



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

1934

1ST JANUARY TO 31ST DECEMBER.

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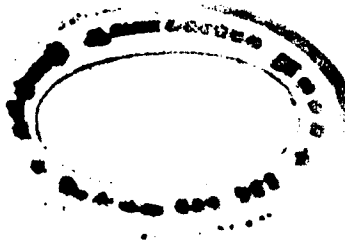
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(1934) I.L.R. 57 Madras

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INDIAN LAW REPORTS
(MADRAS SERIES).

PRIVY COUNCIL.

KRISHNAYYA RAO AND ANOTHER (DEFENDANTS),
APPELLANTS,

J.C.*
1933,
June 30.

v.

RAJA OF PITTAPUR (PLAINTIFF), RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

*Evidence—Admissibility—Deceased person—Evidence in former
suit—Representative in interest—Indian Evidence Act
(I of 1872), sec. 33.*

The first proviso to section 33 of the Indian Evidence Act, 1872, which prescribes the circumstances in which the evidence of a witness in a judicial proceeding, who has since died, is admissible in a subsequent proceeding, requires, upon its true construction, that the party to the first proceeding should have represented in interest the party to the second proceeding in relation to the question in issue in the first proceeding to which the facts which the evidence states were relevant. The proviso covers not only cases of privity of estate and succession of title, but also cases where both the following conditions exist:—(1) the interest of the relevant party to the second proceeding in the subject-matter of the first proceeding is consistent with, and not antagonistic to, the interest therein of the relevant party to the first proceeding, and (2) the interest of both in the answer to be given to the particular issue in the first proceeding is identical.

The proviso does not reproduce the English law on the subject.

Findings on two issues by the High Court, (1928) I.L.R. 51

* *Present*: Lord BLANESBURGH, Lord TOMLIN, Lord RUSSELL of KILLOWEN, Sir LANCELOT SANDERSON, and Sir GEORGE LOWNDES.

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Mad. 893, set aside, and case remanded with a direction that excluded evidence was admissible under section 33, and for reconsideration of the issues.

APPEAL (No. 44 of 1930) from a decree of the High Court made upon an appeal under Clause 15 of the Letters Patent (March 7, 1928) affirming a decree of the Court in its appellate jurisdiction (October 26, 1926), which affirmed a decree of the District Judge of Godavari (October 5, 1920); and petition to admit evidence excluded.

The suit was instituted in 1915 by the respondent against the appellants, the second appellant being in possession of the estate of Gollaprolu for a widow's estate, and the first appellant having been adopted by her to her deceased husband Venkata Rao in 1914. The plaintiff, claiming to be the nearest reversioner entitled to succeed to Gollaprolu, prayed for a declaration that the adoption was invalid. The defendants by their written statement denied that the plaintiff was, as he claimed to be, the *aurasa* son of the Raja of Pittapur who died in 1890, and contended that consequently he could not maintain the suit; issues upon that question were framed.

The only question determined, or argued, upon the present proceedings was whether under section 33 of the Indian Evidence Act, 1872, the evidence given by witnesses, since dead, in a suit of 1891 was admissible. The suit of 1891 was instituted by Ramakrishna, the adopted son of the late Raja of Pittapur, against the Court of Wards and the present respondent, who claimed to be the subsequently-born son of the late Raja; the claim in the suit was to succeed to the property of the late Raja. The evidence in question had been

given upon an issue whether the present respondent was the *aurasa* son of the late Raja. That issue had been determined against the present respondent by the trial Judge, but upon appeal the High Court held that the present respondent was entitled to succeed under the will of the late Raja as *persona designata*, and consequently did not determine the issue; upon appeal to the Privy Council the judgment of the High Court was affirmed [*Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. The Court of Wards*(1)]. The late Raja had granted the estate of Gollaprolu in 1869 to his brother Venkata Rao, who died childless in 1871.

The facts as to the two suits appear more fully from the judgment of the Judicial Committee, which also sets out the material parts of section 33 of the Indian Evidence Act, 1872.

The trial Judge and the learned Judges in both appeals held that the evidence in question was not admissible and that upon the evidence adduced in the suit the respondent was the *aurasa* son of the late Raja of Pittapur. Upon the Letters Patent Appeal [reported as *Krishnayya Rao v. Raja of Pittapur*(2)] it was held by a majority that the adoption was invalid.

Upon the opening of the present appeal the Judicial Committee directed that the admissibility of the evidence given in the suit of 1891 should first be argued.

Dunne K.C. and *Subba Row* for appellants.—Upon the true construction of the first proviso to section 33 of the Evidence Act, the "proceeding" there referred to is the earlier

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(1) (1899) I.L.R. 22 Mad. 383; L.R. 26 I.A. 83.

(2) (1928) I.L.R. 51 Mad. 893.

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proceeding, as the proviso uses the word "was" and not "is"; throughout the section the later proceeding is referred to as "the subsequent proceeding". The question therefore is whether in the suit of 1891 Ramakrishna represented the interest of Krishna in the present suit, not whether Krishna represented the interest of Ramakrishna, or was his privy in estate. It is not material that the property in suit was different in the two suits, nor that Krishna was not born at the date of the first suit. In the suit of 1891 Ramakrishna, in relation to the issue as to the respondent's sonship, represented all the reversioners to the late Raja, and that issue is common to both suits. Krishna as the adopted son of Venkata Rao was one of the reversioners both as to the partible and impartible estate. Even with regard to the impartible property every member of the joint family had an interest greater than a mere *spes successionis*: *Shibaprasad Singh v. Prayagkumari Debee*(1). If the issue had been determined in favour of the respondent that determination would have been binding upon all the reversioners. The principle of Hindu law under which a litigant may represent, without purporting to do so, all reversionary interests, is well recognized. *Risal Singh v. Balwant Singh*(2) is an instance of the application of that principle. That was a case of *res judicata* but the appellants do not concede that the test under section 33 is the same as under section 11 of the Code of Civil Procedure. The view that the proceeding referred to in the first proviso is the earlier proceeding was adopted in *Sitanath Dass v. Mohesh Chunder Chuckerbati*(3) and *Chandreshwar Prasad Narain Singh v. Bisheshwar Pratap Narain Singh*(4); it is conceded that other decisions in India have applied the proviso differently. [Reference was made also to *Patinharkara Vellabhan Chattan Rajah v. Rama Varma*(5) and *Lakshmanma v. Vardhanamma*(6).]

Upjohn K.C., De Gruyther K.C., Sidney Smith and C. Sambasiva Rao for respondent.—The phrase "representatives in interest" in proviso 1 to section 33 implies property or an interest in property which admits of devolution. Whether the word "proceeding" in the proviso refers to the first or second suit the proviso requires that there shall be an interest

(1) (1932) I.L.R. 59 Cal. 1399, 1414; L.R. 59 I.A. 331, 345.

(2) (1918) I.L.R. 40 All. 593; L.R. 45 I.A. 168.

(3) (1886) I.L.R. 12 Cal. 627.

(5) (1914) 28 M.L.J. 669.

(4) (1926) I.L.R. 5 Pat. 777.

(6) (1918) I.L.R. 42 Mad. 103.

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common to both suits and represented in both, and by proviso 3 the question in issue must be substantially the same in both suits. The requirements are not satisfied in this case. In the suit of 1891 the claim was only to Pittapur and such other property as passed on the death of the late Raja. The plaintiff in the first suit could not claim a declaration as to his reversionary interest in Gollaprolu: *Janaki Ammal v. Narayanasami Aiyer*(1). His claim was not, and did not purport to be, on behalf of the family; if successful he would have obtained complete power to alienate the impartible estate. The present suit relates only to Gollaprolu, which since 1869 devolved by a different title. The interest litigated in either suit was not represented in the other; there was no privity either of estate or in law. Further, the question of the respondent's sonship, which the appellants rely on as common to both suits, arises in this suit only if Krishna's adoption was invalid, and in that case he has no interest. The Indian Evidence Act, 1872, in the main reproduces the English law of evidence. Section 33 embodies the practice in England which was well settled before 1872, and required that there should be privity between the parties. In *Humphreys v. Pensam*(2) in 1856 Lord COTTENHAM held that evidence in an earlier suit was inadmissible as the interest of the party tendering it "was not represented" in the earlier suit, he was "not a party nor a privy to" that suit. [As to the law in England reference was made also to *Llanover v. Homfray*(3) and Taylor on Evidence, 12th edition, sections 467, 787.] In *Mrinmoyee Dabee v. Bhoobunmoyee Dabee*(4) in 1874 Sir RICHARD COUCH treated section 33 as embodying the practice in England, and that view has been followed in other cases: *Rajkumari Debi v. Nrityakali Debi*(5) and *Lakshmanma v. Vardhanamma*(6). That was also the view of text-book writers writing soon after the passing of the Act. [Reference was made to Field, 1872 edition, Norton, 1873 supplement, and Cunningham, published in 1872.] Weight attaches to the construction of the section contemporary with its enactment: *The Lord Fermoy's Claim to Vote*(7). The phrase "representative in interest" occurs also in sections 92, 99 and 122, and there

(1) (1916) I.L.R. 39 Mad. 634; L.R. 43 I.A. 207.

(2) (1836) 1 My. & Cr. 580, 587; 40 E.R. 498, 501.

(3) (1881) 19 Ch. D. 224.

(4) (1874) 15 Ben. L.R. 1.

(5) (1910) 12 C.L.J. 434.

(6) (1918) I.L.R. 42 Mad. 103.

(7) (1856) 5 H.L.C. 716, 747.

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it clearly means a person claiming title through a predecessor. The class of cases in which a Hindu litigant, although not suing under Order I, rule 8, may bind other members of the family, is limited to well defined and strictly limited categories. It is only the next reversioner who can represent the family in a declaratory suit against a widow in possession and the suit must relate to the estate: *Rani Anand Kunwar v. The Court of Wards*(1), *Venkatanarayana Pillay v. Subbammal*(2) and *Mata Prasad v. Nageshar Sahai*(3). A decision obtained by or against the manager binds the whole joint family only if he was acting on behalf of the family: *Lingangowda v. Basan-gowda*(4) and *Hori Lal v. Munman Kunwar*(5). If a final decision had been given the question of the respondent's sonship would not have been *res judicata* under section 11 of the Code as Krishna did not claim through Ramakrishna. The question which now arises is analogous and subject to the same test.

Dunne K.C. in reply.—*Pittapur Raja v. Buchi Sitayya*(6) in which the circumstances were similar to those in this case shows that a final decision in the 1891 suit would have been *res judicata*. The decision there was as to the validity of an adoption which arose in both suits though they related to different properties claimed under different titles. It is conceded that the law as enacted by section 33 differs from the law in England. It was intended to have a wider scope. The framers of the Act must have contemplated cases in which a member of a joint family represented the whole family. Proviso 1 would have used the words "or parties under whom they claim" if that had been intended. Those words had been used in section 2 of the Civil Procedure Code of 1859 and were subsequently used in the Codes of 1877, 1882 and 1908 when dealing with *res judicata*. It is said that the issue as to the respondent's sonship arises in this suit only if the adoption was invalid; but if the adoption was invalid Krishna in his natural family was a sapinda of the late Raja.

Upjohn K.C. was heard as to the above case cited in reply.

- (1) (1880) I.L.R. 6 Calc. 764; L.R. 8 I.A. 14.
(2) (1915) I.L.R. 39 Mad. 107; L.R. 42 I.A. 125.
(3) (1925) I.L.R. 47 All. 882; L.R. 52 I.A. 398.
(4) (1927) I.L.R. 51 Bom. 450; L.R. 54 I.A. 123.
(5) (1912) I.L.R. 34 All. 549.
(6) (1884) I.L.R. 8 Mad. 219; L.R. 12 I.A. 16.

The JUDGMENT of their Lordships was delivered by LORD RUSSELL OF KILLOWEN.—In this appeal there arose a point to be primarily argued and decided, namely, the question whether certain evidence recorded in an earlier suit was admissible as evidence in the suit out of which this appeal arises. Their Lordships, having already expressed to the parties that the conclusion which they had reached is that the evidence in question was admissible, now proceed to state the reasons upon which that conclusion was based.

The relevant facts must first be stated. In the year 1873 the then Raja of Pittapur, Gangadhara Rama Rao (who may be conveniently referred to as the late Raja), having had no son born to him, adopted Ramakrishna, the son of the Raja of Venkatagiri. It is alleged that on the 5th October 1885 the late Raja's wife, Mangayamma, gave birth to a son, who is the plaintiff in the present suit and respondent to this appeal, and who will be referred to as the plaintiff. The late Raja died in the year 1890, leaving his estate to the plaintiff by a will in which he described the plaintiff as his *aurasa* (natural-born) son.

In 1891 Ramakrishna brought a suit (No. 6 of 1891) in the District Court of Godavari against the Court of Wards as first defendant and the plaintiff as second defendant, in which he prayed for the following reliefs:—

(1) That it may be declared that the second defendant is not the son of the deceased Raja and that the will in his favour is wholly ineffectual and invalid. (2) That if the Court should be of opinion that the second defendant is the son of the deceased Raja then that it may be ascertained and declared which of the properties taken possession of by the first defendant are impartible and which are partible, and that it may be

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further declared that the plaintiff [i.e., Ramakrishna] by primogeniture is entitled to all such properties as may be declared to be impartible and also that he is, as the eldest surviving member of the late Raja's family, entitled to possession of all properties which may be declared to be partible. (3) That the first defendant may be decreed to deliver to the plaintiff [Ramakrishna] possession of the estates and other properties immovable and movable in the schedules hereunder written and more particularly mentioned and all other properties in the possession or enjoyment of the late Raja of Pittapur at the time of his death taken possession of by the first defendant as in the plaint alleged. (4) That an account be taken of all the properties, immovable and movable, in the possession of the late Raja of Pittapur at the time of his death taken possession of by the first defendant. (5) That the first defendant may be decreed to pay to the plaintiff [Ramakrishna] mesne profits of the properties so taken possession of by the first defendant from the time the said first defendant took possession of such properties till such properties are returned to the plaintiff [Ramakrishna]. (6) That the defendants may be decreed to pay the costs of this suit. (7) That plaintiff [Ramakrishna] may have such further or other relief in the premises as to this Honourable Court shall seem meet and the nature of the case may require.

In that suit the District Judge found that the plaintiff "was not born from the womb of Mangayamma, and that he is not the son of the late Raja of Pittapur"; and he held that the plaintiff was not *persona designata* under the will, and, not being the *aurasa* son, there was no gift in his favour. A decree was made declaring that the plaintiff was not the son of the late Raja, and that the will in his favour was wholly ineffectual and invalid, and directing that possession be delivered to Ramakrishna of the estates and other properties immovable and movable in four schedules mentioned. On appeal, the High Court held that the plaintiff took under the will as *persona designata*, and that the question of his sonship did not arise. On further appeal, their Lordships' Board

took the same view. The case is reported as *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. The Court of Wards*(1).

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The late Raja had a brother, Venkata Rao, in whose favour he had, in the year 1869, executed a grant of an estate known as Gollaprolu, in settlement of rights to maintenance. Venkata Rao died in the year 1871 childless, but leaving two widows, viz., Ramayamma and Venkayamma. Venkayamma died in the year 1889. On the 15th February 1914, Ramayamma, who was in possession of Gollaprolu for a widow's estate, adopted as a son to her husband, Venkata Rao, one Krishna (the principal appellant before the Board), who was one of the younger sons of Ramakrishna and who was born in or about the year 1894.

Thereupon the plaintiff instituted in the Court of the Subordinate Judge of Cocanada the suit now under appeal against Ramayamma and Krishna claiming to be the nearest reversioner entitled to succeed to the properties in the possession of Ramayamma after her death, and praying for a decree declaring that the adoption of Krishna was invalid and not binding on him.

It is obvious that the plaintiff (being not otherwise related) could have no right to maintain such an action if he were not in truth the *aurasa* son of the late Raja, and accordingly his plaint opens with an allegation to that effect. By their written statement the defendants denied that he was the *aurasa* son of the late Raja or of his wife Mangayamma, and alleged that he was put forward as such for fraudulent purposes, and that

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he was not entitled to dispute the adoption. It is unnecessary to state the grounds upon which the adoption was alleged by the plaintiff to be invalid, beyond recording that they include as a reason the alleged fact that Ramayamma "had neither the authority of her husband nor that of the plaintiff who is the head of the family to adopt" Krishna.

Amongst the issues framed, two dealt with the question of the sonship of the plaintiff : they ran thus :—

I (a) Whether the plaintiff is the son born of Raja Mangayamma Rao Bahadur Garu ?

(b) If so, whether he is not the *aurasa* son of the late Raja of Pittapur . . . ?

Some evidence was given in this suit on behalf of the defendants upon these issues, but it was conceded by the appellants' Counsel before their Lordships here that upon that evidence alone he could not succeed in establishing that the plaintiff was not the *aurasa* son of the late Raja. But in addition to that evidence there was tendered on behalf of the defendants before the District Judge of Godavari, to whom the suit had been referred, the evidence recorded in the suit No. 6 of 1891 brought by Ramakrishna, which was claimed to be admissible under and by virtue of section 33 of the Indian Evidence Act. The District Judge rejected the evidence as inadmissible. As to issue I (a) he found that the plaintiff was the son born of Mangayamma, and as to issue I (b) he found that the plaintiff was the *aurasa* son of the late Raja. By his decree dated the 5th October 1920 he ordered and decreed that the adoption be declared invalid and not binding on the plaintiff, and that the adoption did not affect the

plaintiff's rights as the reversioner under the Hindu law entitled to the Gollaprolu estate.

On appeal to the High Court at Madras, the two Judges who formed the Bench differed. KRISHNAN J. held that the plaintiff was justified in withholding his consent to the adoption, and that in the absence of his consent the adoption was invalid. VENKATASUBBA RAO J. held that the plaintiff was not justified in refusing his consent, and that the adoption was valid. Both Judges agreed that the tendered evidence had been rightly rejected, and accepted the District Judge's findings on issues I (a) and I (b). In the result the appeal was dismissed, and a decree dated the 28th October 1926 was made confirming the decree of the District Judge.

Ramayamma had died pending the appeal, and her legal representative was joined as a party to the proceedings. Krishna and this new party preferred an appeal under the Letters Patent against this decree, which was heard by KUMARASWAMI SASTRI, ODGERS and JACKSON JJ. KUMARASWAMI SASTRI J. upheld the validity of the adoption, but ODGERS and JACKSON JJ. held it to be invalid. All three Judges held that the tendered evidence had been rightly rejected. By their decree dated the 7th March 1928, the decree of the 28th October 1926 was confirmed, and the Letters Patent Appeal was dismissed.

Krishna and the representative of Ramayamma then appealed to His Majesty in Council, praying that the decrees of the Courts in India should be set aside and the plaintiff's suit be dismissed with costs ; and they also preferred a petition to their

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Lordships' Board, praying that the tendered evidence be admitted as evidence in the suit.

These being the relevant facts, it became evident at an early stage of the proceedings before the Board that it was essential to decide the question of the admissibility of this evidence before the consideration of any other matter arising on the appeal; for it was agreed by both sides that, in the event of the evidence being admissible in the suit, the matter must be sent back to the Indian Courts for the purpose of having that evidence considered and the findings on issues I (a) and I (b) reviewed and, if necessary, amended in the light thereof.

The question for decision turns upon the true construction of section 33 of the Indian Evidence Act (Act I of 1872), and the application of its provisions to the circumstances of the present litigation. Omitting words which are inapplicable, the section runs thus:—

“Evidence given by a witness in a judicial proceeding . . . is relevant for the purpose of proving in a subsequent judicial proceeding . . . the truth of the facts which it states when the witness is dead . . .

Provided—

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.”

The proviso, it will be observed, is threefold, and it is common ground that the second proviso is fulfilled in the present case. In regard to the third proviso, their Lordships feel no doubt that this also is fulfilled. It is not necessary that all the questions in issue in the two proceedings

should be substantially the same. In the suit No. 6 of 1891 the question of the sonship of the plaintiff was the principal question in issue before the trial Judge, and the very same question is in issue in this the second proceeding.

The contest before their Lordships has mainly centred round the first proviso, both as to its true construction and as to whether its requirements (whatever they may be) are in fact complied with.

There is but little authority in the way of decision by the Courts in India upon the meaning and effect of the first proviso. Such as there is was cited in argument before the Board. In addition, there are the judgments of the learned Judges in the present case. Their Lordships proceed to consider the views so expressed, more particularly in regard to the question whether, for the purpose of complying with the first proviso (where the parties to the two proceedings are not identical), the party to the first proceeding must have been a representative in interest of the party to the second proceeding or the party to the second proceeding must be a representative in interest of the party to the first proceeding. This appears to their Lordships a crucial question, for, if the latter view be the true one, it would seem that the proviso could only be fulfilled where an interest vested in the party to the first proceeding at the date thereof had become vested in the party to the second proceeding—in other words, where, according to the well-known terms of English law, the party to the second proceeding was privy in estate with the party to the first proceeding and so claimed title through and under him. On the

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other hand, if the former view prevails, the words "representatives in interest" may cover a much wider field, and include persons who have no privity of estate with and do not claim through or under the propositus.

The earliest reported decision is the case of *Mrinmoyee Dabea v. Bhoobunmoyee Dabea*(1), decided in the year 1874. In that case certain evidence in an earlier suit was held inadmissible in a later suit. Sir RICHARD COUCH, in his judgment, gave no reasons except that the second proceeding was not between representatives in interest of the parties to the first proceeding. There was apparently no critical examination or consideration of the language used in the first proviso to the section. In *Rajkumari Debi v. Nrityakali Debi*(2) evidence given in an earlier suit was held inadmissible on the ground that the second proviso was not complied with; but there are indications that the Court thought that the first proviso also had not been fulfilled because the relevant party to the second proceeding did not "claim through" the relevant party to the first proceeding. So, too, it would appear from the language used in the judgment of the CHIEF JUSTICE in *Lakshman v. Vardhanamma*(3), that the same view was there entertained in regard to the first proviso. On the other hand, the judgments in *Sitanath Dass v. Mohesh Chunder Chuckerbati*(4) and *Chandreshwar Prasad Narain Singh v. Bisheshwar Pratap Narain Singh*(5) indicate the view that for the purpose of complying

(1) (1874) 15 Ben. L.R. 1.

(3) (1918) I.L.R. 42 Mad. 103.

(2) (1910) 12 C.L.J. 434.

(4) (1886) I.L.R. 12 Calc. 627

(5) (1926) I.L.R. 5 Pat. 777.

with the first proviso you must find in the first proceeding a party thereto who was a representative in interest of a party to the second proceeding.

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The judgments under appeal, while differing somewhat as to the meaning of the first proviso, agree in rejecting the evidence. The District Judge puts the matter thus: ". . . where the parties are not identical in both the proceedings, the party in the prior suit should have represented in interest the party in the subsequent suit to make this proviso applicable. The question is whether Ramakrishna Rao represented the interest of the present second defendant in the prior suit." He excluded the evidence upon answering that question in the negative. In the High Court, KRISHNAN J., while realizing that the wording of the first proviso is "perhaps a little defective" for the purpose of the construction which he places upon it, states its meaning thus: "The parties in the second proceeding in which the evidence is tendered must be the representative in interest of the parties in the first proceeding; or, in other words, should be the persons who derive their title through or claim under them, or shortly are their privies." He then cites the English rule (hereinafter referred to), and states that there is no reason to suppose that the Indian rule is in any way different from the English rule on this point. VENKATASUBBA RAO J., like his colleague, felt the difficulty of fitting his view into the words of the section, but nevertheless stated that under the section the question resolved itself into this: "Is the party in the second proceeding the representative in interest of the party

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in the first? In other words, was the party in the first the predecessor in interest of the party in the second? Upon the Letters Patent Appeal, KUMARASWAMI SASTRI J. thought the evidence inadmissible, "as the second defendant in this suit is not the legal representative of the plaintiff in Original Suit No. 6 of 1891." ODGERS J., on the other hand, stated the question as being "was Ramakrishna the representative in interest of the second defendant . . . ?" and contents himself with saying that nothing had been shown to cause him to come to any other conclusion than that arrived at by the other Judges. JACKSON J. simply agreed with the judgment of KRISHNAN J.

Their Lordships find themselves unable to agree with the view which first finds expression in the judgment of Sir RICHARD COUCH. Reading the words of the first proviso as enacted, it would seem that the words "that the proceeding was" must, from the use of the past tense, necessarily refer to the first proceeding. If this be so, then this proviso must mean (and can properly be so paraphrased) "Provided that the first proceeding was between the parties to the second proceeding or between representatives in interest of the parties to the second proceeding." In other words, where *A* seeks to read against *B* in a later proceeding evidence given in an earlier proceeding to which *A* was not but *B* was a party, *A* must show that a party to the earlier proceeding was a representative in interest of *A*, i.e., that the person who is called by the proviso a "representative in interest" of another is a person who was a party to the first proceeding.

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The judgments appealed from are all based in substance upon the view that the first proviso was not fulfilled because there was no privity of estate between Ramakrishna and Krishna in regard either to Pittapur or Gollaprolu. In truth, the learned Judges have treated the matter as governed by a section identical with the provisions of the English law. Whatever may have been the intention of those who framed the section, the first proviso exactly inverts the requirements of the English law, which requires that the parties to the second proceeding should legally represent the parties to the first proceeding, or be their privies in estate. Their Lordships, however, are not disposed to consider this inversion to be accidental. Nothing would have been easier, had it been desired so to do, than to follow the English rule, or to require that the party to the first proceeding should be privy in estate with or the predecessor in title of the party to the second proceeding. Instead of using such well-known terms, a much more elastic phrase is employed, and one which is neither technical nor a term of art. The legislative authority was, it must be remembered, dealing with a country in which (amongst other institutions) the Hindu joint family involved representation of interest of a kind and degree and in circumstances unfamiliar to English law. In view of this fact, their Lordships cannot but surmise that the omission of strict English legal terminology and the employment of the less restricted phrase "representatives in interest" was deliberate and intentional.

It will be a question depending for its correct answer upon the circumstances of each case

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where the question arises, whether there was a party to the first proceeding who was a representative in interest of a party to the second proceeding within the wider meaning which their Lordships attribute to those words.

Turning back to the first proviso, it requires, in their Lordships' view, that the party to the first proceeding should have represented in interest the party to the second proceeding in relation to the question in issue in the first proceeding to which "the facts which the evidence states" were relevant. It covers not only cases of privity in estate and succession of title, but also cases where both the following conditions exist, viz. (1) the interest of the relevant party to the second proceeding in the subject-matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding, and (2) the interest of both in the answer to be given to the particular question in issue in the first proceeding is identical. There may be other cases covered by the first proviso; but if both the above conditions are fulfilled, the relevant party to the first proceeding in fact represented in the first proceeding the relevant party to the second proceeding in regard to his interest in relation to the particular question in issue in the first proceeding, and may grammatically and truthfully be described as a representative in interest of the party to the second proceeding.

What the section intends is to allow the admission of evidence given in a former proceeding, which it is, for the specified reasons, impossible to give in a later proceeding, subject to the protection

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which the provisos afford to the party to the later proceeding against whom the evidence is tendered. What the first proviso aims at securing is that the evidence shall not be admitted unless the person who tested, or had the opportunity of testing, the evidence by cross-examination, either is himself, or represented the interests of, the party to the later proceeding against whom the evidence is tendered, i.e., that he was (in the latter case), in effect, fighting that person's battle as well as his own.

In the light of their Lordships' views as to the meaning and effect of the first proviso, how does the present case stand? The evidence is tendered by Krishna against the plaintiff, who was himself a party to the first proceeding and who himself (by his Counsel) cross-examined the witnesses. But notwithstanding this fact, since Krishna was not himself a party to the first proceeding (indeed he was then unborn), the admissibility of the evidence in favour of Krishna must be tested by its admissibility if tendered against him. If not admissible against him it cannot be admissible in his favour.

The determining factor is the answer to the question whether the relevant party to the first proceeding (viz., Ramakrishna) was a representative in interest of the relevant party to the second proceeding (viz., Krishna). In their Lordships' opinion he was.

The suit No. 6 of 1891 related not only to the impartible Raj of Pittapur. It related also to the late Raja's self-acquired property to a value claimed to be at least equal to the value of Pittapur. As regards Pittapur, the estate, though

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impartible, still retained to some extent its character of joint family property. Although other rights which a coparcener acquires by birth in joint family property did not exist in regard to it, the birthright of the senior member to take by survivorship still remained; see *Shibaprasad Singh v. Prayagkumari Debee*(1). This right of survivorship, which might in certain events have enured for the benefit of Krishna, was a right which he would acquire on birth, and their Lordships are not prepared to say, even in regard to Pittapur alone, that Ramakrishna, in claiming Pittapur on the footing of the plaintiff being a supposititious child, was not a representative in interest of Krishna within the meaning of the first proviso. But there can be no doubt in their opinion that, in relation to the claim for self-acquired property, Ramakrishna was such a representative in interest of Krishna. He claimed possession of this property, which in his hands would be joint family property, and in which (under the Mitakshara law) all his after-born sons would, upon birth, acquire an immediate interest as coparceners. It is difficult to see how it could be said that Ramakrishna in asserting his claim to that property upon that footing was not the representative in interest of his sons born and to be born, except upon the restricted view taken by the Courts in India.

Much was said in argument in reference to *res judicata* and section 11 of the Code of Civil Procedure, but their Lordships get no assistance from that section in construing the first proviso. Nor

(1) (1932) I.L.R. 59 Calc. 1399; L.R. 59 I.A. 331.

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do they feel able to depart from the plain language of the first proviso, because in other sections of the Indian Evidence Act the words "representative in interest" appear in contexts which clearly show that the representative comes after and does not precede the person whose representative he is.

Their Lordships are of opinion that the evidence in question was admissible, and should have been read and considered as relevant for the purpose of proving in the present suit the truth of the facts which it states.

The existing findings on issues I (a) and I (b) must be set aside. The case as regards those two issues must be remanded to the High Court, with a direction that the evidence in question is, subject to all just exceptions, admissible under section 33 of the Indian Evidence Act, in order that they may either themselves, if they think proper, consider the evidence and frame findings in answer to issues I (a) and I (b), or remit the case as regards those two issues to the District Judge for him to consider the evidence and frame findings in answer to those issues, the findings of the District Judge being, in that event, submitted for consideration and review by the High Court. In the former event the findings of the High Court, and in the latter event the findings of the District Judge and the findings of the High Court, are to be submitted to their Lordships' Board. In the meanwhile, the hearing of the rest of the appeal is adjourned, without prejudice to the right of the appellants to make any application which they may think fit to make to the Courts in India for the appointment of a receiver or otherwise. Pending the final hearing of this

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appeal, all further proceedings under the decrees of the 5th October 1920, the 28th October 1926, and the 7th March 1928, must be stayed. The respondent must pay the costs of the appellants of their petition for the admission of evidence and of the hearing of this appeal before their Lordships, down to and including this judgment.

Their Lordships have humbly advised His Majesty accordingly.

Solicitors for appellants : *Hy. S. L. Polak & Co.*

Solicitors for respondent : *Douglas Grant & Dold.*

A.M.T.

INCOME-TAX REFERENCE.

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

A. S. PL. VR. RAMASAMI CHETTYAR, PETITIONER,

v.

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

Indian Income-tax Act (XI of 1922), sec. 4 (2)—Foreign money-lending business—Properties taken over in discharge of debts in course of—Rents derived from, and treated as assets of that business—Assessability of, as part of profits of that business when remitted to British India, under sec. 4 (2).

Held (CORNISH J. dissenting) that rents derived from properties taken over in discharge of debts in the course of foreign money-lending business and treated as assets of that business could be assessed as part of the profits of that business when remitted to British India under section 4 (2) of the Indian Income-tax Act, XI of 1922.

* Original Petition No. 108 of 1932.

Salisbury House Estate, Limited v. Fry, (1929) 15 T.C. 267, is not an authority for the position that in law under no circumstances can a company or firm deriving profits from land be described as traders and those profits the profits of a trade. What has to be seen is whether the transaction which resulted in those profits can fairly be described as a part of the assessee's ordinary business.

Section 9 of the Indian Income-tax Act is inapplicable to income from property in a foreign country.

Per CORNISH J.—In order to bring income within the reach of section 4 (2) it must be shown that it is a profit of a business which means that the source of the profit is a business carried on by the assessee, be the assessee a business-man or a business concern. Rents derived from property do not become profits of a business simply by virtue of the ownership of the property being in a business concern, and it makes no difference that the property was acquired by the profits of the business or in the course of the business. The rent may be a profit of the business-man; but it is not a profit of the business unless it is derived from the business. Rents received by the assessee from his house property cannot become assessable as income from the trade or business of the assessee by reason of the assessee treating those rents as part of its profits.

PETITION under section 66 (3) of the Indian Income-tax Act, XI of 1922.

R. Kesava Ayyangar for petitioner.

M. Patanjali Sastri for Commissioner of Income-tax.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—The following question has been referred to us by the Commissioner of Income-tax, Madras, in pursuance of this High Court's order in Original Petition No. 108 of 1932, dated the 30th August 1932, namely,

“Whether the rentals derived from properties taken over in discharge of debts in the course of foreign money-lending

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business and treated as assets of that business can be assessed as part of the profits of that business when remitted to British India under section 4 (2) of the Indian Income-tax Act."

The petitioner is a Nattukkottai Chetti and is the proprietor of a money-lending business in Burma and also a partner with a seven-eighths share in a banking business at Kuala Lumpur in the Federated Malay States, namely, the "A.S.P.L. VR." firm. In the year of account a large sum of money was shown in the books of the firms at Burma and Kuala Lumpur to have been remitted from Kuala Lumpur to Burma during that year. The question arose during the assessment whether that sum included any part or the whole of the petitioner's share of profits of the Kuala Lumpur business during the three years prior to the year of account which would be liable to tax under section 4 (2) of the Act. In considering this question, the Income-tax Officer had to deal with the rental income derived from fifteen house properties in Kuala Lumpur, all the houses except one admittedly having been taken over in discharge of the debts due from the customers of the business. The one house also was acquired with a view to secure overdrafts from banks for the purposes of the money-lending business. All these houses are shown as assets of the money-lending business; and the rentals from the houses and the expenditure relating to them are accounted for in the books and the net result is taken periodically to the profit and loss account of the business. All the houses except one have now been sold and the profits derived by the sale of the house properties have been assessed already as business profits. The Income-tax Officer held that the rents received amounting to \$9,219 should

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be treated as part of the petitioner's income from business. He, therefore, included that amount in the profit available for remittance under section 4 (2) of the Act. In the opinion of the Commissioner of Income-tax that assessment was correct; and, in dealing with the question referred by him, he observes that, under section 9 (1) of the Act, tax is payable by an assessee under the head "property" in respect of the *bona fide* annual value of buildings, etc., of which he is the owner, that there is nothing in the section to indicate that the buildings, etc., must be situate in British India but that this section is governed by section 4 (1), which requires that income, to be assessable, must accrue or arise or be received in British India. He draws the conclusion that, as what is assessed is the annual value of the buildings and not the rent, even if the owner of buildings situate elsewhere receives the rent in British India, that does not constitute under section 4 (1) a receipt of income taxable under the head "property". As regards the annual value of buildings, he contends that section 9 of the Act is of no application to buildings situate elsewhere than in British India. His contention, therefore, is that, where these rents are received abroad from foreign property, they cannot be reached by section 9 of the Act and can only be reached by section 4 (2) and then only if the facts warrant that income to be properly described as profits and gains of a foreign business. The petitioner, on the other hand, contends that income of this nature is not and cannot be business income. He points out that income-tax is paid by an assessee under various heads for which

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sections are provided, that, had this income accrued in British India, the tax would have been payable by the assessee under section 9 of the Act and not section 10 which deals with the profits or gains of a business and that the two sections are quite distinct, the one relating to property and the other relating to the profits or gains of a business, and this of course is quite true. In support of this argument it is contended that the House of Lords have decided that income derived from the letting of premises is assessable as income derived from property in land and not as business profits. That is in the case of *Salisbury House Estate, Limited v. Fry*(1). In that case, the appellant company was the owner of a large block of buildings and let out the rooms as unfurnished offices to tenants. The company had no other business except the letting out and management of the one property. Their Lordships held that the company was properly assessable under Schedule A and not under Schedule D. It is argued by the petitioner here that this is a decision directly in point because the opinion expressed by their Lordships in this case was that the assessee in such a case cannot be said in respect of the income from land to be earning profits from trade. Putting out of consideration any question of distinct classification of income such as the determination of which schedule the income falls within for the purpose of its being taxed, if the judgment of their Lordships means that income derived by a trading company from land can never be profit earned

(1) (1929) 15 T.C. 267.

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from trade or business, although that may be the only business carried on by an assessee, then this case is strongly in point. But it has to be remembered that what their Lordships were considering was whether that particular income stood to be assessed under Schedule A or Schedule D and not whether it was liable to be assessed at all and whether the income-tax authorities as they claimed had any option to include that income in Schedule D notwithstanding the fact that it might also have been included in Schedule A. This claim of the income-tax authorities their Lordships negatived. They held that the income-tax authorities had no such option and that, where the assessee was capable of being assessed under Schedule A, they could not, in respect of the same income, be assessed under Schedule D, in other words, where there are various classes of income and the taxing statute says that income of a particular class is to be charged under a particular section or schedule, then it is to be charged under that section or schedule only. Exactly similar is the case under the Indian Income-tax Act. But it must be remembered that in the House of Lords case what was being dealt with was income derived from property within the United Kingdom and not property elsewhere. If the contention put forward by the petitioner here is correct, it means that this class of income, having once been labelled "property", wherever that income is derived, whether in British India or in any other part of the world, it is still "property" and has to be dealt with under section 9 of the Act as such. In my view, that argument is unsound; and it is important to see

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whether under the English Act such income, once having been assessable under Schedule A, must still be so when it is derived from property in a foreign country. It is clear that such income is no longer assessed under Schedule A but under Case V of Schedule D, namely, tax in respect of income arising from stocks, shares and rents out of the United Kingdom. This certainly shows that it is only when the property in respect of which the assessment is made is in the United Kingdom that Schedule A is of application and that, when the income accrues from foreign property, it is dealt with in Schedule D in the same way as are all profits and gains from whatever source accruing in the foreign country to a resident in England and in which schedule all profits of any trade, profession, employment and vocation in England also are assessable; nor is the assessment based on the annual value as it is in Schedule A but on actual profit. It seems to me, therefore, that, by the analogy of the English Act, section 9 of the Indian Act cannot be applied to income from property in a foreign country and that it is only when income is derived from property in British India that section 9 is of any application at all. How then is this income to be taxed when it is brought into British India? The petitioner's contention is that, if section 9 does not apply, the income is not taxable at all. With that contention I am unable to agree. If there is evidence upon which the income-tax authorities can find that these are the profits and gains of a business, then it seems to me that they are taxable under section 4(2) of the Act; and the fact that they would, if the property had been in

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British India, be classified under section 9 instead of section 10 of the Act cannot alter that description if they are capable of bearing it. It then becomes a question of fact, namely, whether these rentals can be said to be the profits and gains of the petitioner's banking business. I do not understand their Lordships in *the Salisbury House Case*(1) to say that in law under no circumstances can a company or firm deriving profits from land be described as traders and those profits the profits of a trade. They are merely deciding a question of income-tax. At page 328 of the report of *Salisbury House Estate, Limited v. Fry*(1), Lord MACMILLAN says, speaking of the company's activities,

"Land-owning, however profitable, is not a trade within the meaning of the Income-tax Code. Property in land as a source of income is dealt with, and can only be dealt with, under Schedule A, and the rules of that schedule prescribe how the income from landed property is to be ascertained and measured."

In my view, when section 9 is put out of consideration as touching this matter, all that has to be seen is whether this banking firm as a part of its business activities derived this profit. This is a question of fact. If the Commissioner of Income-tax holds that this income is a profit of the business because it has accrued to that business irrespective of whether it did so in the ordinary way of the business, then I think that he has not applied the proper test. What has to be seen is whether the transaction which resulted in this profit can fairly be described as a part of the assessee's ordinary business.

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I think it can. This is a banking business and it is the business of bankers to lend money and in the course of that business the loans are repaid usually of course in cash but certainly, not uncommonly, by the sale of jewels and other valuable articles pledged with the bankers. When loans are repaid, the money is ordinarily invested in the business. This is particularly so where the assessee carries on a banking business abroad and has normally no intention of becoming a land-owner in that foreign country. The interest on the investment is a business profit clearly. Does what took place in this case differ materially from the banker's ordinary transaction? Instead of taking cash payments from the debtors the assessee took their equivalent, the houses, in discharge of their debts. That was as much a part of the assessee's banking business as if he had received the repayment in cash. During the interval between the receipt of the houses and their sale, rents were received from the tenants of the houses so handed over in discharge of the debts. It is not as though the assessee had invested some of his profits in immovable property. That is not the case here at all. That rents were received by him instead of interest on the returned loans was merely due to the accident that instead of being repaid in cash the assessee was repaid in kind. In my view, therefore, the rents received by the assessee were not only received by him in the course of his business but were received by him as a banker and the transaction was a banking transaction.

I would, therefore, answer the question referred to us in the affirmative and direct the

petitioner to pay Rs. 250 costs of the Commissioner of Income-tax.

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CORNISH J.—The sole question for decision on this reference is whether income derived as rent from property situated outside British India, but received by the assessee-owner within British India, can be charged to income-tax under section 4 (2) as "profits and gains of a business accruing or arising without British India".

It is admitted by Mr. Patanjali Sastri on behalf of the Income-tax Commissioner that if the property in question had been situate in British India the assessee would have been chargeable to tax under section 9. It does not of course follow that because this income is not taxable under section 9, on account of the property being situate outside British India, it could not be chargeable to tax under section 4 (2) if the income received by the assessee from the property is a profit of a business. It is only on that footing that this income can be made taxable. But in order to bring the income within the reach of section 4 (2) it must be shown that it is a profit of a business, which means that the source of the profit is a business carried on by the assessee, be the assessee a business-man or a business concern. Rents derived from property do not become profits of a business simply by virtue of the ownership of the property being in a business concern, and it makes no difference, in my opinion, that the property was acquired by the profits of the business or in the course of the business. The rent may be a profit of the business-man; but it is not a profit of the business unless it is derived from the business. In the present case, the assessee acquired

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the property in the course of his money-lending business. Certain customers to whom he had lent money were unable to pay their debts and the assessee took over the security, the property, in satisfaction of his claims. By that operation the money-lender became a land-owner and let the property for rent to tenants. He dealt with the property as a landlord. The payment of rent by his tenants was entirely independent of any money-lending business carried on by him. The rent was paid to him and received by him because he was the landlord and not on account of any transaction in his money-lending business. Applying the language of Lord WARRINGTON in *Salisbury House Estate, Limited v. Fry*(1):

"There is nothing in the facts stated in the case which would properly lead to the conclusion that in dealing with the property the Company (the words 'the money-lender' may here be substituted for 'the company') is acting otherwise than as an ordinary landlord would act in turning to profitable account the land of which he is the owner."

The Income-tax Commissioner relies on the facts that the assessee was carrying on a business of money-lending; that the house properties were assets of his business and were treated by the assessee as such; and the Commissioner's conclusion is that any income from the property must be a receipt of the business—therefore, a profit of the business. I have already endeavoured to show that, according to my judgment, the acquisition of property by a business concern in the course of its business does not *ipso facto* render the rent received from that property profits of the business. In *Salisbury House Estate, Limited v. Fry*(1)

(1) (1929) 15 T.C. 267, 315.

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(supra) Lord ATKIN stated (page 318) that it made no difference that rents received from property owned by a trading company formed part of the annual profits of the Company; the income would be assessable under Schedule A and not as income from trading under Schedule D. I take that to mean that the rents received by the Company from its house property could not become assessable as income from the trade or business of the Company by reason of the Company treating those rents as part of its profits. That seems to me decisive against the argument of the Income-tax Commissioner, to which I have just referred, that income from property owned by a business concern is a profit of the business.

I would, therefore, answer the reference by saying that the income received by the assessee from the property in question cannot be assessed under section 4 (2) as profits of business.

BARDSWELL J.—I have had the advantage of reading in advance the judgments just delivered by my Lord the CHIEF JUSTICE and my learned brother, CORNISH J. I think it clear, for the reasons fully set out in my Lord's judgment, that the rentals from the house properties in question cannot be treated as income under section 9. They can, therefore, be taxed only if they can be regarded as profits and gains of a business so as to come within the scope of section 4 (2). In my opinion they can be so treated.

The remarks of Lord ATKIN in *Salisbury House Estate, Limited v. Fry*(1), which have been quoted

(1) (1929) 15 T.C. 267, 315, 318.

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by CORNISH J., have to be read with what that learned Lord has said later at page 321:

"I find it difficult to say that companies which acquire and let houses for the purposes of their trade . . . do not let the premises as part of their operation of trade."

I take that case as deciding no more than that rentals from house property can only be included in Schedule A to which, in this country, section 9 corresponds, if that schedule is applicable and not that such rentals can in no circumstances be treated as profits and gains of a business. In the present instance it is found that section 9, which corresponds to Schedule A, is not applicable, while except in the case of one house the properties acquired have not been acquired merely for the purposes of the money-lending business, but actually been received as a payment in kind in discharge of debts, due to the money-lending firm. I agree with my Lord that the rentals received from these properties after the properties had been received and before they had been sold were as much interest on the repaid loans as if the loans had been repaid in cash. The rental of the remaining house has also, in my opinion, clearly to be regarded as a profit of the business, seeing the purpose for which it had been acquired. I agree that the question referred to us should be answered in the affirmative and that the petitioner should pay the costs of the Commissioner of Income-tax.

A.S.V.

APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Bardswell.

S. NARAYANA IYENGAR, TRUSTEE OF SRI SANTHANA-
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(PETITIONER), PETITIONER,

v.

K. V. DESIKA CHARIAR (RESPONDENT),
RESPONDENT.*

*Madras Hindu Religious Endowments Act (II of 1927), sec.
78—Delivery of possession—Order for—Resistance or
obstruction—Enforcement of order after removal of—Power
of Court.*

An order under section 78 of the Madras Hindu Religious Endowments Act for delivery of possession can be enforced in the usual way in which orders for delivery of possession are enforced. In giving the Court jurisdiction under that section to make orders for the delivery of possession the Legislature must be considered to have impliedly granted the power of doing all acts necessary to the execution of its order.

When once a Court is given a jurisdiction, the necessary consequences flow from its exercise of such jurisdiction without any express words.

PETITION under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court of Tinnevely, dated the 20th November 1928 and made in Execution Petition No. 22 of 1928 in Original Petition No. 79 of 1927.

K. V. Sessa Ayyangar for petitioner.

R. Krishnaswami Ayyangar for respondent.

Cur. adv. vult.

* Civil Revision Petition No. 721 of 1929.

JUDGMENT.

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BEASLEY C.J.—This petition at the instance of KRISHNAN PANDALAI J. has been referred to a Bench although our learned brother himself felt very little doubt that the order in this case was wrong.

The facts of the case are that under section 78 of the Madras Hindu Religious Endowments Act the petitioner, being a trustee of a temple, appointed under the Act, obtained an order from the District Court against an obstructor directing him to deliver up the temple and its properties to the petitioner. The obstructor disobeyed that order. The petitioner then applied to the District Court to cause delivery of possession to be given to him by an officer of the Court. The learned District Judge was of the opinion that he had no jurisdiction to pass such an order because the provisions of the Code of Civil Procedure have not been made applicable to the Religious Endowments Act which in his opinion is a self-contained code and the order contemplated under section 78 of the Act is not a decree which can be enforced under the provisions of the Code of Civil Procedure. Section 78 of the Act enables the Court on application by a person appointed a trustee by the Committee or the Board in accordance with the provisions of the Act and on production of the order of appointment to order the delivery to such person of possession of the mutt, etc., where such person is resisted in, or prevented from, obtaining such possession. If the view of the learned District Judge is correct, it means that, although the Court may make an order for delivery of possession, it cannot enforce its order. That, it

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seems to me, is a position that can hardly have been intended by the Legislature which must in giving the Court jurisdiction under section 78 to make orders for the delivery of possession have impliedly granted the power of doing all acts necessary to the execution of its order; Maxwell on Interpretation of Statutes, fifth edition, page 575. It is obvious that the power to make orders would be useless if these could not be enforced. In *National Telephone Company, Limited v. Postmaster-General*(1) Viscount HALDANE L.C., at page 552, stated:—

“When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decision likewise attaches.”

At page 555 Lord ATKINSON stated:—

“It is simply the question of extending the jurisdiction of an existing Court of law, with all its incidents including a right of appeal, to a new matter closely resembling in character those matters over which it has already jurisdiction as a Court of law.”;

and at page 557 Lord SHAW stated:—

“In the general case, when a Court of record (which the Railway and Canal Commission is by the Act of 1888, section 2) becomes possessed, by force of agreement and statute, of a reference to it of differences between parties, the whole of the statutory consequences of procedure before such a Court ensue.”

This case shows that, when once a Court is given a jurisdiction, the necessary consequence flows from its exercise of such jurisdiction without any express words. In my opinion, the learned District Judge came to a wrong conclusion in this case and the Court's order can be enforced

(1) [1913] A.C. 546.

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in the usual way in which orders for the delivery of possession are enforced. This civil revision petition must, therefore, be allowed with costs both here and in the Court below, the order of the lower Court set aside and the case remanded to the District Court for disposal according to law.

BARDSWELL J.—I agree.

A.S.V.

APPELLATE CIVIL.

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

1933,
February 16.

SAIT PUNNAMCHAND CHATRABAN FIRM OF MARWADI
BANKERS, REPRESENTED BY THEIR MUKTYAR (AGENT)
SAGARMAL (PETITIONER), PETITIONER,

v.

VIJJAPU SATYANANDAM (COUNTER-PETITIONER),
RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 73—Assets received or realized—Decree-holder given leave to bid and set off—Purchase by—Assets when deemed to be received or realized in case of—Application for rateable distribution made after conclusion of sale in case of—Applicability of sec. 73 to—O. XXI, r. 72—Leave to set off—Grant of, at same time as permission to bid—Permissibility.

Under Order XXI, rule 72, of the Code of Civil Procedure leave to set off can legally be given before the sale has been held and concluded. It may be given at the same time as the permission to bid.

When a decree-holder has been given permission to bid and set off and when the amount of the successful bid is less than

* Civil Revision Petitions Nos. 1335 to 1338 of 1928.

the decree amount, the whole of the set-off must be deemed as made on the date of sale and the whole of the amount must be deemed to have been received or realized *eo instanti* the sale is made and section 73 of the Code of Civil Procedure will give no benefit to other decree-holders who apply for rateable distribution after the conclusion of the sale, however soon after its conclusion their applications may be made.

Arunachalam Chetty v. Somasundaram Chetty, (1920) 12 L.W. 328, disapproved.

Ramaraju v. Lakshmiah, (1930) M.W.N. 568, approved.

Hazarimal v. Namdev, (1908) I.L.R. 32 Bom. 379, followed.

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 orders of the District Court of East Godavari at Rajahmundry, dated 28th February 1928 in Execution Petition No. 14 of 1927 in Original Suit No. 5 of 1924, in Execution Petition No. 15 of 1927 in Original Suit No. 345 of 1924 on the file of the Court of the Principal District Munsif of Rajahmundry and in Execution Petition No. 16 of 1927 in Original Suit No. 39 of 1923 on the file of the Court of the Principal District Munsif of Rajahmundry and the order of the District Court of East Godavari at Rajahmundry in Execution Petition No. 17 of 1927 in Original Suit No. 61 of 1923 on the file of the Court of the Principal District Munsif of Rajahmundry.

G. Lakshmanan for petitioner.

V. Govindarajachari for respondent.

Cur. adv. vult.

JUDGMENT.

BARDSWELL J.—The respondent to these petitions obtained a decree in Original Suit No. 67 of 1920 on the file of the Subordinate Court of

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Vizagapatam. The decree was transmitted to the District Court of East Godavari for execution. The respondent filed an Execution Petition No. 45 of 1925 in that Court and was given permission, on an application on that behalf, to bid at the execution sale and to set off the amount of his bid, if successful, against the amount due to him under his decree. The actual expression in the order was not "set off" but "credit", but it is perfectly clear, and is not disputed, that the effect of the order was to give permission to set off. The sale began on 7th January 1927 and was concluded on 12th January 1927 on which date the property was knocked down to the respondent. There has been no objection to the sale on any ground. On the evening on which the sale was concluded, but just after its conclusion, the petitioners in these petitions, each of whom held a decree against the same judgment-debtor, filed petitions, asking rateable distribution. The learned District Judge of East Godavari has dismissed the petitions, holding that they had not been put in, as section 73, Civil Procedure Code, requires that such petitions should be, before the receipt of the assets, which they asked to be distributed, by the Court that held them. In his view in that the respondent had been given permission to set off, the sale proceeds must have been deemed to have been paid into Court by the respondent-purchaser and immediately repaid to him towards satisfaction of his decree. The petitioners, therefore, could not have the benefit of section 73, as their applications were not made to the Court before it had received the assets. They appeal against this decision.

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In *Arunachalam Chetty v. Somasundaram Chetty*(1) a view was taken by SESHAGIRI AYYAR J. sitting as a single Judge that is favourable to the appellants. A decree-holder had obtained permission to bid and set off and was the successful bidder at a sale which was held and concluded on 28th August 1918. On the following day another decree-holder applied for rateable distribution. The learned Judge pointed out that under Order XXI, rule 72, permission to bid and set off is given subject to the rights of decree-holders under section 73 and, as there was nothing to show that permission in that case was of a different character, he allowed the petition for rateable distribution. This decision, however, has been considered by RAMESAM J., when also sitting as a single Judge, in *Ramaraju v. Lakshmiiah*(2), and he held it to be wrong. In his view when a decree-holder has been given permission to bid and set off and when, as in the case now under notice, the amount of the successful bid is less than the decree amount, the whole of the set off must be deemed as made on the date of sale and the whole of the amount must be deemed to have been received or realized *eo instanti* the sale is made. This view must, in my opinion and with respect, be taken as the correct one. Ordinarily under rule 84 of Order XXI the successful bidder has to pay a deposit of 25 per cent of his bid immediately on his being declared to be the purchaser, but, if the purchaser is the decree-holder and is entitled to set off the purchase-money under rule 72, then the Court may dispense

(1) (1920) 12 L.W. 328.

(2) (1930) M.W.N. 568.

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with the requirements of the rule. Normally there will be such dispensation, in which case, as soon as such decree-holder is declared the purchaser, the set-off must be taken as having been made, and section 73 will give no benefit to other decree-holders who apply for rateable distribution after the conclusion of the sale, however soon after its conclusion their applications may be made.

Mr. Lakshman's main point for the petitioners is that leave to set off cannot legally be given before the sale has been held and concluded, and he quotes, in his support, an opinion to that effect by BROOMFIELD J. in *Navaj v. Totaram*(1). That opinion, however, was *obiter* and was not necessary for the decision of the case which was then before the Bench of which that learned Judge was a member. It is certainly not the view taken by RAMESAM J. in the case above cited and it is also contrary to the view indicated by another Bench of the Bombay High Court in *Hazarimal v. Namdev*(2). There with reference to section 294 of the previous Code, to which the present Order XXI, rule 72, corresponds, JENKINS C.J. remarked :

"That section is perfectly clear. The first paragraph of that section requires the permission of the Court to enable the decree-holder to bid for property. If he gets that permission and gets it without qualification, then the amount due on the mortgage may, if he so desires, be set off. But it may be one of the terms on which permission to bid is granted that there should not be this right of set off."

If there can be refusal in advance to allow set off, it would appear that it is equally permissible for set off to be allowed in advance. And that permission to set off may be granted at the same

(1) A.I.R. 1931 Bom. 252.

(2) (1908) I.L.R. 32 Bom. 379.

time as the permission to bid seems clear from the terms of rule 84, by which the decree-holder purchaser may be dispensed from the immediate payment of the purchase-money that would have otherwise to be made. There could be no dispensation from immediate deposit unless the permission to set off had been obtained prior to the sale.

In my opinion the orders under appeal are correct. These petitions must, therefore, be dismissed with costs (one set). Pleader's Fees Rs. 50.

BEASLEY C.J.—I agree.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

CHEEDELLA ROSAYYA AND ANOTHER (PLAINTIFFS),
APPELLANTS,

v.

KOMMI PITCHAYYA AND ANOTHER (DEFENDANTS
SIX AND EIGHT), RESPONDENTS.*

Indian Limitation Act (IX of 1908), sec. 19—Execution of deed—Admission of, before Sub-Registrar—If, amounts to acknowledgment of liability.

Whether admission of execution of a deed before a Sub-Registrar would amount to an acknowledgment of liability within the meaning of section 19 of the Indian Limitation Act would depend on the circumstances of the case.

Where a registered mortgage deed contained recitals to the following effect: "The old documents were looked into and a

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sum of Rs. 4,000 odd remained due, and for Rs. 4,000 out of this amount the mortgage deeds were executed",

held that, when the document was presented for registration, the executants not only admitted the fact of its execution but also admitted the contents of the document, namely, their liability on it, and, as such, an acknowledgment by the executants of liability within the meaning of section 19 of the Indian Limitation Act was necessarily implied.

APPEAL against the judgment and decree of the Court of the Subordinate Judge of Nellore, dated 27th September 1926, in Original Suit No. 42 of 1925.

K. Kuppuswami for appellants.

M. Patanjali Sastri for respondents.

RAMESAM J.—The JUDGMENT of the Court was delivered by RAMESAM J.—This appeal arises out of a suit on two mortgage bonds, dated 21st May 1909 for Rs. 2,500 and Rs. 1,500, respectively. The mortgage bonds were executed by one Subba Nayudu, the father of defendants 1 and 2, for himself and as guardian of defendants 7 and 8, by the present third defendant for himself and as guardian of the fourth defendant and by defendants 5 and 6. The documents were presented for registration on 9th September 1909 and all the executants admitted execution before the Sub-Registrar. On 18th July 1915 a payment was made and the payment was signed by Subba Nayudu and the third defendant but not by the sixth defendant. On 7th July 1921 there was again a payment and endorsements were made and they were signed by all the parties. One of the issues raised before the Subordinate Judge was whether the documents were not barred by limitation as against the defendants who were not parties to the endorsements of 1915. He held that the endorsements of 1915 would be inoperative against those

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who were not parties to it, but as to defendants 5 and 7 he relied upon another acknowledgment (Exhibit E) and held that, so far as they are concerned, the suit was not barred. As to defendants 6 and 8 he held that the suit was barred. Against the other defendants he gave a decree. The plaintiffs have preferred this appeal.

In the plaint the age of the eighth defendant is given as twenty-three on the date of plaint (March 1925) and so in 1915 the eighth defendant must have been aged thirteen. In the written statement of defendants 5 to 8 there is no denial about the age of the eighth defendant as given in the plaint. But it was pleaded that, at the time of the endorsements in 1915, seventh and eighth defendants were majors. This no doubt indirectly involves a denial of the correctness of the age as given in the plaint but the written statement does not proceed to state what the correct age of the eighth defendant is. On this pleading we cannot accept an implied denial in the written statement as an adequate pleading. We must therefore take it that the age of the eighth defendant as given in the plaint is correct, and, if so, Subba Nayudu, who was the guardian at the time of the execution of the document, properly acted as guardian in acknowledging also in 1915. He was certainly a person authorized within the meaning of section 21 of the Limitation Act. We think therefore that, so far as the eighth defendant is concerned, the acknowledgment of 1915 is binding on him and there ought to be a decree against him.

The next question is as to the sixth defendant. The learned Advocate for the appellants contends

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that the admission of execution before the Sub-Registrar amounts to an acknowledgment of liability within the meaning of section 19 of the Limitation Act and that being so the second acknowledgment in July 1921 would be within twelve years of the first acknowledgment and the suit would not be barred. This point was raised before the Subordinate Judge, but in considering it he relied on three decisions, viz., *Kandasami Reddi v. Suppammal*(1), *Muthukumara Mudaliar v. Chockalinga Mudaliar*(2) and *Lallu Mal v. Reoti Ram*(3), and held that the admission of execution before the Sub-Registrar would not amount to an acknowledgment. Now, in *Kandasami Reddi v. Suppammal*(1) it appears that in a former suit for specific performance the plaintiffs admitted the execution of the hypothecation deed which was the subject of the later suit and it was held that it was not an acknowledgment. The decision is not that such admission should never be taken as an acknowledgment. All that it means is that, while in some circumstances it may amount to an acknowledgment, there may be other circumstances in which it may not amount to an acknowledgment. In that case a person admitted execution of a document some years before and there was no occasion for saying whether the amount was paid or not, and it was therefore held that it was not an acknowledgment. *Muthukumara Mudaliar v. Chockalinga Mudaliar*(2) is a case in which the defendant admitted in a deposition the execution of the bond in question but no further question was put as to whether any

(1) (1921) I.L.R. 45 Mad. 443.

(2) (1923) 17 L.W. 674.

(3) (1923) I.L.R. 45 All. 679.

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amount was due on it. In *Lallu Mal v. Reoti Ram*(1), while execution of a document was admitted, it was pleaded that it was taken under undue influence, and in a prior suit the execution was admitted. These are all cases in which, from the circumstances in which admission of execution was made, it was impossible to imply necessarily an acknowledgment of existing liability. On the other hand, we have got *Swaminatha Odayar v. Subbarama Aiyar*(2), a decision of REILLY J. and one of us, in which it was held that from the surrounding circumstances an acknowledgment of liability may be inferred. In that case, the anxiety of the party was to show that the transaction was real and that he was willing to pay on the note but for the unwillingness of the other party to receive. The Subordinate Judge refers to another case, *Labha Mal v. Imam Din*(3), which comes nearest to the case before us. In that case there was an admission of execution before the Sub-Registrar but a question was put to the executant whether he received consideration and he admitted the receipt of consideration also—a circumstance which does not appear in the case before us. Merely on this ground the Subordinate Judge held that that case is distinguishable. We do not agree with that conclusion. Even if the receipt of consideration is admitted, one may suggest that it was really a *benami* transaction, in which case the executant may not really mean to admit liability. Except where a *benami* transaction is suggested, the admission of execution before a Sub-Registrar within four months

(1) (1923) I.L.R. 45 All. 679.

(2) (1926) 51 M.L.J. 856.

(3) (1923) 76 I.C. 751.

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after the execution of the document is to make the document operative. It will be the strongest case where a man is anxious to admit his liability. Even in a *benami* transaction, for the purpose of misleading the outside world, a person purports to admit liability at the time, whatever the truth of the matter may be. The circumstance that there was an admission of receipt of consideration in *Labha Mal v. Imam Din*(1) does not necessarily distinguish that case from the case before us. In the present case, the contents of the documents show that the old accounts were looked into and a sum of Rs. 4,000 odd remained due, and for Rs. 4,000 out of this amount the mortgage deeds were executed. There was no new consideration to be received and there was no necessity for putting any such question about the receipt of consideration by the Sub-Registrar. When a document is presented for registration, the executors not only admit the fact of its execution but admit the contents of the document, namely, their liability on it. In our opinion this is a case where acknowledgment of liability is necessarily implied. It is not necessary to deal with possible cases where there may be some difficulty in making such an implication. If admission of execution in such circumstances is an acknowledgment, it is admitted that the suit is not barred. We allow the appeal against defendants 6 and 8 with costs throughout.

G.R.

(1) (1923) 76 I.C. 751.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.

RAJAH BAHADUR DHANARAJAGERJI (FOURTH
RESPONDENT, FIRST DEFENDANT'S LEGAL
REPRESENTATIVE), APPELLANT,

1932,
December
12.

v.

RAJAH PANUGANTI PARTHASARADHY RAYANIM
VARU AND THREE OTHERS (PETITIONERS 1, 3 AND 4 AND THIRD
RESPONDENT—PLAINTIFFS 1 AND 3, SECOND PLAINTIFF'S LEGAL
REPRESENTATIVE AND SECOND DEFENDANT'S LEGAL REPRESENT-
ATIVE), RESPONDENTS.*

*Mesne profits—Claim for—Onus of proof in—Shifting of—
Conditions—Collection charges—Right to, of person liable
for mesne profits—Possession wrongful—Possession also
tortious and malicious—Distinction between—Propriety of—
“Mesne Profits” in Code of Civil Procedure (Act V of
1908)—Meaning of—Premia from new tenants which were
either collected or might, with ordinary diligence, have been
collected by trespasser in possession—Part of mesne profits if
—Mortgagee in possession—Payments made by, to temples
in taluks mortgaged—Recovery of, from auction-pur-
chasers of taluks claiming redemption—Right of—Payments
made by mortgagor while in possession—Decree for posses-
sion of property—Deterioration of property by damage done
by judgment-debtor subsequent to decree and while in
possession of it—Compensation for—Decree-holder's right to
—Question as to, if falls within sec. 47 of Code of Civil
Procedure—Matter falling within that section—Duty of
executing Court to decide.*

When a party claims damages, he must adduce proof in support of his claim. The burden of proof rests in the first instance upon him; in order to succeed he must put the Court in possession of satisfactory evidence as to the quantum of

* Appeals against Orders Nos. 362 of 1929 and 161 of 1930 and Civil Revision Petitions Nos. 626 and 627 of 1930.

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damages to which he is entitled. The claim for mesne profits is virtually a claim for damages, and the rule that the plaintiff must discharge the burden applies therefore to such a claim. But the expression "mesne profits" is defined in section 2 (12) of the Code of Civil Procedure as meaning, not only those profits which a person in wrongful possession actually received but also such profits as he might with ordinary diligence have received. If the defendant asserts that a particular amount and no more was received by him, the duty of establishing it affirmatively rests upon him, that fact being especially within his own knowledge. If he lays before the Court sufficient evidence to prove that fact, he shifts the burden to the opposite party of proving that more might have been received.

Where the defendant had at his command all the machinery available to a Zamindar to collect the amount fixed as the beriz, the plaintiff, on showing what that beriz is, must be deemed to have *prima facie* made out that the opposite party could with ordinary diligence have collected it, and it lies upon the opposite party to give some explanation or offer some evidence to show that as a matter of fact and for causes over which he had no control this sum was not realised by him. The question of the burden of proof is of subsidiary importance in a case in which the defendant has attempted to show by putting forward certain specific pleas why the real receipts fell short of the gross demand and has failed to prove them by satisfactory evidence.

A mortgagee with possession of a taluk is under no legal obligation to make payments to the temples in the taluk merely because such payments were made by the mortgagor when he was in possession. The position of the mortgagee is different from that of the mortgagor in this respect. Any payments made by the mortgagee to the temples must be regarded as purely voluntary and he cannot hold persons who as auction-purchasers of the taluk claim to redeem him liable for the monies he paid.

Wrongful possession is the very essence of a claim for mesne profits as defined in section 2 (12) of the Code of Civil Procedure. The only relevant consideration under that definition is, whether the defendant's possession was wrongful or not. If it was wrongful, the Court is not justified in going further and inquiring what the degree of the misconduct or culpability

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is. A person liable for mesne profits is entitled to charge the estate with collection charges for the whole period of accounting and no distinction can in this respect be made between the period when his possession was wrongful and that when his possession was, besides being wrongful, also tortious and malicious.

The term "mesne profits" occurring in the Code of Civil Procedure is very different from "gross receipts" used in the Transfer of Property Act. In their ordinary and popular sense the two words "receipts" and "profits" are very different expressions. Profits are the surplus by which the receipts exceed the expenditure.

Premia from new tenants which were either collected or might with ordinary diligence have been collected by a trespasser in possession are a part of the mesne profits for which he is accountable.

When a decree awards a person a certain property, he is entitled to get it in the state in which it was when that decree was passed. He cannot be said to get it in that state, if the property, while in the opponent's possession, suffered deterioration by damage done by him subsequent to the decree. Whether, when the property was delivered, it continued to be in the state in which it was when the decree was passed or in the meantime underwent deterioration and the decree-holder is entitled to compensation for the loss caused by such deterioration is a matter that should be considered in execution under section 47 of the Code of Civil Procedure.

Section 47 (1) of the Code of Civil Procedure is mandatory and, in regard to a matter that properly falls under that section, the Court is bound to decide it in execution and has no discretion to refer the parties to a separate suit.

APPEALS, respectively, by the first defendant's legal representative, and by the first and third plaintiffs, against the order of the Court of the Subordinate Judge of Nellore, dated the 26th August 1929, and made in Execution Petition No. 63 of 1924 in Original Suit No. 1 of 1917.

Petitions under section 115 of Act V of 1908 and section 107 of the Government of India Act

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1915 praying the High Court to revise the orders of the Court of the Subordinate Judge of Nellore dated the 26th August 1929 and made respectively in Execution Application No. 120 of 1928 and in Interlocutory Application No. 22 of 1925 in the said Execution Petition No. 63 of 1924 in Original Suit No. 1 of 1917.

Advocate-General (Sir A. Krishnaswami Ayyar), with him A. S. Krishna Rao and K. Umamaheswaran for appellant.

Government Pleader (P. Venkataramana Rao), V. S. Narasimhachar, M. Seshachalapathy, A. Venkatachalam, V. Subramaniam and C. Basu Dev for respondents.

Cur. adv. vult.

JUDGMENT.

Civil Miscellaneous Appeal No. 362 of 1929.

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VENKATASUBBA RAO J.—This appeal is filed by the fourth defendant against the order dated 26th of August 1929 of the Subordinate Judge of Nellore fixing the amount of mesne profits made in pursuance of the order of His Majesty dated the 25th June 1924. The order in question was made on the Execution Petition No. 63 of 1924 filed by the plaintiffs, and the facts which led to the filing of that petition may be shortly stated.

As a result of a certain transaction between the late Rajah of Kalahasti and the first defendant (after whose death the fourth defendant, his son, was brought on the record as his representative) the suit properties passed to the latter and the plaintiffs, who succeeded as auction-purchasers to the rights in the properties of the Rajah, filed Original Suit No. 55 of 1915 (which subsequently

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was re-numbered as No. 1 of 1917) claiming to redeem them on the footing that the transaction was a mortgage. Alternatively the plaintiffs claimed to have the properties reconveyed to them upon payment of the purchase price on the ground that, if the transaction amounted to an out-and-out sale, the conditions entitling the Rajah to a reconveyance had been complied with by him and they succeeded to his rights. The learned Subordinate Judge held that the transaction amounted to a mortgage by conditional sale, but the High Court on appeal was of the opinion that it was an absolute sale of the properties but found, agreeing with the trial Court, that the conditions entitling the Rajah to a reconveyance had been performed and that the plaintiffs were entitled to have the properties reconveyed to them on payment of the price. The question of fact that was discussed at great length both in the trial Court and the High Court was whether the late Rajah tendered as alleged by the plaintiffs the price of six lakhs on the 31st of August 1914. The Subordinate Judge held that the plaintiffs' case regarding the tender was true, and treating, as I have said, the transaction as a mortgage, passed on the 5th October 1918 a preliminary decree declaring that the amount due by the plaintiffs to the defendant was Rupees six lakhs and directing that, on payment by the former of that sum on or before the 5th of March 1919, the latter should reconvey the properties to them and further ordering the defendant to pay the plaintiffs Rs. 60,000 on account of past mesne profits for fasli 1324. The plaintiffs paid into Court the mortgage amount (six lakhs) on the 5th March 1919, and the trial Court passed a

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final decree on the 7th of October 1919 directing the defendant to reconvey the properties to the plaintiffs. It was against these preliminary and final decrees that appeals were filed to the High Court. They were Appeals Nos. 46/19 and 57/20, both filed by defendant 1, and the plaintiffs also filed a memorandum of objections. The High Court concurred with the finding of the trial Court on the point of tender, but, having held, as I have said, that the transaction amounted to an absolute sale with an agreement to reconvey, passed a decree which varied materially the decree of the trial Court as to interest and mesne profits. In view of a certain contention raised before us to which I shall presently refer, it may be useful to point out here why the Subordinate Judge awarded mesne profits only for fasli 1324. The tender of the price was, as stated above, made on the 31st of August 1914 and the suit claiming the properties back was filed in August 1915. The plaintiffs did not follow up the tender by paying the amount into Court, and the Subordinate Judge therefore held that they were entitled to mesne profits only up to the institution of the suit and not to the subsequent profits. Taking this view, the Subordinate Judge granted mesne profits for fasli 1324, i.e., for the period between the date of the tender and the date of the suit. When the matter came up before the High Court, the question as to mesne profits and interest was fully considered and the learned CHIEF JUSTICE, WALLIS C. J., discusses in his judgment what the true legal principles are that would apply to the case, in view of the High Court's finding that the first defendant having refused the tender continued to

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be in possession as mortgagee. The conclusion at which the High Court arrived is thus stated in the judgment of WALLIS C.J. :

"The first defendant therefore will be entitled to interest on the sum of Rs. 6 lakhs from 1st September 1914 up to 5th March 1919, the date of the deposit, at 6 per cent per annum. On the other hand the plaintiffs will be entitled to mesne profits from 1st July 1914 until possession or until the expiry of three years from this date, whichever may be earlier."

It will be noticed that, though the liability for the mesne profits was determined by the judgment, it did not fix the actual amount or the rate; but the decree that was drawn up (dated the 24th February 1921), going further than the judgment, fixed the amount at Rs. 60,000 per annum. The result therefore was that under the High Court's decree the first defendant became entitled to interest at six and a half per cent per annum on the six lakhs from the 1st September 1914 (the tender having been made on the 31st August) up to the 5th March 1919 (the money having been on that date deposited into Court); and the plaintiffs on the other hand became entitled to mesne profits at Rs. 60,000 per annum from the 1st July 1914 until delivery of possession. From this decree of the High Court the first defendant filed an appeal to the Privy Council. On the question of tender their Lordships held, agreeing with the concurrent findings of the Courts in India, that the plaintiffs' case was true, and, as regards the character of the transaction, they decided, upholding the Subordinate Judge's view and differing from that of the High Court, that it amounted to a mortgage and not to an out-and-out sale with an agreement to reconvey. On these findings the Judicial Committee advised that the judgment of the High

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Court should be discharged and that the decree of the Subordinate Judge should be restored with the following variations: (i) that the plaintiffs were chargeable with interest upon the mortgage money at six per cent per annum from the 1st September 1914 to the 5th March 1919 when it was paid into Court, (ii) that the first defendant (by that time deceased and represented by the fourth defendant) was entitled to the interest earned by the mortgage money since it was so deposited into Court and (iii) that the fourth defendant should account to the plaintiffs for the mesne profits of the properties from the 1st July 1914 until actual delivery. The order of His Majesty approving these recommendations of the Privy Council was made on the 25th June 1924, and it was in due course transmitted by the High Court to the lower Court for its terms being carried into execution. It is in pursuance of this order that the learned Subordinate Judge has now determined the amount of the mesne profits, and from his decision both the parties have filed the appeals.

* * * * *

Some question has been raised as to the onus of proof; but in the circumstances of this case any discussion as to the onus seems unnecessary. The fourth defendant has put forward a specific case that owing to certain reasons he was not in a position to collect the full rentals and has failed to make it out. But I may state what in my opinion the true rule as to the onus of proof is. When a party claims damages, he must adduce proof in support of his claim. The burden of proof rests in the first instance upon him; in order to succeed

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he must put the Court in possession of satisfactory evidence as to the quantum of damages to which he is entitled. The claim for mesne profits is virtually a claim for damages, and the rule that the plaintiff must discharge the burden applies therefore to such a claim. But the expression "mesne profits" is defined in section 2, clause 12, Civil Procedure Code, as meaning, not only those profits which a person in wrongful possession actually received but also such profits as he might with ordinary diligence have received. If the defendant asserts that a particular amount and no more was received by him, the duty of establishing it affirmatively rests upon him, that fact being especially within his own knowledge (section 106 of the Evidence Act). On his laying before the Courts sufficient evidence to prove that fact, he shifts the burden to the opposite party of proving that more might have been received. This is the effect of *Ramakka v. Negasam*(1) on which both sides have relied. *Muhammad Abdul Gaffur Rowther v. Muhammad Samsuddin Rowther*(2) does not lay down a different rule. In *Amir Kazim v. Darbari Mal*(3) the learned Judges observe:

"In calculating such mesne profits, the execution department should not award the gross rental of the property unless it is satisfied that the entire rental was received by the lessees (defendants) or with ordinary diligence might have been received by them."

Turning to the facts of the present case, the defendant had at his command all the machinery available to a zamindar to collect the amount fixed as the beriz, and the plaintiffs, on showing what that beriz is, must be deemed to have *prima facie*

(1) (1923) I.L.R. 47 Mad. 800.

(2) (1924) 47 M.L.J. 730.

(3) (1902) I.L.R. 24 All. 475.

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made out that the opposite party could with ordinary diligence have collected it. This principle is recognized in *Brojendro Coomar Roy v. Madhub Chunder Ghose*(1), where the learned Judges, after stating that it was proved that a certain jumma was payable in respect of the property, observed:

"It lay upon the judgment-debtors to give some explanation or offer some evidence to show that as a matter of fact and for causes over which they had no control this sum had not been realised by them."

In *Grish Chunder Lahiri v. Shoshi Shikhareswar Roy*(2) the Judicial Committee also lay down the rule in more or less the same terms:

"And *prima facie*",
their Lordships observe,

"it is fair to infer that a person in possession of land may by ordinary diligence get rent for it according to the prevailing rates for such land and that the true owner wrongfully dispossessed has been a loser by that amount."

An earlier passage from the same judgment may usefully be extracted:

"But the amin, as directed by the Subordinate Judge, has tried to ascertain the very thing which the Code directs. He called for evidence of actual receipts. Whether if that had been produced it would have satisfied the inquiry, cannot be known. It might still have been necessary to inquire into the possibility of larger receipts by ordinary diligence."

This case is an authority for the proposition that *prima facie* it is fair to presume that a person in possession may by ordinary diligence get rent according to the prevailing rates, in other words, up to the beriz or the demand on the land.

In this case, as I have said, the question of the burden of proof is of subsidiary importance, as the

(1) (1882) I.L.R. 8 Calc. 343.

(2) (1900) I.L.R. 27 Calc. 951 (P.C.).

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fourth defendant has attempted to show by putting forward certain specific pleas why the real receipts fell short of the gross demand and has failed to prove them by satisfactory evidence.

In the result, we must hold that on the credit side of the account should be placed for the accounting period (fasli 1325 to fasli 1333) the sum of Rs. 1,42,250 per year, the same amount as we have fixed as the beriz or the gross annual demand. It may be recalled that the figure at which the lower Court has arrived is Rs. 1,48,096-6-2.

