this Court on 12th March 1931, the principal amount sued for being made up of the amount for which the High Court of Bikanir had given the decree and Rs. 573-12-0 which had been allowed for costs. One objection taken before STONE J. who tried

the suit was that the High Court of Bikanir had no jurisdiction, but this objection, which is said to have been only faintly argued, was over-ruled and that decision has not been challenged. The defendant, however, has succeeded on another point that was taken on his behalf and that is that the suit claim was barred by limitation except for the sum of Rs. 573-12-0 allowed for costs, the claim to which was admitted.

STONE J. has held that the word "judgment" in the expression "foreign judgment" in section 2 (6) of the Civil Procedure Code means the "decree" of the foreign Court and this view, which is in accordance with common sense and with what is the English law on the subject, has not been contested. It is, therefore, article 117 of the Indian Limitation Act that has to be considered. Under that article the time allowed for bringing a suit upon a foreign judgment is six years from the date of the judgment. What has been held is that by "date of the judgment" is meant the date of the original judgment and that, as the date of the original judgment at Bikanir was more than six years before the filing of the suit in this Court, the suit was barred by limitation. For the plaintiff, who is now the appellant, it is argued that time has to run from the date of the appellate judgment. If that view is correct the suit will have been brought in time.

To enable a foreign judgment to be enforced it must be one that is final and conclusive between the parties and it may be final and conclusive though it is subject to an appeal and though an appeal against it is actually pending in the foreign country where it was given. The law on the subject is thus set out in Rule 114 of Dicey's Conflict of Laws on which Mr. Doraiswami Iyer lays stress in his arguments on behalf of the respondent. But the same learned author in his

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commentary on this rule gives as the test of finality the treatment of the judgment by the foreign tribunal as *res judicata*. He quotes from the judgment of Lord HERSCHELL in *Nouvion v. Freeman*(1):

"In order to establish that a (final and conclusive) judgment has been pronounced it must be shown that in the Court by which it was pronounced, it conclusively, finally and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties."

The same extract is also given in Smith's Leading Cases as the test of what is a conclusive judgment. In the case of some foreign Courts the decision of the Court of first instance may act as *res judicata*. Such a state of things is contemplated in *Nouvion v. Freeman*(1) at page 13, and, when it exists, the first Court's judgment, as stated in that decision, will only be enforced subject to conditions which will save the interests of those who have the right of appeal. But what we have to consider is what is the position as regards *res judicata* of a decree passed by a Court of first instance in accordance with the provisions of the Code of Civil Procedure of British India when that decree has been appealed against, even if the result of the appeal is for it to be confirmed. It is common ground that the law of the Bikanir State is on all relevant matters the same as that of British India.

By Order XII, rule 32, of the Civil Procedure Code the appellate judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, and in *Kailash Chandra Bose v. Girija Sundari Debi*(2) JENKINS C.J. has called special attention to this rule (then section 577) and has held that, where there is a decree on appeal which confirms the decree against

which the appeal is made, the appellate decree super- sedes the original decree. In *Sheosagar Singh v. Sitaram Singh*(1) the Privy Council have held:

"To support a plea of *res judicata* it is not enough that the parties are the same and that the same matter is in issue. The matter must have been 'heard and finally decided'. If there had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea. But the appeal destroyed the finality of the decision. The judgment of the lower Court was superseded by the judgment of the Court of Appeal."

This decision has been followed by a later Privy Council decision in *Abdullah Ashgar Ali Khan v. Ganesh Dass*(2) while in *Annamalai Chetty v. Thornhill*(3) their Lordships have held that

"where an appeal lies the finality of the decree, on such appeal being taken, is qualified by the appeal and the decree is not final in the sense that it will form *res judicata* as between the same parties."

In *Chengalvala Gurraju v. Madapathy Venkateswara Row*(4) it has been held by a Bench of this Court that a judgment pending appeal or for which the appeal time has not expired is only a provisional judgment and does not operate as *res judicata*. It is unnecessary to discuss this decision here, in so far as it extends the principle to a judgment not yet appealed against while the time for appeal has not yet expired, as in the case under notice there has been an appeal and the decisions of the Privy Council are conclusive as to a case of that kind.

Great stress has been laid for the respondent on the Privy Council decision in *Juscurn Boid v. Pirthichand Lal Choudhury*(5). In that case it was held that failure of consideration dated from the first Court decree setting aside a sale for arrears of rent and not from the date of the appellate decree by which it was confirmed,

(1) (1889) 15 App. Cas. 1.

(2) (1912) I.L.R. 39 Cal. 925.

(1) (1897) I.L.R. 24 Cal. 616 (P.C.).

(2) (1917) I.L.R. 45 Cal. 442 (P.C.).

(3) (1931) 61 M.L.J. 420 (P.C.).

(4) (1916) 30 M.L.J. 379.

(5) (1918) I.L.R. 46 Cal. 670 (P.C.).

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and it was pointed out that under the Indian Law- and Procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal. A subsequent suit that was brought for the recovery of money was, therefore, held to be time-barred under article 97 of the Limitation Act. This decision has been considered by a Bench of this Court in *Venkayya v. Sathiraju*(1) and it is pointed out there what was held was that consideration had failed when the sale was set aside in the first Court and that it did not fail afresh when the order setting aside the same was affirmed by the appellate Court. It was held in this Madras Case that the remarks of the Privy Council in *Juscurn Boid v. Pirthichand Lal Choudhury*(2) did not apply to questions arising under articles 181 and 182 of the Limitation Act and that, even though by article 182 the appellate decree is expressly made a fresh starting point for purposes of execution, whereas there is no corresponding provision to article 181, yet even an application under the latter article for a decree absolute could be made within three years from the passing of the preliminary decree by the appellate Court. And that this view as to article 181 is correct is shown by the Privy Council decision, *Jowad Hussain v. Gendan Singh*(3). Therein is cited with approval a remark of BANERJI J. in *Gajadhar Singh v. Kishan Jiwan Lal* (4) :

"It seems to me that this rule",

the rule regulating applications for final decrees in mortgage actions,

"contemplates the passing of only one final decree in a suit for sale upon a mortgage. The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties.

(1) (1921) I.L.R. 44 Mad. 714.

(3) (1926) I.L.R. 6 Pat. 24 (P.O.).

(2) (1918) I.L.R. 46 Calo. 670 (P.O.).

(4) (1917) I.L.R. 39 All. 641 (F.B.).

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Where an appeal has been preferred, it is the decree of the appellate Court which is the final decree in the cause." There appears to be no authority directly bearing on the question of from the date of which judgment or decree, in the case of there being an original decree and an appellate decree confirming it, time should run for the purposes of article 117, but it seems to me that the decision in *Jowad Hussain v. Gendan Singh*(1) is an authority that gives better guidance as to how that article should be interpreted than is *Juscurn Boid v. Pirthichand Lal Choudhury*(2). In the latter case what had to be looked to for the purposes of article 97 was not so much the decree itself as what had been decided by the decree. For the purposes of article 117 as for those of article 181, the existence of a decree is essential as the basis of the action and that decree has to be one that is final and conclusive between the parties so as to operate as *res judicata*.