* * * * *

Devasthanam Expenses.—We now pass on to item 9 of Exhibit 201, the Devasthanam expenses. The facts bearing on this point may be briefly stated. The Rajahs of Kalahasti, when they were the owners, used to make contribution to the temples in the taluk. They collected from the ryots what were known as *srivar rusooms*, and, by adding monies of their own, made payments to the temples on a certain scale. The Court of Wards was for some time in management of the estate on behalf of the then Rajahs of Kalahasti. At that time an expenditure of Rs. 5,000 was sanctioned by the Court of Wards, and this sum was being paid out from time to time. There was also some suit relating to the succession to the zamindari, and in that proceeding, a receiver having been appointed, the Court seems to have sanctioned his spending Rs. 5,000 a year for this purpose. It is now urged for the defendant that he continued to make payments on the same scale and that the monies he spent can properly be debited against the plaintiffs. We agree with the lower Court that this contention

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cannot be accepted. Any payments made to the devasthanams beyond what was collected as *srivara ruseoms* must be regarded as purely voluntary. There was no legal duty cast upon the defendant in his capacity as the mortgagee to make these payments. His position is different from that of the zamindars in this respect. The latter, who were the owners, could, to show their piety and devotion, pay what sums they liked. Again, as regards the Court of Wards, whether they rightly made the payments or not is not a matter which we are called on to decide; but in any case they were managing the estate for the owners, and, if the latter did not object, there was no reason why the usual contributions should be withheld. Similarly the receiver in the succession suit represented the parties either entitled to or claiming the zamindari, and he must be deemed, while making the payments with the sanction of the Court, to be performing the duties, which the Rajahs, if in possession, would have carried out. The defendant's position is entirely dissimilar and he cannot hold the plaintiffs liable for the monies he paid. It may be added that the temples on which the Rs. 5,000 a year was spent by the Court of Wards and the Receiver included some in that part of the Pannur Taluk which never came into the possession of the first defendant or the fourth defendant.

* * * *

Collection charges (generally).—A question has been raised whether the defendant can be allowed to charge the estate with the expenses of collection. The learned Judge has allowed these charges to be defrayed out of the mesne profits to the end

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of fasli 1328, but for the subsequent period he has held that the defendant is disentitled to recover those charges. The distinction appears to be based on the ground that, when the act of trespass is besides being wrongful (every trespass is wrongful) also tortious and malicious, the trespasser is in equity disentitled to charge such expenses as have been voluntarily incurred. The charges are divided into two categories: first, necessary payments such as government revenue or ground rent—these every wrongdoer is entitled to recover—and secondly, ordinary expenses which would be voluntarily incurred, such as collection fees, which only an honest trespasser can recover. This distinction was recognized and acted on in *Altaf Ali v. Lalji Mal*(1). In that case the Court (STUART C.J. dissenting) held that, when the trespasser entered or continued on the property without any *bona fide* belief that he was entitled to do so, it is not imperative on the Court to allow him to charge the estate with the expenses of collection. This was followed in *Dungar Mal v. Jai Ram*(2). The test to be applied according to this decision is, is the trespass tortious and malicious, in other words, is the misconduct of an aggravated character? If so, the collection charges should not be allowed to the trespasser. This view seems to have been accepted by the Calcutta High Court in *Raja Sashikanta v. Raja Sarat Chandra*(3). Another case that has been cited as supporting this view is *Dakshina Mohun Roy Chowdhry v. Saroda Mohun Roy Chowdhry*(4). We may at once state that the last-mentioned case does not deal

(1) (1877) I.L.R. 1 All. 518 (F.B.).

(3) (1921) 34 C.L.J. 415.

(2) (1902) I.L.R. 24 All. 376.

(4) (1893) L.R. 20 I.A. 160.

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with the point at all. The question is whether the view taken by the lower Court can be supported. Wrongful possession is the very essence of a claim for mesne profits; that is what the definition of the expression "mesne profits" states. Mesne profits are defined (section 2, clause 12) as those profits which a person in wrongful possession actually received or might with ordinary diligence have received. The only relevant consideration under this definition is, whether the defendant's possession was wrongful or not. If it was wrongful, the Court is not justified in going further and inquiring what the degree of the misconduct or culpability is. With great respect, sufficient attention does not seem to have been paid to the definition in the Code in the cases to which we have referred, and we are unable to follow them. Our view is in accordance with a decision of this Court in *Thirumalayappa Mudaliar v. Kaliyani Anni*(1).

Neither side supports the actual method adopted by the learned Judge. On the one hand, it is argued for the plaintiffs that the defendant's possession should from the very beginning be treated as tortious and malicious, and for the defence it is contended, on the other, that this distinction is totally unfounded and ought not to be recognized. In the opinion we have formed, it is unnecessary to decide whether at any point of time the trespass was of an aggravated character. I therefore hold that for the whole period of accounting the defendant is entitled to charge the estate with collection charges.

* * * * *

(1) (1931) M.W.N. 813.

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The decree of the lower Court is modified accordingly.

We make the following order as to the costs of the appeal. The plaintiffs shall pay the fourth defendant's costs, which are hereby fixed at Rs. 2,000 and the fourth defendant shall pay the plaintiffs' costs, which are fixed at Rs. 6,000. The order of the lower Court as to costs shall stand.

REILLY J.—I agree.

Civil Miscellaneous Appeal No. 161 of 1930.

VENKATASUBBA RAO J.—We have just disposed of the appeal filed by defendant 4. The plaintiffs have filed the present appeal, attacking the same order of the learned Subordinate Judge, and it mainly raises a question relating to the construction of the order of His Majesty. The plaintiffs contend that they are entitled to *gross receipts* as distinguished from mesne profits. Mr. Venkataramana Rao, their learned Counsel, urges that, as the Judicial Committee has found that the legal relationship was one of mortgagor and mortgagee, the proper inference is that section 76(i) of the Transfer of Property Act applies, and the plaintiffs are entitled to gross receipts without deductions. This position is untenable; for our duty is not to consider what the rights of the parties are, but we are merely concerned with giving effect to His Majesty's order. Is it to be supposed that, when their Lordships used the expression "mesne profits", they intended it to mean gross receipts? First, it must be observed that the term "mesne profits" was used as meaning *net receipts* throughout the proceedings by the parties, the trial Judge and the High Court, and there is no warrant for

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supposing that the Judicial Committee intended to use it in a different sense. In their plaint the plaintiffs were careful enough to distinguish the gross income (estimated at Rupees 1,40,000) from the net income (stated to be Rupees 80,000). Having thus referred both to the gross income and the net, they describe the latter sum alone as mesne profits. It is doubtful whether any claim was made in the plaint for gross receipts at all; but granting that the plaint is susceptible of such a construction, it is clear beyond doubt, as we have said, that the expression "mesne profits" was used as meaning net receipts. Then the trial Judge found that the transaction in dispute amounted to a mortgage, and the question therefore arose whether the defendant as mortgagee in possession was liable under the Transfer of Property Act to account for gross receipts. Applying his mind therefore to this distinction, the learned Subordinate Judge observes: "In the present case the plaintiffs have claimed only the net receipts as mesne profits." When the case was taken in appeal to the High Court, it became necessary, in the view the learned Judges took that the transaction amounted to a sale, to consider the nature of the relief to which the plaintiffs were entitled. The judgment of the High Court shows that what was then being considered was a claim to mesne profits and not to gross receipts. It is inconceivable that the Privy Council for the first time departed from this meaning and used the expression in a different sense. Further, the words neither in ordinary parlance nor in their legal acceptation mean gross receipts. The term "mesne profits" occurring in

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the Code is very different from "gross receipts" used in the Transfer of Property Act. Each of these terms has a different connotation and is used in a particular sense, and it is difficult to believe that their Lordships, when they meant gross receipts, used the term "mesne profits". Mr. Venkatramana Rao suggests that there are some judgments where these expressions are treated as convertible terms; but surely that does not justify us in holding that there has been a similar lapse on the part of the Judicial Committee. In their ordinary and popular sense the two words "receipts" and "profits" are very different expressions. *Profits*, as has been repeatedly pointed out, are the surplus by which the receipts exceed the expenditure; see *Russell v. Town and County Bank*(1) and *Gresham Life Assurance Society v. Styles*(2). In the last mentioned case Lord HERSCHELL observes:

"Whether there be such a thing as *profit* or *gain* can only be ascertained by setting against the *receipts* the expenditure or obligations to which they have given rise."

In *Hurro Durga Chowdhurani v. Surut Sundari Debi*(3) Sir BARNES PEACOCK defines what mesne profits are:

"Now that depends really upon the question what was the meaning of the term 'mesne profits'. In their Lordships' opinion, the amount which might have been received from the land, deducting the collection charges, was the profits of the land."

Lastly, the conduct of the plaintiffs themselves shows that they did not understand the term as equivalent to gross receipts. Even in their latest execution petition, they claimed the net profits and

(1) (1888) 13 App. Cas. 418, 424.

(2) [1892] A.C. 309, 323.

(3) (1881) I.L.R. 8 Cal. 332, 335 (P.C.).

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not gross receipts, and filed particulars showing how the amount they claimed was arrived at. Sometime later they applied by way of amendment to be allowed to correct mesne profits into gross receipts. I have not the slightest doubt that this contention of the plaintiffs must be rejected as being wholly untenable.

The only other point taken in this appeal is that the Judge should have disallowed the collection charges for the whole period of the accounting on the ground that the defendant's trespass was of an aggravated nature. I have already shown in the connected appeal that this contention is untenable.

In the result, the appeal fails and is dismissed, and we direct the appellants (plaintiffs) to pay the costs of the fourth defendant, which we fix at Rs. 4,000.

REILLY J.—I agree.

* * * * *

Civil Revision Petition No. 626 of 1930.

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VENKATASUBBA RAO J.—This civil revision petition has been heard along with the appeals, which we have just disposed of. The plaintiffs applied by Execution Application No. 120 of 1928 for leave to amend their execution petition (Execution Petition No. 63 of 1924). The order now attacked was made by the learned Judge on the 26th August 1929, i.e., the same day when he delivered judgment in the main petition. That order runs thus :

"The execution petition, Execution Petition No. 63 of 1924, has been allowed to-day. Though this matter seems to arise in execution, inasmuch as it covers a large amount and must involve intricate questions of law and fact, this will be

filed as a suit subsequent to payment of court-fees, etc., by the petitioner. Time one month."

This order, it will be observed, allows the proceeding to be treated as a suit. We shall consider presently the question whether the learned Judge was right in converting the application into a suit. The first point, however, that has to be determined is, was the lower Court justified in entertaining the plaintiffs' application at all? The answer depends upon the correct view to be taken of the nature of the relief claimed in it. The plaintiffs filed an affidavit in support of their petition, and in that they claimed not only the premia but also compensation or loss sustained by them on account of the alleged wrongful conduct of the defendant. The conduct that is stated to be wrongful is thus described :

"After the possession of the taluk was taken in December 1924, it was discovered that in a number of cases the judgment-debtor, who in law was merely a trespasser from the date of the tender of the money in 1914 and had therefore no power or authority to make fresh assignment of lands to the ryots which a landholder alone could do under the Estates Land Act, has acted fraudulently and dishonestly and has let into possession of unoccupied lands a number of tenants who now claim rights of occupancy."

Mr. Venkataramana Rao, the plaintiffs' learned Counsel, contends that this petition relates to two distinct matters : first, the premia that were either collected or might with ordinary diligence have been collected and secondly, the loss sustained by the value of the property being impaired on account of occupancy rights having been unlawfully conferred. We think, on a proper reading, the petition comprises these two distinct claims as contended. It is not for us now to consider whether the plaintiffs' claims are in law

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sustainable or whether any relief can be ultimately granted to them. But each of the two claims, to which the petition relates, must be considered separately; and the plaintiffs' request, in so far as it related to the premia, should in our opinion not have been granted by the lower Court. In the first place, the plaintiffs, when they filed Execution Petition No. 63 of 1924, expressly reserved their claim to the premia to a future proceeding. Secondly, the application in question was made at a very late stage. It was filed after the expiry of four years from the date of the original execution petition. There was a prolonged inquiry before the Commissioner regarding the mesne profits, and even that inquiry came almost to a close. It was seven months after the conclusion of the taking of the evidence that the application was made; and all that remained to be done was for the Commissioner to submit his report. It has not been seriously disputed that premia are a part of mesne profits. That being so, the plaintiffs cannot reasonably ask that a fresh inquiry should now be held for the purpose of deciding to what additional profits, if any, they are entitled.

But then their claim in respect of the alleged loss stands on a different footing, and is not in any way connected with the mesne profits. Under the decree of the Privy Council they were entitled to recover possession as well as mesne profits. In Execution Petition No. 63 of 1924, which they filed in the lower Court for enforcing that decree, they prayed *inter alia* for two reliefs: (i) for being placed in possession of the properties and (ii) for an inquiry being held as to the mesne

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profits. In execution they obtained possession of the property and then discovered (so they allege) that its value had been greatly impaired. Mr. Venkataramana Rao's argument may be thus put: When a decree awards a person a certain property, he is entitled to get it in the state in which it was when that decree was passed; and whether, when the property was delivered, it continued to be in the same state or in the meantime underwent deterioration is a question to be determined in execution. We think this argument is well-founded. This very point arose for decision in *Hari v. Sakharam*(1) and the following passage contains in our opinion a correct statement of the law:

"But we think that the question with regard to the waste committed by the judgment-debtor after decree was a question arising between the parties relating to the execution, discharge or satisfaction of the decree, and must be determined by the Court executing the decree, and not by a separate suit. The appellant is entitled under the decree to the property of which possession was directed to be given to him. If the property has depreciated in value or been damaged since the decree, owing to the wilful action of the defendants, it is a question in execution whether the defendants are liable to make good the loss."

This case was followed by another Bench of the same Court in *Bai Lalbu v. Mohanlal*(2). The question is whether a successful party can be said to get possession of what was directed to be given to him by the decree, if the property, while in the opponent's possession, suffered deterioration by damage subsequent to the decree; and whether a claim to compensation is well-founded or not is a matter that should be considered in execution

(1) (1923) 25 Bom. L.R. 449.

(2) (1925) 27 Bom. L.R. 687.

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under section 47 of the Code of Civil Procedure. A different view was no doubt taken in *Ramu Shettithi v. Manniappu Shettithi*(1). The point was there disposed of in a brief sentence, and no reasons were given in support of the view taken. The learned Judges purport to rely upon *Becharam Paul v. Bhugwan Chunder Ghose*(2), which on examination does not support their conclusion. We therefore think that both in principle and on authority the plaintiffs' contention must be upheld.

Then remains the question, if that is a matter coming within section 47, was the lower Court justified in directing the proceeding to be converted into a suit? The same point was considered recently in *Seetharaman Chettiar v. Chidambaram Chettiar*(3), and we there held that section 47 (1) is mandatory and, in regard to a matter that properly falls under that section, the Court is bound to decide it in execution and has no discretion whether or not to refer the parties to a separate suit. It is unnecessary to re-state our reasons for this view, and we hold that the order of the lower Court directing the proceeding to be converted into a suit was wrongly made and must be set aside.

There is one other matter to which we must refer. The petition, we have said, must be confined to the loss alleged to have been sustained by the plaintiffs. But should they be permitted to claim that loss by being allowed to amend the original execution petition? There is no reason why in the circumstances we have set forth that

(1) (1916) 33 I.C. 520.

(2) (1879) 5 C.L.R. 522.

(3) (1932) I.L.R. 56 Mad. 447.

indulgence should be granted to the plaintiffs. When this was pointed out, Mr. Venkataramana Rao says that he has no objection to this amendment petition being treated as an independent proceeding. Treating it in that way, we must hold that the lower Court has not properly disposed of it, and we now remand it for proper disposal in the light of our observations.

REILLY J.—I agree.

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The learned Advocate-General represents that his client has various contentions, including one of limitation, to raise in connection with this remanded application. Those contentions we have not considered.

We make no order as to costs.

*Civil Miscellaneous Appeals Nos. 362 of 1929, etc.,
posted for being spoken to.*

These cases at the request of Counsel are now posted for being spoken to. The first point raised is that we should have found the amount due on the date of the lower Court's order and not, as we did, on the date of our judgment. This contention is in our opinion well-founded, and we therefore direct that the account shall be made up as on 26th August 1929, the date of the order of the lower Court. In the table annexed to our judgment for the words "to this day" must therefore be substituted the words "to 26th August 1929". The aggregate balance due on that date shall carry interest at six per cent per annum.

The next point relates to interest upon Rs. 7,000—the mesne profits for fasli 1334. We direct that this sum shall carry interest at six per cent per annum from 1st December 1924 to 26th August

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1929. In arriving at the aggregate balance due on 26th August 1929, this sum with interest as aforesaid shall also be taken into account.

The learned Advocate-General contends that we should allow interest on the sum of Rs. 1,62,400 from 27th July 1921. We referred in our judgment to a similar contention, but the interest then claimed was from an earlier date, namely 5th March 1919. The learned Counsel points out that he has now chosen 27th July 1921, as, in an execution petition filed on that date, his clients were given credit for this sum of Rs. 1,62,400. The argument seems to be that the act of the opposite party amounts to an admission that interest runs from that date. As we pointed out in our judgment, we are guided by the terms of the order of His Majesty in Council which we are carrying into effect, and under that order the sum of Rs. 1,62,400 carries interest only from the 1st September 1914 to the 5th March 1919. In the absence of any direction that the amount should carry interest for any subsequent period, we cannot allow it. The fact that, before the rights of the parties were ultimately settled by the final order in Council, the amount was credited in the execution petition in accordance with the High Court's judgment then in force makes in our opinion no difference.

Lastly, it is now brought to our notice that the plaintiff drew the following sums subsequent to the lower Court's order ; part-satisfaction to that extent is recorded. :—

(1) Rs. 2,50,000 on 6th September 1929.

(2) Rs. 83,382 on 22nd August 1930.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

SRI SRI SRI RAMACHANDRA DEO, MAHARAJA OF
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LEGAL REPRESENTATIVE), APPELLANTS,

1933,
January 9.

v.

SUTAPALLI RAMAMURTY AND NINE OTHERS (DEFENDANTS
12 TO 21), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 11—Law—Erroneous decision on question of—Res judicata if and when—Recurring liability—Prior period—Decision as to—Res judicata in suit for subsequent period if.

Section 11 of the Code of Civil Procedure makes no reference to question of law or to cause of action. Under that section if an 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 and if that has been heard and finally decided then the decision on that issue is *res judicata* in the subsequent suit provided the other conditions are fulfilled. Neither the fact that the previous decision was erroneous in law nor the fact that it was given with respect to previous *faslis* has any bearing on the question whether that decision does or does not operate as *res judicata*.

Sree Rajah Bommadevara Venkata Narasimha Naidu v. Andavolu Venkataratnam, (1916) 32 M.L.J. 63 ; *Tarini Charan Bhattacharya v. Kedar Nath Haldar*, (1928) I.L.R. 56 Cal. 723, 735 and 736 (F.B.) ; and *Debi Prasad v. Jaldhar Mahton*, (1925) 94 I.C. 553, followed.

APPEAL against the decree of the Court of the Agency Additional District Judge, Waltair, in Original Suit No. 11 of 1924 (Original Suit No. 7 of 1921, Court of the Deputy Commissioner, Ghats Agency).

* Appeal No. 260 of 1926.

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Advocate-General (Sir A. Krishnaswami Ayyar)
and *B. Satyanarayana* for appellants.

B. Jagannadha Doss for respondents.

Cur. adv. vult.

MADHAVAN
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The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The plaintiff is the appellant. This appeal arises out of a suit instituted by the plaintiff, the Maharaja of Jeypore, in the Court of the Agency Additional District Judge of Waltair for kattubadi for the years ending 30th June 1918, 30th June 1919 and 30th June 1920. The suit is directed against the mokasaders of the Pachipenta estate and the usufructuary mortgagees from the mokasaders of a portion of the suit mokasa. These usufructuary mortgagees are defendants 12 to 21. These defendants contended that as being mortgagees from the mokasaders there was no privity of contract between them and the plaintiff and that therefore they were not liable for rent payable by the mortgagors. Plaintiff pleaded that these defendants are estopped by the decrees in Original Suit No. 18 of 1913 on the file of the Special Assistant Agent, Koraput, and in Appeal Suit No. 3 of 1916 on the file of the Agent to the Governor, Vizagapatam, from questioning the plaintiff's right to obtain kattubadi from them (Issue 5). The other contentions raised by the parties were not pressed before us. The learned Additional District Judge held that the decisions referred to did not debar the defendants from raising the contention that they are not liable to pay the kattubadi claimed, and he also held that they were not in law liable for the same.

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In Original Suit No. 18 of 1913 the Maharaja of Jeypore claimed arrears of kattubadi for certain previous faslis. The main issue fought was the right of the Maharaja to kattubadi. There was no specific issue regarding the liability of the mortgagees to pay the kattubadi. The Assistant Agent decided against the Maharaja. On appeal after remand in Appeal Suit No. 3 of 1916 the Agent decided in favour of the Maharaja and gave him a decree for the kattubadi claimed. Sutapalli Appanna, the predecessor of the respondents, was respondent No. 4 in that appeal. The learned Advocate-General on behalf of the appellant argues that these decisions constitute *res judicata* in the present case and the respondents are precluded from raising their plea of non-liability on the strength of these decisions. Having regard to explanation 4 of section 11, Civil Procedure Code, which says:

“Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit”,

the fact that the plea of their non-liability was not *expressly* raised by the respondents' predecessor may be ignored in deciding the question of *res judicata* and the appeal has been rightly argued by Mr. Jagannadha Doss on behalf of the respondents as if the point was raised specifically and decided against their predecessor. His argument is that the decision in Original Suit No. 18 of 1913 and in Appeal Suit No. 3 of 1916 holding that the mortgagee is liable to pay the rent is an erroneous decision on a question of law and as such cannot operate as *res judicata* when the same question is raised between the same

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parties or their representatives in a subsequent suit. The question for us to decide is whether this argument can be upheld.

In support of his contention the respondent relies on a decision of this Court in *Mangalathammal v. Narayanswami Aiyar*(1). In that case it was held that

“where a purchaser of property at a Court sale purchases it subject to a charge for maintenance, such purchaser cannot, under section 69 of the Contract Act, recover from the owner in whose hands it was so liable,—payments made by him (the purchaser) towards maintenance to prevent the sale of the property.”

It was objected that the question was *res judicata* in the plaintiff's, i.e., the purchaser's favour, because in a previous suit she recovered from the defendant money which she had paid in satisfaction of the maintenance charge. There was no dispute that in giving the judgment for the plaintiff in the previous suit the Court had arrived at an erroneous conclusion on a point of law. The learned Judges overruled the contention as to *res judicata* in these words :

“It has long been settled by authority in this Court and cannot, we think, now be questioned that the erroneous decision by a competent tribunal of a question of law directly and substantially in issue between the parties to a suit does not prevent a Court from deciding the same question arising between the same parties in a subsequent suit according to law.”

provided the decision in the latter case does not in any way question the correctness of the former decree. If this decision lays down the correct law, then there can be no doubt that the respondents' objection should be upheld ; but it has been pointed out in *Sree Rajah Bommadevara*

(1) (1907) I.L.R. 30 Mad. 461.

Venkata Narasimha Naidu v. Andavolu Venkata-ratnam(1), that this decision does not accurately express the law. In that case NAPIER J. who wrote the leading judgment, after an elaborate discussion of the question in the light of the Privy Council decision in *Badar Bee v. Habib Merican Noordin*(2) and also the English law, came to the conclusion that

“where a decision on a point of law whether it be on the construction of a document or of a statute or on common law or on customary law settles a question that arises directly out of conflicting views as to the rights of the parties it is *res judicata*.”

SADASIVA AYYAR J. concurred with NAPIER J. and pointed out that WALLIS C.J. in *The Secretary of State for India v. Maharajah of Venkata-giri*(3) had clearly changed the view to which he was a party in *Mangalathammal v. Narayanswami Aiyar*(4). Shortly stated, in that case the learned Judges pointed out that, if the question of law to be decided was a matter directly and substantially in issue in both suits within the meaning of section 11 of the Code of Civil Procedure, then the previous decision on the question will be *res judicata* in the subsequent suit, provided of course the other conditions relating to *res judicata* are fulfilled. In *Badar Bee v. Habib Merican Noordin*(2) the question was whether the point of law, viz., the true construction of a will as to the destination of released funds was *res judicata* by reason of a previous decision on the construction of the testator's will. The previous decision clearly was a pure question of law and

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(1) (1916) 32 M.L.J. 63.
(3) (1916) 31 M.L.J. 97.

(2) [1909] A.C. 615.
(4) (1907) I.L.R. 30 Mad. 461.

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their Lordships of the Privy Council held that the question was *res judicata* in these words :

"The decree of 1872 was a decision on the construction of the testator's will as to the destination of funds released from the operation of the trust declared under the sixth clause of the will . . . The result is that it appears that the point raised by this appeal has already been adjudicated on and it is not open to the Court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal."

Regarding this decision NAPIER J. observed that it is to be noted that the Board drew no distinction between question of law and mixed questions of fact and law. The decision in *Sree Rajah Bommadevara Venkata Narasimha Naidu v. Andavolu Venkataratnam*(1) was followed in *Doorwas Seshadri Aiyar v. Govindaswami Pillai*(2) by the same Judges when a similar question arose for decision. In this connection attention may also be drawn to the observations of their Lordships of the Privy Council in *Hoystead v. Commissioner of Taxation*(3). Their Lordships observed thus :

"It is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted."

(1) (1916) 32 M.L.J. 63.

(2) (1921) 40 M.L.J. 556.

(3) [1926] A.C. 155, 165.

It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle . . ."

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The question was considered recently somewhat elaborately by a Full Bench of the Calcutta High Court in *Tarini Charan Bhattacharya v. Kedar Nath Haldar*(1); see pages 735 and 736. In the course of his observations, RANKIN C.J. pointed out that the correctness or otherwise of a judicial decision has no bearing on the question whether it does or does not operate as *res judicata*. It was also pointed out by him that if it is found

"that the matter directly and substantially in issue in the former suit has been heard and finally decided by such Court, the principle of *res judicata* is not to be ignored merely on the ground that the reasoning, whether in law or otherwise, of a previous decision can be attacked on a particular point."

This view follows from the language of section 11 of the Code of Civil Procedure and is substantially the view adopted by our own Court in *Sree Rajah Bommadevara Venkata Narasimha Naidu v. Andavolu Venkataratnam*(2). The latest decision of the Bombay High Court in *Keshav v. Gangadhar*(3) is also to the same effect.

The next argument of Mr. Jagannadha Doss was that, as the present suit is for the recovery of kattubadi from the mortgagees for the years 1918, 1919 and 1920, the decision that they were liable to pay the kattubadi in the previous faslis cannot be treated as *res judicata*, as the causes of action in the two suits are different. In support of this argument reference was made to the decision of the Privy Council in *Broken Hill Proprietary Co. v. Broken Hill Municipal Council*(4)

(1) (1928) I.L.R. 56 Calc. 723 (F.B.).

(2) (1916) 32 M.L.J. 63.

(3) A.I.R. 1931 Bom. 571.

(4) [1926] A.C. 94.

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The question in that case related to the valuation under the Local Government Act, 1919, of New South Wales. There was an adjudication for valuation in a previous year and the question was as to the valuation for the subsequent year. It was argued that the adjudication of the Court for the previous year would be *res judicata* as regards the adjudication for the subsequent years. Lord CARSON rejected the argument with the following observations:

"The present case relates to a new question, namely, the valuation for a different year and the liability for that year. It is not *eadem questio*; and therefore the principle of *res judicata* cannot apply."

It was argued that these observations might well be applied to the present case also. The true significance of these observations was pointed out by this Court in *Sankaralinga Nadar Brothers v. The Commissioner of Income-tax, Madras*(1) in which case the learned Judges dealt with both the decision in *Hoystead v. Commissioner of Taxation*(2) (already referred to) and the decision in *Broken Hill Proprietary Co. v. Broken Hill Municipal Council*(3). Referring to the latter decision the learned Judges stated the following as the principle deducible from it:

"But if the question is decided by a Court on a reference which depends upon consideration which may vary from year to year, e.g., the case in *Broken Hill Proprietary Co. v. Broken Hill Municipal Council*(3), in which the average valuation had to be taken there can be no question of *res judicata*."

The observations of Lord CARSON in *Broken Hill Proprietary Co. v. Broken Hill Municipal Council*(3) cannot therefore help the respondents

(1) (1929) 58 M.L.J. 260, 272.

(3) [1926] A.C. 94.

(2) [1926] A.C. 155.

inasmuch as it is not and it cannot be alleged that the liability to pay kattubadi in different years depends upon consideration which varies from year to year. It has been decided that

"it is settled law that even if the cause of action for a suit be a recurring one every matter decided in the suit may be *res judicata* which was directly and substantially in issue in the previous suit even though the decision in the former suit be erroneous."

See *Debi Prasad v. Jaldhar Mahton*(1). Section 11 of the Code of Civil Procedure makes no reference to question of law or to cause of action. Under that section if an 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 and if that has been heard and finally decided then the decision on that issue is *res judicata* in the subsequent suit provided the other conditions are fulfilled. Both on principle and on authority it follows that the arguments that the previous decision was erroneous in law and that it was given with respect to previous faslis have no bearing on the question whether that decision does or does not operate as *res judicata*. We must therefore accept the contention of the learned Advocate-General that the decision in Appeal Suit No. 3 of 1918 by the Agent to the Governor, Vizagapatam, is *res judicata* in the present case and that the respondents-mortgagees are also liable for the kattubadi claimed by the appellant. The decree of the lower Court in so far as it exempts the respondents from such liability is set aside with costs here and in the Court below.

A.S.V.

(1) (1925) 94 I.C. 553.

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APPELLATE CIVIL.

*Before Mr. Justice Cornish.*1933,
March 24.

MANICKA CHETTY (PETITIONER), PETITIONER,

v.

NARAYANASWAMI NAIDU AND EIGHT OTHERS
(RESPONDENTS), RESPONDENTS.**Code of Civil Procedure (Act V of 1908), O. XXXIII, r. 1—
Suit for redemption of mortgage—"Subject-matter of
suit"—Equity of redemption if.*

A suit to redeem a mortgage by conditional sale was brought by the mortgagor *in forma pauperis*. On objection being taken that the petitioner was not a "pauper", as he possessed the equity of redemption which was worth more than Rs. 100,

Held, that the equity of redemption being the "subject-matter of the suit" within the meaning of Order XXXIII, rule 1, of the Code of Civil Procedure must be excluded in determining whether petitioner is a "pauper" as defined in the latter portion of the explanation to Order XXXIII, rule 1.

Kapil Deo Singh v. Ram Rikha Singh, (1910) I.L.R. 33 All. 237, distinguished.

Sekharan v. Eacharan, (1909) 20 M.L.J. 121, approved.

PETITION under sections 115 of the Civil Procedure Code (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 Cuddalore, dated the 7th August 1929 and made in Original Petition No. 41 of 1929.

J. R. Gundappa Rao for petitioner.

S. Srirangachari for respondents.

Cur. adv. vult.

* Civil Revision Petition No. 291 of 1930.

JUDGMENT.

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The petitioner who applied for leave to sue as a pauper has brought a suit to redeem a mortgage for Rs. 6,000. The mortgage is stated to be a mortgage by conditional sale, and the petitioner is not in possession. In his plaint he alleges that the mortgaged property is worth at least Rs. 12,000. The Subordinate Judge has dismissed the application in the following words :—

"The petitioner cannot redeem except on payment of Rs. 6,000 according to him. If he can find that amount after the decree is passed he can find it now and file the suit after paying court-fee."

The petitioner in order to bring himself within the explanation of "pauper" in Order XXXIII, rule 1, Civil Procedure Code, must show that he is not entitled to property worth Rs. 100 other than his necessary wearing apparel and the subject-matter of the suit. He has at least the equity of redemption which he admits to be worth considerably more than Rs. 100. In *Kapil Deo Singh v. Ram Rikha Singh*(1) it was held that a plaintiff suing for redemption of a mortgage could not be allowed to sue as a pauper when he could raise money on his equity of redemption. The ground of that decision was that such a course did not amount to a mortgaging of the plaintiff's claim within the mischief aimed at in *Vedanta Desikacharyulu v. Perindevamma*(2). The report does not state what was the character of the mortgage or whether the mortgagor was in possession. But the ruling does not cover the question to be considered in the present case. I think there can be no doubt that the subject-matter of a mortgagor's

(1) (1910) I.L.R. 33 All. 237.

(2) (1881) I.L.R. 3 Mad. 249.

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suit for redemption is his right to redeem or his equity of redemption. I cannot conceive what else could be the subject-matter of the suit. Reference has been made to *Sekharan v. Eacharan*(1). There it was held that the equity of redemption was "the subject-matter in dispute" for the purpose of the Court Fees Act. It was suggested in the argument that the decision should be limited to the construction of the particular words in that Act. It seems to me that there is no real distinction, and that in a suit for redemption the equity of redemption is equally "the subject-matter in dispute" within the Court Fees Act and "the subject-matter of the suit" under Order XXXIII, rule 1. The value of the equity of redemption to which the petitioner is entitled must therefore be excluded in determining whether he is a "pauper" as defined in the latter part of the explanation. The Subordinate Judge will have to enquire whether the petitioner is entitled to any other property worth Rs. 100. The case is remitted to him for this purpose and for disposal in the light of the above observations. The costs of this revision petition will abide the result of his finding.

K.W.R.

(1) (1909) 20 M.L.J. 121.

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APPELLATE CRIMINAL.

Before Mr. Justice Bardswell and Mr. Justice Burn.

THE PUBLIC PROSECUTOR, APPELLANT,

v.

MALAIPATI GURAPPA NAIDU (ACCUSED), RESPONDENT.*

Criminal Procedure Code (Act V of 1898), sec. 380—Powers of a Magistrate under—Not empowered to acquit a convicted person—Difference between ss. 349 and 380.

A Magistrate to whom a criminal case has been referred under the proviso to section 562 (1) of the Code of Criminal Procedure can only dispose of it in the manner provided by section 380. When an accused person comes before a Magistrate under section 380, he can be treated only as a convicted person and the Magistrate acting under that section is not empowered to set aside the conviction already recorded by the referring Magistrate, and acquit him.

There is a clear difference between section 349 and section 380 of the Criminal Procedure Code. When a Magistrate submits proceedings under section 349, he does not convict but merely expresses the opinion that the accused is guilty. The order which a Magistrate is permitted to pass under section 380 can only be such an order as can be passed upon a convicted person.

APPEAL under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) by the Joint Magistrate of Chandragiri in Calendar Case No. 171 of 1932.

Public Prosecutor (*L. H. Bewes*) for the Crown.

B. Manavala Chowdri for accused.

Cur. adv. vult.

* Criminal Appeal No. 158 of 1933.

1933,
April 24.

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BARDSWELL J.

The JUDGMENT of the Court was written by BARDSWELL J. and delivered by BURN J.—

The respondent to this appeal was convicted by the Second-class Magistrate of Tiruttani of an offence punishable under section 212, Indian Penal Code, for harbouring a person who had committed theft. That Magistrate, not being empowered to take action under section 562 (1), Criminal Procedure Code, submitted the proceedings to the First-class Subdivisional Magistrate of Chandragiri. The Subdivisional Magistrate without giving notice to anybody found the respondent not guilty and acquitted him. The Government is appealing against this acquittal.

The case has not been argued before us on the merits but merely with reference to the powers of a Magistrate under section 380, Criminal Procedure Code. When a case is referred, as was this case, to a Magistrate under the proviso to section 562 (1), Criminal Procedure Code, the Magistrate to whom it is referred has to dispose of the case in the manner provided by section 380 and under section 380 such Magistrate may pass such sentence or make such order as he might have passed or made if the case had originally been heard by him. What is argued for the respondent is that a Magistrate acting under section 380 has exactly the same powers as has a Magistrate to whom proceedings are submitted under section 349, Criminal Procedure Code. No authority of any High Court has been quoted on this subject but the Judicial Commissioner of Upper Burma has in *Mi Thi Hla v. Mi Kin*(1) held that the same powers can be exercised under section 380 as

(1) (1915) 29 I.C. 663.

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under section 349, and has expressed the opinion that it is difficult to suppose that the Legislature intended anything else. The question is, however, not what the Legislature intended or contemplated but what it has in fact enacted. There is a very clear difference between section 349 and section 380. When a Magistrate of the second or third class submits proceedings under section 349 he does not convict but merely expresses the opinion that an accused person is guilty. But when a case is submitted under section 562 a conviction has first of all to be recorded and so when the proceedings reach the Magistrate for disposal under section 380, that Magistrate has to deal with a person who has been convicted and it is not a case of the referring Magistrate having merely recorded the opinion that he ought to be convicted; such opinion as the referring Magistrate expresses being that on the conviction action should be taken under section 562. It is our opinion that when an accused person comes before a Magistrate under section 380, he can be treated only as a convicted person and that it is not permissible for the Magistrate acting under that section to set aside the conviction and to acquit him. Normally a conviction can only be set aside on appeal or on revision. It is pointed out that a sentence of death can be set aside merely on a reference for confirmation but for that there is a special provision in section 376. We think that the order which it is permissible for a Magistrate to pass under section 380 can only be such an order as can be passed upon a convicted person and section 408 provides, it may be noticed, for an appeal both against an order and a sentence passed under

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section 380. It is true that under section 380 the Magistrate may, if he thinks further enquiry or additional evidence on any point to be necessary, make such enquiry or take such evidence himself or direct such enquiry or evidence to be made or taken. It is asked why such powers should be given. It may be for the purpose of satisfying the Magistrate that it really is a case for applying section 562, and possibly such evidence might be taken with a view to seeing whether the conviction was correct. Even so, in our view, section 380 does not allow of a Magistrate who acts under it to set aside a conviction.

Cases in which a Magistrate so acting thinks that the conviction is improper will probably be very few. If in any case he thinks it to be improper we think his proper action will be to refer the matter under the revision sections.

The respondent is an old man of seventy and we have not been asked to send the matter back to the Subdivisional Magistrate for proper disposal and so we pass no further order on this appeal apart from saying that the Subdivisional Magistrate's action in passing orders without any notice to either side was improper.

K.W.R.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Madhavan Nair, Mr. Justice Jackson
and Mr. Justice Lakshmana Rao.

SUBBARAYA GOUNDAN AND ANOTHER (PETITIONER—THIRD
DEFENDANT—JUDGMENT-DEBTOR AND NIL), APPELLANTS,

1933,
May 5.

v.

V. V. R. VIRAPPA CHETTIAR BANK AND THREE OTHERS
(RESPONDENTS—PLAINTIFFS—DECREE-HOLDERS), RESPONDENTS.*

Insolvency—Order dismissing application put in by judgment-debtor under Order XXI, rule 90, of the Code of Civil Procedure—Judgment-debtor becoming insolvent—Right of appeal of insolvent.

A judgment-debtor who has been adjudicated an insolvent has the right to prefer an appeal against an order dismissing an application put in by him under Order XXI, rule 90, of the Code of Civil Procedure in the course of the execution of the decree passed against him.

Kondapalli Tatireddi v. Ramachandra Rao, (1921) 13 L.W. 616, approved. *Palaniandi Chettiar v. Kalyanarama Aiyar*, (1926) 97 I.C. 486, overruled. *Hari Rao v. Official Assignee, Madras*, (1926) I.L.R. 49 Mad. 461 (F.B.), distinguished.

APPEAL against the order of the Court of the Subordinate Judge of Coimbatore, dated 18th October 1929 and made in Execution Application No. 384 of 1929 in Execution Petition No. 491 of 1927 in Original Suit No. 246 of 1926.

This appeal against order coming on for hearing in the first instance the Court (PAKENHAM WALSH J.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

The first appellant was a judgment-debtor in a certain suit and his property was sold in accordance with the decree therein and purchased by the decree-holders. He filed an application

* Appeal against Order No. 107 of 1930.

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under Order XXI, Rule 90, Civil Procedure Code, to set aside the sale. The application was dismissed by the Court of first instance but on appeal to the High Court the sale was set aside. The decree-holders then filed a review petition on the ground that when the judgment-debtor filed the appeal to the High Court he had been adjudicated an insolvent on a creditor's petition and was not competent to file the appeal. These facts have been ascertained to be correct and the Official Receiver has now consented to continue the proceedings. The initial question is whether the appeal by the insolvent was competent or not. There is direct conflict of authority in this Court with regard to this matter. The first case is *Kondapalli Tatireddi v. Ramachandra Rao*(1), where SPENCER and RAMESAM JJ. held that the insolvency of a judgment-debtor does not render it incompetent for him to continue the proceedings under Order XXI, rule 72, by way of an appeal. The judgment in this case was delivered on 2nd February 1921. The other case is *Palaniandi Chettiar v. Kalyanarama Aiyar*(2), where PHILLIPS and MADHAVAN NAIR JJ. held that a party to a suit after adjudication as an insolvent cannot be deemed to be a person aggrieved by it and has therefore no right to institute an appeal against the decree in the suit. That related to a matter under Order XXII, rule 8. The decision in *Kondapalli Tatireddi v. Ramachandra Rao*(1) is not referred to in that case, but the learned Judges considered the matter as governed by the Full Bench decision in *Hari Rao v. Official Assignee, Madras*(3). The Full Bench case was a matter arising entirely under the Insolvency Act. The insolvent there wished that a particular piece of property should not be sold at a particular time and wanted to appeal against the order of the Official Receiver to sell it. In this matter the question arose whether he was aggrieved by the order of the Official Receiver. The Full Bench held that he was not a person aggrieved. That case is not a direct authority on the position of an insolvent preferring an appeal against an order in execution of a decree passed against him and one of the main arguments urged in that case was that the insolvent had no right to interfere with the insolvency proceedings and retard them. Here the Official Receiver is interested in continuing the appeal. In

(1) (1921) 13 L.W. 616.

(2) (1926) 97 I.C. 486.

(3) (1926) I.L.R. 49 Mad. 461 (F.B.).

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view of the direct conflict of authority between *Kondapalli Tatireddi v. Ramachandra Rao*(1) and *Palaniandi Chettiar v. Kalyanarama Aiyar*(2) I would suggest to the CHIEF JUSTICE to refer the following questions to a Full Bench:—

(1) Has the judgment-debtor who has been adjudicated an insolvent right to prefer an appeal against an order dismissing an application put in by him under Order XXI, rule 90, in the course of the execution of the decree passed against him? and

(2) if such an appeal is incompetent in its inception can it be continued if the Official Receiver consents to continue it?

K. V. Ramachandra Ayyar for appellants.

C. S. Swaminathan for *T. S. Anantaraman* for respondents.

Cur. adv. vult.

The OPINION of the Court was delivered by MADHAVAN NAIR J.—The questions referred to the Full Bench are :

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(1) Has the judgment-debtor who has been adjudicated an insolvent right to prefer an appeal against an order dismissing an application put in by him under Order XXI, rule 90, Civil Procedure Code, in the course of the execution of the decree passed against him? and (2) if such an appeal is incompetent in its inception can it be continued if the Official Receiver consents to continue it?

This reference has been occasioned on account of the conflict between the decisions in *Kondapalli Tatireddi v. Ramachandra Rao*(1) and *Palaniandi Chettiar v. Kalyanarama Aiyar*(2). In *Kondapalli Tatireddi v. Ramachandra Rao*(1) it was held that the insolvency of a judgment-debtor does not render it incompetent for him to continue the proceedings under Order XXI, rule 72, by way of an appeal. In *Palaniandi Chettiar v. Kalyanarama Aiyar*(2) it was held that a party to a suit after adjudication as an insolvent cannot

(1) (1921) 13 L.W. 616.

(2) (1926) 97 I.C. 486.

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be deemed to be a person aggrieved by it and has therefore no right to institute an appeal against the decree in the suit.

The facts of the case under reference are as follows :—In execution of the decree in Original Suit No. 246 of 1926 on the file of the Subordinate Judge of Coimbatore properties belonging to the judgment-debtor were sold on 6th March 1929 and purchased by the decree-holders. On 4th April 1929 the judgment-debtor filed an application under Order XXI, rule 90, Civil Procedure Code, to set aside the sale. On 15th October 1929 he was adjudicated an insolvent on an application filed by a creditor on 26th April 1929. On 18th October 1929 the judgment-debtor's application to set aside the sale was dismissed by the Court of first instance, but on appeal filed by him on 16th December 1929 the High Court set aside the sale on 7th October 1931. The decree-holders then filed a review petition on the ground that when the judgment-debtor filed the appeal to the High Court he had been adjudicated an insolvent and was therefore not competent to prefer the appeal. Notice was then issued to the Official Receiver and he has consented to continue the proceedings.

The first question for decision is whether the appeal by the insolvent to the High Court was competent or not. On the facts of the case there is no difficulty in answering this question. The insolvency petition was filed after the properties were sold in Court auction and until the sale is set aside the properties will not vest in the Official Receiver. The Official Receiver has not taken any steps to set aside the sale; and the assets having been realized before the date of the

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admission of the insolvency petition he cannot even claim the benefit of the execution (vide section 51 of the Provincial Insolvency Act). It follows therefore that the judgment-debtor whose interests are affected by the sale can not only file an application under Order XXI, rule 90, but also prefer an appeal against the Subordinate Judge's order. The respondent relies on Order XXII, rule 8, Civil Procedure Code, in support of his contention that

“even when the proceedings had been properly instituted by the insolvent he cannot himself continue them, for if the Official Receiver refuses or neglects to continue those proceedings the Court may make an order dismissing the suit on the defendant's application.”

No doubt this is the view expressed by the learned Judges in *Palaniandi Chettiar v. Kalyanarama Aiyar*(1) but it is not noticed in that judgment that Order XXII, rule 12, Civil Procedure Code, makes rule 8 inapplicable to proceedings in execution of a decree or order. As pointed out in *Kondapalli Tatireddi v. Ramachandra Rao*(2), Order XXII, rule 8, applies to an insolvent-plaintiff and is confined to suits when the events mentioned therein happen. This decision has not been referred to in *Palaniandi Chettiar v. Kalyanarama Aiyar*(1). In the latter case the learned Judges relied on the Full Bench decision in *Hari Rao v. Official Assignee, Madras*(3). But in that case the question arose under the Insolvency Act and the decision therefore cannot be considered, as observed in the order of reference, as a direct authority on the position of an insolvent preferring an appeal against an order in execution

(1) (1926) 97 I.C. 486.

(2) (1921) 13 L.W. 616.

(3) (1926) I.L.R. 49 Mad. 461 (F.B.).

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of a decree passed against him under the Civil Procedure Code. The decision in *Kondapalli Tatireddi v. Ramachandra Rao*(1) has been followed in *Ramchandra v. Shripati*(2). In our opinion the decision in *Kondapalli Tatireddi v. Ramachandra Rao*(1) lays down the correct law. For the reasons given above we would answer the first question referred to the Full Bench in the affirmative. In this view the second question does not arise for decision.

G.R.

(1) (1921) 13 L.W. 616.

(2) A.I.R. 1929 Bom. 202.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Ramesam, Mr. Justice Anantakrishna Ayyar
and Mr. Justice Cornish.

THAVVA RANGASAYI AND TWO OTHERS (RESPONDENTS),
PETITIONERS,

1933,
January 19.

v.

THAVVA NAGARATHNAMMA (PETITIONER), RESPONDENT.*

*Hindu law—Partition—Minor's suit for—Death of minor before
adjudication by Court that the suit was for his benefit—
Right of legal representative to continue suit and prove that
the suit when instituted was for his benefit.*

A suit by a minor for partition does not abate if he dies before the Court has found that the partition is for his benefit. It is open to his legal representative to proceed with the trial and obtain a decree on his showing that when the partition suit was instituted it was for the benefit of the minor.

PETITION, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Ellore, dated 20th April 1931, and made in Interlocutory Application No. 352 of 1931 in Original Suit No. 36 of 1930.

This petition coming on for hearing, the Court (VENKATASUBBA RAO and REILLY JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

VENKATASUBBA RAO J.—The learned Subordinate Judge follows the decision of JACKSON J. in *Akkanna v. Rangaraja†*

* Civil Revision Petition No. 790 of 1931.

† Civil Revision Petition No. 984 of 1929:—JACKSON J.—In the partition suit out of which this petition arises there is a grandfather plaintiff, a son

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and the question shortly resolves itself into this: Does the view of JACKSON J. receive support from some rulings at least of this Court, or, is it, while being opposed to *Chelimi Chetty v. Subbamma*(1) from which JACKSON J. differs, also at variance with the later authorities, as contended for by Mr. Varadachari?

Chelimi Chetty v. Subbamma(1) deals with two points and the confusion has arisen by their not having been kept distinct. As I shall show presently, the first point alone has received the support of the later cases; but those cases have

(1) (1917) I.L.R. 41 Mad. 442.

who remains *ex parte*, and two grandsons, the elder is *ex parte*, and the younger, who filed a written statement claiming one-sixth share in consonance with the plaint, has died. In appointing his legal representative the learned Sub-Judge has held that there was severance in status at least from the date of filing the suit, and therefore the proper legal representative is the boy's mother. Defendants 11 and 12 seek to set aside this order, on the ground that in the case of a minor there can be no severance until the decree is passed.

The point is not material, but I think the learned Judge should have said from date of the written statement of the minor defendant. Possibly in certain circumstances the grandfather might have disrupted the family by his own authority, but the present plaint does not amount to such an act. The proper view upon which the argument must proceed is that the minor's written statement is tantamount to a plaint.

The petitioners rely upon *Chelimi Chetty v. Subbamma*, (1917) I.L.R. 41 Mad. 442, where it is held that in a suit for partition instituted on behalf of a minor the filing of the plaint can effect no severance because it has been laid down that it depends upon the discretion of the Court whether to make a decree for partition or not, and it would follow *prima facie* that the matter does not depend upon the option of the person acting on behalf of the minor.

As authorities for the proposition that it depends upon the discretion of the Court *Bachoo v. Mankorebai*, (1907) I.L.R. 31 Bom. 373, (P.C.), and *Kamakshi Ammal v. Chidambara Reddi*, (1866) 3 M.H.C.R. 94, are cited.

In the Madras case it was held that a minor can sue for partition, and the cause of action need not necessarily be the malversation of the defendants. But a suit will not lie unless there is something clearly indicating that the interests of the minor will be advanced by partition and the Court might of its own motion require to be satisfied that the suit was really for the minor's benefit and generally so great a change in the condition of a minor as a partition operates ought not to be allowed to take place unless it is clearly for his benefit that it should be so.

In the Bombay case the trial Judge on the Original Side refused to exercise his discretion in ordering a partition, and both the Appellate Bench and the Judicial Committee approved his action.

In both these cases the question is, what action should the Court take when it is asked to effect a partition of a minor from the joint family. The question whether a minor through his guardian can himself effect

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not, with the doubtful exception of *Rama Rao v. Hanumantha Rao*(1), dealt with the second point, with which alone we are now concerned. I am not therefore prepared to hold that JACKSON J. was wrong in not having considered himself bound, while sitting as a single Judge, by the authority of *Chelimi Chetty v. Subbamma*(2).

The facts may be briefly stated.—Sobhanadri, the plaintiff's father, died on the 16th of May 1929. The plaintiff was then an infant and his mother, on his behalf, filed the present suit for partition in October 1929 impleading as defendants

(1) (1929) I.L.R. 52 Mad. 856.

(2) (1917) I.L.R. 41 Mad. 442.

the severance, and then merely apply for allotment of his share by Court decree was not under consideration. No doubt these cases lay down that a Court when applied to for partition on behalf of a minor has a discretion whether to order it or not but these cases do not lay down that the application must be made to the Court, or that the person acting on behalf of the minor cannot effect severance without the Court's intervention. In the case of adult and minor alike there must be a definite and unambiguous indication of intention to separate. If the guardian without such definite indication confines himself to praying for partition, the Court will insist upon being satisfied that it is for the minor's benefit; but if the guardian declares that there has been partition, and merely prays for allotment, can the Court then hold the partition in suspense? That is the question; and I see no *prima facie* inference from these two authorities that the guardian has no option; a point which was never considered in either case. If there were a clear statement of law that in the case of a minor the Court has power to say whether there shall be a division or not, this question would present no difficulty; but such a clear statement has not been brought to my notice. The Court has power to say, no doubt, that it will not of itself order a minor's partition, but where has it been given the power to say that the minor through his guardian cannot effect severance without resort to the Court.

Assuming that a Court is vested with no particular power in this respect, it remains to consider whether upon general grounds a Court can treat as void the severance of a minor by his guardian. It seems to be held in *Chelimi Chetty v. Subbamma*, (1917) I.L.R. 41 Mad. 442, that as the severance depends upon the volition of the individual coparcener there can be no severance by a minor who is incapable of volition. That resolves itself into the question how far the minor's guardian can exercise volition on his behalf, a point not discussed in the ruling beyond stating that a guardian who so acted might cause great hardship and inconvenience. I do not think it can be said that in a matter of volition nothing can be done till the minor comes of age. If that were so, and if to claim partition were peculiarly and essentially the right of the adult, it is difficult to see how the Court could interfere any more than the guardian because the Court in this matter only acts as a super-guardian. But once it is assumed that the Court may act for the minor and vicariously exercise his volition, there is nothing in logic to prevent the guardian doing the same. It would be idle for a single Judge so closely to examine the decision of the Bench in *Chelimi Chetty v. Subbamma*, (1917) I.L.R. 41

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the plaintiff's paternal uncle (the first defendant), the latter's son (the second defendant) and the plaintiff's step-brother (the third defendant). While the suit was pending and before a preliminary decree was passed, the plaintiff died on the 21st of March 1931. The question is, did the suit abate on the plaintiff's death, as contended for by the defendants, or, was the mother entitled to be brought on the record as the plaintiff's representative? The learned Subordinate Judge allowing the mother's petition brought her on the record and raised an issue in the suit to the following effect:—

Was the suit instituted in the interests of the minor and, if he had survived, would a decree for partition have been passed with effect from the date of the plaint?

Mad. 442, were it not for the circumstance that, at least by implication its authority is considerably shaken by other rulings. As candidly admitted in the case itself it runs directly counter to the general effect of the Full Bench ruling in *Soundararajan v. Arunachalam Chetty*, (1915) I.L.R. 39 Mad. 159 (F.B.). There a minor sued by his next friend for partition and it was held that the presentation of the plaint effected severance. The case is distinguished in *Chelimi Chetty v. Subbamma*, (1917) I.L.R. 41 Mad. 442, because the question whether a minor's guardian could effect severance was never raised; but on the other hand it may be said that what a Full Bench takes for granted in law cannot be lightly brushed aside. The learned Judges have written most copious judgments on a point which had already been settled by the Privy Council, and there is no doubt that they explored every feature of the case. SESHAGIRI AYYAR J. states in terms that if the questions were not concluded by the Privy Council he would have found the other way, and it is difficult to suppose in those circumstances that, if the plaintiff's being a minor distinguished the case, His Lordship would have overlooked so obvious a point.

In *Krishnaswami Thevan v. Pulukaruppa Thevan*, (1924) I.L.R. 48 Mad. 465, there is no doubt a strong affirmation of *Chelimi Chetty v. Subbamma*, (1917) I.L.R. 41 Mad. 442, "The learned Judges were perfectly right." "There is no reason to doubt the soundness of the decision." Yet the conclusion in this latter case is that the minor has a divided share from the date of the suit. It was a case of a minor suing for partition, and a brother being born in the course of the suit. It is held that the analogy of an alienation is applicable; just as the alienee takes his share as from the date of his alienation and not from the date of the decree so too does the minor take his share from the date of his plaint. "On the date when the plaintiff filed his suit he was entitled to a half share, and supposing several members are added to the family during the pendency of the suit is it reasonable to hold that the plaintiff should be deprived of his share?" An alienee gets his share from the date of the alienation because the alienation is an accomplished fact, and not a mere ground of claim; and if that analogy applies, it would seem that the plaint must also be regarded as an accomplished fact of severance. And if on the date of plaint the minor is entitled to a half share in the sense that it was his separate property and not to be shared with any after-born brother then for all

It is this order that is questioned before us by Mr. Varadachari, the defendants' learned Counsel.

The law relating to unilateral declarations was for the first time clearly laid down by the Judicial Committee in *Suraj Narain v. Iqbal Narain*(1). Then the question arose, whether the filing of a suit for partition amounted to a definite and unambiguous indication of intention to separate. This was answered in the affirmative by a Full Bench of the Madras High Court in *Soundararajan v. Arunachalam Chetty*(2) and later by the Judicial Committee in *Girja Bai v. Sadashiv Dhundiraj*(3). The facts of *Soundararajan v. Arunachalam Chetty*(2) are

- (1) (1912) I.L.R. 35 All. 80 (P.C.). (2) (1915) I.L.R. 39 Mad. 159 (F.B.).
(3) (1916) I.L.R. 43 Calc. 1031 (P.C.).

practical purposes his plaint has effected a severance. Unless there is an actual severance it is difficult to see how the minor-plaintiff can have a right to exclude the after-born. Courts carry their decrees back to the date of the plaint, when upon that date the plaintiff had a present right; and if in fact there is no severance until the date of the decree, it would be hard to justify the exclusion of the after-born by any rule of equity. They too might appeal to reason, and ask in the words of this judgment, if there is no severance at the time of the plaint is it reasonable that we should be deprived of our share? The short way out of this difficulty is to make no distinction between minors and adults in respect of this matter of unilateral severance; the course adopted by the Full Bench in *Soundararajan v. Arunachalam Chetty*, (1915) I.L.R. 39 Mad. 159 (F.B.) and, in terms by the Patna High Court in *Krishna Lal Jha v. Nandeshwar* (1918) 1 P.L.J. 38, 48. "We are unable to accede to the proposition that under Hindu Law a minor cannot express either himself or through his guardian an intention to do that which is clearly not against his own interest." It must be observed however that *Chelimi Chetty v. Subbamma*, (1917) I.L.R. 41 Mad. 442, was never brought to the notice of that Court, and this ruling is dissented from in *Krishnaswami Thevan v. Pulukaruppa Thevan*, (1924) I.L.R. 48 Mad. 465.

The conclusion to which this examination of the authorities points is that the law is by no means so clear that the learned Subordinate Judge can be said to have acted with material irregularity in finding that there was a severance of status from the date of the suit, which is the assumption in *Soundararajan v. Arunachalam Chetty*, (1915) I.L.R. 39 Mad. 159 (F.B.), and in my opinion the logical effect of *Krishnaswami Thevan v. Pulukaruppa Thevan*, (1924) I.L.R. 48 Mad. 465. Of course if ultimately he decrees partition *Krishnaswami Thevan v. Pulukaruppa Thevan*, (1924) I.L.R. 48 Mad. 465, will be direct authority for dating the severance from the plaint; and if he does not decree partition, the present petitioners will not be affected. Anyhow if necessary this question will be fully reconsidered in the trial itself. The learned Subordinate Judge states that his order appointing the legal representative is not *res judicata* in regard to the actual issues of the suit, and there he is right. The matter has been decided by him almost summarily with no reference to authority, and cannot be said to have been substantially in issue.

The petition for the above reasons is dismissed with costs.

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interesting, although it is an open question, whether the learned Judges that took part in it were or were not aware of the fact that the plaintiff in that case was a minor. JACKSON J. in the case already cited seems inclined to the view that they could not have overlooked that fact. For my purpose, it is not necessary to make any such assumption. In that case, the sole defendant died pending the suit and the minor plaintiff claimed that he became entitled to the entire estate in the joint family property. It was held that he became separated in status by his having filed the partition suit and on that ground his contention was negatived and the mother, defendant's personal representative, was brought on the record, as having succeeded to her son's divided interest. If the fact of the plaintiff's minority had been specially adverted to and considered in the judgment, this authority would have been decisive in favour of the present respondent. Another remark which I wish to make on this case is that the defendant's death occurred before the passing of any preliminary decree. Passing on to the other case to which I have referred, *Girja Bai v. Sadashiv Dhundiraj*(1), its importance lies in the fact that, in spite of the plaintiff's death pending the suit, it was held that his status became one of severance. His widow was brought on the record as his heir and a preliminary decree was passed in her favour directing partition. There is another Privy Council case belonging to this group, *Kawai Nain v. Budh Singh*(2), which shows that the fact that the partition suit is dismissed does not affect the rule that by the filing of the suit the plaintiff becomes divided. Their Lordships observe :

"A decree may be necessary for working out the result of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgment or not."

Thus, in the case of an adult plaintiff, the claim in the plaint amounts to an intimation to his co-sharers of his unequivocal desire for separation and this rule is not affected either by the fact that the suit is later dismissed or that pending the action the plaintiff dies, although the Judicial Committee has further held in *Palani Ammal v. Muthuvenkatachala*

(1) (1916) I.L.R. 43 Cal. 1031 (P.C.). (2) (1917) I.L.R. 39 All. 496 (P.C.).

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Moniagar(1) that, where the plaintiff has withdrawn from the suit before the trial, the filing of the plaint does not necessarily result in his severance.

So much then as to the law when the plaintiff happens to be an adult; but if the suit has been brought on behalf of an infant, in what respect does his position differ? It must now be taken as settled that the filing of the plaint does not *ipso facto* bring about his severance. It is this part of the decision in *Chelimi Chetty v. Subbamma*(2) that has been affirmed by the later rulings. But the case goes further and holds that, on the death of the minor plaintiff pending the suit, his legal representatives are not entitled to continue the action. The later cases, in my opinion, recognize the distinction. True, by the mere filing of the plaint the plaintiff's status does not become one of separation; but when, at a later stage, a preliminary decree is passed, the minor plaintiff becomes divided in interest and the division dates back from the institution of the suit. In *Chelimi Chetty v. Subbamma*(2) this distinction was not borne in mind and the extreme position was contended for, namely, that a minor plaintiff became divided in status the moment a suit for partition was filed on his behalf. It was this contention that was rejected and, if I may say so with respect, properly. But why should the Court not proceed with the trial and pass a preliminary decree, if it is satisfied that the suit as originally laid was for the benefit of the minor? In *Krishnaswami Thevan v. Pulukaruppa Thevan*(3) SPENCER J., while affirming *Chelimi Chetty v. Subbamma*(2) in so far as it holds that the filing of a suit does not *ipso facto* bring about the minor plaintiff's severance, goes on to observe :

"But in cases where the Court gives a decree to a minor for partition, it seems to me, with due respect, that there should be no departure from the general rule that every suit has to be tried on the cause of action as it existed at the date of its commencement—vide *Rai Charan v. Biwa Nath*(4). Therefore, in my judgment, the only sound principle will be to regard the prayer in the minor's plaint for division as a conditional request that, provided that the Court sees fit, it may declare the status of the minor divided as from the date of the plaint. It is true that there can be no division of status unless the

(1) (1924) I.L.R. 48 Mad. 254 (P.C.).

(3) (1924) I.L.R. 48 Mad. 465.

(2) (1917) I.L.R. 41 Mad. 442.

(4) (1914) 20 C.L.J. 107.

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Court sees fit to decree it, but there is no reason why the Court should not make its decree take effect from the date of the institution of the suit." (See page 468.)

This, in my opinion, does not amount to an approval of the second part of the rule laid down in *Chelimi Chetty v. Subbamma*(1). On the contrary, as is pointed out in the judgment of COUTTS TROTTER C.J. and SUNDARAM CHETTI J. in the later case of *Sri Ranga Thathachariar v. Srinivasa Thathachariar*(2), (the names of the Judges are given wrongly in the report), *Krishnaswami Thevan v. Pulukaruppa Thevan*(3) far from affirming, in toto, *Chelimi Chetty v. Subbamma*(1) distinguishes the last-mentioned case. I may usefully quote the following passage from the judgment:—

"If such a suit proceeds to the stage of a decree in the plaintiff's favour on the Court finding that the partition would conduce to the best interests of the minor, the further question is whether the severance of the joint status takes place only from the date of the preliminary decree or from the date of the plaint. On this question there is the direct authority of a recent decision of a Bench of this High Court reported as *Krishnaswami Thevan v. Pulukaruppa Thevan*(3). It has been held in that case, distinguishing the decision in *Chelimi Chetty v. Subbamma*(1), that a suit by a minor for partition, if it ends in a decree for partition, has the effect of creating a division of status from the date of the plaint." (See page 870.)

Again in the same judgment, the following observation was made:—"As to what would be the result if in such a suit the Court had passed a preliminary decree for partition, there was no necessity to decide in that case", i.e., in *Chelimi Chetty v. Subbamma*(1). (See pages 871 and 872.)

Let us now turn to the facts of *Krishnaswami Thevan v. Pulukaruppa Thevan*(3). The minor's suit for partition against his father was filed on the 31st of January 1919. Another son was born to the father in May or June 1920. Conception must have taken place about August 1919, after the filing of the plaint. The question arose, was the plaintiff's share diminished by the subsequent birth of the son? The answer depended upon whether or not the suit had the effect of creating a division in status from the date of the plaint. The learned

(1) (1917) I.L.R. 41 Mad. 442.

(2) (1927) I.L.R. 50 Mad. 866.

(3) (1924) I.L.R. 48 Mad. 465.

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Judges held that the minor plaintiff became divided in interest from the date of the plaint and that his share did not suffer diminution. The point to note is, and that is very important, that it was subsequent to the birth of the second son that the preliminary decree was passed. Having passed it, the Court held that the partition dated back from the institution of the suit. Supposing the event that happened did not have the effect of diminishing but increasing the minor plaintiff's share, would the Court have come to a different conclusion? The judgment itself furnishes the answer. SPENCER J. observes in the passage already quoted:

"But in cases where the Court gives a decree to a minor for partition, it seems to me, with due respect, that there should be no departure from the general rule that every suit has to be tried on the cause of action as it existed at the date of its commencement—vide *Rai Charan v. Biswa Nath*"(1).

This principle is affirmed by COUTTS TROTTER C.J. and SUNDARAM CHETTI J. in the subsequent case of *Sri Ranga Thathachariar v. Srinivasa Thathachariar*(2), where they lay down:

"Though the enquiry has necessarily to be made by the Court subsequent to the filing of the plaint, it is the state of affairs that existed on the date of the suit that determine the exercise of the Court's discretion. It seems to us therefore that the principle of the decision in *Krishnaswami Thevan v. Pulukaruppa Thevan*(3) has to be applied to the present case."

These cases seem, in my opinion, to be clear authorities for the principle that the death of a minor plaintiff pending his suit does not render it any the less incumbent on the Court to decide, if so invited, whether or not the action, when originally brought, was for the benefit of the minor. It is true that generally, on a proper case being made out, the Court in a partition suit adverts to the circumstances as they existed on the date of the decree. But it must be remembered that this is an exception to the general rule so clearly laid down in the two decisions to which I have referred "that every suit has to be tried on the cause of action as it existed at the date of its commencement." Moreover, when the minor plaintiff dies before the time arrives for the passing of the decree, it would

(1) (1914) 20 C.L.J. 107

(2) (1927) I.L.R. 50 Mad. 866.

(3) (1924) I.L.R. 48 Mad. 465.

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be idle to apply the test, would it be for the benefit of the deceased minor or not to pass a decree? There is thus no scope for the exception coming into effect and the general rule must prevail; in other words, the Court should address itself to the question—Would it have been for the minor's benefit, had he lived, to decree a partition in his suit "on the cause of action as it existed at the date of its commencement"? This position is quite sound in principle, as it does not lead to, but on the contrary avoids, the inconvenience and the hardship referred to in *Chelimi Chetty v. Subbamma*(1). If in the event it turns out that the suit was improperly brought, the Court straightway dismisses it and where is the question of any officious next friend being enabled to file a vexatious suit? The principle to which I have adverted contains within itself the necessary safeguard. To take an illustration: if the plaintiff alleges that the minor's uncle has been grossly ill-treating him and wasting the property, and that allegation is subsequently made good, why should the uncle be benefited by the fact that the minor died pending his suit? In that case, I see no hardship in his infant widow succeeding to his estate; on the contrary, it seems to me eminently just. If, however, it turns out that the suit was in its inception vexatious, the Court refuses to decree a partition, and the uncle whose conduct, according to this hypothesis, is free from blame, succeeds to the minor's share. Further, to treat a right to partition as a mere personal right, is, in my opinion, wrong. If, in the ordinary course, the minor's personal representative can get a benefit, I fail to see why the Courts, by importing a fiction, should hold that the state of jointness continues.

Ganapathy v. Subramanyam Chetty(2) throws no light on the point under discussion. The first plaintiff in that case filed the suit for partition on behalf of himself and his minor sons, the second and the third plaintiffs. On the first plaintiff's death pending the suit the second plaintiff, who had attained majority, elected to continue the suit not only on his own behalf but professed to do so also on behalf of his minor brother, the third plaintiff. But the latter's mother applied to be made his guardian and, stating that the partition was not in his interests, got him transposed as the 31st defendant. The only question that arose was—Was it or was it not open to the

(1) (1917) I.L.R. 41 Mad. 442.

(2) (1929) I.L.R. 52 Mad. 845.

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third plaintiff to withdraw from the suit?—and the question was answered in the affirmative. It was held that the mere filing of the plaint by the father on behalf of his minor sons, did not necessarily effect a severance in status as regards the minors, and that, as the third plaintiff must be deemed to have continued joint with the defendants, a decree should be given to the major second plaintiff alone for his share in the property. This case, as I have said, has no bearing upon the matter in hand. *Rama Rao v. Hanumantha Rao*(1) (a decision of RAMESAM and JACKSON JJ.) supports Mr. Varadachari to the extent that it impliedly affirms the decision in *Chelimi Chetty v. Subbamma*(2). There again the only point raised seems to be whether by the mere filing of the plaint a minor becomes severed from the family. Granting that he does not, the further point was not argued, that, notwithstanding the minor's death, the Court would or would not allow the case to proceed to trial "on the cause of action as it existed at the date of its commencement". Apart from this, the value of this ruling as an authority is impaired by the fact that not only the judgment contains no discussion but that one of the learned Judges who was a party to it (JACKSON J.) came to the very opposite conclusion in the case referred to already, *Akkanna v. Ranga-raja*(3), some time later. Although I may not agree with all the reasons given by him in his judgment, I agree, as I have said, with that conclusion.

There remain only two cases to be dealt with, one of the Allahabad and the other of the Patna High Courts. *Lalta Prasad v. Sri Mahadeoji Birajman Temple*(4) (relied on by the petitioners) merely affirms the uncontested proposition that the institution of a partition suit on behalf of a minor does not *ipso facto* effect a separation of the family. The point decided is thus stated in the judgment of MEARS C.J.:

"It has been argued before us that a minor, so represented by a next friend, can, by the very institution of a suit, effect the same immediate legal consequences as would admittedly follow from a suit brought by a man *sui juris*. We cannot agree with that contention at all."

That this and no more is the effect of this ruling is recognized both in *Krishnaswami Thevan v. Pulukaruppa*

(1) (1929) I.L.R. 52 Mad. 856.

(3) F.N. page 95 *supra*.

(2) (1917) I.L.R. 41 Mad. 442.

(4) (1920) I.L.R. 42 All. 461.

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Thevan(1) (see page 469), and *Sri Ranga Thathachariar v. Srinivasa Thathachariar*(2).

In *Krishna Lal Jha v. Nandeshwar*(3) (relied on by the respondent) the minor plaintiff was held to have become divided from the filing of the plaint and his share did not suffer diminution by the birth of another son to the plaintiff's father, whose conception took place after the institution of the suit but before the passing of the preliminary decree. This case is referred to in the judgment of SPENCER J. in *Krishna-swami Thevan v. Pulukaruppa Thevan*(1).

I have therefore come to the conclusion that the view taken by the lower Court is not only right in principle but is consistent with the decisions binding upon it. But as my learned brother is taking a different view and as the point raised is of considerable importance I refer the following questions to a Full Bench :

(1) Does a suit by a minor for partition abate if he dies before the Court has found that partition is for his benefit?

(2) Or is it open to his legal representative to proceed with the trial and obtain a decree on his showing that when the partition suit was instituted it was for the benefit of the minor?

REILLY J.—I regret that with the very greatest respect I am unable to agree with the judgment just pronounced by my learned brother.

The plaintiff, a member of a Hindu joint family, sued as a minor with his mother as next friend for partition. At the date of the plaint he was under two years old. Before he was four, and before any decree was made in the suit, he died. His mother applied to be brought on record as his heiress and legal representative and so to be allowed to prosecute the suit for her own benefit. The learned Subordinate Judge has allowed that in spite of the defendant's objection that with the death of the minor plaintiff the suit abated. This petition is against the Subordinate Judge's order.

It has not been disputed before us that in a suit by a minor member of a Hindu joint family for partition the Court cannot make a decree for the plaintiff unless it is found that that would be for his benefit. That rule has been established in a

(1) (1924) I.L.R. 48 Mad. 465.

(2) (1927) I.L.R. 50 Mad. 866, 879.

(3) (1918) 4 P.L.J. 38.

number of cases and was approved by the Privy Council in *Bachoo v. Mankorebai*(1).

The result of that is that the filing of a suit for partition by a minor through his next friend is not such a declaration of intention to divide by a co-parcener as itself effects a division in status and that this is an exception to the rule in *Suraj Narain's*(2), *Girja Bai's*(3), and *Kawal Nain's*(4) cases. A minor on whose behalf such a plaint is filed remains undivided in status in spite of the plaint, and, if the Court never finds that partition would be to his benefit, his status as a member of a joint family remains undisturbed. If he dies before the Court has reached a decision that partition would be to his benefit, he dies undivided. That being so, at the moment he dies undivided in status the rule of survivorship comes into play, and his suit for partition dies with him. If that is so—and I think it is a necessary consequence of the rule that his plaint alone does not effect a division in status but that it must be supplemented and supported by a finding of the Court that partition is for his benefit—it is sufficient for the decision of this case. But I may add that I have no doubt that in such a partition suit, if the stage is reached at which the Judge has to decide whether partition is to the benefit of the minor, what he has to ask himself is whether at that date partition will be to the minor's benefit, not whether it would have been to the minor's benefit at the date of the plaint. Partition suits are not always disposed of very promptly. On the contrary they are often pending for long periods. Between the date when the plaint is filed and the date of the Court's finding regarding benefit to the minor circumstances have often changed materially through the birth or death of other members of the family or from other causes. I do not think it can be seriously contended that, if by the time the question is tried the Judge finds that in consequence of the death of other parties or for other reasons it would be clearly detrimental to the minor's interests to make a decree for partition, he is bound to do so because it can be shown that, had the circumstances at the time of the plaint remained unchanged, a partition would have been of benefit to the minor. That to my mind would be a travesty of the rule that the Judge must do what in his

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(1) (1907) I.L.R. 31 Bom. 373 (P.C.). (2) (1912) I.L.R. 35 All. 80 (P.C.)
(3) (1916) I.L.R. 43 Calc. 1031 (P.C.). (4) (1917) I.L.R. 39 All. 496 (P.C.)

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opinion is for the benefit of the minor, whose interests are in this way entrusted to him. And on the contrary, if it happens that the Judge comes to the conclusion that at the time it was filed the plaintiff was not in the minor's interest, but that circumstances have so changed that it is clearly to his benefit that partition be made, I can see nothing in the rule to suggest that the Judge must dismiss a suit, which, as it turns out eventually, is to the minor's benefit, and drive him to the expense of another suit. As I understand the matter, what the Judge has to ask himself is what is to the minor's benefit, so far as he can see, at the time when he makes his decision. To interpret the rule in any other way would often be to compel the Judge knowingly to do harm to a minor under a rule intended, as is not disputed, for the minor's benefit. If the minor plaintiff dies before the Court has reached a finding that partition will be for his benefit, it can never afterwards be found that partition will be for his benefit in this world. On that consideration also it appears to me clear that, if the minor plaintiff dies at that stage, his suit must abate. Those appear to me to be logical consequences of the rule that a minor member of a Hindu joint family does not become divided in status by suing for partition unless something further happens, viz., the Court finds that partition is to his benefit.

My interpretation of the rule and its consequences is I think well supported by authority in this Court. In 1917 in *Chelimi Chetty v. Subbamma*(1), as the head-note of the report shows, ABDUR RAHIM and OLDFIELD JJ. decided two propositions—firstly, that the institution of a suit for partition on behalf of a minor does not itself effect severance of status for the reason that it is for the Court to decide whether partition will be beneficial to the minor, and secondly, that, if a minor plaintiff dies while such a suit is pending (i.e., before a preliminary decree has been made), his legal representative is not entitled to continue the suit, the reason obviously being that the minor has died undivided. The first proposition is the result of the discussion in the judgment; the second was the actual decision in the case, for which the first proposition was the basis. That decision clearly covers the present case. It has stood for 15 years, and it has never been overruled. On the contrary the first proposition—which is merely a

(1) (1917) I.L.R. 41 Mad. 442.

restatement of the old rule in a minor's suit as being still in force in spite of the Privy Council's rulings in regard to unilateral declarations of intention to divide from *Suraj Narain's case*(1) onwards—has been repeatedly approved in this Court. In *Krishnaswami Thevan v. Pulukaruppa Thevan*(2) both SPENCER and DEVADOSS JJ. explicitly approved of that proposition, though they came to the conclusion that, if the Court eventually finds that a partition will be for the benefit of the minor, the division in status will relate back to the date of the plaintiff, and the partition will be worked out accordingly. And there is no doubt, I think, that they accepted also the second proposition in *Chelimi Chetty v. Subbamma*(3) as a consequence of the first. DEVADOSS J. referred explicitly to the decision in that case "that the cause of action did not survive to the mother" and after discussing a contention that that decision was wrong concluded by saying "there is no reason to doubt the soundness of the decision in *Chelimi Chetty v. Subbamma*(3)." He also said: "Till the Court determines the question whether a partition should be effected in favour of a minor the joint status of the minor with other members of the family is not in any way severed", from which it follows that, if the minor plaintiff dies before the determination is reached, he dies an undivided member of his family and the rule of survivorship applies. In *Sri Ranga Thathachariar v. Srinivasa Thathachariar*(4), COURTS TROTTER C.J. and SUNDARAM CHETTI J. accepted as correct the proposition in *Chelimi Chetty v. Subbamma*(3) "that the mere filing of a plaintiff on behalf of a minor would not *ipso facto* effect a severance of the joint family status, for in such a suit it is for the Court to determine whether the partition asked for will be beneficial to the minor", which in its implication that, if the minor dies before the Court has so determined, he dies undivided is sufficient for the present case. They also quoted with apparent approval *Lalta Prasad v. Sri Mahadeoji Birajman Temple*(5), in which a minor, on whose behalf a suit for partition had been filed, was treated as still undivided in spite of the suit and by the decision got the benefit of the rule of survivorship. They went on to say: "If such a suit proceeds to the stage of a decree in the plaintiff's favour . . . the further question is whether the severance of

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(1) (1912) I.L.R. 35 All. 80 (P.C.).

(2) (1924) I.L.R. 48 Mad. 465.

(3) (1917) I.L.R. 41 Mad. 442.

(4) (1927) I.L.R. 50 Mad. 866.

(5) (1920) I.L.R. 42 All. 461.