Now in the present instance there was no final and conclusive decree between the parties such as could so operate till the decree of confirmation had been passed on the appeal. In these circumstances it is from the date of that decree and not from the date of the original decree that limitation began to run against the plaintiff as, when there had been an appeal, it was not till the appeal had been decided that the plaintiff had obtained a decree of the necessary finality and conclusiveness for him to take action upon it in British India. I would, therefore, allow this appeal and grant a decree for the full amount sued for with interest at six per cent per annum from date of suit to date of realisation and costs both on the appeal and on the first hearing.

Attorney for respondent: N. T. Shamanna.

G.R.

(1) (1926) I.L.R. 6 Pat. 24 (P.O.).

(2) (1918) I.L.R. 46 Calo. 670 (P.O.).

APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Bardswell.

GOMATHI AMMAL (DEFENDANT), PETITIONER,

v.

AVU AMMAL (PLAINTIFF), RESPONDENT.*

1938,
February 21.

Indian Limitation Act (IX of 1908), ss. 19 and 21—"Agent duly authorized in this behalf"—Lunatic—Wife of, not appointed committee or manager of husband's property under Indian Lunacy Act (IV of 1912) but managing his business after he became insane—Not husband's "agent duly authorized in this behalf"—Acknowledgment of husband's debt by her—Fresh starting point of limitation not afforded by.

The wife of a lunatic put in a petition under the Indian Lunacy Act to have her husband declared to be insane and for the appointment of herself as guardian of his person and manager of his property. For the purpose of her petition, she had to set out her husband's assets and liabilities and she included in the latter a debt due under a promissory note executed by her husband. An order was made on her petition appointing her guardian and manager on furnishing security; but she failed to furnish the security ordered and in the meantime her husband died and she was in fact never appointed his guardian and the manager of his property.

Held that, as the wife had never been appointed committee or manager of her insane husband's property, she did not come within the provisions of section 21 (1) of the Indian Limitation Act and had no authority to acknowledge the promissory note debt on her husband's behalf so as to afford a fresh starting point of limitation for a suit on the promissory note.

PETITION under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the

District Munsif of Ambasamudram in Small Cause
Suit No. 407 of 1928.

G. Ramakrishna Ayyar for petitioner.

S. Ramaswami Ayyar for respondent.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—The suit out of which this civil revision petition arises was upon a promissory note executed by the defendant's deceased husband and dated the 17th August 1923. The suit was filed in 1928. On the 16th August 1924 the defendant's husband made a payment of Rs. 5 in respect of the promissory note. This had the effect of extending the period of limitation to the 16th August 1927. The suit having been filed in 1928, the plaintiff's claim would be barred by limitation but it was claimed that the debt had been kept alive by an acknowledgment of it made by the defendant. This acknowledgment is, it is alleged on behalf of the plaintiff, to be found in an admission made by her in the petition which she put in to get herself appointed guardian of her husband who had then become insane. The petition is Original Petition No. 38 of 1926. The petition was made under the Indian Lunacy Act to have her husband declared to be insane and for the appointment of herself as guardian of his person and manager of his property. It is conceded that the defendant's husband must have been found to be insane as a result of an enquiry under the Act because an order was made on the defendant's petition appointing her guardian and manager on furnishing security. She failed, however, to furnish the security ordered and in the meantime her husband died and she was in fact never appointed his guardian and the manager of his property. For the purpose of her petition, she had to

* Civil Revision Petition No. 1055 of 1928.

GOMATHI set out her husband's assets and liabilities and she included in the latter the suit promissory note debt. AVU AMMAL. It was contended in the lower Court that this was an acknowledgment by the defendant within section 19 (1) of the Indian Limitation Act and that the defendant was her husband's "agent duly authorized in this behalf". This contention the learned District Munsif upheld in the following words:—

"The defendant's husband being insane and he being divided from his brothers, the natural and *de facto* guardian was his wife who was major even then, and she also put in the original petition. P.W. 1 further states that it was she who was managing her husband's property. Thus she, as the actual manager of the estate and the *de facto* and the legal guardian under Hindu Law, has acknowledged the suit debt in the said original petition. Wife's acknowledgment, where she is accustomed to conduct her husband's business, is sufficient, she being regarded as a duly authorized agent. Rustomji on Limitation, 4th Edition, page 244. Thus the defendant's acknowledgment in the said original petition is sufficient to give a fresh starting point of limitation for the suit promissory note."

For the petitioner it is argued that she was not the lawful guardian of her insane husband and that therefore she was not her husband's "agent duly authorized in this behalf" in section 19 as defined in section 21 (1) of the Limitation Act which reads as follows:—

"The expression 'agent duly authorized in this behalf' in sections 19 and 20 shall, in the case of a person under disability, include his lawful guardian, committee or manager, or an agent duly authorized by such guardian, committee or manager to sign the acknowledgment or make the payment."

That section therefore deals with persons who are under disability such as the defendant's husband here. If at the time when the acknowledgment was made the defendant had been appointed the committee or manager of her insane husband's property, then she clearly would have come within the provision of section 21 (1)

of the Limitation Act as section 75 of the Indian Lunacy Act permits every manager of the estate of a lunatic appointed under the Act to pay all just claims, debts and liabilities due by the estate of the lunatic; but she never was so appointed. It is argued that she was not his lawful guardian either and that the section as regards guardianship can have no application to majors and that, even as regards minors, a *de facto* guardian has no power to acknowledge a debt so as to bind a minor and *Ramaswami Pillai v. Kasinath Ayyar*(1) is relied upon. In that case, at page 536, KUMARASWAMI SASTRI J. says:

"Section 21 of the Limitation Act says 'the expression "agent duly authorized" referred to in sections 19 and 20 shall, in the case of a person under disability, include his lawful guardian, committee or manager . . . to sign the acknowledgment or to make the payment.' It can hardly be said that a person who takes upon himself the management of property without being the legal guardian under Hindu Law or a guardian duly appointed by authority can be said to be a lawful guardian under section 21."

It is very difficult to see how any question of guardianship arises at all in the case of a major person. If that person comes under disability by reason of insanity, then, in my opinion, anybody, even if it is his wife, who does any acts in his behalf without being clothed with authority conferred by the Indian Lunacy Act does not do such acts as the lawful guardian of the person under disability and is almost in the position of an intermeddler. Upon the question as to whether the *de facto* guardian of a minor can acknowledge debts so as to bind the minor, there is a considerable conflict of opinion. That a *de facto* guardian can alienate family property so as to bind the minor there is clear authority for, if such alienation is for necessity or for the benefit

(1) (1927) 108 I.C. 623.

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BEASLEY C.J. of the minor. But it is difficult to see how the acknowledgment of a debt can be of benefit to a minor and in this case we are not dealing with a minor at all but with an insane person. There is a decision of BAKEWELL J., *Ganjayya v. Ramaswami*(1), in which it was held by him that the natural mother of a minor, when acting for the benefit of the minor, was a lawful guardian within the meaning of section 21 of the Limitation Act. This case however is not in agreement with *Ramaswami Pillai v. Kasinath Ayyar*(2). An executor appointed under the will of a deceased person can by the inclusion of a debt due by the deceased in the form of valuation filed with the petition for the grant of letters of administration make an acknowledgment of that debt within the provisions of the Limitation Act because he is the man to acknowledge liability in his capacity of legal representative of the deceased. This arises from his position of executor who derives his title from the will and immediately upon the testator's death his property vests in the executor for the law knows no interval between the testator's death and the vesting of the property. In *Raja Rama v. Fakuruddin Sahib*(3) it was held that the position of an administrator is very different and that he derives his title wholly from the Court and has no title until letters of administration are granted and the property of the deceased vests in him only from the time of the grant. In my view, the defendant had no authority to acknowledge the suit debt on her husband's behalf. She certainly had no direct authority and I cannot see that she had any implied authority to do so. It is true that a wife has an implied authority to pledge the credit of her husband for necessities and that this implied authority

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BEASLEY C.J. is not taken away or diminished by reason of her husband's insanity. But it is a limited authority and limited only to necessities. But it is contended on behalf of the respondent that, as it was necessary for the defendant to put in a petition to get herself appointed guardian and manager under the Indian Lunacy Act and as it was necessary for that purpose to set out the assets and liabilities of her insane husband, the admission she is alleged to have made was a necessary one and that she was in fact an agent of necessity. But I do not think that she was an agent of necessity or that it follows that she had any implied authority to acknowledge the debt on behalf of her insane husband. It is further contended on behalf of the respondent that the lower Court has found that the respondent was managing her husband's business and that as manager of his business she had authority to pledge his credit and acknowledge his debts. I take the finding to be that the defendant was only managing her husband's business after he became insane and not before. But she certainly could derive no authority from her husband to manage his business as he was insane. In my opinion, the District Munsif was wrong in holding that the suit debt has been acknowledged. This civil revision petition must therefore be allowed with costs, the lower Court's decree set aside and the plaintiff's suit dismissed with costs.

BARDSWELL J.—I agree.

A.S.V.

(1) (1913) 24 M.L.J. 428.

(2) (1927) 108 I.C. 529.

(3) (1929) 58 M.L.J. 210.

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Bardswell.*

MANJERI S. KRISHNA AYYAR (PETITIONER),
APPELLANT,

v.

THE SECRETARY, URBAN BANK, LTD., CALICUT,
AND ANOTHER (RESPONDENTS), RESPONDENTS.*

Co-operative Societies Act (II of 1912)—Madras Co-operative Societies Act (VI of 1932)—Co-operative Bank—Vakil of—Dispute between, relating to Vakil's acts as Bank's Vakil—Dispute if one to which either of the said Acts applies—Jurisdiction of Registrar of Co-operative Societies to deal with the matter—Vakil also member, director and legal adviser of Bank—Effect—Legal Practitioner member of a Society—Acting by, as Society's Vakil—Propriety of—Practitioner also legal adviser of Society—Effect.

The appellant, a legal practitioner, was a member, a director and the legal adviser of a Co-operative Bank. He was also the Vakil of the Bank conducting litigation on its behalf. He was, however, not a whole-time Vakil of the Bank receiving as his remuneration a fixed salary but a Vakil appearing in each case for a fee.

Held that a dispute between the appellant and the Bank arising out of matters relating to the appellant's acts as the Bank's Vakil was not a dispute to which either the Co-operative Societies Act (II of 1912) or the Madras Co-operative Societies Act (VI of 1932) applied and that the Registrar of Co-operative Societies had therefore no jurisdiction to deal with the matter.

The appellant, in his capacity of Vakil to the Bank, was not an officer, agent or servant of the Society and what he did in that capacity was not done in his capacity as a member of the Society at all. The fact that he at the same time occupied

the other positions already specified in the Society, however irregular his conduct might be in occupying them, could not in the least degree affect the question as to the nature of the dispute between him in his capacity of Vakil to the Bank and the Bank.

Merely because a legal practitioner is a member of a Society, he is not prevented by any rule of professional etiquette from accepting instructions from the Society of which he is a member. There can be no impropriety in his doing so provided that his engagement is not directly due to his being a member. The appellant's conduct in legally advising the Society and appearing as its Vakil in both capacities for remuneration whilst being a director was most improper.

APPEAL under Clause 15 of the Letters Patent against the order of BURN J., dated the 18th day of October 1932 and passed in Civil Miscellaneous Petition No. 4004 of 1932 for the issue of a writ of prohibition prohibiting the respondents from proceeding with the trial of Suit No. 179 of 1932-33 on the file of the Court of the Deputy Registrar of Co-operative Societies, Calicut.

T. R. Venkatarama Sastri and P. S. Narayanaswami Ayyar for petitioner.

Government Pleader (P. Venkataramana Rao) and P. Govinda Menon for respondents.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—This is a Letters Patent Appeal from BEASLEY C.J. an order of BURN J. dismissing the appellant's petition for the issue by the High Court of a writ of prohibition prohibiting the respondents from proceeding with the trial of Suit No. 179 of 1932-33 on the file of the Deputy Registrar of Co-operative Societies, Calicut.

The appellant who is a legal practitioner was and is a member of the Calicut Co-operative Bank, Ltd. He was a director of the Bank from November 1919 to December 1929 and then again from October 1930 to

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January 1932. He was also the legal adviser of the Bank from September 1922 to December 1929 and he was also the Vakil of the Bank from July 1922 to March 1932. The Secretary of the Calicut Urban Bank, Ltd., filed a suit under section 51 of the Madras Co-operative Societies Act (VI of 1932) against the appellant claiming a sum of Rs. 6,017-7-1.

That amount is made up as follows :—

	RS.	A.
(a) Out of pocket expenses charged by the appellant	1,007	1 0
(b) Extra fees charged by him for which there is no sanction of the Directors	892	12 0
(c) Aggregate of amounts paid in by him to the Bank out of collections from the Bank's borrowers which are not found entered in the cash book of the Bank and for which the appellant holds no valid receipts ...	4,117	10 1

The accounts of the appellant with the Bank as its Vakil were the subject of an investigation by a special sub-committee of the Committee of Depositors appointed on the 11th April 1932. As a result of this investigation, the Directors of the Bank requested the Deputy Registrar of Co-operative Societies, Calicut, to cause the accounts to be audited and accordingly the Acting Senior Inspector of Co-operative Societies conducted an audit and in his report he observed *inter alia* that items (a) and (b) were exorbitant and inadmissible. The appellant was accordingly called upon to pay the sum of Rs. 6,017-7-1 to the Bank in default of which it was stated that a suit would be filed against him. He declined to pay and accordingly a reference was made under section 51 of the Madras Co-operative Societies Act (VI of 1932) and a decree against him was asked for. The appellant raised the point that the

Registrar had no jurisdiction to entertain this reference on the grounds that the matters complained of related to the conduct of the appellant in his capacity of Vakil conducting litigation on behalf of the Bank and that the dispute did not touch the business of the Society. He moved for the issue of a writ of prohibition. BURN J. dismissed that petition holding that under both the Co-operative Societies Act (Act II of 1912) and the Act of 1932 there was a dispute between the petitioner and the Society which fell to be decided by the Registrar on the ground that the appellant was a member, the legal adviser and a member of the Board of Directors of the Society and was an "officer" of the Society, that the business concerning which the present dispute has arisen was business which came to him as legal adviser and that it was his position as legal adviser that made him a member of the Board of Directors. It is, in my opinion, not correct to say that the business of the Society with which the present dispute is concerned came to the appellant as its legal adviser because it is the appellant's case—and this is conceded also by the Bank—that the dispute arises out of matters relating to the appellant's acts as the Bank's Vakil; and it is important to keep in mind the distinction between the two capacities of Bank's legal adviser and Bank's Vakil. In my opinion, BURN J. was right in holding that in the capacity of legal adviser to the Bank the appellant was an "officer" of the Society as defined by section 2 of the Act which by clause (d) includes

"a Chairman, Secretary, Treasurer, Member of Committee, or other person empowered under the rules or the bye-laws to give directions in regard to the business of the Society".