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the joint status takes place only from the date of the preliminary decree or from the date of the plaint; " and it was that further question which they set out to decide, arriving at the same conclusion as in *Krishnaswami Thevan v. Pulukaruppa Thevan*(1), which they pointed out was not in conflict with *Chelimi Chetty v. Subbamma*(2). In regard to the question whether the Court should consider the benefit to the minor as on the date of its decision or as on the date of the plaint it is true that they said "it is the state of affairs that existed on the date of the suit which determines the exercise of the Court's discretion." That with respect I venture to suggest is not in accordance with the principle that benefit to the minor is to determine the Court's decision, and, as will be seen, it is not in accord with a later case, where the question had to be decided. But the learned Judges were, as they explain, merely considering what was the question to be answered if the stage of answering it was reached. They said nothing whatever to throw doubt on the proposition that, until it is decided that partition is to the benefit of the minor (in respect of whatever date the benefit is to be considered), he remains in spite of his plaint undivided in status. On the contrary their quotation of *Chelimi Chetty v. Subbamma*(2) and *Lalta Prasad v. Sri Mahadeoji Birajman Temple*(3) show that they accepted it. In *Ganapathy v. Subramanyam Chetty*(4) PHILLIPS and MADHAVAN NAIR JJ. applied the first proposition in *Chelimi Chetty v. Subbamma*(2) that the filing of a suit for partition on behalf of a minor does not effect for him a division in status from the other members of his joint family until a preliminary decree has been made and applied also the consequential proposition that until that stage has been reached the minor remains undivided in status. And they decided the question of benefit to the minor and disposed of the suit accordingly, not by the test of what would have been beneficial to him at the date of the plaint, but of what would be beneficial to him at the date of the preliminary decree. In another partition suit, *Rama Rao v. Hanumantha Rao*(5), RAMESAM and JACKSON JJ. said: "The second plaintiff, being a minor, is incapable of exercising the intention to separate himself. The next friend does it for

(1) (1924) I.L.R. 48 Mad. 465.

(3) (1920) I.L.R. 42 All. 461.

(2) (1917) I.L.R. 41 Mad. 442.

(4) (1929) I.L.R. 52 Mad. 845.

(5) (1929) I.L.R. 52 Mad. 856.

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him. If the Court thinks fit to allow partition on behalf of the minor, one can well say that the minor has become divided; but until the decree is passed, one cannot say that the minor's interests are divided from the rest of the family." And they went on to decide that, as the minor second plaintiff died before a preliminary decree had been made, his share passed by survivorship to his father, the first defendant in the suit. The learned Judges adopted the first proposition in *Chelimi Chetty v. Subbamma*(1), though they did not mention that case, and they rested their decision on its consequence that, as the minor died before the Court had found partition to be for his benefit, he died undivided in status. That decision again covers the present case, as according to it the minor plaintiff in this case, when he died before the Court had found partition to be for his benefit, died undivided in status, and therefore his suit must abate. In *Lalta Prasad v. Sri Mahadeoji Birajman Temple*(2) a Bench of three Judges agreed with the first proposition in *Chelimi Chetty v. Subbamma*(1), and applied it as a ground for deciding that, when a minor's partition suit abated on the death of the only defendant, the minor was undivided in status and took that defendant's share by survivorship. On the other hand in *Krishna Lal Jha v. Nandeshwar*(3) a Bench of two Judges decided that a minor's plaint in a partition suit itself effected a division in status. With respect I may mention that in the judgment there is no discussion of the question; *Chelimi Chetty v. Subbamma*(1) is not noticed; and there is nothing to suggest that the learned Judges remembered that the Privy Council had approved the rule that it is for the Court to consider whether partition is for the benefit of a minor and to grant or refuse partition accordingly. And I may add that from the decision of the Patna High Court the learned Judges who took part in *Krishnaswami Thevan v. Pulukaruppa Thevan*(4) dissented.

On these decisions I think it is clear that there is overwhelming authority in this Court that a minor's plaint for partition does not itself make him divided in status but that, if he dies before the Court has decided that partition is for his benefit, he dies undivided from his family. That the minor remains undivided after his suit for partition has been filed

(1) (1917) I.L.R. 41 Mad. 442.

(3) (1918) 4 P.L.J. 38.

(2) (1920) I.L.R. 42 All. 461.

(4) (1924) I.L.R. 48 Mad. 465.

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until the Court finds that partition is for his benefit was accepted as correct in *Krishnaswami Thevan v. Pulukaruppa Thevan*(1) and *Sri Ranga Thathachariar v. Srinivasa Thathachariar*(2), and was the basis of the decisions in *Chelimi Chetty v. Subbamma*(3), *Ganapathy v. Subramanyam Chetty*(4), and *Rama Rao v. Hanumantha Rao*(5), as well as in *Lalta Prasad v. Sri Mahadeoji Birajman Temple*(6). In the present case *Chelimi Chetty v. Subbamma*(3) was cited before the learned Subordinate Judge; but he refused to follow it and preferred to follow a later decision of a single Judge of this Court, who had not followed *Chelimi Chetty v. Subbamma*(3), but had made an order opposed to it. I do not understand on what principle the Subordinate Judge acted. The decision of the single Judge is that of JACKSON J. in *Akkanna v. Rangaraja*(7), and the order which the learned Judge made is not only in conflict with the other cases of this Court which I have mentioned: it is in conflict with his own decision with RAMESAM J. in *Rama Rao v. Hanumantha Rao*(5), which he appears to have overlooked. JACKSON J. does not hold himself bound by *Chelimi Chetty v. Subbamma*(3), because "at least by implication its authority is considerably shaken by other rulings." The first of such rulings to which he refers is the opinion of the Full Bench in *Soundararajan v. Arunachalam Chetty*(8). That case was an earlier case than *Chelimi Chetty v. Subbamma*(3), and the opinion of the Full Bench was considered and interpreted in *Chelimi Chetty v. Subbamma*(3). With great respect I do not understand what is meant in the circumstances by saying that the authority of *Chelimi Chetty v. Subbamma*(3) is shaken by *Soundararajan v. Arunachalam Chetty*(8). There is certainly, as JACKSON J. has pointed out, a remarkable feature in *Soundararajan v. Arunachalam Chetty*(8). The question before the Full Bench was "Whether a member of a Hindu joint family becomes separated from the other members by the fact of suing them for partition." The referring Judges felt a doubt whether the recent ruling of the Privy Council in *Suraj Narain's case*(9) applied to a plaint for partition. The answer of the Full Bench was in effect that it did apply, an answer

(1) (1924) I.L.R. 48 Mad. 465.

(3) (1917) I.L.R. 41 Mad. 442.

(5) (1929) I.L.R. 52 Mad. 856.

(7) F.N. page 95 *supra*.

(9) (1912) I.L.R. 35 All. 80 (P.C.).

(2) (1927) I.L.R. 50 Mad. 866.

(4) (1929) I.L.R. 52 Mad. 845.

(6) (1920) I.L.R. 42 All. 461.

(8) (1915) I.L.R. 39 Mad. 159 (F.B.).

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about which apart from the opinion of the Full Bench later decisions of the Privy Council have left no doubt. But it happened that in *Soundararajan v. Arunachalam Chetty*(1) the plaintiff suing for partition was a minor. Nevertheless that was not held to take him out of the general rule adopted by the Full Bench, and eventually the case was decided on the view that by his plaint for partition he became divided in status from its date, as if the fact that he was a minor did not affect the question. It is certainly a very curious thing that the general rule was applied to a minor's plaint in that way. But there is nothing in the opinions or in the arguments in that case as reported to show that any contention was based on the fact that the plaint was that of a minor. Attention appears to have been confined to the question what is the effect of a co-parcener's plaint for partition in its general form without drawing any distinction between a minor and a major plaintiff. But, if that case had not been interpreted in later cases, I think it would have been right to say that the Judges who referred the case and who eventually decided it—and it may be remarked that both of them were members of the Full Bench—must have been aware that the plaintiff was a minor and yet they applied the ruling of the Full Bench to him and so created a precedent. *Soundararajan v. Arunachalam Chetty*(1) was noticed and considered in *Chelimi Chetty v. Subbamma*(2). The opinion of the Full Bench was quoted before ABDUR RAHIM and OLDFIELD JJ.; but they interpreted it as not applying to a minor's plaint on the ground that no question of the effect of a minor's plaint was raised before the Full Bench. In *Krishnaswami Thevan v. Pulukaruppa Thevan*(3) both learned Judges referred to *Soundararajan v. Arunachalam Chetty*(1) and both accepted the interpretation of it in *Chelimi Chetty v. Subbamma*(2) as correct. It was referred to again in *Sri Ranga Thathachariar v. Srinivasa Thathachariar*(4) and there, as also in *Ganapathy v. Subramanyam Chetty*(5) and *Rama Rao v. Hanumantha Rao*(6), the learned Judges who accepted the first proposition in *Chelimi Chetty v. Subbamma*(2) must have known that in accepting that proposition they were also accepting the interpretation of *Soundararajan v. Arunachalam Chetty*(1) adopted in *Chelimi*

(1) (1915) I.L.R. 39 Mad. 159 (F.B.).

(3) (1924) I.L.R. 48 Mad. 465.

(5) (1929) I.L.R. 52 Mad. 845.

(2) (1917) I.L.R. 41 Mad. 442.

(4) (1927) I.L.R. 50 Mad. 866.

(6) (1929) I.L.R. 52 Mad. 856.

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Chetty v. Subbamma(1). When the opinion of a Full Bench of this Court has been interpreted by a Bench of two Judges of this Court, a Judge of this Court sitting alone, as I understand the matter, is as much bound by that interpretation as he would be by the interpretation of a pronouncement of the Privy Council or of a provision of a statute adopted by a Bench. In the present instance, as I have shown, the interpretation of the opinion of the Full Bench in *Soundararajan v. Arunachalam Chetty*(2) viz., that it does not apply to a minor's suit for partition, and the view that in spite of the opinion of the Full Bench a minor does not become divided in status from the members of his family by the filing of a plaint for partition on his behalf but nevertheless remains undivided until the Court has found that partition is for his benefit have been adopted, as my learned brother recognises, by Bench after Bench of this Court. If a Judge sitting alone is really of opinion that a matter so well-settled requires reconsideration, the usual course is, I believe, to refer the case before him to a Bench with such observations as he may think necessary; and the Bench, if its members agree with him, may refer the matter to a Full Bench, though, when there is a long line of decisions, it is in my opinion extremely undesirable that they should do so save in exceptional cases. JACKSON J. also regards *Krishnaswami Thevan v. Pulukaruppa Thevan*(3) as throwing doubt on *Chelimi Chetty v. Subbamma*(1). The learned Judges who decided *Krishnaswami Thevan v. Pulukaruppa Thevan*(3) did not regard their decision as inconsistent with *Chelimi Chetty v. Subbamma*(1) nor did the learned Judges who decided *Sri Ranga Thathachariar v. Srinivasa Thathachariar*(4). On the contrary, as I have mentioned, both in *Krishnaswami Thevan v. Pulukaruppa Thevan*(3) and *Sri Ranga Thathachariar v. Srinivasa Thathachariar*(4), the decision in *Chelimi Chetty v. Subbamma*(1) was accepted as correct. JACKSON J. has also mentioned *Krishna Lal Jha v. Nandeshwar*(5). But, as he has noticed, not only is that decision in conflict with *Chelimi Chetty v. Subbamma*(1) but in *Krishnaswami Thevan v. Pulukaruppa Thevan*(3) dissent from it has been definitely expressed. His conclusion appears to be that the answer to the question whether, when a minor suing

(1) (1917) I.L.R. 41 Mad. 442.

(2) (1915) I.L.R. 39 Mad. 159 (F.B.).

(3) (1924) I.L.R. 48 Mad. 465.

(4) (1927) I.L.R. 50 Mad. 866.

(5) (1918) 4 P. L.J. 38.

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for partition (or a minor defendant claiming partition) dies before the Court has found that partition is for his benefit, he dies divided or undivided in status is not clear, and he left it to be debated in the suit. With the greatest respect in my opinion the answer is quite clear in principle, when we adopt, as we must adopt, the rule approved by the Privy Council that a minor can get partition by suit only after the Court has found it is to his benefit, and is quite clear on the authority of a number of decisions of this Court, in one of which JACKSON J. himself joined.

My learned brother agrees with me that the first proposition in *Chelimi Chetty v. Subbamma*(1), the proposition which JACKSON J. doubts, viz., that the institution of a suit for partition on behalf of a minor does not itself effect severance of status, is now incontestable. If that is so, the minor remains undivided in status even after the plaint is filed until something further happens, i.e., until the Court has found that partition is to his benefit. If he dies before that has been found, he dies undivided in status and the law of survivorship comes into operation. If the first proposition is accepted, as I understand that my learned brother accepts it, with the very greatest respect I do not see how the next step in the argument can be avoided, viz., that the minor plaintiff remains undivided in status even after the plaint has been filed. If he dies while undivided, no further question arises: the rule of survivorship comes into play. To attack that rule directly would be hopeless. When a member of a joint family, whether a major or a minor, dies and at the moment of his death he is undivided in status, his share goes to his co-parceners by survivorship. At the moment he died the minor plaintiff in this case was undivided: no one can deny that unless the first proposition in *Chelimi Chetty v. Subbamma*(1), which my learned brother recognises as correct and well-established, is overruled, as JACKSON J. would like to overrule it: if nothing more happened, for instance if no one took any further interest in the suit, by the rule of survivorship the minor's share must go to his co-parceners. But it is suggested that *ex post facto* by an inquiry into what would have been to the benefit of this unfortunate infant if he had lived, which he did not, and had not died, which he did, the fact that he died a joint member of his

(1) (1917) I.L.R. 41 Mad. 442.

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family may be properly converted into a fiction that he died divided in status. And this is to be done by a Court which has to act with a single eye to the minor's benefit. Under the guise of a rule intended for the benefit of the minor plaintiff to embark after his death on a hypothetical inquiry, which no longer can have any relation to existing facts, and to do this, not for the benefit of the minor, who is beyond all human benefit, but for the benefit of his heirs, in respect of whom the Court has no special duty or responsibility, appears to me a very artificial way of evading the law of survivorship.

As I have indicated, in my opinion there is no doubt how the Subordinate Judge should have disposed of the application before him. But, as I am unfortunate enough to be in disagreement from my learned brother and as the learned Advocates on both sides have requested that the matter be referred to a Full Bench, I agree that the questions proposed by my learned brother be so referred.

The arguments are fully dealt with in the judgments of their Lordships.

S. Varadachari and B. T. M. Raghavachari for petitioners.

G. Lakshmanma, G. Chandrasekhara Sastri and T. S. Narasinga Rao for respondent.

Cur. adv. vult.

OPINION.

RAMESAM J.

RAMESAM J.—The facts out of which this revision petition arises are as follows:—Original Suit No. 36 of 1930 was filed for partition in the Subordinate Judge's Court of Ellore on behalf of an infant plaintiff by his mother as next friend. The first defendant is an uncle of the plaintiff; the second defendant is his son and the third defendant is the plaintiff's half-brother. The plaintiff, his deceased father and the defendants were members of a joint family. The plaintiff's father died on the 16th May 1929 and the suit was

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instituted on the 29th October 1929 on the allegation that the defendants were misappropriating the plaintiff's share in the family properties and that they refused to deliver the plaintiff's share though demanded and turned him and his mother out of the family house in September 1929. While the suit was pending the plaintiff died on the 21st March 1931. His mother then applied to be brought on record as legal representative. The Subordinate Judge passed an order directing that the plaintiff's mother be brought on record as legal representative. He also directed that an issue be framed in the suit as to whether the suit was instituted in the interests of the minor and whether, had he survived, a decree for partition with effect from the date of the plaint at the latest ought to have been passed. Against this order the defendants filed this revision petition. The revision petition originally came on for arguments before our brothers VENKATASUBBA RAO and REILLY JJ. who differed and referred the following questions to a Full Bench:

I. Does a suit by a minor for partition abate if he dies before the Court has found that partition is for his benefit? or

II. Is it open to his legal representative to proceed with the trial and obtain a decree on his showing that when the partition suit was instituted it was for the benefit of the minor?

So far as an adult plaintiff is concerned, it is now established law that the filing of a suit for partition amounts to a definite and unambiguous intention to separate; vide *Suraj Narain v. Iqbal Narain*(1). A member of a joint family can separate from the family even prior to a suit

(1) (1912) I.L.R. 35 All. 80 (P.C.).

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provided he declares a definite and unambiguous intention to separate and communicates it to the other members of the family ; vide *Girja Bai v. Sadashiv Dhundiraj*(1). The question now arises how far are these principles to be applied to the case of a minor? If it can be said that a suit for partition can always be filed on behalf of a minor and there are no limitations as to the granting of a decree in such a suit, no difficulty arises. But, while a suit on behalf of a minor can be filed by any person as next friend, Courts have laid down that in the case of a suit for partition the suit ought not to be decreed unless it is for the benefit of the minor. The reason for such a limitation imposed by the Courts is not that there cannot be a partition between a minor and the other members of the family but it is possible that the suit may not be for his benefit. When it is remembered that any person can sue on behalf of a minor as next friend it is easy to imagine cases where the partition is not for his benefit. If the property is not being properly managed or if his rights are denied, it is obvious that he should have a partition ; vide *Kamakshi Ammal v. Chidambara Reddi*(2). But where the property is being well managed and the minor is well looked after, there is no need of a suit for partition and it is possible that a meddlesome next friend without keeping in his mind the minor's interests may file a suit for partition on account of some misunderstanding of his own with the members of the family or some other motive. It is to avoid such a contingency that the rule has been

(1) (1916) I.L.R. 43 Calc. 1031 (P.C.).

(2) (1866) 3 M.H.C.R. 94, 98.

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observed by the Courts. In *Nallappa Reddi v. Balammal*(1) a private partition in which the minor was represented by a proper guardian was held to be binding. See also *Chanvirapa v. Danava*(2).

From the facts of the Privy Council decision in *Balkishen Das v. Ram Narain Sahu*(3) it appears that two of the parties to the *ikrarnama* in that case were minors represented by their guardian. It was held that the *ikrarnama* was binding on the minors. An adult member can separate from the family even if there are minors by communicating his intention to the other adult members and in the case of minors to some person properly representing them. The question therefore that arises before us is what is the effect of such a rule of practice conceived in the interests of minors? When it is said that the Court does not grant a decree for partition in favour of a minor unless it is shown to be required for his benefit, is it merely a limitation on the passing of the decree or on the maintainability of the suit? If until the Court actually applies its mind to the facts and passes a decree directing a partition the minor cannot be said to be separated from the family, how is it that there can be a private partition even without the machinery of the Court? If a guardian representing the minor can obtain a partition on his behalf or in other words if he can assert the right for a division on behalf of the minor outside the Court why can he not assert such a right by the filing of a plaint? In *Soundararajan v. Arunachalam Chetty*(4) the suit

(1) (1864) 2 M.H.C.R. 182.

(3) (1903) I.L.R. 30 Calc. 738 (P.C.).

(2) (1894) I.L.R. 19 Bom. 593.

(4) (1915) I.L.R. 39 Mad. 159 (F.B.).

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was filed on behalf of an illegitimate son for partition. The Subordinate Judge dismissed the suit on the ground that his paternity was not proved. On appeal the High Court found on the facts that it was proved and referred to a Full Bench the question of the *quantum* of his share. During the pendency of the appeal the defendant (the legitimate son) died. At this stage it was contended on behalf of the minor that he was entitled to the whole property. It was held that he was not. It was also held by the Full Bench that he was entitled only to the share to which he was entitled at the time of the filing of the plaint. It was suggested both before the Division Bench and before us that the fact that the plaintiff was a minor was overlooked by the Judges and the Counsel in the case and that that decision should not be regarded as an authority. The actual judgments make no reference to the fact of the plaintiff being a minor. But for this the suggestion could not be made. JACKSON J. in *Akkanna v. Rangaraja*(1) thought that the learned Judges could not have overlooked the fact. I am inclined to agree with JACKSON J.'s view. I cannot imagine that the very eminent Judges who dealt with the case and the eminent Advocates (Messrs. A. Krishnaswami Ayyar and S. Srinivasa Ayyangar) that appeared in it could have overlooked such a fact. In my opinion that decision is authority for saying that a suit having been filed on behalf of a minor plaintiff, there being obvious differences in the family the plaintiff being the illegitimate son and the defendant the

(1) F.N. page 95 *supra*.

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legitimate son and there being no question as to the desirability of a partition, the plaintiff became separated by the filing of the plaint. However that is not the point referred to the Full Bench and, as the point was not discussed, it is desirable to consider the point apart from the weight of that decision.

In *Chelimi Chetty v. Subbamma*(1) the Court upheld the view now contended for by the defendants. At page 444 it is observed :

"That *prima facie* implies that the member who exercises such discretion must be of an age capable of exercising discretion in law. That will not be the case with a minor at least if he is of an age when discretion cannot be imputed to him."

This rather suggests that if the minor is of an age capable of exercising discretion, then there may be severance. But that is not consistent with the cases. The cases show that the volition indicating a desire for separation and an unambiguous intention to separate cannot be expressed by the minor himself but must be exercised on his behalf by some other person—by a guardian in a private partition and by a next friend in the filing of a plaint. At page 445 it is observed :

"This clearly does not amount to anything more than this, that it is open to a person who chooses to act on behalf of a minor member of a Hindu family to exercise the discretion on his behalf to effect a severance."

This sentence clearly shows that it is not the minor's volition but the next friend's volition that matters. But the learned Judges further proceed to say :

"What causes the severance of a joint Hindu family is not the existence of certain facts which would justify any member to ask for partition, but it is the exercise of the option

(1) (1917) I.L.R. 41 Mad. 442.

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which the law lodges in a member of the joint family to say whether he shall continue to remain joint or whether he shall ask for a division."

If in the case of a minor the option cannot be exercised by him but should be done by somebody else on his behalf, why should not the exercise of that option on his behalf effect a severance as in the case of an adult? The learned Judges say :

"In the case of a minor the law gives the Court the power to say whether there should be a division or not, etc."

As I said, this is a rule conceived in the interests of minors. It does not mean that the exercise of the discretion is totally inoperative until the Court records its finding. In such a case it seems to me that the proper way of describing the situation is that the exercise of the option on behalf of the minor effects a severance conditional on the Court finding that it was for the benefit of the minor.

In *Krishnaswami Thevan v. Pulukaruppa Thevan*(1) it was held that there was a division of status from the date of the plaint. There the suit was on behalf of a minor plaintiff, and his prayer was described as a conditional request that, provided that the Court sees fit, it may declare the status of the minor divided as from the date of the plaint. But it was added :

"It is true that there can be no division of status unless the Court sees fit to decree it."

This case is not conclusive either way.

In *Sri Ranga Thathachariar v. Srinivasa Thathachariar*(2) COUTTS TROTTER C.J. observed :

"When the Court thinks fit on a consideration of the circumstances set forth in the plaint to decree partition of the family properties, the *imprimatur* of the Court must be deemed

(1) (1924) I.L.R. 48 Mad. 465.

(2) (1927) I.L.R. 50 Mad. 866.

to have been placed on the allegations made in the plaint justifying the effecting of a partition."

No doubt the preceding part of the sentence assumes that a severance in the status of the family could not be effected by the individual volition of the minor's next friend, still the latter part of the sentence seems to indicate that the decree operates only as a "guinea stamp", whereas the essential factor is the volition exercised on behalf of the minor. However this decision too is not conclusive.

In *Rama Rao v. Hanumantha Rao*(1) in which I delivered the judgment this point did not arise and our observations were made with reference to the actual contentions in the case. The major plaintiff in that case claimed a two-thirds share on the ground that the share of his brother (the minor plaintiff) came to him by survivorship. Merely saying that the minor plaintiff was also divided from the rest of the family was not enough for the major plaintiff. The major plaintiff had to show not only that the minor plaintiff was separated from his father but remained joint with the major plaintiff. With reference to this claim the actual observations were made. I observed in that case :

"The second plaintiff, being a minor, is incapable of exercising the intention to separate by himself. The next friend does it for him."

I there indicated my opinion that the next friend exercised the volition on behalf of the minor. Then I said :

"If the Court thinks fit to allow partition on behalf of the minor, one can well say that the minor has become divided ;

(1) (1929) I.L.R. 52 Mad. 856.

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but until the decree is passed one cannot say that the minor's interests are divided from the rest of the family."

All that I said in this sentence was that until the decree was passed one is not in a position to assert that the minor's interests are divided. I did not say that the minor's interests are divided only from the date of the decree. The decree gives us information enabling us to say that the minor has become divided. In my opinion there is nothing in the judgment against the contention of the legal representative in this case.

In *Krishnamurthy Pillai v. Sundaramurthy Pillai*(1) I observed at page 569 :

"In the present case, neither the father nor the Official Assignee has any power to deal with the son's share after 11th February 1927."

From the facts at page 560 it appears that that was the date of the suit filed on behalf of the minor son. This seems to indicate that there is a severance of the son's interest by the filing of the plaint. However the matter was not discussed.

It seems to me that the decision of the case depends upon whether the essential act on behalf of the minor is the volition of the guardian expressed on his behalf or whether it is the discretion exercised by the Court. This can be tested in the following way : Suppose a suit for partition was filed on behalf of a minor of 17. By the time the case comes on for trial the minor attains majority and he continues the suit. In such a case is a finding by the Court necessary that the suit when filed was for the benefit of the minor? If in such a suit one defendant dies prior to the plaintiff attaining majority can the

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minor's share be augmented by that death or would it be limited to his own share? Now, if it is the Court's judgment that effects the severance in such a suit, the Court has still to give a finding that when the suit was filed it was conceived for his benefit. If it was not conceived for his benefit, though in the events that happened the suit proceeds, the severance was not effected from the date of the plaint and the plaintiff would get the benefit of survivorship on account of the death of the defendant. But if the suit was well-conceived at the date it was filed, then the plaintiff becomes completely separated on the date of the plaint. I do not think that in practice in such a suit any Court addresses itself to the question whether the suit was for the benefit of the minor. Or again suppose in such a suit when the case comes on for trial there was still three months for the plaintiff to attain majority. There is an issue in the case whether the filing of the suit was for the benefit of the minor. From the point of view of commonsense the most obvious course would be to avoid the trial of that issue and adjourn the case for the remaining three months. Again let us take the case of a suit filed on behalf of a minor by a next friend and while the suit was pending the next friend retires from the case or dies and no other person comes forward to continue the suit as next friend. In such a case the suit cannot be dismissed. The strictly logical course in such a case is if no other next friend can be found to wait until the minor attains majority and then proceed with the suit or not according to the wishes of the *quondam* minor. Again, if a suit is filed by a

(1) (1931) I.L.R. 55 Mad. 558.

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father for himself and his minor son for partition, is it necessary to decide the issue that the partition is beneficial to the minor? In such cases, except in special circumstances, the son follows the father. Both become divided from the filing of the plaint. The opposite view involves the anomaly that in the same suit, while the father became divided from the date of the plaint, the son becomes divided after the Court records a finding that the suit is beneficial to the minor. In such a case, the father and son are together severed from the rest of the family from the date of the plaint. These instances show that the object of the issue whether the suit was for the benefit of the minor is really to remove the obstacle to the passing of the decree. It is no objection to the maintainability of the suit. In the instances I have given the suits are perfectly maintainable. The condition is somewhat analogous to the production of a succession certificate before the decree is passed. In my opinion therefore in all such cases the severance is effected from the date of the suit conditional on the Court being able to find that the suit when filed was for the benefit of the minor. If so the legal representative can bring himself on record and ask for the decision of such an issue in the trial of the suit which is to be continued at his instance.

It is unnecessary to refer to the other decisions of single Judges cited before us.

In my opinion the view of VENKATASUBBA RAO J. is correct and I accordingly answer the questions referred to us.

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ANANTAKRISHNA AYYAR J.—I agree. Sobhanadhri and the first defendant were undivided

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brothers. The third defendant is the son of Sobhanadhri by his first wife and the minor plaintiff is the son of Sobhanadhri by his second wife. The second defendant is the son of the first defendant. After the death of Sobhanadhri, the minor plaintiff, through his next friend, his mother, instituted Original Suit No. 36 of 1930 on the file of the Subordinate Judge's Court of Ellore for partition of the joint family properties of the parties. The plaint contained certain allegations with a view to show that it was for the clear benefit of the minor that partition should be decreed. The plaint also stated that prior to suit, in September 1929, the plaintiff's next friend declared to the defendants that it was in the interests of the plaintiff to separate, and asked the defendants to partition the family properties, which the defendants declined to do. The defendants filed written statements denying the allegations in the plaint and contending that it was not in the interests of the plaintiff to separate from the defendants. After issues were framed, the plaintiff died on 21st March 1931, before the suit came on for trial. The plaintiff's mother filed Interlocutory Application No. 352 of 1931 praying that she might be brought on record as legal representative of the deceased plaintiff with a view to continue the suit. Her application was opposed by the defendants. The learned Subordinate Judge by his order dated 20th April 1931, observed that

"if the present case be proceeded with, it was quite possible that the Court may hold, if the suit be tried in the circumstances as they stood on and prior to the date of the plaint, that the suit was beneficial to the minor plaintiff; that, had the plaintiff survived, a decree for partition would have been passed, and that therefore the plaintiff must be considered

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to have become separated in status at least from the date of the plaint. If such a finding is possible, the petitioner must, I think, be brought on record. I allow the petition; an issue will however be framed in the suit as to whether the suit was instituted in the interests of the minor and whether had he survived a decree for partition with effect from the date of the plaint at the least would have been passed."

Against that order, defendants 1, 2 and 3 preferred a civil revision petition to the High Court. When the civil revision petition came on before me for final disposal, having regard to the importance of the question, I referred the revision petition to a Bench for disposal. The learned Judges who ultimately heard the revision petition differed in their opinion, with the result that the following two questions have been referred to the decision of a Full Bench:

I. Does a suit by a minor for partition abate if he dies before the Court had found that partition is for his benefit? or

II. Is it open to his legal representative to proceed with the trial and obtain a decree on his showing that when the partition suit was instituted it was for the benefit of the minor?

Before proceeding to discuss the question, I must state that the decision of the Full Bench in *Soundararajan v. Arunachalam Chetty*(1), WALLIS C.J. and SADASIVA AYYAR and SESHAGIRI AYYAR JJ., seems in effect to answer the exact questions now referred to us. The Full Bench held that a member of a joint Hindu family becomes separated from the other members by the fact of suing them for partition. It was brought to our notice that, as a matter of fact, the plaintiff was a minor in that case, and that, as that fact is clear, it must be taken that the Full Bench answered the

(1) (1915) I.L.R. 39 Mad. 159 (F.B.).

question with reference to a minor plaintiff suing for partition. Though very able Counsel argued that case, the opinions of the learned Judges given in answer to the Full Bench reference do not specifically refer to the fact that the plaintiff was a minor. If the answer given by the Full Bench in *Soundararajan v. Arunachalam Chetty*(1) should be taken to be given with reference to the facts appearing in that case, where the plaintiff was a minor, then, it goes without saying that that decision *prima facie* binds the present Full Bench. However, as we have heard elaborate arguments from learned Counsel in this case, I proceed to consider the arguments advanced before us, and to state what in my opinion should be the answers to the two questions referred to us.

This question came directly for decision in *Chelmi Chetty v. Subbamma*(2) and the learned Judges decided that

"where a minor plaintiff dies during the pendency of the suit, his legal representatives are not entitled to continue the suit."

The correctness of this decision has been questioned before us.

It has been held by the Privy Council that partition in the case of an adult coparcener in a joint Hindu Mitakshara family is the severance of joint status, that it is a matter of individual volition, and that a definite and unequivocal indication of his intention by a member of such a joint family to separate himself from the family constitutes a partition in status; and, whether the others assent to it or not, there is in law

(1) (1915) I.L.R. 39 Mad. 159 (F.B.).

(2) (1917) I.L.R. 41 Mad. 442.

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an immediate severance of the joint status of such a member. There are various ways by which such intention may be evinced; *Suraj Narain v. Iqbal Narain*(1) and *Girja Bai v. Sadashiv Dhundiraj*(2). Such a notice given by a coparcener may be withdrawn with the consent of all coparceners. The institution of a suit for partition against all the other coparceners would also be evidence of an expression of such an intention and would work division in status in the case of an adult plaintiff; *Kedar Nath v. Ratan Singh*(3) and *Palani Ammal v. Muthuvenkatachala Moniagar*(4). The result of withdrawal of such a plaint is thus expressed by the Privy Council at page 258 of *Palani Ammal v. Muthuvenkatachala Moniagar*(4):

“The fact that any member of a joint family has separated himself from his coparceners may be proved by his suing for a partition of the joint family property; and if the suit is decreed, the date of his severance from the joint family will, if nothing else is proved, be treated as the date when the suit was instituted. In *Kedar Nath v. Ratan Singh*(3) a member of a joint Hindu family had filed a plaint claiming a partition but afterwards had withdrawn it and the Board held that no severance of the joint status resulted. Their Lordships see no reason to depart from that view, although such a plaint, even if withdrawn, would, unless explained, afford evidence that an intention to separate had been entertained; see *Girja Bai v. Sadashiv Dhundiraj*(2) and *Kawal Nain v. Budh Singh*(5).

Again, if the suit of an adult coparcener-plaintiff for partition is decreed, the date of his severance from the joint family will, if nothing else be proved, be treated as the date when the

suit was instituted. The question we have now to consider relates to a suit filed on behalf of a minor plaintiff when the minor died before any decree was passed in the suit.

As observed by the Privy Council at page 257 of *Palani Ammal v. Muthuvenkatachala Moniagar*(1),

“that the coparceners in a joint Hindu family can by agreement amongst themselves separate and cease to be a joint family, and on separation they are entitled to partition the joint family properties, is now well-established law.”

It is rarely that a joint Hindu family consists only of adult coparceners, without any minors. But it has been held that a valid partition could be made outside Court by the members of a joint family though some were minors at the time. In *Balkishen Das v. Ram Narain Sahu*(2) the Privy Council observed as follows:—

“The question upon which their Lordships have felt most difficulty is whether the document can be considered as binding upon the coparceners who were minors at the date of it. But they think that in these proceedings they must treat it as binding upon them. There is no doubt that a valid agreement for partition may be made during the minority of one or more of the coparceners. That seems to follow from the admitted right of one coparcener to claim a partition; and (as has been said) if an agreement for partition could not be made binding on minors, a partition could hardly ever take place. No doubt if the partition was unfair or prejudicial to the minor's interests, he might, on attaining his majority, by proper proceedings, set it aside so far as regards himself. Some evidence was given to show that the mothers of the two minors were acting under the control and influence of Ramjiban. But as against this it may be pointed out that in the proceedings for a certificate which led to the execution of the

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(1) (1912) I.L.R. 35 All. 80 (P.C.). (2) (1916) I.L.R. 43 Calc. 1031 (P.C.).
(3) (1910) I.L.R. 32 All. 415 (P.C.). (4) (1924) I.L.R. 48 Mad. 254 (P.C.).
(5) (1917) I.L.R. 39 All. 496 (P.C.).

(1) (1924) I.L.R. 48 Mad. 254 (P.C.).
(2) (1903) I.L.R. 30 Calc. 738, 752 (P.C.).

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ikrarnama they seem to have been acting independently of, and even adversely to, Ramjiban. For he can hardly be thought to have prompted a petition which contained an allegation that he was ready to waste the property of the minors. It should also be said that the partition on the face of it was not unfair; and in fact the shares allotted to the minors were at least as large as, and perhaps larger than, they were strictly entitled to."

It is open to the adult coparceners to express their intention to separate from the others, and, even though some coparceners were minors, such intention to separate may be communicated to the mothers or other natural guardians of the minors. A partition effected by the adult coparceners with the mothers or other natural guardians of the minor coparceners representing the minors would be a valid partition, and would be binding upon the minors. No doubt it would be open to the minors when they come of age to take steps to have such a partition modified if their proper shares of the joint family property had not been secured to them; but they cannot impugn the partition on the simple ground that it ought not to have been entered into when they were minors. It is a right of the adult members, including the karta or the manager, to claim partition with a view to have their shares separated. The result in such a case would be that the minor also is separated from the other members and his share ascertained and taken charge of by his mother or other natural guardian. The karta or the manager of the whole family, when he himself is claiming separation from the minor, could not represent the minor's interests in such a partition. The practice in such cases is to have the minor's interests represented by the minor's mother or other near relation interested in the minor whose

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interests are not adverse to the minor. Such a practice has been approved by the Privy Council in the case reported as *Balkishen Das v. Ram Narain Sahu*(1), and a partition arrangement in which the minors were represented by their mothers was held by the Privy Council to be binding on the minors in the absence of fraud, etc., when the proper shares of the minors were allotted and delivered to their mothers. It has not been considered, or felt in practice, that as the karta or the manager who desires partition is the legal guardian of the minors of the joint family, no partition outside Court could be effected for want of legal guardians for the minors. As already remarked, the minors' mothers or other natural guardians have been held entitled to represent the minors on such occasions. The Privy Council has held in *Gharib-ul-lah v. Khalak Singh*(2) that a guardian of the property of an infant cannot properly be appointed under the Guardians and Wards Act in respect of the infant's interests in the property of an undivided Mitakshara family, such interest not being individual property and therefore not property with which a guardian if appointed would have anything to do. This circumstance has not been allowed to stand in the way of the mother of the minor representing the minor in partition arrangements made outside Court among members of a joint Hindu family.

Thus, it will be noted that it is open to an adult coparcener to become divided by the communication of his unilateral intention to separate

(1) (1903) I.L.R. 30 Calc. 738, 752 (P.C.).
(2) (1903) I.L.R. 25 All. 407 (P.C.).

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from the other members of the joint family; that the karta or the manager could do so, so far as he is concerned, by communicating his intention to do so to the minor coparcener's mother; that a partition among coparceners would be valid, though some coparceners are minors, if they were represented by their mothers and the arrangement be proper and *bona fide*; and that it is not correct to say that partition among members of a joint Hindu family could be effected only by proceedings taken in Court.

The decision of the Privy Council in *Balkishen Das v. Ram Narain Sahu*(1) is clear that a partition arrangement could be entered into among members of a joint Hindu family though some of the coparceners were minors. That the Privy Council has only recognized a longstanding practice existing in the country is clear from reported decisions. In *Nallappa Reddi v. Balammal*(2) the minor's father died in 1835, leaving the minor three years old. The minor's mother entered into a partition with the paternal uncle of the minor in 1837. It was held, there being no proof of fraud or that undue advantage was taken of the plaintiff's minority, that the division was valid and binding upon the plaintiff. In *Chanvirapa v. Danava*(3) the partition took place in 1872, the plaintiff being represented by his mother and natural guardian. The Court held that the partition made by the mother as the guardian of her minor son was valid but that the minor on coming of age will have a right to set aside the division if it can be shown to be illegal or fraudulent or

(1) (1903) I.L.R. 30 Cal. 738 (P.C.).

(2) (1864) 2 M.H.C.R. 182.

(3) (1894) I.L.R. 19 Bom. 593.

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even if it was made in such an informal manner that there are no means of testing its validity; see also *Yechuri Ramamurthi v. Yechuri Ramamma*(1). This principle has been extended to cases arising under Marumakkattayam Law in force in Malabar where partition could not be had unless agreed to by all the members of the tarwad; but a partition arrived at when some members were minors, but were represented by their mothers, was upheld as binding on the minors, unless fraud or serious prejudice be shown, *Narainikutti Amma v. Achuthankutti Nair*(2), in which case, the partition would be re-opened so far as the minors are concerned, so that they may be awarded the proper share which should have been set apart for them; *Veluthakal Chirudevi v. Veluthakal Tarwad Karnavan*(3).

It is unnecessary to multiply instances found in Law Reports of private arrangements of partition in joint Hindu families made outside Court when some of the coparceners were minors represented by their mothers or other natural guardians.

Further, in the case of an adult coparcener the filing of a suit for partition by such a coparcener has been held to bring about severance in status, and also that the decree in such a suit works out severance as from the date of the plaint. It is not necessary now to consider the effect of withdrawal of such a plaint. That being the law in the case of adult coparceners, what grounds are there to come to a different conclusion in the case of a minor coparcener, when the Court is satisfied that partition is for the benefit of the minor?

(1) (1915) 30 M.L.J. 308.

(2) (1918) I.L.R. 42 Mad. 292.

(3) (1916) 31 M.L.J. 879, 881.

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We have seen that a minor's mother may accept a communication from the adult coparceners expressing their intention to separate from the minor. The question arises whether she could not on behalf of the minor coparcener communicate a similar intention on behalf of the minor to separate from the adult coparceners, if it is proved to be for the benefit of the minor so to separate. Even in a proper case, when a minor's mother as his guardian expressed on behalf of the minor the intention to separate, and communicated the same to the other coparceners, it may happen that her request may not be granted by the other coparceners, and she may, as the next friend of her minor son, have to institute a suit for partition. No doubt, any person (not necessarily a mother, or in fact any relation at all of the minor) may institute a suit on behalf of a minor, as his next friend. A suit for partition may be similarly instituted by a stranger as next friend of a minor. Such a stranger might have, prior to suit, expressed such intention to the other coparceners. Is the minor necessarily to be bound by such acts and is the Court helpless in the matter? On the other hand, if the said acts be proved to be beneficial to the minor, is it, or is it not, open to the Court to give necessary relief to the plaintiff in such cases? These are relevant considerations that arise in such cases.

It has been laid down by a series of decisions that a suit on behalf of a minor coparcener for partition will lie if the interests of the minor are likely to be prejudiced by the property being left in the hands of the other coparceners; see *Kamakshi*

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The present is not a case of a personal action which is said to die with the person—*actio personalis moritur cum persona*. Nobody has contended before us that the present suit comes within the above principle. Right of partition is a right relating to property. *Prima facie* such a suit, if properly instituted, should not abate, but on plaintiff's death his legal representatives should be in a position to carry on the litigation. The very same question which will have to be decided

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| (5) (1902) 4 Bom. L.R. 883. | (6) (1907) I.L.R. 29 All. 373. |
| (7) (1915) 50 I.C. 272. | (8) (1894) I.L.R. 19 Bom. 99. |
| (9) (1907) I.L.R. 31 Bom. 373 (P.C.). | |

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(1) (1866) 3 M.H.C.R. 94

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(7) (1915) 30 I.C. 272.

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in the suit itself, namely, whether partition is for the benefit of the minor, will also decide whether his interests have passed by survivorship to the other coparceners or have passed to his (minor's) heir, widow, daughter or mother, as the case may be. I am not able to see any insuperable obstacle or anything illegal in holding that the suit does not abate in such circumstances. The minor may die after the suit is dismissed after full trial and when an appeal on his behalf is pending, one of the questions raised in appeal being that the finding arrived at by the trial Court on the evidence that the suit was not for the benefit of the minor is erroneous. It is open to the appellate Court to come to a different conclusion on the evidence on that question.

It has been decided in *Krishnaswami Thevan v. Pulukaruppa Thevan*(1), *Sri Ranga Thathachariar v. Srinivasa Thathachariar*(2) and *Ganapathy v. Subramanyam Chetty*(3) that, if a decree is ultimately passed in favour of a minor for partition, the status of division is created as from the date of the plaint, with reference to the *quantum* of the minor's share, and the date from which accounts should be taken, etc. If persons other than strictly legal guardians can represent a minor coparcener in a partition arrangement outside Court, and if no legal guardian could, under the Guardians and Wards Act, be appointed with reference to the minor's share in the joint family property, it would be anomalous if the minor's mother or other natural guardian could not act on behalf of the minor in

(1) (1924) I.L.R. 48 Mad. 465.

(2) (1927) I.L.R. 50 Mad. 866.

(3) (1929) I.L.R. 52 Mad. 845.

proper cases, in the matter of expressing intention to separate from the other coparceners, and in demanding partition, and also, if necessary, in instituting a suit for partition (if the same should become necessary) to enforce the just rights of the minor. I am assuming that proper circumstances exist for demanding such partition. It is clear that the karta or the other legal guardians of the minor would not take any steps in the matter, as their interests would be adverse to those of the minor, and, according to the hypothesis, they are acting to the prejudice of the minor. In fact, it is their acts that are complained against, and it is from their wrongful acts that the minor is sought to be protected. I am not forgetting that any stranger could institute a suit for partition on behalf of the minor as his next friend, and such a person might have demanded partition outside Court and might have communicated to the other coparceners the intention to separate, on behalf of the minor. Is the minor necessarily to be bound by such acts of strangers? The answer seems to be that the Court has got control of the suit and the proceedings; and, if it should find that the suit was instituted owing to malice or bad faith by the next friend to wreak his vengeance against the adult coparceners and out of pure private spite, the Court has got the remedies in its own hands. Question of benefit for the minor may not be confined to considerations purely and solely personal to the minor only. Considerations concerning the minor's own mother or widow or daughter, in relation to the minor, may have to be kept in view. The question is a rather novel one in which Hindu Law texts afford no help.

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Some English decisions are cited in *Kamakshi Ammal v. Chidambara Reddi*(1), and also in Halsbury's Laws of England, Vol. 17, pages 134-135, which show that the Courts have got power to control proceedings and to prevent vexatious suits from being proceeded with, and if necessary to order proceedings to be stayed. I am anxious not to say anything about the merits of the suit. It will depend upon the evidence and circumstances of each case. I am only now concerned to note that Courts have full powers in the matter to see that no injustice is done.

The decision in *Chelimi Chetty v. Subbamma*(2) directly holds that the death of a minor prior to decree causes such a suit to abate.

The learned Judges are, if I may say so, quite right in stating that it depends upon the (volition) discretion of a member of a joint Hindu family whether he is to continue the joint status or whether there should be individual separation. But, when they proceed to infer from the same that "the member who exercises such discretion must be of an age capable of exercising discretion, in law", I think they have not paid due regard to the circumstances already mentioned by me, with reference to such a discretion (volition) of a minor being exercised on the minor's behalf by the minor's mother or possibly by other natural guardians of the minor, when partition is effected outside Court between the members of a joint Hindu family. If such a thing could be done on behalf of the minor by his mother, etc., outside Court when partition is effected by private arrangement, I do not see sufficient reason for holding

that such a thing could not be done in a proper case on behalf of the minor when a suit for partition on behalf of the minor becomes necessary. No doubt, a partition by private arrangement outside Court could be impugned by the minor when coming of age on particular grounds, and it is open to him to file a suit with a view to get his proper share. But when a suit for partition on behalf of a minor is instituted, the Court takes care to examine the circumstances with a view to satisfy itself whether it is beneficial to the minor. Obviously it is inconvenient, if not against sound legal principles also, to have a decree for partition passed on behalf of a minor made the subject of complaint in a subsequent suit, when no fraud in the conduct of the suit is alleged but all that is complained of is that the partition is not in the interests of the minor. To avoid such inconvenience, the Court before passing the decree examines the circumstances with a view to find out whether the partition claimed is to the benefit of the minor. But to hold that, should the minor die before decree, the Court has no jurisdiction to examine the question and that the suit should be taken to have abated, would be to give undue prominence to a subsidiary matter, and allow subsidiary considerations to overlord and govern substantial rights. I think it is possible to give effect to the subsidiary incidental matters and at the same time to give effect to substantial rights if we were to hold that it is open to the guardian of a minor to exercise the discretion or volition on behalf of a minor in such a case prior to suit when proper circumstances exist to justify such an exercise, and also to institute a suit on

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(1) (1866) 3 M.H.C.R. 94.

(2) (1917) I.L.R. 41 Mad. 442.

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behalf of the minor for partition. Neither the exercise of such discretion, nor the institution of the suit, nor both combined, could bring about severance in status of the minor, unless the Court was satisfied that, having regard to the circumstances, partition was to the benefit of the minor. But when the Court comes to such a conclusion, it would seem to follow that severance in status should be deemed to have taken place, *at least* on the institution of the suit. I say "*at least*," because, logically, it would seem to follow in a proper case that the severance should be deemed to have taken place when the discretion or volition was exercised on behalf of the minor and the necessary communications made to the other coparceners prior to the institution of the suit. I may repeat that I am quite alive to the circumstance that it is open to any stranger to institute such a suit as the next friend of the minor; but, in the view above stated, I do not think that there need on that account be any cause for alarm, seeing that the Court would take that circumstance also into account in coming to its conclusion whether the suit was for the benefit of the minor or not. The minor might have attained the age of discretion in the sense that his opinion might be taken by the Court to be the result of intelligent discussion by him in his own mind of the pros and cons of the question. But the next friend might be the mother of the minor, and the partition might have been demanded against the step-brothers or other relations of the minor who are acting prejudicially to the minor. In all cases, it is necessary that the reasons alleged in the plaint and the whole of the circumstances of the

case should be considered by the Court. The Court can also in proper cases stay the suit as frivolous or vexatious if brought by a next friend merely to satisfy his own personal grudge against the defendants. These relate to considerations of matters of evidence. In considering the principle of law applicable, we should not forget that the ultimate approval of *imprimatur* is by the Court. If regard be had to all the considerations, the suggestion of "great hardship and inconvenience if it were left to the discretion of any person who chooses to file a suit on behalf of a minor to decide whether the family of which the minor is a member shall continue joint or become separate" should not be taken to be conclusive of the question. I respectfully agree that the logical result would be that even a notice given by such a person on behalf of a minor to the other members of the family would be effectual in working a severance of the joint status, provided the Court finds in the suit for partition that it was to the benefit of the minor. On the other hand, it needs no effort to imagine a case (not uncommon in practice) where a suit on behalf of a minor plaintiff is instituted by his mother, the defendant being the minor's step-brother. It is possible that the step-brothers find it impossible to get on together peacefully, the step-mother also finding it impossible to get on with the defendant, the step-son. Again the minor plaintiff might have been married before suit. In the circumstances, the minor, so far as he could exercise his discretion in the matter, his mother and near relations might well have come to the conclusion that partition is the only solution to put an end to misery and bring peace

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to the parties. Even if the minor should die before decree in such cases, it is possible that the Court might come to the conclusion that, in all the circumstances, it was for the benefit for the minor to have partition. I doubt whether one is confined to considerations purely personal to the minor—minor's personal comforts or inconvenience—though that would naturally be a very material consideration. I only remark that considerations in relation to the minor's wife, minor's daughter, minor's mother, etc., may not be quite irrelevant. Again, a Hindu father might have left minor sons by different wives. The minors and their mothers might not have been able to get on peacefully at all. In such cases, if the respective mothers could arrange for a valid partition outside Court, why should they be helpless if litigation is found necessary? While I agree with the learned Judges that it must be left to the Court to decide whether there should be partition or not, I find myself unable to agree with their reasoning that the death of the minor has the result of causing the suit to abate.

It has been held in several cases by this Court that, when once the Court comes to a conclusion on the evidence that the suit is for the benefit of the minor, then the decree that is passed works out a severance of the status from the date of the plaint; see *Krishnaswami Thevan v. Pulukaruppa Thevan*(1). There the question arose with reference to the *quantum* of share to which the minor plaintiff was entitled, when there were subsequent births of coparceners in the family after the date

(1) (1924) I.L.R. 48 Mad. 465.

of the plaint. The learned Judges, SPENCER and DEVADOSS JJ., held that

“a suit by a minor for partition, if it ends in a decree for partition, has the effect of creating a division of status from the date of the plaint.”

Logically, I think that it must be said that the decision of the learned Judges in *Krishnaswami Thevan v. Pulukaruppa Thevan*(1) is not consistent with the principle of the decision in *Chelimi Chetty v. Subbamma*(2). It is not from the date of the Court's finding that the suit is for the benefit of the minor that severance is to be worked out, but from the date of the plaint at least. I respectfully agree with the considerations mentioned by the learned Judges which induced them to hold that the date of severance should not be from the date of the decision by the Court. If this view be accepted, then the real basis for the decision in *Chelimi Chetty v. Subbamma*(2) would have been greatly shaken.

In the next case, *Sri Ranga Thathachariar v. Srinivasa Thathachariar*(3), decided by COUTTS TROTTER C.J. and SUNDARAM CHETTI J. (not SRINIVASA AYYANGAR J.), when a question arose as to the exact date of severance of status in a case where the Court passes a decree for partition, with a view to fix the date from which accounts had to be taken, the learned Judges held at page 872 as follows :—

“Accepting the principle that in a suit for partition brought by the minor it is for the Court to determine whether the partition would be advantageous to the minor or not, and that a severance in the status of the family could not be effected by the individual volition of the minor's guardian or

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(1) (1924) I.L.R. 48 Mad. 465. (2) (1917) I.L.R. 41 Mad. 442.
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next friend, still, when the Court thinks fit on a consideration of the circumstances set forth in the plaint to decree partition of the family properties, the *imprimatur* of the Court must be deemed to have been placed on the allegations made in the plaint justifying the effecting of a partition. That being so, the Court must be deemed to have determined that, even on the date of the plaint, it would have allowed a partition to be effected as it was beneficial to the minor. Though the enquiry has necessarily to be made by the Court subsequent to the filing of the plaint, it is the state of affairs that existed on the date of the suit that determine the exercise of the Court's discretion."

The principle of the decision in *Krishnaswami Thevan v. Pulukaruppa Thevan*(1) was therefore followed by the learned Judges in *Sri Ranga Thathachariar v. Srinivasa Thathachariar*(2). This also, in my view, is against the real principle of the decision in *Chelimi Chetty v. Subbamma*(3). In *Rama Rao v. Hanumantha Rao*(4) RAMESAM and JACKSON JJ. held at page 859, as follows :—

"The second plaintiff, being a minor, is incapable of exercising the intention to separate by himself. The next friend does it for him. If the Court thinks fit to allow partition on behalf of the minor, one can well say that the minor has become divided; but until the decree is passed, one cannot say that the minor's interests are divided from the rest of the family."

It was held by the Calcutta High Court in the case reported as *Rai Charan v. Biswa Nath*(5) and by the Privy Council in the case reported as *Palani Ammal v. Muthuvenkatachala Moniagar*(6) that, if a suit for partition is decreed, the date of severance from the joint family will, if nothing else is proved, be treated as the date when the suit was instituted.

(1) (1924) I.L.R. 48 Mad. 465.
(3) (1917) I.L.R. 41 Mad. 442.
(5) (1914) 20 C.L.J. 107.

(2) (1927) I.L.R. 30 Mad. 866.
(4) (1929) I.L.R. 52 Mad. 856.
(6) (1924) I.L.R. 48 Mad. 254, 258 (P.C.)

It however seems to be logical to hold that severance should be considered to have taken place, if a decree for partition is passed, ordinarily from the date of the expression of the discretion or volition on behalf of the minor and communication thereof to the other coparceners before suit, in the absence of other circumstances.

Instances of the Court staying suits instituted on behalf of the minor when the same was considered purely vexatious are mentioned in *Kamakshi Ammal v. Chidambara Reddi*(1), citing *Da Costa v. Da Costa*(2), *Fox v. Suwerkrop*(3), and *Sale v. Sale*(4). This is ordinarily a sufficient safe guard to prevent vexatious suits. There is also jurisdiction in Courts to direct the next friends personally to pay the costs of the proceedings.

It may perhaps be useful to bear in mind the exact nature of the jurisdiction possessed by Courts with reference to suits and proceedings instituted on behalf of minors. While any person who is not himself incapable of instituting proceedings and who is not connected with the defendant or otherwise interested adversely to the infant may file a suit on behalf of an infant as next friend, preference will be given to the father or mother or guardian or some other of the relatives or connections of the infant or their nominee. The next friend is an officer of the Court appointed to look after the interests of the infant and has the conduct of the proceedings in his hands. Upon the application of the defendant, or of a next friend of the infant appointed for the purpose,

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(1) (1866) 3 M.H.C.R. 94.
(3), (1839) 48 E.R. 1068.

(2) (1732) 24 E.R. 1003.
(4) (1859) 48 E.R. 1068.

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the Court can, if it thinks fit, direct an inquiry whether the proceedings are for the benefit of the infant, and, if it appears that they are not, can deal with the proceedings as it thinks fit; see pages 134 and 135 of Halsbury's Laws of England, Vol. 17, section 312.

BHASHYAM AYYANGAR J. made similar observations in *Doraiswami Pillai v. Thungasami Pillai*(1) that

"a suit relating to the estate or person of an infant and for his benefit has the effect of making him a ward of the Court; and no act could be done affecting the property of the minor unless under the express or implied direction of the Court itself."

See also the observations of SCOTT J. in *Karmali Rahimbhoy v. Rahimbhoy Habibhoy*(2), and Story's Equity Jurisprudence, section 1353.

Having regard to the provisions of Order XXXII, rules 6 and 7, among others, of the Code of Civil Procedure relating to receipt, by the next friend or guardian of a minor, of money or other movable property on behalf of the minor, and relating to an agreement or compromise by the next friend or guardian of the suit, it is not generally deemed necessary for the Court to interfere with acts of next friends and guardians *ad litem* of minors at every stage of the suit in ordinary cases. The general principle of law is, as stated above, that an infant litigant becomes a ward of the Court and the Court has got the right and also the duty to see that next friends act properly and *bona fide* in the interests of minors, and that no suits are instituted or carried on by next friends for their own benefit only—irrespective of the

(1) (1903) I.L.R. 27 Mad. 377.

(2) (1888) I.L.R. 13 Bom. 137.

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benefit of the minors. The Court would have jurisdiction in every case in which a minor is a litigant to see that proceedings are all carried on properly, and any suit instituted by a next friend which is proved to be not in the interests of the plaintiff could be stayed by order of the Court. Having regard to the importance of partition suits to coparceners of joint Hindu families, Courts take particular care when such suits for partition are instituted on behalf of minors. By staying such suits or dismissing them on the ground that they are not for the minor's benefit, the Court is only exercising a part of its general jurisdiction with reference to minors generally. It seems to me that the exercise by the Court of its general jurisdiction over minors should not be taken to affect in any way the substantive rights of minors. It is a maxim of law that "acts of Courts injure nobody". In this view also, if the suit for partition on behalf of the minor is proved to have been for his benefit when instituted, the same should not be rendered ineffective simply because the minor should happen to die before the Court could satisfy itself of the beneficial nature of the action and that the action was properly instituted. Substantial rights of minors should not be prejudicially affected by the exercise by Courts of a jurisdiction which they possess in the interests of the minor and with a view to see that the rights of minors are not prejudiced.

When we consider what is happening outside Court when partition arrangements amongst coparceners of a joint Hindu family, some of whom are minors, are carried out as a matter of course, and when we consider the real nature of the

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jurisdiction exercised by Courts in suits in which minors are plaintiffs, the conclusion is irresistible that the accidental death of a minor plaintiff in a suit for partition should not have the result of abatement of the suit, if otherwise the suit would be decreed in favour of the minor had he been alive at the date of the decree.

There are no Hindu Law texts to which our attention was drawn which would govern the decision of the exact question now before us. Our attention was not drawn to any case directly deciding this question, excepting the case of *Chelimi Chetty v. Subbamma*(1), already referred to, and a decision of the Patna High Court in the case reported as *Krishna Lal Jha v. Nandeshwar* (2), in which, however, a view contrary to the decision in *Chelimi Chetty v. Subbamma*(1) was taken.

On general principles by which we should in such cases be guided, I think the correct view to take is that the suit does not abate in such cases but that the Court should proceed with the trial of the suit; and, if it should come to the conclusion on the evidence that the suit as instituted was for the benefit of the minor, it should pass a decree, the benefit of which will go to the legal heirs of the deceased minor.

The above line of reasoning has led me to answer the first question referred to us in the negative and the second question in the affirmative.

CORNISH J.

CORNISH J.—Except for *Chelimi Chetty v. Subbamma*(1), no case covering the question referred to us has been brought to our notice. In that

(1) (1917) I.L.R. 41 Mad. 442.

(2) (1918) 4 P.L.J. 38.

case it was held that on the death of the minor plaintiff in a partition suit before decree a legal representative was not entitled to be brought on record to continue the suit. But there is no discussion of the topic in the judgment. The judgment merely accepts the respondent's contention that, as there was no partition, whatever rights the minor had in the coparcenary property survived to his coparceners. I think the explanation suggested by VENKATASUBBA RAO J. in the referring order must be correct, that the contention put forward by the appellant in that case was that, without anything more, a minor became divided in status from his coparceners at the moment of instituting his suit for partition. The judgment must be taken as proceeding upon and refuting that proposition. There can be no doubt upon the authorities that in the case of a minor suing for partition through his next friend severance of status is only accomplished if the suit is decreed, but the severance will be deemed to have taken place from the date of the plaint. The effect of the Court's decree is to affirm the minor's right to separate from his coparceners. This seems to me to be the implication from what is said in *Sri Ranga Thathachariar v. Srinivasa Thathachariar*(1) that

"when the Court thinks fit on a consideration of the circumstances set forth in the plaint to decree partition, the *imprimatur* of the Court must be deemed to have been placed on the allegations in the plaint justifying the effecting of a partition."

The question is, what is the position when the minor plaintiff dies pending suit? If the suit is

(1) (1927) I.L.R. 50 Mad. 866, 872.

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discontinued, the minor's undivided interest in the joint property will, of course, survive to his remaining coparceners. But the suit will only abate if the cause of action does not survive. A right of a coparcener to have his share defined and divided from the joint property is incidental to coparcenership. In the case of an adult coparcener the institution of a suit by him is regarded as such an unequivocal expression of an intention to separate that he is deemed to have become thereby divided in status, and should he thereafter die while the suit is pending his share is severed from the coparcenary property. If he is solely entitled to that share it will form part of his separate estate. In the case of a minor the assertion by suit of his right to separate is, as we have seen, an inchoate right until perfected by a decree of the Court. But whether the plaintiff be an adult or a minor there is no distinction as regards the date from which divided status begins; *Krishnaswami Thevan v. Pulukaruppa Thevan*(1). Now, the minor's right to enforce a partition being solely dependent upon the approval by the Court of the circumstances alleged in the plaint for justifying a partition, I can see no reason why the justification should be treated as ceasing to exist with the subsequent death of the minor. Why should his death debar the Court from confirming his right to partition? The interest or benefit of the minor which is said to be the guiding consideration with the Court in decreeing the suit is not simply an interest or benefit personal to the minor. It involves the existence of special

(1) (1924) I.L.R. 48 Mad. 465.

rights to property. In my judgment the accident of the minor's death pending suit ought not to prevent the pursuit of those rights for the benefit of the minor's estate by his legal representative.

G.R.

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APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

KALAVACHERLA BAPIRAJU (SECOND PLAINTIFF),
APPELLANT,

v.

RAMACHARNADAS BAVAJEE (DEFENDANT),
RESPONDENT.*

*Charitable and Religious Trusts Act (XIV of 1920), sec. 6—
Suit under—Persons competent to institute—Reliefs claim-
able in—Code of Civil Procedure (Act V of 1908), sec. 92—
Suit under, and appeal arising out of such suit—Abate-
ment of—Death of one of plaintiffs who obtained sanction
—Effect.*

The suit contemplated by section 6 of Act XIV of 1920 may be instituted by persons other than the particular individual who obtained the permission. The reliefs that can be claimed in the suit under section 92, Civil Procedure Code, filed in pursuance of permission obtained under section 6 of Act XIV of 1920 are, however, only those which arise out of the failure to produce the accounts and are connected with it. A declaration that the defendant is not the rightful mahant is not a relief arising out of the failure to produce accounts and cannot be claimed in such a suit.

A suit under section 92, Civil Procedure Code, or an appeal arising out of such a suit does not abate on the death of one of the plaintiffs who obtained sanction for instituting the suit.

* Appeal No. 131 of 1927.

BAPIRAJU
v.
RAMACHARNA-
DAS BAVAJEE.

APPEAL against the decree of the Court of the Subordinate Judge of Ellore in Original Suit No. 80 of 1926.

P. R. Ganapathi Ayyar and *V. Krishna Mohan* for appellant.

P. Somasundaram for respondent.

MADHAVAN
NAIR J.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The second plaintiff is the appellant. The appeal arises out of a suit instituted by the plaintiffs under section 92, Civil Procedure Code. Prior to the institution of the suit, the first plaintiff applied under the provisions of Act XIV of 1920 to the District Court to obtain orders from the Court under sections 3 and 4 directing the trustee to furnish accounts and give the necessary information about the trust. The learned District Judge repeatedly gave time to the defendant to produce accounts, but ultimately the order of the Court was not complied with and, under section 6, he passed an order giving permission to institute a suit under section 92, Civil Procedure Code. After obtaining such permission the other two plaintiffs joined the first plaintiff and instituted this suit against the trustee. In the course of the trial, the first plaintiff at whose instance permission was obtained from the District Judge dropped out of the suit and later on the third plaintiff also abandoned it. So, the only person who proceeded with the suit was the second plaintiff. In the suit, various reliefs were claimed. In paragraph 12 (a) an inventory was asked for from the defendant. In paragraph 12 (b) the defendant was sought to be removed and it was also requested that it should be declared that he is not the rightful mahant. In paragraph 12 (c)

a scheme was sought to be framed for the management of the properties and accounts were also asked to be rendered by the defendant-trustee. The learned Subordinate Judge dismissed the suit without going into the merits. He held that the plaintiff who obtained permission to institute the suit from the District Court having dropped out of the proceedings it was not competent for the other plaintiffs to proceed with the suit; and he also held that since the reliefs claimed in the suit exceeded and went beyond the particular relief with respect to which sanction was given by the District Judge the suit was incompetent.

In appeal it is argued that the learned Subordinate Judge's decision on both these points is wrong. The first question is whether the suit contemplated by section 6 of Act XIV of 1920 cannot be instituted by persons other than the particular individual who obtained the permission. It is true that under sections 3, 4 and 5 the application should be made by a person interested in the trust. But once a breach of trust has been committed by the trustee by his refusal to produce the accounts, then section 6 says that a suit so far as it is based on such failure may be instituted without the previous sanction of the Advocate-General. The section nowhere says that such a suit should be instituted by the person who made the application under sections 3 and 4 of Act XIV of 1920. Under section 92, Civil Procedure Code, the previous sanction of the Advocate-General is required for the institution of a suit contemplated by that section. Under section 6 once the breach referred to in that section is committed by the disobedience of an order passed by the District

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Judge then a suit may be instituted under section 92, Civil Procedure Code. The necessity for obtaining the sanction of the Advocate-General is thus removed under section 6; and it does not say anywhere that the suit should be instituted only by the person who secures the order from the District Court, in the circumstances mentioned in the previous sections. In *Umrao Singh v. Har Prasad*(1) it was held that, when the order of the District Judge for filing of accounts under section 5 of the Charitable and Religious Trusts Act has not been complied with, there is a breach of trust by virtue of section 6 which could be made the basis of a suit under section 92, Civil Procedure Code. It should however be noted that the reliefs claimed in the suit under section 92 filed in pursuance of permission obtained under section 6 must be confined to those which arise out of the failure to produce the accounts and are connected with it. In this suit all the reliefs claimed arise out of the failure to produce accounts except the one regarding the declaration that the defendant is not the rightful mahant. Such a relief has nothing to do with the failure to produce the accounts and is not in any way connected with it. We think all the other reliefs can be based on the defendant's failure to produce the accounts; and the suit cannot therefore be said to be incompetent as asking for reliefs which do not come within the scope of the suit contemplated by section 6 of Act XIV of 1920.

Then it is said that two of the plaintiffs having dropped out, it is not competent for one plaintiff

(1) A.I.R. 1930 All. 582.

alone to proceed with the suit under section 92, Civil Procedure Code. This point has already been decided in this Court in *Gulam Gouse v. Mohammad Khan*(1) where it was held that a suit under section 92, Civil Procedure Code, or an appeal arising out of such a suit does not abate on the death of one of the plaintiffs who obtained sanction for instituting the suit. It cannot therefore be said that the present suit is incompetent because there is only one person left to conduct the suit.

For the above reasons we hold that the decision of the learned Judge cannot be sustained. We set aside the decision and remand the suit for disposal according to law. The inquiry into the case will be confined as already pointed out to all the reliefs except the one contained in the first part of clause (b) in paragraph 12, viz., that it be declared that the defendant is not the rightful mahant. Costs of the appeal will abide the result. We do not interfere with the costs of the lower Court. The court-fee may be refunded.

A.S.V.

(1) (1924) 20 L.W. 882.

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APPELLATE CRIMINAL.

Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Burdswell.

1933,
May 3.

IN RE KALIAPPA GOUNDAN AND ANOTHER (ACCUSED
1 AND 2), APPELLANTS.*

*Indian Penal Code (Act XLV of 1860) ss. 302 and 307—
Murder or attempt at murder—Deliberate plan formed by
accused to kill deceased—Accused struggling with deceased,
dragging her in unconscious or semi-conscious condition on
to a railway line and placing her body across railway line—
Deceased killed by passing train—Accused acting with a
reckless indifference and ignorance whether the woman was
alive or dead—Offence committed in case of.*

The accused, who had formed a deliberate plan to kill a woman and who had intended to kill her, decoyed her under pretence of taking her to a sick relation. On the way they had a struggle with the woman during which her *thali* fell off or was removed. An attempt might have been made to strangle her. She was immediately dragged either in an unconscious or semi-conscious condition on to a railway line, her body was put across the railway line in such a way that her neck lay across the rails, and she was killed by a passing train. The accused did not put forward the case that they believed the woman to be dead when they put her body across the railway line.

Held that the accused were guilty of the offence of murder and that the Sessions Judge erred in holding that they were guilty only of the offence of an attempt at murder under section 307 of the Indian Penal Code.

The intention of the accused throughout being to kill the woman, the intention with which they struggled with the woman could not be separated from the intention with which they put her body across the railway line; the two acts were intimately connected with each other and, as the latter act followed immediately on the former, both acts of the accused must be treated as being only one transaction, the transaction being to kill the woman.

* Criminal Appeals Nos. 6 and 179 of 1933.

Held further, that, even if in dragging the woman and putting her body across the railway line the accused acted with a reckless indifference and ignorance as to whether the woman was alive or dead, they were nevertheless guilty of the offence of murder.

Palani Goundan v. Emperor, (1919) I.L.R. 42 Mad. 547 (F.B.), explained and distinguished.

Emperor v. Khubi, (1924) 25 Cr.L.J.R. 703, *Emperor v. Gajjan Singh*, (1931) 32 Cr.L.J.R. 483, and the judgment of PARSONS J., in *Queen Empress v. Khandu*, (1890) I.L.R. 15 Bom. 194, relied upon.

APPEAL against the order of conviction for an offence under section 307, Indian Penal Code, by the Court of Session of the Coimbatore Division in Sessions Case No. 134 of 1932 and APPEAL under section 417 of the Code of Criminal Procedure against the order of acquittal for an offence under section 302, Indian Penal Code, in the said case.

L. H. Bewes (Public Prosecutor) for the Crown.

K. W. Rama Rao for accused 1 and 2.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—The two appellants were charged in the Sessions Court of Coimbatore with having murdered a woman named Muthayee, the wife of the first appellant, on the 16th September of last year and also with having caused evidence of the said offence to disappear by placing her body on the railway line with the intention of screening themselves from legal punishment. They were thus charged, firstly, under section 302, Indian Penal Code, and, secondly, under section 201, Indian Penal Code. The learned Sessions Judge convicted them of the offence of attempt at murder under

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section 307, Indian Penal Code, under the first count and sentenced them to transportation for life. The appellants appeal against that conviction. The Public Prosecutor has presented a memorandum of criminal appeal against that order of the learned Sessions Judge on the following grounds, namely, that the appellants ought to have been convicted of murder and that the learned Sessions Judge, having found in paragraph 18 of his judgment that there was no doubt that the appellants intended to kill their victim, was wrong in convicting them only of an offence under section 307, Indian Penal Code. It was in consequence of observations which fell from us when the appellants' appeal first came before us that the Public Prosecutor presented his criminal appeal.

The prosecution case was that the first appellant who is a cart-driver and the second appellant a cooly are related to each other and that the two appellants decoyed the first appellant's wife, Muthayee, under pretence of taking her to see a sick relation of the first appellant at Koneripatti, strangled her on the way and put her dead body on the railway line between Somanur and Vanjipalayam so that the train might run over it and obliterate all traces of their crime. There is the evidence of P.Ws. 4 and 5, the former the mother of the deceased and the latter her father, that the first appellant had been married for about 15 years and that he was addicted to drink and used to ill-treat the deceased causing her often to seek refuge in their house. At about noon on the day of the occurrence the deceased took her two children to her parents, left them at their house and went

away with the first appellant saying that she was going on a visit to Koneripatti where a relation of the first appellant lay ill. She never reached Koneripatti and her body was discovered across the railway line between Somanur and Vanjipalayam stations. Her head had been severed from her body and lay at some distance away. It is clear that her head was cut off by a passing train and that this train was the Blue Mountain Express. The deceased woman was last seen in company with the appellants at about 5-30 p.m. by P.W. 9 on a country road along the southern side of the railway line. On this road he met Muthayee and the two appellants. He asked them where they were going and they replied that they were going to Pollachi. Previously to this the deceased is shown to have been in the company of the appellants on a shuttle train which left Erode at 2-15 p.m. and arrived at Vanjipalayam at about 4 p.m. Then there is evidence that at Vanjipalayam the deceased was in the company of the appellants in a petty shop belonging to P.W. 8. A little later the two appellants drank toddy at a toddy shop half a mile away. At about 7-30 p.m. P.Ws. 10 and 11 arrived by train at Somanur railway station. Together they started eastwards along the railway line to go to their villages. Having gone about a mile they saw two persons getting down from the railway track on its southern side. At this time P.W. 11 saw something black lying across the rails and drew his companion's attention to it. Immediately afterwards the Blue Mountain Express came past them and they found that what had appeared to them to be something black lying across the line

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was the dead body of a woman subsequently identified to be Muthayee. The body was naked and headless, the head being discovered about 60 feet away. A woman's cloth lay south of the line. They then ran after the two persons whom they had previously seen and these two persons began to run. P.Ws. 12 and 13 also pursued them and they were eventually caught at a level crossing by P.Ws. 14 and 15. These two men were the appellants. They are said to have been tipsy at the time. An examination was made of the site and the land near by, and marks of a struggle were discovered by the sub-inspector at D and D-1 on the plan where also was found M.O.1, a *thali* string. This place is on the country road nine and a half feet below the line to the south and there were marks of something having been dragged towards the railway line. The prosecution case, therefore, was that the appellants intended to murder the deceased and that they decoyed her away to this spot and strangled her and then put her body across the railway line so that it could be run over by a passing train and thus the traces of strangulation on the deceased's body would be obliterated and death appear to be the result either of suicide or accident.

On the question of the murder of Muthayee by strangulation, in support there was evidence of P.W. 1, the Sub-Assistant Surgeon in charge of the Local Fund Dispensary at Palladam who conducted the post-mortem examination and in Exhibit G, the post-mortem certificate, expressed it as his opinion that the death of the deceased was due to asphyxia. That being the medical opinion as to the cause of death, the prosecution

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case was death by strangulation and not by decapitation. There were of course no actual eye-witnesses to the crime and, therefore, as regards the cause of death the prosecution had to proceed on theory although *prima facie* the evidence of witnesses other than P.W. 1 would establish the case of murder by decapitation on the railway line. Having regard to the fact that the deceased woman's head was cut off at the neck, it seems to me that all objective signs of strangulation on the part of the woman's body, if there had been any, would have been obliterated by the decapitation. A different view of the cause of death was taken by Lieutenant-Colonel Fraser, I.M.S., who was examined as a Court witness, as from the evidence of P.W. 1 it appeared that the death of the woman had probably been caused by decapitation—at least that witness's evidence appeared to the learned Sessions Judge to suggest that. Lieutenant-Colonel Fraser stated as his definite view that the case that the deceased was first strangled to death and then decapitated by the train was inconsistent with the appearances described in Exhibit G-1. The learned Sessions Judge came to the conclusion that it could be safely taken that the deceased woman was alive when she was run over by the Blue Mountain Express and therefore that the prosecution case that she had already been killed was incorrect.

The defence story that the deceased woman was killed by accident, namely, in rushing across from one side of the line to the other in front of the passing train cannot possibly be accepted and was rightly rejected by the learned Sessions Judge. It is opposed to the evidence of P.Ws. 10 and 11.

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It does not fit in with the marks of a struggle near the road nor with the discovery of the deceased's *thali* on that spot nor with the fact that the deceased's clothing had been removed before she got across the line. The defence story, however, does show that the two accused and the deceased woman were together at that spot and the accused have no explanation as to how the deceased's body got across the rails.

Turning to the medical evidence, it may be that P.W. 1's opinion expressed in the post-mortem certificate was correct and that the deceased was strangled. If that is so, of course the accused were guilty of murder, but, having regard to Lieutenant-Colonel Fraser's evidence which has been accepted by the learned Sessions Judge, the deceased did not die of strangulation but as a result of decapitation on the line. Accepting that position what offence has been committed by the appellants? The learned Sessions Judge thinks that the appellants intended to murder the deceased and tried to do so by strangling her, that they did not succeed in killing her although they thought that they had done so and that, believing that she was already dead, they put her body across the line in order to hide the traces of the crime which they thought they had committed. It is perfectly clear that the appellants did intend to kill the deceased and that it was in pursuance of a deliberately planned transaction that she was taken to the spot where the marks of a struggle were; and it is beyond question of course that the deceased died as a result of the appellants' act. If, as the prosecution first thought, she was strangled by the appellants,

then it was that act of the appellants which caused her death. If the case accepted by the learned Sessions Judge is correct, it was the act of the appellants in putting her body on the line which caused her death. The question before us is whether, on the case accepted in the Sessions Court, the appellants can escape a conviction on the murder charge. In this High Court the view has been taken by at least two Criminal Benches of both of which I was a member that, if persons intend to cause the death of another or others and do an act in furtherance of that intention, which act does not in fact cause the death of that person or the other persons, and, in the belief that the act has caused death, those persons do another act, for example, for the purpose of hiding the traces of their crime, and such act results in death, the offenders cannot be convicted of murder but of some lesser offence. This view has been taken in consequence of a Full Bench decision of this High Court, namely, *Palani Goundan v. Emperor*(1). There an accused struck his wife a blow on her head with a ploughshare which, though not shown to be a blow likely to cause death, did in fact render her unconscious, and believing her to be dead, in order to lay the foundation of a false defence of suicide by hanging, the accused hanged her on a beam by a rope and thereby caused her death by strangulation; and it was held by the Full Bench that the accused was not guilty of either murder or culpable homicide not amounting to murder. In view of this decision, in the two Criminal Bench cases referred to, no argument was

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(1) (1919) I.L.R. 42 Mad. 547 (F.B.).

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addressed to the Bench that the offence was murder, although in one of these cases my learned brother and I agreed with Counsel for the appellant who had been convicted in the Sessions Court of murder, that the offence of murder had not in the circumstances of that case been committed because an unconscious person believed to be dead through the act of the appellant was killed by the appellant's act in endeavouring to screen his offence. When the present case first came before us, it appeared to us to be necessary to consider whether in all such cases it is right to hold that the offenders are guilty of a lesser offence than murder particularly so as it also appeared to us that *Palani Goundan v. Emperor*(1) was distinguishable certainly from the present case. In that case it was not shown that the blow on the deceased's head with a ploughshare was likely to cause death though it certainly rendered her unconscious and, in the end, after the Full Bench decision, when the case came before the Division Bench, it resulted in the conviction of the appellant of grievous hurt under section 326, Indian Penal Code, only. It must be observed also that of the two referring Judges, NAPIER J. was of the opinion that even on the facts of that case the accused was guilty of murder. In the course of his judgment he makes one observation at page 552 with which I entirely agree, and it is :

"Apart from the actual offence of concealing a murder, it is the grossest violation of natural rights to stab, shoot or hang a person without absolute knowledge that that person is dead unless of course it is done innocently, and I see no reason why the offender should not suffer the consequences of his act."