There is no committee in this Society but there is a Board of Directors in whom the management of the affairs of the Society is vested by Bye-law No. 41 of

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the Bye-laws of the Society and this Board of Directors form the Committee as defined in section 2 (b) of the Act of 1912. The same definition of "officer" appears in the Act of 1932 in section 2 (e) except that two or three other persons are included. Bye-law 41 (a) of the Society says:—

"The affairs of the Society shall be managed by a Board of Directors consisting of a President, a Vice-President, a Secretary, an Assistant Secretary, a Legal Adviser, a Treasurer, and not more than six other members. The members of the Board of Directors shall be elected once in two years by general assembly from among the members holding not less than five shares each. The Directors shall elect from among themselves the President, Vice-President, Secretary and Assistant Secretary, Treasurer and Legal Adviser."

In my opinion, therefore, the legal adviser of the Bank is an "Officer" of the Bank. I must now consider the rules under both Acts. Under the Act of 1912, by section 43 (1), the Local Government is empowered to make rules to carry out the purposes of the Act and, by section 43 (2) (i), such rules may provide that any dispute touching the business of a Society between members or past members of the Society or persons claiming through a member or past member or between a member or past member or persons so claiming and the committee or any officer shall be referred to the Registrar for decision etc. Bye-law 68 of the Society is as follows:—

"If any dispute arises touching the business of the Society between members or past members of the Society, or persons claiming through a member or past member or between a member or a past member or persons so claiming and the Board of Directors, the party or parties concerned may refer the matter in writing to the Registrar. Similarly in the case of a dispute relating to a debt due to the Society by a member or past member or persons claiming through a member or past member a reference in writing may be made by either party to the Registrar."

The decision of the Registrar or the arbitrator appointed by him is to be final. The Act of 1932 provides by section 51 (1) that

"if any dispute touching the business of a registered Society (other than a dispute regarding disciplinary action taken by the Society or its committee against a paid servant of the Society) arises (a) among members, past members and persons claiming through members, past members and deceased members, or (b) between a member, past member or persons claiming through a member, past member or deceased member and the Society, its committee or any officer, agent or servant of the Society, or (c) between the Society or its committee and any officer, agent or servant of the Society, or (d) between the Society and any other registered Society, such dispute shall be referred to the Registrar for decision."

There is an explanation which reads as follows:—

"A claim by a registered Society for any debt or demand due to it from a member, past member or the nominee, heir or legal representative of a deceased member, whether such debt or demand be admitted or not, is a dispute touching the business of the Society within the meaning of this sub-section."

It will be seen that section 51 (1) of Act of 1932 is wider in its terms than the earlier Act. The Bank claims to make a reference to the Registrar under the latter Act contending that this question comes within either sub-clause (b) or (c) to sub-section (1) of section 51 or both. It is further contended that, if it should be held that the Act of 1932 does not apply to the case but that the procedure laid down by the Act of 1912 is to be followed, the rules made under section 43 of that Act apply equally to this case.

It is contended on behalf of the appellant that the Act of 1932 is of no retrospective effect and that, as the matters complained of were matters which occurred before the passing of the new Act, the dispute with regard to them was not one which under the rules made under that Act could be referred to the Registrar for decision. It is argued (i) that the appellant was not

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engaged in the business of the Society, (ii) that it is not a dispute between a member of the Society and the committee or any officer and the Society, (iii) that the acts complained of were not done by the appellant in his capacity as member of the Society but as its Vakil and (iv) that, even if the Act of 1932 is of application, the appellant as the Society's Vakil was not an officer, agent or servant of the Society. As before stated, no question arises here with regard to any acts of the appellant in his capacity of legal adviser but only as the Bank's Vakil. It is quite true that he is a member of the Society, that he was a director of the Society and that he was the legal adviser of the Society. But does that in any way affect his position as Vakil? It seems to me that this matter has got to be considered from the standpoint only of a Vakil engaged in the Society's legal business.

The fact that he may at the same time occupy the other positions already specified in the Society, however irregular his conduct may be in occupying them, cannot in the least degree affect this question.

As regards the appellant's first contention, namely, that the appellant was not engaged in the business of the Society, in my view, the appellant was. In the course of the Society's business members of the Society incur debts and it is the business of the Society to recover from its members the sums of money owed by them to the Society and, if necessary, to take legal proceedings for their recovery. The appellant as the Vakil engaged by the Society to do so was clearly engaged in the business of the Society.

The next two contentions, namely, that this is not a dispute between a member of the Society and the committee or any officer and the Society and that the acts complained of were not done by the appellant in his

capacity as member of the Society but as its Vakil, may be considered together. This is a dispute between the Society's Vakil and the Society and the acts complained of were done by the appellant in his capacity of the Society's Vakil. Had this been a dispute between the Society and the appellant as its legal adviser, then under the Act of 1932 it might be a dispute between the Society and one of its officers, namely, its legal adviser. But, even assuming that this case is governed by the Act of 1932, in my view the appellant was not an officer, agent or servant of the Society and what he did was not done in his capacity as a member of the Society at all. I think it is clear that both under the Building Societies Act and the Friendly Societies Act in England which contain somewhat similar provisions as regards the settlement of disputes within the Society by the Registrar that, in order that such a dispute can be dealt with by the Registrar, it must be a dispute between the Society and a member in his capacity as member. See Halsbury's Laws of England, second edition, Vol. III, page 436, paragraph 829, which deals with Building Societies, and Halsbury's Laws of England, first edition, Vol. XV, page 177, paragraph 370, which deals with Friendly Societies, where it is stated that disputes between a Society and a member not in his capacity as member, e.g., a claim by a Society against one of its officers for misappropriation of funds, are not disputes to which the Act applies and consequently they are determinable by ordinary legal methods. Viewed in this light, this dispute is not a dispute within the provisions of the Act of 1912 and, unless the appellant when acting as the Society's Vakil was doing so as an officer, agent or servant of the Society, the Act of 1932 is also not of application. It is, however, contended that the appellant was the agent of the Society as its Vakil within

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the provisions of section 51 of the Act of 1932. With this contention I am unable to agree. In acting in litigation as the Society's Vakil he was not the agent of the Society but he occupied merely the position of a Vakil to his client. Different considerations altogether may arise where the Vakil is a whole-time Vakil of a Society or a company and receives as his remuneration a fixed salary. It may be stated here that the Registrar of Co-operative Societies is not anxious to clutch at a jurisdiction which he does not possess. The position he takes up here is that he desires only to know whether in such cases as this he does possess jurisdiction. In my view, he does not. Here the position is that of Vakil and client, the Vakil appearing in each case for a fee. Mr. T. R. Venkata-rama Sastri stated that the question before us is one of considerable importance to members of the Bar and put to us the question, "What is the position of a member of the Bar who is a member of a Co-operative Society and who is instructed by the Society of which he is a member to engage in legal proceedings on their behalf?" It seems to me that the answer to this question must be that, merely because a legal practitioner is a member of a Society, he is not prevented by any rule of professional etiquette from accepting instructions from the Society of which he is a member. There can, in my view, be no impropriety in his doing so provided that his engagement is not directly due to his being a member. The Madras Bar Council have recently ruled that it is improper for a member of the Bar who is a director of a company or a Society to appear for remuneration for that company or Society in its legal business. This rule follows that of the English Bar. That the appellant's conduct in legally advising the Society and appearing as its Vakil in both capacities for remuneration whilst being a director was without question most

improper, but, so far as the case before us is concerned, we have only to consider him in his capacity of Vakil to the Society. That being so, this dispute is not a dispute to which either the Act of 1912 or the Act of 1932 applies; and it is therefore unnecessary to consider the further question raised as to which Act this dispute falls to be decided under.