(1) (1919) I.L.R. 42 Mad. 547 (F.B.).

He then refers to *Gour Gobindo Thakoor*(1). There one Gour Gobind struck the deceased a blow which knocked him down and then he and others, without inquiry as to whether he was dead or not, in haste hung him up to a tree so as to make it appear that he committed suicide. The accused were all convicted of hurt, but the High Court quashed the proceedings and directed the accused to be retried on charges of murder, culpable homicide not amounting to murder and hurt. SETON-KARR J. says :

"If, however, the deceased was not actually killed by the blow, but was killed by the suspension, then Gour Gobindo himself, and also all the other Thakoors who took part in hanging him up to the tree, would be clearly liable to a charge of culpable homicide amounting to murder; for, without having ascertained that he was actually dead, and under the impression that he was only stunned, they must have done the act with the intention of causing death, or bodily injury likely to cause death, and without the exceptions provided by the law; or they might have been committed for culpable homicide *not* amounting to murder."

The next case to which reference is made by NAPIER J. is *Queen Empress v. Khandu*(2). In that case it was found that the accused struck the deceased three blows on the head with a stick with the intention of killing him. The accused, believing him to be dead, set fire to the hut in which he was lying with a view to remove all evidence of the crime. The medical evidence showed that the blows were not likely to cause death and did not cause death and that death was really caused by injuries from burning. The Bombay High Court was of the opinion that the offence committed was attempt to murder and not murder. In this

(1) (1866), 6 W.R. (Cr. R.) 55.

(2) (1890) I.L.R. 15 Bom. 194.

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view the Judges were not unanimous. PARSONS J. took the view that the whole transaction, the blow and the burning, must be treated as one and that therefore the original intention to cause death applied to the act of burning which did cause death. With this view NAPIER J. agreed—and, for reasons which I will presently state, I do also—and expressed the opinion that *Queen Empress v. Khandu*(1) was wrongly decided. Another case referred to in the judgment of NAPIER J. is *The Emperor v. Dalu Sardar*(2). There the accused assaulted his wife by kicking her below the navel. She fell down and became unconscious. In order to create an appearance that the woman had committed suicide, he took up the unconscious body and, thinking it to be a dead body, hung it by a rope. The post-mortem examination showed that death was due to hanging. The Court held that as the accused thought it to be a dead body he could not have intended to kill her; if he thought that the woman was already dead, the offence was not murder. SADASIYA AYYAR J., the other referring Judge, considers the latter case correctly decided and is of the opinion that the intention in section 299, Indian Penal Code, "to cause such bodily injury as is likely to cause death" cannot mean anything except "bodily injury" to a living human body. When the case came before the Full Bench, the Public Prosecutor did not contend that the facts as found by the referring Judges constituted the offence of murder or even culpable homicide. The Full Bench, however, gave an opinion upon the matter and WALLIS C.J. in his judgment says :

(1) (1890) I.L.R. 15 Bom. 194.

(2) (1914) 18 C.W.N. 1279.

"The conclusion is irresistible that the intention of the accused must be judged not in the light of the actual circumstances, but in the light of what he supposed to be the circumstances. It follows that a man is not guilty of culpable homicide if his intention was directed only to what he believed to be a lifeless body. Complications may arise when it is arguable that the two acts of the accused should be treated as being really one transaction as in *Queen Empress v. Khandu*(1), or when the facts suggest a doubt whether there may not be imputed to the accused a reckless indifference and ignorance as to whether the body he handled was alive or dead, as in *Gour Gobindo's case*(2). The facts as found here eliminate both these possibilities, and are practically the same as those found in *The Emperor v. Dalu Sardar*(3)."

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It is clear, therefore, that the Full Bench distinguish the two former cases from the case which was before them and seem to indicate an opinion that in those cases the offence committed might have been murder. In my opinion, we are therefore free to consider the present case, which is, in my opinion, as near a case as could be found to *Queen Empress v. Khandu*(1), as not being covered by the decision in *Palani Goundan v. Emperor*(4). Accordingly I will refer again to *Queen Empress v. Khandu*(1). In that case the accused confessed to having struck his father-in-law, the deceased, three blows with a stick one on the back and one on each ear. The injured man immediately fell down on the ground and the accused said that he died. The accused then set fire to the hut. It was found that the deceased man died from the burns received and that the blows struck by the accused were not likely to cause death and did not do so. BIRDWOOD J., and SARGENT C.J. to whom the case was referred

(1) (1890) I.L.R. 15 Bom. 194.

(2) (1866) 6 W.R. (Cr. R.) 55.

(3) (1914) 18 C.W.N. 1279.

(4) (1919) I.L.R. 42 Mad. 547 (F.B.).

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owing to a difference of opinion between BIRDWOOD and PARSONS J.J., held that, as the accused had not intended to cause the death of the deceased by setting fire to the shed but had only done so after he thought that the deceased was dead, the act of setting fire to the shed by which the death was caused was not done with such intent or knowledge as is contemplated in section 299, Indian Penal Code. PARSONS J. took a different view. On page 200 he says :

“It is true that the accused says that, immediately after he dealt the three blows, his father-in-law died and fell down on the ground, but he does not say that he in any way satisfied himself that he was actually dead or even that he thought that he was dead, still less does he say that his intention in setting fire to the hut was to conceal his crime. He does not say what his intention was. This being so, I think the presumption of law is that in all that he did he was actuated throughout by one and the same intention. There is no evidence or proof of any change therein. There is then the intention of the accused to cause death and there are two acts committed by him which together have caused death—acts so closely following upon and so intimately connected with each other that they cannot be separated and assigned the one to one intention and the other to another, but must both be ascribed to the original intention which prompted the commission of those acts and without which neither would have been done. In my opinion, the accused in committing those acts is guilty of murder.”

In my view, PARSONS J. was right. If the intention is to kill and a killing results, the accused succeed in doing that which they intended to do and, if the acts follow closely upon one another and are intimately connected with one another such as they were in the Bombay case, then in my opinion the offence of murder has been committed. Similarly when the facts suggest the accused acted with a reckless indifference and ignorance as to whether the body he handled was alive or dead. It is only right also to say that in the present case, unlike the

other cases referred to, there is no evidence of what the acts of the appellants were at the place where there were marks of a struggle beyond the fact that it is likely that a struggle took place there. In all the other cases the act which the accused thought had caused the death of the murdered person was proved either by the accused's own statement or by the evidence of eye-witnesses. Here it has not been shown that the appellants thought that the deceased woman was dead when they put her body across the rails. It is not the appellants' case that they thought so and the Court is merely asked to infer that they did so because there were marks of a struggle and signs of an attempt at strangulation both of which are quite consistent also with the alternative that the appellants merely intended to make the woman unconscious in order to make it easy for them to put her body on the line, or another alternative that they did not know or care whether she was dead or not and put her body across the line. There is also another alternative which presents itself, namely, that the woman's body was put across the line in order to finish her off. When the Court has facts before it such as in this case that the appellants deliberately put the woman's body across the line and that she was killed by a passing train, then it certainly seems to me that very much stronger facts are required than there are present in this case to prove the case which has been accepted in the Sessions Court. In the absence of such proof, I will go so far as to say that no proof of that case is to be found and it was not the case put forward by the appellants. Even assuming the case to be as accepted by the learned

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Sessions Judge, I am strongly of the opinion that the offence committed was murder. In support of my view, in addition to the view expressed by PARSONS J. in *Queen Empress v. Khandu*(1), there is a decision of the Allahabad High Court, namely, *Emperor v. Khubi*(2). There the accused, a full grown man, beat his child wife, an invalid and weak girl, so recklessly with a *lathi* that he thought he had killed her. He then threw her down a dry well 33 feet deep, an act which, if she was not already dead, must inevitably have killed her. He was convicted in the Sessions Court under section 304, Indian Penal Code, and it was held however by WALSH and RYVES JJ. in the High Court that the accused was probably guilty of an offence under section 302, Indian Penal Code. WALSH J. in the course of his judgment expresses the opinion that the difference of opinion in *Queen Empress v. Khandu*(1) between PARSONS J. and the majority of the Bench was a difference of fact and not of law. Later on he states:

"His subsequent conduct indicates that he felt no surprise and showed no remorse. Instead of going to his friends or her friends or anybody in authority to explain this accident which he had brought about, if it was an accident—though in my opinion he must be taken within the meaning of the Code to have known quite well that what he was doing was likely to cause her death—he surreptitiously by night carried what he thought was her dead body and threw it down a well leaving it there presumably in the hope of covering up the traces of enquiry. I am by no means satisfied with the inference drawn by the learned Judge which I think is too merciful and too improbable that he really thought that she was dead. I think he must have known when he was carrying the body that she

was still alive; but in either case, in the peculiar circumstances of his conduct, it seems to me to make no difference. He either beat her till she was dead or he beat her until her chances of recovery were slight and finished her off by throwing her down a dry well 33 feet deep. If I had tried him he would have been convicted under section 302, Indian Penal Code, and sentenced to death".

And, later :

"To sum up my reason, it is this, that one common intention of inflicting such injuries upon her as he must have known to be likely to cause her death is present throughout the case from the beginning to the end, and, if this is the case, I agree with Mr. Justice PARSONS in his view of the facts in the Bombay case."

RYVES J. agrees with WALSH J. There is also a decision of the Lahore High Court, viz. *Emperor v. Gajjan Singh*(1). There the accused struck the deceased two or three times on the head and when the latter fell down unconscious threw him face downwards into a pool containing a few inches of water, removed the contents of his pockets and covered the body with the branches of a tree. Later on the accused carried the body of the deceased in a *dhoti* and threw it into a canal. The Sessions Judge held that the offence of murder had not been made out and convicted the accused under sections 325 and 379, Indian Penal Code. On appeal it was held that the action being continuous and it being impossible to resolve the two incidents into two wholly separate actions, inspired by different motives and committed for different reasons, the accused must be treated as having done one act with the intention of causing death and as having succeeded in carrying out his object and he was therefore guilty of murder. The learned Judges in that case in dealing with the

(1) (1890) I.L.R. 15 Bom. 194. (2) (1924) 25 Cr.L.J.R. 703.

(1) (1931) 32 Cr. L.J.R. 483.

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act proved to have been committed by the accused observe that

"the one thing that can be said with positive certainty is that, after he had lain face downwards in the pool of water for some hours, and before he was removed to the canal, Bagawan Das was dead. There is another difference between this case and the facts of the two authorities relied upon, *Queen Empress v. Khandu*(1) and *Palini Goundan v. Emperor*(2), and that is that there was no definite break in the events of the first two chapters. The incidents ran into each other and the action was continuous. The accused struck Bagawan Das and, as soon as he fell, he removed him and put him into the pool and, after taking what money there was on him, covered him with the branches of the *ak* bush. The action being continuous, etc."

To sum up this case: (i) an intention to kill Muthayee was clearly proved; (ii) that it was in pursuance of a deliberate plan; (iii) that the appellants placed Muthayee's body across the railway line; (iv) that it was that act which caused her death; (v) the appellants have not put forward the case that they believed Muthayee to be dead when they put her body across the line; (vi) the marks of a struggle and the body being dragged and the discovery of the woman's *thali* at that spot prove nothing more than a struggle and (vii) there is some slight medical evidence regarding marks of strangulation. This, however, was not the cause of Muthayee's death. The conclusions I arrive at from the before-mentioned facts are that the appellants had a struggle with the deceased woman during which her *thali* fell off or was removed, that an attempt may have been made to strangle her, that she was immediately dragged either in an unconscious or semi-conscious condition on to the railway line and placed in front of

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the train, the intention throughout being to kill Muthayee, that the intention with which the accused struggled with Muthayee cannot be separated from the intention with which they put her body across the line, that the two acts were intimately connected with each other and the latter act followed immediately upon the former, that both the acts of the appellants must be treated as being only one transaction, the transaction being to kill Muthayee, and that the most favourable inference that could possibly be drawn in favour of the appellants is that they acted with a reckless indifference and ignorance as to whether Muthayee was alive or dead. Even this inference, in my view, is not such a reasonable one as the former but it is the most favourable one which could be drawn. All this leads me to one conclusion and one conclusion only, namely, that the appellants were guilty of the offence of murder. They have been acquitted on that charge in the Sessions Court. The question is whether we should interfere with that acquittal. I am clearly of the opinion that we should do so, firstly, because the learned Judge's view of the legal position is incorrect and, secondly, because I can see nothing which could reasonably justify the learned Sessions Judge in drawing the inference that the appellants thought that Muthayee was dead when they placed her body on the railway line. It seems to me to be a pure guess and nothing more. There is evidence that the appellants were tipsy when they were arrested. They cannot have been so drunk as not to know what they were doing because they dragged Muthayee on to the line, put her body across the line in such a way that her neck lay

(1) (1890) I.L.R. 15 Bom. 194.

(2) (1919) I.L.R. 42 Mad. 547 (F.B.).

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across the rails, and then ran away. The probability is, as the evidence shows, that they took some drink before the occurrence in order to screw themselves up to the necessary pitch for the performance of the murder. In my opinion, the acquittal of the appellants on the charge of murder must be set aside and the appellants must be convicted of the offence of murder. As regards the sentence, the murder was a deliberately-planned one and a very cruel one. There are no mitigating circumstances whatever and no reason for not inflicting the ordinary sentence which the law requires, that is to say, the sentence of death.

BARDSWELL J.

BARDSWELL J.—I agree.

The sentence of the Court is that the two accused be hanged by the neck until they are dead.

K.W.B.

APPELLATE CIVIL—FULL BENCH.

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

KODURU JANARDANA RAO (RESPONDENT), PETITIONER,

1933,
April 12.

v.

PRATTIPATY LAKSHMI NARASAMMA (PETITIONER),
RESPONDENT.*

*Code of Criminal Procedure (Act V of 1898), sec. 476-B—
Appeal under, in a civil proceeding—Remand—Power of
—Appellate Court if has—Sec. 423 (c) and (d)—Effect.*

In an appeal under section 476-B of the Code of Criminal Procedure in a civil proceeding the appellate Court has power, under clauses (c) and (d) of section 423 of that Code, to remand the matter back to the lower Court for proper disposal.

PETITION, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the District Court of Kistna at Masulipatam, dated the 7th day of August 1930 and made in Miscellaneous Appeal No. 15 of 1930, preferred against the order of the Court of the Subordinate Judge of Masulipatam, dated the 27th day of February 1930 and made in Execution Application No. 734 of 1928 in Small Cause Suit No. 599 of 1927.

The petition originally came on for hearing before PAKENHAM WALSH J. on the 16th December 1932, when his Lordship made the following

ORDER OF REFERENCE TO A FULL BENCH.

This revision petition raises an important and difficult question as to whether on an appeal preferred under section 476-B of the Criminal Procedure Code the appellate Court has the

* Civil Revision Petition No. 1331 of 1930.

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power of remand. In this Court, following *King-Emperor v. Karri Venkanna Patrudu*(1), it has been held that if the matter complained of arises in a civil proceeding the proceedings are conducted on the civil side and the powers of this Court in revision are exercised under section 115 of the Civil Procedure Code. It is necessary to bear this fact in mind in discussing the following authorities, which are to be found on the matter. The only reported authority in this Court, and it has reference to a revision petition on the criminal side, is *Kuppuswami Rao v. Sathiapriya Rao*(2), a decision by JACKSON J. This decision is not of much assistance in a civil revision petition. *Sami Vannia Nainar v. Penasami Naidu*(3) is on the point whether additional evidence can be taken and it does not throw light on the present point. The only decision really bearing on the matter is an unreported decision of JACKSON J. in Civil Revision Petition No. 422 of 1930. There it was held that the appellate Court had no power of remand. In that case the learned Judge says that "the section has been read in the restricted sense in *Sami Vannia Nainar v. Penasami Naidu*(3) and in *Manir Ahamed Chowdhury v. Jogesh Chandra Roy*(4) it is contemplated that the Court shall exercise full appellate powers under the Code either of Criminal or Civil Procedure." The reference to *Manir Ahamed Chowdhury v. Jogesh Chandra Roy*(4) appears to be a mistake, for in that case it was held that there was no power of remand. Perhaps *Hamid Ali v. Madhu Sudan Das Sarkar*(5) was referred to, but that case is of no authority because it did not decide this point, and on the matter in question there are two *obiter* and differing remarks of the two learned Judges. However, there have been two Bench decisions since the judgment of JACKSON J.:—*Dhanpat Rai v. Balak Ram*(6) in which this point was discussed and there it was held that there was no power of remand. But it has to be observed that this conclusion is based on the logical result of the view taken by the Lahore High Court that the revisional powers of the High Court are altogether under the Criminal Procedure Code under section 439 and in fact they say (at page 762) that "it must follow logically that, if a revision lies under section 439 of the Criminal Procedure Code, the procedure on appeal under section 476-B must be procedure on an appeal

(1) (1916) 31 M.L.J. 440.

(3) (1927) I.L.R. 51 Mad. 603.

(5) (1926) I.L.R. 54 Cal. 355.

(2) (1931) M.W.N. 713.

(4) (1928) I.L.R. 55 Cal. 1277.

(6) A.I.R. 1931 Lah. 761 (F.B.).

under the Criminal Procedure Code. It follows therefore that as that Code provides for no remand, the appellate Court cannot make a remand to the trial Court." That reasoning cannot be applied in this Court where it is held that the revisional powers are exercised under section 115 of the Civil Procedure Code.

The other Bench ruling is reported as *Surendra Nath v. Susil Kumar*(1), and that ruling is the more applicable here because the Calcutta High Court takes the same view as this High Court that the revisional powers are exercised under section 115 of the Civil Procedure Code. In that case certain weighty arguments have been adduced to show that section 476-B is not itself a self-contained section, for instance, there is no provision there for the dismissal of an appeal against an order ordering a complaint to be preferred. On a perusal of those arguments I feel some doubt as to whether the view of JACKSON J. in the unreported case took those points into consideration.

It appears to me that this is an important and difficult matter and I would suggest that his Lordship the CHIEF JUSTICE may refer it to a Full Bench of three Judges. The question to be referred is "In an appeal under section 476-B of the Criminal Procedure Code in a civil proceeding has the appellate Court power to remand the matter back to the lower Court for disposal?" I may note perhaps that in the Calcutta case, *Surendra Nath v. Susil Kumar* (1), it was suggested that even in criminal cases, though the Court may have no powers under section 428, its powers under section 423 to send back the matter for retrial remain unaffected. This however does not arise for determination in the present case.

It is regrettable that final orders on this revision petition which was filed nearly three years ago should be still further delayed, but it seems to me a matter of considerable importance and difficulty and if the answer should be in the affirmative the time to be spent in the rehearing on the appeal by the District Judge (since that course will have to be adopted if the remand order is wrong) will be saved.

This petition came on for hearing in pursuance of the aforesaid Order of Reference to a Full Bench before the Full Bench constituted as above.

(1) A.I.R. 1931 Cal. 604.

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Ch. Raghava Rao for petitioner.

P. Satyanarayana Rao for respondent.

Cur. adv. vult.

OPINION.

BARDSWELL J.

BARDSWELL J.—The question that has been referred to us is “In an appeal under section 476-B of the Criminal Procedure Code in a civil proceeding has the appellate Court power to remand the matter back to the lower Court for disposal?”

In the course of the argument reference has been made to *Rama Aiyar v. Venkatachella Pudayachi*(1). In that case it was held that a Court exercising what is therein called its appellate jurisdiction under section 195, Criminal Procedure Code, that is, under the now abolished clause 6 of that section, had no power to remand a case for fresh enquiry. I do not, however, think that that decision can be quoted as an authority directly bearing on the point now under reference. Though section 195 (6) gave to the superior Court powers that were of an appellate character, the clause said nothing as to the powers which it gave of granting or revoking a sanction to prosecute being given to a Court as a Court of appeal. On the other hand the new section 476-B specifically refers to the powers which may be exercised on appeal by a superior Court in a case where an inferior Court has refused to make a complaint or has directed that a complaint should be made. This has made the position very different as what was of the nature of an appeal has become definitely an appeal. It has to be considered, then, whether a Civil Court when sitting as an appellate Court under section 476-B has the power of remand

(1) (1907) I.L.R. 30 Mad. 311.

which this Court found that it did not possess under section 195 (6).

What has first to be considered is whether an order passed by a Civil Court under section 476-B, Criminal Procedure Code, is of a civil character so that the provisions of the Civil Procedure Code can be applied to it. In this Court it is the practice to treat revision petitions against an order passed under section 476-B as being made under section 115, Civil Procedure Code. If this practice be correct, then, in the view of DUVAL J. in *Hamid Ali v. Madhu Sudan Das Sarkar*(1), an appeal under section 476-B, Criminal Procedure Code, is a civil miscellaneous appeal to which Order XLI of the Civil Procedure Code applies. And if Order XLI applies then the Civil Court that takes action under section 476-B will no doubt have power to remand. There has, however, been a variance of opinion as to whether a Civil Court that takes action under section 476-B, Criminal Procedure Code, can be considered to be acting under the provisions of the Civil Procedure Code. In *In the matter of the petition of Bhup Kunwar*(2) a majority of two Judges, dealing with section 476, Criminal Procedure Code, as it stood before section 476-B was added, held that they could revise such an order under section 622 (now section 115), Civil Procedure Code, but the third Judge held that such power of revision was exercised under section 439, Criminal Procedure Code. After the introduction of section 476-B it has been held in *Abdul Haq v. Sheo Ram*(3) by a single Judge that an appellate order in such a

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(1) (1926) I.L.R. 54 Calc. 355. (2) (1903) I.L.R. 26 All. 249 (F.B.).
(3) (1927) I.L.R. 49 All. 536.

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case was revisable by the High Court only on its civil side. The same view has been expressed by the Calcutta High Court in *Emperor v. Har Prasad Das*(1) which is a decision by five Judges. In this it has been tersely put that it is plain that an order under section 476 may be revised by the High Court under section 115 of the Civil Procedure Code. The same view has been expressed by the Patna High Court in *Jagannath v. Rajagopalachari*(2).

As to the nature of an appeal under section 476-B, Criminal Procedure Code, it has been held in *Nasaruddin Khan v. Emperor*(3) that the procedure relating to it is governed by the Civil and not by the Criminal Procedure Code and it was held that it followed from the fact of the appeal, though itself one which is allowed by the Criminal Procedure Code, being one which must be heard by a civil appellate Court that the procedure governing it was one which has to be sought within the four corners of the Civil Procedure Code. The same view has also been taken in *Surendra Nath v. Susil Kumar*(4). But in *Hamid Ali v. Madhu Sudan Das Sarkar*(5), to which reference has already been made, CHOTZNER J. was of opinion that it was plain from the wording of section 476-B that where a complaint has been made under section 476 the person affected by the complaint may take an appeal to the Court to which the Court making the complaint is subordinate, and that that appeal must be dealt with as an ordinary appeal under the Criminal Procedure

Code. And a Full Bench of the Lahore High Court has held in *Dhanpat Rai v. Balak Ram*(1) that the High Court deals with all cases of revision of an order passed under section 476-B, whether the Court passing the order was a Civil, Criminal or Revenue Court, under section 439, Criminal Procedure Code, from which it would seem to follow almost logically that the procedure on appeal under section 476-B must be procedure on appeal under the Criminal Procedure Code.

As to the applicability of section 115, Civil Procedure Code, as that section empowers a High Court to revise the proceedings of any Court subordinate to it, it is hard to see how it cannot apply to the proceedings of a Civil Court even when they are taken under section 476-B of the Criminal Procedure Code. I can see nothing in the language of the section to suggest any such restriction. Even, however, taking it that that section applies in cases of revision, I cannot see how it follows therefrom that the procedure of a Civil Court in hearing an appeal under section 476-B must be taken to be that allowed by the Code of Civil Procedure. As pointed out in *Nasaruddin Khan v. Emperor*(2), the Civil Court gets its power to hear such an appeal from the Criminal Procedure Code and when it gets the power from that Code I should take it that it must also exercise it according to the provisions of that Code and that it does not follow merely from the fact of its being a Civil Court that, being once seized of the appeal, it can proceed to apply the provisions of the Civil Procedure Code from which its right to hear the appeal has not been derived. This is the

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(1) (1913) I.L.R. 40 Cal. 477 (F.B.).

(3) (1926) I.L.R. 53 Cal. 827.

(2) A.I.R. 1931 Pat. 411.

(4) A.I.R. 1931 Cal. 604.

(5) (1926) I.L.R. 54 Cal. 355.

(1) A.I.R. 1931 Lah. 761 (F.B.).

(2) (1926) I.L.R. 53 Cal. 827.

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view that was taken in *Rama Aiyar v. Venkatachella Padayachi*(1) with reference to section 195, Criminal Procedure Code. The opinion was there-
in expressed that, even if proceedings under section 195, Criminal Procedure Code, before Judges of Civil Courts might be revisable under section 622 (now section 115), Civil Procedure Code, it did not follow that such proceedings, which are of a criminal rather than of a civil nature, can be held to come under section 647 (now section 141), Civil Procedure Code. That reasoning I would respectfully adopt. Though the law has been altered and we now have section 476-B where formerly we had section 195 (6), the position still is, with reference to proceedings under section 476-B, that they are of a criminal rather than of a civil character.

When I take this view it is unnecessary for me to discuss whether the proceedings of a Civil Court under section 476-B could be revised by a High Court under section 439, Criminal Procedure Code. If they could be revised under that section, then it would appear necessarily to follow that the Civil Court, when exercising its powers under section 476-B, is acting as provided for by the Criminal Procedure Code, as, in my view, it does even if the High Court exercise its revisional authority under section 115, Civil Procedure Code.

What then is the power of any Court, Civil or Criminal, in dealing with an appeal under section 476-B? Does that section stand complete by itself, except in so far as it is connected with sections 476 and 476-A, or is it to be read along with the provisions of Chapter XXXI of the

(1) (1907) I.L.R. 30 Mad. 311.

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Criminal Procedure Code relating to appeals? Section 428 in Chapter XXXI certainly cannot be read with section 476-B, as it is made applicable only to appeals under that chapter. That is the section as to taking additional evidence. It is also pointed out that section 486, which allows of an appeal against a conviction under section 425 for contempt of Court, expressly provides that the provisions of Chapter XXXI shall, so far as they are applicable, apply to appeals under that section, and it is argued that, when there is no similar provision with reference to section 476-B, it must follow that that section must stand by itself and cannot be read with Chapter XXXI. But here comes in the difficulty that a Court in disposing of an appeal under section 476-B must at times exercise a power which is not given to it by that section. That is the power of dismissal. That section does not give the Court the power to dismiss an application and so it would appear that its power to do so must be derived from section 423. And so, I take it, it must be held that the provisions of Chapter XXXI can be applied to the hearing of an appeal under section 476-B. The calling for further evidence is not permissible under section 428 as has already been held by a single Judge of this Court in *Sami Vannia Nainar v. Penasami Naidu*(1), but I would hold that a remand for proper disposal is competent under clauses (c) and (d) of section 423. My view as to that and as to sections 476, 476-A and 476-B not being self-contained is supported by the judgment of a Bench of the Calcutta High Court in *Surendra Nath v. Susil Kumar*(2). I would, accordingly,

(1) (1927) I.L.R. 51 Mad. 603.

(2) A.I.B. 1931 Cal. 604.

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answer the question that has been referred to us in the affirmative.

BEASLEY C.J.—I agree.

BURN J.—I agree.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

THE OFFICIAL RECEIVER OF RAMNAD AT
MADURA (FIRST DEFENDANT), APPELLANT,

v.

K. R. MUTHU A. R. ARUNACHALAM CHETTIAR
AND THREE OTHERS (PLAINTIFF, SECOND, THIRD AND
FOURTH DEFENDANTS), RESPONDENTS.*

Suits Valuation Act (VII of 1887), sec. 8—Madras Civil Courts Act (III of 1873), sec. 14—Conflict between—Former section to prevail—"Jurisdiction conferred by this Act" in sec. 14—Meaning of.

When section 8 of the Suits Valuation Act (VII of 1887) comes into conflict with section 14 of the Madras Civil Courts Act (III of 1873) the former section should prevail.

The words "jurisdiction conferred by this Act" appearing in section 14 of the Madras Civil Courts Act have the same meaning whether they have got to be construed for the purpose of institution of suits or for the purpose of filing appeals.

APPEAL against the decree of the Court of the Subordinate Judge of Sivaganga in Original Suit No. 113 of 1924.

T. M. Krishnaswami Ayyar and K. V. Ramachandra Ayyar for appellant.

* Appeal No. 54 of 1928.

C. S. Venkatachari for first respondent.

Second, third and fourth respondents were unrepresented.

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RAMESAM J.

The JUDGMENT of the Court was delivered by RAMESAM J.—In this appeal a preliminary objection is taken that the appeal does not lie to this Court. For the purpose of deciding the objection we have to see what the nature of the suit is. The suit was for a declaration that the properties which are the subject-matter of the suit do not belong to the second defendant but belong to the plaintiff and defendants 3 and 4 and that the first defendant had no power to bring them to sale as the properties of the second defendant and for a permanent injunction restraining the first defendant from selling them. Under the Court Fees Act, section 7 (iv), the plaintiff has got to value the injunction and pay court-fees *ad valorem* on it. Prior to the amendment of the Court Fees Act in 1922 the plaintiff might have given any valuation he liked. But the amendment prescribes a minimum valuation which is half the value of the land. Here the value of the suit properties is Rs. 8,000 and therefore the plaintiff had to value the relief at not less than Rs. 4,000. He accordingly valued it at Rs. 4,000 and brought the suit. The suit was originally dismissed. There was an appeal to the High Court by the plaintiff. No objection was then taken. The High Court reversed the decision of the District Judge and remanded the suit for fresh disposal. After the remand the Subordinate Judge of Sivaganga gave a decree to the plaintiff. Now the first defendant files this appeal.

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RAMESAM J.

The objection is taken that if the value of the properties is only Rs. 4,000 the appeal lies to the District Court and not to this Court and for that purpose section 8 of the Suits Valuation Act is relied on. On the other side section 14 of the Madras Civil Courts Act was relied on, and it is contended for the appellant that, where section 14 of the Civil Courts Act comes into conflict with section 8 of the Suits Valuation Act, it is the former that should prevail. As no rules have yet been framed by the Local Government under section 3 of the Suits Valuation Act, we cannot say section 14 of the Civil Courts Act has been repealed. But all the same we have got the fact that section 8 of the Suits Valuation Act says that in certain suits, namely, those other than suits under section 7, paragraphs v, vi and ix and paragraph x, clause (d), the value as determinable for the computation of court-fees and the value for purposes of jurisdiction should be the same. Whatever doubts one may entertain if the matter were *res integra*, we find that the matter has been considered by a series of authorities of this Court and the view taken has always been uniform. We think we are not justified in differing from the view, even if we think there ought to be a different construction, and it is not clear that we think that section 14 of the Civil Courts Act should prevail over section 8 of the Suits Valuation Act. In *Seshagiri Row v. Narayanaswami Naidu*(1) AYLING J. took this view. There was a Letters Patent appeal. SADASIYA AYYAR and PHILLIPS JJ. confirmed his judgment in *Narayanaswami Naidu v. Seshagiri Row*(2). The same view

(1) (1914) I.L.R. 38 Mad. 795.

(2) (1915) I.L.R. 39 Mad. 873.

was taken by MILLER and SUNDARA AYYAR JJ. in *Ramayya v. Ramaswami*(1). The same view was also taken in *Sundara Ramanujam Naidu v. Sivalingam Pillai*(2). In this last case one may say that the suit was one for possession and not a suit for mere specific performance. But if the suit is one for specific performance only, the decision supports the respondent. Some other cases have been referred to us but in these decisions section 14 was not referred to or discussed, for instance, a decision of mine in *Balakrishna Nair v. Vishnu Numbudri*(3) which on this account is not of much value. We are therefore inclined to follow the decisions first mentioned.

It is next contended by the learned Advocate for the appellant that, even if one is to follow these decisions for the purpose of determining the forum at the time of the institution of the suit, still section 14 of the Civil Courts Act may be applied for the purpose of determining the Court before which the appeal should be filed. But this is making a distinction as to the meaning of the words "jurisdiction conferred by this Act" according as the question arises for the purpose of institution and for the purpose of appeal. We do not see any justification for making this distinction. Jurisdiction conferred by the Act was regarded as always one and, if a suit is to lie before a particular Court on the ground that the valuation for purposes of jurisdiction should be regarded as a certain amount, that should guide also the valuation for purposes of appeal. We cannot apply section 14 in one way for one

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(1) (1912) M.W.N. 199.

(2) (1923) 18 L.W. 333.

(3) (1930) M.W.N. 509.

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purpose and in another way for another purpose. We think that this preliminary objection is well founded and the memorandum of appeal should be returned for presentation to the proper Court. The appellant will pay costs of this order in this Court. Costs on the half scale.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Curgenvven and Mr. Justice
Sundaram Chetti.

1933,
April 18.

MUTYALA VIRAYYA (PLAINTIFF), APPELLANT,

v.

MAHABUB SUR FRAJA VANTU RAJAH PARDHA-
SARATHI APPA RAO SAVAYI ASWARA RAO
ZAMINDAR GARU AND TWO OTHERS (DEPENDANTS),
RESPONDENTS.*

*Hindu Law—Father's debts—Pious obligation of sons—
Scope of.*

The pious obligation of a Hindu to discharge the debts of his father is irrespective of the fact whether his father was or was not, at the time when he contracted the debts, the manager of the joint family or whether the joint family was or was not composed of persons other than the father and his sons.

APPEAL against the decree of the Court of the Subordinate Judge of Kistna at Ellore in Original Suit No. 84 of 1924.

V. Govindarajachari for appellant.

Ag. Advocate-General (P. Venkataramana Rao)
for second and third respondents.

The JUDGMENT of the Court was delivered by
CURGENVEN J.—The plaintiff, who appeals, sued

* Appeal No. 185 of 1926.

upon a promissory note executed by one Narayya Appa Rao. Narayya Appa Rao died and the suit was brought against his father, the first defendant, and his sons, the second and third defendants, these three defendants forming a Hindu co-parcenary. The question arose whether each and every one of these defendants could be made liable in respect of their shares of the family property. The learned Subordinate Judge tried the question whether the debt was borrowed by Narayya Appa Rao in his capacity as family manager and for family necessity, and answered it in the negative. He further came to the conclusion that the debt was not contracted for any illegal or immoral purpose, and the findings upon these issues have not been controverted before us. Notwithstanding the finding upon the latter issue, the learned Subordinate Judge has come to the conclusion that the shares of the second and third defendants, i.e., the sons of the executant of the note, are not liable for the debt, and that is the question arising in this appeal. His view is that the pious obligation of a son to discharge his father's debt does not extend to a case where the family consists not merely of father and sons but of collaterals as well, though in the present instance the first defendant can hardly be described as a collateral but as an ascendant. The principle contended for before us, which is virtually the same as that adopted by the Subordinate Judge, is that only where the father happens to be the family manager will the sons' share in the family property be liable for the debt. The leading case dealing with the question of pious obligation is *Brij Narain v.*

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Mangal Prasad(1). At the close of the judgment the Privy Council have summarised their conclusions upon that and cognate points in five paragraphs. This case has been made the subject of comment by SRINIVASA AYYANGAR J. in *Subramania Ayyar v. Sabapathy Aiyar*(2). That was the Full Bench case which decided that the pre-partition debts of the father are binding upon the son's shares after a *bona fide* partition. In delivering one of the minority judgments the learned Judge took occasion to discuss the meaning of the Privy Council's pronouncement in the case just cited and came to the conclusion that it was to be read as meaning that only when the father is the managing co-parcener can the creditor proceed against the son's share. The same view was at one time held by two learned Judges of the Allahabad High Court in *Ayodhia Prasad v. Data Ram*(3), that also being a case where the grandfather was still alive when the question of the liability of the sons for the personal debt of the father arose. This case however was subsequently considered by a Full Bench in *Bankey Lal v. Durga Prasad*(4) in which the two learned Judges, SULAIMAN Ag. C.J. and YOUNG J. who had decided the previous case, were members and occasion was taken to reconsider the former decision and the Full Bench concluded that it had not been correctly decided. It is certainly difficult to understand upon what logical basis the principle of a son's pious obligation should be identified with the liability of a co-parcener of a joint

(1) (1923) I.L.R. 46 All. 95 (P.C.).
(2) (1927) I.L.R. 51 Mad. 361, 390 (F.B.). (3) A.I.R. 1931 All. 131.
(4) (1931) I.L.R. 53 All. 868 (F.B.).

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undivided estate for a family debt contracted by the manager. Whatever connection may be discovered between the first two paragraphs of the Privy Council summary of their principles, we think that a perusal of the text of the judgment will make it amply clear that the two doctrines with which they are dealing and which they describe as "seemingly conflicting principles" are regarded as quite distinct and as based upon two entirely different foundations. A still more recent case of the Allahabad High Court, *Lalta Prasad v. Gajadhar Shukul*(1), is a direct authority for the view that, even where the family consists of other members than the father and the sons, the pious obligation still arises. IQBAL AHMAD J. remarks :

"I can discover no justification for holding that the sons of a father who is not the manager of the joint family are under no such religious obligation or that, if the joint family consists of members over and above the father and the son, there is no such obligation on the sons. To put it in another way, every Hindu son is under a religious obligation to discharge his father's debts of the class mentioned above, irrespective of the fact whether the father is or is not the manager of the joint family or whether the joint family is or is not composed of persons other than the father and the sons."

It seems to us that this is the only reasonable principle to adopt upon this point and we agree with the view so expressed.

In the present case, if the father had been alive, there could be no doubt we think that his own and his sons' shares would have been liable for the debt, whatever other members the family might have consisted of, and it seems indisputable that the same liability must exist after the father's

(1) (1932) I.L.R. 55 All. 283.

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death, as the sons are in enjoyment of the whole of the property which they formerly shared with their father. That being so, we think that the lower Court was wrong in refusing to give the plaintiff a decree against the half share of the second and third defendants in the family property; and allowing the appeal we amend the decree in the sense indicated, by declaring that the second and third defendants' half share is liable for the suit debt. As the appellant has not succeeded on the issue regarding family necessity, he will get the full court-fee and half of the printing charges and vakil's fee from the respondents, who will bear their own costs. The costs decreed here and those decreed in the lower Court will be recoverable from the same share in the family property, as well as from any private property of Narayya Appa Rao in their hands.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

DASO POLAI (PLAINTIFF), APPELLANT,

v.

NARAYANA PATRO AND SEVEN OTHERS (DEFENDANTS),
RESPONDENTS.*

1933,
March 29.

Execution sale—Purchaser of property at—Mortgage on property sold—Validity of—Right to dispute—Estoppel—Property sold subject to mortgage as under O. XXI, r. 62, Civil Procedure Code (Act V of 1908)—Notice of alleged mortgage given in proclamation of sale as under O. XXI, r. 66—Distinction—Claim based on sale deed—Order under O. XXI, r. 61, rejecting—Effect—Sale deed not rendered void—Mortgage in discharge of which sale deed executed not revived—Mortgage—Extinguishment—Keeping alive—Intention—Presumption—Mortgagee—Sale deed in respect of mortgaged property executed in favour of, in discharge of mortgage.

The Code of Civil Procedure makes a clear distinction between a case where property is sold subject to a mortgage as under Order XXI, rule 62, and a case in which notice of an alleged mortgage is given in the proclamation of sale as under Order XXI, rule 66. In the former case, the Court is satisfied of the existence of the mortgage and sells only the judgment-debtor's equity of redemption and the purchaser has to redeem the mortgage. In the latter case, the purchaser buys the property with notice of the mortgage subject to such risks as the notice might involve, in other words, the executing Court does not decide whether the mortgage subsists or not and the purchaser is not precluded from questioning the validity of the mortgage.

Where by a note appearing in the sale proclamation the decree-holder intended to give notice of a mortgage which he thought was *prima facie* valid, *held* that he was not precluded from questioning the validity of the mortgage.

* Appeal No. 314 of 1927.

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Admissions of a decree-holder to the effect that the property has been sold subject to a mortgage, which are merely statements in the proclamation of sale and the bidders' list, cannot be made a ground for saying that the purchaser is liable under the mortgage unless it is proved that the mortgage continued to exist in spite of the sale.

An order under Order XXI, rule 61, of the Code of Civil Procedure rejecting a claim made under Order XXI, rule 58, on the strength of a sale deed does not, when the order becomes conclusive under Order XXI, rule 63, operate as an order *in rem* and so render void the sale deed upon which the claimant based his claim. The order precludes the claimant from proceeding upon the same cause of action against the attaching decree-holder or against the auction-purchaser whose title proceeded from the same attachment and sale, but otherwise it does not affect the validity of the sale deed. It does not operate to revive a mortgage in discharge of which the sale deed was executed.

Under section 101 of the Transfer of Property Act the effect of the execution in favour of a mortgagee of a sale deed in respect of the mortgaged property in discharge of the mortgage is the extinguishment of the mortgage unless there is an express or implied intention to keep the mortgage alive.

APPEAL against the decree of the District Court of Ganjām, dated the 15th day of January 1927 and passed in Original Suit No. 33 of 1926.

Advocate-General (Sir A. Krishnaswami Ayyar) and *B. Jagannadha Das* for appellant.

C. S. Venkatachari and *K. R. Rama Ayyar* for respondents.

Cur. adv. vult.

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The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The plaintiff is the appellant. The appeal arises out of a suit instituted by the plaintiff for Rs. 21,000 due on a registered mortgage bond, dated 1st August 1913. The sum secured by the mortgage was Rs. 5,000 and the debt was

repayable in seven years. The mortgagors are defendants 1 to 4.

The circumstances relating to the suit are these. In Original Suit No. 59 of 1919 on the file of the Court of the Subordinate Judge of Berham-pur one Bennu Nahko, the late father of defendants 5 and 6 and the grandfather of defendants 7 and 8, obtained a money decree against the plaintiff's mortgagors, defendants 1 to 4, on 18th October 1919. In Execution Petition No. 150 of 1919 the decree-holder asked for attachment and sale of the suit property. In Exhibit A, the schedule attached to this execution petition, the decree-holder gave a list of five encumbrances said to be existing on the property. There is a note at the end of Exhibit A which runs as follows :—

“ These properties ought to be sold after issue of sale proclamation subject to the mortgage deed dated 1st August 1913 and executed in favour of Daso Pollayi (the present plaintiff) for Rs. 3,000—this is admittedly a mistake for Rs. 5,000. Except as regards item No. 2 specified in the certificate of the Registrar, that is the mortgage deed for Rs. 3,000, the remaining items Nos. 3, 4, 5 and 6 were executed fraudulently and without any consideration whatsoever.”

A similar note appears at the end of the bidders' list also—see Exhibit A-1. The sale of the property was fixed for 12th July 1920 on which date the plaintiff put in a claim petition, Execution Application No. 81 of 1920 (Exhibit II), in which he stated that the suit mortgage bond of 1913 had been fully discharged by means of a registered sale deed, Exhibit I, dated 10th September 1919 for Rs. 8,000 under which he became the absolute owner of the property and that he has been in possession and enjoyment of the same ever

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since the sale—see paragraph three of Exhibit II. This claim petition was dismissed on 12th July 1920 because it was filed too late. On the same day, the property was purchased by Bennu Nahko, the decree-holder in Original Suit No. 59 of 1919. Exhibit III is the sale certificate issued to him. The plaintiff did not institute a suit to establish his right to the property within a year from the date of the order, and so the order made against him became conclusive under Order XXI, rule 63, Civil Procedure Code. In 1923, Bennu Nahko, the decree-holder-purchaser of the suit property, filed Original Suit No. 131 of 1923 in the Berhampur District Munsif's Court for recovery of mesne profits of the lands purchased by him in Court auction. In this suit the plaintiff was the tenth defendant and he resisted it on the ground that some of the lands purchased by Bennu Nahko were his property by virtue of the sale deed Exhibit I. The learned District Munsif held that, inasmuch as the plaintiff's claim based on the sale was dismissed and he did not bring a suit within a year to set aside the order, he lost his right under the sale deed and was debarred from claiming the property any longer—Exhibit IV. This finding was upheld on appeal by the learned Subordinate Judge—Exhibit V. Having lost his rights under the sale deed by his own default, the plaintiff instituted the present suit on 14th October 1926 to recover the money due under the mortgage bond dated 1st August 1913.

The plaintiff's argument is twofold. He argues first that the dismissal of his claim petition does not affect the suit mortgage and that, since the

property was purchased by the decree-holder himself subject to the mortgage, what he purchased was only the equity of redemption and that therefore the contesting defendants are estopped from questioning the plaintiff's right as mortgagee under the suit mortgage. Next, he argues that, since as a result of the claim petition his sale deed became ineffectual and inoperative, the Court should hold that the original mortgage to which the property was subject revived as a matter of law and that in equity he is entitled to sue on the same. The defendants argue (i) that, though the property was sold subject to the mortgage, the Court did not as a matter of fact decide whether the mortgage subsisted or not, and that therefore the court-purchaser of the properties and those who claim under him are not estopped from questioning its validity; and (ii) that in law and also, as will appear from the contentions of the plaintiff himself, the suit mortgage became merged in and completely extinguished by the sale deed Exhibit I which was valid when it was made and that therefore the plaintiff cannot invoke any equity at all in support of his contention that the suit mortgage should be enforced. The learned District Judge over-ruled the contentions of the plaintiff and dismissed the suit.

Dealing with the first contention of the plaintiff, it does not appear in the present case that the Court made an order that the property should be sold subject to the suit mortgage. Under Order XXI, rule 62, Civil Procedure Code,

“where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge.”

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There is nothing on the record to show that the executing Court decided whether the suit mortgage subsisted or not and ordered attachment and sale subject to the mortgage as required under this provision. Under Order XXI, rule 66,

“where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made and the proclamation shall contain amongst other things the encumbrances to which the property is liable.”

The Code makes a clear distinction between a case where the property is sold subject to a mortgage as under Order XXI, rule 62, and a case in which the notice of an alleged encumbrance is given in the proclamation of sale as under Order XXI, rule 66. In the former case, the Court is satisfied of the existence of the mortgage and sells only the judgment-debtor's equity of redemption and the purchaser has to redeem the mortgage. In the latter case, the purchaser buys the property with notice of the mortgage subject to such risks as the notice might involve, in other words, the executing Court does not decide whether the mortgage subsists or not and the purchaser is not precluded from questioning the validity of the mortgage. In our opinion, the present case falls within the latter class and we are confirmed in this opinion by a comparison of the proclamation of sale with Form No. 56 given in the Civil Rules of Practice. We think that by the note appearing in the sale proclamation the decree-holder intended to give notice of the suit mortgage which he thought was *prima facie* valid and he gave also notice of other encumbrances which in his view were invalid. He is therefore not precluded from questioning the validity of the suit mortgage.

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The so-called admissions of the decree-holder to the effect that the property has been sold subject to the suit mortgage, which are merely statements in the proclamation of sale and the bidders' list, cannot be made a ground for saying that the purchaser is liable under the mortgage unless it is proved by the plaintiff that the mortgage continued to exist in spite of the sale.

The next argument of the learned Advocate-General is that the sale deed proving unavailing as a result of the order passed in claim proceedings, the mortgagee-purchaser (the plaintiff) may in equity be allowed to fall back on his mortgage. This argument cannot be accepted for two reasons. In the first place the facts of the case show that the plaintiff should not be allowed to invoke equity on his side and secondly the sale deed, in spite of the order under Order XXI, rule 61, which became conclusive under rule 63, does not become ineffective for all purposes in law.

Ever since the sale in question the plaintiff has always been relying on the sale deed in support of his claim to the property. In his claim petition under Order XXI, rule 58 (Exhibit II) he stated with reference to the sale that he purchased the property under a registered sale deed, that it is supported by consideration and has been effected in partial discharge of the debt due to him under the registered mortgage bond dated 1st August 1913 (that is, the suit bond) for Rs. 5,000 (see paragraph 3). Thus his case has been that the mortgage is discharged and that it has been supplanted by the sale. In the present suit also his attitude is the same. This is made clear in paragraph 4 of the plaint. If the plaintiff had

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pleaded in the suit adopting the previous averments of the defendants that the sale was fraudulent and without consideration and if that plea had been accepted it might be possible to find that the sale was a nullity which could not extinguish the mortgage. But he has always preferred to rest his case on the sale calling it a valid one. There is no case of estoppel here as in *Chhiddu v. Sheo Mangal Singh*(1). In that case the contesting defendants maintained that the two mortgage deeds which were executed after the suit mortgage were not binding on them, and then their Lordships observed that it does not appear to them "to be consistent with equity or good conscience" that they having successfully maintained that the two deeds were not binding should now claim the benefit of the transactions. The present claim of the plaintiff is in the teeth of his case in the claim petition as well as in the plaint. In our opinion the plaintiff cannot also plead that the order under Order XXI, rule 61, Civil Procedure Code, when it became conclusive under rule 63 operated as an order *in rem* and so rendered void the sale deed upon which the plaintiff had based his claim when he moved the Court under Order XXI, rule 58. The order precluded the plaintiff from proceeding upon the same cause of action against the attaching decree-holder or against the auction-purchaser whose title proceeded from the same attachment and sale, but otherwise it does not affect the validity of the sale deed; in other words, the mortgage is not revived by operation of this order. In this connexion we may refer to the decisions in *Raja of Ramnad v. Subramaniam*

(1) (1916) I.L.R. 39 All. 186.

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Chettiar(1) and *Chhiddu v. Sheo Mangal Singh*(2) relied on by the learned Advocate-General in support of his contention. In both these cases the subsequent transactions—the settlement deed in the Madras case and the two mortgage deeds in the Allahabad case—executed after the suit mortgages were found invalid and not binding on the parties executing them and then the Courts held that the plaintiffs were in equity entitled to fall back upon the prior mortgages. The same cannot be said with reference to the present case. The sale deed was a valid one when it was executed and in spite of the conclusiveness of the order under Order XXI, rule 63, as we have already pointed above, it has not become absolutely void. There is therefore no reason why the plaintiff should be allowed to fall back upon the previous mortgage. In our opinion the suit mortgage which formed the consideration for the sale deed was extinguished when the sale was effected. Under section 101 of the Transfer of Property Act, where the owner of a charge or other encumbrance on immovable property is or becomes absolutely entitled to that property, the charge or the encumbrance shall be extinguished unless he declares by express words or necessary implication that it shall continue to subsist or such continuance would be for his benefit. The effect of the execution of the sale deed must therefore be taken to be the extinguishment of the suit mortgage unless there is an express or implied intention to keep the encumbrance alive. No such intention has been pleaded in this case, nor can it be found on the facts. We must therefore hold rejecting the arguments

(1) (1928) I.L.R. 52 Mad. 465.

(2) (1916) I.L.R. 39 All. 186.

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of the appellant that the suit mortgage in this case cannot be enforced inasmuch as it has become extinguished by the sale of the property in favour of the plaintiff for which it formed the consideration. We have already shown that the sale deed has not been rendered void in the way contended for by the appellant. While no doubt there is good authority for Courts in equity allowing a party when one remedy has failed to take whatever other remedy lies ready to hand, Courts can hardly go so far as to allow a party to revive a dead remedy merely because that best suits his convenience. Before the plaintiff can invoke equity in his favour he must show that there is a remedy available to him on which he can rely. This is precisely what he has been unable to do in this case.

For the above reasons we must hold that the appeal fails. It is dismissed with costs.

A.S.V.

APPELLATE CIVIL

Before Mr. Justice Curgenvven and Mr. Justice
Sundaram Chetti.

SRI SRI SRI PALAHARI MAHANT RAJA RAM DOSS
BAVAJI (DEFENDANT), APPELLANT,

1933,
February 1.

v.

SRI SRI SRI GAJAPATHI KRISHNA CHENDRA
DEO GARU (PLAINTIFF), RESPONDENT.*

*Interest—Contract—Breach of—Damages for—Award of
interest by way of—Conditions—Interest Act (XXXII of
1839)—Claim not coming within scope of—Indian Con-
tract Act (IX of 1872), sec. 73, Ills. (n) and (r)—Scope
and effect of.*

In respect of claims coming within the scope of the Interest Act (XXXII of 1839), interest can be awarded, if the conditions therein prescribed are satisfied, and there is no need to prove actual loss or damage. In respect of claims not covered by that Act, the Court can award interest by way of damages, under section 73 of the Indian Contract Act, as component of the compensation to be fixed for the loss caused to the plaintiff by reason of the breach of a contract, only if adequate proof is given that, by reason of the breach of contract, special loss or damage was sustained by the plaintiff for which the mere repayment of the amount due under the contract would not be adequate compensation, but the proper measure of damages awardable should include a reasonable rate of interest also on account of the loss proved to have been sustained. If the Court should find that, in the special circumstances of a case, adequate compensation for the loss caused by the breach of contract should include a certain rate of interest as its component, and the claim is not one coming under the category of cases specified in the Interest Act, effect may be given to illustration (n) or (r) to section 73 of the Indian Contract Act without infringing the rule of Common Law that interest cannot be awarded as damages for the mere wrongful detention

* Appeal No. 46 of 1927.

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of money or the Interest Act. Where, however, it is shown that the non-payment of money due is itself the breach of contract, and nothing else is proved to make out the claim for compensation for such breach, no interest can be awarded in addition to the recovery of the money withheld.

Illustrations (n) and (r) to section 73 of the Contract Act mean no more than that interest, if otherwise payable, will be a proper component of the damages.

APPEAL against the decree of the Court of the Subordinate Judge of Berhampur in Original Suit No. 47 of 1925.

V. *Govindarajachari* and *H. Suryanarayana* for appellant.

B. Jagannadha Das for respondent.

Cur. adv. vult.

JUDGMENT.

CURGENVEN J. —The defendant, the Mahant of Balaga mutt, holds a usufructuary mortgage over a part of the Nandigam estate, of which the plaintiff is Zamindar. The mortgage deed provides that the mortgagee shall pay annually a sum of Rs. 2,000 towards the peishcush, and the land cess due upon the portion mortgaged. The defendant defaulted in making these payments for faslis 1330 and 1331, so that the plaintiff was himself compelled to pay them. To recover as damages the amounts so paid he has filed two successive suits. That out of which this appeal arises is the second, and relates to part of the payment for fasli 1330 and the whole of the payment for fasli 1331. The defendant raised various defences, the chief defence pressed at the trial being that the mortgage was not binding upon the mutt. This was decided against him and has been abandoned on appeal. The points

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taken before us are, firstly, that the interest which the lower Court awarded upon the amounts paid, from dates of payment up to suit, is inadmissible; secondly, that no proof has been adduced that the amount claimed as land cess paid for fasli 1331 is correct; thirdly, that subsequent interest has been calculated not only upon the principal amount due but also upon the pre-suit interest.

Dealing first with the question whether interest up to suit is admissible, it cannot seriously be contended that the Interest Act (XXXII of 1839) empowers the Court to award it. The amount claimed as damages is neither a debt nor a sum certain payable by virtue of a written instrument at a certain time, since the occasion for its payment only arose upon a breach of the terms of the mortgage bond, and upon the plaintiff making good the defendant's default. Nor, to satisfy the second stipulation of the Act, has any proof of a written demand of payment been given. Some legal basis other than the Act furnishes must therefore be found if the claim is to be admitted.

We are asked to hold that, independently of the Interest Act, interest is payable as damages under section 73 of the Contract Act. The Act itself closes with a proviso "that interest shall be payable in all cases in which it is now payable by law"; and section 73, it is said, supplies the legal provision necessary. Before referring to authority on this point it is, I think, necessary to clear up an aspect of the matter which in the present case has led to attempts to distinguish certain cases, English as well as Indian, which are not in my view distinguishable. The proposition is advanced that, while interest as damages for the

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non-payment of a debt or other sum due under contract may not be awardable under section 73, it is otherwise when the interest is claimed upon a principal sum due as damages, and as a component part of those damages. It is urged that section 73 empowers the Court to make such an award because it is no more than part of the compensation for loss or damage which naturally arose from such breach; and there is nothing in the section itself to exclude the award of damages in this shape. Indeed, illustrations (n) and (r) to the section expressly contemplate the award of such interest. Leaving aside for a moment the question of the effect of these illustrations, a little consideration will I think show that, whatever be the nature of the obligation to pay the principal sum, whether, for example, it originate in contract or in tort, interest can only be claimed upon it as damages for the reason that payment of it has been improperly withheld. In the present instance, so soon as the plaintiff had paid to Government the sums in the payment of which the defendant had defaulted, he became entitled to be reimbursed them in the shape of damages. Those sums, and those alone, were the measure of the damages due for the breach; and if any interest upon them was payable it could only be because the defendant had further defaulted in promptly compensating the plaintiff for the loss occasioned by the breach, in other words, had improperly withheld money due to be paid.

If this be sound reasoning, the case is no more than a particular instance of the general class of claims to interest as damages for the non-payment of a pecuniary obligation, and cases which decide

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the general question, even although the principal subject-matter of them may not be a claim to damages, are not really distinguishable. That upon this question the law in this country is substantially the same as in England is not disputed. Our Interest Act reproduces Lord Tenterden's Act, and section 73 of the Contract Act is based upon the Common Law. Accordingly the judgment of the House of Lords in *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.*(1), which had the effect of settling what the English Law was, may be accepted, as indeed it has been accepted, as equally a guide to the law of India upon this point. In an earlier English case, BEST C.J. had said :

"However a debt is contracted, if it has been wrongfully withheld by the defendant after the plaintiff has endeavoured to obtain payment of it, the jury may give interest in the shape of damages for the unjust detention of the money."

This, as Lord HERSCHELL L.C. says, "is a very clear expression of principle and a rule sufficiently definite"; and he proceeds to make it equally clear that upon such broad grounds interest is not awardable.

The earliest case of this Court, and one which deals with the matter upon these lines, is *Kisara Rukkumma Rau v. Cripati Viyanna Dikshatulu*(2). It is enough, however, to go back only so far as *Kamalammal v. Peeru Meera Levvai Rowthen*(3), a case in which the above-cited judgment of the House of Lords was followed. The learned Judges then consider the effect of section 73 of the Contract Act, coupled with illustration (n), and point

(1) [1893] A.C. 429.

(2) (1863) 1 M.H.C.R. 369.

(3) (1897) I.L.R. 20 Mad. 481.

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out the conflict which would arise if the section were held to allow the award of interest not admissible under the Interest Act. If the proviso to the single section of that Act,—“provided that interest shall be payable in all cases in which it is now payable by law”—enabled so all-embracing an application of section 73, the Act would become a superfluity. This case was followed in *Subramania Ayyar v. Subramania Ayyar*(1). The course which decisions have since taken in this Court has been traced quite recently by VENKATASUBBA RAO and MADHAVAN NAIR JJ. in *Nanchappa Koundan v. Illichathara Manadiar*(2), and it can now be said, I think, that the departure from the generally accepted position marked by *Abdul Saffur Rowther v. Hamida Bivi Ammal*(3), which went beyond the English Law and awarded interest upon broad equitable principles, [a case which I myself followed in *Krishnan Namboodripad v. Komath Ambu Kurup*(4)], has since been definitely disapproved. Indeed, but a short time later WALLIS C.J., in *Raja of Pittapur v. Ballapragada Pallamraju*(5), re-affirmed the earlier cases, *Kisara Rukkumma Rau v. Cripati Viyanna Dikshatulu*(6) and *Kamallamm v. Peeru Meera Levvai Rowthen*(7), basing himself upon the law as it had been settled in England, namely, that at Common law interest could not be given as damages for the non-payment of debts. This too forms the basis of the Privy Council's decision in *The Maine and New Brunswick Electrical Power Co., Ltd. v. Alice M.*

(1) (1908) I.L.R. 31 Mad. 250.

(3) (1919) I.L.R. 42 Mad. 661.

(5) (1920) 40 M.L.J. 18.

(2) (1929) I.L.R. 53 Mad. 549.

(4) (1926) 51 M.L.J. 638.

(6) (1863) 1 M.H.C.B. 369.

(7) (1897) I.L.R. 20 Mad. 481.

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Hart(1), a case from New Brunswick but subject to substantially identical provisions of law. The equitable jurisdiction of the Court, it was found, was not involved, and the parties were left to their remedies at law.

Reference may now be made to two cases of this Court which relate to damages for breach of contract and are therefore more directly in point. *Boddu Sanyasiraju v. Kotra Ramamurthi*(2) was an ordinary case of failure to deliver goods according to contract, and the question arose whether interest could be allowed upon the damages assessed. It was held that interest was not allowable upon unliquidated damages. TYABJI J. notices the argument which has been advanced before us that the Court ought to have the power to place the aggrieved party in the position he would have enjoyed if the contract had been fulfilled; but he felt constrained by the weight of authority against allowing a remedy of this kind. He qualifies his acceptance of the general position by adding that, if the plaintiff had alleged and proved that having been deprived of the use of money he had suffered loss, there might have been less difficulty in his recovering damages for the loss so caused. A similar view had been taken in *Surja Narain Mukhopadhyaya v. Pratap Narain Mukhopadhyaya*(3), and a cognate exception is to be found in English Law,—where the plaintiff's money has been used and interest made upon it (XXI Halsbury, page 40). But without such proof a claim to interest is unsustainable. The other case in which a claim to interest on unliquidated

(1) (1929) 57 M.L.J. 662 (P.C.).

(3) (1899) I.L.R. 26 Calc. 355.

(2) (1913) 21 I.C. 543.

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damages was disallowed is *Kavuta Purnanandam v. Lakshminarasimha Charyulu*(1). The respondent here has attempted to argue that, because the principal amount of the damages cannot, from the nature of the case, be in question, the damages are not unliquidated but liquidated. This is to misconceive the meaning of "liquidated damages", a term not used in the Contract Act but employed to denote a sum named in the contract as the amount to be paid in case of a breach. Section 74 deals with such a case, while section 73 relates to a contract the damages for the breach of which are unliquidated; and the only effect of holding that we are here dealing with a question of liquidated damages would be to take the case out of section 73. It may be that no two opinions are possible as to the amount of the damages due, but it is not possible to found a distinction upon the relative ease and certainty with which the quantum of damages is ascertainable. Accordingly I can discover no grounds for differentiating between a case like the present and any other case of breach of contract. It is equally true of all that an interval must elapse between the date upon which loss occasioned by the breach accrues to the plaintiff and the date upon which he receives compensation for that loss, and that in the meanwhile he is out of pocket. Unless he can resort to some positive provision of law, such as the Interest Act, that circumstance cannot as the law at present stands be met by the award of interest.

In the Full Bench case of *Kandappa Mudaliar v. Muthuswami Ayyar*(2) it was decided that a person who sues to recover an advance made for

(1) (1914) 26 I.C. 429.

(2) (1926) I.L.R. 50 Mad. 94 (F.B.).

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the supply of goods, the contract being broken, is not entitled to interest upon the amount of the advance. Of the three learned Judges who took part in that decision, COUTTS TROTTER C.J. and BEASLEY J. (as he then was) held as above, while RAMESAM J. dissented. The last named learned Judge took the view that *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.*(1) was not against the respondent (who claimed interest) because the case "related to sums recovered in performance of contract and was therefore covered by the Act", i.e., Lord Tenterden's Act. His view seems to have been that while in cases "covered by the Act", which I take to mean cases of the class—based on contract—to which alone the Act applies, the test of admissibility of interest is of one kind, it is otherwise with cases not "covered by the Act", e.g., a case of damages. It seems to me that this is a distinction somewhat difficult to maintain. It will be agreed that interest claimed as damages is claimed quite independently of the Act. That it was so claimed in the House of Lords case is shewn by the following passage in Lord HERSCHELL's judgment (page 437):

"But, my Lords, the appellants contended that even although they might not under the terms of Lord Tenterden's Act be entitled to interest, yet interest might be given by way of damages in respect of the wrongful detention of the debt."

The Full Bench may be taken to have decided the significance of the illustrations (n) and (r) to section 73,—that they mean no more than that interest, if otherwise payable, will be a proper component of the damages. This had been previously so held in *Kamalammal v. Peeru Meera*

(1) [1893] A.C. 429.

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Lervai Rowthen(1) (see Pollock and Mulla's Contract Act, sixth edition, page 430).

I conclude accordingly that the interest up to suit awarded by the Court below must be disallowed.

Upon this finding the third point taken for the appellant does not arise. There remains the question of the correct amount of land cess to be charged to him for fasli 1331. According to the statement filed with the plaint, the amount claimed was Rs. 1,530-15-4. The lower Court has found (paragraph 12) that only half the amount of land cess due upon the mortgaged area minus Rs. 16 was payable by the defendant, and so far there is no dispute. But most unfortunately for the plaintiff, no proof whatever was given of the correctness of the plaint figure, and no admission of it was obtained from the defendant. We cannot therefore confirm the decree in this respect, nor do we find any justification for remanding the suit to have this omission supplied. The only course is to accept the figure which the defendant admits to be his share, viz., Rs. 458-4-6, substituting this for the figure Rs. 749-7-8 found by the lower Court. The result of this, and of the disallowance of interest, will be that the sum of Rs. 4,633-9-0 named in the decree will be replaced by the sum of Rs. 3,659-4-6, with consequential alterations in subsequent interest and costs. The parties will pay and receive proportionate costs of appeal.

SUNDARAM
CHETTI J.

SUNDARAM CHETTI J.—I agree and wish to state briefly what I have got to say on the somewhat difficult question relating to the award of interest in this case. The Interest Act, XXXII of 1839,

(1) (1897) I.L.R. 20 Mad. 481.

provides for the award of interest in certain categories of cases, viz., claims relating to debts or sums certain, payable at a certain time or otherwise, if they are payable by virtue of some written instrument at a certain time, but, if no time is fixed for payment in the instrument, interest can be awarded only when a demand in writing giving notice to the debtor that interest would be claimed has been given, in which case interest will run only from the date of such demand. The proviso to this section exempts from the operation of this Act all cases in which interest is made payable by law. It is clear that, in respect of claims coming within the scope of the Act, interest can be awarded if the conditions therein prescribed are satisfied, and there is no need to prove actual loss or damage. The Court is enabled to award interest in such cases on the strength of this statutory provision. In the category of cases specified in the Act, no interest can be awarded if the requirements laid down in the Act are not complied with. Otherwise, it would be an infringement of the provisions of this Act. What about claims not coming within the scope of the Act itself? Claims for damages on account of breach of contract are dealt with by section 73 of the Contract Act, and a number of illustrations are given. For the purpose of the present case, illustrations (n) and (r) are relevant. As held in *Kamalammal v. Peeru Meera Lervai Rowthen*(1), this later enactment cannot be taken to have impliedly repealed the Interest Act. The following observation at page 483 is important :

"In fact, there is no real conflict between the two, since effect may well be given to section 73, by holding that the

(1) (1897) I.L.R. 20 Mad. 481.

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award of interest, as compensation contemplated by that section, has reference to cases in which such award can be made without infringing the provisions of the other Act." The claim dealt with by the learned Judges appears to be one coming within the scope of the Interest Act, and no interest can be awarded, as the requirements of that Act have not been fulfilled. The decision in *Kamalammal v. Peeru Meera Levvai Rowthen*(1) has been followed in a series of later decisions of this High Court. The question is whether, in respect of claims not covered by the Interest Act, the Court can award interest by way of damages, under section 73 of the Contract Act, as component of the compensation to be fixed for the loss caused to the plaintiff by reason of the breach of a contract. Section 73 being declaratory of the English Common Law as to damages, this section cannot be deemed to abrogate the rule of Common Law in the award of damages. Under the Common Law, which is now well settled in England, interest cannot be awarded as damages for the mere wrongful detention of money. I take this to mean that, where it is shown that the non-payment of money due is itself the breach of contract, and nothing else is proved to make out the claim for compensation for such breach, no interest can be awarded in addition to the recovery of the money withheld. But, if adequate proof is given that, by reason of the breach of contract, special loss or damage was sustained by the plaintiff for which the mere repayment of the amount due under the contract would not be an adequate compensation, but the proper measure of damages awardable should include a reasonable rate of interest also on

(1) (1897) I.L.R. 20 Mad. 481.

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account of the loss proved to have been sustained, I think the Court can award interest as part of the damages, either under illustration (n) or illustration (r) to section 73. If the awarding of interest is deemed to be giving a remote damage, then such a relief will not be given under section 73. But if the Court should find that, in the special circumstances of a case, adequate compensation for the loss caused by the breach of contract should include a certain rate of interest as its component, and the claim is not one coming under the category of cases specified in the Interest Act, effect may be given to illustration (n) or (r) of section 73, without infringing the rule of Common Law [or the Interest Act. The observations of BANERJEE J. in *Surja Narain Mukhopadhyaya v. Pratap Narain Mukhopadhyaya*(1) bring out this aspect clearly. I am of opinion that, on such special proof of loss or damage, interest can be awarded as a component part of compensation payable for the breach of contract, when the claim is one outside the category of claims mentioned in the Interest Act.

In the present case, it can be stated that the claim is not one coming within the purview of the Interest Act, but no proof of special loss or damage as required by section 73 for awarding interest as damages is adduced.

I am, therefore, of opinion that no interest prior to suit is awardable. I agree with my learned brother in the order proposed by him.

A.S.V.

(1) (1899) I.L.R. 26 Calc. 955.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

1933,
January 17.

PANAGANTI RAMA RAYANIMGAR AND ANOTHER (FIRST
DEFENDANT AND LEGAL REPRESENTATIVE OF FIRST
DEFENDANT), APPELLANTS,

v.

UMADE RAJAH RAJE DAMARA KUMARA VENKATA-
LINGAM NAYANIM BAHADUR VARU, RAJA OF
KALAHASTI AND ANOTHER (PLAINTIFF AND SECOND
DEFENDANT), RESPONDENTS.*

Charge—Money decree—Stay of execution of, pending appeal therefrom—Security bond given by judgment-debtor as condition of—“Charge enforceable in execution” if created by—Purchaser of property subject to charge—Liability of, to indemnify owner against charge—Suit for enforcement of indemnity—Maintainability of—Payment of entire decree amount by owner if a condition of—Limitation for suit—Limitation Act (IX of 1908), arts. 83, 120 and 132—Applicability of.

The plaintiff appealed to the High Court against a decree for payment of money due on a promissory note obtained against him by the second defendant. Execution of the decree was stayed pending disposal of the appeal on the plaintiff undertaking to furnish security for the performance of any decree that might be passed in the appeal. He executed a document called “security bond”, Exhibit B, which stated specifically that the immovable properties (a number of villages attached to his taluk) were furnished as “security” and that that security was given for acting according to the final decree that might be passed in the appeal. The plaintiff’s appeal to the High Court was eventually dismissed and the lower Court’s decree was confirmed.

In execution of another money decree obtained against the plaintiff by a third party some of the villages comprised in Exhibit B were sold and were purchased by the first defendant.

* Appeal No. 63 of 1927.

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the brother of the second, subject to the security created by Exhibit B. In the meanwhile, the second defendant executed the decree in his favour by proceeding against the other properties belonging to the plaintiff and realized a considerable portion of the decree amount by obtaining rateable distribution. Thereupon the plaintiff instituted the suit out of which the appeal arose claiming that, since the first defendant’s purchase of some of the villages comprised in Exhibit B was subject to the security created in favour of the second defendant by that document, it was the first defendant’s duty to have satisfied the second defendant’s decree, and that, since, on account of the first defendant’s failure to do so, other properties belonging to the plaintiff had been sold by the second defendant and he had in consequence suffered loss, the villages purchased by the first defendant should be sold by the Court and the balance found due after paying the decree amount due to the second defendant should be paid over to him.

Held (1) that the security bond, Exhibit B, created an enforceable charge;

(2) that by purchasing some of the villages subject to the charge created on them by Exhibit B the first defendant was under an obligation to indemnify the plaintiff against the incumbrance;

(3) that, as the real nature of the plaintiff’s claim was a declaration of his right of indemnity and the prayer was for its enforcement and as the plaintiff did not demand that the sale proceeds should be paid to him, the indemnity claimed by the plaintiff could be enforced against the first defendant, though the plaintiff had not paid the entire debt due under the decree in favour of the second defendant;

and (4) that article 132 and not either article 83 or article 120 of the Limitation Act applied to the suit.

When property is sold subject to incumbrances the purchaser impliedly agrees to indemnify the vendor against the encumbrances. The operation of this right of indemnity extends to all cases where the facts suggest that such an obligation of the conscience should be cast on the purchaser. The right would apply to cases of sales of property subject to a “charge” also.

Article 83 of the Limitation Act applies only to personal contracts of indemnity and not to a case of indemnity arising under a charge.

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APPEAL against the decree of the Court of the Subordinate Judge of Chittoor, dated 15th July 1926 and passed in Original Suit No. 26 of 1922.

Government Pleader (P. Venkataramana Rao)
and *V. S. Narasimhachar* for appellants.

S. Varadachariar, A. Ramachandra Ayyar and A. Sundaresan for respondents.

Cur. adv. vult.

MADHAVAN
NAIR J.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The legal representative of the deceased first defendant is the appellant. This appeal arises out of a suit instituted by the plaintiff in the following circumstances.

The plaintiff is the Raja of Kalahasti. In Original Suit No. 22 of 1908 on the file of the District Court of North Arcot, the second defendant, the brother of the first defendant, obtained on 29th March 1909 a money decree for Rs. 81,548-5-4 (Exhibit A) against the predecessor of the present plaintiff who was sued as the legal representative of the previous zamindar. Against this decree the judgment-debtor filed Appeal Suit No. 93 of 1909 to the High Court and applied for stay of execution of the decree pending disposal of the appeal. Execution was stayed on the applicant undertaking to furnish security for the performance of any decree that may be passed in the appeal. Exhibit B is the security bond. Under it, seventy villages attached to the Kalahasti Taluk in the North Arcot District, subject to certain encumbrances, were furnished as security. The document described as the "Security Bond executed by us" (the Raja of Kalahasti) runs as follows :

" Therefore we have furnished as security the properties worth six lakhs of rupees described in the schedule

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for acting according to the final decree that may be passed in Appeal No. 93 of 1909. A sum of about Rs. 2,74,426 is still due to Venkatagiri Rajah Garu on the said property under the decree obtained by him in Original Suit No. 200 of 1907 on the file of the Sub-Court, North Arcot. We and our brothers have maintenance charge on the said property also besides on the whole of the Kalahasti Estate. The said property has been furnished as security under this bond subject to the aforesaid encumbrances. This is the security bond executed and given with our consent."

Appeal No. 93 of 1909 was dismissed and the lower Court's decree was confirmed on 8th November 1910. In Civil Suit No. 125 of 1899 a decree was passed by the High Court at the instance of one Sadagopachari against the Raja of Kalahasti for about Rs. 9,000 and odd and it was transferred for execution to the District Court of North Arcot. In execution of that decree nine out of the seventy villages furnished as security in Appeal No. 93 of 1909 were proclaimed and sold, and were bought by the first defendant in the present suit for a sum of Rs. 32,000. Exhibit V (4th January 1912) is the sale proclamation and Exhibit D (19th April 1912) is the sale certificate. The sale was actually held on 5th February 1912. In both these Exhibits V and D, the sale is mentioned to be subject to the security bond executed by the Raja in Appeal No. 93 of 1909. Exhibit D says :

" The auction sale amount is Rs. 32,000 subject to the debt of Rs. 19,500 due to the Venkatagiri Maharaja Garu under the decree in Original Suit No. 27 of 1910 on the file of the Sub-Court and subject to the security bond of Rupees one lakh given by the defendant in respect of the decree in Original Suit No. 22 of 1908 in the District Court"

The first defendant obtained possession of the nine villages purchased by him between the dates

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27th April 1912 and 29th April 1912. Exhibit E series are the delivery receipts and in all these it is noted that the villages are liable to the incumbrances mentioned in Exhibit D. There can be no doubt that the purchase of the nine villages by the first defendant was subject to the security created by the bond Exhibit B. In the meanwhile, the second defendant began to execute the decree in Original Suit No. 22 of 1908 by proceeding against the other properties belonging to the Raja of Kalahasti. He obtained a transfer of the decree to the Nellore District Court and realised a considerable portion of the decree amount by obtaining rateable distribution. The statement dated 19th September 1925 containing the amounts realised by him in execution shows that the decree in Original Suit No. 22 of 1908 has been satisfied to the extent of Rs. 71,405-8-2.

In the above circumstances, the plaintiff claims that, since the first defendant has purchased the nine villages subject to the security created in favour of the second defendant in Appeal Suit No. 93 of 1909 confirming Original Suit No. 22 of 1908, it was his (first defendant's) duty to have satisfied that decree and that, since, on account of his failure to do so, other properties belonging to the plaintiff were sold by the second defendant and he has in consequence suffered loss, the nine villages purchased by him should be sold by the Court and the balance found due after paying the decree amount due to the second defendant should be paid over to him. This is the alternative prayer contained in the plaint and is the prayer pressed in the Court below and in this Court. The contention of the plaintiff which is purely a

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question of law is this,—that, by his purchase of the properties subject to a charge, the first defendant has impliedly undertaken to indemnify him against the incumbrance affecting them and that, if by his default loss is caused to him by the proceedings taken by the incumbrancer, then the first defendant is bound to indemnify him, and that the right to indemnity is to be worked out by the Court by the sale of the villages purchased subject to the incumbrance and the payment to him of the balance of the sale proceeds, if any, after paying the amount remaining due to the incumbrancer, i.e., the second defendant. The main contentions of the defendants are that the security bond does not create any "enforceable charge" on the properties mentioned in it, that the purchase of the properties by the first defendant did not involve any implied undertaking on his part to indemnify the plaintiff against the claims of the second defendant and that the plaintiff has no cause of action till the entire decree amount was realised from him by the second defendant. They also contend that the suit is barred by limitation. Rejecting these contentions the learned Subordinate Judge passed a decree in favour of the plaintiff.

On the first part of the case, the plaintiff sought to support his argument by a series of decisions; but, before dealing with them and the arguments of the appellant with reference to them, we will first briefly deal with the question whether the security bond, Exhibit B, creates an "enforceable charge". We have already referred to the terms of Exhibit B. The document is called "Security Bond" and it states specifically that the properties

mentioned in it are furnished as "security". It is thus a security of immovable property. This security is given for acting according to the final decree that may be passed in Appeal No. 93 of 1909. It is clear that the security is in respect of a future liability, i.e., the liability arising from the decree that may be passed in Appeal No. 93 of 1909. If the executant of the bond succeeds in the appeal the properties will not be liable; otherwise, they will be security for the decree. As the liability is a future one, its incidents can be understood only by reading the bond along with the decree under appeal. That decree was one for payment of money due on a promissory note. We have no doubt that the essentials necessary for creating a charge are present in this document and, in our opinion, the charge created by it is also enforceable in law. In *Subramanian Chettiar v. Raja of Ramnad*(1) it was held by this Court that immovable property given by a judgment-debtor as security for the due performance of a decree in pursuance of an order staying execution under Order XLI, rule 5 (3), of the Code of Civil Procedure can be realized in execution. See also *Official Receiver, Tanjore v. Nagaratna Mudaliar*(2). There is nothing in the decision of the Privy Council in *Raj Raghobar Singh v. Jai Indra Bahadur Singh*(3) to support the contention of the appellant that the charge contained in Exhibit B is unenforceable. Dealing with the document under consideration their Lordships observed that

"here is an unquestioned liability and there must be some mode of enforcing it and that the only mode of enforcing

(1) (1917) I.L.R. 41 Mad. 327.