The result is that this Letters Patent Appeal is allowed and an order is made directing the issue of the writ of prohibition sought for by the appellant. With regard to costs, in my view, the proper order will be to direct the appellant and the respondents to bear their own costs. It is improbable that the Registrar of Co-operative Societies would have thought that he had jurisdiction to deal with the matter if the appellant had not been also a director, the paid legal adviser of the Society and at the same time its Vakil.

BARDSWELL J.—I agree.

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APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

1933,
January 17. THE NATIONAL INDIAN LIFE INSURANCE CO., LTD.,
REPRESENTED BY J. A. N. ALSTON, RESIDENT MANAGER,
CALCUTTA (DEFENDANT), APPELLANT,

v.

MAHADEVAN AND THREE OTHERS (PLAINTIFFS),
RESPONDENTS.*

*Insurance policy—Construction of—“One year’s premium”—
Surrender value of policy sufficient to cover—Application
of, in payment of instalments of premium due, and no for-
feiture of policy in case of—Provision in policy as to—
“One year’s premium”—Meaning of—Amount paid by
assured for the year if to be taken into account in ascer-
taining.*

The material portion of a clause in a policy of insurance
ran as follows:—

“A policy which has acquired a surrender value sufficient
to pay at least one year’s premium is not forfeited immediately
by non-payment of the premium within the days of grace; such
surrender value being automatically applied in payment of
instalments of premium and interest thereon to keep the policy
in force for so long a term as such surrender value will cover.”

Held that the expression “one year’s premium” in the
clause of the policy did not mean a calendar year’s premium or
a full year’s premium in the abstract, without reference to the
amount actually due for any particular year.

In a case in which the annual premium was Rs. 150-12-0,
payable in four quarterly instalments, three instalments amount-
ing to Rs. 113-1-0 were duly paid, and there was a default in
the payment of the fourth instalment, which amounted to
Rs. 37-11-0. The surrender value of the policy on the date of
default was admittedly Rs. 86-3-0.

Held that the surrender value was sufficient to pay the
year’s premium within the meaning of the clause in the policy

* Second Appeal No. 199 of 1929.

and that the default in question did not therefore lead to a
forfeiture of the policy.

APPEAL against the decree of the Court of the Subordi-
nate Judge of Trichinopoly in Appeal Suit No. 110 of
1928 (Appeal Suit No. 214 of 1927, District Court)
preferred against the decree of the Court of the District
Munsif of Trichinopoly in Original Suit No. 175 of
1924.

S. Rajamanickam for appellant.

K. V. Krishnaswami Ayyar for respondents.

JUDGMENT.

A question of some interest has been raised in this
appeal. The lower Courts have held that no forfeiture
was incurred and in my opinion rightly.

It is unnecessary to quote the relevant clauses of
the policy, which have been set forth in the careful and
well-considered judgment of the learned District Munsif.
The short point in the case is, What is the true con-
struction of the words “sufficient to pay at least one
year’s premium”? Before attempting to construe
these words, I shall briefly state the facts. The year
with which we are concerned is 2nd April 1920 to 1st
April 1921. The annual premium was Rs. 150-12-0,
payable in four quarterly instalments. Three instal-
ments amounting to Rs. 113-1-0 were duly paid, and
the fourth instalment, which amounts to Rs. 37-11-0,
became payable on 2nd January 1921. The default
that occurred was in respect of that instalment. The
point to decide is, whether that default led to a for-
feiture of the policy. The material portion of the
clause runs as follows:—

“A policy which has acquired a surrender value sufficient
to pay at least one year’s premium is not forfeited immediately
by non-payment of the premium within the days of grace;
such surrender value being automatically applied in payment of

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instalments of premium and interest thereon to keep the policy in force for so long a term as such surrender value will cover."

What is the intention to be gathered from this clause? The surrender value is treated as the money belonging to the assured, and, so long as the company has in its hands a sum sufficient to pay at least a year's premium, the parties stipulate that the policy shall not lapse. This is a provision distinctly intended for the benefit of the assured and, bearing that in mind, can the construction suggested for the insurance company be accepted? As I have said, the balance due against the annual premium was only Rs. 37-11-0, but the surrender value of the policy on the date of default was admittedly Rs. 86-3-0. Was that amount sufficient or not to pay the year's premium? What then was the year's premium? Out of the premium payable for the year in question, Rs. 113-1-0 had already been paid; thus a balance of Rs. 37-11-0 only was left. In considering whether the surrender value was sufficient to pay the year's premium or not, we cannot overlook that a portion of the year's premium had already been paid. To ignore this circumstance would be not only unreasonable but be opposed to the clear intention of the parties. This is the view taken by the lower Courts, and in my opinion it is both reasonable and sound. Mr. Rajamanickam, the learned Counsel for the Company, has referred me to *Haughton v. Empire Marine Insurance Company*(1), where CHANNELL B. observes:—

"A policy of insurance is to be construed by the same rules as other contracts, the duty of the Court being to collect the meaning of the parties by taking the language employed in a plain and ordinary sense and not to speculate on some supposed meaning which they have not expressed."

(1) (1866) L.R. 1 Exch. 208.

Surely, I am not departing from this well-known rule of construction; but what is more to the point is, that it is equally well settled that the Courts will, far from favouring a forfeiture, lean against it: see Porter's Law of Insurance, seventh edition, pages 79 and 80, and Woodfall on Landlord and Tenant, twenty-second edition, page 397. What the Company suggests is that a year's premium means a calendar year's premium, in other words, a full year's premium in the abstract, without reference to the amount actually due for any particular year. This could not have been the intention of the parties. The words "such surrender value being automatically applied in payment of instalments of premium . . . for so long a term as such surrender value will cover" clearly negative the contention put forward for the insurance company. I underline the two words in that clause, namely, "automatically" and "instalments".

In the result, the second appeal fails and is dismissed with costs.

Solicitors for appellant: *Messrs. Short, Bewes & Co.*
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APPELLATE CIVIL.

Before Mr. Justice Pakenham Walsh.

DIBBA BALESU (PETITIONER), APPELLANT,

v.

LAGUDU CHINNA SANYASAYYA AND ANOTHER
(COUNTER-PETITIONERS), RESPONDENTS.**Agency Tracts Interest and Land Transfer Act (I of 1917),
sec. 4 (2)—Application under—Appellate order of Agent
affirming Assistant Agent's order dismissing—Second appeal
against—Competency of.*

An application under section 4 (2) of the Agency Tracts Interest and Land Transfer Act (I of 1917) is not a suit and the order refusing it is not a decree. No second appeal therefore lies to the High Court against an order of the Agent affirming on appeal an order of the Assistant Agent dismissing an application under section 4 (2) of the Act.

APPEAL against the order of the Court of the Agent to the Governor, Vizagapatam, dated 24th September 1927 and made in Civil Miscellaneous Appeal No. 15 of 1927 (Civil Miscellaneous Applications Nos. 1 and 2 of 1926 on the file of the Court of the Special Assistant Agent, Narasapatam).

B. Jagannadha Doss for petitioner.*V. Govindarajachari* for respondents.

JUDGMENT.

Under section 4 (1) of the Agency Tracts Interest and Land Transfer Act (I of 1917) any transfer of immovable property situated within the Agency tracts by a member of a hill tribe shall be absolutely null and void unless made in favour of another member of a hill tribe, or with the previous consent in writing of the

* Appeal against Appellate Order No. 132 of 1929.

Agent or any other prescribed officer. Where a transfer of property is made in contravention of sub-section (1), the Agent or any other prescribed officer may, on application by anyone interested, decree ejectment against any person in possession of the property claiming under the transfer and may restore it to the transferor or his heirs [section 4 (2)]. An application under section 4 (2) for such ejectment was made before the Special Assistant Agent, Narasapatam, by the appellant. The Assistant Agent found that he was not a person interested and dismissed the application. He put in an appeal to the Agent, and the order was confirmed. This second appeal has been filed in the High Court. A preliminary objection was taken by the office as to the maintainability of the appeal, and it was ultimately admitted subject to the matter being left open to discussion when the appeal came on for hearing.

This preliminary objection that no second appeal to the High Court lies is based on the fact that section 4 (3) states:

"Subject to such conditions as may be prescribed, an appeal against a decree or order under sub-section (2), if made by the Agent, shall lie to the Governor in Council, and if made by any other officer shall lie to the Assistant Agent or to the Agent as may be prescribed."

Rule 4, framed under the Act, which deals with appeals from ejectment orders, expressly says that no second appeal lies. For the appellant it is argued that the prohibition contained in rule 4 applies only to orders of ejectment passed under section 4 (2) of the Act but not to orders refusing ejectment, that an order refusing the application is a decree and therefore a second appeal to the High Court under Rule 48 of the Agency Rules lies. The interpretation clause in the rules says that "decree" shall include orders passed

Balesu v. Santasayya. under Rules 39 (1) and 43 (3) but not orders under Rules 33 and 35. Rules 39 (1) and 43 (3) are not in question in the present case. Turning to the definition of "decree" in section 2 of the Code of Civil Procedure, it is stated to be

"the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final."

Therefore to be a decree within this definition, the determination must be made by a Court, must conclusively determine the rights of the parties with regard to all or any of the matters in controversy and must be in a suit. There is in my opinion nothing to show that an application under section 4 of Act I of 1917 is a suit. Under the Code of Civil Procedure decrees are appealable; first appeals lie under section 96 and second appeals under section 100. Certain orders are also made appealable by section 104 (1) and by section 47 orders in execution between the parties are to be deemed decrees for purposes of appeal. Thus it will be seen that, unless there is a decree, there is no second appeal under the Code of Civil Procedure. No doubt section 4 (2) of Act I of 1917 talks about the Court "decreeing ejectment against any person" and section 4 (3) of an appeal "against a decree or order under sub-section (2)"; but, if we adopt the appellant's reasoning that there is a difference in procedure, namely, that, if the order is one dismissing the application for ejectment, a second appeal lies to the High Court but does not lie from an order granting the application, then we might equally introduce the same distinction into the words and say that it is only an ejectment order which is a decree and hence the words "decreeing" and "decree" will not avail to bring an

order refusing the application under the definition of a "decree." It would certainly be anomalous that there should be a second appeal to the High Court by the unsuccessful applicant but that no second appeal lies to the High Court by the person who is ejected from the property. In my opinion the application is not a suit and the order refusing it is not a decree. Therefore I must dismiss the appeal as I hold it does not lie. The respondents will have their costs.

A.S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Burn.

IN RE HARI SINGH (ACCUSED), PETITIONER.*

*Criminal Procedure Code (Act V of 1898), sec. 162—
Chapter VIII—Enquiry under—Scope of—Statements to
Police—Admissibility of.*

1938,
March 31.

The Police when investigating a case under the preventive sections of the Criminal Procedure Code are not acting under section 162 of the Code. An enquiry under Chapter VIII of the Code is not an enquiry into an "offence", and section 162 cannot be used to shut out statements given to the police by persons who are afterwards called as witnesses.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Sessions of the Coimbatore Division, dated 4th July 1932 and passed in Criminal Appeal No. 19 of 1932 preferred against the judgment of the Court of the Joint Magistrate of Coonoor in Miscellaneous Case No. 1 of 1932.

M. Ranganatha Sastri and N. S. Mani for petitioner.
Public Prosecutor (L. H. Bewes) for the Crown.

* Criminal Revision Case No. 848 of 1932.

HARI SINGH,
In re.

ORDER.

The sole ground on which this petition was admitted was that statements recorded by the Police under section 162, Criminal Procedure Code, had been used by the lower Courts as substantive evidence. But the Police when investigating a case under the *preventive* sections of the Criminal Procedure Code are not acting under section 162, Criminal Procedure Code. Moreover the inquiry before the learned Joint Magistrate under Chapter VIII of the Criminal Procedure Code was not an inquiry into an "offence" and therefore section 162, Criminal Procedure Code, cannot be used to shut out statements given to the Police by persons who are afterwards called as witnesses. This point therefore fails. On the merits I will only say that the evidence, in so far as it has been accepted by the learned Joint Magistrate and the learned Sessions Judge, was quite sufficient to support the finding that the petitioner was a person to whom section 110 (f), Criminal Procedure Code, was properly applicable. I decline to interfere in revision.

K.W.R.

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Bardswell.*

ERAMULLAN KUNHI MOIDIN AND ANOTHER
(APPELLANTS), APPELLANTS,

1933,
February 8.

v.

KUNHI KOMAN NAIR AND ANOTHER (RESPONDENTS),
RESPONDENTS.*

Security bond—Enforcement of—Mode of—Temporary injunction in favour of plaintiff pending disposal of suit—Security bond executed by plaintiff to Court as condition of, for amount exceeding Rs. 1,000 undertaking, in event of dismissal of suit eventually, to make good loss caused to defendants by reason of injunction—Enforcement of—Code of Civil Procedure (Act V of 1908), ss. 47, 95, 145 and 151—Applicability and effect of—Suit to enforce bond—Necessity.

Pending a suit for a declaration of title to certain immovable properties and for a permanent injunction restraining, *inter alia*, the appellants, who were in possession of the properties, from cutting or removing trees on them or from interfering in any way with the plaintiff's management of the same, a temporary injunction was granted to the plaintiff restraining the appellants from cutting and removing the trees on the suit properties on condition of his giving security to the extent of Rs. 15,000. A registered security bond was executed by means of which the plaintiff gave an undertaking to the Court to make good to the appellants whatever loss was sustained by them on account of the injunction order in case the suit was eventually decided against him and further agreed that, in case he did not make good the loss, the properties mentioned in the security bond were to be liable for the amount of the loss suffered by the appellants and he also made himself personally liable. The suit was eventually dismissed with costs and the

* Appeal against Appellate Order No. 34 of 1928 and Civil Revision Petition No. 264 of 1926.