(2) (1925) 49 M.L.J. 648.

(3) (1919) I.L.R. 42 All. 158 (P.C.).

it must be by the Court making an order in the suit upon the application to which the sureties are parties that the properties charged be sold . . . 2.

i.e., that the properties may be proceeded against in execution. For these reasons we hold that Exhibit B contains a "charge" and that the "charge" is enforceable in execution.

The next question is whether when property is sold subject to a "charge" the purchaser becomes bound in law to indemnify the owner against the incumbrance or, in other words, in this case, whether, by purchasing the nine villages subject to the charge created on them by Exhibit B, the first defendant is expressly or impliedly under an obligation to indemnify the plaintiff against the incumbrance. In support of the contention that in such a case the purchaser is bound to indemnify the owner the plaintiff has relied mainly on the decisions in *Izzat-un-nisa Begam v. Partap Singh*(1), *Veerappa Chetty v. Arunachellam Chetty*(2) and *Mills v. United Counties Bank, Limited*(3). In *Izzat-un-nisa Begam v. Partap Singh*(1) the equity of redemption in certain property was sold in auction and was purchased by the decree-holder. The sale was subject to two prior mortgages. Those mortgages were found to be invalid and the purchaser had nothing to pay on their account. The owner of the property then sued the purchaser to recover the amounts of these mortgages from him, as unpaid vendor's purchase-money. Reversing the decision of the High Court, the Judicial Committee held that the purchaser of the equity of redemption was entitled

(1) (1909) I.L.R. 31 All. 583 (P.C.). (2) (1924) 47 M.L.J. 168 (P.C.).

(3) [1912] 1 Ch. 231.

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to whatever benefit accrued to him by reason of the mortgages supposed to be existing on the property being found to be inoperative. Their Lordships stated the principle of the decision in the following terms :

“ On the sale of the property subject to encumbrances the vendor gets the price of his interest whatever it may be whether the price be settled by private bargain or determined by public competition, together with an indemnity against the encumbrances affecting the land. The contract of indemnity may be express or implied. If the purchaser covenants with the vendor to pay the encumbrances, it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burthen attached to it. If the encumbrances turn out to be invalid, the vendor has nothing to complain of. He has got what he bargained for. His indemnity is complete . . . ”

It is argued that the purchaser in the present case, i.e., the appellant, cannot be said to have agreed impliedly to indemnify the owner of the property against the incumbrance, inasmuch as he is not the purchaser of the equity of redemption but has only purchased the property subject to a “charge”. Or, in other words, the argument is that, as a “charge” does not import an agreement to pay as in the case of a “mortgage”, a contract of indemnity cannot be implied in the present case. We will presently consider the force of this objection. In *Izzat-un-nisa Begam v. Partap Singh*(1) their Lordships of the Judicial Committee followed *Waring v. Ward*(2) where this obligation to indemnify is described by Lord ELDON as an obligation of conscience. It is similarly described in *Mills v. United Counties Bank, Limited*(3) ; see also *Adair v. Carden*(4). If this

(1) (1909) I.L.R. 31 All. 583 (P.C.).
(3) [1912] 1 Ch. 231.

(2) (1802) 7 Ves. 332, 336.
(4) (1892) 29 L.R. Ir. 469.

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is a true and correct description, then it is difficult to say that the doctrine in *Waring v. Ward*(1) should be limited to the case of purchases of the equity of redemption though it must be said that, in the decisions, the application of the principle has arisen only in cases relating to mortgages. In this connection it may also be noticed that in *Izzat-un-nisa Begam v. Partap Singh*(2) the language used is “encumbrance affecting the land”, and a charge is certainly an encumbrance. In *Veerappa Chetty v. Arunachellam Chetty*(3), on the dissolution of a partnership one partner who took over the firm’s estates for consideration made himself personally liable for the partnership’s debts and liabilities. In such a case the nature of the undertaking and the rights of the other partners are thus described by their Lordships :

“ But by that agreement the respondent, as between himself and each of his former partners, became solely responsible for the firm’s debt to O.A.M.K., and Veerappa as one of these partners became entitled to an indemnity from the respondent against all liability as a former partner of his in respect of it. And he was entitled to have that right of indemnity declared and enforced (by an order on the respondent for example, to pay off the debt) if the right were disputed or the obligation neglected. But he was entitled to no more. Veerappa could not recover the debt from the respondent unless and until he had himself paid it.”

In *Richardson, In re St. Thomas’s Hospital (Governors), Ex parte*(4) it was pointed out that right to indemnity may be found in cases of suretyship and contribution. From the above cases the following principles clearly emerge : viz., (i) that, where property is sold subject to encumbrances,

(1) (1802) 7 Ves. 332, 336.

(3) (1924) 47 M.L.J. 168 (P.C.).

(2) (1909) I.L.R., 31 All. 583 (P.C.).

(4) [1911] 2 K.B. 705.

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the purchaser impliedly agrees to indemnify the vendor against the encumbrances ; (ii) that the operation of this right of indemnity is not restricted to sales of immovable property but it would also apply to cases of dissolution of partnership, suretyship, contribution, etc. It is permissible to infer from these cases that the operation of the right may be extended to all cases where the facts suggest that such an obligation of the conscience should be cast on the purchaser. This is not decided in any case but is only an inference. But if the inference is justified, as we think it is, from the nature and scope of this right, then the right would apply to cases of sales of property subject to a "charge" also. In the present case it is strenuously argued that Exhibit B is only a security bond and does not contain any personal obligation to discharge the decree of the High Court. But in our opinion it is not right to construe Exhibit B apart from the decree. Under the decree there is no doubt that the judgment-debtor is under a personal obligation to pay the decree amount to the decree-holder. After the execution of Exhibit B, the decree-holder gets in addition a right to proceed against the property therein mentioned. Taking the decree and the bond together, we do not think it will be straining the language to say that the charge contained in Exhibit B in the circumstances of the case raises a personal obligation to pay and it therefore follows that in the present case as in the case of a "sale of equity of redemption" the vendor gets a right to indemnity from the purchaser. Even if it was not so, we are prepared to hold from the essential nature of the obligation and its wide

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applicability that effect should be given to it even in a case of sale of property subject to a "charge". For these reasons we hold that the right of indemnity exists in this case and that the plaintiff can ask the Court to have it enforced on his behalf.

The next question is whether for its enforcement it is necessary that the *entire* decree debt should have been discharged by the plaintiff. Admittedly a sum of about Rs. 81,000 is still due to the second defendant under his decree. It is argued that this amount remaining unpaid, the plaintiff can have no cause of action to institute the suit. This argument stands quite independent of the question of limitation which will be discussed later ; for, if the argument is answered against the plaintiff, his suit will have to be dismissed and no question of limitation will then arise. The objection raised can best be answered only by examining the nature of the relief claimed in the suit. The plaintiff does not ask for the payment to himself of the sale proceeds ; what he in effect says is, that as he has suffered damages, this being the amount collected from him by the second defendant under rateable distribution owing to the failure on the part of the first defendant to pay off the encumbrance, the Court should by way of enforcing the "indemnity" against him sell the property subject to the charge and after discharging the debt of the second defendant pay over the balance to him, if any remains, by way of damages. Of course as pointed out by the learned Judge it is not the whole of the balance that the plaintiff would be entitled to but only to the extent, if that be less, of the moneys that the second defendant has recovered by rateable

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distribution with interest and, if there is a margin over, that would clearly belong to the first defendant as the owner of the properties and not to the plaintiff. This is the alternative prayer mentioned in the plaint. The real nature of the claim is a declaration of the plaintiff's right of indemnity and the prayer is for its enforcement. Viewed in this light, the question whether the plaintiff has fully discharged the decree is not relevant, for what he is asking the Court is only to enforce the "indemnity" against the first defendant by selling the villages and paying off the second defendant and thus save him from damages which he will have otherwise to suffer owing to the default of the first defendant. Such an "anticipatory" form of action though somewhat rare is not unknown to the English and the Indian Law. In *Richardson, In re St. Thomas's Hospital (Governors), Ex parte*(1) it was pointed out by FLETCHER MOULTON L.J. that, though under Common Law the right of indemnity can be availed of only after the person entitled to it has paid the debt, the rule in Chancery was slightly different and that

"you could file a bill against the principal debtor to make him pay the debt so that you would not be called upon to pay the debt and then you obtained a declaration that you were entitled to an indemnity."

In the same case BUCKLEY L.J. stated at page 715 :

"Indemnity is not necessarily given by repayment after payment. Indemnity requires that the party to be indemnified shall never be called upon to pay . . ."

This case was followed in this Court in *Mohideen Batcha Sahib v. Sheik Dawood Sahib*(2). In

(1) [1911] 2 K.B. 705, 712.

(2) (1926) 51 M.L.J. 203.

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that case the plaintiff obtained a decree in the High Court declaring that he was only a surety for a firm represented by defendants 1 to 3 and that they are bound to indemnify the plaintiff in respect of the decree in Original Suit No. 9 of 1923 passed against him and the defendants, and that the defendants 1 to 3 are liable in the first instance to satisfy the fourth defendant's decree in Original Suit No. 9 of 1923. It was held :

"In the event of non-satisfaction of 4th defendant's decree by defendants 1 to 3 to the extent of the amount as decreed by the Sub-Court in Original Suit No. 9 of 1923 within three weeks, plaintiff will have liberty to apply in execution to raise the amount due under the said decree by the appointment of a receiver or otherwise from the assets of the firm and have the same paid to the 4th defendant in satisfaction of the said decree."

In the course of the judgment RAMESAM J. observed that "if the plaintiff is a surety, he can be indemnified in an appropriate case *before actual payment* (the italics are ours) by an anticipatory action of this kind", and the result of the action shows that relief was given to him before he was called upon to pay the amount in Original Suit No. 9 of 1923. The case in *Richardson, In re St. Thomas's Hospital (Governors), Ex parte*(1) and the other relevant cases bearing on the point were followed in *Osman Jamal & Sons, Ltd. v. Gopal Purshattam*(2) in which it was held that,

"where commission agents had incurred liability on behalf of their principals who had agreed to indemnify them, and the agents having subsequently gone into liquidation the Official Liquidator sued the principals for the amount of the liability, he could recover the said amount even though the agents having gone into liquidation had not actually paid their vendor."

(1) [1911] 2 K.B. 705.

(2) (1928) I.L.R. 56 Cal. 262.

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Considerable light is thrown on this question by the observation of their Lordships of the Privy Council in *Veerappa Chetty v. Arunachellam Chetty*(1). Generally stated, that was a case where the question of indemnity was in certain circumstances considered, after the dissolution of a partnership in which at the time of the dissolution one of the partners on consideration took over the assets and liabilities of the firm, relieving the other partners from the liabilities. The relevant extract from the judgment has already been quoted while discussing the nature of the "indemnity". Their Lordships observed :

"And he (Veerappa) was entitled to have that right of indemnity declared and enforced (by an order on the respondent for example, to pay off the debt) if the right were disputed or the obligation neglected. But he was entitled to no more."

Their Lordships also observed that, if Veerappa was claiming the debt, he could not do so unless and until he has himself paid it. We have already stated that in the present case the plaintiff does not demand that the sale proceeds should be paid to him ; what he asks for is only that the properties should be brought to sale and the equities adjusted by the Court. For the above reasons we hold that having regard to the essential nature of the relief claimed the indemnity claimed by the plaintiff can be enforced against the first defendant though he has not paid the entire debt due under the decree.

It now remains to consider the last point argued before us, the question of limitation. In the lower Court various suggestions seem to have

(1) (1924) 47 M.L.J. 168 (P.C.).

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been made on behalf of the appellant as to when limitation would commence in the suit. But in this Court Mr. Venkataramana Rao has clearly confined himself to two positions. His argument is that the plaintiff's suit is barred either under article 83 or under article 120 of the Limitation Act. On the other hand, Mr. Varadachari on behalf of the respondent contends that the article applicable to the case is article 132. After specifying the periods of limitation for suits by a surety against the principal debtor (article 81) and by a surety against a co-surety (article 82), the Limitation Act prescribes under article 83 a period of three years for a suit "upon any other contract to indemnify", and the period starts from the time "when the plaintiff is actually damnified". Article 120 prescribes a period of six years for a "suit for which no period of limitation is provided elsewhere in this schedule" and the period commences from the time "when the right to sue accrues". Article 132 prescribes a period of twelve years for a suit "to enforce payment of money charged upon immovable property" and the period begins from the time "when the money sued for becomes due". The question is which of these articles applies to the present suit.

We will first take article 83. For the purpose of his argument the appellant's learned Counsel is prepared to assume that the suit may be viewed as one to enforce a contract of indemnity as contended for by the respondent. His case is that, if so treated, under article 83, the period of limitation would commence from the time when the plaintiff is actually damnified. It is stated that the earliest date when the plaintiff may well

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have considered himself to have been damnified is when the sum of Rs. 24,855-10-8 was collected from him under rateable distribution on 9th March 1916 (see the statement dated 19th September 1925). It is stated that till that date nobody could have said whether the plaintiff was going to be damnified or not, for the second defendant may well have collected the debt due to him by selling the properties secured under Exhibit B. Instead of doing so, he proceeded against other properties and realized the abovementioned sum on 9th March 1916 under rateable distribution. The present suit was instituted on 5th April 1922. It is therefore argued that having been damnified on 9th March 1916, the suit not having been brought within three years from that date, it is barred under article 83. It is clear to us that this argument cannot be accepted and that article 83 does not apply to the case. The indemnity that is sought to be enforced is not a personal one. As mentioned before, an obligation to pay is involved in the "charge" created by the security bond and the indemnity sought to be enforced against the first defendant arises from out of this obligation which was passed on to him when he purchased the nine villages subject to the charge. The essence of this right of indemnity is that the liability to discharge the decree was cast by the security bond upon the property mentioned in it. This indemnity which arises under a charge, like the indemnity cast upon the purchaser of equity of redemption which is declared to be real [see *Banning on Limitation*, page 163, and *Kinnaird v. Trollope*(1)], should also be held to be real and

(1) (1888) 39 Ch. D. 636.

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not merely personal. Article 83, in our opinion, applies only to personal contracts of indemnity and not to a case of indemnity arising under a charge. It therefore follows that this article is inapplicable. In this connection it was also argued that, even if the case is to be treated as one for the enforcement of a charge, article 83 would apply as the necessity to enforce the charge arose only after 9th March 1916. Obviously the argument is untenable for, if the suit is to be treated as one for the enforcement of a charge, clearly article 132 would apply as that is the special article provided by the Limitation Act for that class of cases.

The next question is whether article 120 would apply to the case or whether the article applicable is article 132. It is argued by Mr. Venkataramana Rao that the suit is for a declaration that the plaintiff is entitled to enforce the indemnity relied on by him and that this right accrued the moment when the first defendant became liable to it by his purchase of the property. The sale certificate, Exhibit D, is dated 19th April 1912. It is argued that the plaintiff must be considered to have become entitled to the indemnity on that date and that the right to enforce it also accrued at the same time; and that, since the suit was not brought within six years of that date, it is barred. To decide this point we have to consider the nature of the relief claimed by the plaintiff. We have already referred to it in detail in considering the first part of the case. There we have stated while explaining the exact nature of the plaintiff's claim that what he asks for is in its essence a declaration of his right to indemnity and

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for its enforcement by way of sale of the property subject to the charge; but in order to succeed in the suit it is not necessary that he should specifically ask for a declaration that he is entitled to the indemnity. The declaration that he is entitled to the indemnity is involved in the relief asked for by the plaintiff, which is the sale of the property, and he need not separately ask for the declaration. The plaintiff's suit is, in its nature, like a mortgage suit. It may be seen from the plaint that he has not asked for a declaration of his right to sell the properties but has only asked for their sale, obviously, by enforcing the charge under the security bond. In this view, we think the article applicable is article 132 and time will start "when the money sued for becomes due". There can be no doubt that the security bond became enforceable only upon the passing of the High Court's decree, i.e., 8th November 1910. The suit having been filed within twelve years from that date is not therefore barred under article 132. In *Ramasami Iyengar v. Kuppusami Iyer* (1) the appellant purchased certain items of property covered by what might be described as a security bond. The holder of the bond instituted the suit to enforce its terms against the executants and against the property bound by it. One of the contentions in the case was that the suit was barred under article 83 of the Limitation Act. The learned Judges held that, though article 83 provides for suits on contracts of indemnity, and no doubt Exhibit C is a contract of indemnity, having regard to the fact that it created a charge, the suit should be treated as one to

(1) (1921) 14 L.W. 99.

enforce payment of money charged on immovable property and that it fell within article 132 of the Limitation Act. Having regard to the nature of the relief claimed in the suit, we hold that article 120 does not apply to the case and that it is governed by article 132 and is not barred by limitation.

No other points were argued before us. In the result, the appeal is dismissed with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Curgenvven and Mr. Justice
Sundaram Chetti.

M. S. GOPALASAMI CHETTIAR (PLAINTIFF), APPELLANT,
v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,
REPRESENTED BY THE COLLECTOR OF SALEM (DEFENDANT),
RESPONDENT.*

1933,
February 10.

Cotton Duties Act (II of 1896), sec. 9—Assessment of duty by Collector under—Power of—Condition of—Submission of return by owner of factory not a—Assessment made independently of any return—Suit contesting legality of—Maintainability of—Liability for duty—Owner of factory at time when return called for under sec. 8 of Act ceasing to be such at time when assessment made—Liability of—Delay in assessment—Person liable for duty and failing to submit return required by sec. 8 cannot complain of—Statute—Fiscal statute—Strict construction of—Rule as to—Applicability of—Procedure—Matters of.

Section 9 of the Cotton Duties Act (II of 1896) gives the Collector power to assess the duty payable. The power of the Collector to make the assessment, so given, cannot be limited either by any defect in the return or even by the absence of any

* Appeal No. 45 of 1927.

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return. The mere fact that the duty is described as "payable in respect of the period to which the return relates" cannot be read as meaning that if no return be made there can be no period in respect of which it is payable. The return is only intended to facilitate assessment and cannot be described as an indispensable pre-requisite of it.

When an assessment is made independently of any return, the method and result of such assessment may be the subject of departmental appeal, but so long as it conformed to ordinary notions of fairness it cannot be questioned in a suit contesting the legality of the assessment.

A person who has become liable to pay duty and who fails to submit the return required by section 8 of the Cotton Duties Act cannot plead lapse of time between the production of his goods and the initiation of steps to assess them as a defence to the claim.

A person who was the owner of a factory at the time when he was called upon to submit a return under section 8 of the Cotton Duties Act and who made a profit from the goods which were liable to duty does not cease to be liable for the duty merely because at the time when the assessment was made he had ceased to be the owner of the factory and another person had become its owner by purchase from him.

The principle that a statute which imposes a duty must be strictly construed applies only in so far as the imposition of the liability is concerned. It does not extend to mere matters of procedure devised as the best means in all ordinary circumstances to collect the impost.

Where the liability to duty is clear, it would be improper to conclude that no means exist of realising it unless the language of the statute compelled such a view.

APPEAL against the decree of the Court of the Subordinate Judge of Salem, dated the 24th day of August 1926 and passed in Original Suit No. 3 of 1924 (Original Suit No. 56 of 1924 on the file of the District Court, Salem).

K. V. Sessa Ayyangar for appellant.
Government Pleader (P. Venkataramana Rao) for respondent.

Cur. adv. vult.

JUDGMENT.

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CURGENVEN J.—The plaintiff, now appellant, sued to recover a sum of Rs. 6,300 from the Government in the following circumstances. In 1913 he started the Salem Knitting Factory and remained its proprietor until March 1923 when he sold it to the Salem Industrials. The factory produced cotton banians and it is not disputed that its products were liable to duty under the Cotton Duties Act II of 1896. Although the duty was payable monthly, no steps were taken to collect it until February 1923, when the Revenue Divisional Officer called upon the plaintiff to submit a return showing the quantity and value of goods produced in the factory up to 31st December 1922, so that the duty might be assessed and levied. The plaintiff did not answer this reference, and a further demand was made on 5th April 1923. This also met with no response and on 11th July the Revenue Divisional Officer passed orders assessing the goods produced in the factory from its establishment up to the end of 1922 at Rs. 6,300. The plaintiff, who had as already stated ceased to be the proprietor, paid this sum in instalments under protest and filed this suit to recover it as an illegal levy. He bases his claim upon three separate grounds; firstly, that no duty can be assessed or collected in the absence of a return made by the proprietor; secondly, that the Act does not provide for the collection of arrears; thirdly, that the liability, if any, has devolved upon the company which purchased the mill.

To understand the first contention it is necessary to look at some of the provisions of the

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Cotton Duties Act. Section 6 directs that there shall be levied and collected at every mill in British India upon all cotton goods produced in such mill a duty at the rate of three and a half *per centum* of the value of such goods. Under section 8 the owner has to prepare and deliver to the Collector each month a return of the cotton goods produced at his mill during the preceding month, stating quantity and value. This return has to be delivered within three working days and at most within seven days of the period to which it relates. Sub-section (1) of section 9 runs as follows :

"The Collector shall assess the duties payable in respect of the period to which the return relates, and unless the amount thereof is immediately tendered shall cause a notice, in such form as may be prescribed by any rules under this Act, to be served on the owner requiring him to make payment of the amount assessed within ten days of the date of service of notice."

Section 11 provides that if the duty so assessed is not paid within the time fixed a sum not exceeding double the amount may be levied, recovery being in the manner provided in section 30 of the Income-tax Act (I of 1886). Upon these provisions the learned Advocate for the appellant bases the argument that no duty whatever is leviable unless the mill-owner submits the return required by section 8. His contention is in brief that the Act provides a certain definite procedure for the realization of the duty and that if any essential part of that procedure is wanting the remainder must remain inoperative. In other words, if no return is made there can be no assessment, because the assessment is made upon the data supplied by the return, and without assessment there can of

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course be no collection. He draws our attention to other Acts dealing with the collection of taxes or duties which make provision for an alternative procedure in the case of a default occurring. Section 22 of the Income-tax Act for instance requires a return to be made of the total income during the previous year and, if a failure to make this return occurs, under section 23 (4) the Income-tax Officer shall make the assessment to the best of his judgment. Similarly, under section 80 of the Madras Local Boards Act (XIV of 1920), certain landholders have to furnish the Collector with lists of the lands held by them, together with certain other particulars to afford a basis for the assessment of land cess, and under section 83, if no such list be furnished within the time allowed, the Collector shall himself fix the annual rent value of the lands held by the defaulting landholder. It is true that the Cotton Duties Act does not expressly provide for the consequences of failure to submit a return. But that is not to say that no power remains to collect the duty. Section 9 gives the Collector power to assess the duty payable, and the mere fact that it is described as "payable in respect of the period to which the return relates" cannot be read as meaning that if no return be made there can be no period in respect of which it is payable. The section is so worded because it has in contemplation the normal case when the mill-holder complies with the terms of the Act. But the power of the Collector to make the assessment, so given, cannot be limited either by any defect in the return or even by the absence of any return. Under section 16 the Collector is given wide powers of

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inspection, examination of records and accounts of the mill, etc., for the purpose of testing the accuracy of any return or of informing himself as to any particulars regarding which information is required for the purpose of the Act, and under rule 3 of the rules framed under the Act he has to check the return in any manner that may appear to him desirable and may for such purpose examine and compare the records and accounts of the mill. Ample provision is thus made for arriving at a correct assessment of the duty independently of the information furnished by the return. The return in fact is only intended to facilitate assessment and cannot be described as an indispensable pre-requisite of it.

But even if the Act and the rules thereunder were less explicit, I think that, the liability to duty being clear, it would be improper to conclude that no means exist of realising it unless the language of the Act compelled such a view.

"One of the first principles of law with regard to the effect of an enabling Act is that, if the Legislature enables something to be done, it gives power at the same time, by necessary implication, to do everything which is indispensable for the purpose of carrying out the purpose in view."

(Craies on Statute Law, Third Edition, page 227.)

"It seldom happens",
says CLEASBY B. in *Scott v. Legg*(1),

"that the framer of an Act of Parliament or the Legislature has in contemplation all the cases which are likely to arise, and the language therefore seldom fits every possible case. Whenever the case is clearly within the mischief, the words must be read so as to cover the case if by any reasonable construction they can be read so as to cover it, though the words may point more exactly to another case; this must be

(1) (1876) 2 Ex.D. 39.

done rather than make such a case a *casus omissus* under the statute."

A case decided upon these principles, raising a question somewhat similar to that with which we are dealing, is *Dutton v. Atkins*(1). Under the Vaccination Act of 1867, a Justice had the power, upon information laid, of summoning a parent to appear before him with the child and of ordering the child's vaccination. A parent who was so summoned refused to produce his child and the Justice deemed himself unable to make an order on the ground that the appearance of the child was necessary in order to give him jurisdiction. Upon this, BLACKBURN J. observed:

"The meaning of the Act seems to be this. In the first instance, the parent is to be summoned, and he is to be directed to bring the child with him; but it cannot be a condition precedent to the Magistrate's jurisdiction to make an order that the child is brought, otherwise the absurdity would follow that by appearing without the child the parent might always defeat the operation of the statute. If the child is brought the examination of the child might be sufficient, but evidence would probably have to be taken; and if, without examination of the child, the Magistrate is satisfied, after examination of evidence, that the child has not been vaccinated, he may, if he thinks fit, make an order."

MELLOR J. delivering judgment to the same effect observed :

"If the parent refuses to produce it, it is not to be supposed that that is to obstruct the operation of the Act and prevent the Magistrate from proceeding and making an order, if, after examination of the evidence, he finds that the child has not been vaccinated."

Similarly here the return which the mill-owner has to submit would afford good *prima facie* evidence of the quantity and value of the

(1) (1871) 6 Q.B. 373.

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goods produced at the mill. But if the owner refuses to make the return he must not thereby be allowed to obstruct the working of the Act and prevent the Collector from obtaining the required information in some other manner and so making the assessment. It is no doubt true that a statute which imposes a duty must be strictly construed, but only I think in so far as the imposition of the liability is concerned. The principle does not extend to mere matters of procedure devised as the best means in all ordinary circumstances to collect the impost. A case which emphasizes this distinction is *Werle & Co. v. Colquhoun*(1), where the contention was raised that the Crown could not assess a firm of wine merchants operating from abroad to income-tax because they possessed in England no such agent or factor as was contemplated by the statute. This consideration was characterized by Lord ESHER M.R. as only a matter of machinery and in no way limiting the right to make an assessment; and similar language was used by FRY L.J. Dealing with the principle that a person should not be permitted to profit by his own default, Lord ESHER M.R., in *Gowan v. Wright*(2), says :

"I find in Maxwell on the Interpretation of Statutes, page 184 (page 180 in the seventh edition), in a section headed, 'construction against impairing obligations or permitting advantage from one's own wrong', the principle resulting from the various authorities there collected expressed as follows:— 'On the general principle of avoiding injustice and absurdity any construction would be rejected, if escape from it were possible, which enabled a person to defeat a statute or impair the obligation of his contract by his own act or otherwise to profit by his own wrong.'"

(1) (1888) 20 Q.B.D. 753.

(2) (1886) 18 Q.B.D. 201.

The learned Master of the Rolls proceeds to summarize a number of cases illustrative of this principle.

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The only argument that remains to be considered under this head is that the statute does in fact provide an alternative procedure, because under section 25 a penalty not exceeding Rs. 1,000 is awardable for the offence of omitting to make the return required by section 8. If the argument is that by resorting to a prosecution a sum of money equal to the duty may be extracted the answer is in the first place that the amount of the fine lies in the discretion of the Court and not of the Revenue authorities, and secondly that a fine imposed for failing to make a return is in no sense duty and the duty would still remain unpaid; nor does the Act provide any means whereby, even if a prosecution is resorted to and a fine imposed, the owner can be compelled to furnish the return.

We are not here concerned with the precise means adopted by the Revenue Divisional Officer in assessing the duty in the absence of any information supplied by the mill-owner. Not only did the latter fail to submit any returns, but he failed to maintain or at any rate to preserve the registers and accounts which the Act required him to keep, so that in the absence of them an estimate had to be formed of the value of the goods produced upon the best information available. If it be granted that the power to assess independently of any return is given by the Act the method and result of such assessment may be the subject of departmental appeal, but so long as it conformed to ordinary notions of fairness it cannot be questioned in a suit of this character.

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The second contention is that, even if the Act allowed an assessment to be made in the circumstances of this case, it does not authorize the collection of arrears of duty—at any rate—arrears occurring over a period of years. Admittedly it does not expressly impose any time limit but it is contended that there is implied in its provisions a more or less immediate assessment and collection of the duty. The duty, it is said, is leviable on a monthly basis in the interests of the producer, so that he may be in a position to fix the price of his goods and to dispose of them; and it would work hardship if it were allowed to remain for any length of time unassessed and uncollected. There are I think several considerations which weaken the force of this argument. In the first place the producer can be under no misapprehension as to his position because he will know the quantity and value of the goods produced, and the duty is fixed by the Act at three and a half per cent of the value. No restriction is imposed upon the disposal of the goods pending the completion of the process of collection under the Act. Lastly, the argument from convenience comes somewhat ill from a party whose grievance if any arises from his own failure to comply with the Act. It may be that collection and assessment of the duty was fixed upon a monthly basis in the interests of the assessee as well as of the revenue, but, if the return which was to form the initial step in such a procedure is withheld, it would be unreasonable to insist that it is still incumbent upon the revenue department either to assess the duty month by month or to forego their revenue altogether. Where there is a liability and no express

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provision limiting its realization it is to be inferred that it may be realized at any time after it arises. I can find nothing in the Act to preclude the Collector from so collecting it. Indeed Mr. Sesha Ayyangar frankly admits that he cannot formulate any exact rule upon this point. But unless there can be such a rule, it is not possible to say that, in respect of the duty payable for any particular month, the assessment and demand are out of time. Section 34 of the Income-tax Act affords an example of the existence of such a provision, income which has escaped assessment in any one year being assessable if a notice be served within one year of the end of that year. We have been asked to find another analogy in the payment of profession tax under the Madras City Municipal Act (IV of 1919) and some reliance has been placed upon *Prince of Arcot v. Corporation of Madras*(1), which deals with a case arising under that Act. In respect of an allowance received from Government the Commissioner of the Corporation assessed the Prince of Arcot to profession tax in September 1926 for the ten half-years commencing from the second half-year of 1920-21 and the question arose whether this assessment could be made so as to comprise such arrears. The answer given by the Bench was in the negative, the scheme of the Act requiring that the assessment must be made during the period to which it relates. I do not think that this decision affords much help in the present case. In the first place it lay upon the Municipality and not upon the tax-payer to take the initial step and some consideration was

(1) (1929) I.L.R. 52 Mad. 866.

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given to the inconvenience or hardship which would be involved in such arrear collections. There was no question in that case of a default on the part of the assessee. It was also held that the tax was in the nature of a licence which has to be paid contemporaneously, whereas here it is recoverable after the expiry of the period to which it relates. In their discussion of the question whether the tax was "due" I do not understand the learned Judges to mean that liability had never arisen for its payment, because section 113 of the Madras City Municipal Act clearly makes residence *ipso facto* give rise to liability, thereby differing from the case of water-cess dealt with in *Raja Ramachandra Appa Row v. Secretary of State for India*(1). There was in fact a liability to the tax, but it was not "due" until it had been assessed, and the same is true in the present case. But that does not affect the question whether or not liability for arrears can be enforced. Some attempt has also been made to derive assistance from the Sea Customs Act (VIII of 1878) several of the provisions of which have by section 10 of the Cotton Duties Act been applied to the assessment and recovery of duties under that Act. Section 39 provides that where customs duties have been short-levied the deficiency shall be recoverable on demand made within three months from the date of the first assessment. This is one of the sections which has been extended, but it can be of no help to the appellant, even if it applied to circumstances like the present, because the three months is to run not from the date when the liability arises but from the assessment of it.

(1) (1911) I.L.R. 35 Mad. 197.

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I must find accordingly that a person who has become liable to pay duty and who fails to submit the return required by section 8 of the Act cannot plead lapse of time between the production of his goods and the initiation of steps to assess them as a defence to the claim.

The third point taken is that the duty is payable by the owner, and that the owner of the factory at the time when the assessment was made was the plaintiff's vendee. I do not think it is necessary to decide the general question which would have arisen had the requirements of the Act been complied with. There is no doubt that at the time when the plaintiff was called upon to submit a return and failed to do so he was the owner of the factory. Had he duly complied there is equally little doubt that he would have been liable to make the payment. It is not possible to hold that he escapes by reason of his failure to comply with the direction. He was the person who made a profit from the goods which were liable to duty and I think he was properly called upon to pay it.

The result of these findings is that the levy of duty made by the defendant was legally valid and that the plaintiff's suit for refund has been rightly dismissed. The appeal is dismissed with costs.

SUNDARAM CHETTI J.—I agree.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Krishnan Pandalai.

1933,
April 7.

RANGAPPAYA AITHALA AND TWO OTHERS (PLAINTIFFS),
APPELLANTS,

v.

SHIVA AITHALA AND TWO OTHERS (DEFENDANTS),
(RESPONDENTS).*

*Hindu Law—Widow—Maintenance—Right of—Nature of—
Apportionment—English Common Law doctrine of—Applicability of.*

The right of a Hindu widow to maintenance is traceable to the property out of which in her husband's lifetime she would be maintained and on which her maintenance was and remained a charge. In its origin the right is one which accrues from day to day during her lifetime, and she is entitled to be paid her necessary expenses as and when they arise. It is not a right depending on any contract for whose performance a due date is previously agreed upon.

The fixing of a date for the annual payment of maintenance cannot have the effect of altering the nature of the right by cutting it down to an annual payment for every completed year of existence.

Where the surviving coparceners in a joint Hindu family executed an agreement charging specific family property to pay to the widow of a deceased member maintenance at a certain rate on a particular date in each year for the previous year, and the widow died on an intermediate date,

Held, that the widow's heirs were entitled to recover the proportionate amount due after the last payment till the date of her death and that the English Common Law doctrine as to apportionment was inapplicable to the case.

APPEAL against the decree of the Court of the Subordinate Judge of South Kanara in Appeal

* Second Appeal No. 837 of 1931.

Suit No. 106 of 1930 (Appeal Suit No. 293 of 1929, District Court of South Kanara) preferred against the decree of the Court of the District Munsif of Mangalore in Original Suit No. 10 of 1929.

K. Y. Adiga for appellants.

B. Sitarama Rao for respondents.

Cur. adv. vult.

JUDGMENT.

The question in the case is whether the heirs of a Hindu widow in whose favour the head of her husband's family has executed an agreement charging specific family property to pay her maintenance at a certain rate on a particular date in each year for the previous year can, if she dies on an intermediate date, recover the proportionate amount due after the last payment till the date of her death.

The facts are not in dispute. The plaintiffs and defendants 2 and 3 represent one brother and the first defendant another brother, and the father-in-law of Mahalaxmi Hengsa was the third (eldest) brother in a joint Hindu family. On 2nd June 1870 after the death of Mahalaxmi's husband and father-in-law, the father of plaintiffs as the eldest surviving brother and head of the family executed in her favour a registered agreement, Exhibit B, charging some of the family properties agreeing to pay her for each year from 1st Chaitra Sudha (about 25th March) of 1870 maintenance at Rs. 68 and 21 *muras* of rice per year, the payments to begin on 1st Chaitra Sudha (about 25th March) 1871 and on default of punctual payment to pay interest at 12 per cent on the money and customary interest in kind on

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the rice. In 1875 the plaintiffs' and first defendant's branches partitioned the family property including the properties charged for Mahalaxmi's maintenance and the deed stipulated that the first defendant's branch would pay their half share of the maintenance to the plaintiffs' father who was to pay the whole maintenance over to Mahalaxmi. Mahalaxmi died on 2nd March 1917, the due date as per the agreement for payment of that year's maintenance being 23rd March 1917. Her heirs on her death were the plaintiffs and the father of defendants 2 and 3 who are nearer by one degree to her husband than the first defendant. The suit was brought by plaintiffs as her heirs for recovery for themselves and defendants 2 and 3 from the properties charged in the possession of first defendant one half of the proportionate amount of maintenance due for the year ending 23rd March 1917 less the 21 days before Mahalaxmi's death. The lower Courts have held that the whole year's maintenance fell due after Mahalaxmi's death, that the claim is not apportionable from day to day and that the plaintiffs have no cause of action. The suit was accordingly dismissed. Hence this appeal by the plaintiffs.

No Indian authority applicable either way has been referred to in the judgment of the Courts below or in the arguments before me. Apparently the lower Courts rely, as the respondents' learned Advocate wants me to rely, on the old Common Law doctrine that except in the case of interest on money lent an entire contract is not apportionable either as to time or partial performance. (Story on Equity, sections 470 to 475, third English edition.) In England this doctrine was all but entirely

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abolished by the Apportionment Act, 1870, 33 and 34 Vic. c. 35 (Chitty's Statutes, 6th edition, Vol. I, page 393). In India the statutory provision contained in section 36 of the Transfer of Property Act is applicable only as between transferor and transferee of the benefit of the payment and not as between the person liable for and the person entitled to the payment. Section 340(2) of the Succession Act applies to wills only. There is no statutory provision in India applicable to the case and the question is whether the old Common Law rule is to be applied to maintenance due under the Hindu Law and, even if generally not to be so applied, whether there being an express contract, Exhibit B, making the maintenance payable on a certain date in the year, the rule should be applied to this case.

My first observation is that primarily the law to be applied to the case is not the English Common Law but the Hindu Law, and if there is no specific rule in that law on the question, the rule of justice, equity and good conscience; the rule of justice, equity and good conscience; section 16, Civil Courts Act, 1873. According to Hindu Law, the obligation to maintain widows is dependent on taking the property of the deceased by inheritance or survivorship; see Mayne's Hindu Law, section 451, citing the Smriti Chandrika XI-I, section 34. Mahalaxmi, being the widow of a coparcener whose share was taken on his death by the other branches, was entitled to be maintained by them after his death and this right was enforceable, as indeed Exhibit B recognizes, against the whole family and not only against the branch which took by survivorship his undivided share; vide *Subbarayulu Chetti v.*

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Kamalavallithayaramma(1). The right is traceable to the property out of which in her husband's lifetime she would be maintained and on which her maintenance was and remained a charge. In its origin therefore the right is one which accrues from day to day during the lifetime of the wife or widow who is entitled to be paid her necessary expenses as and when they arise. It is not one depending on any contract for whose performance a due date is previously agreed on. That being so, it is clear to me that, if there were no such express contract as is found in Exhibit B fixing a particular date for the payment of each year's maintenance, the respondents' contention that Mahalaxmi could not demand maintenance for the incomplete period of eleven and odd months during which she lived after receiving the last payment would be unfounded.

This being the nature of the right, I think, the fixing of a date for the annual payment had not, and was not intended to have, the effect of altering the nature of the right by cutting it down to an annual payment for every completed year of existence. The date was fixed for convenience both for those who paid and for the widow who was to receive.

I therefore think that the view of the lower Courts was erroneous and that the appellants as heirs of Mahalaxmi are entitled to the arrears till her death and interest thereon as per Exhibit B till date of plaint and interest at 6 per cent from date of plaint. The decree of the lower Courts is set aside. Though it was agreed by the parties that second-class Gazette rates should be adopted

(1) (1911) I.L.R. 35 Mad. 147.

for valuing the rice the District Munsif has not recorded a finding what that rate is. It is therefore impossible now to pass a decree. The case will be sent back to the District Munsif with the direction to pass a decree for sale in accordance with the above. The appellants will have their costs in this Court and in the lower appellate Court. The District Munsif will provide for the costs hitherto incurred and hereafter to be incurred in his Court in the revised decree.

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APPELLATE CIVIL.

Before Mr. Justice Curgenvven and Mr. Justice Sundaram Chetti.

KALEPALLI RAJITAGIRIPATHI (PLAINTIFF),
APPELLANT,

v.

JANNAVULA PEDAKOTAYYA AND THREE OTHERS
(DEPENDANTS), RESPONDENTS.*

*Madras Estates Land Act (I of 1908), sec. 112—Lawful ryot
—Sale without proper notice to—Nullity of—Affixture—
Service of notice by—When to be resorted to.*

A sale held under section 112 of the Madras Estates Land Act without proper notice to the lawful ryot is a nullity. *Kootoorlingam Pillai v. Sennappa Reddiar*, (1931) 61 M.L.J. 203, approved.

Service of notice by affixture should be resorted to only if personal service cannot be effected.

APPEAL against the decree of the District Court of Kistna at Masulipatam in Original Suit No. 19 of 1927.

* Appeal No. 234 of 1928.

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T. Ramachandra Rao for appellant.
S. Varadachari and S. V. Venugopalachari for respondents.

Cur. adv. vult.

CURGENVEN J. The JUDGMENT of the Court was delivered by CURGENVEN J.—The plaintiff, who appeals, was a ryot of the South Vallur Zamindari, and his holding was sold in 1915 for arrears of rent under sections 111 *et seq* of the Madras Estates Land Act, bought in by the landholder, and regranted to the first defendant. He sued in 1927 to recover it, and without taking any evidence, the preliminary issue, whether the suit was within time, was decided against him, and the suit dismissed. The question involved in this issue is this:—whether the sale was held with jurisdiction and had therefore, if found irregular, to be set aside, or whether it was held without jurisdiction and was therefore a nullity. In the former case it is admitted that, whichever article of the Limitation Act is applicable—articles 12, 95 or 120—the suit would be out of time. In the latter the plaintiff could ignore the sale, and the suit would be within the twelve years available for recovery of the property.

The learned District Judge has proceeded upon the assumption, which is made upon the allegations in the plaint and in the absence of evidence to the contrary, that personal service of notice on the sale was neither made nor attempted upon the plaintiff, but that service by affixture was made; and he has held that, although the sale was irregular or illegal, it was not a nullity. Provision for the service of notice upon the default

is contained in section 112 of the Act. Four copies of the notice are to be sent to the Collector,

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“who shall cause service to be effected by delivering a copy to the defaulter or to his authorized agent, or to some adult male member of his family at his usual place of abode, or, if such service cannot be effected, by affixing a copy thereof on some conspicuous part of his last known residence, if he has any, within ten miles of the holding, or on some conspicuous part of the holding.”

There is no doubt, we think, that if no service is effected at all the sale will be void. That has been held by RAMESAM J. in *Kootoorlingam Pillai v. Sennappa Reddiar*(1), the learned Judge observing :

“In my opinion, notice to the lawful ryot is such an important condition precedent to the holding of the sale under section 112 that the want of it must be regarded as making the sale a nullity.”

A similar view has been expressed in the case of a sale in execution by a Full Bench of this Court in *Rajagopala Ayyar v. Ramanujachariar*(2) following a decision by the Privy Council in *Raghunath Das v. Sundar Das Khetri*(3). Mr. Varadachari would rely upon an earlier Full Bench decision in *Venkata v. Chengadu*(4) under the Madras Revenue Recovery Act (II of 1864), which held that failure to issue a notice was not a defect which affected jurisdiction, and that, so long as an arrear was found to exist, if a sale was conducted it was a proceeding under the Act which had to be set aside. Whether or not in view of the more recent decisions this is still good law so far as the Revenue Recovery Act is concerned we do not think it is necessary to express an opinion. There is enough authority,

(1) (1931) 61 M.L.J. 203.

(2) (1923) I.L.R. 47 Mad. 288 (F.B.).

(3) (1914) I.L.R. 42 Calc. 72 (P.C.).

(4) (1888) I.L.R. 12 Mad. 168 (F.B.).

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we think, for the view taken by RAMESAM J., which we propose to adopt.

The question then which this case actually raises is whether service by affixture, where no attempt has been made to effect personal service, stands upon a different footing from no service at all, and does not render a sale a nullity. The point is bare of authority, and we can only decide it by reference to general principles. In the first place, such a course involves an express breach of the statute, which provides that only if personal service cannot be effected shall service by affixture be resorted to. The reason for requiring this condition precedent to service by affixture is clear; personal service alone affords a guarantee that the defaulter is apprised of the projected sale, and not until that course has been found impracticable may the less effectual method of service be adopted. The principle involved is of course that no order should be made against a person to his detriment unless and until he has been afforded an opportunity to appear and shew cause against it. It is a principle which is violated by the failure to issue notice, and it seems to us that it is also violated, though perhaps not so flagrantly, by the omission to follow a direction of law which is devised to secure that it is observed. The difference between the two cases is one of degree rather than of kind. In the one case no steps are taken to inform the defaulter, in the other the steps taken are so defective that in a certain number of cases he will not be informed. As an abstract proposition of law we think that in neither case ought a sale so held to be regarded as otherwise than a nullity.

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We must accordingly differ from the Court below, and hold that on the materials at present available, i.e. the pleadings, the suit is not shown to be barred. It will of course be open to the defendants to show that the terms of section 112 with regard to personal service were complied with or that for any other reason appearing from the pleadings the suit is barred. The appeal is allowed, the decree set aside and the suit remanded for further trial and disposal according to law. Costs in this Court will abide the result. The appellant will be entitled to a refund of the court-fee on the memorandum of appeal.

G.B.

APPELLATE CRIMINAL.

Before Mr. Justice Ramesam and Mr. Justice Curgenven.

In re KAVANNA NAGUTHA MUHAMMED NAINA
MARIKAYAR (ACQUSED), PETITIONER.*

1933,
May 30.

Fugitive Offenders Act of 1881 (44 and 45 Vic. c. 69), ss. 14 and 19—Order refusing extradition—Order under ss. 14 or 19—Appeal to High Court from—Competency of—Remand of case for reception of evidence in—Power of—Code of Criminal Procedure (Act V of 1898), sec. 491—Person detained under order of High Court—Application by, for writ of Habeas Corpus—If lies to a Bench of same Court.

A complaint was filed before the Police Magistrate of Singapore against petitioner who was subsequently arrested in British India on a warrant issued by the Police Magistrate to the District Superintendent of Police of South Arcot. Petitioner was brought before the District Magistrate under sec. 13 of the Fugitive Offenders Act, 1881, for extradition, which was

* Criminal Miscellaneous Petition No. 325 of 1933.

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refused ostensibly under section 14. On appeal to the High Court, the District Magistrate was directed to take fresh evidence before passing final orders under section 14. The District Magistrate after further enquiry directed extradition of the petitioner. An appeal to the High Court was dismissed. On an application under section 491 of the Criminal Procedure Code (Act V of 1898) for the issue of a writ of *Habeas Corpus*,

Held, that an appeal lay to the High Court against the order of the District Magistrate refusing to order the extradition of the petitioner, and that, in disposing of the appeal, the High Court was competent to remand the case for the reception of evidence.

Per CURGENVEN J.—*Quære* whether, when a person has been detained under an order of a High Court, an application under section 491 of the Criminal Procedure Code for the issue of a writ of *Habeas Corpus* will lie to a Bench of the same Court.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *Habeas Corpus* to the District Magistrate of South Arcot directing him to release the petitioner therein forthwith from the custody of his bail and to set him at liberty.

K. S. Jayarama Ayyar and S. K. Ahmed Meeran for petitioner.

A. Narasimha Ayyar for Public Prosecutor (L. H. Bewes) for the Crown.

M. A. T. Coelho and D. Israel for the complainant.

Cur. adv. vult.

ORDER.

RAMESAM J.

RAMESAM J.—The facts so far as they are necessary for this petition are as follows. A complaint was filed before the Police Magistrate of Singapore against the petitioner before us on 17th July 1931 charging him with criminal misappropriation. The petitioner returned to British India

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about the middle of 1931. The Police Magistrate issued a warrant for the arrest of the petitioner to the District Superintendent of Police of South Arcot. The warrant was endorsed by the District Magistrate and the petitioner was arrested under the warrant and brought before the District Magistrate under section 13 of the Fugitive Offenders Act. Mr. Boulton, the District Magistrate of South Arcot, was of opinion that he was not bound to comply with all applications for extradition. He thought his discretion in dealing with the matter was not limited to the particular circumstances mentioned in section 19 and he therefore refused to order the extradition of the petitioner. There was an appeal to the High Court which came on before WALLACE J. No objection was taken before WALLACE J. that no appeal lay to the High Court on the ground that the order was under section 14 and not under section 19. WALLACE J. disagreed with Mr. Boulton. He thought that all the grounds on which a District Magistrate may refuse to order extradition are contained in section 19 and he directed the District Magistrate to take fresh evidence before making final orders under section 14, and dispose of the matter according to law. The new District Magistrate after further inquiry directed the extradition of the petitioner. There was an appeal to the High Court and the appeal was dismissed by our brother BURN J. The present application is filed under section 491 for the issue of a writ of *Habeas Corpus*. The matter accordingly comes before us.

Mr. Jayarama Ayyar, the learned Advocate who appeared for the petitioner, first contended

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that there is no appeal under the Fugitive Offenders Act against an order under section 14 and that the judgment of WALLACE J. was therefore *ultra vires* and must be regarded as a nullity. I have already pointed out that the objection was not taken before WALLACE J. It is true that mere consent does not confer jurisdiction and in a case in which the matter is perfectly plain it may be that the order of a Court acting without jurisdiction must be regarded as a nullity. But the matter before us is not such a perfectly plain matter. Even conceding for the sake of argument that an order under section 14 is a totally different order from one under section 19 and that the operations of the two sections are exclusive, it is not very clear that the appellate jurisdiction of the High Court is excluded. It is possible to argue that the High Court as a superior criminal Court is competent to act either under section 107 of the Charter Act or in some other way. But apart from this consideration it seems to me perfectly plain that the scheme of the Act shows that sections 14 and 19 cannot be separated into two rigidly watertight compartments. Sections 14 to 18 of the Act enumerate the various instances where extradition warrants may be issued. Section 14 relates to the case of an accused ; section 16 provides for a provisional warrant pending the arrival of the warrant issued by the magisterial authority in the first British Possession ; section 17 relates to a case where the warrant has not been carried out for a month. Section 18 provides for the case where the prisoner after being returned was not prosecuted. Having enumerated these various cases of special powers under the Act,

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section 19 deals with the discretion which the Magistrate in the second British Possession has in cases where the return of the prisoner is sought or ordered under the Act. The case where the return is ordered obviously relates to the case of a later stage than section 14, but the case where the return of the prisoner is sought relates to a case under section 14 so that it looks as if one part of section 19 and section 14 overlap and section 19 deals with the discretion which the Magistrate dealing with the matter under section 14 has. So regarded, it cannot be said that an order under section 14 refusing to return the prisoner is not an order under section 19. It is true that Mr. Boulton on his interpretation of the sections thought that he was acting under section 14 only and not exercising the discretion with reference to section 19. But if his interpretation of the sections is not correct, and on this matter I agree with WALLACE J., every order under section 14 relating to a prisoner whose return is sought is merely an order under section 19 and in my opinion an appeal lay to the High Court.

The second point raised by Mr. Jayarama Ayyar is that, assuming an appeal lay, the High Court had no jurisdiction to order the taking of further evidence as the Act does not provide for the superior Court directing the taking of further evidence. Now the Act does not say anything about the powers which the appellate Court may exercise. It looks therefore as if the Act is not complete in itself ; and one would therefore infer that what the superior Court should do is left by the Legislature to the law of the particular British Possession relating to appeals. Obviously

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the appellate Court must do something and even if, as contended by the petitioner, the only power which the appellate Court has is to direct the return or to confirm the lower Court's order, the fact that the appellate Court has passed an order of a slightly different kind does not make it an order without jurisdiction. We sometimes use the word "jurisdiction" loosely in such cases. A case of that kind must be regarded more as an irregular exercise of jurisdiction than as a case of a total lack of jurisdiction. Now, when a jurisdiction exists, however irregularly it may be exercised, the order cannot be regarded as a nullity. Here again it is necessary to point out that the matter was not brought to the notice of WALLACE J. at the time of delivering judgment nor was any objection taken before BURN J. We are not sitting in appeal against the orders of BURN J. or of WALLACE J. We are neither an appellate Court nor a revision Court and to attack the validity of the judgment of WALLACE J. and to contend that his order amounts to a nullity in a collateral proceeding of this kind, I do not think, is permissible. I make these remarks on the assumption that WALLACE J. had no power to direct the taking of further evidence. But even this is not really very clear. No authority has been cited before us to show that in general, where a right of appeal is given but nothing more is said about the powers of the appellate Court, the appellate Court's powers are limited and the appellate Court cannot direct the taking of further evidence or direct further inquiry. The decisions in *Rama Aiyar v. Venkatachella Padayachi*(1) and *Krishna Reddy v.*

(1) (1907) I.L.R. 30 Mad. 311.

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Emperor(1) relate to the powers under section 195, Criminal Procedure Code, and I do not think they are strictly relevant. They do not lay down any general principle. These cases are applied by DEVADOSS J. to a case under section 476 in *Sami Vannia Nainar v. Penasami Naidu*(2). If this last-mentioned case is to be regarded as correctly decided, it can only rest on the language of section 476-B of the Code and I do not think it can be supported on the ground that a similar conclusion was arrived at in cases under section 195, Criminal Procedure Code. But we find that the decision in *Sami Vannia Nainar v. Penasami Naidu*(2) has not been followed by the CHIEF JUSTICE, BARDSWELL and BURN JJ. in a case recently decided, *Janardana Rao v. Lakshmi Narasamma*(3). In that case it was held that, though section 428 may not apply to an appeal against an order under section 476 on account of the words "any appeal under this chapter", still the rest of Chapter XXXI is applicable and clauses (c) and (d) of section 423 are wide enough to enable the appellate Court to direct the taking of further evidence. They also rely on a decision of the Calcutta High Court in *Muhammad Bayetulla v. Emperor*(4). Mr. Jayarama Ayyar contended that directing of further evidence is not a consequential or incidental order and he relied on *Mehi Singh v. Mangal Khandu*(5). I do not think this case helps him. There may be cases where the appellate Court, while feeling that the lower Court's order is wrong, feels it is unable to dispose of the case one way or another

(1) (1909) I.L.R. 33 Mad. 90.

(2) (1927) I.L.R. 51 Mad. 603.

(3) (1933) I.L.R. 57 Mad. 177 (F.B.).

(4) (1930) I.L.R. 58 Calc. 402.

(5) (1911) I.L.R. 39 Cal. 157 (F.B.).

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and in such cases a direction for further inquiry may be a consequential or incidental order. I am therefore inclined to agree with the decision of the Full Bench. But the whole of this discussion merely shows that there is no such general principle as that an appellate Court has no inherent power to direct a further inquiry. The remarks of Lord ALVERSTONE C.J. in *Rex v. Governor of Brixton Prison. Percival, Ex parte*(1),

"I have felt very grave doubt whether, . . . we ought not to send the case back to the magistrate, so that he might allow further evidence to be given as to the law of Victoria, or whether we might ourselves have required that evidence to be given to us; . . ."

and similar remarks of DARLING J. at page 708 :

" . . . without doing that which I am quite clear we could do, viz., either send it back to the magistrate and point out to him the defect in the proceedings . . . and allow him to have the prosecution reopened and evidence given, or else require for our own information an affidavit shewing what the law of Victoria applicable to this case is."

confirm my opinion. I therefore think that the order of WALLACE J. is perfectly right and is not vitiated even by an irregularity, much less by want of jurisdiction.

The only other point suggested to us is that the warrant exhausted itself when the petitioner was first brought before Mr. Boulton. When he directed the return of the warrant the High Court stayed the operation of that order and stayed the return of the warrant to Singapore. But apart from that, when the order of Mr. Boulton was set aside, all that happened from the time his order was passed up to the time the case went back before Mr. Vellodi must be regarded

(1) [1907] 1 K.B. 696, 707.

as wiped out and non-existent; and when Mr. Vellodi came to a different conclusion the warrant has got to be executed. In my opinion there is nothing in this point.

The petition must therefore be dismissed.

CURGENVEN J.—I agree with my learned brother that this application must fail. The question whether, when a person has been detained under an order of a High Court, an application of this nature will lie to a Bench of the same Court—amounting as it would virtually to an application to revise that order on the ground of lack of jurisdiction—has not been argued and is certainly not a self-evident proposition. But assuming this point to be found in the petitioner's favour, I agree that the order of WALLACE J. has not been shown to have been passed without jurisdiction. On the contrary, I think the learned Judge was right in holding that an appeal lay from Mr. Boulton's order refusing to order extradition. Section 14 of the Fugitive Offenders Act requires the Magistrate to satisfy himself that the warrant is in order and that the prisoner is the person named or described in it. If he is so satisfied, then, so far as the provisions of that section go, he is to order his return to the British Possession in which the warrant was issued. If he is not so satisfied, then no doubt it is open to him to refuse to make an order, and it may be that no appeal would lie from such refusal. The section contemplates only the matters of form adverted to in it, and not any question of the merits of the application, and in invoking its provisions as affording a means to support a decision upon the merits I think that

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the learned District Magistrate exercised a power which the section does not confer. Even if the section stood alone the mere use of the word "may" would not necessarily confer that power. But in section 19, which must be read with it in order to possess ourselves of a full statement of the Magistrate's powers in dealing with a warrant, we find a specific enumeration of the circumstances in which, upon the merits of the case, an order of discharge may be made. It may be made if it appears that

"by reason of the trivial nature of the case, or by reason of the application for the return of such prisoner not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment, to return the prisoner either at all or until the expiration of a certain period."

Now I think it is clear that, where the Legislature has adopted the course of defining, with some particularity, the circumstances in which extradition may be refused, it is not open to a Court to hold that, merely because the instruction in section 14 is permissive and not mandatory in form, it may ignore the terms of the later section and exercise a discretion not conferred by them. It would be still more objectionable if an order so passed were, as is contended before us, not to be subject to appeal, while an order passed on any of the grounds mentioned in section 19 is appealable. I am inclined to think that the order of the District Magistrate, although ostensibly passed under section 14, could in terms be brought under section 19, because he holds that the case is not one where the interests of justice

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require the rendition of the accused person. But whether that be so or not, I am clear that section 19 is the only provision which enables a Magistrate to adjudicate upon the merits of the application, and, that being so, Mr. Boulton's order must be taken as having been passed under that section. It was therefore appealable.

The only other point deserving consideration is whether, in disposing of the appeal, this Court was competent to remand the case for the reception of evidence. As my learned brother has pointed out, the Fugitive Offenders Act does not define the powers which an appellate Court, may exercise in this behalf, and the only reasonable inference is that it may act in accordance with the normal procedure by which it is governed in the exercise of its appellate criminal jurisdiction. It is hardly to be expected that the language of the Criminal Procedure Code will be found adapted to a case of this nature *verbatim et literim*. It is enough, I think, to point out that, under the provisions of section 423, (a) in an appeal from an acquittal an order may be made directing further inquiry, and (b) in an appeal from a conviction an order may be made directing a retrial. The section further empowers the appellate Court, in language markedly wide, to "make any amendment or any consequential or incidental order that may be just or proper". Furthermore, section 428 empowers an appellate Court to order the reception of further evidence, either by itself or by another Court. In view of these provisions I think it lies somewhat heavily upon the party asserting it to establish that the normal powers of an appellate Court do not include the power to

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remand a case for further inquiry ; and this is the more so because in cases such as the present it may happen that such a course alone would avail to reach a right conclusion. My learned brother has discussed the case law relating to sections 195 and 476 of the Code of Criminal Procedure. In view of the recent Full Bench decision in *Janardana Rao v. Lakshmi Narasamma*(1) they do not help the petitioner. No other authority for the position pressed upon us has been cited. I conclude that the order of remand was passed with jurisdiction, and confers validity upon the subsequent orders passed in this case.

BY COURT :—The petitioner will present himself before the Police Magistrate of Singapore on or before 20th June.

K.W.R.

(1) (1933) I.L.R. 57 Mad. 177 (F.B.).

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Mudhavan Nair, Mr. Justice Jackson and
Mr. Justice Lakshmana Rao.*

N. K. R. M. RAJAGOPALA CHETTIAR (PETITIONER),
APPELLANT,

1933,
April 11.

v.

THE HINDU RELIGIOUS ENDOWMENTS BOARD,
MADRAS, REPRESENTED BY ITS PRESIDENT R. SURYA ROW,
AND FOUR OTHERS (RESPONDENTS ONE TO FOUR AND NIL),
RESPONDENTS.*

*Madras Hindu Religious Endowments Act (II of 1927), sec. 84,
cls. (1) and (2)—Order under sec. 84 (2) on an application
under sec. 84 (1) of the Act—Appealability of.*

There is no appeal to the High Court either under the Hindu Religious Endowments Act or under the Code of Civil Procedure from an order passed by the District Judge under section 84 (2) of the Hindu Religious Endowments Act on an application to the District Court to set aside the decision of the Hindu Religious Endowments Board under section 84 (1) of the said Act.

APPEAL against the order of the District Court of East Tanjore at Negapatam in Original Petition No. 31 of 1931.

This appeal coming on for hearing before MADHAVAN NAIR and JACKSON JJ., the Court made the following

ORDER OF REFERENCE TO A FULL BENCH.

The question for decision in this appeal is whether the order passed by the District Judge under section 84 (2) of the Madras Hindu Religious Endowments Act (II of 1927) on an application made to the District Court to set aside the decision of the Hindu Religious Endowments Board passed under section 84 (1) of the Act is appealable to the High Court. It was

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held by a Bench of this Court (REILLY and CORNISH JJ.), in Appeal No. 44 1931, that such decisions are not appealable as they do not fall within the definition of decrees as defined by the Code of Civil Procedure. If we follow that decision this appeal will have to be dismissed but CORNISH J. is not—so it appears to us—apparently prepared to affirm this decision as he and RAMESAM J. have sent this appeal for hearing before another Bench. This being so, we think, it will be more convenient if this case is heard by a Full Bench.

V. V. Srinivasa Ayyangar and K. Sankara Sastri for appellant.

P. Venkataramana Rao (Government Pleader) for first respondent.

B. Govindan for second respondent.

R. Sundaralingam for third and fourth respondents.

S. G. Rangaramanujam for fifth respondent.

Cur. adv. vult.

OPINION.

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MADHAVAN NAIR J.—This case relates to the Sri Rajagopalaswami temple at Ammayappan in the East Tanjore District. The appellant contends that the temple is an excepted temple. Under section 84 (1) of the Madras Hindu Religious Endowments Act,

“if any dispute arise as to whether a math or temple is one to which this Act applies or as to whether a temple is an excepted temple, such dispute shall be decided by the Board.”

The Hindu Religious Endowments Board by its order, dated 31st January 1931, decided that the temple is not an excepted temple. Under section 84 (2),

“a trustee affected by a decision under sub-section (1) may within one year apply to the Court to modify or set aside such decision but, subject to the result of such application, the order of the Board shall be final.”

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The appellant applied to the District Court to set aside the decision of the Board, but the District Judge confirmed its order. The appellant has now appealed to the High Court against the decision of the District Court. It is contended by the first respondent (The Hindu Religious Endowments Board) that under section 84 (2) no appeal lies to the High Court against the decision of the District Judge. This contention is supported by a decision of a Bench of this Court in Appeal No. 44 of 1931 which held that there is no right of appeal to the High Court against an order by the District Court under section 84 (2) of the Act. It is argued by Mr. Srinivasa Ayyangar for the appellant that this decision requires reconsideration and that an appeal lies to the High Court against such an order. The question we have to decide in this Full Bench is

“whether the order passed by the District Judge under section 84 (2) of the Hindu Religious Endowments Act on an application made to the District Court to set aside the decision of the Hindu Religious Endowments Board under section 84 (1) of the Act is appealable to the High Court.”

The law is well-settled that it cannot be assumed that there is a right of appeal in every matter which comes under the consideration of a Judge. Such right may be given by statute or some authority equivalent to a statute; *Minakshi v. Subramanya* (1). Unless it is so given a right of appeal does not exist. Mr. Srinivasa Ayyangar does not contend that the Act expressly gives the appellant a right of appeal to the High Court against orders passed under section 84 (2), but what he first contends is that there is nothing in

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the Act to signify that there is no right of appeal to the High Court. On this point Mr. Venkata-ramana Rao contends that the Act clearly forbids an appeal to the High Court. As the appellant's right of appeal is statedly based by his learned Counsel not on the provisions of the Act but on the general law as embodied in the Civil Procedure Code, it is really not necessary to discuss this contention; but as the point has been argued I shall deal with it very briefly. In this connection our attention has been invited to the language used in the Act in describing the finality of the orders of the District Court in sections 53 (4) and 76 (3) on one side, and sections 77 (2) and 84 (2) on the other. Section 53 deals with the removal and dismissal of trustees by the Committee. Clause 4 of that section states :

"The order of the committee under this section shall, when no appeal is preferred or application made under sub-section (3), be final; and when such appeal is preferred or application is made the order of the Board or the Court, as the case may be, shall be final."

The application mentioned here is the application to the District Court. Section 76 deals with the alienation of immovable trust property belonging to any mutt or temple. Clause 3 of the section states that

"the order of the Board or committee under sub-section (1) when no application is made under sub-section (2) and the order of the Court when such application is made shall be final."

These two sections state clearly that the orders passed by the District Judge on applications made to the District Court under those sections are final and therefore not appealable. Now observe the language of sections 77 (2) and 84 (2). Section 77 (2) states:

"Any party affected by an order under sub-section (1) may within such time as may be prescribed apply to the Court to modify or set aside such order but, subject to the result of such application, the order of the Board shall be final."

Section 84 (2), already quoted, states that

"a trustee affected by a decision under sub-section (1) may within one year apply to the Court to modify or set aside such decision but, subject to the result of such application, the order of the Board shall be final."

Now it cannot be disputed that there is a difference in the language of the two sets of sections referring to the finality of the orders of the District Court. Mr. Srinivasa Ayyangar argues that, whereas in sections 53 (4) and 76 (3) it is clearly stated that the order of the Court shall be final, it is not so stated in sections 77 (2) and 84 (2), and that the contrast in the language shows that an appeal to the High Court against the decision of the District Court under section 84 (2) is not forbidden by the Act, for, if it was so forbidden, the Legislature would have said, as it has said in the other two sections, that the order of the Court shall be final. This argument is not without force, but it becomes more forcible when we remember that section 77 which uses in clause (2) the language

"subject to the result of such application (to the Court), the order of the Board shall be final"

comes *immediately after* section 76 (3) which uses the language

"the order of the Court when such application is made shall be final."

It is argued by the appellant that no reason can be assigned for the difference in the language used unless it be that the Legislature did not desire to forbid appeals against the orders passed by the

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District Court under sections 77 (2) and 84 (2). The difficulty in construing these provisions in the Act has been commented upon by this Court in *Iswarananda Bharathi Swami v. H.R.E. Board, Madras*(1) where, after remarking with reference to these sections that

“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”,

ANANTAKRISHNA AYYAR J. says :

“The question suggests itself whether there is any, and if so, what, difference between saying that ‘the order of the Court when such application is made shall be final’ and saying ‘subject to the result of such application to the Court, the order (of the Board) shall be final’.”

But the line of discussion suggested by this question was not pursued as it was not necessary for the disposal of the case before the Court; nor is it necessary to pursue the discussion any further in this case also, as the appellant, as already stated, does not purport to base his right of appeal on the provisions of the Act, his contention being only that the Act does not forbid an appeal to the High Court. However, it may be stated that, though it is difficult to account satisfactorily for the difference in the language used in the two sets of sections, it is not clear despite the close proximity of the two sections 76 and 77 that the Legislature by using different language really intended to produce a different effect. The expression,

“subject to the result of such application (to the Court), the order of the Board shall be final”, may, I think, without doing any violence to the language, be interpreted to mean that the finality

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of the order of the Board is only subject to the result of an application to the Court and to nothing further. If this view is correct then the orders of the District Court in sections 77 (2) and 84 (2) become as final as the orders of the Court in sections 53 (4) and 76 (3). Whatever difficulties there may be in reconciling the language used in the two sets of sections 53 (4), 76 (3) and 77 (2), 84 (2), one thing is clear beyond doubt, viz., that the effect of the language in section 84 (2) is not to give a right of appeal to the appellant as such a right must be given expressly by a statute or by an equivalent authority.

I will now deal with the main argument of Mr. Srinivasa Ayyangar which is that the appellant is entitled to prefer the appeal under the general law, that is, under the provisions of the Civil Procedure Code. Section 2 (2), Civil Procedure Code, defines a decree as follows :—

“‘Decree’ means 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.” (The italics are mine.)

Section 96 of the Code says :

“Save otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court.”

It is contended that the order made by the District Court on an application under section 84 (2) of the Hindu Religious Endowments Act is a “decree” within the meaning of the Civil Procedure Code and that under section 96, Civil Procedure Code, such an order is appealable to

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the High Court as appeals against such orders are not otherwise provided for. This contention can be accepted if it can be shown that the order passed by the District Court under section 84 (2) is a "decree" as defined by section 2 (2), Civil Procedure Code. It cannot be disputed that the decision of the District Court in the case before us fulfils all the requirements of a decree except that the decision has not been given in a *suit* but has been given on an *application* made to the Court. Since the decision was not given in a *suit*, it is argued by Mr. Venkataramana Rao that it amounts only to an order, and as it does not fall within the list of appealable orders it cannot be appealed against to the High Court either as a decree or an order; on the other hand, it is contended by the appellant that the term "suit" used in the definition of a decree would include a proceeding based on an application as well, and that the decision on an application conclusively determining the rights of the parties as in the present case will fall within the definition of a decree. The word "suit" is not defined in the Code. Undoubtedly it is a term of wide significance; the only indication of what is meant by the term in the Civil Procedure Code is what we get from section 26 of the Code which says that every suit shall be instituted by the presentation of a "*plaint*" or in such other manner as may be prescribed. (See also Order IV, rule 1.) It has been held that a proceeding that does not commence with a *plaint* is not a *suit*, *Venkata Chandrappa Nayanivaru v. Venkatarama Reddi*(1); and when there is no *suit* there can be no decree.

(1) (1898) I.L.R. 22 Mad. 256.

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Minakshi v. Subramanya(1). It must therefore follow that an order passed by the District Judge on an application, even if that order complies with all the other requirements of the definition of a decree, cannot be a "decree" under the Code inasmuch as an application cannot be the commencement of a suit and without a suit there cannot be a decree. This reasoning is met with a twofold reply. In the first place, it is argued that so long as the application by which the District Court is moved contains all the particulars which a *plaint* should contain under Order VII, rule 1, Civil Procedure Code—and it is not denied that the application in the present case contains all such necessary particulars—there can be no difference between a *plaint* and an application; and that a proceeding commenced by an application may well, for all substantial purposes, be termed a *suit*. This argument is sought to be supported also by a reference to Order IV, rule 1 (2), which says that every *plaint* shall comply with the rules contained in Orders VI and VII *so far as they are applicable*. Emphasising the words "*so far as they are applicable*" it is suggested that the term "*plaint*" would include within its connotation an application also which cannot strictly be called a *plaint*. Secondly, it is argued, having regard to certain decisions which will be noticed later, that a proceeding in which rights of parties are determined may be deemed a "*suit*", and that an order in such a proceeding even though it is commenced only by an application should be treated as a decree.

(1) (1887) I.L.R. 11 Mad. 26 (P.C.).

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within the meaning of section 2 (2), Civil Procedure Code. It appears to me that neither of these arguments can be accepted. It is clear that in defining "decree" the Civil Procedure Code has recognized a distinction between a proceeding commenced by an application and one commenced by a plaint. By way of illustration reference may be made to Order XXXIII which relates to suits by paupers. This order instead of helping the appellant, I think, helps the respondent. Though such suits are initiated by applications for permission to sue as paupers, the proceedings do not become suits instituted in the ordinary manner till the applications are granted. Rule 8 of the Order makes this clear. It says that

"where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner . . ."

This rule distinctly shows that the Code recognizes a distinction between a proceeding commenced by an application and a proceeding commenced by a plaint. After the applications have become plaints the proceedings become "suits" and the adjudications thereon then become decrees within the meaning of section 2 (2). It may be observed that an order rejecting an application for leave to sue *in forma pauperis* is only an order and not a decree, for no suit has till then been filed; see *The Secretary of State for India in Council v. Jillo*(1). The term "suit" in the Civil Procedure Code can mean only a proceeding instituted by the presentation of a plaint. Of course, a proceeding commenced by an application would

(1) (1898) I.L.R. 21 All. 133 (F.B.).

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also fall within the term "suit" if such a proceeding has been specially declared to be a "suit" under the Code by the specific provision of any special enactment, for instance, a contentious probate proceeding. A decision given in such a proceeding would be a decree. Under the Hindu Religious Endowments Act, "applications" and "suits" are treated as distinct remedies for aggrieved persons. Remedy by suit is provided for in sections 55 (4), 57 (3), 57 (4), 63 (4), 65, 67 (5) and 73 and remedy by application is provided for in sections 44, 62, 70 (2), 76 (2), 77 (2), 78 and 84 (2). It is true that the court-fee payable on an application under section 84 (2) is what is payable on a plaint (see Schedule II to the Hindu Religious Endowments Act) and that such an application has been described as analogous to a regular suit; see *Damodaran v. H.R.E. Board, Madras*(1). But however much it may approximate to a suit it cannot be said for the reasons given above that under the Civil Procedure Code a proceeding commenced on such an application will fall within the meaning of the term "suit"; if so, an order on an application made to the District Court under section 84 (2) of the Hindu Religious Endowments Act cannot be called a decree and is not therefore appealable to the High Court.

The above conclusion is not in any way affected by the decisions relied on by the appellant's learned Counsel to show that a proceeding in which the rights of parties are determined may be termed a suit and that an order in such a proceeding even though it is commenced only by an application should be treated as a decree within

(1) (1929) I.L.R. 53 Mad. 266, 269 (F.B.).

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the meaning of section 2 (2), Civil Procedure Code. This is the second of the appellant's contentions already referred to. The decisions chiefly relied on are the Privy Council decisions in *Secretary of State for India v. Chellikani Rama Rao*(1) and *Ramachandra Rao v. Ramachandra Rao*(2) and the decisions of our own Court in *Mahalinga Kudumban v. Theetharappa Mudaliar*(3) and *Secretary of State for India v. Narayanaswamy Chettiar*(4). On examination it will be found that none of these decisions supports the contention of the appellant. To appreciate the true significance of the reference to a "decree" in their Lordships' judgments in *Secretary of State for India in Council v. Chellikani Rama Rao*(1) and *Ramachandra Rao v. Ramachandra Rao*(2) it is necessary to state that those observations refer to "decree" as defined in the Civil Procedure Code of 1882 (Act XIV of 1882). Under that Code "decree" meant

"the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court when such adjudication, so far as regards the Court expressing it, decides the suit or appeal."

An adjudication which decides an appeal would also fall within the meaning of the term "decree" under that Code, whereas this part of the definition is omitted from the present Code which confines the term "decree" to adjudications on matters of controversy in the suit alone. The decision in *Secretary of State for India v. Chellikani Rama Rao*(1) arose under the Madras Forest Act (Act V of 1882). In that case a consolidated

(1) (1916) I.L.R. 39 Mad. 617 (P.C.).
(2) (1922) I.L.R. 45 Mad. 320 (P.C.).
(3) (1928) 56 M.L.J. 387.
(4) (1931) I.L.R. 55 Mad. 391.

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appeal was filed in the Privy Council against two decrees (30th September 1909) of the High Court of Madras which reversed and varied respectively two decrees (27th July 1904) of the District Judge of Gōdāvari by which two orders (19th October 1903) made by the Forest Settlement Officer of Gōdāvari were upheld. The question for determination was whether the Secretary of State for India in Council was entitled to incorporate the land in dispute into a reserve forest under the Madras Forest Act. Section 10 of the Forest Act enacted that the Forest Settlement Officer "shall pass an order specifying the particulars of such claim (claims made against land taken up for reservation) and admitting or rejecting the same wholly or in part." Under section 10 (ii) of the Act,

"if such claim be rejected wholly or in part, the claimant may, within thirty days of the date of the order, prefer an appeal to the District Court in respect of such rejection only."

In that case the claim was rejected by the Forest Settlement Officer and an appeal by the respondents was made to the District Court which pronounced a decision. Against the District Judge's decision appeals were preferred to the High Court.

It was argued before their Lordships that the appeals to the High Court were incompetent. In repelling that contention their Lordships observed as follows :—

"In their Lordships' opinion this objection is not well-founded. Their view is that when proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders and decrees, the ordinary rules of the Civil Procedure Code apply. This is in full accord with the decision

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of the Full Bench in *Kamaraju v. The Secretary of State for India*(1), a decision which was given in 1888 and has been acted on in Madras ever since."

On the basis of these observations it is argued that in the present case also the order of the District Court should be treated as a decree and that an appeal would lie to the High Court from such an order, notwithstanding the fact that the decision of the District Court was made only on an application and not in a suit. This argument loses sight of the true basis of their Lordships' decision. What their Lordships decided was only this, that the decision of the District Court passed in appeal (under the Madras Forest Act) is a decree under the Civil Procedure Code to which the ordinary rules of the Civil Procedure Code will apply and that therefore an appeal would lie against such an order to the High Court. This, if I may say so very respectfully, is quite in accordance with the definition of "decree" under the Code of 1882 according to which an adjudication passed in an appeal would be a decree. As already stated, this part of the definition of the term "decree" is omitted in the present Code. Their Lordships' observations do not lend any support to the suggestion that the decision passed by a District Judge on an application should be treated as a decree.

That question did not arise before their Lordships; what they decided was only this, that an adjudication of rights in appeal was a "decree", and that being so, an appeal would lie against it to the High Court. That this is the true significance of their Lordships' observations becomes

(1) (1888) I.L.R. 11 Mad. 309 (F.B.).

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clear beyond doubt when we refer to *Kamaraju v. The Secretary of State for India*(1), which their Lordships say is in full accord with their views. It decided that an appeal lies to the High Court from a decision of the District Court passed under section 10 of the Madras Forest Act, 1882, on appeal from the decision of a Forest Settlement Officer. This was all that their Lordships decided in *Secretary of State for India v. Chellikani Rama Rao*(2). For these reasons I do not think the decision in *Secretary of State for India v. Chellikani Rama Rao*(2) supports the appellant. The same may be said about the decision in *Ramachandra Rao v. Ramachandra Rao*(3) also. In that case a reference relating to a dispute as to the title to receive compensation was made to the District Court and the decision of the District Judge was appealed against to the High Court. As the printed papers (in Appeal No. 74 of 1896 on the file of the High Court) will show, the reference was made under section 18 of the Land Acquisition Act, and the appeal to the High Court was preferred under section 54 of the Act. The decision of the High Court dated the 13th July 1897 (in Appeal No. 74 of 1896) became final as no appeal was filed against it. It was held by the Judicial Committee that this decision would be *res judicata* in subsequent proceedings. In the course of their judgment their Lordships stated thus :

"How the proceedings were commenced is a matter that is not material, provided that they were instituted in the manner that gave the Court jurisdiction, for they ended in a decree made by the High Court and appealable to this Board."