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question arose as to the mode in which the appellants were entitled to enforce the security bond.

Held (1) that, as the security bond did not purport to bind the plaintiff to any individual officer or person but merely bound the plaintiff to the Court, the appellants were not entitled to sue upon the security bond ;

(2) that an application under section 95 of the Code of Civil Procedure was incompetent as the security bond was for a larger amount than Rs. 1,000 ;

(3) that section 145 of the Code of Civil Procedure was inapplicable as the appellants and the plaintiff were parties to the suit ; and

(4) that, on the assumption that section 47 of the Code of Civil Procedure was inapplicable to the case, the appellants having no remedy either under that section or under section 145 and no remedy by suit, the case came within section 151 of the Code of Civil Procedure and the claim could properly be dealt with under that section.

APPEAL against, and PETITION under section 115 of the Code of Civil Procedure and section 107 of the Government of India Act praying the High Court to revise the order of the District Court of South Kanara, dated 7th day of September 1925, in Appeal Suit No. 24 of 1924 (Original Petition No. 5 of 1922, Sub-Court, South Kanara).

D. A. Krishna Variar for appellants.

B. Sitarama Rao for respondents.

Our. adv. vult.

JUDGMENT.

BEASLEY C.J.—The suit out of which this matter arises, namely, Original Suit No. 32 of 1920 in the Court of the Subordinate Judge of South Kanara, was a suit instituted by the Karnavan of a tavazhi seeking a declaration that the suit scheduled properties were the joint family properties of the tavazhi and not the private properties of the second defendant. There was

also a claim for a permanent injunction restraining defendants 1 and 2 and 30 and 31 or their men from cutting or removing trees on the plaint properties or from interfering in any way with the plaintiff's management of them. The first defendant in the suit had leased the properties to the second defendant who sub-leased them to defendants 30 and 31, the appellants here, who were thus in possession of the properties, cutting and removing the trees on them. Pending the disposal of the suit, the plaintiff applied for a temporary injunction against defendants 1 and 2 and the appellants. The plaintiff, in view of the fact that damages were likely to be suffered by the appellants if the temporary injunction were granted and the suit should not succeed, offered to give security to the extent of Rs. 15,000 as a condition for the granting of the temporary injunction ; and a registered security bond was executed by means of which the plaintiff gave an undertaking to the Court to make good to the appellants whatever loss was sustained by them on account of the injunction order in case the suit was eventually decided against him and further agreed that, in case he did not make good the loss, the properties mentioned in the security bond were to be liable for the amount of the loss suffered by the appellants and he also made himself personally liable. The security bond having been executed and put into Court, the temporary injunction was granted. As against some of the defendants, who were members of the tavazhi, the suit was compromised. As against the appellants, the suit was dismissed with costs. Then the appellants in execution proceedings (Original Petition No. 5 of 1922) claimed an assessment of the damages suffered by them by reason of the temporary injunction and a payment to them by the plaintiff of the sum so assessed or so much

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of it as was covered by the security bond and in default a sale of the properties given as security in the security bond. The Subordinate Judge was of the opinion that the appellants were entitled to put in their claim under section 145 of the Code of Civil Procedure. The first respondent appealed to the District Judge who held that the appellants here were not entitled in execution proceedings to enforce the security bond on the ground that there had been no decree for the payment of the damages nor any executable order with regard to them. He held that section 145, Civil Procedure Code, only applied to execution against persons who had become liable as sureties and who are not parties to the suit. He held further that section 47 was not applicable because there had been no decree or executable order and that the matter did not relate to the execution, discharge or satisfaction of the decree. He further held that section 151, Civil Procedure Code, was of no help to the appellants. It was contended on behalf of the respondents that the appellants' only remedy was by way of suit.

The question before us is whether the appellants are entitled to enforce the security bond in execution either under section 145 or section 47, Civil Procedure Code, or, failing a remedy if those sections are not applicable, then under section 151, Civil Procedure Code. For the respondents it is contended that the appellants' remedy is by way of a suit or that an application should have been made under section 95, Civil Procedure Code, to the Court to award compensation to the appellants, and in support of the latter contention *Varajlal v. Kastur*(1) was referred to. In that case, the respondent had obtained a decree against one Vanmalai and attached a house in execution. The appellant intervened and

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applied that the house, if sold, should be sold subject to a mortgage which he held upon the house. His application was dismissed and he thereupon brought a suit for a declaration that the house was not liable to be attached in execution of the respondent's decree. The suit was dismissed by the lower Court and the appellant appealed. Pending the hearing of the appeal, he applied for and obtained under section 492 of the Code of Civil Procedure (1882) an injunction restraining the sale until the result of the appeal on his giving security for interest at six per cent on Rs. 2,000, the acknowledged value of the house. The appeal was heard in due course and was dismissed with costs and thereupon the respondent applied to recover the interest for which security was ordered to be given by the District Court. It was held that he was not entitled to recover it as a Court of execution cannot award interest when the decree is silent and that his remedy was under section 497, Civil Procedure Code (1882) the equivalent of section 95 of the present Code, and that that remedy was obtainable on application not to the Court of execution but to the Court which issued the injunction. The short answer, it seems to me, to this contention is that section 95, Civil Procedure Code, only deals with cases of compensation not exceeding Rs. 1,000 and cannot be applied to cases where a security bond for a larger amount than Rs. 1,000 has been given. It was faintly argued nevertheless by Mr. Sitarama Rao that the section is applicable because it shows that the Court had no power to make any order as a condition for the granting of a temporary injunction for the giving of security to a greater extent than Rs. 1,000. In my view, such a contention as that cannot be sustained as the power of a Court to order security in such cases obviously cannot be limited by section 95 of the Code of Civil Procedure.

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As regards the other contention that the appellants' remedy is by suit, there is one obvious difficulty and it is that the security bond was given to the Court. The appellants therefore were unable to sue upon the bond unless it had been assigned to them. By whom was the security bond to be assigned? If the bond had been executed in favour of the Amin or some officer of the Court, then that person could either have sued upon it or, under orders of the Court, assigned it to the appellants to sue upon. But that is not the case here as the security bond does not purport to bind the plaintiff to any individual officer or person but merely binds the plaintiff to the Court and, as was pointed out in *Raj Raghobar Singh v. Jai Indra Bahadur Singh*(1), the Court is not a juridical person and cannot be sued and it cannot take property and, as it cannot take property, it cannot assign it. The security bond in question here is as follows:—

"I am the plaintiff in the above suit. As per order on R.I.A. No. 241 of 1920 besides issuing an injunction restraining defendants 1, 2, 30 and 31 from entering on the suit properties and from felling the trees standing thereon and from removing therefrom the trees already felled, the Court has ordered me to furnish security for Rs. 15,000. I offer as security my arwar right in the properties mentioned in the schedule annexed hereto and give the following undertaking to the Court. If the suit goes against me, I shall be bound to pay defendants 1, 2, 30 and 31 the amount of damages which may be assessed by the Court resulting on account of the order on R.I.A. No. 241 of 1920. In case of my default to pay the amount of damages as stated above, I bind myself and my heirs and representatives to pay the same on my personal liability as well as on the responsibility of my properties mentioned below when ordered by the Court."

It is quite clear that the undertaking was given to the Court and I am unable to agree that the appellants

(1) (1919) I.L.R. 42 All. 158, 167 (P.C.).

could have sued upon the security bond. It remains to be seen what was the appellants' remedy. The procedure provided by sections 145 and 47, Civil Procedure Code, was resorted to. It is, I think, clear that section 145, Civil Procedure Code, does not apply to such a case as this as the appellants and the respondents were parties to the suit; and *Raj Raghobar Singh v. Jai Indra Bahadur Singh*(1) is authority for the position that, although the case does not come within the terms of section 145, Civil Procedure Code, the Court has inherent power to enforce its bond without recourse to a suit. Therefore, even assuming that the respondents' contention is correct that section 47, Civil Procedure Code, does not provide for such a case as this, the appellants having no remedy under either of those sections and no remedy by suit, it is a case which brings into play section 151, Civil Procedure Code, and, in my view, this is a claim which can properly be dealt with under that section. That being so, the judgment of the lower appellate Court was erroneous upon this point and its decree must be set aside and that of the Subordinate Judge restored with costs here and in the lower appellate Court. The petition is restored to the file of the first Court for further enquiry.

BARDSWELL J.—I agree.

A.S.V.

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APPELLATE CRIMINAL—FULL BENCH.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice
Bardswell and Mr. Justice Burn.

1933,
May 11.

IN RE V. M. RATHNAVELU AND TWO OTHERS (ACCUSED),
PETITIONERS.*

Code of Criminal Procedure (Act V of 1898), sec. 403—Acquittal—Judgment of, by Magistrate having no territorial jurisdiction—Bar if, to fresh complaint on same facts filed before Magistrate of Co-ordinate jurisdiction—Sec. 531—Effect of.

A judgment of acquittal passed by a Magistrate cannot, by reason of the provisions of section 531, Criminal Procedure Code, be set aside on the ground of want of territorial jurisdiction, even by the High Court, in the absence of any suggestion that any failure of justice has occurred by reason of the trial having been held in a wrong area.

A fortiori such a judgment cannot be ignored by another Magistrate who is not a tribunal superior to the Magistrate who passed the judgment of acquittal.

Where the Subdivisional Magistrate of Vellore, who had no territorial jurisdiction to try a case, tried it and acquitted the accused,

held, accordingly, that a fresh complaint filed before the Chief Presidency Magistrate of Madras on the same facts was barred by section 403, Criminal Procedure Code.

Emperor v. Doraiswamy Mudali, (1906) I.L.R. 30 Mad. 94, approved.

Shanker Tulsiram v. Kundlik Anyaba, (1928) I.L.R. 53 Bom. 69, dissented from.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Chief Presidency Magistrate of the Court of the Presidency Magistrates, Egmore,

Madras, dated the 7th day of November 1932 and ^{RATHNAVELU,}
passed in Calendar Case Nos. 30672 and 30673 of 1931. ^{In re.}

K. S. Jayarama Ayyar and G. Gopalaswami for petitioners.

Crown Prosecutor (K. P. M. Menon) for the Crown.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by
BURN J.—Two persons were charged for cheating ^{BURN J.}
(section 420, Indian Penal Code) in two cases and were tried by the Subdivisional Magistrate of Vellore. There was a dispute before the Magistrate on the question whether he had jurisdiction to try the case. The accused persons contended that he had not, and that the cases ought to be tried in Madras. The complainant contended that he had, and the learned Subdivisional Magistrate held that he had jurisdiction, proceeded with the trial, and acquitted both the accused.

The complainant filed revision petitions in this Court against the orders of acquittal. LAKSHMANA RAO J. dismissed the revision petitions, observing that the lower Court, i.e., the Subdivisional Magistrate, Vellore, “had clearly no jurisdiction to try the case”, and that “all his remarks relating to the merits of the case must be regarded as mere *obiter dicta*.”

Then the complainant filed fresh complaints before the Chief Presidency Magistrate on the same facts. The Chief Presidency Magistrate dismissed the complaints on 17th December 1931 accepting the plea of the accused that they had already been tried and acquitted, and that a petition to revise the orders of acquittal had been dismissed.

Then the complainant came to this Court with revision petitions against the orders of the Chief Presidency Magistrate dismissing his complaints. Those cases. (Criminal Revision Cases Nos. 461 and 462 of 1932)

* Criminal Revision Cases Nos. 15 and 16 of 1933.

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were laid by direction of RAMESAM J. before a Bench and were disposed of by JACKSON and MOCKETT JJ. The order was pronounced by JACKSON J. and is to this effect:

"An accused person can only plead '*autrefois acquit*' under section 403 of the Code of Criminal Procedure if the acquittal set up is by a Court of competent jurisdiction. A Court without territorial jurisdiction is not a Court of competent jurisdiction.

That is laid down in *Shankar Tulsiram v. Kundlik Anyaba*(1) and it is difficult to see how it could be held otherwise.

No one is applying to have the order of acquittal set aside under section 531, and there is no need to consider that section.

Whether or no there was territorial jurisdiction is a matter that has not been decided after hearing both parties, and the Chief Presidency Magistrate can decide that fact. His order is set aside and he is directed to proceed."

Thereupon the Chief Presidency Magistrate appears to have taken some further evidence and decided that the Vellore Magistrate had no territorial jurisdiction. He therefore ordered the third Presidency Magistrate to dispose of both the cases according to law.

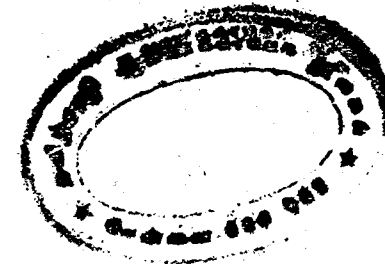
From these orders the present revision petitions have been brought.

It is clear that the attention of JACKSON and MOCKETT JJ. was not drawn to the case of *Emperor v. Doraiswamy Mudali*(2) in which a Bench of this Court took a different view from that of the Bombay High Court in *Shankar Tulsiram v. Kundlik Anyaba*(1). Section 531, Criminal Procedure Code, is strictly applicable to the facts of these cases. The only defect in the jurisdiction of the Vellore Subdivisional Magistrate, which is alleged, is a want of territorial jurisdiction.

Section 531, Criminal Procedure Code, says that no finding of a Criminal Court shall be set aside merely because the trial was held in a wrong area. It follows that the judgments of acquittal passed by the Subdivisional Magistrate, Vellore, could not have been set aside on the ground of want of territorial jurisdiction, even by this Court (since there is no suggestion that any failure of justice has occurred by reason of the trial having been held in Vellore rather than in Madras). *A fortiori* it follows that those judgments cannot be ignored by the Presidency Magistrates of Madras who are not tribunals superior to the Subdivisional Magistrate, Vellore.

We therefore hold that the complaints to the learned Chief Presidency Magistrate in these cases were barred by section 403, Criminal Procedure Code. We set aside his order directing the third Presidency Magistrate to dispose of them according to law, and we restore his order of 17th December 1931 dismissing both complaints.

K.W.B.



(1) (1928) I.L.R. 53 Bom. 89..

(2) (1906) I.L.R. 30 Mad. 94.