(1) (1888) I.L.R. 11 Mad. 309 (F.B.). (2) (1916) I.L.R. 39 Mad. 617 (P.C.).
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This would show that the adjudication by the High Court was dealt with as a decree which it was under the Code of 1882 as being a decision in appeal and this decree not being appealed against became final for the purpose of *res judicata*. Their Lordships were dealing with the finality of the High Court's decree for the purposes of *res judicata* and were not directly concerned about the appealability of the order passed by the District Court. The objection that the previous decision, not being one in a former suit, could not be *res judicata* was thus met by their Lordships :

"It has been suggested that the decision was not in a former suit, but whether this were so or not makes no difference, for it has been recently pointed out by this Board in *Hook v. Administrator-General of Bengal*(1) that the principle which prevents the same case being twice litigated is of general application and is not limited by the specific words of the Code in this respect."

I do not think it will be an unfair inference from this passage that their Lordships recognized the distinction between decision on an application and decision in a suit, but for purposes of *res judicata* they thought that the distinction did not matter as section 11 of the Code is not exhaustive of the circumstances in which an issue is *res judicata*. In my opinion the decision in *Ramachandra Rao v. Ramachandra Rao*(2) does not support the argument that an adjudication on an application stands on the same footing as an adjudication in a suit for the purposes of the definition of a decree under the Code. These decisions do not say anything more than this, viz., that when a proceeding comes before the District Court it will be subject

(1) (1921) I.L.R. 48 Cal. 499 (P.C.). (2) (1922) I.L.R. 45 Mad. 320 (P.C.).

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to the rules of the Code of Civil Procedure and the decision passed on it will be appealable, if it is a decree within the meaning of the Code.

The decision in *National Telephone Company, Limited v. Postmaster-General*(1) does not lay down any different principle. In *Mahalinga Kudumban v. Theetharappa Mudaliar*(2), which was also a case under the Land Acquisition Act, DEVADOSS J., in upholding the contention that the word "suit" in the definition of "decree" may be applied to any contentious proceeding in a Civil Court in which rights of parties are in question and in which the Court is asked to determine them, even though the proceeding was not commenced by a plaint, relied on the following observations of PEACOCK C.J. in *Hurro Chunder Roy Chowdhry v. Shooradhonee Debia*(3) :

"The word 'suit' does not necessarily mean an action, nor do the words 'cause of action' and 'defendant' necessarily mean cause upon which an action has been brought, or a person against whom an action has been brought, in the ordinary restricted sense of the words. Any proceeding in a Court of justice to enforce a demand is a suit; the person who applies to the Court is a suitor for relief; the person who defends himself against the enforcement of the relief sought is a defendant; and the claim, if recoverable, is a cause of action."

These observations cover a very wide ground, but it may be noted that the case was decided under the Code of Civil Procedure of 1859 in which a provision corresponding to section 26 of the present Code does not find a place. It may also be mentioned that the decision in *Hurro Chunder Roy Chowdhry v. Shooradhonee Debia*(3) may be rested on a narrower ground. The

(1) [1913] A.C. 546.

(2) (1928) 56 M.L.J. 387.

(3) (1868) 9 W.R. (Civ.) 402, 406 (F.B.).

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question for decision in that case was "whether the prosecution of the claim for mesne profits in the miscellaneous proceedings before the Principal Sudder Ameen was the 'prosecuting of a suit' within the meaning of section 14 of the Limitation Act." The Full Bench answered the question in the affirmative. After making the observations above quoted, PEACOCK C.J. indicates the narrower grounds on which the judgment may be based in the following remarks :

"The Legislature has clearly shown what it understood by the word 'suit', for the Act which provides a period of limitation in the case of proceedings by process of execution to enforce judgments and decrees, as well as periods for the limitation of actions or suits in the ordinary acceptance of the words, is described merely as 'an Act to provide for the limitation of suits', and it recites that it is expedient to amend the law relating to the limitation of suits. We ought not, in my opinion, to fritter away the law by construing words according to a mere technical sense, instead of giving them a broad meaning, so as to embrace all cases intended by the Legislature to be provided for."

This would show that the decision was based on considerations specially applicable to the Limitation Act. It would therefore not be proper to apply this decision while considering the question whether the term "suit" appearing in another enactment would include within its meaning an "application". The next case relied on by the appellant is *Secretary of State for India v. Narayanaswamy Chettiar*(1). In that case also reference is made to the decision in *Ramachandra Rao v. Ramachandra Rao*(2), which I have already discussed. If the decisions in *Mahalinga Kudumban v. Theetharappa Mudaliar*(3) and *Secretary of*

(1) (1931) I.L.R. 55 Mad. 391.

(2) (1922) I.L.R. 45 Mad. 320 (P.C.).

(3) (1928) 56 M.L.J. 387.

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State for India v. Narayanaswamy Chettiar(1) mean that a decision though not given in a suit will be a decree under the Code of Civil Procedure, then I would respectfully differ from that view. I would therefore hold that the decision of the District Court under section 84 (2) of the Hindu Religious Endowments Act does not fall within the meaning of the term "decree", as defined in section 2 (2) of the Code of Civil Procedure.

It follows from the above considerations that the order passed by the District Judge under section 84 (2) of the Hindu Religious Endowments Act on an application made to the District Court to set aside the decision of the Hindu Religious Endowments Board under section 84 (1) of the Act is not appealable to the High Court either under the Hindu Religious Endowments Act or under the Code of Civil Procedure. In expressing this opinion I am perfectly alive to the force of the criticism that it is desirable that no decision of a Court regarding the rights of parties or their title to properties should be allowed to remain without giving the aggrieved party a right of appeal against such a decision to a higher tribunal ; but that is a matter for the Legislature to consider and it cannot be made a ground for giving the aggrieved party a right of appeal when such a right is not given expressly under the Statute.

JACKSON J.—The point for determination is whether in section 84 (2), Madras Hindu Religious Endowments Act (II of 1927), the words "subject to the result of such application" mean "subject to the order of that Court to which the

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(1) (1931) I.L.R. 55 Mad. 391.

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application is made" or mean "subject to the order of the final appellate authority to which that Court is subject".

Then if the latter interpretation is accepted, a further question arises whether in the circumstances of such application, there is any further appellate authority, a question which turns on the point whether the Court to which application is made passes a decree.

I think there can be no doubt that the words "subject to the result" mean subject to what may result under the ordinary rules of the Civil Procedure Code. When proceedings reach the District Court the Code applies; cf. *Secretary of State for India v. Chellikani Rama Rao*(1).

And this is made clear by comparing the formula "subject to the result" with another formula used in this Act (they will be found successively in sections 76 and 77) "the order of the Court when such application is made shall be final." Obviously the different wording carries a different sense, and the difference would seem to be that in one case the order of the Court to which application is made is intended to be final, and in the other case the ultimate result of the ordinary rules of the Civil Procedure Code is contemplated as finally settling the matter. But then it is argued that if the District Court is moved by application its decision is final, and no appeal is provided by the ordinary rules of the Code of Civil Procedure. This depends upon whether the decision is a decree within the definition of section 2 (2), Civil Procedure Code; and, since it is conceded that the decision is a decree in all

(1) (1916) I.L.R. 39 Mad. 617, 624 (P.C.).

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respects except that it is not made "in a suit", the ultimate point for determination is whether such a proceeding is a suit.

Every suit shall be instituted by the presentation of a plaint; section 26. Pleading shall mean plaint; Order VI, rule 1. The plaint shall contain particulars; Order VII. But if it does not contain all these particulars it may still be the foundation of a suit; Order IV, rule 1 (2). A plaint in order to be accepted must be properly stamped; Order VII, rule 11. In the present case the pleading which was carried to the District Court contained all the particulars required by Order VII, and was stamped as a plaint (as enjoined in the second Schedule of Madras Act II of 1927). The only reason for not calling it a plaint is that it is called a petition (Original Petition No. 31 of 1931). So the question reduces itself to a very narrow compass. Can a pleading be considered in law a plaint in spite of the fact that by the local statute it is styled an application? This may be arguable either way [for the difficulty in defining a suit cf., *Venkata Chandrappa Nayani-varu v. Venkatarama Reddi*(1)], and in these circumstances it seems better *stare decisis* and to affirm the decision in Appeal No. 44 of 1931.

In *Ramachandra Rao v. Ramachandra Rao*(2), there is a discussion of a case arising not by way of a plaint but from a Collector's reference under the Land Acquisition Act, which seems to have been carried on appeal from the District to the High Court, and therefore presumably to have been treated as a suit. But that presumable precedent is not binding upon this Bench; for it was never

(1) (1898) I.L.R. 22 Mad. 256.

(2) (1922) I.L.R. 45 Mad. 320 (P.C.).

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approved by the Judicial Committee. Their Lordships observe on page 326, "What the actual proceedings were that ensued between them is not plain", and on page 331, "It has been suggested that the decision was not in a former suit, but whether this were so or not makes no difference."

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LAKSHMANA RAO J.—I agree that the question referred to the Full Bench should be answered in the negative and would only add a few words in view of its general importance. It is well settled that a right of appeal from any decision of any tribunal must be given by express enactment and the Madras Hindu Religious Endowments Act does not expressly provide for an appeal from a decision of the District Court on an application under section 84, clause 2 of the Act. It was not seriously argued that a right of appeal can legitimately be founded on the contrast between the language of sections 77 and 84 which make the decision of the Board final subject to the result of the application to the Court to modify or set it aside, and sections 53 clause 4 and 76 clause 3 which provide that the order of the Court on applications under those sections shall be final; and the real question for determination is whether, as urged on behalf of the appellant, the Code of Civil Procedure gives him a right of appeal. The Code of Civil Procedure is not in terms made applicable to proceedings under the Madras Hindu Religious Endowments Act and, as pointed out in *Parasurama Ayyar v. Seshier*(1) and *Damodara Menon v. Kittappa Menon*(2), section 141, which provides that the procedure in regard to suits should be followed as far as it can be made

(1) (1903) I.L.R. 27 Mad. 504.

(2) (1911) I.L.R. 36 Mad. 16.

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applicable in all proceedings in any Court of civil jurisdiction, only extends the mode of trial and the procedure incidental thereto. It will not give a party to a proceeding, not a suit, a right of appeal, nor does the Code of Civil Procedure confer a right of appeal in every matter which comes under the consideration of the District Court. To be appealable the decision must be a decree within the meaning of section 2, clause 2, or an order against which an appeal is provided for under section 104 of the Code of Civil Procedure, and it cannot be contended that the decision on an application under section 84, clause 2, is an order against which an appeal is specially provided. It has therefore to be considered whether the decision is a decree within the meaning of the Code of Civil Procedure, and to be a decree the decision should according to section 2, clause 2, be expressed *in the suit*. Section 26 of the Code of Civil Procedure provides that every suit should be instituted by the presentation of a plaint or in such other manner as may be prescribed, and it is clear from Order XXXIII, rule 8, which enacts that, where an application for permission to sue as a pauper is granted, it shall be numbered and registered and shall be deemed the plaint in the suit, that the distinction between a plaint and an application is recognised even in the Code of Civil Procedure. Such a provision would be unnecessary and superfluous if without it an application can be treated as or deemed a plaint, and, considering that, according to Order XXXIII, rule 2, an application for permission to sue as a pauper should contain the particulars in regard to plaints in suits, it follows that independently

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of a statutory provision it is not permissible to treat an application as or deem it a plaint though it may contain the particulars required in regard to plaints in suits. That a proceeding which does not commence with a plaint is not a suit is pointed out in *Venkata Chandrappa Nayanivaru v. Venkatarama Reddi*(1) and it is not as if the Legislature in this case was not aware of the distinction between the several remedies. It was unquestionably within its competence to provide for a remedy by way of application and not suit, in spite of the importance of the matter in controversy, under section 84, clause 2, and the Madras Hindu Religious Endowments Act specifically provides for suits, appeals, and applications. It is also apparent from Schedule II, which describes the proceeding under section 84, clause 2, as an *application* and prescribes the court-fee as that leviable on a *plaint* under article 17 of the Madras Court Fees Amendment Act of 1922, that the distinction between a plaint and an application was kept in view, and it would be against sound rules of construction to treat an application under section 84, clause 2, as or deem it a plaint. Applications under this section are not really suits though they are analogous to them; vide *Damodaran v. H.R.E. Board, Madras*(2), and it follows that the decision on such an application is not a decree. The decisions of the Privy Council in *Secretary of State for India v. Chellikani Rama Rao*(3) and *Ramachandra Rao v. Ramachandra Rao* (4) do not militate against this view, as the

(1) (1898) I.L.R. 22 Mad. 256.
(2) (1929) I.L.R. 53 Mad. 266, 269 (F.B.).
(3) (1916) I.L.R. 39 Mad. 617 (P.C.). (4) (1922) I.L.R. 45 Mad. 320 (P.C.).

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nature of the decisions in question in those cases had to be determined with reference to the Code of Civil Procedure of 1882, wherein a decree is defined as meaning the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal, and what is pointed out in *Secretary of State for India v. Chellikani Rama Rao*(1) is that, when the proceedings reach the District Court, that Court is appealed to as one of the ordinary Courts of the country with regard to whose procedure, orders and decrees the ordinary rules of the Civil Procedure Code apply. The decision of the District Court in that case was a decree within the meaning of the Code of Civil Procedure of 1882 as it was one passed on appeal, as in *Kamaraju v. The Secretary of State for India*(2) which was approved by the Privy Council, and the observation in *Ramachandra Rao v. Ramachandra Rao*(3) that the proceedings in the particular case ended in a decree *made by the High Court* and appealable to the Board clearly indicate that the nature of the decision was considered with reference to the Code of Civil Procedure of 1882. The principle deducible from these cases appears to be that, when any proceedings reach the District Court, the ordinary rules of the Code of Civil Procedure apply, and the appealability or otherwise of the decision in any particular case depends upon whether or not it is a decree within the meaning of the Code of Civil Procedure or an

(1) (1916) I.L.R. 39 Mad. 617, 624 (P.C.).
(2) (1888) I.L.R. 11 Mad. 309 (F.B.).
(3) (1922) I.L.R. 45. Mad. 320, 330 (P.C.).

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order against which an appeal is specially provided in the Code.

The decision in *National Telephone Company Limited v. Postmaster-General*(1) does not enounce a different principle, as according to it also the decision would be appealable only if there is a general right of appeal from the decisions of the particular Court to which the question is referred without more, and it follows that, unless the decision on an application under section 84, clause 2, is a decree within the meaning of the Code of Civil Procedure of 1908 or an appealable order, an appeal would not lie. It is admittedly not an order against which an appeal is specially provided and it cannot be a decree within the meaning of the Code of Civil Procedure as it was not expressed in a suit. The proceedings under section 84, clause 2, cannot be deemed to be or treated as suits and with all respect I am unable to agree with the view taken in *Venkatareddi v. Adhinarayana Rao*(2) and *Mahalinga Kudumban v. Theetharappa Mudaliar*(3) that to be a decree within the meaning of the Code of Civil Procedure of 1908 the decision need not be expressed in a suit. It does not necessarily follow from the decision in *Ramachandra Rao v. Ramachandra Rao*(4), nor need the previous decision be a decree within the meaning of the Code of Civil Procedure to render the question *res judicata* in a subsequent suit. Further it appears from the printed papers in the land acquisition proceedings in that case that the dispute was referred to the District Court

(1) [1913] A.C. 546.

(2) (1928) 56 M.L.J. 357.

(3) (1928) 56 M.L.J. 387.

(4) (1922) I.L.R. 45 Mad. 320, 330 (P.C.).

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under section 18 of the Land Acquisition Act and the appeal was taken to the High Court under section 54, as it then stood and was understood, with the result that it ended in a decree made by the High Court within the meaning of the Code of Civil Procedure, 1882; and, independently of the contention advanced on behalf of the Board on the authority of the decision of the Privy Council in *Secretary of State for India in Council v. Hindusthan Co-operative Insurance Society, Limited*(1) as to the effect of the language of section 84, clause 2, of the Madras Hindu Religious Endowments Act, the answer to the question referred to the Full Bench should be in the negative.

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APPELLATE CIVIL.

Before Mr. Justice Sundaram Chetti and Mr. Justice
Pakenham Walsh.

SRINIVASA AYYAR *alias* SRINIVASA AYYANGAR
(PETITIONER), APPELLANT,

v.

THE BOARD OF COMMISSIONERS FOR THE HINDU
RELIGIOUS ENDOWMENTS, MADRAS, AND TWO OTHERS
(RESPONDENTS), RESPONDENTS.*

Madras Hindu Religious Endowments Act (II of 1927), sec. 84
— Application under—Dismissal for default of—Refusal
to set aside—Order of—Appeal from, if lies.

An appeal does not lie against an order refusing to set aside the dismissal for default of an application under section 84 of the Madras Hindu Religious Endowments Act (II of 1927).

(1) (1931) I.L.R. 59 Cal. 55 (P.C.).
* Appeal against Order No. 237 of 1933.

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APPEAL against the order of the District Court of West Tanjore dated 4th March 1933 and made in Interlocutory Application No. 519 of 1932 in Original Petition No. 57 of 1931.

Advocate-General (Sir A. Krishnaswami Ayyar), K. S. Desikan and K. G. Srinivasa Ayyar for appellant.

K. Subba Rao for Government Pleader (*P. Venkataramana Rao*) and *N. Muthuswami Ayyar* for respondents.

SUNDARAM
 CHETTI J.

The JUDGMENT of the Court was delivered by SUNDARAM CHETTI J.—A decision by the District Judge under section 84 (2) of the Madras Hindu Religious Endowments Act (II of 1927) has been held to be not appealable under a recent Full Bench decision of our High Court in *Rajagopala Chettiar v. H.R.E. Board, Madras*(1). This is an appeal against an order refusing to set aside the dismissal of the application under the aforesaid section 84 for default. According to Order XLIII, rule 1, clause (c), of the Code of Civil Procedure an appeal would lie against such an order only in a case open to appeal.

We therefore hold that the civil miscellaneous appeal is incompetent and dismiss it with costs. (Two sets.)

A.S.V.

(1) (1933) I.L.R. 57 Mad. 271 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Krishnan Pandalai and Mr. Justice Curgenven.

A. M. RAMASAMI CHETTIAR (SECOND PLAINTIFF),
 APPELLANT,

v.

RENGAN CHETTIAR AND FIVE OTHERS (DEFENDANTS
 ONE TO FIVE AND FIRST PLAINTIFF), RESPONDENTS.*

Civil Procedure, Code of (Act V of 1908), O. XXIII, r. 1, sub-rule (4)—One of several plaintiffs—Right of, to withdraw from suit.

A Court has power to refuse to allow one of several plaintiffs to withdraw from a suit if such a course is not consented to by the remaining plaintiff or plaintiffs and would be prejudicial to his or their interests.

APPEAL against the decree of the District Court of West Tanjore at Tanjore, dated 7th February 1927, in Original Suit No. 9 of 1926.

B. Sitarama Rao and S. R. Muttuswami Ayyar for appellant.

K. S. Sankara Ayyar for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by CURGENVEN J.—The first plaintiff is the Zamin-
 dar of Naduvasal. He succeeded his father, who died on the 18th August 1923. On the 22nd November 1920 the father and son joined in executing a sale deed of the suit property for a sum of Rs. 30,000. After the first plaintiff had succeeded to the estate, on the 14th August 1926, he mortgaged the same property to the second

* Appeal No. 94 of 1928.

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plaintiff. Both plaintiffs then brought the present suit for a declaration that the sale-deed of the 22nd November 1920 was invalid and inoperative beyond the father's lifetime, under the terms of the Impartible Estates Act (II of 1904). The defendants, who were the vendees, filed their written statements and the suit was posted for settlement of issues when the first plaintiff applied to withdraw from the suit. This was objected to by the second plaintiff, the mortgagee, but was eventually allowed. We have been unable to find any order upon the application to withdraw itself, but the result is so stated in the learned District Judge's judgment. Having thus allowed the first plaintiff to withdraw, the question was considered whether the second plaintiff was entitled by himself to continue the suit and was answered in the negative. This latter question will only arise if we confirm the order allowing the first plaintiff to withdraw.

Under sub-rule 1 of rule 1 of Order XXIII, Civil Procedure Code, "the plaintiff" may at any time after the institution of the suit withdraw it as against all or any of the defendants; sub-rule (2) enables the Court to permit the plaintiff to withdraw from a suit with liberty to institute a fresh suit; and sub-rule 3 relates to withdrawal without such permission. Sub-rule 4 runs as follows:—

"Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to withdraw without the consent of the others."

The use of the word "rule" supports the view that this qualification applies not only to sub-rules 2 and 3 but also to sub-rule 1. On the

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other hand, it has been pointed out that, under sub-rule 1, no permission of the Court is necessary, so that sub-rule 4, which contemplates an operation requiring such permission, is not suitably worded to apply to a withdrawal under sub-rule 1. There is some authority for the view that sub-rule 4 does not apply to sub-rule 1. It was so held in *Mohamaya Chowdhraim v. Durga Churn Shaha*(1) under the corresponding provision (section 373) of the Code of Civil Procedure, 1877. That was a case of two co-plaintiffs and it was held that one could withdraw without the consent of the other under this provision of the Code. The matter came up in relation to an appeal in *Nilappagouda v. Basangouda*(2) where a similar view was taken by SHAH J. FAWCETT J., while agreeing that in that particular case one of the appellants might be permitted to withdraw and being inclined to accept the construction put upon the rule, reserved his opinion whether apart from the terms of the rule the Court had not power to control a co-plaintiff who desires to withdraw from a suit, if such withdrawal would operate to the prejudice of his co-plaintiffs. He referred to an English case, *Mathews, In re. Oates v. Mooney*(3), in which it was held that one of several co-plaintiffs has no absolute right to withdraw from an action and have his name struck out. The reason of course is that, if one person engages with another or others to institute a suit, he ought not to be allowed to resile if such action will be to the detriment of his co-plaintiff in the conduct of the proceedings. This, we

(1) (1881) 9 C.L.R. 332.

(2) (1926) 29 Bom. L.R. 299.

(3) [1905] 2 Ch. 460.

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think, is a perfectly valid principle and it finds support in the terms of sub-rule 1 of Order XXIII, rule 1, which says "the plaintiff" may withdraw. Where there are more plaintiffs than one the expression, "the plaintiff", must be read as all the plaintiffs collectively, and not so as to include one only amongst several plaintiffs. This principle has been recognised and acted upon in two cases cited before us; *Tukaram Mahadu v. Ramchandra Mahadu*(1) and *Punnayya v. Lingayya*(2). Irrespective therefore of the question whether sub-rule 4 governs sub-rule 1 we think that the Court can refuse to allow one of several plaintiffs to withdraw if such a course is not consented to by the remaining plaintiff or plaintiffs and be prejudicial to his or their interests. In the present case the first plaintiff, we think, having given the second plaintiff a mortgage, presumably on the understanding that the sale was not binding after the father's death, ought not to be allowed to abandon a suit intended to secure a declaration to that effect. We think accordingly that the withdrawal petition, Interlocutory Application No. 243 of 1926, should not have been allowed and we dismiss it. We further set aside the judgment and decree in Original Suit No. 9 of 1926 and direct the lower Court to restore the suit to file and proceed with it according to law. The respondents will pay the appellant's costs of the appeal.

The appellant will be entitled to a refund of the court-fee paid upon the appeal memorandum under section 13 of the Court Fees Act.

G.R.

(1) (1925) I.L.R. 49 Bom. 672.

(2) A.I.R. 1928 Mad. 496.

APPELLATE CIVIL.

Before Mr. Justice Sundaram Chetti and Mr. Justice
Pakenham Walsh.

LAKSHMANAN CHETTIAR, MINOR BY HIS MOTHER AND
NEXT FRIEND LAKSHMI ACHI, AND ANOTHER (PETITIONERS
2 AND 3), APPELLANTS,

v.

Rm. C. T. C. T. CHIDAMBARAM CHETTIAR AND NINE
OTHERS (RESPONDENTS 1 TO 3, 5, 6, 10, 11 AND
13 TO 15), RESPONDENTS.*

Court Fees Act (VII of 1870), sec. 11—Additional court-fee on excess amount decreed—Payment of—Direction in final decree for—Necessity—Liability for additional court-fee—Judgment-debtors if under—Question of—Jurisdiction of executing Court to decide—Final decree—Provision in, not amounting to determination of question.

In view of the express provision in section 11 of the Court Fees Act, which casts a duty on the executing Court to collect the deficit court-fee when it finds that execution is sought for the recovery of an amount over and above what was claimed in the plaint, no direction for the payment of the additional court-fee for the excess sum decreed need be given at all in the final decree, and any such direction, if given in the final decree, should be deemed to be a mere surplusage.

The executing Court, which directs the payment of the additional court-fee under section 11 of the Court Fees Act, is also competent to determine whether that amount should be borne by the decree-holder himself or can be recovered by him from the judgment-debtors who are liable to pay the amount on which the extra court-fee was paid. The payment of the additional court-fee which is necessitated by section 11 of the Court Fees Act would be the payment of costs necessary for realising the fruits of the decree by execution and may well nigh be deemed to be costs relating to execution regarding which the executing Court has jurisdiction to pass any order.

* Appeal against Order No. 202 of 1930.

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Where the final decree in a suit for dissolution of a partnership and for accounts provided that "on payment of the additional court-fee the plaintiff do recover the excess amount decreed", *held* that there was no express or implied direction in the decree that the plaintiff should alone bear the costs of the additional court-fee without any right to recover the sum from the defendants.

APPEAL against the order of the Court of the Subordinate Judge of Devakottah, dated 1st November 1929 and made in Execution Petition No. 23 of 1929 (Original Suit No. 209 of 1911, on the file of the Court of the Additional Subordinate Judge of Ramnad).

M. Patanjali Sastri for appellants.

V. Ramaswami Ayyar for respondents.

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The JUDGMENT of the Court was delivered by SUNDARAM CHETTI J.—The appellants are the legal representatives of the deceased decree-holder. The decree in this case arises out of a suit for dissolution of a partnership and for accounts and other incidental reliefs. In the final decree that was passed in this suit a decree was given in favour of the plaintiff for a sum of Rs. 4,284-12-11 against defendants 1 to 3 in excess of the amount claimed in the plaint for which court-fee was already paid. According to the provisions of section 11 of the Court Fees Act, the decree for the excess amount shall not be executed until the additional court-fee is actually paid. This is a mandatory provision which the executing Court is to carry out when the decree-holder applies for the recovery of such excess amount by way of execution of the decree. In the final decree that was passed in this suit there is a direction that "on payment of the additional court-fee the plaintiff do recover the sum of

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Rs. 4,284-12-11, the excess amount decreed". The legal representatives of the deceased decree-holder when applying for execution in order to recover this excess amount paid the additional court-fee of Rs. 359-11-0 before seeking to execute the decree for that amount. The question arising for consideration is whether in a case of this kind it is competent to the executing Court to determine whether the excess court-fee so paid is recoverable or not from defendants 1 to 3. It is urged strenuously on behalf of the respondents that in the absence of a specific direction in the final decree as to which, if any, of the defendants, are liable to pay this excess court-fee the executing Court is not competent to give any direction as to the recovery of this amount as costs of execution or costs incidental or relating to execution. In the first place, we have the authority of the decision of this High Court in *Perianan Chetti v. Nagappa Mudaliar*(1) wherein the learned Judges have stated that any direction for the payment of the additional court-fee for the excess sum decreed, if given in the final decree, should be deemed to be a mere surplusage. It is clear from the opinion expressed in this decision that in view of the mandatory provision of section 11 of the Court Fees Act no such direction need be given at all in the final decree. We are in agreement with that view having regard to the express provision in the aforesaid section of the Court Fees Act, which casts a duty on the executing Court to collect the deficit court-fee when it finds that execution is sought for the recovery of an amount over and above what was claimed in the

(1) (1906) I.L.R. 30 Mad. 32.

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plaint. That being so, no argument can be reasonably based on the supposed omission in the final decree as to the ultimate liability for the payment of this excess court-fee. This is not therefore a case in which we can hold that there is an express or implied direction in the decree itself that the plaintiff should alone bear the costs of the additional court-fee without any right to recover the sum from the defendants.

Then, the next question arising for consideration is whether the executing Court which directs the payment of the additional court-fee under section 11 of the Court Fees Act is not also competent to determine whether this amount should be borne by the decree-holder himself or can be recovered by him from the judgment-debtors who are liable to pay the amount on which this extra court-fee was paid. It is argued by Mr. Ramaswami Ayyar for the respondents that unless this sum can be taken to be strictly costs of execution the executing Court is not competent to pass any order for the recovery of the additional court-fee from the defendants. There is no doubt that costs subsequently incurred by the decree-holder for the purpose of executing the decree have to be provided for in the order of the executing Court. Such costs will be tacked on to the decree amount and made recoverable by the very same process of execution. The additional court-fee, the payment of which is made the condition precedent for the recovery of the excess amount by execution of the decree, can very well be deemed to be so intimately connected with the costs of execution as to warrant us to infer that it is within the competence of the executing Court to give any reasonable

direction regarding it. Though this additional court-fee may in one sense be deemed to be part of the stamp duty to be paid on the plaint itself, still the payment of that sum in the course of execution of the decree which is necessitated by section 11 of the Court Fees Act would be the payment of costs necessary for realising the fruits of the decree by execution. The costs so incurred by the decree-holder by reason of the payment of the additional court-fee may well nigh be deemed to be costs relating to execution and therefore the executing Court has jurisdiction to pass any order regarding it. In the present case, nothing has been shown to us to justify the non-observance of the usual rule that costs should follow the event. There is no reason why the decree-holder should lose the costs incurred by him by way of paying the additional court-fee when the defendants who are bound to pay that sum have necessitated his resorting to the executing Court for the recovery of the sum. We find ourselves unable to agree with the view of the learned Subordinate Judge and hold that the petitioners are entitled to recover this sum of Rs. 359-11-0 from defendants 1 to 3 in the course of execution proceedings. The order of the lower Court on the aforesaid point is set aside and the execution petition will be remanded for disposal according to law in the light of the above observations. The appellants' costs in this appeal will be paid by the third respondent.

A.S.V.

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APPELLATE CIVIL.

*Before Mr. Justice Ramesam.*1933,
May 5.

SARANATHA AYYANGAR (PETITIONER), PETITIONER,

v.

MUTHIAH MOOPPANAR AND SEVEN OTHERS (APPELLANTS),
RESPONDENTS.**Suit—Restoration of—Interlocutory matters—Whether or not
restored—Dependent on construction of order of restoration
in suit.*

The question whether, in a case where there is no question of any intermediate alienations between the dismissal of a suit for default and its restoration, all interlocutory orders or matters as between the parties to the suit are or are not restored consequent on such restoration of the suit, depends upon the construction of the order of restoration.

In the absence of any circumstance expressly appearing against the view that all interlocutory matters are restored on the restoration of a suit, it should be held that the suit and all incidental matters are restored to file.

After the admission of a revision petition filed in the High Court against an order of the lower appellate Court dismissing plaintiff's application for a temporary injunction pending disposal of the suit, the suit itself was dismissed for default and was subsequently restored to file by the Court of first instance.

Held, that the restoration of the suit involved the restoration of all interlocutory matters connected with it, and that the dismissal of the suit for default was no bar to the hearing of the revision petition.

PETITION under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the District Court of West Tanjore at Tanjore, dated 26th September 1932, in Civil Miscellaneous Appeal No. 17 of 1931 preferred against the order of the Court of the District Munsif of Valangiman,

* Civil Revision Petition No. 1603 of 1932.

dated 19th March 1931, and made in Interlocutory Application No. 706 of 1930 in Original Suit No. 236 of 1930.

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T. M. Krishnasamy Ayyar, A. Srirangachariar and S. Ramanujam for petitioner.

K. Bhashyam Ayyangar, C. Padmanabha Ayyangar, K. R. Rangasami Ayyangar, K. Aravamudu Ayyangar, P. R. Srinivasa Ayyangar, K. Narasimha Ayyangar and K. S. Desikon for respondents.

Cur. adv. vult.

JUDGMENT.

A preliminary objection has been raised by the respondents in this revision petition that this petition cannot be heard now. To understand the nature of the objection the facts have got to be stated. The petitioner filed Original Suit No. 236 of 1930 in the District Munsif's Court of Valangiman for a declaration that the defendants are not entitled to the office of Adhyapakam in the shrine of Sri Saranadaperumal in the Tanjore district, and other reliefs. Pending the disposal of the suit the plaintiff applied for a temporary injunction restraining the defendants from interfering with his exercise of this office and enjoyment of the honours and emoluments attached to it and similar other reliefs. The District Munsif granted the injunction. There was an appeal to the District Court of West Tanjore. The learned District Judge reversed the order of the District Munsif and dismissed the application for injunction. Against the order of the District Judge the present revision petition was filed on the 26th October 1932. Some time after the revision

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petition was admitted, the suit was called on for hearing and as both parties were not present it was dismissed for default, but soon after it was restored to file and the suit is now pending. It is now contended that the effect of the dismissal of the suit for default was to dismiss not only the suit itself but all other interlocutory applications filed on behalf of the plaintiff and on which orders might have been passed in his favour by the District Munsif, and also to put an end to all interlocutory matters connected with the suit and pending at the time of the dismissal either in the first Court or in higher Courts, and that when the suit was again restored only the suit is restored but not the interlocutory matters. Reliance is placed for this contention on *Balaraju Chettiar v. Masilamony Pillai*(1). That judgment is a Full Bench judgment which binds me. In that case it was held that if a suit was tried and dismissed, an attachment before judgment came to an end with the dismissal, though the Court did not pass an order withdrawing it, and if on appeal the suit was decreed there was no attachment order which the decree-holder could avail himself of. Not only does this judgment bind me, but, if I may respectfully say so, I entirely agree with it. But it seems to me that case does not govern the present case. At page 346 PAKENHAM WALSH J. observed :

"As stated above, the reference before us does not deal with a suit dismissed for default and restored to file but with one where the decree dismissing the suit is reversed on appeal."

It was argued before the Full Bench that in the case of a suit dismissed for default and restored

(1) (1929) I.L.R. 53 Mad. 334, 346 (F.B.).

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in the course of the same day it would work hardship to hold that the attachment before judgment ceased to have force. As to this argument the learned Judge observed: "It is difficult to see how that can be a hardship which the law commands." I agree with this observation. The case should be decided not with reference to considerations of hardship but with reference to what the law is. If it is the law that the restoration of a suit does not restore the interlocutory orders, the consideration of hardship is irrelevant. Another case relied on by the learned Advocate for the respondents is the decision of PAGE C.J. and MYA BU J. in *Pindi v. U Thaw Ma*(1). In that case the learned CHIEF JUSTICE observed, with reference to the decision of PHILLIPS and DEVADOSS JJ. in *Namagiri Ammal v. Muthu Velappa Goundan*(2) [which must now be regarded as overruled by the decision of the Full Bench in *Balaraju Chettiar v. Masilamony Pillai*(3)], that

"it is no answer to a legal right that it may, in certain circumstances, if enforced, work hardship. Hard cases make bad law."

Here again, if I may respectfully say so, I agree with the learned Judge's observation. The learned Judge then proceeded to say :

"If the suit on being dismissed for default came to an end, all interim and ancillary orders in the proceedings must fall with it."

I agree with this observation too. But the question is not whether the ancillary orders fall with the suit, but whether, when the suit is restored, they are also restored. The learned Judge then proceeded to refer to the decision of MAHMOOD J.

(1) (1931) I.L.R. 9 Rang. 472.

(2) (1928) 56 M.L.J. 70.

(3) (1929) I.L.R. 53 Mad. 334 (F.B.).

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in *Ram Chand v. Pitam Mal*(1), where it was held that an attachment obtained before judgment ceased with the dismissal of the suit even though the Court failed to pass an order ending the attachment. The other cases also referred to by him, except *Jyotish Chandra Sen v. Har Chandra Saha*(2), are not cases of dismissal for default. In *Jyotish Chandra Sen v. Har Chandra Saha*(2) an attachment before judgment was obtained on 31st August 1915. An *ex parte* decree was obtained on the 11th November 1915 which however became a nullity as the defendant died before that date. In August 1916 the defendant's heirs sold the property in dispute. On 5th January 1918 an application was made to set aside the abatement and to restore the suit and it was restored. In that case the facts are such that, even if it is held that the restoration of the suit restored the interlocutory orders, the order can operate only from the date of the restoration and cannot affect any intermediate alienation between the abatement of the suit (May 1916) and its restoration in January 1918. The opposite position is so untenable that one does not feel any difficulty about that case. But to agree with that case does not dispose of the matter before me, and, in my humble opinion, the question before PAGE C.J. In a case where there is no question of any intermediate alienations between the dismissal and the restoration the question still remains whether the restoration of the suit does not restore the interlocutory orders or matters as between the parties to the suit. Such a question, it seems to me, should be decided with reference to the

(1) (1888) I.L.R. 10 All. 506.

(2) (1927) 47 C.L.J. 282.

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intention of the officer who passed the order restoring the suit. It is a question of the construction of the order of restoration. If he intended to restore the suit and all the ancillary matters connected with it, they are all restored. If he did not so intend to restore all of them, they are not restored. If the order makes express reference to these matters, there is no difficulty; but where there is no such express reference it is a question of construction. As a matter of general rule I would say that the intention would be to restore the suit and all incidental matters. It is as if when the suit is dismissed the record of the suit was sent to the record room, and when restored the whole bundle was brought back to the Court file with all the matters contained in it. If there is anything expressly appearing against the view that all the interlocutory matters are restored, then one would hold that they are not so restored. In the absence of such a thing I would hold that the suit and all incidental matters are restored to file. That being so, the injunction petition, the order passed on it by the District Munsif, the refusal to grant the injunction by the District Judge, and the revision petition to the High Court would all be restored, because they are in the nature of pendants to the suit. I would therefore disallow the preliminary objection. This view seems to be in accordance with the observations of myself and JACKSON J. in *Selvarayan Samson v. Amalorpavanadham*(1), and consonant with the interests of justice.

Now coming to the merits of this revision petition: in the first place, it seems to me that the

(1) (1927) 55 M.L.J. 262.

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view taken by the District Judge is correct. Though the judgment of the High Court in the former litigation between the present defendants and the trustees of the temple does not bind the present plaintiff because he was not a party to that suit, still the fact remains that the High Court on the evidence before it held that the present defendants were also entitled to the office of Adhyapakam and other offices. Certain documents referred to by the learned Advocate for the petitioner seem to throw doubt on the defendants' rights, but these documents were considered by the High Court and they seem to relate not exactly to the rights to the office but to some other matters. But whatever it may be—and I do not wish to make further observations in favour of or against either party—it seems to me that the District Judge is right in thinking that there is some *prima facie* view in favour of the defendants, and the plaintiff has not given other *prima facie* evidence so as to override it, and the record shows that prior to 1901 the right of the defendants as Adhyapakas does not seem to have been questioned. It may be necessary, when the suit is finally disposed of, to place limitations on the defendants in the exercise of that office. It may be that under the guise of the exercise of that office they ought not to interfere in other matters. It may be these things have all to be clearly defined finally in this litigation, but it is clear that a total injunction against the defendants exercising the office is not justified. Even if there were any doubt in the matter, I do not think that there is any question of jurisdiction arising or of material irregularity in the case

justifying my interference in this civil revision petition.

The civil revision petition is dismissed with costs.

K.W.R.

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1933,
 May 11.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

TRIKADERI MANEKAL VASUDEVAN ADISERPAD
 AND THREE OTHERS (DEFENDANTS 1, 3, 4 AND 5), APPELLANTS,

v.

THEKKAMPARAMBATH MANAKAL BHAWADASAN
 NAMBUDIRI AND EIGHT OTHERS [PLAINTIFF AND DEFENDANTS 2
 (LEGAL REPRESENTATIVE) 6 TO 10 AND 13 AND LEGAL-
 REPRESENTATIVE OF FOURTH DEFENDANT], RESPONDENTS.*

*Madras Hindu Religious Endowments Act (II of 1927), sec. 73
 (1)—Suit instituted under—Account and inquiry—Decree
 for—Court's power to pass—Sec. 73 (1) (d)—Reliefs
 covered by—Sec. 73 (2)—Suit for recovery of money found
 due by a trustee on an audit report not barred by.*

It is not competent to the Court in a suit instituted under section 73 (1) of the Madras Hindu Religious Endowments Act (II of 1927) to decree an account and inquiry.

Section 73 of the Madras Hindu Religious Endowments Act contains no clause corresponding with clause (d) of section 92 of the Code of Civil Procedure for "directing accounts and enquiries"; and the omission was made advisedly. There are ample provisions in the Madras Hindu Religious Endowments Act for checking the accounts and fixing the liability of trustees, and a special provision enabling the Board or persons interested in the proper administration of the trust to sue for an account and inquiry would be superfluous.

Per RAMESAM J.—Section 73 of the Madras Hindu Religious Endowments Act is confined to cases in which the main relief

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falls under any of the clauses (a), (b) and (c) of sub-section (1) thereof; and clause (d) of sub-section (1) of the section covers relief only incidental to and *ejusdem generis* with the main reliefs. Beyond the reliefs expressly mentioned in clauses (a), (b) and (c) of sub-section (1) of section 73 and any relief incidental to them no further relief can be prayed for in a suit instituted under the sub-section.

Per CORNISH J.—Money found due by a trustee on an audit report would be a debt due by the trustee to the temple, and would be recoverable in a suit either by a co-trustee, or by a new trustee appointed in the place of the trustee in default, or, if a scheme has been framed, by the person or body appointed to the management. Such a suit would not be barred by sub-section (2) of section 73 of the Madras Hindu Religious Endowments Act.

APPEAL against the decree of the District Court of South Malabar in Original Suit No. 3 of 1929.

T. R. Venkatarama Sastri, K. P. M. Menon, K. P. Krishna Menon and P. Govinda Menon for appellants.

Advocate-General (Sir A. Krishnaswami Ayyar), K. P. Ramakrishna Ayyar, P. S. Narayanaswami Ayyar, P. R. Ramakrishna Ayyar and P. R. Vasudevan for respondents.

Cur. adv. vult.

JUDGMENT.

RAMESAM J.

RAMESAM J.—This is an appeal against the decree of the District Judge of South Malabar in Original Suit No. 3 of 1929. The suit was filed under section 73 of the Madras Hindu Religious Endowments Act II of 1927. In the plaint the following reliefs were prayed for:—

(a) removing such of the defendants from their places as trustees of Tirumullapalli temple as the Court finds to be guilty of fraud or gross mismanagement;

(b) framing a scheme of management for the Tirumullapalli temple in Karalamanna Amsom, Walluvanad taluk, in consultation with the Board of Religious Endowments;

(c) directing defendants 1 to 5 and 11 and 12 to render an account of their management after producing all account books and documents and other temple property in their possession or power and pay such sums as are found due;

(d) directing defendants 1 to 5 and 11 and 12 to surrender all temple articles, jewels, documents, keys, etc., in their possession or power;

(e) directing defendants 1 to 5 and 11 and 12 to pay damages for all loss caused to the temple by their fraud and mismanagement; and

(f) granting plaintiff's costs and such further relief as the nature of the case may require.

The District Judge has given a decree directing that an account should be taken of various items and that the defendants should pay to the Board of Religious Endowments such sum as may be found due on the taking of accounts and granting some other reliefs. Defendants 1, 3, 4 and 5 have filed this appeal. The fourth defendant afterwards died and his legal representative has been made a respondent.

[Portion of the judgment omitted as being unnecessary for the report.]

One of the objections taken in this appeal is that the suit in so far as it prays for the taking of accounts and for a decree directing the defendants to pay certain sums of money to the plaintiff is not maintainable. I will discuss this question lower down.

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[Portion of the judgment omitted as being unnecessary for the report.]

After making these remarks in connexion with specific items I now come to the important question in the case as to whether the suit as framed is maintainable. The suit was filed under section 73 of the Madras Hindu Religious Endowments Act II of 1927. This section, on the face of it, appears to be drafted with reference to section 92, Civil Procedure Code, by omitting some of the sub-clauses in it. Clauses (a) and (b) of section 92 are clubbed together as clause (a) of section 73 (1). Clauses (c), (e) and (h) of section 92 are reproduced as clauses (b), (c) and (d) of section 73 (1). Clauses (f) and (g) of section 92 have been provided for in other sections, namely sections 57 and 63. These relate to schemes and alienations. Clauses (f) and (g) of section 92 are not therefore reproduced in section 73. Clause (d) of section 92 especially relates to directing accounts. That clause did not exist in section 539 of the older Codes of 1877 or 1882. There was a considerable conflict of opinion as to whether a trustee can be removed under the old section 539; vide *Narasimha v. Ayyan*(1), *Subbayya v. Krishna*(2) and *Rangasami Naickan v. Varadappa Naickan*(3). The final Madras view was that a trustee cannot be removed. The learned Advocate-General for the respondents referred us to *Manohar Ganesh Tambekar v. Lakshmi-ram Govindram*(4) which was affirmed by the Privy Council in *Chotalal v. Manohar Ganesh Tambekar*(5). It was an instance of a suit

(1) (1888) I.L.R. 12 Mad. 157. (2) (1890) I.L.R. 14 Mad. 186.
(3) (1894) I.L.R. 17 Mad. 462 (F.B.). (4) (1887) I.L.R. 12 Bom. 247.
(5) (1899) I.L.R. 24 Bom. 50 (P.C.).

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where accounts were demanded and there was no objection in the suit that such a suit was not maintainable. The point was never raised nor argued by Mr. Mayne before the Privy Council nor is there a judgment on the matter. But, assuming that under section 539 there might be a prayer for taking accounts and that such a prayer comes under the last clause relating to "such further or other relief as the nature of the case may require", still the Indian Legislature thought it necessary to make the matter clear by expressly inserting clause (d) in section 92 which relates to the taking of accounts in the Act of 1908. The question now is what significance is to be attached to the omission of clause (d) of section 92 in section 73 and not whether a suit for taking accounts would be maintainable under a section standing like section 539 without any prior history. In the present case prayer (c) of the plaint is a prayer demanding accounts and also for directing the defendants to pay such sums as are found due. But prayer (d) refers to the surrender of temple articles, jewels, documents, keys, etc., by the defendants. Surely a prayer like this does not come under the clause directing accounts. It is a prayer for the recovery of specific property. Is such a prayer also to come under the general clause relating to further relief? We find as a matter of fact that provision has been made in section 78 of the Endowments Act which gives a summary remedy for the recovery of any property admittedly belonging to a temple. If there is any question whether property movable or immovable belongs to a temple and if issues arise with respect to title to such property, can it be

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said that a claim to recover such property falls under the general prayer for further or other reliefs in section 73 and that issues as to title can be tried in such a suit? Similarly again we come to prayer (e) which asks that the defendants should be directed to pay damages for all loss caused to the temple by their fraud and mismanagement. Is this also a prayer like the one asking for accounts? Could a prayer like this fall under clause (d) of section 73 relating to further or other relief? It may be that under the Court Fees Act a prayer for accounting may be tentatively valued by the plaintiff; vide section 7 (iv) of the Court Fees Act VII of 1870. It may be that the Court Fees Amendment Act of 1922 allowed all suits for accounts and damages to be filed with a court-fee of Rs. 15. But this last provision of law remained in force only for three years because in 1925 the Religious Endowments Act came into force and it provided for a court-fee of Rs. 50 for suits under section 73; vide section 81 and Schedule II. Section 81 says: "Notwithstanding anything contained in the first or second Schedule to the Madras Court Fees Amendment Act, 1922". This shows that the object of section 81 and Schedule II was to raise the court-fee from Rs. 15 to Rs. 50 and not to make suits under section 73 cheap. But the question is whether it was intended by section 81 and Schedule II which permit a suit under section 73 to be filed with a court-fee of Rs. 50 that suits not only for accounts but also for the recovery of properties movable or immovable whether admitted or not admitted to belong to a temple, suits for damages or loss on account of negligence, all such suits could be

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allowed to be filed with a court-fee of Rs. 50 only and without stating the valuation of such items. *Prima facie* it looks as if the Legislature could not have intended such suits to be filed under section 73. It is contended by the Advocate-General who appeared for the respondents that clause 2 of section 73 shows that no suit claiming any relief in respect of the administration or management of a religious endowment can be instituted except as provided by the Act, that is by section 73. But this construction proves a little too much for them for it is conceded that according to the decisions certainly there are suits which are held not to be covered by section 73 though they do relate to the administration or management of a religious endowment. In *Vythilinga Pandara Sannadhi v. The Temple Committee, Tinnevely Circle* (1) it was held by my brother CORNISH J. and CURGENVEN J. that section 73 is not a bar to the institution of a suit to establish a right of hereditary trusteeship of a temple and for certain consequential reliefs.

It was also held that "except as provided by this Act" in section 73 meant "contrary to the provisions of this Act". It has not been contended before us that this case is wrongly decided. And when a person wants to establish his right to the hereditary trusteeship of a temple as against other persons who deny it, it cannot be said that in some sense the suit relates to the administration or management of a religious endowment because if the plaintiff succeeds in such a case the endowment will have the benefit of his management as hereditary trustee but if he fails the endowment

(1) (1931) I.L.R. 54 Mad. 1011.

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will not have his heirs as managers and such a suit will finally decide the point whether a particular person's heirs also shall take part or shall not take part in the management of the temple. In a general sense it cannot be said that such a suit does not relate to the administration or management of the temple. If the words of section 73 are to be construed liberally such a suit would be barred by that section and yet it was held that it was not barred. Again in *Chandukchand v. Vedachala Chettiar*(1) my Lord the CHIEF JUSTICE and my brother CORNISH J. held that a suit by the trustee of a temple to recover property from alienees is not governed by section 73. Here again it is conceded that the decision is correct. If the words "in respect of administration or management" are to be construed in a liberal sense such a suit has relation to the administration or management of the temple because, where property is lost to the temple, the trustee has to recover it; if an attempt is made to restore it, the result of the attempt is to improve the management for administration of the temple and to cure the results of past maladministration. And yet it was held that section 73 does not bar such a suit. Again in *Ranganayaki Bai Ammal v. Shivarama Dubay*(2) CURGENVEN J. held that section 73 (1) (a) does not enable the institution of a suit unprovided for by the rest of the section, and that a suit by some trustees for the removal of co-trustees does not fall under this section. I agree with all these decisions and the main principle underlying them. The principle underlying them is that section 73 ought not to be construed

(1) (1931) I.L.R. 55 Mad. 549.

(2) (1929) 58 M.L.J. 104.

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as if it prohibits the filing of any suit relating to the administration or management of a religious endowment. Some limitation has to be placed upon the apparent generality of the language in section 73, clause 2. On what principle is such a limitation to be based? I think the key to the situation is to be obtained by reading clause 2 as a pendant to clause 1 and as prohibiting suits like those provided in clause 1 from being filed except as provided for in the Act, i.e., under section 73. Formerly they could be filed under section 92, Civil Procedure Code, and Order I, rule 8, thereof. The object of section 73 is to prevent the filing of such suits under section 92 or under any other provision and to see that they are filed only under section 73 of the Endowments Act, and to fix a court-fee of Rs. 50 for such suits. Its object is not to prevent other suits not falling under clause 1 from being filed outside the Act. It is agreed on both sides that clauses 1 and 2 should be construed so as to be consistent with each other. It is conceded on the one hand by the appellants that, if clause 2 prohibits the filing of all suits except as provided by the Act, clause 1 should be so construed as to permit the filing of such suits. It is conceded by the respondents that, if certain suits are not covered by clause 1 and should not be filed under section 73, clause 2 should not be so interpreted as to prohibit the filing of those suits under provisions outside the Act.

To this extent both sides are agreed. But the respondents want as wide a construction to be given to section 73 particularly so as to include suits of the kind before us and for the purpose of arriving at such a conclusion they rely on the

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language of clause 2. But when we find a number of decisions excluding a number of suits from the operation of clause 2, obviously we must regard them as excluded also from the operation of clause 1. They do not fall under the general words of clause (d) "further or other relief". Then why should this particular suit be held to fall under section 73? It prays for damages without any valuation of the property and without payment of any court-fee in respect of these two items. In my opinion section 73, having regard to the manner in which it has come to be framed and taken with the provisions relating to court-fees, is confined to cases in which the main relief falls under any of the clauses (a), (b), (c), and (d), and covers relief only incidental to and *ejusdem generis* with the main reliefs and it is because it is to be confined to suits of such a simplified nature that the court-fee is made definite and limited to Rs. 50. On the one hand suits under section 73 are not made too cheap like the suits under the Court Fees Amendment Act of 1922 or under the Court Fees Act VII of 1870 where the notional valuation given by the plaintiff may be very small; on the other hand they are not made too costly because it is inexpedient to do so where the relief is for the removal of a trustee or to vest property in a receiver, etc. But when it is sought to recover properties which may be worth thousands or even lakhs and to recover moneys as the result of taking accounts or gross mismanagement or as damages for some act of default, to permit such suits to be filed with a court-fee of Rs. 50 seems not to have been intended by the Legislature. In my opinion beyond the reliefs expressly mentioned in clauses

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(a), (b) and (c) of section 73 and any relief incidental to them no further relief can be prayed for in the suit. On this ground I allow the appeal in so far as it prays for the taking of accounts and making defendants 1 to 10 liable for the amount found due on the taking of such accounts. As to the actual scheme, that has to be dealt with in the connected appeal against Original Suit No. 4 of 1929 and it will be dealt with separately.

In the case of a devaswom which happens to be grossly mismanaged as in this case not on account so much of the dishonesty of the trustees but on account of disunion among them, what one has to be more anxious about is the framing of a scheme which will place the future management of the temple on a sound footing. As to the past, if any one is actually found to have come into possession of moneys or properties of the temple, no doubt steps ought to be taken against him for recovering them. Similarly in the case of gross negligence or wilful default. But it is inexpedient that steps should be taken against hereditary trustees who discharged a thankless task for the consequences of their failure to discharge their duties on account of the impossibility of discharging those duties arising out of disunion among them. And men in the position of the present plaintiff and the Board ought to concentrate their attention on placing the management of this temple on a sounder footing from the point of view of future management.

A memorandum of objections has been filed by the eighth respondent, the Endowments Board. It is urged that these trustees ought to be removed. We agree with the learned District Judge that in

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the circumstances no case has been made out for their removal and we hope that no such necessity will arise if a proper scheme of management is framed. It is then urged that we should make Nedungadi and Chandu Nair parties to this appeal and give decrees against them. This does not strictly arise in a memorandum of objections. The proper remedy was to have filed a revision petition against the order exonerating them. It is true we have got inherent power now to make them parties and proceed against them. But we do not see any reason why we should exercise that power in this case. The memorandum of objections is therefore dismissed. We reserve the order as to costs until the connected appeal is heard.

CORNISH J.

CORNISH J.—I agree that this appeal in respect of the decree for an account should be allowed. In my judgment it is not competent to the Court in a suit instituted under section 73 (1) to decree an account and an inquiry, and this is a fatal objection to the decree made against the trustee-defendants in the present suit.

A comparison of section 73 (1) of the Religious Endowments Act with section 92 (1) of the Code shows that clauses (a), (b), (c) and (d) of section 73 have been taken from clauses (a), (b), (c), (e) and (h) of section 92. There was no need to reproduce in section 73 the clauses (f) and (g) of section 92, because provision is made elsewhere in the Act for sanction of a sale or mortgage of land belonging to a religious endowment (section 76) and for settling a scheme of management (*vide* sections 57 and 63). Section 73 contains no clause corresponding with clause (d) of section 92 for "directing accounts and enquiries". The omission

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must have been made advisedly. It would indeed be strange if the framers of the Endowments Act with the precedent of section 92 (1), Civil Procedure Code, before their eyes, and knowing that clause (d), which had no counterpart in section 539 of the 1882 Code, had been inserted in section 92 (1) of the 1908 Code in order to make certain that which had been the subject of divergent views in the different High Courts [see *Abdur Rahim v. Mahomed Barkat Ali*(1)], should have chosen to leave it open to doubt whether a direction for an account and inquiry could be given as ancillary relief in a suit under section 73 (1) of the Act. I think there is a perfectly valid explanation of the omission from section 73 of a clause corresponding to clause (d) of section 92.

An effective machinery is set up by the Act for controlling the conduct of trustees of religious endowments. The Act requires that accounts shall be kept by temple trustees and that these accounts shall be audited annually by Government auditors (section 45). The audit report must specify all cases of improper expenditure or of failure to recover moneys due to the institution or of loss caused by neglect or misconduct of the trustee (section 47). A failure to keep accounts would be a neglect of duty, for which, of course, a trustee of a non-excepted temple might be removed from office under section 53, or, in the case of a trustee of an excepted temple, by means of a suit under section 73 (1). In view of the ample provisions in the Act for checking the accounts and fixing the liability of trustees, I think that a special provision enabling the Board or persons

(1) (1927) I.L.R. 55 Cal. 519, 529 (P.C.).

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interested in the proper administration of the trust to sue for an account and inquiry would be superfluous. The audit will discover, as far as it is discoverable, the extent of a trustee's misappropriation or misapplication of trust money or of the loss occasioned by his neglect or default; and the audit report fulfils the very purpose of a decree directing accounts and inquiries. This seems to me the explanation of the omission of clause (d) of section 92 of the Code from the reliefs classified in section 73 (1) of the Act. The money found due by a trustee on an audit report would be a debt due by the trustee to the temple and would be recoverable in a suit either by a co-trustee, or by a new trustee appointed in the place of the trustee in default, or, if a scheme has been framed, by the person or body appointed to the management.

It has been strongly argued that such a suit would be barred by sub-section 2 of section 73. I do not agree with this contention. It would be barred only if it was a suit that could be instituted in the manner provided by the Act. In *Vythilinga Pandara Sannadhi v. The Temple Committee, Tinnevely Circle*(1) it was held that the words in section 73 (2) "no suit in respect of such administration or management shall be instituted except as provided by this Act" mean "no suit in respect of such administration or management shall be instituted contrary to the provisions of this Act". The Act makes specific provision for the institution of suits in respect of the administration or management of religious endowments in section 73 (1) and in sections 55 (4), 57 (3), 63 (4),

(1) (1931) I.L.R. 54 Mad. 1011.

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65 and 67 (4) and (5). A suit in respect of the administration of a religious endowment would not be contrary to the provisions of the Act if it is not a suit for which the Act has made provision. For this reason I think that such a suit as I have described would not be barred by section 73 (2). This view seems to me to be in conformity with the policy of section 73 (1) of the Act. The consent of the Board or temple committee which must be obtained by a party desirous of instituting a suit under section 73 (1) is obviously intended to serve as a check upon vexatious or frivolous suits against temple trustees. But there is no occasion for this check when the suit is to recover a debt ascertained and reported by the official auditors to be due by a trustee to the temple. In fact, it would be the duty of the persons in charge of the management of the endowment to sue for this debt.

Upon the merits generally of the appellants' case and of the memorandum of objections I do not wish to add anything to the observations of my brother RAMESAM J. with which I entirely agree. I think the circumstances of the case are such that the Court should be rather concerned to formulate a scheme to prevent mismanagement of the endowment properties in the future than to seek to visit the trustees with punishment for their past shortcomings.

A.S.V.

APPELLATE CIVIL.

*Before Mr. Justice Pakenham Walsh.*1933,
March 8.T. L. SWAMINATHA AYYAR (PETITIONER—DECREE-
HOLDER), APPELLANT,

v.

THE OFFICIAL RECEIVER OF SOUTH MALABAR
(RESPONDENT), RESPONDENT.**Provincial Insolvency Act (V of 1920), ss. 51 and 52—Insolvency petition—Attachment effected before filing of—Sale pursuant to, thereafter and before adjudication—Expenses incurred in bringing property to sale—Decree-holder's right to a charge on sale proceeds in respect of—"Benefit" in sec. 51—Meaning of.*

A debt due to a judgment-debtor was, after an insolvency petition had been filed against him, sold in execution of a decree which had been obtained against him by the appellant pursuant to an attachment effected before the filing of the insolvency petition. The judgment-debtor was subsequently adjudicated insolvent. The question for decision was whether the appellant was, as against the Official Receiver, entitled to a charge on the sale proceeds for the expenses incurred by him in bringing the debt to sale.

Held that under section 51 of the Provincial Insolvency Act the appellant was entitled to a charge on the sale proceeds for the expenses incurred by him in bringing the debt to sale.

The word "benefit" in section 51 of the Act means the net realisation in execution after paying the costs.

Section 52 of the Act is inapplicable to a case where the property has been brought to sale.

APPEALS against the appellate orders of the District Court of South Malabar dated 11th October 1928 and made in Appeal Suits Nos. 10 of 1928 and 31 of 1928 preferred respectively against the orders, dated 12th November 1927 and made in

* Appeals against Appellate Orders Nos. 94 and 95 of 1929.

Miscellaneous Petition No. 2288 of 1927 and in Miscellaneous Petition No. 2196 of 1927 in Original Suit No. 79 of 1925, Palghat Sub-Court.

T. M. Krishnaswami Ayyar for appellant.

T. S. Anantaraman for respondent.

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JUDGMENT.

These appeals raise a matter of some difficulty. One Swaminatha got a decree against one Gopalakrishna and in execution attached on 12th March 1926 some debts due to the debtor. An insolvency petition was filed against Gopalakrishna in April 1926 and the Official Receiver was appointed interim Receiver. He petitioned the executing Court to have the execution of Swaminatha's decree stopped and to have the attached properties delivered to him. Ultimately the debts attached were sold on 25th June 1926 by the Court in execution of Swaminatha's decree. In August 1926 Swaminatha applied to the Court for payment to him of the sale proceeds. The Subordinate Judge dismissed the petition as there were insolvency petitions pending against Gopalakrishna the judgment-debtor. Gopalakrishna was adjudged insolvent in August 1927. Both Swaminatha and the Official Receiver then applied for payment of the sale proceeds. The Subordinate Judge ordered the payment of the whole amount to the Official Receiver. In appeal it was held that Swaminatha was not entitled to the sale proceeds nor was he entitled to a first charge with regard to the costs incurred by him in bringing the property to sale. In second appeal it is not contended that he is entitled to the sale proceeds; but it is contended that he is entitled

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to a first charge for the costs incurred by him in bringing the debts to sale. The learned District Judge held that section 52 applied only to the property of a debtor attached in execution but which has not been sold, and that, as this was the only section under which the appellant could recover the charges for bringing the property to sale, he could not be allowed those charges. He admits that it is illogical that, while a creditor who has taken out execution but has not brought the property to sale is entitled to a charge for the costs of his suit and of the execution, a creditor who has taken out execution and has brought the property to sale should not be entitled to anything. He says: "But the wording of section 52 is too clear to allow of an interpretation which would remove this illogicality." With regard to the case which he quotes, *Lyon Lord & Coy. v. Virbhandas Rattanchand*(1) decided by the Assistant Judicial Commissioner of Sind, that would not be an authority in this Court and as a matter of fact the view taken in that case that section 52 applies only to movable property has been dissented from in *Haranchandra Chakravarti v. Jay Chand*(2) and *Sivaswami Odayar v. C. R. Subramania Iyer*(3). This however does not really touch one of the main points in question, viz., whether section 52 applies to property which has already been sold. It may be observed that the application to the Sub-Court by the Official Receiver was made before the sale but was refused on the strength of the rulings in *Firm Lyon Lord & Co. v. Firm Virbhandas*(4), *Ralla Ram v. Ram*

(1) (1923) 76 I.C. 380.
(3) (1931) M.W.N. 1251.

(2) (1929) I.L.R. 57 Calc. 122.
(4) A.I.R. 1924 Sind. 69.

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Labhaya(1) and *Official Receiver, Tanjore v. Sankara Aiyar*(2). But in *Sivaswami Odayar v. C. R. Subramania Ayyar*(3) quoted above the opposite view was held that section 52 would apply to an interim Receiver. This is the latest authority but it cannot be said perhaps that the point is decidedly settled. Anyhow, I do not see any escape from the conclusion that section 52, which deals entirely with property which has not been brought to sale, is inapplicable to a case where the property has been brought to sale. But it is contended that section 51 will cover the case. Section 51 says :

"Where execution of a decree has issued against the property of a debtor no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition."

It is argued for the appellant that the word "benefit" here means net realisations after meeting the charges. This argument was put in another form before the learned District Judge, namely, that if section 52 is excluded there is no other section under which the Court has power to direct the proceeds belonging to the debtor to be delivered to the Receiver. With regard to this the learned Judge held that the effect of the provisions of the Act in general, and of section 51 in particular, was to vest such money in the Official Receiver on behalf of the general body of creditors. I agree that section 51 does vest the property which has been sold under such circumstances in the Official Receiver, but it appears to

(1) A.I.R. 1925 Lah. 158.

(2) (1925) 50 M.L.J. 239.

(3) (1931) M.W.N. 1251.

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me a reasonable interpretation of the word "benefit" to hold that it is the net realisation in execution after paying the costs. If that is so, the balance will not belong to the Official Receiver and, in the absence of any clear provision to the contrary, it would be justifiable to award it to the decree-holder who has incurred the expenses of bringing the property to sale. If section 51 can be read so as to do justice to the parties, I think it is preferable to read it in such a manner, seeing that section 52 does not apply, rather than to put a construction upon it which is obviously unjust.

I would therefore hold that under section 51 the appellant is entitled to a charge on the property sold for the expenses incurred by him in bringing it to sale. The appeal is therefore allowed with costs throughout (one set) out of the estate. Appellant will recover costs of the suit and of execution.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

KALASIPUDI SUBBA RAO AND FOUR OTHERS (PLAINTIFF
DECEASED AND HIS LEGAL REPRESENTATIVES), APPELLANTS,

1933,
March 29.

v.

PALAKURTHI BHIMALINGAM AND TWENTY-ONE OTHERS
(DEFENDANTS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 11—Court competent to try subsequent suit—Possession—Suit in Munsif's Court for—Dismissal of—Affirmance of, by District Judge on appeal, latter holding that redemption of mortgage was condition precedent to plaintiff obtaining possession—Subsequent suit by plaintiff for redemption of mortgage and for possession—Maintainability—Munsif who disposed of first suit not competent to entertain second one.

The owners of A and B schedule lands executed first a usufructuary mortgage over both of them in favour of the predecessor-in-title of defendants 1 to 5, then a simple mortgage in favour of one P, and afterwards a simple mortgage in favour of L and V, L having a two-thirds share in the mortgage and V a third share. P transferred his second mortgage to the first mortgagee. Subsequently plaintiff's father purchased the equity of redemption in both sets of lands in execution of a money decree which he had obtained against the mortgagors and obtained symbolical delivery. Defendants 1 to 5 then sued on their second mortgage and obtained a decree. That decree amount was paid off by the plaintiff's father. Thereupon the plaintiff got an assignment from L of his two-thirds share in the third mortgage. V, the owner of the remaining third share in that mortgage, then obtained a decree which was transferred to the sixth defendant and he purchased the A and B schedule lands in execution of that decree, plaintiff's father being a party to the suit. The A schedule lands being Mazumdar service inam were inalienable and their sale was therefore invalid. The plaintiff, who was subsequently given a patta for the A schedule lands by the Government, sued defendants 1 to

* Appeal No. 305 of 1927.

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5 and the sixth defendant for recovery of possession of those lands. The District Munsif dismissed that suit holding that the patta granted to the plaintiff had not the effect of cancelling the sale of the lands in favour of the sixth defendant. On appeal, the District Judge concurred in dismissing the suit, but he held that the plaintiff was entitled to redeem defendants 1 to 5 and that a suit should be brought for that purpose if he wanted to recover possession. In a suit subsequently instituted by the plaintiff against defendants 1 to 5 and the sixth defendant for redemption and for possession of the A schedule lands,

Held that the suit was not barred by *res judicata* by virtue of the decision in the prior suit of the plaintiff.

In the previous suit the District Munsif did not decide that the plaintiff was not entitled to get possession as against the sixth defendant, nor was it decided that defendants 1 to 5 were entitled to remain in possession against the plaintiff. The final decision in the prior suit, that of the District Judge, was that to get possession plaintiff must pay off the mortgage of defendants 1 to 5 and the present suit had been brought in conformity with that decision.

APPEAL against the decree and judgment of the Court of the Additional Subordinate Judge at Vizagapatam, dated the 7th day of March 1927, in Original Suit No. 11 of 1925.

V. Govindarajachari and B. V. Ramanarasu for appellants.

Y. Suryanarayana and P. Somasundaram for respondents.

Cur. adv. vult.

JUDGMENT.

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NAIR J.

MADHAVAN NAIR J.—Plaintiff is the appellant. The plaintiff's suit was for the redemption of the mortgage over the lands in A and B schedules of the plaintiff and for possession of the same. A schedule lands are Muzumdari service inam and the B schedule lands are quit-rent inam. These lands were originally held by the members of Kasiraja family. In 1885 the holders executed a

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usufructuary mortgage over both the A schedule and B schedule lands in favour of the predecessor-in-title of defendants 1 to 5 for Rs. 6,000. In 1886 a simple mortgage of these lands was executed in favour of one Putta Audenna for Rs. 1,500. In the same year a third mortgage, which was also a simple mortgage, was executed in favour of two persons, K. Latchayya and M. Venkata Rao, Latchayya having a two-thirds share in the mortgage and Venkata Rao a one-third share. This mortgage was for Rs. 1,200. The second mortgagee transferred his mortgage to the first mortgagee. In execution of the decree in Original Suit No. 27 of 1887 the plaintiff's father who had obtained a money decree against the mortgagors purchased the equity of redemption over these lands and obtained symbolical delivery on the 14th October 1892. In 1893 defendants 1 to 5 brought Original Suit No. 34 of 1893 on the second mortgage and obtained a decree. This decree amount was paid off by the plaintiff's father. On the 17th of July 1894 the plaintiff got an assignment of the two-thirds share of the third mortgage owned by K. Latchayya. In Original Suit No. 303 of 1896 Venkata Rao the mortgagee of one-third share of the third mortgage obtained a decree which was transferred to the sixth defendant who got the lands sold at Court auction and purchased them. The plaintiff's father was a party to the suit. It may here be observed that the sale and purchase of the A schedule lands was invalid as the lands are Muzumdari service inam and hence inalienable; but the sale of the B schedule lands was not open to this objection. However, the plaintiff being bound by the decree must be deemed to

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have lost his rights over both the properties; but in 1902 he was given a patta for the A schedule lands by the Government. In *Venkata Jagannadha v. Veerabhadrayya*(1) it was held that the grant of patta constitutes a fresh grant. The plaintiff must therefore be deemed in consequence of the grant to have obtained an absolute title to the property for which he was given a patta. On the strength of the title thus obtained the plaintiff instituted Original Suit No. 280 of 1903 for possession of the A schedule properties against the present defendants 1 to 5 and the sixth defendant who was the nineteenth defendant in that suit. The first issue in the suit was whether the patta granted to the plaintiff had the effect of cancelling the sale of the lands in favour of the nineteenth defendant. On this issue the District Munsif found against the plaintiff and dismissed the suit (See Exhibit IV). On appeal the District Judge confirmed the District Munsif's decision holding that to get possession the plaintiff must first pay off the mortgage of defendants 1 to 4 and that the grant of the patta in his favour did not affect the rights of the nineteenth defendant (i.e., the sixth defendant) in the suit lands (See Exhibit V). As a result of this decision the plaintiff instituted the suit out of which this appeal arises for redemption and for possession of the suit lands. The suit is admittedly confined to the lands for which the plaintiff has obtained a patta from the Government as already mentioned in 1902.

Besides raising the contentions relating to the merits of the case, the contesting defendants raised, at the very outset, various legal objections

(1) (1921) I.L.R. 44 Mad. 643 (P.C.).

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to the suit, as preliminary points for decision. These points were that the plaintiff's rights in the lands have been extinguished in consequence of some of the previous proceedings, that his rights, if any, were barred by limitation, that the suit was barred under Order II, rule 2, of the Code of Civil Procedure and that it was also barred by *res judicata* by reason of the decision in Original Suit No. 280 of 1903. On these preliminary points, the learned Subordinate Judge upheld the contentions of the defendants and in consequence the plaintiff's suit was dismissed without an enquiry into its merits.

In appeal Mr. Govindarajachari on behalf of the plaintiff-appellant contended before us that the decision on all these points is wrong and that the case should be sent down for a decision on the merits. Mr. Somasundaram on behalf of the sixth defendant attempted to support before us the lower Court's decision only on the point of *res judicata*. The only point, therefore, for us to decide is, "Is the plaintiff's suit barred by *res judicata* by reason of the decision in Original Suit No. 280 of 1903?" It may here be mentioned that the plaintiff is willing to redeem defendants 1 to 5, but they support the sixth defendant's plea which, if successful, would entail dismissal of the plaintiff's suit.

The lower Court's decision on the question of *res judicata* is contained in paragraph 13 of the judgment which is as follows :

" . . . The sixth defendant was the nineteenth defendant in the previous suit. There was a specific issue raised therein as to whether the patta to plaintiff had the effect of cancelling the sale in favour of nineteenth defendant. This

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issue was found against the plaintiff. This finding was confirmed in appeal. This decision is conclusive there being no second appeal by the plaintiff."

Mr. Govindarajachari contends that, assuming that a previous decision on a question of law, though erroneous, can be treated as *res judicata* in a subsequent suit—a proposition which he is not willing to concede though, we think, the decisions are against him—the decision of the appellate Court in the previous suit should not be accepted as *res judicata* in the present suit inasmuch as the District Munsif in whose Court the previous suit was instituted is not competent to try the present suit which has been instituted in the Sub-Court. According to section 11 of the Civil Procedure Code, to constitute a previous decision *res judicata* in a subsequent suit it is necessary amongst other things that the Court which tried the previous suit must have been a Court "competent to try the subsequent suit". In the case before us the Court of the District Munsif was competent to try the previous suit, that suit being one for possession; but admittedly the present suit being one for redemption of a mortgage of Rs. 6,000 it was not competent for the District Munsif's Court to try it. It must therefore follow according to section 11, Civil Procedure Code, that the previous decision cannot operate as *res judicata* in the present suit. But Mr. Somasundaram for the respondent argues that the nature of the previous and the present suits remains the same and that the plaintiff should not be allowed by merely tacking on to the prayer for possession a prayer for redemption to get rid of the effect of the decree in the previous suit. In support of his contention he strongly relies on the decision in *Pathuma*

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v. *Salimamma*(1), followed and explained in *Thekkamannengath Raman alias Kochu Poduval* v. *Kakkasseril Pozhiyot Manakkal Karnavan*(2) and *Patrachariar v. Alamelumangai Ammal*(3), but on examination it will be found that decision does not support him. In that case it was held that the decision of a District Munsif with regard to the validity of a gift of a *shop and a warehouse* which was only one of the items in a deed of gift which comprised various other properties also was *res judicata* in a subsequent suit as it was within his competency to decide it; but his decision as to the validity of the deed of gift which was a larger question was not *res judicata* in a subsequent suit as his Court was not competent to decide this larger issue which involved title to the rest of the properties comprised in the gift. Applying this principle to the present case the position will be this. If the District Munsif had held in the previous suit that the plaintiff could not recover possession from the nineteenth defendant (that is, the present sixth defendant), then that decision which fell within the competency of his Court to decide would be *res judicata* in the present suit and the plaintiff will be precluded from raising the same question again; and, if the District Munsif gave any decision with regard to the redemption of the mortgage, that decision would not be *res judicata* as his Court could not try a suit for redemption and may therefore be disregarded. In the previous case it was not decided that the plaintiff was not entitled to possession as against the nineteenth

(1) (1884) I.L.R. 8 Mad. 83.

(2) (1915) 28 M.L.J. 184.

(3) (1921) 25 L.W. 11.

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defendant. As between the nineteenth defendant and the plaintiff the only issue raised in that suit was whether the patta granted to the plaintiff had the effect of cancelling the sale of the lands in favour of the nineteenth defendant. On this point the decision was against the plaintiff. That decision not only did not say that the plaintiff is not entitled to possession against the nineteenth defendant but it did not involve any finding that the defendants 1 to 4 were entitled to remain in possession, for the final decision was the decision of the District Judge and he held that the plaintiff is entitled to redeem defendants 1 to 4 and that a suit should be brought for that purpose if he wanted to recover possession. The present suit has been instituted in consequence of that decision. The nature of the decision in the prior suit being as described above, I do not think the contention of the appellants' learned Counsel in the present case in any way goes against the decision in *Pathuma v. Salimamma*(1). Various decisions, such as *Misir Ragho-bardial v. Sheo Baksh Singh*(2), *Ran Bahadur Singh v. Lucho Koer*(3), *Sheoparsan Singh v. Ramnandan Prasad Singh*(4), etc., were brought to our notice, but, as they have only a general bearing on the question under discussion, I do not think it is necessary to deal with them. The case relied on by the lower Court in support of its decision, *Bhugwanbutti Chowdhurani v. Forbes*(5), has no application to the present case. In that case the previous suit was brought in the Munsif's Court where it was held that the plaintiff was not entitled

(1) (1884) I.L.R. 8 Mad. 83.

(3) (1884) I.L.R. 11 Calc. 301 (P.C.).

(2) (1882) I.L.R. 9 Calc. 439 (P.C.).

(4) (1916) I.L.R. 43 Calc. 694 (P.C.).

(5) (1900) I.L.R. 28 Calc. 78.

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to road and public work cesses. In the subsequent suit instituted by him against the same defendant in the Sub-Court he claimed to recover the road and public work cesses and also embankment and dak cesses. It was rightly held that the plaintiff cannot be allowed to enlarge the scope of the suit by adding reliefs to it to get rid of the effect of the decree in the previous suit. The present case is clearly not one of that class. The plaintiff now seeks to redeem the suit mortgage. Such a suit cannot be tried in a District Munsif's Court. If in the suit before him the District Munsif expressed any opinion about redemption such opinion may be disregarded; but his decision about possession which he was competent to decide would be binding; see *Pathuma v. Salimamma*(1). In the present case, as already pointed out, the District Munsif did not decide in the previous suit that the plaintiff was not entitled to possession as against the nineteenth defendant, nor was it decided that defendants 1 to 4 are entitled to remain in possession against the plaintiff. What was finally decided was that the plaintiff may redeem. In no way does the present suit therefore go against the decisions of this Court in *Pathuma v. Salimamma*(1), *Thekkamannengath Raman alias Kochu Poduval v. Kakkasseri Pozhiyot Manakkal Karnavan*(2) and other cases of a similar nature. For the above reasons I would hold that this suit is not barred by *res judicata* by virtue of the decision in Original Suit No. 280 of 1903.

In the result we set aside the decision of the lower Court and remand the case for disposal according to law after hearing the case on the

(1) (1884) I.L.R. 8 Mad. 83.

(2) (1915) 28 M.L.J. 184.

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remaining issues on which we express no opinion. The appellant is entitled to the costs of this appeal. We may say there is no liability in respect of the court-fee as the appeal was allowed to be filed *in forma pauperis*.

JACKSON J.

JACKSON J.—A mass of authority has been cited upon the question of *res judicata*, but the case is very simple and runs on all fours with *Pathuma v. Salimamma*(1). In both cases plaintiff was suing a defendant in ejection and a third party intervened claiming paramount title. In *Pathuma v. Salimamma*(1) “an issue as to the title derived under the gift was framed” and it might run in this fashion,

Whether the title set up by plaintiff had the effect of cancelling the gift in favour of Salimamma, the third party.

In our case we have the issue whether the patta granted to plaintiff had the effect of cancelling the sale in favour of nineteenth defendant (the third party).

In *Pathuma v. Salimamma*(1) the Munsif's Court found in favour of the plaintiff, and in our case against him. That makes no difference. The point is that when a larger question was agitated in the superior Court, the opinion of the Munsif who was not competent to deal with this larger question was not treated as *res judicata*.

Salimamma sued for all the property under her alleged deed of gift, and the gift was upheld.

In the same way when plaintiff sues in our case for his right to redeem as mortgagor—a matter beyond the competence of the Munsif—his right can be upheld regardless of the Munsif's opinion that he had no right.

(1) (1884) I.L.R. 8 Mad. 88.

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But what cannot be disregarded, and this is the main import of *Pathuma v. Salimamma*(1), although it is mere common sense which hardly requires a ruling, is the competent decision of the Munsif within the bounds of his jurisdiction. The Munsif decreed that plaintiff must have the shop and warehouse for which he sued, and that decree cannot be upset on any theory of its not being *res judicata*. Section 11 of the Civil Procedure Code contemplates “matter in issue” which no one except out of sheer perversity could suppose to mean “matter already decreed”. And so too in our case if the Munsif within his competence had decreed that plaintiff could not eject the nineteenth defendant, it would be idle for plaintiff to reopen the matter. He might get a decree in redemption against defendants 1 to 4 but defendant 19 would be irremovable under the prior decree.

But nineteenth defendant never claimed possession in Original Suit No. 280 of 1903. He claimed (see paragraph 5 of the judgment, Exhibit IV), as was set forth in the issue, that his title by sale was superior to plaintiff's title by patta just as Salimamma had claimed that her title by gift was superior. The Munsif found in favour of nineteenth defendant and if in consequence of that finding it had been held that plaintiff could not eject defendants 1 to 4, defendants 1 to 4 could retain their possession just as in *Pathuma v. Salimamma*(1) plaintiff retained his shop and warehouse. But that was not the final finding; for the District Judge held that to get possession plaintiff must first pay off first defendant's

(1) (1884) I.L.R. 8 Mad. 83.

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JACKSON J. mortgage (Exhibit V) in conformity with which finding the present suit is brought. An attempt to shake the authority of *Pathuma v. Salimamma*(1) by reference to an *obiter dictum* of the Privy Council in *Gokul Mandar v. Pudmanund Singh*(2) was repelled by a Bench of this Court in *Thekkamannengath Raman alias Kochu Poduval v. Kakkasseri Pozhiyot Manakkal Karnavan*(3). But in the present suit the question there is academic. If the dictum of the Privy Council is given the literal interpretation which was attempted to be applied to it, not even the decree of the Munsif's Court would be *res judicata* in the superior Court—the whole proceeding of the Court not competent to try such subsequent suit would be a nullity. But, for the appellant, Mr. Govindarajachari does not carry his argument so far, and is content to rest it upon *Pathuma v. Salimamma*(1) leaving the respondents entitled to whatever they got by the decree in the Munsif's Court. Of course if the decree also is ruled out, respondents are worse off than they were before. It seems hardly necessary to add that in my opinion the dictum does not carry this meaning and has been correctly interpreted in *Thekkamannengath Raman alias Kochu Poduval v. Kakkasseri Pozhiyot Manakkal Karnavan*(3).

A.S.V.

(1) (1884) I.L.R. 8 Mad 83.

(2) (1902) I.L.R. 29 Calc. 707 (P.C.).

(3) (1915) 28 M.L.J. 184.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

LINGAMALLU SEENAYYA (DEFENDANT), APPELLANT,

1933,
May 10.

v.

LINGAMALLU RAMALINGAYYA (PLAINTIFF),
RESPONDENT.*

*Indian Limitation Act (IX of 1908), arts. 61, 106 and 120—
Suit by principal partner against sub-partner—Special
contract between—Article governing.*

Plaintiff, a principal partner of a firm, sued the defendant, his sub-partner, for the recovery of that portion of the plaintiff's share of the partnership losses paid by him to the creditors of the partnership on its dissolution which the defendant was bound to contribute under a special contract between the plaintiff and the defendant.

Held, that the suit was governed by article 120 and not by article 106 or article 61 of the Indian Limitation Act.

Article 106 is intended to deal with suits between partners *inter se*, and the words construed in their plain and natural sense do not seem to apply to actions between a principal partner and a sub-partner.

When a main partner pays his share of the loss, he makes the payment on his own behalf and the fact that he can recover a proportion of what he has paid from the sub-partner is no reason for holding that he has paid the amount on the latter's behalf, and hence article 61 does not apply.

APPEAL against the decree of the District Court of Guntur in Appeal Suit No. 38 of 1927 preferred against the decree of the Court of the Principal Subordinate Judge of Guntur in Original Suit No. 36 of 1925.

G. Lakshman and M. Sriramamurti for appellant.

B. Sitarama Rao for respondent.

* Second Appeal No. 716 of 1929.

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The plaintiff was a member of a firm, and the defendant was his sub-partner. The lower Courts proceed on the footing that the main partnership was dissolved in 1921. This is disputed by Mr. Sitarama Rao, the Counsel for the plaintiff (respondent); but, in the view I am taking, it is unnecessary to pursue this point. The accounts of the partnership were settled in August 1925, and it was found that there having been a loss, the plaintiff had to bear his share of it. The plaintiff had paid in 1922 a major portion of what was found at the settlement to be due by him for his share. The suit was filed in August 1925, apparently some days after the settlement. The question to be decided is, is the suit barred by limitation? The lower Courts, being of the opinion that article 120 applies, have held that the suit was filed within time.

Mr. Lakshmanan for the defendant argues that the suit is governed by article 106 of the Limitation Act. That article relates to a suit "for an account and a share of the profits of a dissolved partnership".

Can it be said that a suit by a partner against his sub-partner relates either to "an account" or "a share of the profits of dissolved partnership"? I think not. What the plaintiff in such a suit claims is a share of his own share; with the profits of the main partnership as such, the suit has no concern. Moreover, the present action is not for a share of the profits at all. The principal partnership having resulted in a loss and the plaintiff having had to bear his share of it, he sues for the recovery of that portion which the

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defendant was bound to contribute under the special contract between the latter and the plaintiff. I find it very difficult to regard such a suit as being governed by the terms of article 106. No case has been cited to show that this article was ever held applicable to cases between a main partner and sub-partner. Mr. Lakshmanan contends that in fact there is a partnership within a partnership. But that is not the question with which I have to deal. Is this suit of the nature contemplated by article 106 of the Limitation Act?—that is the point that has to be decided.

It is next contended that section 31 of the English Partnership Act gives the sub-partner a right to proceed for obtaining an account against not only the assigning partner but also against the remaining partners. It is then argued that this section shows that the rights of the partner and the sub-partner are alike and that there is no difference in their right to demand an account from the date of the dissolution. In the first place, that provision does not deal with a question of limitation and secondly, it is sufficient to say that the present suit is not by a sub-partner as against the main partner.

The question resolves itself into this: Is it necessary to place a strained interpretation on article 106 to bring a case like the present within it? The article seems intended to deal with suits between partners *inter se* and the words construed in their plain and natural sense do not seem to apply to actions between a principal partner and sub-partner.

In the lower Courts it seems to have been argued that article 61 applies. When a main

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partner pays his share of the loss, he cannot be deemed to be paying it for, or on behalf of, his sub-partner; he makes the payment on his own behalf and the fact that he can recover a proportion of what he has paid from the sub-partner is no reason for holding that he has paid the amount on the latter's behalf; see *Kuppuswami Chetty v. Singaravelu Chetty*(1) and *Yerukola v. Yerukola*(2).

We are thus left to fall back upon article 120, the residuary article. The next question is, what is the starting point? Mr. Sitarama Rao maintains that time must be computed from the payment by the main partner of his share of the loss or, in the alternative, from the date of the settlement of the accounts of the dissolved partnership. Mr. Lakshmananna on the other hand urges that the starting point is the date of the dissolution of the partnership. It is unnecessary to decide this question, as in any event the suit is within time.

In the result, the second appeal is dismissed with costs.

K.W.R.

(1) (1923) 45 M.L.J. 233, 236.

(2) (1922) I.L.R. 45 Mad. 648 (F.B.).

APPELLATE CRIMINAL.

Before Mr. Justice Sundaram Chetti and Mr. Justice
Pakenham Walsh.

GUJJALA NARASIMHULU (PETITIONER), PETITIONER,

v.

NAGUR SAHIB AND TWELVE OTHERS (ACCUSED),
RESPONDENTS.*

1933,
July 31.

*Indian Penal Code (Act XLV of 1860), ss. 147 and 427—
Public nuisance—Abatement of—Right of public—
Encroachment on public street—Demolition of superstructure—Whether constitutes offence of mischief.*

There is no statutory provision in India justifying a private person or a member of the public in demolishing a building and causing loss to another person by way of abating a nuisance.

Complainants rebuilt their houses which abutted a public street. A portion of the superstructure was an encroachment on a portion thereof. The accused gathered there for the purpose of abating what they considered to be a public nuisance, and demolished a portion of the superstructure which stood on the encroached portion. The harm caused by the encroachment was not of such a nature and so imminent as to justify the accused to take the law into their own hands and demolish the superstructure.

Held that, as the accused had no right of abating the public nuisance, the demolition of the superstructure by them had no justification in law, the loss caused to the complainants by such demolition was wrongful loss within the meaning of section 23, Indian Penal Code, and the accused were guilty of the offence of mischief.

Re Dharmalinga Mudaly, (1914) I.L.R. 39 Mad. 57, dissented from.

Held further that, as the common object of the accused in gathering on the scene was for the purpose of causing wrongful loss to the complainants, the accused might properly be deemed to have been guilty of rioting also.

* Criminal Revision Cases Nos. 650 and 652 of 1932.

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NAGUR SAHIB. Questions of this kind have to be determined according to the statute law of India and the English Common law principle cannot be applied.

Gopal Naidu v. King Emperor, (1922) I.L.R. 46 Mad. 605 (F.B.), followed.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgments of the Court of the Stationary Sub-Magistrate of Badvel in Calendar Cases Nos. 342 and 343 of 1931 respectively.

K. S. Jayarama Ayyar for petitioner.

N. Somasundaram for *V. L. Ethiraj* for respondents.

A. Narasimha Ayyar for *Public Prosecutor* (*L. H. Bewes*) for the Crown.

SUNDARAM
CHETTI J.

The JUDGMENT of the Court was delivered by SUNDARAM CHETTI J.—These are two connected petitions filed by the complainants against the orders of acquittal passed in two cases by the Stationary Sub-Magistrate of Badvel in Cuddapah District. The two complainants were rebuilding their houses which abut a public street in the aforesaid village. A portion of the superstructure was alleged to be an encroachment on a portion of the public street and the accused in these two cases are said to have gathered there for the purpose of abating what they considered to be a public nuisance, and demolished a portion of the terrace and the walls which stood on the encroached portion. The Magistrate who tried the case framed charges against the accused under sections 147 and 427, Indian Penal Code, and in one case there was an additional charge under section 114. According to the facts found by the

Magistrate, the portions of the building demolished by the accused would be an encroachment on part of the public path and the respondents were participating in the acts complained of. We have therefore to take it that the alleged demolition of the walls and a portion of the terrace by the accused is true.

The main question arising for consideration now is, whether in view of the aforesaid findings of fact the accused can be deemed to be guilty of the offences with which they were charged. It is clear that the act of the complainants in building upon a portion of the public pathway would amount to the offence of public nuisance under section 268, Indian Penal Code. The Magistrate in the Court below mainly relied on the decision of SADASIVA AYYAR J. in *Re Dharmalinga Mudaly*(1), and held that the accused could not be found guilty of the offence of mischief and consequently they would not constitute an unlawful assembly within the meaning of section 141, Indian Penal Code. It is argued before us by Mr. Jayarama Ayyar for the petitioners that there is no statutory provision in India justifying a private person or a member of the public in demolishing a building and causing loss to another person by way of abating a nuisance. This contention, we are of opinion, is well-founded. The very scheme of the Legislature, as would appear from sections 133 to 140, Criminal Procedure Code, indicates that, in the case of such a public nuisance, anybody aggrieved by it should not take the law into his own hands but must resort to the particular procedure laid down therein. There are provisions

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in the Madras Local Boards Act and also in the Land Encroachment Act to the effect that in cases of encroachment on public streets or Government property the remedy laid down in those Acts has to be adopted, implying clearly that there would be no right to take the law into one's own hands for the purpose of abating a nuisance as the one mentioned above. The object with which these provisions are introduced in the statutes is a salutary one. We need hardly say that the Legislature has taken a precaution by means of these provisions against breaches of public peace and acts of high-handedness. It is suggested that the view taken in *Re Dharmalinga Mudaly*(1) might have been based on the impression that the principle of English Common Law is applicable to India. But we find from the decisions relied on by the learned Advocate for the petitioners that even in England an unconditional right to abate a public nuisance is not given. The principle of one of the decisions cited is that a private individual cannot of his own accord abate a public nuisance, unless by such nuisance he has suffered some special injury—vide *Dimes v. Petley*(2) and also *Bateman v. Bluck*(3). In the latter case, the learned Judges have held that, unless it was absolutely necessary for a person to demolish a wall in order to exercise a right of passage, there would be no justification for such removal. As was held by a Full Bench of this High Court in *Gopal Naidu v. King-Emperor*(4), a question of this kind has to be determined according to the Statute Law of India and the English

(1) (1914) I.L.R. 39 Mad. 57.

(2) (1850) 15 Q.B. 276 ; 117 E.R. 462.

(3) (1852) 18 Q.B. 870 ; 118 E.R. 329.

(4) (1922) I.L.R. 46 Mad. 605 (F.B.).

Common Law principle cannot be applied. Even in the decision of the Bombay High Court reported as *Emperor v. Zipru*(1) it was held that, when there was an obstruction to the exercise of a private right of easement, it was not open to the dominant owner to remove the obstruction of his own accord, when there is a statutory remedy under section 36 of the Indian Easements Act. That being so, we have only to see whether the acts complained of in the present cases would amount to the offence of mischief. We may note that there is no charge of criminal trespass in the present cases, as there was in *Re Dharmalinga Mudaly*(2), and it is not necessary for us to express any opinion on the portion of the judgment dealing with that aspect. But, with great respect, we have to differ from the view taken in the said case that by the act complained of there would be no wrongful loss and consequently there would be no offence of mischief. If the damage to the complainants' properties caused by the demolition of the walls and the terrace can be deemed to be wrongful loss, then the essential element necessary to make out the offence of mischief exists. Under section 23, Indian Penal Code, wrongful loss is loss by unlawful means of property to which the person losing it is legally entitled. If the demolition of the walls and the terrace undertaken by the accused has no justification in law, then the loss caused to the complainants by reason of that demolition must be deemed to be by unlawful means. Unless these accused have got a right of abating a public nuisance, the acts done by them can in no sense be

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(1) (1927) I.L.R. 51 Bom. 487.

(2) (1914) I.L.R. 39 Mad. 57.

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deemed to be lawful. There are only two ways in which the accused can contend that no offence has been committed by them. They may either show that the ingredients for the offences of mischief and rioting do not exist, and even if those do exist, they can make out facts which would bring their case under any of the general exceptions in Chapter IV, Indian Penal Code. Even section 81 in that chapter cannot be easily invoked for the aid of the accused in this case, as the explanation to that section shows it is a question of fact in each case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify the doing of the act with the knowledge that it was likely to cause harm. The portions of the terraces in question were built in the course of a month or so, and the encroachment thereby was only on a small portion of the public street. In no sense can we say that the harm caused by these encroachments was of such a nature and so imminent as to justify the accused to take the law into their own hands and demolish the buildings. We are therefore of opinion that the accused were really guilty of the offence of mischief and, as their common object in gathering on the scene was for the purpose of causing wrongful loss to the complainants, they may properly be deemed to have been guilty of rioting also.

The learned Magistrate has acquitted them on what we think to be an erroneous view of the law, and therefore we set aside the order of acquittal in these two cases and order their retrial and disposal according to law.

K.W.B.

INCOME-TAX REFERENCE.

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

THE COMMISSIONER OF INCOME-TAX, MADRAS,
PETITIONER,

v.

NACHAL ACHI, WIDOW OF S. R. M. R. M. RAMASWAMI
CHETTIAR, KARAIKUDI, RESPONDENT.*

1933,
May 3.

Indian Income-tax Act (XI of 1922), sec. 34—Income escaping assessment—Assessment under section 34 in case of, on successor of person liable to tax—Permissibility—Sec. 26 (2)—Succession taking place after close of year in which income escaped assessment—Notice under section 34 served on predecessor—Continuance of proceedings against successor in case of, by issue of notices under sections 22 (4) and 23 (2)—Permissibility.

When income has escaped assessment, an assessment can be made under section 34 of the Indian Income-tax Act on the successor of the person who, if no succession had taken place, would have been liable to the tax. Such assessment, if otherwise valid, is not invalidated by the fact that the succession took place after the close of the year in which the income escaped assessment.

When a notice under section 34 of the Act has been served on a person and he has made a return in response thereto, the proceedings can be continued by the issue of notices under sections 22 (4) and 23 (2) of the Act to the successor of such person. Proceedings against the successor need not be started *de novo*.

R. Kesava Ayyangar for assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

* Original Petition No. 270 of 1932.

JUDGMENT.

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BEASLEY C.J.

BEASLEY C.J.—Three questions have been referred to us by the Commissioner of Income-tax, Madras.

Question (i) is :

“ When income has escaped assessment can an assessment be made under section 34 on the successor of the person who, if no succession had taken place, would have been liable to the tax ? ”

Question (ii) is :

“ If such assessment is otherwise valid, is it invalidated by the fact that the succession took place after the close of the year in which the income escaped assessment (in this case the year 1929-30) ? ”

Question (iii) is :

“ When a notice under section 34 has been served on a person and he has made a return in response thereto, can the proceedings be continued by the issue of notices under sections 22 (4) and 23 (2) to the successor of such person, or should proceedings against the successor be started *de novo* ? ”

The facts of the case are that 1928-29 was the year of account and that an original assessment was made on the profits of the business carried on by the petitioner's husband (deceased) on the 18th July 1929. The assessment was upon Rs. 8,418. After this assessment had been made, the Income-tax Officer thought that the assessment was incorrect and that a large part of the income of the assessee, that is to say, the petitioner's now deceased husband, had escaped assessment. He accordingly gave notice to him under section 34 of the Act. This notice was dated 29th October 1930 and was admittedly in time. In response to this notice on 27th November 1930 the then assessee denied that his previous return had been incorrect and he repeated it. On 27th August 1931 he died and in November of the same year, in ignorance of

the fact that he was dead, notices under sections 22 (4) and 23 (2) of the Act were issued but of course could not be served upon him on account of his previous death. The Income-tax Officer, having discovered that he was dead, on the 14th December 1931 issued the same notices upon his widow, the petitioner here, and on the 15th April 1932 he made an assessment upon her as the successor to the business carried on by her husband under section 26 (2) upon Rs. 1,08,592.

The petitioner raises three points here in support of the contention that this assessment was illegal.

The first point is that section 34 of the Act is inapplicable to a deceased person. The answer to this contention is that the notice was served on the petitioner's husband when he was sufficiently alive to deny that his previous return was false and to repeat that previous return which, in the light of the subsequent assessment, was grossly inaccurate. The premise, therefore, upon which this argument is based does not exist.

The second point raised is that the petitioner was improperly assessed as the successor to her husband under section 26 (2) because she did not succeed to her husband's business until his death on the 27th August 1931, because the Act only applies to a successor during the year of assessment or the previous year. That is not so. The Act provides for an assessment on the date on which the person carrying on business has been succeeded by another person in which case that other person is to be assessed as if he or she had been carrying on the business during the year of account and as if he or she had received the

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whole of the profits of that year of account. In this section the only important times are the date of the assessment and the year of account. In this case the Income-tax Officer in the course of his assessment found at the date of the assessment that the petitioner was carrying on the business of her husband (deceased). He, therefore, rightly found that she was the successor of her husband and strictly in compliance with the provisions of that section he made an assessment upon her as if she had been carrying on the business of her husband in the year of account and had received the profits of that year herself.

The third point raised is that, even if the petitioner is to be regarded as the successor to her husband's business, she could not be assessed under section 26 (2) without a notice having been served upon her under section 22 (2), that is to say, that proceedings against her in respect of income-tax should have been commenced *de novo*. This of course is an argument which, if accepted, would be of considerable benefit to the petitioner because admittedly the notice under section 22 (2) would be out of time and this income would thereby completely escape liability for payment of income-tax. But the section in question does not require such a notice to be given to the person who is assessed under that section. From a perusal of the section it is quite clear, on the face of it, that the Income-tax Officer can proceed to assess the successor as if he were the predecessor if in the course of making his assessment he discovers that another person is the successor to that predecessor. He can then and there assess that person under section 26 (2); and indeed the

section makes it quite clear that proceedings do not have to be commenced *de novo* and that an assessment can then and there be made. Admittedly the notice under section 34 was served upon the petitioner's husband (deceased) while he was alive and in time. The service of that notice upon him at once attracted all the provisions of sections 23 and 26. The proceedings, therefore, under section 23 which related to the assessment went on. The assessment was proceeding under section 23 and in the course of that assessment the discovery to which reference has already been made with regard to the succession was made and quite properly the provisions of section 26, having been attracted by the notice under section 34, were applied. The petitioner was therefore quite properly assessed to income-tax.

In the result, I would answer question (i) in the affirmative, question (ii) in the negative and question (iii) by saying that proceedings against the successor should not be started *de novo*.

The petitioner is directed to pay the Income-tax Commissioner Rs. 250, costs.

CORNISH J.—I agree.

BARDSWELL J.—I agree.

A.S.V.

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APPELLATE CIVIL.

Before Sir Vepa Ramesam, Kt., Officiating Chief Justice,
and Mr. Justice Venkatasubba Rao.

1933,
September 11.

VYTHILINGA PANDARA SANNADHI (FIRST DEFENDANT),
PETITIONER,

v.

G. RANGANADHA MUDALIAR AND THREE OTHERS
(PLAINTIFFS 1 AND 2 AND DEFENDANTS 2 AND 3),
RESPONDENTS.*

Madras Hindu Religious Endowments Act (II of 1927), sec. 73 (1)
—Kattalai—Suit in respect of administration or management of—Maintainability of, under sec. 73 (1)—Sec. 73 (2)
—First part of—Scope and effect of—Suits contemplated by
—“Except as provided by this Act” in sec. 73 (2)—
Meaning of.

A suit in respect of the administration or management of a kattalai strictly so called is not maintainable under section 73 (1) of the Madras Hindu Religious Endowments Act (II of 1927).

The words of the first part of section 73 (2) of the Act are not confined to those suits only claiming such reliefs as are mentioned in sub-section (1) of the section and clearly exclude the applicability of section 92 of the Code of Civil Procedure to a suit relating to the administration or management of a kattalai which is a religious endowment under the Madras Hindu Religious Endowments Act.

The words “except as provided by this Act” in the second part of section 73 (2) mean, not “contrary to the provisions of this Act”, but “except under the provisions of this Act”. They are not confined in their application to the procedure governing the suit but are intended to lay down the substantive law also.

Necessity for, and effect of, the words “no suit in respect of such administration or management shall be instituted except as provided by this Act” in the second part of section 73 (2) pointed out.

* Civil Revision Petitions Nos. 875 and 876 of 1933.

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 East Tanjore at Negapatam, dated 3rd March 1933 and made in Original Suits Nos. 8 and 7 of 1931 respectively.

K. Rajah Ayyar, B. R. Chakravarty Ayyangar and *A. M. Krishnaswami Ayyangar* for petitioner.

A. V. Viswanatha Sastri and *K. S. Desikan* for respondents.

Cur. adv. vult.

JUDGMENT.

VENKATASUBBA RAO J.—These civil revision petitions raise a question of some importance regarding the construction of section 73 of the Madras Hindu Religious Endowments Act (Act II of 1927).

Two suits were filed in the lower Court, the plaintiffs being the members of the Board of Control of Sri Thyagarajaswami temple, Tiruvarur. One of them was for the removal of the first defendant, described as the hereditary trustee of the kattalai, known as Annadana kattalai; the other related to the Abhisheka kattalai, in regard to which also the first defendant is the hereditary trustee. Various allegations of misconduct are made in these suits against the first defendant, and the suits were filed both under section 73 of the Hindu Religious Endowments Act and section 92 of the Code of Civil Procedure. The consent of the Advocate-General under section 92 was obtained, as also the consent of the Board under section 73. A preliminary issue was raised in these suits which runs thus: “Is the suit sustainable in law and has this Court jurisdiction

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to try it?" The learned District Judge of East Tanjore having decided that issue in the affirmative, the first defendant has filed the present civil revision petitions, questioning the correctness of the order.

Section 73 is in the following terms :

"(1) The Board or Committee having jurisdiction over any math or temple or any person having interest and having obtained the consent of the Board may institute a suit in the Court to obtain a decree—

(a) appointing or removing the trustee of a math or excepted temple,

(b) vesting any property in the trustee,

(c) declaring what proportion of the endowed property or of the interest therein shall be allocated to any particular object of the endowment, or

(d) granting such further or other relief as the nature of the case may require.

(2) Sections 92 and 93 and rule 8 of Order I of the first Schedule of the Code of Civil Procedure, 1908, shall have no application to any suit claiming any relief in respect of the administration or management of a religious endowment and no suit in respect of such administration or management shall be instituted except as provided by this Act."

Section 73 (1) (a) mentions only a "math or excepted temple" but does not refer to a kattalai. Under that section the petitioner contends that no suit can lie for the removal of a trustee of a kattalai. The contention is based upon the terms of clause 2 of the provision quoted above. Under the same clause it is further contended that even under section 92 of the Code of Civil Procedure these suits do not lie. This view of the section is in my opinion well-founded. Clause 2 consists of two parts, and I shall deal first with the earlier portion. That enacts that section 92 (I omit the words not material for the present purpose) shall have no application to any suit claiming any relief

in respect of the administration or management of a religious endowment. The expression "religious endowment" is thus defined in section 9 (11):

"'Religious endowment' or 'Endowment' means all property belonging to, or given or endowed for the support of, maths or temples or for the performance of any service or charity connected therewith and includes the premises of maths or temples but does not include gifts of property made as personal gifts or offerings to the head of a math or to the archaka or other employee of a temple."

That definition is wide enough to include the case of a kattalai. Now, the words of the first part of section 73 (2), construed as they stand, refer to "any suit claiming any relief", the terms are quite general and comprehensive and are not confined to those suits only claiming such reliefs as are mentioned in clause 1. The argument of Mr. A. V. Viswanatha Sastri, the respondents' learned Counsel, that the ambit of clause 2 is no wider than that of clause 1 does not commend itself to me. His contention involves that the words "any suit claiming any relief" are used in a restrictive sense, although that interpretation is opposed to the plain and natural meaning of the words. When the section says "any relief"—words free from all ambiguity—why should they be construed as meaning "such reliefs as are mentioned above"? Granting that any doubt remains, that is dispelled by the very clear and plain terms of the second part of clause 2. That provides that

"no suit in respect of such administration or management shall be instituted except as provided by this Act."

In regard to this part at any rate, it cannot possibly be suggested that it is merely complementary to section 73 (1), for it refers to "this Act"

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generally and not to any particular provision of the aforesaid section. By no stretch of language can the words "this Act" be construed as meaning "a particular provision of this Act". The situation then is this: clause 2 consists of two parts. The second part cannot obviously be regarded as restrictive in its scope or as being merely dependent upon section 73 (1). It would be wrong to apply two different tests to the two different parts which compose the same clause. If my construction then of the first part of clause 2 is right, it follows that the words there clearly exclude the applicability of section 92 to the suits in question, as they relate to the administration or management of a kattalai which, as I have shown, is a religious endowment under the Act.

I shall now proceed to the second part of section 73 (2) which reads thus:

"No suit in respect of such administration or management shall be instituted except as provided by this Act." The point we have to decide really turns upon the construction to be placed upon the expression "except as provided by this Act". In *Vythilinga Pandara Sannadhi v. Temple Committee, Tinnevely Circle*(1) CURGENVEN J. (in a judgment with which CORNISH J. agrees) construes the expression as meaning "contrary to the provisions of this Act". The learned Judge recognises that this construction puts a strained sense upon the words, but feels obliged to adopt that view in order to avoid certain difficulties, which he thinks would otherwise result. In arriving at that conclusion, he dissents from his own earlier view expressed in *Ranganayaki Bai Ammal v. Shivarama Dubay*(2)

(1) (1931) I.L.R. 54 Mad. 1011. (2) (1929) 58 M.L.J. 104.

and follows a decision of WALLACE J. in *Alagappa Chettiar v. Arunachallam Chetty*(1). In the last-mentioned case WALLACE J. observes thus:

"Therefore, if the Act sets out the provisions under which such a suit shall be instituted, the present suit will not lie unless such provisions are complied with. But I do not find that the Act does lay down provisions for a suit of this kind."

Again, CORNISH J. in *Vasudevan Adiserpad v. Bhawadasan Nambudiri*(2) has made some observations in the same sense. I have carefully gone through the judgments in the cases referred to above and I am satisfied that the expressions of view on this point by the learned Judges in *Vythilinga Pandara Sannadhi v. Temple Committee, Tinnevely Circle*(3) and *Vasudevan Adiserpad v. Bhawadasan Nambudiri*(2) (decisions of Benches of this Court) are *obiter* and are not therefore binding upon us. In the first of these two cases the plaintiff sued to establish his right as the hereditary trustee of a certain temple. After stating that such a suit relates to a personal right, CURGENVEN J., if I may say so with respect, very rightly points out:

"Now, in the first place, it appears to me very doubtful whether a suit by a trustee to establish his hereditary right to his office is a suit in respect of the administration or management of the religious endowment to which the trusteeship appertains."

Then, after dealing with the scope of section 92 of the Code of Civil Procedure, the learned Judge goes on to observe:

"For this reason alone I do not think that sub-section 2 of section 73 of the Act opposes any bar to the institution of a suit like the present."

(1) A.I.R. 1927 Mad. 338. (2) (1933) I.L.R. 57 Mad. 315. (3) (1931) I.L.R. 54 Mad. 1011.

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That was decisive of the case and sufficient to dispose of it; but, assuming that his view, namely, that a suit to establish a personal right is outside the scope of section 73, may be wrong, he proceeded to deal with the construction of the words "as provided by this Act" occurring in the closing part of the section. The decision on that point was, in my opinion, therefore not necessary for the determination of the case before him. Now, turning to *Vasudevan Adiserpad v. Bhawadasan Nambudiri*(1), the only question that arose was, whether a suit for directing accounts was or was not covered by section 73 of the Religious Endowments Act. That question was answered in the negative, and the observations on the meaning of the expression we have now to construe were *obiter*. In my opinion, the proper meaning to be placed upon the words is, "except under the provisions of this Act". There is no reason to construe the terms as being confined in their application to the procedure governing the suit for, in their plain and natural sense, they are intended to lay down the substantive law also.

A comparison of the eight clauses of section 92(1), Civil Procedure Code, with the several provisions occurring in the body of the Hindu Religious Endowments Act will show that the framers of the last-mentioned Act intended (whether they succeeded in giving effect to that intention is quite another matter) to deal with every aspect of the administration or management of religious endowments in the same manner as section 92 was designed to deal with.

(1) (1933) I.L.R. 57 Mad. 315.

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Taking first the case of non-excepted temples, section 51 relates to the appointment of non-hereditary trustees; section 54, disqualifications of trustees [*cf.* section 92 (1) (a) and (b)]; section 57, settlement of schemes [*cf.* section 92 (1) (g)]; section 59 deals with safeguards as to accounts; sections 45 to 47 may also be referred to in this connection [*cf.* section 92 (1) (d)]; section 73 (1) (b) and (c) deal with the vesting of property and with declarations as to what proportion of the endowed property shall be allocated to any particular object [*cf.* section 92 (1) (e)]; section 76 deals with the letting, selling, etc., of the trust property [*cf.* section 92 (1) (f)].

Next taking the case of maths and excepted temples, sections 62 to 65 relate to settlement of schemes [*cf.* section 92 (1) (g)]; section 73 (1) (a) deals with appointing and removing of trustees [*cf.* section 92 (1) (a) and (b)]; section 73 (1) (b), with vesting of property [*cf.* section 92 (1) (c)]; section 73 (1) (c), with declarations as to proportion, etc. [*cf.* section 92 (1) (e)] and section 76, with the letting, selling, etc., of the trust property [*cf.* section 92 (1) (f)].

The above analysis cannot in the very nature of things be either exact or exhaustive. But the point I want to make is that the Legislature, while repealing section 92, Civil Procedure Code, (the repeal, I need hardly point out, is only to the extent of the endowments dealt with by the Act), has endeavoured to provide for all the matters which had been dealt with by the repealed provision; at the same time, the bar to the institution of suits contained in the last clause of section 92 having also been repealed, it became necessary to

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re-enact a provision on the lines of the repealed clause. That was why the closing words were added:

"No suit in respect of such administration or management shall be instituted except as provided by this Act."

There is some force in Mr. Viswanatha Sastri's contention that these words are wider, and seem to be more comprehensive, than the corresponding repealed words of section 92 (2); but I do not think it was intended to extend the prohibition beyond what was decided by numerous cases to be the effect of the bar contained in that abrogated section. If this be borne in mind, it will be seen that there is no real conflict between the view I have taken and the actual decisions, apart from the *dicta*, in the cases cited before us.

It must be confessed that there are lacunae in the Act; for instance, no effective provision has been made in regard to the directing of accounts [*cf.* section 92 (1) (d), Civil Procedure Code] and that difficulty has been felt in *Vasudevan AdisERPAd v. Bhawadasan Nambudiri*(1) already referred to. Again, no suitable provisions appear to have been enacted in regard to kattalais, it being doubtful whether section 54 (in respect of non-excepted temples) and sections 62 to 65 (in respect of maths and excepted temples), which deal with settlement of schemes, are applicable to kattalais; and similarly there are no provisions, as we are now holding, in regard to appointment or removal of trustees in respect of such endowments. I may parenthetically point out that it is also doubtful whether section 73 (1) (b), which

(1) (1933) I.L.R. 57 Mad. 315.

refers to vesting of property in trustees, is applicable to kattalais.

"It is far better",

observes Lord CAMPBELL in *Coe v. Lawrence*(1), "that we should abide by the words of a statute than seek to reform it according to the supposed intention."

The Hindu Religious Endowments Act is a recent one and there can be no difficulty in the Legislature suitably amending it to remedy the defects which the cases brought to the Courts reveal.

The result is that, in my opinion, the civil revision petitions must be allowed, and I agree in the order proposed by the learned Officiating Chief Justice. I also concur with what he says at the close of his judgment regarding any application for amendment of the plaint.

RAMESAM OFFG. C.J.—I agree with the judgment of VENKATASUBBA RAO J. just pronounced. A study of the scheme of the Madras Hindu Religious Endowments Act shows that it is intended to be a comprehensive piece of legislation, (i) providing for all kinds of suits relating to the administration or management of all Hindu religious endowments and (ii) making sections 92 and 93 of the Civil Procedure Code as well as the Religious Endowments Act (XX of 1863) inapplicable to such suits. The latter object has been achieved by section 8 of the Act and by section 73 (2) first part. While the first part of section 73 (2) makes sections 92 and 93 of the Civil Procedure Code inapplicable to suits in respect of the administration or management of Hindu religious endowments, the second part proceeds to say that such

(1) (1853) 1 El. & Bl. 517; 118 E.R. 529.

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suits shall not be filed except as provided by this Act. The second part was enacted on the assumption that every suit in respect of the administration or management of Hindu religious endowments is actually provided for in the Act. Unfortunately this assumption, though in the main justifiable, turns out not altogether correct. Section 73 (1) and the other sections of the Act which are enumerated by my brother (an enumeration which it is unnecessary for me to repeat) provide for various suits in respect of the administration or management of non-excepted temples and maths and excepted temples; but, unfortunately, there is no section providing for a suit in respect of the administration or management of a kattalai. Undoubtedly kattalais are also covered by the definition of a religious endowment in section 9 (11). That being so, they are included in the prohibition of section 73 (2), but the counterpart of such prohibition, namely, a provision in the Act providing for a suit in respect of kattalais, is lacking. The proper place for it probably would be section 73 (1) (a). As my learned brother has pointed out, it is far better that we should point out a difficulty of this kind facilitating immediate amendment of the Act rather than strain the language of the Act and hold that kattalais are governed by section 73 (1) or conversely that the prohibition of section 73 (2) does not apply to them so as to avoid the lacuna.

Some reliance is placed by the respondents upon my judgment in *Vasudevan Adiserpad v. Bhawadasan Nambudiri* (1). In that case myself and my brother CORNISH J. were not considering

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the question whether the Act applies to kattalais, by which I mean whether the Act provides for suits in respect of the administration or management of kattalais. That question was not before us though in the course of the argument by the learned Advocates reference was made to kattalais and the possibility of there being a difficulty in section 73 so far as the kattalais are concerned. What was held in that case by us was that the actual suit which was the subject of that appeal and which related to a temple was not maintainable in the form in which it was framed. It was a suit to recover money due on an examination of the accounts, to recover several items of movable property including vahanams, jewellery and documents such as promissory notes belonging to the temple and to recover damages for acts of misfeasance and malfeasance on the part of the trustees. We held that such a suit was not maintainable under section 73 of the Act which permits suits for certain reliefs on payment of a court-fee of Rs. 50 and we held that the suit in that case did not fall under section 73. The learned Advocate for the respondents urged, in reference to the argument that such a suit was not maintainable under section 73, that, if it was not permitted under section 73, no other suit would be possible because he contended that any other suit was prohibited under section 73 (2). In meeting this argument I suggested as a possible construction that such a suit would not be prohibited under section 73 (2) because, under the first part, section 92 of the Code of Civil Procedure is made inapplicable not to all suits for the administration or management of a

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religious endowment but only to suits mentioned in section 73 (1), and that the second part of section 73 (2) would not compel the filing of such a suit under the Act because the second part applies only to the suits referred to in the first part. In dealing with the first part of section 73 (2) I happened to refer to *Vythilinga Pandara Sannadhi v. Temple Committee, Tinnevely Circle*(1), *Ranganayaki Bai Ammal v. Shivarama Dubay*(2) and *Chandukchand v. Vedachala Chettiar*(3), and I proceeded to observe that these decisions also related in a sense to the administration or management of religious endowments. A different reply might have been suggested with reference to the argument of the learned Advocate, viz., that the suits in those cases did not strictly relate to the administration or management of religious endowments and therefore section 92 was not rendered inapplicable to those suits and therefore the prohibition of section 73 (2) also did not apply to those suits. Similarly, the suit relating to the appeal then before us was not a suit relating to administration or management of a religious endowment and probably section 92 was not rendered inapplicable to it by section 73 (2). But, whether section 92 is applicable or not, suits merely to recover money found due by the defendant on the taking of accounts and to recover property belonging to the trust but in the possession of the defendant and to recover damages for a tort committed by the defendant would always be maintainable under the general law and may not fall under section 92 even, and they certainly

(1) (1931) I.L.R. 54 Mad. 1011. (2) (1929) 58 M.L.J. 104.
(3) (1931) I.L.R. 55 Mad. 549.

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would not be suits relating to the administration or management of religious endowments. Whether the suggestion in that judgment by which I actually met the learned Advocate's arguments is the correct way of meeting them or whether the suggestion which I would now make is the better way of meeting them depends upon what is the exact meaning of the words "administration or management of a religious endowment". If the words "any suit claiming any relief in respect of the administration or management of a religious endowment" are taken strictly and are confined to suits the object of which is to obtain a reform or change in the administration or management of a religious endowment, then the suit covered by the decisions already mentioned and also the suit which was the subject of the appeal before us would not fall under the prohibition of section 73 (2). But, if the words "administration or management of a religious endowment" are taken in a looser and wider sense, then the three suits in the decisions cited by me and the suit then before us would be such suits and it would be possible to hold that section 92 would not be inapplicable to them only by saying that the prohibition in section 73 (2) relates only to suits permitted in section 73 (1). That the possibility of a stricter sense of the words "administration or management of a religious endowment" was in my mind is clear from the words "in a sense" in my judgment. In another sense, a stricter sense, they would not be suits relating to the administration or management of an endowment in which case section 92 is not inapplicable, and moreover under the general law some of the suits are themselves

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maintainable. The second suggestion might also have been mentioned in that judgment. But anyhow that judgment has nothing to do with the question whether a suit in respect of the administration or management of a kattalai is maintainable under section 73 (1) and neither myself nor my brother CORNISH J. gave any opinion in connection with that matter. I therefore agree with my brother in holding that a suit in respect of a kattalai strictly so called is not maintainable under section 73 (1).

The learned Advocate for the respondents then urged another argument before us that the word "kattalai" has got two senses, a stricter and a looser sense, and that, in this case, the trustee of a kattalai is a trustee of the temple. In the stricter sense it is a religious endowment the object of which was the performance of some kind of religious duty in the temple for the benefit of some other individual or institution outside the temple. In this sense the temple is not the beneficiary but something has got to be done in the temple for the spiritual benefit of the beneficiary. In the looser sense there is no outside institution or individual who is the beneficiary but the temple itself is the beneficiary. That there are two such senses appears from the judgment of MUTTUSAMI AYYAR J. in *Vythilinga Pandara Sannadhi v. Somasundara Mudaliar*(1) which was a case relating to this very temple before us, namely, the Sri Tyagarajaswami temple at Tiruvarur; and the possibility of the kattalais in this temple being merely a number of separate trusts also appears from the judgment of myself and CORNISH J. in

(1) (1893) I.L.R. 17 Mad. 199.

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Ramanathan Chettiar v. Balayee Ammal(1). But, however, we do not mean to express a final opinion on this point because it is very inconvenient to do so. It was raised for the first time in this Court during the argument of this civil revision petition. It was not raised in the first Court and we have not got the benefit of a judgment of the first Court after a consideration of the facts of the case, and it is possible that both parties have not adduced evidence with reference to this matter. If the trial Court deals with this point, it is possible for the parties to question the correctness of the decision in a first appeal and the Judges dealing with the first appeal will deal with it unhampered by any expression of our opinion in this revision petition. We permit the plaintiff to amend his plaint, if he thinks necessary, by addition of any further allegation to enable him to raise this point and we leave this point open for consideration by the trial Court. At present we confine our decision merely to this, namely, that if kattalais in this suit are kattalais in the stricter sense so called the suit is not maintainable.

In the circumstances of the case we make no order as to costs.

A.S.V.

APPELLATE CIVIL.

Before Sir Vepu Ramesam, Kt., Officiating Chief Justice,
and Mr. Justice Venkatasubbu Rao.

V. KOTHANDAPANI CHETTI (PLAINTIFF), APPELLANT,
v.

K. C. SREEMANAVEDAN RAJA alias VALIA KUNHI
THAMPURAN AND SEVEN OTHERS (DEFENDANTS AND
NIL), RESPONDENTS.*

*Indian Limitation Act (IX of 1908), arts. 106, 116 and 120—
Applicability of—Partnership—Dissolved partnership—Suit
for account and share of profits of—What amounts to—
Limitation for—Fraudulent acts of partner entitling other
partner to claim dissolution—Death of partner subsequently
and dissolution of partnership by reason of it—Suit brought
after, claiming dissolution—Nature of—Limitation for—
Indian Contract Act (IX of 1872), sec. 253 (10)—Death
of partner—Dissolution of partnership by—Contract to
contrary within meaning of sec. 253.*

In 1918 the plaintiff entered into a partnership with the West Coast Company, the partners of which were the first defendant and one S, for the purpose of dealing in timber in a forest of which the first defendant had obtained a lease. The partnership deed was registered and it provided by clause 8: "This partnership is in force for the whole period of the lease of sixty years between 'A' and 'B'", and by clause 21: "The interests of 'A' and 'B' in this partnership deed are assignable only among themselves or to their legal heirs." On 14th July 1919 the first defendant and S transferred their leasehold interest in favour of defendants 6 and 7. S died in April 1920. On 14th July 1925 the plaintiff instituted a suit against defendant 1, defendants 2 to 5 (the representatives of S) and defendants 6 and 7 for directing accounts to be taken of the said partnership. The plaint also prayed for "dissolving the partnership between the plaintiff on the one hand and the first defendant and S on the other."

* Second Appeal No. 172 of 1929.

Held (1) that, under section 253 (10) of the Indian Contract Act, the partnership became dissolved by the death of S in April 1920 and that a contract to the contrary could not be inferred from the provisions of clauses 8 and 21 of the partnership deed; and

(2) that the suit was in substance for an account and a share of the profits of a dissolved partnership and was governed by article 106 and not by article 120 or article 116 of the Indian Limitation Act.

The transfer of the leasehold interest in 1919 gave the plaintiff the right to ask the Court to dissolve the partnership, but that was an option that the plaintiff had and he was not bound to claim a dissolution on that account. S having died the partnership had become dissolved by operation of law. The plaintiff could not ask the Court to dissolve a partnership which had already become dissolved. Article 120 of the Limitation Act was therefore inapplicable to the case.

A suit for an account of a dissolved partnership is not a suit "for compensation for the breach of a contract" within the meaning of article 116 of the Limitation Act.

Vairavan Asari v. Ponnayya, (1898) I.L.R. 22 Mad. 14, followed.

Annu v. Somasundara, (1930) I.L.R. 54 Mad. 654, applied.

Bhagirath v. Prem Chand, (1912) 17 C.L.J. 201, dissented from.

APPEAL against the decree of the District Court of South Malabar in Appeal Suit No. 292 of 1927 preferred against the decree of the Court of the Additional Subordinate Judge of South Malabar at Calicut in Original Suit No. 40 of 1925.

T. M. Krishnaswami Ayyar and *K. V. Ramchandra Ayyar* for appellant.

K. S. Champakesa Ayyangar, *S. Rangaraju Ayyangar* and *K. Kuttikrishna Menon* for respondents.

JUDGMENT.

RAMESAM OFFG. C.J.—This second appeal arises out of a suit brought by one Kothandapani

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Chetti for directing accounts to be taken of a partnership entered into between the plaintiff, and the West Coast Company the partners of which are the first defendant and the husband of the second defendant. The partnership related to the working of timber in certain forests. The date of the partnership is 8th December 1918. The husband of the second defendant, Srinivasaraghavacharya, died in April 1920. The present suit was filed on 14th July 1925 against the first defendant, one of the original partners, defendants 2 to 5, the legal representatives of the deceased Srinivasaraghavacharya, and the sixth and seventh defendants, vendees of the leasehold property from the first defendant and Srinivasaraghavacharya. Twenty-six issues were framed in the case, but all the issues were not tried. The suit was disposed of with reference to the findings of the Subordinate Judge on issues 7, 8, 10, 12 and 18 only. Issues 7 and 8 relate to the question whether the partnership was dissolved prior to suit. Issue 10 raises the question of the amount contributed by the plaintiff to the partnership. Issue 12 raises the question whether the suit is barred by limitation. Issue 18 relates to the question whether the defendants are liable to account to the plaintiff for his share in the plaint-mentioned property. On these issues the Subordinate Judge found that the suit is barred by limitation on the ground that the suit is one for taking the accounts of a dissolved partnership and therefore is governed by article 106 and not by article 120 of the Limitation Act as it would have been if it was really a suit for dissolving a partnership. There was an appeal and the District Judge of South Malabar

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held that the Subordinate Judge rightly dismissed the suit on the ground that it was barred under article 106. The plaintiff files this second appeal.

In second appeal Mr. T. M. Krishnaswami Ayyar, the learned Advocate for the appellant, put forward three contentions: first, that the suit was based on certain fraudulent acts of the first defendant and Srinivasaraghavacharya and that these fraudulent acts of the partners gave the plaintiff a right to seek dissolution of the partnership within six years from the date the cause of action arose. One of the fraudulent acts mentioned in the plaint is the sale of the leasehold property, in which the timber forest was situate, by sale deed dated 14th July 1919. Plaintiff contends that the suit, which was filed on 14th July 1925, i.e., within six years from the sale, is therefore within time. He also contends that the right to sue for an account within six years was not cut down by the death of Srinivasaraghavacharya. The obvious reply to this contention is that we have to look at the real nature of the suit that is filed in Court in determining whether a particular article of the Limitation Act is applicable. When Srinivasaraghavacharya died in 1920, under section 253 of the Indian Contract Act the partnership was dissolved by his death, subject to the argument to be noticed under the second heading. If the partnership was dissolved in April 1920, there was no undissolved partnership for the dissolution of which the plaintiff had to file a suit. The partnership was dissolved by operation of law, and, if the plaintiff wants to recover any amount on the taking of the accounts of the partnership, the suit is really for taking the

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accounts of a dissolved partnership. The first prayer in the plaint, namely, "dissolving the partnership between the plaintiff on the one hand and the first defendant and the said Srinivasa-
raghavacharya on the other", is a prayer which was neither necessary nor a relief to which he was entitled. The suit is really only for the taking of the accounts of a dissolved partnership, and by adding a redundant prayer he cannot convert the real nature of his suit, which is one for taking the accounts of a dissolved partnership, into one for dissolving a partnership. Mr. T. M. Krishna-
swami Ayyar argues that, even if the partnership had been dissolved by the death of Srinivasa-
raghavacharya, on account of the fraudulent act of selling the leasehold property in July 1919, he was entitled to the relief of dissolving the partnership as and from July 1919. He is not satisfied with the dissolution of the partnership in April 1920 by the death of Srinivasaraghava-
charya and he wants the dissolution as and from July 1919 and for this purpose he argues that he can ask for dissolution of partnership. I do not think that this contention is well-founded. A suit for dissolution of partnership is always for dissolution as and from the date of judgment or at the earliest from the date of the plaint. If, instead of asking for dissolution earlier, the plaintiff waits for some time and then brings a suit, the relief to which he is entitled is only from the date of the suit or judgment; *vide* Daniel's Chancery Practice, Vol. II, page 1301. It is true that there may be cases in which the Court may declare that the partnership is dissolved from a fixed date; but that only applies to cases where

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it is possible to say that the partnership was dissolved as and from a fixed date by operation of law, though it may not have been known to the parties at the time the suit was filed, such as a case of the death of a partner or bankruptcy in English Law and similar circumstances. But where a party seeks the aid of a Court in dissolving the partnership, that principle does not apply, and the observation of JAMES L.J. in *Lyon v. Tweddell*(1) must only be construed to mean that sometimes Courts may dissolve a partnership earlier than the judgment, i.e., from the date of the issue of a writ of summons or at the earliest from the date of the plaint. Mr. Krishnaswami Ayyar's argument on the first point must therefore be disallowed.

The second point argued by him is that the partnership was not dissolved by the death of Srinivasaraghavacharya in April 1920, because there is a contract to the contrary in the articles of the partnership. It is not contended before us that a contract to the contrary should be inferred from the subsequent conduct of the parties and therefore we have not got to consider that aspect of the case and certain Calcutta decisions which might be relevant if such a contention were put forward. Exhibit A is the deed of partnership. The two relevant clauses contained in it are clauses 8 and 21. Clause 8 says: "This partnership is in force for the whole period of the lease of sixty years between 'A' and 'B'." Clause 21 runs thus: "The interests of 'A' or 'B' in this partnership deed are assignable only among themselves or to their legal heirs." As we read

(1) (1881) 17 Ch.D. 529.

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clause 8, it only means that a term is fixed for the partnership. It is true that the term is very long and the parties could not have contemplated they would be living so long as sixty years from the date of the partnership. All the same, wherever a term is fixed in a partnership deed, it only means that a certain period is fixed and it is not permissible for the Court to infer merely from the term a contract to the contrary within the meaning of section 253 of the Contract Act. Lindley in his Principles of Partnership, page 703, observes :

“Death is a contingency which all persons entering into partnership know may unexpectedly put an end to it. If, therefore, they do not expressly guard against this risk, they may reasonably be treated as contented to incur it: and if death should unexpectedly happen, no return of premium not expressly provided for can be demanded.”

Section 253 (10) provides that a partnership, whether entered into for a fixed term or not, is dissolved by the death of one of the partners and, if there is no provision, express or necessarily or reasonably implied, in the terms of the deed of partnership that the partnership should be continued after the death of one of the partners, the partnership would be put an end to. In this case beyond stating that the partnership is to continue for sixty years, we do not find any attempt was made to make any extra provision for this purpose in clause 8. Therefore clause 8 does not help the parties. Coming to clause 21, we think it is of less help to the appellant. The object of this clause is to prevent the parties from introducing outsiders into the partnership. They contemplated the possibility of one of the partners dying and his interest devolving upon his heir.

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That the interest of a deceased partner should descend to his heir is a thing which happens by operation of law and which the parties cannot prevent. All that the parties say in clause 21 in effect is that, apart from death, they should not, by act of parties, allow outsiders to be concerned with the partnership. The devolution of the interest of one partner to his heir is a thing which has necessarily to be submitted to by the parties; but the clause does not say that after such devolution the heir should be allowed the option to continue in the partnership if he chooses to. There is no reference, either express or implied, by which it may be inferred that the parties contemplated that the heir or heirs of dying partners should continue with the surviving partners and carry on the business of the partnership. It is unnecessary to discuss the several English and Indian cases cited before us in which the question is raised whether, if such a provision is made, it is an imperative provision or gives only an option to the heir and what legal consequences flow from such a clause—such as *Lancaster v. Allsup*(1), cited by me in *Sayyed Abdul Hawk v. Tumuluri Vaikuntam*(2), and other English cases tending in the same direction. I am therefore of opinion that this contention does not help the appellant.

We now come to the third contention pressed by Mr. Krishnaswami Ayyar, namely, that in this case the deed of partnership is registered and therefore article 116 and not article 106 applies. It is true that there are some cases in which a liberal interpretation is given to article 116 and in the case of claims arising out of contracts

(1) (1887) 57 L.T. (N.S.) 53.

(2) (1926) 52 M.L.J. 318.

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contained in registered instruments article 116 was held to apply, though it may be perhaps said that strictly they may not be cases of compensation for breach of the terms of a contract in writing registered. But, when the cases are carefully examined, I think they are distinguishable. One of the earliest cases is *Ranga Reddi v. Chinna Reddi*(1), a decision of MUTTUSAMI AYYAR and SHEPHARD JJ. In that case there was a clause in the registered deed of partnership that if losses were incurred each party should bear the loss in proportion to his share. The plaintiff alleged that loss had been incurred in the business and sued to recover his share of the loss. The learned Judges held that by reason of this clause article 116 was applicable. In answer to the argument that where there are specific articles only the special article should be applied and not article 116, they point out that, where there is a registered instrument, article 116 displaces certain other specific articles which in the case of an oral or unregistered contract might be applicable. Another case in which the point arose in respect of a partnership is *Vairavan Asari v. Ponnayya*(2). One of the Judges, SHEPHARD J., was also a party to the former judgment in *Ranga Reddi v. Chinna Reddi*(1). In that case the suit was merely for taking the accounts of the partnership; the suit was not based upon any particular clause in the deed of partnership. The learned Judges held that, in spite of the liberal interpretation given to article 116, some limit must be placed to such liberal interpretation and that, where the suit is merely for taking the accounts of a partnership,

(1) (1891) I.L.R. 14 Mad. 465.

(2) (1898) I.L.R. 22 Mad. 14.

article 116 is not applicable and article 106 is the only article applicable. It was strenuously contended by Mr. Krishnaswami Ayyar that in all partnerships there is an implied term that at the end of the business the partnership property should be sold, accounts taken and, after paying the debts, the net proceeds should be distributed between the parties according to their shares. No doubt such a principle is implied in every partnership transaction and the rights of parties in the end should be regulated on such principle. Where one party files a suit for taking the accounts, the other party has got to submit to such a suit on account of such principle. But all this does not make the suit for taking the accounts a suit for compensation for breach of a contract in writing. It is very difficult to say in such a case that any one of the parties has broken any particular term of the contract. Even if some specific breaches of some clauses in the deed are alleged, in the main the suit is one for taking the accounts. In the course of taking such accounts, results of breaches made by particular partners may have to be considered; but the main characteristic of the suit is not altered. In this second appeal it is true that charges are made against defendants that they are guilty of breach of certain obligations under which they were according to some of the clauses in the deed of partnership; but the main prayer in the suit is that accounts should be taken of the partnership transactions. The principle of *Vairavan Asari v. Ponnayya*(1) was followed in later decisions. In some of the cases arising out of contracts of

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agency where the conflict was between the application of article 89 and article 115, there being no discussion about article 116, the cases would not be of help to us in the present appeal. In *Hafezuddin Mandal v. Jadu Nath Saha*(1), where it was observed by MACLEAN C.J. that suits for accounts against an agent may not be aptly described as suits for compensation for breach of a contract in writing registered, the case finally turned on the application of article 132 because under the contract there was a charge on the defendant's property and therefore that decision again may not be of much use to us now. However there is one decision which certainly is in favour of the appellant, namely, the decision in *Bhagirath v. Prem Chand*(2), where article 116 was applied to a suit for accounts against the agent, the instrument being registered. But, in the face of the decision in *Vairavan Asari v. Ponnayya*(3) of this Court which has not been to this date dissented from and a subsequent decision of this Court which I am about to mention, we are unable to agree with that decision. The decision in *Jogesh Chandra alias Dhalu Ghose v. Benode Lal Roy*(4) is distinguishable on the ground that there was a specific stipulation in the contract that the agent should render account annually. The decision of the Privy Council in *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur*(5) is not of direct help to us because it is a case of rent. Finally we come to the decision of this Court (REILLY and ANANTA-KRISHNA AYYAR JJ.) in *Annu v. Somasundara*(6).

(1) (1908) I.L.R. 35 Calc. 298.

(3) (1898) I.L.R. 22 Mad. 14.

(5) (1916) I.L.R. 44 Calc. 759 (P.C.).

(2) (1912) 17 C.L.J. 201; 16 I.C. 832.

(4) (1909) 14 C.W.N. 122; 5 I.C. 59.

(6) (1930) I.L.R. 54 Mad. 654.

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It is true that that case relates to a contract of agency; but the decision turned on nothing peculiar to the contract of agency but on the nature of a suit for accounts. After an exhaustive discussion of the relevant cases, the learned Judges were of the opinion that a suit for taking accounts between parties is not a suit for compensation for breach of contract. And, though the discussion turned upon articles 89, 115 and other corresponding articles in the matter of agency, we think the principle of that decision applies. In the place of article 89, we have got article 106 in the case of partnership. When there is a specific stipulation in the deed of partnership and the suit is based on a breach of that stipulation, it may be said that the suit falls under article 116 as in the case of *Ranga Reddi v. Chinna Reddi*(1). Generally speaking, in cases where accounts are to be taken between the parties, the breach of any particular stipulation by one of the parties being a subordinate matter and the prayer being for the taking of the accounts of the partnership, the reasoning of *Annu v. Somasundara*(2) applies equally to cases of partnership. Agreeing with it we think that the proper article applicable is article 106 and not article 116 and that the suit has been rightly held to be barred.

It may be useful to mention that, as in the case of a suit for accounts against an agent, so also in the case of accounts as between partners, the suit may end in a decree against the plaintiff in favour of the defendant as observed by the Privy Council in *Hurrinath Rai v. Krishna Kumar Bakshi*(3).

(1) (1891) I.L.R. 14 Mad. 465.

(2) (1930) I.L.R. 54 Mad. 654.

(3) (1886) I.L.R. 14 Calc. 147 (P.O.).

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All the contentions urged by the learned Advocate for the appellant fail and the second appeal is dismissed with costs. The Advocates' fee is to be divided equally between respondents 2 to 5 on the one hand and respondent 8 on the other, the other costs will be paid to respondents 2 to 5.

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VENKATASUBBA RAO J.—Questions of some importance have been raised in this second appeal, and I shall deal with them shortly.

The first defendant obtained a lease of a forest in 1913. The suit partnership was entered into in 1918 for the purpose of dealing in timber in that forest. That partnership consisted of the plaintiff, the first defendant and one Srinivasaraghavacharya, deceased, now represented by defendants 2 to 5. The plaintiff alleges that on 14th July 1919 the first defendant illegally transferred his leasehold interest in favour of the sixth defendant. The suit was filed on 14th July 1925.

The first question that arises is, what is the article of the Limitation Act that is applicable? It must be mentioned that in April 1920 Srinivasaraghavacharya died and by his death the partnership became *ipso facto* dissolved. Article 106 provides a period of three years for a suit claiming "an account and a share of the profits of a dissolved partnership", the starting point being the date of the dissolution. It is contended by Mr. T. M. Krishnaswami Ayyar, the appellant's (plaintiff's) learned Counsel, that article 120 governs the case. He puts his argument thus. The alienation by the first defendant of his interest gave the plaintiff the right to claim a dissolution; see section 254 of the Contract Act. That being the plaintiff's cause of action, he could

file a suit under article 120 within six years from the date of the accrual of that right. This argument rests upon a fallacy. No doubt the transfer of his interest by the first defendant gave the plaintiff the right to ask the Court to dissolve the partnership, but that was an option that the plaintiff had and he was not bound to claim a dissolution on that account. In the meantime Srinivasaraghavacharya died and the partnership became dissolved by operation of law; see section 253 (10) of the Contract Act. It would be futile to ask the Court to dissolve a partnership which has already become dissolved. The suit then is in substance for an account and a share of the profits of a dissolved partnership. We are not here concerned with the question as to what the article is that is applicable in respect of a suit to dissolve an existing or a continuing partnership; nor are we concerned with the kinds of partnership suits that are governed by article 120. When a partnership has already become dissolved, as in this case, the provision that governs the case is article 106. In this connection, I may point out that the law makes a distinction between two kinds of events: on the happening of the events of one kind, the partnership becomes automatically dissolved, but in the case of the events of the other kind, the party must come to Court and seek its aid to get a dissolution; see Daniel's Chancery Practice, Vol. II, pages 1300-1301. So much for the first contention.

It is next argued that the partnership having been entered into for a fixed term of sixty years, there are clauses in the articles which show that the parties intended that it was not to be

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dissolved in the meantime by the death of any of them. Clause 8, which runs thus :

"This partnership is in force for the whole period of the lease of sixty years between 'A' and 'B'."

is relied upon. This clause does not help the plaintiff in the least. The lease having been taken for sixty years, the same period was naturally fixed as the term for which the partnership was to subsist. In the face of the express provision contained in section 253 (10) of the Contract Act which says :

"Partnerships, whether entered into for a fixed term or not, are dissolved by the death of any partner."

this argument is of no avail. Then clause 21, on which reliance is placed, is to the following effect :

"The interests of 'A' or 'B' in this partnership deed are assignable only among themselves or to their legal heirs."

This clause does no more than given a preferential right to the partners to acquire each other's shares ; this was intended as a safeguard against strangers being brought in. The operation of section (253 10) may be excluded, as the opening words of that very section show, by a contract to the contrary. What is pleaded here is not of course an express contract ; but can a contract to the contrary be implied by either necessary or reasonable inference from the words used ? I think not. I need not quote the passage from Lindley, to which the learned Officiating Chief Justice has referred. I am clearly of the opinion that a contract to continue the partnership in spite of the death of a partner has not been shown.

Granting that such a contract to the contrary has been proved, what is the result ? Can the heirs of the deceased Srinivasaraghavacharya be compelled by the Court to continue in partnership

with the plaintiff ? *Downs v. Collins*(1) is an instructive case on the point. The articles of partnership between two partners contained a covenant that they and their respective executors and administrators would continue partners for twenty-one years. It was held, in a suit by the executors of the deceased partner against the survivor for a dissolution, that the provisions for the continuance of the partnership

"could not be enforced in equity by way of specific performance of the partnership contract against the representatives of a deceased partner, either by way of relief in a suit in which such surviving partner was plaintiff, or by way of protection in a suit in which he was defendant."

This case was followed by STIRLING J. in *Lancaster v. Allsup*(2). By the articles of partnership it was provided that the parties should become and be partners and that the partnership should continue for a term of fifteen years from a certain date. The action was brought by the representatives of Thomas Lancaster, deceased, to have the affairs of the partnership, in which he had been a partner in his lifetime, wound up. For the defendant (the surviving partner) it was contended that the words of the clause amounted to an absolute covenant by each partner that the partnership was to continue for fifteen years and that, if any partner died, his representative should stand in his place, in other words, that it was not a mere enabling provision which gave an option to the representatives but was an absolute and imperative one. STIRLING J. deals with the argument thus :

"For the purpose of my decision I will assume that it is so. Then the question is, is that a contract which the Court will enforce against the executors ?"

(1) (1848) 6 Hare 418 ; 67 E.R. 1228.

(2) (1887) 57 L.T. (N.S.) 53.

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That question the learned Judge answers in the negative. Following *Downs v. Collins*(1) and another case to which I need not refer, the learned Judge decided that *the death of Thomas Lancaster created a dissolution of the partnership and that it must be wound up on that footing*. He goes on to add :

“The judgment will contain a provision, as in *Downs v. Collins*(1), reserving to them their right to prosecute any claim which they may have in respect of any alleged breach of contract. Except for that, there will be the usual partnership judgment, the assets to be realised in chambers.”

The third defendant in his written statement (which in this particular has been adopted by the other representatives of the deceased) alleges that there was not even a concluded agreement of partnership with the plaintiff and further pleads that in any event there was no covenant for the continuance of the concern after the death of any of the partners. The heirs of Srinivasaraghavacharya must be therefore taken to have declined from the very beginning to continue as partners with the plaintiff. Even granting then that the clauses are capable of being read as containing a covenant for continuance as contended for, there can be no doubt that the partnership became dissolved on the death of Srinivasaraghavacharya. The suit is therefore one in respect of a dissolved partnership and article 106, as I have said, governs the case.

Then remains the third and last contention, that the articles of partnership having been registered under the Registration Act, the article applicable is not article 106 but article 116. The latter article cannot apply unless the suit is “for

(1) (1848) 6 Hare 418; 67 E.R. 1228.

compensation for the breach of a contract in writing registered”. *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur*(1), so strongly relied upon by the appellant, does not seem to help him. In that case their Lordships of the Judicial Committee held that, when rent was claimed under a registered instrument, article 116 and not article 110 applied. Their judgment appears to have been based on two grounds: first, that the large body of decisions which applied article 116 must be followed, and secondly, that the omission from article 116 of the words which occur in article 115, namely, “and not herein specially provided for”, is critical. This decision is no doubt an authority for the position that a suit for rent can properly be described as a suit “for compensation for the breach of a contract”, but there is nothing in that case to warrant the view that a suit in respect of a dissolved partnership is a suit of that description. Nor can I accede to the contention that *Ratnasabapathy Chettiar v. Devasigamony Pillai*(2) supports the appellant. That was a suit for the recovery of a debt due under a personal covenant contained in a mortgage deed, and it was held that such a suit was governed by article 116. In the case of a contract for the payment of a debt, what the Court decrees on breach is strictly compensation. But a suit for an account of a dissolved partnership cannot, without great violence to the language, be described as a suit “for compensation for the breach of a contract”. What are the kinds of relief which are granted in such a suit? The partnership accounts are directed to be taken, the assets to be

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(1) (1916) I.L.R. 44 Cal. 759 (P.C.). (2) (1928) I.L.R. 52 Mad. 105 (F.B.).

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realised, the outstandings to be collected, the properties to be sold and the debts to be paid off; the balance, if there be found any, is ordered to be divided between the parties; if the concern ends in a loss (and that is important), the plaintiff is directed, equally with the defendants, to bear his share of it. The construction must not be strained to include cases plainly omitted from the natural meaning of the words—that is a well-known canon of interpretation; see Maxwell on Interpretation of Statutes, seventh edition (1929), page 59. Several cases dealing with suits against agents have been cited before us and they have been referred to in the judgment just pronounced by the learned Officiating Chief Justice. I do not propose to deal with them, but I must remark that such of them (whether they support the appellant or not) as have not recognised the distinction pointed out by the Judicial Committee in *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur*(1) between article 115 and article 116 cannot be of much value. But *Annu v. Somasundara*(2) is not open to this criticism and it has been held in that case that a suit for an account against an agent cannot be regarded as a suit “for compensation for the breach of a contract”. We are here concerned with a case of partnership and not with a case of agency; but still the analogy is useful. As to direct authority, two cases have been cited before us. In *Ranga Reddi v. Chinna Reddi*(3) there was a partnership deed which provided for the liability of a partner to pay the loss and the suit was

(1) (1916) I.L.R. 44 Cal. 759 (P.C.). (2) (1930) I.L.R. 54 Mad. 654.
(3) (1891) I.L.R. 14 Mad. 465.

brought on an account stated, which showed what the actual amount of the loss was. It was held that article 116 applied. The reason is thus stated :

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“The contract of partnership contains an express stipulation that the parties should, according to their shares, pay the loss, and thus the origin of the obligation now in suit was a registered contract. The account stated had reference to the registered contract and did not constitute in itself an independent contract.”

The second of the cases referred to, namely, *Vairavan Asari v. Ponnayya*(1), was a suit for an account and share of the profits of a partnership. Although the partnership was entered into under a registered agreement, it was held that the suit was governed by the three year rule under article 106. SHEPHARD J. was a party to both these decisions. In the second case, the earlier one was distinguished on the ground that the learned Judges were not prepared to say that

“the article can be stretched to cover every case in which the plaintiff’s claim may in its origin be referred to a contractual relation which is expressed in a registered instrument.”

Vairavan Asari v. Ponnayya(1) has stood unquestioned from 1898 and I agree with the conclusion arrived at in that case, although I, for my part, would prefer to rest my judgment upon the ground that a suit in respect of a dissolved partnership is not a suit “for compensation for the breach of a contract”. The third contention is also therefore disallowed.

In the result, the second appeal fails and I agree in the order proposed by the learned Officiating Chief Justice.

A.S.V.

(1) (1898) I.L.R. 22 Mad. 14.

APPELLATE CIVIL.

Before Mr. Justice Sundaram Chetti and
Mr. Justice Pakenham Walsh.

1933,
August 2.

GURUSAMI NAIDU (THIRD DEFENDANT), PETITIONER,

v.

GOVINDAPPA NAIDU AND THREE OTHERS (PLAINTIFFS 1 AND 4
TO 6), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXXIV, r. 7 (2)
— *Extension of time for payment under—Jurisdiction of Court—Suit in form not one of redemption of a mortgage but for recovery of property—Decree for recovery of property in, imposing condition of payment of amount by plaintiff within a certain time—Liability for such payment arising out of or being connected with a mortgage.*

The reversionary heirs of a deceased Hindu sued for recovery of possession of his properties free from a mortgage effected by his deceased widow. The Court found that a portion of the mortgage debt was valid and binding on the reversioners and consequently they could not recover possession unconditionally. The decree passed in the suit ran as follows:—"The plaintiffs will therefore recover the suit properties from the third defendant on paying Rs. 2,814-9-11. Six months' time is granted for payment of the money. The properties will be a charge for the money till then."

Held that the decree was one in the nature of a redemption decree and that, as the effect of non-payment of the amount within the time fixed was not specified in the decree by means of a penalty clause, such as, "the suit will stand dismissed" or "the plaintiff is debarred from redeeming", the Court had power to extend the time for payment under Order XXXIV, rule 7 (2), of the Code of Civil Procedure.

Quaere whether the Court would not have power to extend the time for payment if there was in the decree a penalty clause of the kind mentioned above.

* Civil Revision Petition No. 1562 of 1931.

A decree may be one for redemption of a mortgage although the suit is not strictly in the form of a redemption suit, and the power to extend the time vested in the Court under Order XXXIV, rule 7, can be exercised even in such a case.

PETITION under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Ranipet, dated 12th September 1931, in Civil Miscellaneous Petition No. 605 of 1931 in Original Suit No. 12 of 1920.

A. Rajah Ayyar and N. G. Krishna Ayyangar for petitioner.

K. Bhashyam Ayyangar and T. R. Srinivasan for respondents.

Cur. adv. vult.

JUDGMENT.

SUNDARAM CHETTI J.—This revision petition has been filed by the third defendant against the order of the District Munsif of Ranipet in Civil Miscellaneous Petition No. 605 of 1931 in Original Suit No. 12 of 1920, extending the time for payment of a sum of money, which according to the terms of the decree was to be paid by plaintiffs within six months before recovering possession of the suit properties from the defendants. The District Munsif construed the decree to be one substantially in the nature of a redemption decree, and in the exercise of his discretion under sub-rule 2 of rule 7 of Order XXXIV, Civil Procedure Code, granted an extension of time. The amount has also been paid into Court. The correctness of this order is questioned in this civil revision petition. It is urged that the lower Court is wrong

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in construing the decree as in the nature of a redemption decree, and that it had no jurisdiction to extend the time fixed in the decree for payment. It is further argued by Mr. Rajah Ayyar for the petitioner that the soundness of the decision in *Idumba Parayan v. Pethi Reddi*(1), on which the order of the lower Court rests, is open to doubt, and that that decision requires reconsideration.

Before discussing this point, let me state briefly the facts of this case. The plaintiffs (as reversioners) filed Original Suit No. 12 of 1920 in the District Munsif's Court of Ranipet for a declaration of their reversionary right and of the invalidity of a mortgage and sale effected by the widow (first defendant). During the pendency of the suit, the widow died, and the plaintiffs appear to have got the plaint amended by the addition of a prayer for recovery of possession of the suit properties free from all incumbrances created by the widow. After due inquiry the Court seems to have found that a portion of the mortgage debt was valid and binding on the reversioners (plaintiffs) and consequently they could not recover possession unconditionally. It looks as if the Court thought that, without paying a certain sum of money to the extent of redeeming the mortgages binding on plaintiffs, they should not recover possession. The decretal portion of the judgment is worded thus :

"The plaintiffs will therefore recover the suit properties from 3rd defendant on paying Rs. 2,814-9-11. Six months' time is granted for payment of the money. The properties will be a charge for the money till then. I pass a decree accordingly."

(1) (1919) I.L.R. 43 Mad. 357.

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Against this decree, there was an appeal to the first appellate Court, and the matter went up to the High Court which ended in plaintiffs' favour on 12th January 1931. The present petition for extension of time for the payment was put in subsequently and granted by the District Munsif.

The point for consideration is what is the nature of the decree in question. A decree for redemption can ordinarily be passed in a suit in which a mortgage is involved as the subject-matter. Unless there is a mortgage lien on the property (or a charge thereon for which the same remedy has to be sought), a decree directing the payment of money by one party to another cannot strictly be termed a redemption decree. In the present case, there is no insurmountable difficulty in regarding the decree as one in the nature of a redemption decree, as the amount which the plaintiffs were directed to pay was for a mortgage or mortgages held to be binding on them. The effect of the decree is that, without redeeming the mortgage by payment of the declared amount, possession cannot be recovered by the plaintiffs. It is, however, contended by Mr. Rajah Ayyar that the suit was not a suit for redemption, and the decree in such a suit cannot be called a redemption decree. I am unable to agree with this contention. If a mortgagor sues for recovery of possession, alleging that the mortgage debt has been fully discharged, and frames the suit as one in ejectment, but the Court finds that some amount is still due under the mortgage and the plaintiff cannot recover possession without discharging the debt, can it not pass a conditional decree, and is not such a decree virtually a redemption decree?

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The decree is in my opinion one for redemption, though the frame of the suit is not akin to a suit for redemption of the mortgage. If authority is needed for this, the decision of a Bench of two learned Judges of this High Court (SUNDARA AYYAR and SADASIVA AYYAR JJ.) supports this view; vide *Ranganatha Pillai v. Paripurnam*(1).

If the decree passed can be reasonably treated as a decree directing the redemption of a mortgage, and if for that purpose it fixes a period of time for payment of the money, there is, in my opinion, no bar to the exercise of the discretionary power for extending such time, as provided in sub-rule 2 of rule 7 of Order XXXIV, Civil Procedure Code. The decision of a Bench of this High Court in *Idumba Parayan v. Pethi Reddi*(2) is distinctly in favour of the plaintiffs' contention. In that case, a decree for recovery of possession of certain properties from the alienees, on payment of a sum of money by a certain date, was passed, without any provision as to the consequence of non-payment. Such a decree was passed in a suit for partition. It was not a suit for redemption of a mortgage, nor does it appear that the amount which the plaintiffs were directed to pay was for redeeming any mortgage. Still, it was held that the decree was in terms and in effect one for redemption, so that the Court would have jurisdiction to extend the time for payment under Order XXXIV, rule 7. For the purposes of the present case, it is not necessary to go so far as the learned Judges went in *Idumba Parayan v. Pethi Reddi*(2). Where the payment of the amount within a certain time fixed as a condition for the

(1) (1912) 16 I.C. 217.

(2) (1919) I.L.R. 43 Mad. 357.

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recovery of the property is one in respect of a mortgage, by way of redemption (as in the present case), I fail to see why the Court is not competent to extend the time under the aforesaid rule. There may be some force in the petitioner's contention, if the liability for the payment of the amount imposed on the plaintiff does not arise out of a mortgage or has no connection at all with a mortgage. Our attention is drawn to two decisions of the Allahabad High Court, viz., *Kandhaiya Singh v. Musammatt Kundan*(1) and *Nandkunwar v. Sujan Singh*(2). The decision in *Idumba Parayan v. Pethi Reddi*(3) has been dissented from. The learned Judges of the Allahabad High Court seem to hold that the Court would have no jurisdiction to extend the time for payment under Order XXXIV, Civil Procedure Code, unless the suit was expressly one for redemption of a mortgage, and the decree is also a redemption decree. This view is opposed to the decision of our High Court in *Ranganatha Pillai v. Paripurnam*(4) already referred to. In an earlier case of the Allahabad High Court, *Kalian v. Sadho Lal*(5), a compound decree in plaintiffs' favour was passed, which was a decree for redemption coupled with a decree for sale, but the suit was not in form a suit for redemption. It was however held that the Court had jurisdiction to extend the time fixed in the decree for redemption under Order XXXIV, Civil Procedure Code. This decision seems to have been approved in *Nandkunwar v. Sujan Singh*(2). With respect, I should think

(1) (1920) I.L.R. 42 All. 639.

(2) (1920) I.L.R. 43 All. 25.

(3) (1919) I.L.R. 43 Mad. 357.

(4) (1912) 16 I.C. 217.

(5) (1912) I.L.R. 35 All. 116.

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it would be too strict an interpretation of rule 7 of Order XXXIV, Civil Procedure Code, to hold that the power to extend the time vested in the Court cannot be exercised even if the decree is virtually one for redemption of a mortgage, unless the suit also is strictly in the form of a redemption suit.

If the effect of non-payment of the amount within the time fixed is also specified in the decree by means of a penalty clause, such as, "the suit will stand dismissed" or "the plaintiff is debarred from redeeming", there may be room for some doubt as to whether the Court can still extend the time or should only allow the decree to work itself out. Even in such a case, the Allahabad High Court went the length of holding that the Court could extend the time; vide *Het Singh v. Tika Ram*(1). In the present case no penalty clause of that kind is found in the decree, and there is nothing in the decree itself to fetter the hands of the Court in the matter of extending the time for payment. In my view, the extension of the time granted by the lower Court in this case was not without jurisdiction. I would affirm that order and dismiss this petition with costs.

Pleader's fee is fixed at Rs. 100.

PAKENHAM WALSH J.—I agree.

A.S.V.

(1) (1912) I.L.R. 34 All. 388.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Burn.

S. M. ARUMUGHA CHETTY (PLAINTIFF), APPELLANT,

1933,
August 11.

v.

RANGANATHAN CHETTY (DEFENDANT), RESPONDENT.*

Hindu Law—Joint family—Agreement between coparceners not to divide for a certain time or until a certain event happens—Validity of.

Coparceners in a joint Hindu family can agree for consideration that for a certain time or until a certain event or for their lives they will not exercise their right to divide.

APPEAL from the judgment of WALLACE J., dated 16th March 1932, and made in Civil Suit No. 164 of 1930 in the Ordinary Original Civil Jurisdiction of the High Court.

C. Veeraraghava Ayyar and T. R. Sundaram for appellant.

K. S. Krishnasami Ayyangar and Srinivasa Raghavan and Thyagarajan for respondent.

JUDGMENT.

REILLY J.—The plaintiff and the defendant, REILLY J. his grandson, are the only coparceners in a Hindu joint family. The plaintiff sues for a declaration that a written instrument, Exhibit A, dated 25th January 1930, and admittedly signed by him, is void, and for partition of the family property. His case in regard to Exhibit A appears to be twofold, first, that he can claim a declaration that it is voidable on account of fraud and misrepresentation and, secondly, that he can ignore it as void

* Original Side Appeal No. 39 of 1932.

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for want of consideration and for another reason, which I will mention shortly, and that it is therefore no bar to the partition which he claims. WALLACE J., who heard the suit, dismissed it; and against that decision the plaintiff appeals.

The plaintiff's story in his plaint is that after the death of his only son in August 1929 he was not satisfied with the behaviour of his grandson, the defendant, a young man then of about 18 years; and that he therefore wished for a partition on the following lines; first, that provision should be made for four of the plaintiff's daughters by settling on each of them a small house from the share that was to be allotted to the plaintiff; secondly, that a house in Thambu Chetty Street and the family house in another street, worth together Rs. 40,000, should be allotted to the plaintiff's share; thirdly, that the family business in brass utensils should be allotted to the defendant; fourthly, that out of the defendant's share two houses worth Rs. 8,000 should be given to the defendant's mother; fifthly, that the jewels in the possession of the various members of the family should be kept by those in whose possession they were; and sixthly, that the remaining property of the family should be kept undivided. The plaintiff goes on in his plaint to allege that he instructed a clerk, Desikachari, who had long been employed in the family business, that that was what he wished to be done. Paragraph 7 of the plaint is as follows:—

"The said Desikachariar said that the defendant was agreeable to this course and thereupon the plaintiff instructed Desikachariar to have a document prepared after consulting lawyers to carry out the proposals set forth above. In or about the last week of January 1930 on a Saturday night after

10 p.m. the said Desikachariar came to the plaintiff along with the defendant and one Ramaswami Ayyar, represented that the document had been prepared in accordance with the express intentions of the plaintiff and had been approved by a Vakil and further informed the plaintiff that it is better to execute the document at once. On the plaintiff asking him to read the document the said Desikachariar assured the plaintiff that the document contained the terms mentioned above in paragraph 6 *supra*. As the plaintiff had implicit confidence in the said Desikachariar and believing in the truth and representations made by the said Desikachariar in the presence of and to the hearing of the defendant, he signed the document then and there and the defendant also put his signature to the said document."

The plaint goes on to state:

"The said Desikachariar was instructed by the plaintiff to keep the document with him."

The story goes on that after about fifteen days the plaintiff obtained from Desikachariar what was represented to be a copy of the document which he had executed, and then to his surprise he found that it was not the kind of document which he had intended but something very different. Exhibit A, after setting out that there had been some misunderstandings between the parties, that it would not be proper to remain in that state, and that a partition should not be effected between them, provides that two specified houses should be given to one of the plaintiff's daughters, four shops to another, a house and site to a third and a house and site to a fourth; then that two houses should be given to the defendant's mother for her life, and after her death they should go to her daughters; then that the defendant should get the brass business, which I have mentioned, with its stock and its outstandings and discharge its debts. Next it is provided that the remaining immovable property

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shall be enjoyed by the plaintiff and the defendant during plaintiff's life and after his death by the plaintiff's wife, if she survives him, and the defendant, during all which time none of the parties concerned shall have power to alienate the property, and after the death of the plaintiff and his wife the property shall go to the defendant absolutely. There is a further provision that out of the income from the immovable property the plaintiff shall be at liberty to take not more than Rs. 200 a month to spend as he likes, and after his death his wife shall be at liberty to take a similar amount. Then it is provided that the defendant shall get all the vessels and movable property of the family and that the jewels shall be taken by those persons in whose use they are. Finally, there is an addition at the end of the document that the plaintiff's daughters shall get the property allotted to them only after the death of the plaintiff and his wife. This, it will be seen, is a very different arrangement from what the plaintiff alleges in his plaint he had told Desikachari was what he wished.

In his written statement the defendant says in paragraph 5:

"This defendant states that as per the desire expressed by the parties and with a view to record the agreement and arrangement which had been arrived at prior thereto, Ramaswami Iyer prepared the document dated 25th January 1930 with legal assistance, and both the plaintiff and defendant executed the said document after reading the same and with full knowledge and understanding of its contents."

In paragraph 11 he says:

"This defendant denies the further allegations in the said paragraph that after 10 p.m. Desikachari went to the plaintiff with the defendant and Ramaswami Iyer. On the other hand, the document was prepared and written by Ramaswami Iyer

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at the express direction of the plaintiff and the same was executed by the parties at about 8 p.m. as per previous arrangement. The plaintiff first read over the document and executed it and the defendant also did so. Ramaswami Iyer and Desikachari attested the execution."

[His Lordship discussed the evidence and the arguments advanced and proceeded:]

In my opinion there is no sufficient reason for differing from WALLACE J.'s finding that the plaintiff's story is untrue and that the plaintiff executed Exhibit A with knowledge of its contents and with free consent.

But it has been urged by Mr. Viraraghava Ayyar that, even if that be so, Exhibit A may be no bar to the plaintiff's present suit. He urges that there was no consideration for the agreement embodied in Exhibit A. I have already discussed some of the elements of consideration for that agreement; and it may be added that, if, as I should be prepared to find in this case, the plaintiff did not want a partition but on the contrary wanted to prevent a partition, then the defendant's forbearance from his right of partition would itself serve as another element of consideration.

But it has been further urged that an agreement between Hindu coparceners not to exercise their right of partition is in itself invalid. That appears to be the view of the Bombay High Court. In *Ramlinga Khanapure v. Viru Pakshi Khanapure*(1) it was decided that an agreement between coparceners never to divide certain property is invalid under the Hindu Law as tending to create a perpetuity. That is not the exact question

(1) (1883) I.L.R. 7 Bom. 538.

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before us. But it appears that in that case the learned Judges were of opinion that an agreement between coparceners not to divide, even if not intended to create a perpetuity, but only to be effective for a certain period or for their lives, would be invalid; and that I understand is the view still taken in Bombay. The learned Judges say that

"the right to demand a partition is in itself superior, as a part of the Hindu public law in the larger sense, to the conventions of individuals."

With very great respect I am not able to follow that. As Mr. Krishnaswami Ayyangar for the defendant has urged, the right of partition itself has been a historical development in Hindu Law. At different stages the right has varied. At the present day it varies among different classes of Hindus in different parts of the country. Although of course Hindu coparceners no more than any one else can create perpetuities except under special provisions, I can see no legal obstacle to prevent two coparceners from agreeing for consideration that for a certain time or until a certain event or for their lives they will not exercise their right to divide. That this is possible is the view held by the High Courts of Calcutta and Allahabad; see *Rajender Dutt v. Sham Chund Mitter*(1), *Srimohan Thakur v. Mac Gregor*(2), *Krishnendra Nath Sarkar v. Debendra Nath Sarkar*(3) and *Rup Singh v. Bhabhuti Singh*(4). There is no direct decision on the question in this Court; but I understand from the judgments in *Ramabhadra Odayar v.*

(1) (1880) I.L.R. 6 Cal. 106.
(3) (1908) 12 C.W.N. 793.

(2) (1901) I.L.R. 28 Cal. 769.
(4) (1919) I.L.R. 42 All. 30.

Gopalaswami Odayar(1) that both the learned Judges, who disposed of that case, were of opinion that such an agreement would be valid.

In my opinion, therefore, both because Exhibit A includes an agreement between the plaintiff and the defendant not to divide the immovable property of the family while the plaintiff and his wife are alive and because Exhibit A embodies a family arrangement, it is a bar to the plaintiff's suit. In my opinion this appeal should be dismissed with costs.

BURN J.—I agree and have nothing to add.

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APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

POPURI MURAHARI BRAHMA SASTRI ALIAS SRI
RAMA SARMA, MINOR, BY VENKATASUBBAMMA
AND ANOTHER (DEFENDANTS 1 AND 2), APPELLANTS,

v.

CHILUKURI SUMITRAMMA AND TWO OTHERS (PLAINTIFF
AND DEFENDANTS 3 AND 4), RESPONDENTS.*

Hindu Law—Adoption—Widow making adoption without the consent of her step-daughter—Validity of—Consent of sapindas and holding of family council—Discussion of the law relating to.

An adoption by a Hindu widow, which is otherwise proper and *bona fide*, is not rendered invalid merely because she did not obtain the consent of her deceased husband's daughter or because she obtained the consent of only one of the two nearest sapindas (the other having capriciously withheld his consent)

(1) (1930) I.L.R. 54 Mad. 269.
* Appeal No. 35 of 1928.

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or because she obtained the consent of only two out of the four remoter sapindas or because she omitted to call a family council to consider the propriety of the adoption.

Viswasundara Row v. Somasundara Rao, (1920) I.L.R. 43 Mad. 876, followed. *Anne Brahmayya v. Chelasami Rattayya*, (1924) 20 L.W. 503, referred to.

An assent given by a sapinda to a Hindu widow to adopt "any boy whom she may like either from among agnates or from sagotrajas for performance of religious rites as ordained by sastras" is not too general and is valid.

Suryanarayana v. Venkataramana, (1903) I.L.R. 26 Mad. 681, distinguished.

The law relating to the consent of sapindas and the holding of family council in cases of adoption by widows reviewed.

APPEAL against the decree of the Court of the Subordinate Judge of Masulipatam dated 10th September 1927 and passed in Original Suit No. 94 of 1926.

S. Varadachari with *K. Kameswara Rao* and *K. Subbarama Ayyar* for appellants.

P. Somasundaram for respondents.

Cur. adv. vult.

JUDGMENT.

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MADHAVAN NAIR J.—Defendants 1 and 2 are the appellants. The appeal arises out of a suit instituted by the plaintiff for a declaration that the alleged adoption of the first defendant by the second defendant is not true or valid.

One Popoori Ramakrishnayya died in or about 1900. The plaintiff is his daughter by his first wife. After the death of the plaintiff's mother, Ramakrishnayya married the second defendant. At his death she had not attained puberty. Defendants 3 and 4 are the divided brothers of the deceased Ramakrishnayya and his nearest gnatis. First defendant is the son of the fourth

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defendant. On 10th July 1923 the second defendant sent a registered post card, Exhibit III, to the third defendant requesting him to give her written authority to adopt. This letter was refused by him. On 26th August 1923 she sent another registered post card, Exhibit IV, to the third defendant making the same request. This was also refused. On 20th September 1923 the registered post card, Exhibit V, was sent by her pleader making the same request. This was also refused by the third defendant. On the same date as Exhibit III the second defendant sent Exhibit VII to the fourth defendant asking his permission to adopt. On the 25th of November 1923 he gave the required consent for the adoption by executing Exhibit II, the deed of authority. On 17th April 1924 the second defendant adopted the first defendant and executed in his favour the adoption deed, Exhibit I. This was attested, amongst others, by Popoori Sastrulu and Popoori Gangadhara Sastri, two reversioners of the deceased Ramakrishnayya. The evidence discloses that two other reversioners of Ramakrishnayya, Popoori Sambayya and Popoori Ramatharakam, were also in existence at that time. The plaintiff denied the factum of the adoption and contended that even if true it was invalid. Holding that the adoption was proved, the learned Judge held that it was invalid for two reasons:— (i) that the plaintiff who was the nearest reversioner was not consulted, and (ii) that, even if plaintiff's consent was not necessary, when the third defendant had not given his consent the adoption should not have been made on the sole consent of the fourth defendant without convening

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a meeting of the other kinsmen and taking their consent. The second ground is more elaborately stated in paragraph 27 of the judgment as follows :—

“ The second reason for holding that first defendant's adoption is invalid is that, even assuming that plaintiff was not one of those to be consulted, the second defendant should have convened a gathering of kinsmen when she found that, of the two nearest agnates, one of them only was prepared to give his consent. As remarked in *Anne Brahmayya v. Chelasami Rattayya*(1), a majority of the kinsmen must consent and one of two cannot form a majority. If third defendant capriciously withheld his consent, the second defendant should have taken the consent of the next reversioners who are said to be one Popoori Sambayya and one Popoori Ramatharakam.”

In appeal Mr. Varadachari argues (i) that in law the consent of the plaintiff is not necessary for the widow to make a valid adoption, and (ii) that the evidence shows that before making the adoption she obtained the consent of a majority of the kinsmen or such consent of the kinsmen as is sufficient to show that her act of adoption was done in the proper and *bona fide* performance of a religious duty and neither capriciously nor from a corrupt motive [see *The Collector of Madura v. Moottoo Ramlinga Sathupathy*(2)], which he contends is all that is required in law to make the adoption valid in the absence of the husband's authority. In addition to the grounds found in his favour by the lower Court, Mr. Somasundaram on behalf of the first respondent urged before us that the authority given to the widow by the fourth defendant is too general to be valid and that the evidence shows that the consent was procured by corrupt motives. The latter ground

(1) (1924) 20 L.W. 503.

(2) (1868) 12 M.I.A. 397.

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though taken was not pressed as the evidence in support of it was stated to be weak, and therefore need not be dealt with. The ground that the authority is too general is also unsubstantial. In *Suryanarayana v. Venkataramana*(1), the decision referred to in support of this contention, the assent of the sapinda obtained by the widow was for the adoption of “any boy at any time” and this was not acted upon for nine years. The assent given by the fourth defendant by Exhibit II is not to adopt any boy whom the widow may like but “any boy whom you may like *either from among agnates or from sagotrajās* (the italics are ours) for performance of religious rites as ordained by Sastras . . .”. The class from which the adoption is to be made is clearly indicated and is not left as vague and as indefinite as in *Suryanarayana v. Venkataramana*(1). It cannot also be said that after obtaining the consent there was any delay in making the adoption. No doubt the adoption was about twenty-four years after the death of her husband, but it must be remembered that at the time of his death the second defendant was only about eleven years old. If the adoption is otherwise valid it cannot be said that it must be held to be invalid solely on the ground that it was not made by her at a date earlier than 1924. The only substantial grounds for consideration therefore are the grounds urged in the lower Court and we will deal with them in order.

The first question is whether the adoption is invalid for the reason that the plaintiff's consent was not obtained. It is conceded that, if the promotion of the spiritual interests of a deceased

(1) (1903) I.L.R. 26 Mad. 681.

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husband is to be the main factor in determining the validity of an adoption, then the argument that the deceased husband's daughter should be consulted has obviously not much force; but what is contended is that the protection of his estate for his heirs should also be considered by the widow in making the adoption and, if so, the adoption without consulting the daughter should be held to be invalid. Admittedly there is no authority either of Hindu Law texts or of any decision in support of this proposition; what authority there is, is against it. In *Viswasundara Row v. Somasundara Rao*(1) the question arose whether a daughter's son is entitled to be consulted regarding an adoption by a widow and it was held that as he is not a gnati he has no right to be consulted. As all the arguments now advanced in support of the proposition have been elaborately dealt with in that case we do not think it is necessary to discuss the question again in this judgment. If a daughter's son has no right to be consulted, then it must follow that the daughter can have no ground to say that she should be consulted; obviously she can have no more right than her own son. Mr. Somasundaram contends that this decision has been dissented from and that "gnatis" (kinsmen) whose consent is material to validate an adoption have been interpreted in subsequent judgments to include cognates also, bringing within its description the daughter of the deceased husband, and reference was made to *Anne Brahmayya v. Chelasami Rattayya*(2) and *Kesar Singh v. Secretary of State for India*(3). In the former case

(1) (1920) 1 L.R. 43 Mad. 876.

(2) (1924) 20 L.W. 503.

(3) (1926) I.L.R. 49 Mad. 652.

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RAMESAM J. no doubt dissented distinctly from the decision in *Viswasundara Row v. Somasundara Rao*(1) but JACKSON J. expressly says, following *Viswasundara Row v. Somasundara Rao*(1), that a daughter's son is not entitled to be consulted as he is not a gnati. Both the learned Judges seem to have based their decision on the facts of the case which showed that of the two nearest agnates one was not consulted at all and the consent of the other was corruptly obtained and that therefore the adoption was invalid. The question whether the assent of a daughter's son of her deceased husband should be obtained by the widow to make an adoption valid did not necessarily arise in the case. In *Kesar Singh v. Secretary of State for India*(2) SPENCER and VENKATASUBBA RAO JJ. held that the reasons given by the learned Judges in *Viswasundara Row v. Somasundara Rao*(1) for excluding a daughter's son from the class of kinsmen whom it is obligatory for a widow to consult were not convincing and well-founded. But that decision cannot help the respondents as what was decided in that case was that

"in the absence of agnate reversioners a Hindu widow can, in Southern India, adopt with the consent of the nearest cognate reversioner." (The italics are ours.)

And further, the question of the consent of the daughter's son did not arise in that case. The point that was decided in that case is thus stated at page 679 :

"There being no agnate relation and the nearest cognate relation who under the law would be the presumptive reversioner having assented to the adoption, does his consent validate it?" It would thus appear that there is no express decision by a Bench differing from the decision in

(1) (1920) I.L.R. 43 Mad. 876.

(2) (1926) I.L.R. 49 Mad. 652.

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Viswasundara Row v. Somasundara Rao(1). As that decision is still good law, following the reasoning adopted in it, we overrule the contention that the second defendant in this case should have, before adopting the first defendant, obtained the consent of the plaintiff for making the adoption valid.

The next question is whether the lower Court's decision that the adoption is invalid on the ground that a clear majority of the agnates was not consulted and did not consent, can be upheld. The nearest sapindas of the second defendant's deceased husband are defendants 3 and 4; and Popoori Sambayya, Popoori Ramatharakam, Popoori Sastrulu and Popoori Gangadhara Sastri are his remote reversioners. Of these the first two seem to be a degree nearer in relationship to the deceased than the other two; but defendants 3 and 4 being the nearest agnates, the others may be taken to fall within the general class of remote reversioners. The third defendant was twice written to by the widow for obtaining his consent. On both occasions he refused to receive the letter addressed to him. The postman, second witness for the defendants, gave evidence to the effect that he told him that the registered postcards came to his address and were sent by the second defendant whose name was noted on the cards and that he refused to receive them saying that he did not require them. About these letters the third defendant in his evidence says:

"I judged that they were in connection with the authority to adopt . . . I asked the postman what they were about. He said that the second defendant wanted to adopt and hence sent the notice."

(1) (1920) I.L.R. 43 Mad. 876.

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The second defendant's vakil also wrote to him and that letter also was refused. It is clear that this conduct in refusing the letters was capricious. He knew what the letters were about and yet he would neither consent nor refuse. Of course in his evidence he now says that he had already given her consent and that being so he thought that there was no necessity to ask again for it. Evidence has been now given by the defendants to show that there was a gathering of the kinsmen prior to the adoption and that the third defendant specifically gave his consent at such a meeting. The evidence on this point has been rightly disbelieved by the learned Subordinate Judge. It is clear that the third defendant is now making an effort to help the widow. We must therefore take it that the third defendant capriciously refused his consent when the widow asked him for permission to adopt. The fourth defendant, as we have already said, gave his consent. The reversioners, Sambayya and Ramatharakam, were not consulted, but the other two reversioners were present at the ceremony and they actually attested the deed of adoption (Exhibit I) along with the acting Village Munsif and many others. The ceremony of adoption must have been sufficiently public, and these two reversioners would not have attested the deed without knowing what it was about. In these circumstances it may be taken that they gave their consent to the adoption. If the third defendant is excluded as one who has virtually refused his consent, then amongst the five agnates of her deceased husband the widow obtained the consent of the only remaining nearest sapinda and two of the reversioners before

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making the adoption. This would constitute support of a majority of her deceased husband's agnatic kinsmen in support of the adoption. It is argued that, if the third defendant capriciously withheld his consent, the second defendant, after obtaining the consent of the fourth defendant, should have taken the consent of the next reversioners, Sambayya and Ramatharakam, and since their consent was not taken the consent of the other reversioners, Sastrulu and Gangadhara Sastri, is useless and that the adoption is therefore invalid. The Privy Council cases which have a bearing on this point do not support this argument. It is no doubt obligatory on the part of the widow to consult the nearest sapindas; but if their consent is capriciously withheld it is not necessary that a family council should be held to consider the propriety of the adoption, or that the reversioners should be consulted in the order of their degree of relationship to the deceased husband, or that even that all the reversioners should be consulted. The reason for the widow to obtain the assent of a kinsman and the nature of the assent are thus described by their Lordships of the Privy Council in *The Collector of Madura v. Mootoo Ramlinga Sathupathy*(1):

"The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity for procuring the consent of all those whose possible and reversionary interest would be defeated by the adoption . . . There should be such evidence of the assent of kinsmen as suffices to show, that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive."

(1) (1868) 12 M.I.A. 397, 442.

Referring to this passage their Lordships explained it in *Vellanki Venkata Krishna Rao v. Venkatarama Lakshmi*(1) as follows:—

"All which this Committee intended to lay down was that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband."

What is meant by "family council" used in this passage is explained by their Lordships in *Kristnayya v. Lakshmipathi*(2) where it is observed:

"The reference to a 'family council' gave rise to some doubt whether, where there were agnatic relations closely related to the deceased, the assent of those standing in a remoter degree was either necessary or sufficient . . . The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter."

These passages which form the basis of the law on the point, read together, do not make it obligatory that a family council of the agnates should be called by the widow to consider the propriety of the adoption or even that all the reversioners should be consulted before the adoption is made. The nearest sapindas of course should be consulted; but when it becomes necessary to consult the reversioners all that is wanted is that there should be such evidence of consent as would show that the widow in making the adoption is not acting improperly or capriciously or from a corrupt motive. This would be proved no doubt by showing that the opinion of a substantial majority of

(1) (1876) I.L.R. 1 Mad. 174 (P.C.). (2) (1920) I.L.R. 43 Mad. 650 (P.C.).

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the reversioners is in favour of the adoption; but it does not mean that each and every reversioner should be consulted or that if one or two are omitted from consultation the adoption would be necessarily invalid. In this case it is not shown that Sambayya and Ramatharakam were not consulted by the second defendant for reasons which would suggest that if consulted they would have opposed the adoption or that she had any special reason for not consulting them. As a matter of fact the evidence shows that Sambayya was present at the adoption ceremony though he has not attested the document. The reversioners form a class of agnates that should be consulted by the widow and, if she is able to show that a substantial majority is in favour of the adoption, she must be taken to have done all that is required under the law to make the adoption valid. That the nearer reversioners were not consulted but only the opinion of those more remote than the excluded ones was taken would have its value as a question of fact in arriving at a conclusion whether a substantial majority in the circumstances of the case can be said to have given an opinion in favour of the adoption. Each case must depend upon its own circumstances. So long as there is a preponderance of opinion amongst the reversioners in favour of the adoption, we do not think that the omission to consult one or two of the reversioners nearer than those that were actually consulted will by that fact alone invalidate the adoption. In the case before us there can be no question about the propriety of the adoption or of the fitness of the boy actually adopted. There is not a shred of evidence to

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show that it was not necessary for the widow to make the adoption, nor is there any evidence to show that in making the adoption she was acting improperly or from corrupt motives. The third defendant having refused to say yes or no to her request for permission, she obtained the consent of the fourth defendant, the next nearest sapinda, and of two other reversioners, thus obtaining the opinion of a substantial majority in her favour. The fact that two of the reversioners were not actually consulted or that a family council was not called to consider the propriety of the adoption will not in our opinion make the adoption of the first defendant invalid in the circumstances of the case. For the above reasons we would hold that the adoption of the first defendant by the second defendant has been proved to be valid.

We would therefore set aside the decree of the lower Court and dismiss the plaintiff's suit with costs throughout.

JACKSON J.—I agree. I think that in this vexed question of adoption by the widow in the absence of her husband's authority the guiding principle is the passage in *Vellanki Venkata Krishna Rao v. Venkatarama Lakshmi*(1) quoted by Lord CAVE in *Kristnayya v. Lakshmipathi*(2):

"Such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow not from capricious or corrupt motive."

In *Veerabasavaraju v. Balasurya Prasada Rao*(3) the word "requisite" is used almost as though the assent was something more than evidence supporting an inference, and amounted

(1) (1876) I.L.R. 1 Mad. 174 (P.C.). (2) (1920) I.L.R. 43 Mad. 650 (P.C.).
(3) (1918) I.L.R. 41 Mad. 998, 1010 (P.C.).

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to an essential precondition of the adoption. But I do not think that the Judicial Committee intended to modify the law as previously laid down.

It has been held by this Court in *Viswasundara Row v. Somasundara Rao*(1) that a daughter's son cannot claim as of right to be consulted by the widow, and that ruling is still binding upon us, though it was questioned by a single judge in *Anne Brahmayya v. Chelasami Rattayya*(2).

In *Kesar Singh v. Secretary of State for India* (3) this Court had to consider a peculiar case where there were no surviving agnates who could have been consulted, and it held that in that circumstance the consent of cognates would afford the support to the inference that the adoption is not capricious for which the Court is seeking. That seems to be a natural and logical conclusion, and I may say that in my judgment in *Anne Brahmayya v. Chelasami Rattayya*(2) I never intended to suggest anything to the contrary. I was only concerned in supporting *Viswasundara Row v. Somasundara Rao*(1) and stated that, although in my opinion the consultation of a cognate was not essential, it might well be very useful in helping the Court to come to its conclusion. If the words on page 658 of *Kesar Singh v. Secretary of State for India*(3),

"there appears to be no authority for limiting the class of gnatis and sapindas whose assent may be taken by a widow"

and again

"the reasons given by them for excluding a daughter's son",

(1) (1920) I.L.R. 43 Mad. 876.

(2) (1924) 20 L.W. 503.

(3) (1926) I.L.R. 49 Mad. 652, 658.

mean that according to my judgment the consent of cognates may not be taken, and a daughter's son must be excluded, I can only say that my judgment has been misunderstood. There was no question of exclusion in my mind, but I did not regard the assent of a daughter's son to be essential, provided that there was sufficient consent of agnates to support the inference of good faith.

Applying those principles to the present case I find no reason to infer caprice, and sufficient consultation and consent to rule out that inference. The widow was acting under legal advice and tried to consult both of her husband's brothers, defendants 3 and 4. Defendant 3 declined to help her by refusing the letter though he was aware of its contents which may clearly be styled an improper refusal, so that he counts for nothing. The second brother, defendant 4, assented in terms which are not too general. Then two remoter sapindas obviously assented because they both attested the deed and were present at the adoption. There is no reason to suppose that fourth defendant was exercising undue influence over the widow, or that she merely wished to spite the plaintiff. The son of the fourth defendant was the natural person to be selected for adoption, and all that can be said against it is that the widow might have performed it at an earlier date. But that alone is not sufficient to invalidate an adoption. Of course the adoption disappointed the hopes of plaintiff's son as reversioner, but unless the adoptee happens to be the reversioner himself that is inevitable. A reversioner has no more right to forbid an

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adoption because his interests are affected, than an heir has to forbid a natural birth. And if an adoption is regarded as a form of birth the logical conclusion would seem to be that at which the Bombay Courts have arrived, that the widow's motive in making an adoption is no more material than a wife's motive in having a baby. The trend of Madras decisions however makes the motive relevant; but in this case I agree that there is no reason for holding that the motive was capricious.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Pakenham Walsh.

1933,
April 26.

VELAYUDA MUDALI AND ANOTHER (PLAINTIFF AND HIS
LEGAL REPRESENTATIVE), APPELLANTS,

v.

THE CO-OPERATIVE RURAL CREDIT SOCIETY OF
ULAKOTTAI VILLAGE REPRESENTED BY ITS PRESIDENT
AYYATHURAI PADAYACHI AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

*Co-operative Societies Act (II of 1912), r. XIV of rules under
—Registrar acting under—Proceedings before—Applica-
bility of section 52 of Transfer of Property Act (IV of
1882) to—Mortgage decree—Registrar's power to pass—
Award of Registrar ordering sale of mortgaged prop-
erty—Validity of—Executing Court's power to refuse to
execute or to amend.*

Proceedings before the Registrar of Co-operative Societies
acting under rule XIV of the rules framed under the Co-
operative Societies Act are proceedings before a Court to which

* Second Appeal No. 1261 of 1928.

the provisions of section 52 of the Transfer of Property Act (Act IV of 1882) apply.

Subba Reddi, In re, (1930) 59 M.L.J. 229, followed.

Even if the Registrar acting under rule XIV of the rules framed under the Co-operative Societies Act (II of 1912) is not a Court, when the award passed by him directing the mortgagor to pay the amount is placed before a competent civil Court in execution and that Court directs the sale of the mortgaged property, any purchase during such proceedings is made *pendente lite*.

Quaere whether rule XIV of the rules framed under the Co-operative Societies Act only enables the Registrar to pass a money decree and not a mortgage decree.

The award passed by the Registrar ordering the sale of the mortgaged property is not an award passed *prima facie* without jurisdiction and the executing Court cannot refuse to execute the award nor can it amend the award in any way.

APPEAL against the decree of the Court of the Subordinate Judge of Trichinopoly in Appeal Suit No. 124 of 1926 (Appeal Suit No. 13 of 1926, District Court) preferred against the decree of the Court of the District Munsif of Ariyalur in Original Suit No. 443 of 1924.

T. L. Venkatarama Ayyar for second appellant.

K. Bhashyam Ayyangar and B. R. Chakravarthi Ayyangar for first respondent.

T. R. Srinivasan for second respondent.

Cur. adv. vult.

JUDGMENT.

The plaintiff is the appellant. The suit relates to two items of property. The A schedule property belongs to one Kuppuswami Padayachi and was sold to the appellant and two others on 9th December 1922 (Exhibit C). The other two vendees sold their share to the plaintiff on 19th December 1923 (Exhibit D). The B schedule

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property belonging to one Thangavelu Padayachi was sold to the plaintiff on 27th June 1923 (Exhibit E). The properties were sold as free of encumbrance. But plaintiff found that they were both subject to a mortgage on 17th August 1917 for Rs. 460 in favour of the first defendant, the Co-operative Rural Credit Society of Ulakottai village. Default having been made under the mortgage to the Co-operative Society, it proceeded by C.C.S. No. 1 of 1922 to obtain an award from the Assistant Registrar of Co-operative Societies. An award was passed on 31st August 1922 directing the mortgagor to pay the amount. It was filed in Court with an execution petition, Execution Petition No. 1650 of 1922, on 17th November 1922. Under this execution petition the properties were sold on 21st November 1923 and the Society purchased the hypotheca. The sale was confirmed on 22nd February 1924. Plaintiff wanted to redeem the properties but his right was denied and it was said that his vendors' right to redeem had disappeared. The sale to the plaintiff was subsequent to the filing of the execution petition on 17th November 1922 and the main question at issue is whether his purchase was *pendente lite* or not. The second respondent is the subsequent purchaser from the Society and his defence is the same as that of the Society. The trial Court held that the proceedings under Exhibit I before the Registrar were proceedings before a Court and therefore attracted the provisions of section 52 of the Transfer of Property Act. On appeal the Subordinate Judge held that the proceedings before the Registrar were not proceedings before a Court and therefore section 52 does not apply,

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but he held that the execution proceedings on the award were proceedings under section 52 and therefore the plaintiff's purchase was *pendente lite*. Against this decision this second appeal has been filed.

It may be more convenient first to discuss the matter from the respondents' standpoint since they contend that the trial Court was correct in considering that the proceedings before the Registrar were proceedings before a Court. If that is made out, except for a general argument, which was not raised at all in the Courts below and to which I shall allude later on, it is clear that the plaintiff's purchase was *pendente lite*. There is one direct decision of this Court that the Registrar of Co-operative Societies is a Court for purposes of section 195, Criminal Procedure Code; *Subba Reddi, In re*(1). It is a decision, no doubt, of a single Judge and is confined to section 195, Criminal Procedure Code, but it is on the exact point and there is no decision to the contrary by this Court. In *Nanda Lal Ganguli v. Khetra Mohan Ghose*(2) it was held that a tribunal constituted by the Calcutta Improvement Act is a Court within the meaning of section 195, Criminal Procedure Code. In *Queen-Empress v. Munda Shetti*(3) it was held that a Tahsildar enquiring into revenue registry is a Revenue Court, and *In re Nataraja Iyer*(4) held that a Divisional Officer hearing appeals under the Income-tax Act is a Court. In *Gopi Nath v. Ram Nath*(5) it was remarked that the Registrar of Co-operative

(1) (1930) 59 M.L.J. 229.

(2) (1918) I.L.R. 45 Calc. 585.

(3) (1900) I.L.R. 24 Mad. 121.

(4) (1912) I.L.R. 36 Mad. 72, 89.

(5) (1924) I.L.R. 47 All. 374, 376.

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Societies or the arbitrators appointed by him are given the powers of a civil Court for the purpose of summoning witnesses and that it is laid down that their award shall be enforceable by a civil Court in the same manner as if it were a decree passed by such a Court.

For the appellant it is pointed out that an Official Assignee is not a Court, *Beardsell & Co. v. Abdul Gunni Sahib*(1), nor is a Registrar of Assurances in registering a will a Court for the purpose of rendering a statement made by an opposing party in an objection petition, a statement made on a privileged occasion, *Krishnamal v. Krishna Iyengar*(2) (Full Bench of this Court), that under the amended section 195, Criminal Procedure Code, a Registrar of Assurances is not a Court for purposes of that section, that a revenue officer when exercising jurisdiction under Chapter XI of the Estates Land Act in relation to settlement of rents is not a Court, *Raja of Mandasa v. Jagannayakulu*(3), that a District Registrar is also not a Court for the purpose of section 622, Civil Procedure Code, 1882, as the High Court has no power to reverse his order under that section, *Manavala Goundan v. Kumarappa Reddy*(4), and that the Chief Judge of a Small Cause Court hearing objections on an election petition acts as a *persona designata* and is not a Court, *Lakshmanan Chetty v. Kannappar*(5).

None of the above instances cited for the appellant deals with the Registrar of Co-operative Societies acting under rule XIV of the rules

(1) (1912) I.L.R. 37 Mad. 107. (2) (1912) 23 M.L.J. 50; 15 I.C. 652 (F.B.).
(3) (1932) 63 M.L.J. 450; M.W.N. 350, 403 (F.B.).
(4) (1907) I.L.R. 30 Mad. 326, 327.
(5) (1926) I.L.R. 50 Mad. 121, 124 (F.B.).

framed under the Co-operative Societies Act. Several points with regard to his position may be noted. The first is that he is not an arbitrator in the sense in which that word is understood under the Arbitration Act or in Schedule II of the Civil Procedure Code, and therefore section 3 of the Evidence Act which excludes arbitration from the definition of Court is not of much assistance. The essential characteristic of an arbitrator is that the matter is referred to him by consent of both parties. But under rule XIV any one party may make a reference to the Registrar and on receipt of such reference he is bound to dispose of the case. He can no doubt refer it to an "arbitrator" appointed by him or to several arbitrators (the word is used in a special sense here). But his position in this matter is that of a Court to whose decision one party can compel the other party to submit. Then, it has to be noticed that the whole procedure under rule XIV appears to be devised as a short-cut by which the Registrar takes the place of the Court, decides a matter which would otherwise have been referred to it, and passes an award which becomes a decree of a civil Court having jurisdiction over the subject-matter of the decision when that Court is asked to enforce it. Unlike revenue officers appointed to fix rents there is no provision that the Registrar can disregard contracts between the parties or import his own knowledge into the matter. This makes his position entirely different from that of such an officer as is dealt with in the Full Bench decision, *Raja of Mandasa v. Jagannayakulu*(1). It is argued that if he were a Court, he would be subject to the

(1) (1932) 63 M.L.J. 450; M.W.N. 350 (F.B.).

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jurisdiction of the High Court beyond that which it can exercise by a writ of *certiorari*. But the fact that the High Court has not any other jurisdiction over him would not, in the light of the rulings in *Queen-Empress v. Munda Shetti*(1) and *In re Nataraja Iyer*(2), prevent his being a Court. Neither of the officers in those two cases is subject to direct control by the High Court. On the whole, following the only actual reported decision on the point of this Court, namely, *Subba Reddi In re*(3), I hold that the Registrar is a Court acting in these circumstances. If that is so, it is clear that the plaintiff's purchase was made *pendente lite*.

Even if that view is not correct, I agree with the lower appellate Court that when once the award has been put before a competent civil Court in execution, as in this case, and the Court directs the sale of the mortgaged property, any purchase during such proceedings is made *pendente lite*. No doubt, it is true that section 141, Civil Procedure Code, does not apply to execution proceedings, but I am not convinced that this argument applies to section 52 of the Transfer of Property Act. Section 52 of the Transfer of Property Act is a general rule of *lis pendens* to avoid multiplicity of suits and the principle applies whether section 52 is in terms applicable or not. It has been held that even sales *in invitum* would fall under it, and the principle has been applied even in the case of movables, so that it is a section of very wide application. It was argued for the appellant that in a mortgage suit the *lis* commences with the suit,

(1) (1900) I.L.R. 24 Mad. 121.

(2) (1912) I.L.R. 36 Mad. 72.

(3) (1930) 59 M.L.J. 229.

but that while ordinarily the *lis* terminates with the decree, there is an exception in mortgage suits if the decree directs the sale of the property. That position, however, cannot be maintained because the *lis* may also continue in a suit for specific performance after decree, *Matti Lall Pal v. Preo Lall Mitra*(1). In *Ramasami Aiyangar v. Govinda Iyer*(2) it was laid down that in a mortgage suit the basis of the doctrine of *lis pendens* after the decree is the fact that the property is directed to be sold, and not the fact that applications are presented to enforce the terms of the decree. Therefore the argument that if the Registrar is not a Court the award which he passes can never become a decree of the executing Court cannot, I think, be sustained. Rule XIV (5-b) of the rules framed under the Co-operative Societies Act, 1912, says that on application to the civil Court having jurisdiction over the subject-matter of the decision or award, that Court may enforce that decision or award as if it were a decree of the Court. In the case reported as *Wyllie & Co. v. Joosub Peer Mahomed & Co.*(3) it was held that for the purpose of recognising the transfer under Order XXI, rule 16, Civil Procedure Code, it was the Court in which execution was taken that must be deemed to be the Court which passed the decree. In *Krishnaji Shridhar v. Mahadeo Sakhamam*(4), it was held that an award of a Co-operative officer filed for execution in one Court can be transferred by that Court to another Court inasmuch as that Court could execute it as if it had passed it. *Ahmad Yar v. Co-operative*

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(1) (1908) 13 C.W.N. 226.
(3) (1923) 27 C.W.N. 666.

(2) (1916) 31 M.L.J. 839.
(4) (1921) I.L.R. 46 Bom. 128.

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Credit Society(1) is a decision of considerable importance with regard to another argument raised. There it was held that a Court executing an award under the Co-operative Societies Act has no power to do anything except to execute the award as if it were a decree of the executing Court, and that an order refusing to do so was appealable. On the other side was quoted *Bajinath v. Ahmed Musaji Saleji*(2) in which it was held that when an award under section 16 of the Indian Arbitration Act has been filed the result is not that there is a suit in which a decree has been passed, but that there is an award which is enforceable as a decree, and in *Jnanendra Mohan Bhaduri v. Rabindra Nath Chakravarty*(3), a case under the Indian Arbitration Act, it was held that a decree cannot be passed on the award as is done under Schedule II of the Civil Procedure Code. These last two decisions do not, I consider, throw any light on the question at issue here. It certainly cannot be held to be correct law that when a matter has been referred to arbitrators and they have submitted an award, subsequent to the award being filed in Court the property can be sold without such sale falling under the rule of *lis pendens*. *Pra'njivan Govardhan Das v. Bajju*(4) is a direct authority on the point. It was there held that the presentation in Court of the award obtained by the plaintiff was equivalent to the presentation of a plaint for the specific performance of the contract of mortgage, and the proceedings consequent thereon constituted a *lis pendens*. I stated at the outset that a

(1) A.I.R. 1926 Lah. 547.

(3) (1932) 64 M.L.J. 341 (P.C.).

(2) (1912) I.L.R. 40 Calc. 219.

(4) (1879) I.L.R. 4 Bom. 34.

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general argument had been raised in this Court for the first time, which was not raised at all before the lower Courts and which is, in my opinion, contrary to the pleading in the plaint. It is that rule XIV of the rules framed under the Co-operative Societies Act only enabled the Registrar to pass a money decree and not a mortgage decree. The relevant words of the rule are these :—

“ 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.”

It is argued that the only procedure by which a mortgage debt can be enforced is by the sale of the mortgaged property under Order XXXIV, rule 14, Civil Procedure Code, that under Order XXXIV, rule 1, all puisne mortgagees should be made parties to the mortgage suit, and that if the decree in a mortgage suit does not order the sale of the mortgaged property, the property could not be sold unless a proper suit is brought in the way prescribed by sections 65, 86, 88 and 99 of the Transfer of Property Act; *Chundra Nath Dey v. Burroda Shoondry Ghose*(1). It is argued that there might be puisne mortgagees who are not members of the Society and over whom the Registrar could have no control and it is urged that if the Registrar could pass a mortgage decree there would have been more elaborate and specific rules as to the parties to be added, the form of the decree, etc. On the other side it is pointed out that a great part of the loans of these societies are granted on mortgages (*vide* by-law 44, page 35 of

(1) (1895) I.L.R. 22 Calc. 813, 816.

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the Manual). The legal question raised is no doubt of very great importance and the arguments of the learned Advocate for the appellant have considerable weight. But in the present case I do not think the question arises for several reasons. The plaint recognises the decree distinctly. In paragraph 8 it says :

"As the hypothecation effected in favour of the defendant Co-operative Rural Credit Society was a transaction which took place prior to the sale effected in favour of the plaintiff, the plaintiff is entitled to pay to the defendant the amounts, etc., due under the decree passed in respect of the said bond and redeem the hypotheca."

There is no doubt that if the decree had not ordered the sale of the property the plaintiff would have been the first to rely on such a fact. In this particular case there was no possibility of making the plaintiff a party either to the proceedings before the Registrar or to the execution proceedings because his purchase was subsequent to the award and also to the institution of the execution proceedings. In my opinion the executing Court could not refuse to execute the award nor could it amend it in any way. That is laid down in *Ahmad Yar v. Co-operative Credit Society*(1). It is no doubt the decision of a single Judge but, with respect, I entirely agree with it. It cannot be said that on the face of it the award was passed without jurisdiction. It is just possible that, if the plaintiff brought a regular suit to set aside the award on the ground that such an award is not contemplated by rule XIV, he might possibly succeed on the legal arguments now addressed to me. But certainly it cannot be said that the award was on its face one passed

(1) A.I.R. 1926 Lah. 547.

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without jurisdiction. The Court was therefore bound to execute it, and a subsequent purchaser had no more rights against the purchaser at the Court sale in execution of the decree than his vendor had. It was the business of the latter to have paid up the decree amount at least before the confirmation of the sale, *Har Shankar Prasad Singh v. Shew Govind Shaw*(1).

In the result, therefore, the decree of the lower appellate Court is confirmed and the second appeal is dismissed with costs (one set).

K.W.R.

APPELLATE CIVIL.

Before Mr. Justice Sundaram Chetti and
Mr. Justice Pakenham Walsh.

KAMARASU RAMACHANDRARAO (FIRST DEFENDANT),
APPELLANT,

1933,
October 12.

v.

SIMHADRI RATTAYYA AND NINE OTHERS (PLAINTIFFS 2
TO 5 AND DEFENDANTS 3 AND 5 TO 9), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XXXIV, r. 5—
Final decree—Order directing drawing up of a—Appeal
against—Competency of.*

An order directing the drawing up of a final decree in a mortgage suit does not amount to a decree within the meaning of the definition given in the Code of Civil Procedure. Such an order is therefore not appealable.

Ranga Raju v. Ethirajammal, (1929) 30 L.W. 846, considered.

(1) (1899) I.L.R. 26 Calc. 966, 970.
* Appeal against Order No. 210 of 1930.

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RAO
v.
RATTAYYA. APPEAL against the order of the Court of the Subordinate Judge of Narsapur, dated 8th July 1929 in Civil Miscellaneous Petition No. 88 of 1929 in Original Suit No. 13 of 1927.

M. Appa Rao for appellant.

V. Suryanarayana for first and second respondents.

SUNDARAM
CHETTI J. The ORDER of the Court was delivered by SUNDARAM CHETTI J.—This is an appeal arising out of an application for the passing of a final decree in a mortgage suit under rule 5 of Order XXXIV, Civil Procedure Code. The lower Court allowed this application and passed a final decree accordingly. The order stands in the place of the judgment and the decree drawn up in pursuance of it is the final decree contemplated in the aforesaid rule. That being so, the present appeal must be deemed to be one against the final decree so passed. In such an appeal, we think, it is open to the appellant to raise the contention that the final decree should not have been passed. But Mr. Appa Rao argues that he is entitled to file an appeal against an order directing the drawing up of a final decree, as if such an order has been passed in this case. Even so, he must be able to show that such an order is appealable. This is not an order against which an appeal is provided by Order XLIII of the Code of Civil Procedure. Nor does such an order amount to a decree within the meaning of the definition given in the Code. It would be anomalous to treat such an order as a decree, in which case two regular appeals would arise out of the application under Order XXXIV, rule 5, one against the order allowing the petition and the

other against the final decree passed on that application itself. The decision of CURGENVEN J. in *Ranga Raju v. Ethirajammal*(1) has been relied on. But we find the question as to whether that order is a decree, and, if not, under what provision of law an appeal would lie against such an order, was not discussed in that judgment. Even if that decision had impliedly decided that such an order is appealable though not as a final decree, with due respect, we have to differ from that view. The decisions wherein the dismissal of such an application was construed to be a decree dismissing the suit are not in point.

We hold that this civil miscellaneous appeal is not maintainable. We would, however allow the appellant to convert this into a regular appeal against the final decree, on payment of the requisite court-fee for which we grant three months' time from this date. In default of such payment, this civil miscellaneous appeal will stand dismissed with costs.

A.S.V.

(1) (1929) 30 L.W. 846.

RAMACHANDRA-
RAO
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RATTAYYA.
—
SUNDARAM
CHETTI J.

APPELLATE CIVIL.

Before Mr. Justice Sundaram Chetti and
Mr. Justice Pakenham Walsh.

1933,
November 2.

N. K. THAJ MAHOMED SAIB (PLAINTIFF),
PETITIONER,

v.

T. BALAJI SINGH, MINOR BY GUARDIAN, RAO SAHIB
T. TAKUR SINGH (FIRST DEFENDANT'S LEGAL
REPRESENTATIVE), RESPONDENT.*

*Provident Funds Act (XIX of 1925), ss. 3 (2) and 4 (1) (a)—
Hindu father deceased—Provident Fund amount standing
to credit of, paid over to his son under sec. 4 (1) (a)—
Liability of, for decree-debt of deceased.*

A Provident Fund amount, which stood to the credit of a deceased Hindu at the time of his death, and which was paid over to his son, as a dependant, under section 4 (1) (a) of the Provident Funds Act (XIX of 1925), cannot be regarded as the assets of the deceased in the hands of his son, and is not liable to be proceeded against for the realisation of a decree-debt due by the deceased. Section 3 (2) of the Act vested the fund in the son, and consequently it became the property of the son.

Hindley v. Joynarain Marwari, (1919) I.L.R. 46 Cal. 962, followed.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the judgment of the Court of Small Causes, Madras, dated 19th February 1929 and delivered in New Trial Application No. 158 of 1928 in Execution Petition No. 4395 of 1928 in Suit No. 17734 of 1925.

L. A. Govindaraghava Ayyar and *L. S. Veeraghava Ayyar* for petitioner.

L. V. Krishnaswami Ayyar for respondent.

Cur. adv. vult.

* Civil Revision Petition No. 1203 of 1929.

The JUDGMENT of the Court was delivered by SUNDARAM CHETTI J.—This is a civil revision petition against the order of the Full Bench of the Madras Small Cause Court, in an application filed by a decree-holder for attachment of the Provident Fund amount which stood to the credit of the deceased judgment-debtor (who was employed under Government as an Assistant Superintendent of Police) at the time of his decease, and which was paid to his minor son, as a dependant, under section 4 (1) (a) of the Provident Funds Act XIX of 1925. The question for consideration is whether the amount so paid over to the son of the deceased judgment-debtor is liable to be attached as the assets of the deceased in the hands of his son. The answer depends upon a proper construction of the wording of section 3 (2) of the Act, having due regard to the scheme of the Act also. The relevant portion of that clause in section 3 is :

“Any sum standing to the credit of any subscriber to, or depositor in, any such Fund at the time of his decease and payable under the rules of the Fund to any dependant of the subscriber or depositor . . . shall . . . vest in the dependant, and shall, subject as aforesaid, be free from any debt or other liability incurred by the deceased or incurred by the dependant before the death of the subscriber or depositor.”

Under clause (a) of sub-section (1) of section 4 the payment should be made to the dependant, if the sum had vested in him under the provisions of section 3. There is no doubt that, so long as the money remains as a compulsory deposit in the Government, it is immune from attachment, as expressly declared by section 3. That is not the point arising for decision in this case, nor does the question whether such fund, after it is paid over to

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the subscriber or depositor, is still immune from attachment for his own debts, arise for decision. What we have to consider is the effect of the statutory vesting of the fund in the dependant under section 3 (2). It is by reason of such vesting that the money has to be paid to the dependant on the death of the subscriber or depositor. In the present case, the dependant is the minor son to whom the money was so paid. This statute has vested that fund in the son, and consequently it has become the property of the son. This fund cannot therefore be deemed to have devolved on the son by right of inheritance. That being so, how can it be regarded as the assets of the deceased depositor in the hands of his son? A son is not liable under Hindu Law to pay his father's debt except from out of his share in the ancestral or joint family properties. The fund in question which belonged to the son (as a dependant specified in the Act) by reason of the statutory vesting, which is a special mode of acquisition by him, cannot be proceeded against, even after it was paid over to him, by a creditor for the realisation of a decree-debt due by the father. There is an elaborate discussion as to the scheme of the Act in the judgment of RANKIN J. reported as *Hindley v. Joynarain Marwari*(1). In respect of section 4 (1) the learned Judge has observed thus at page 969 :

"It ensures that money payable to a widow or child as such directly shall not, even in their hands, be treated as assets of the deceased's estate."

We are in entire agreement with this view. The same opinion was expressed by a Division

(1) (1919) I.L.R. 46 Calc. 962.

Bench of the Calcutta High Court in *The Secretary of State for India in Council v. Mrs. Mary Murray*(1) and the learned Judges stated that the widow was not bound to apply for Letters of Administration to recover the Provident Fund amount as the money belonged to her on account of the statute providing that it would vest in her. On this ground, we confirm the order sought to be revised, and dismiss this petition with costs.

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PRIVY COUNCIL.

POPURI RAMAYYA, APPELLANT,

v.

PUTCHA LAKSHMINARAYANA, RESPONDENT.

[AND CONNECTED APPEALS.]

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Madras Tenancy—Jurisdiction of Civil Court—"Estate"—Enfranchised Inam—Unproduced Grant—Presumption—Indian Evidence Act (I of 1872), sec. 114—Code of Civil Procedure (Act V of 1908), sec. 9; O. VII, r. 1 (f)—Madras Estates Land Act (I of 1908), sec. 3, sub-sec. 2 (d) and sec. 189.

The inamdar of an agrapharam village sued to recover rents from tenants therein. The inam had been granted in 1810 and had been enfranchised. The plaintiff did not produce the grant; the defendants had not sought by discovery to ascertain its existence or whereabouts. There was no evidence as to its terms. The defendants contended that it was to be presumed as a fact that the grant was of the land-revenue alone, and

J.C.*
1934,
January 30.

(1) (1929) 33 C.W.N. 1148.

* Present : Lord THANKERTON, Lord ALNESS, and Sir GEORGE LOWNDER.

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that, as it was not suggested that it was to a person who owned the kudivaram, the village was an "estate" within the Madras Estates Land Act, 1908, section 3, sub-section (2) (d), so that the jurisdiction of the Civil Court was excluded by section 189. They based that contention on the evidence as showing that the grant was of a revenue paying village in which there were cultivating tenants, and was made to Brahmans who resided elsewhere; also upon section 114 of the Indian Evidence Act.

Held, that no presumption as to the terms of the grant arose on either ground, and that as the statements in the plaint sufficiently complied with Order VII, rule 1 (f), of the Code of Civil Procedure, the Civil Court, by section 9 of the Code, had jurisdiction in the absence of proof to the contrary.

Suryanarayana v. Patanna, (1918) I.L.R. 41 Mad. 1012 (P.C.); L.R. 45 I.A. 209, followed. *Seethayya v. Somayajulu*, (1929) I.L.R. 52 Mad. 453 (P.C.); L.R. 56 I.A. 146, distinguished.

Srimath Jagannatha Charyulu v. Kutumbarayudu, (1914) I.L.R. 39 Mad. 21, approved.

Judgment of the High Court affirmed.

CONSOLIDATED APPEAL (No. 66 of 1931) from thirteen orders of the High Court in Appeals against Orders Nos. 398, etc., of 1924 (October 11, 1927) setting aside thirteen orders of the District Munsif of Tenali (August 9, 1922).

The respondent instituted original and small cause suits in the Court of the District Munsif to recover rent or damages for use and occupation of agricultural lands in his *agraharam* village. The question arising upon the appeal was whether the *agraharam* was an "estate" within the definition in section 3, sub-section (2), of Madras Estates Land Act, 1908; if it was, the jurisdiction of the Civil Courts was excluded by section 189 of the Act.

The District Munsif dismissed the suits, holding that the village was an estate under section 3, sub-section (2) (d), of the Act.

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The plaintiff appealed to the District Judge in twelve original suits; he also applied to the High Court for revision in one small cause case. The High Court transferred the appeals to its own file, and heard them with the application for revision.

Upon the hearing the High Court made orders reversing the orders of the trial Judge and directing him to dispose of the cases.

WALLACE J. said that the onus of proving that the suit inam was not cognizable by the ordinary Civil Courts rested with the defendants, and therefore it was upon them to prove that the inam was an estate within the definition in section 3, sub-section (2), of the Madras Estates Land Act, 1908. They had contended that the inam was within clause (d) of that sub-section on the ground that upon the evidence the zamindar had only the *melvaram*. The evidence appeared to show that before the grant there were tenants on the land and that it was a permanently settled zamindari. But the defendants had to show that they were occupancy ryots. They had produced no evidence of that, but relied upon *Venkatanarasimha Naidu v. Dandamudi Kotayya*(1) and *Cheekati Zamin-dar v. Ranasooru Dhora*(2), in which it was held that there was a legal presumption that zamindari tenants had occupancy rights. The learned Judge was of opinion that the above view had been overruled by *Suryanarayana v. Patanna*(3) and later decisions of the Privy Council. The effect of the Privy Council decisions was that there was no presumption either of fact or of law that the zamindar possessed the *melvaram* right only.

(1) (1897) I.L.R. 20 Mad. 299. (2) (1899) I.L.R. 23 Mad. 318.
(3) (1918) I.L.R. 41 Mad. 1012 (P.C.); L.R. 45 I.A. 209.

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TIRUVENKATA ACHARIYAR J. delivered a judgment substantially to the same effect. He pointed that, having regard to the Code of Civil Procedure, 1908, section 9 and Order VII, rule 1, the onus was upon the defendants to show that the Civil Court had not jurisdiction.

Parikh for appellant.—The inam village was an “estate” within the definition in section 3, sub-section(2) (d), of the Madras Estates Land Act, 1908, and the jurisdiction of the Civil Court was therefore excluded by section 189. Having regard to the judgments of the Board in *Suryanarayana v. Patanna*(1) and *Chidambara Sivaprakasa v. Veeranna Reddi*(2) it is not contended that apart from the evidence there is a presumption of law that the grant was of the land-revenue only. That however is to be inferred from the evidence which shows that the grant was of a revenue paying village in which there were cultivating tenants, and was made to Brahmans residing elsewhere. The facts are the same as in *Seethayya v. Somayajulu*(3) in which the Board held that the grant was of the land-revenue only. The evidence corresponds also to *Chidambara Sivaprakasa v. Veeranna Reddi*(2), where it was held to establish a prescriptive right of occupancy. Further, as the plaintiffs failed to produce, or account for the original grant, a presumption arises under the Indian Evidence Act, 1872, section 114, illustration (g), that its terms were unfavourable to their case, and showed that the grant was of the *melvaram* only.

De Gruyther K.C. and *Narasimham* for respondent were not called upon.

LORD
THANKERTON.

The JUDGMENT of their Lordships was delivered by Lord THANKERTON—This is a consolidated appeal against a judgment and thirteen orders dated the 11th October 1927 of the High Court of Judicature at Madras, which set aside a judgment and thirteen orders dated the 9th August 1922 of the Court of the District Munsif of Tenali.

(1) (1918) I.L.R. 41 Mad. 1012 (P.C.); L.R. 45 I.A. 209.
(2) (1922) I.L.R. 45 Mad. 586 (P.C.); L.R. 49 I.A. 286.
(3) (1929) I.L.R. 52 Mad. 453 (P.C.); L.R. 56 I.A. 146.

The appellants are the respective defendants in thirteen suits brought by the respondent to recover rent or damages for use and occupation of agricultural holdings in the respondent's enfranchised inam village of Siripuram, and the only question in the appeal is whether the jurisdiction of the ordinary Civil Courts is excluded by virtue of section 189 of the Madras Estates Land Act (Madras Act I of 1908). It is clear that, in the present case, the determination of that question will depend on whether the respondent's village is an “estate” as defined in section 3 (2) of the Act. The District Munsif held that the village is an estate under the Act, and that he had no jurisdiction to try the suits. The High Court held a contrary view and remanded the suits to be tried by the District Munsif.

The suit village was originally within the ancient zamindari of Chilakalurpeta, which was held by the Manuru family under an imperial grant of 1707 from the Mogul Emperor Aurangzeb. In fasli 1219, i.e., the year 1810, the Raja of Chilakalurpeta granted the village of Siripuram in perpetuity as an aghaharam to one Vedala Rangachari, a Brahman resident of another village called Peddavaram, on a shrotriyam of 80 pagodas (Rs. 320). In the lower Courts the respondent alleged two earlier grants of 1784 and 1799—prior to the permanent settlement of 1802—but these were rejected, and it may now be taken that the grant was in 1810.

In 1846 the zamindari of Chilakalurpeta was sold for arrears of revenue and was purchased by the Government. In 1861 the aghaharam of Siripuram village was confirmed and enfranchised on a combined quit-rent of Rs. 361 by the Inam

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Commissioner. The interest of the inamdar was subsequently purchased by Putchu Sitaramayya, the adoptive father of the respondent, and he created a trust in favour of the Sri Kasi Visweswara Annapurna Choultry at Bezwada in respect of a large portion of the lands in Siripuram Agraharam, constituting himself as the dharmakarta of the charity and providing for the hereditary dharmakartaship in the family. After the death of Sitaramayya, in 1908, his widow adopted the plaintiff as a son to her husband, and the respondent succeeded as dharmakarta of the choultry. The respondent became a major in October 1918 and he instituted the present suits in 1920 and 1921, as dharmakarta of the choultry.

The definition of "Estate" for the purposes of the Madras Estates Land Act (I of 1908) is to be found in section 3 of the Act, which, so far as material, provides as follows:—

"3. In this Act, unless there is something repugnant in the subject or context:—

(2) 'Estate' means—

- (a) any permanently settled estate or temporarily settled zamindari;
- (b) any portion of such permanently settled estate or temporarily settled zamindari which is separately registered in the office of the Collector;
- (d) any village of which the land-revenue alone has been granted in inam to a person not owning the *kudivaram* thereof provided that the grant has been made, confirmed or recognized by the British Government, or any separated part of such village;
- (e) any portion consisting of one or more villages of any of the estates specified above in clauses (a), (b) and (c) which is held on a permanent under-tenure."

It is common ground that, if the village of Siripuram is an estate within the meaning of the statutory definition, the present suits lie within the jurisdiction of the Revenue Court under section 189 of the Act, and that the original jurisdiction of the Civil Courts is thereby excluded.

While the appellants had submitted in the Courts below contentions based on the other clauses above quoted, the argument before this Board was confined to clause (d) of section 3 (2), and the decision of this question mainly depends on whether the respondent is owner of the *kudivaram* right as well as of the *melvaram* right. It is not suggested that the respondent or his predecessors have acquired the *kudivaram* since the date of the grant of 1810, or that they already owned the *kudivaram* at the time of that grant, and it is therefore necessary to ascertain, if possible, whether the grant of 1810 conveyed both varams. The grant of 1810 has not been produced, and the extracts from the inam register of 1861 afford the only documentary evidence as to the nature of the grant. The appellants no longer maintain, as they did in the lower Courts, that the description of the village as *seri* in the inam enquiry involves an inference that the tenants were then recognized as possessing *jirayati* rights. These extracts are not of assistance in determining whether the grant of 1810 conveyed the *kudivaram* right.

As regards the other evidence, the learned Munsif found as follows:—

"The grant of the agraharam was to a non-resident Brahman in fasli 1219 (1810), and it was a grant by a zamindar

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of a village within his permanently settled zamindari. There were cultivating tenants in the village at the time of the grant, and it was even then a *seri* village. The agraaharamdars were only receiving rents as stated in exhibits A and AA, and they had no personal cultivation. The defendants in the cases already stated have been in possession of their respective lands for considerable periods of time. The leases obtained from some tenants, changes in tenantry with regard to some lands in the village and variations in rent have been taking place only since 1904. At about 1902 the tenants, or some of them, set up their rights to the soil and the agraaharamdars left no stone unturned to resist what perhaps they believed to be an unjustifiable claim."

This somewhat meagre result of the evidence may be completed by a passage from the judgment of TIRUVENKATA ACHARIYAR J. in the High Court, as follows :—

"The defendants say that they have been in uninterrupted enjoyment of their respective holdings, even from before the date of the grant, and that they have been partitioning their lands and also disposing of them by sales and mortgages, but they have not produced a single document either of partition or sale or mortgage. Those allegations rest only on their own bare statements, which are entitled to little weight."

This fact, while it is hardly evidence of the terms of the grant, is distinctly unfavourable to the appellants' case.

Their Lordships are clearly of opinion that these findings of fact, apart from a presumption of fact which the appellants maintained to be applicable, as hereafter referred to, do not establish whether the grant of 1810 conveyed the *kudivaram* right or not.

But the appellants contended that the fact of there having been cultivating tenants in the village prior to the grant of 1810 raised a presumption of fact that the zamindar had not the *kudivaram* right, and that accordingly the grant

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did not include that right. But, in their Lordships' opinion, the existence of such a presumption was expressly negatived, and certain decisions of the High Court at Madras and the High Court at Bombay, which had given effect to such a presumption, were over-ruled by the decision of this Board in *Suryanarayana v. Patanna*(1). The appellants sought to rely on the subsequent decision of this Board in *Seethayya v. Somayajulu*(2), but that case was decided on construction of the terms of the particular grant which were before the Board, and not on any presumption of fact. Indeed, it is expressly stated in the judgment that there is no presumption either way as to the inclusion or non-inclusion of the *kudivaram* right. It should be added that the appellants maintained that, in the absence of production of the grant of 1810 by the respondent, the Court should presume that the terms of the grant would negative the respondent's case, in view of section 114 of the Evidence Act, illustration (g), but it is sufficient to say that there is no evidence that the grant could be produced. The respondent's natural father stated in evidence that neither he nor the respondent had it, and he was not cross-examined on this point. Nor did the appellants seek to ascertain by discovery the existence or whereabouts of the grant.

The evidence being inconclusive as to whether the grant of 1810 conveyed the *kudivaram* right or not, it is necessary to consider upon which of the parties the burden of proof lies in regard to the question of jurisdiction. In their Lordships'

(1) (1918) I.L.R. 41 Mad. 1012 (P.C.); L.R. 45 I.A. 209.

(2) (1929) I.L.R. 52 Mad. 457 (P.C.); L.R. 56 I.A. 146.

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opinion, the statements in the plaint sufficiently comply with the provisions of Order VII, rule 1, sub-clause (f), and, that being so, their Lordships are clearly of opinion that the terms of section 9 of the Civil Procedure Code lay down a general rule in favour of the jurisdiction of the Civil Court, and that the burden of proof is on the party who maintains an exception to the general rule. This is in conformity with the decision of the High Court at Madras in *Srimath Jagannatha Charyulu v. Kutumbarayudu*(1).

Accordingly, their Lordships are of opinion that the appellants, on whom lay the burden of proof, have failed to prove that the grant of 1810 was of the *melvaram* only, and therefore have failed to prove that the inam is an "estate" within the definition of the Madras Estates Land Act, so as to oust the jurisdiction of the Civil Court.

Their Lordships will humbly advise His Majesty that the consolidated appeal should be dismissed with costs, and that the judgment and thirteen orders of the High Court, dated the 11th October 1927, should be affirmed.

Solicitors for appellant: *Hy. S. L. Polak & Co.*

Solicitors for respondent: *Douglas Grant & Dold.*

A.M.T.

(1) (1914) I.L.R. 39 Mad. 21.

APPELLATE CIVIL.

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

D. YELLAMANDA (SECOND RESPONDENT), APPELLANT,

v.

NAPPURAJU RAGHAVIAH AND ANOTHER (PETITIONER AND
FIRST RESPONDENT), RESPONDENTS.*

*Letters Patent (Madras), Cl. 18—Insolvency—Debtor outside
limits of Presidency-town—Adjudication of, during vacation
when mufassal Courts are closed and High Court is open—
Jurisdiction of High Court.*

The High Court has no power to adjudicate a debtor, who is outside the limits of the Presidency-town, an insolvent even when the High Court is open during the vacation and the mufassal Courts are closed. Under Clause 18 of the Letters Patent the High Court has power to deal with provincial insolvencies only in the exercise of its appellate jurisdiction, and in its original jurisdiction it has power to deal only with insolvencies which are in the Presidency-town itself such as come within the scope of the Presidency-towns Insolvency Act.

Jumna Bai v. Ramanathan Chetti, (1928) I.L.R. 52 Mad 52, approved.

APPEAL under Clause 15 of the Letters Patent against the order of STONE J. dated the 21st day of June 1932 and made in Civil Miscellaneous Petition No. 3098 of 1932 presented to the High Court for receiving and transmitting the petition for the adjudication of the first respondent therein (second respondent herein) as an insolvent to the Court of the Subordinate Judge of Tenali for disposal and to issue an order directing stay of sales of the two houses by the Court of the District

* Letters Patent Appeal No. 88 of 1932.

1933,
November 29.

YELLAMANDA v. RAGHAVIAH. Munsif of Bapatla in Original Suit No. 653 of 1929 on its file.

K. Kameswara Rao and C. Krishnachandra Mouleswarar for appellant.

T. R. Subramania Ayyar for respondents.

JUDGMENT.

BEASLEY C.J. BEASLEY C.J.—This is an appeal from an order made by STONE J. during the vacation of 1932. The appellant here was the decree-holder in Original Suit No. 653 of 1929 in the District Munsif's Court of Bapatla. In execution of that decree he brought the respondent's property to sale, the sale being fixed for the 13th June 1932. Before the sale could take place, however, an application was presented to this High Court during the vacation to receive an insolvency petition against the judgment-debtor presented by the respondent and asking at the same time for a stay of the sale. An interim order was made by STONE J. on the 11th June 1932 as follows :—

“Sale stayed. O.R. Guntur interim Receiver. Notice for 21st June 1932.”

On 21st June 1932 that order was made final, the papers being transmitted to the Sub-Court of Tenali for disposal after the reopening of that Court. The application was presented in this High Court because at that time the Sub-Court of Tenali, which was the proper Court to deal with the matter, was closed for the summer recess and was not due to be reopened until the 27th June 1932.

The question before us in this appeal is whether this High Court had jurisdiction to pass the order

passed by our learned brother. That question depends upon whether the High Court has, during the vacation, any power to make any order with regard to any matter within the jurisdiction of a mufassal Court which is, at the time, closed for the summer recess which matter was not pending at the time of the closing of that Court. A similar position arose in *Jumna Bai v. Ramanathan Chetti*(1), a decision of RAMESAM J., with which I agree. He there held that, where a suit is pending in a mufassal Court which is closed for the summer recess, the High Court can transfer the case to itself under Clause 13 of the Letters Patent and pass interim orders in the case but that such an application for such transfer must be made on the Original Side of the High Court and that, with regard to cases or suits which are not pending in a mufassal Court, the High Court has no power to make any order with regard to them. In the course of his judgment our learned brother very carefully discusses the various clauses in the Letters Patent in order to see whether any of them gives the jurisdiction to the High Court which was claimed by the petitioner in that case and is claimed by the respondent here and he also refers to section 107 of the Government of India Act. There is one clause, however, in the Letters Patent to which he does not refer and that is Clause 18 which provides for the jurisdiction of the High Court in insolvency matters ; and the respondent here claims that, by reason of that clause, the High Court has jurisdiction to pass such an order as was passed by STONE J. in this case ; and it is the latter part of that

(1) (1928) I.L.R. 52 Mad. 52.

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BEASLEY C.J. clause which is in particular relied upon. It is perhaps necessary to set out the whole of the clause which reads as follows :

" And we do further ordain that the Court for relief of insolvent debtors at Madras shall be held before one of the Judges of the said High Court of Judicature at Madras and the said High Court, and any such Judge thereof "—

and it is the following part which is relied upon by the respondent—

" shall have access and exercise within the Presidency of Madras, such powers and authorities with respect of original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India."

The learned Counsel for the respondents concedes that under that clause the High Court is not empowered to adjudicate a debtor, who is outside the limits of the Presidency-town, an insolvent, but he says that it gives that power when the mufassal Courts which would ordinarily exercise the jurisdiction happen to be closed. It seems to me that, having conceded that the High Court has no authority to adjudicate an insolvent who is in the mufassal, it is quite impossible to argue that it is given that power for a limited period during the year, viz., when the High Court is open during the vacation and when the mufassal Courts are closed. That seems to me to be an impossible position. Nor is it at all justified by the words of that clause which clearly mean that, with regard to the original jurisdiction of the High Court, that is to be governed by the Presidency-towns Insolvency Act and that, with regard to the appellate jurisdiction in respect of cases arising under the Provincial Insolvency Act, that is to be regulated by that Act. This means that the High Court only has power to deal with provincial

insolvencies in the exercise of its appellate jurisdiction and that in its original jurisdiction it only has power to deal with insolvencies which are in the Presidency-town itself such as come within the scope of the Presidency-towns Insolvency Act. Neither of those Acts gives the High Court any power to make any such order as was passed in this case. Therefore, the order passed by our learned brother was without jurisdiction and must be set aside and this appeal allowed with costs.

BARDSWELL J.—I agree.

A.S.V.

APPELLATE CIVIL.

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

NATTAMAI K. P. NARASIMHA AYYAR AND THREE OTHERS
(FIRST RESPONDENT AND HIS LEGAL REPRESENTATIVES),
APPELLANTS,

v.

KASILYA VENKATACHALAPATHI AYYAR AND SIX
OTHERS (PETITIONER AND RESPONDENTS 3 TO 6 AND LEGAL
REPRESENTATIVES OF FIRST RESPONDENT), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 47—Assignee-decree-holder—Application by, for recognition of assignment and for leave to execute decree—Order rejecting—Appeal from—Competency of—Sec. 47 (3)—Effect of.

The assignee of a decree applied to the executing Court for permission to execute the decree against the judgment-debtors and to have the assignment recognized. The application was opposed by the assignor on the ground that there was no consideration for the assignment, and was dismissed.

Held that section 47 of the Code of Civil Procedure applied to the case and that an appeal lay against the order dismissing the application.

* Letters Patent Appeal No. 85 of 1929.

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1933,
October 31.

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Sub-section (3) of section 47 says that such a question is to be determined for the purposes of that section by the executing Court.

As regards the bar of a separate suit no distinction is to be drawn between sub-section (1) of section 47 and any other sub-sections.

APPEAL under Clause 15 of the Letters Patent against the judgment of WALLER J. dated the 24th day of April 1929 and made in Appeal against Appellate Order No. 155 of 1927, preferred against the order of the District Court of Madura dated the 2nd day of September 1927 and made in Appeal Suit No. 132 of 1927 (Execution Application No. 124 of 1927 in Execution Petition No. 882 of 1926 in Original Suit No. 183 of 1924, District Munsif's Court, Madura Town).

K. V. Sesha Ayyangar for appellants.

P. N. Appuswami Ayyar for respondents.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—This is an appeal from a judgment of WALLER J. in Civil Miscellaneous Second Appeal No. 155 of 1927 affirming an order of the District Court of Madura.

This appeal arises out of an execution case. One Muthuswami Ayyar obtained a decree against the defendants. He assigned it to one Narasimha Ayyar who was duly brought on record. Narasimha Ayyar in his turn executed an assignment of the decree in favour of the first respondent here. The first assignee opposed the first respondent's application to the executing Court for permission to execute the decree against the judgment-debtors and to have the assignment recognised. He stated that the assignment deed was true but that there was no consideration for

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it. The learned District Munsif dismissed the petition and an appeal was presented to the District Court. There a preliminary objection was taken that no appeal lay because the substantial contest was between the first assignee and the first respondent here and not between the parties to the dispute, the judgment debtors not being among the parties to the dispute. The learned District Judge overruled the preliminary objection holding that section 47 of the Code of Civil Procedure applies and that an appeal lies; and WALLER J. upheld that finding, and, in my opinion, rightly. It seems to me clear that all matters therein referred to are under a bar to a separate suit. Section 47 (3) says :

“Where a question arises as to whether any person is or is not the representative of a party such question shall for the purposes of this section (and these are the important words) be determined by the Court.”

I am unable to understand from a reading of that section that as regards the bar of a separate suit any distinction is drawn between sub-section (1) and any other sub-sections. The marginal note is “Questions to be determined by the Court executing decrees.” This is a Court executing the decree and sub-section (3) says that the question arising here is to be determined for the purposes of this section by the executing Court. I am aware that upon this point there are conflicting decisions of this High Court but, satisfied as I am that, upon a plain reading of that section, the order in question is an appealable order, I am prepared to base my judgment upon the section and that alone.

This appeal must be dismissed with costs.

BARDSWELL J.—I agree.

A.S.V.

APPELLATE CIVIL.

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

1933,
September 21.

SRI RAJAH KAKARLAPUDI VENKATA KRISHNAMA-
RAJU BAHADUR GARU (THIRD DEFENDANT), APPELLANT,

v.

SRI RAJAH CHINTALAPATI SURYANARAYANA
RAJU BAHADUR AND SEVEN OTHERS (PLAINTIFFS
1 TO 6 AND DEFENDANTS 2 AND 1), RESPONDENTS.*

Madras Land Revenue Assessment Act (I of 1876)—Separate registration and assessment—Right to apply for—"Owner" in sec. 2 of Act—Minerals—Right to—Necessity—Order of Collector rejecting application for separate registration and assessment—Second application by same party for same purpose—Maintainability—Order rejecting second application—Suit to set aside—Limitation for—Art. 120 of Limitation Act (IX of 1908).

The Zamindar of a permanently settled estate made an absolute grant in 1875 of two villages comprised in his estate in favour of one N. The defendants were in possession of some dharmila inam lands in one of those villages claiming the said lands under alienations made by the Zamindar in 1852 and 1859. On an application made under the Madras Land Revenue Assessment Act (I of 1876), the Collector registered the two villages in the name of N and apportioned the assessment payable thereon. In fixing the peishcush of the estate consisting of the said two villages the inam lands in the possession of the defendants were treated as part of that estate for the purpose of subdividing it from the main estate. The plaintiffs, who acquired the said two villages by alienation in or about 1917, applied to the Collector for the separate registration and assessment of the defendants' lands.

Held that, as the defendants' lands had not been separately registered, they must be regarded as part of the plaintiffs' estate consisting of the two villages, and the plaintiffs were

* Second Appeals Nos. 450 and 502 of 1929.

therefore entitled to apply against the defendants for the separate registration and assessment of the lands in their possession.

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A person can be an owner of property for the purposes of the Madras Land Revenue Assessment Act without possessing mineral rights therein. The right to subdivision should not be made to depend upon the test whether the grantee has the right to minerals. If in all other respects the grant is absolute the grantee is entitled to subdivision.

An order rejecting an application under the Madras Land Revenue Assessment Act on the ground that the other party did not concur does not possess any legal validity and does not require to be set aside. It does not debar the applicant from making a second application for the same purpose provided his liability to pay the assessment in respect of the share of the other party continues. Where he makes a second application and it is rejected, even then he may ignore the order. But if he chooses to come to Court to have it set aside, he must bring his action under article 120 of the Limitation Act within six years from the date of the order.

APPEALS against the decrees of the Court of the Subordinate Judge of Vizagapatam in Appeal Suits Nos. 41 and 42 of 1928 (Appeal Suits Nos. 315 and 316 of 1927, District Court, Vizagapatam), preferred against the decrees of the Court of the District Munsif of Yellamanchilli in Original Suits Nos. 220 and 221 of 1926, respectively.

N. Rama Rao and T. Satyanarayana for appellant.

K. Venkatarama Raju for respondents.

Cur. adv. vult.

JUDGMENT.

Second Appeal No. 450 of 1929.

RAMESAM J.—The suit out of which this second appeal arises was brought by six plaintiffs who are now the registered proprietors of Panduru

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Mallavaram estate against the Secretary of State for India in Council (first defendant) and defendants 2 and 3 who are owners of certain lands for an order directing the separate registration of the defendants' land from the estate of Panduru Mallavaram. The villages of Panduru and Mallavaram were themselves originally part of the permanently settled estate of Uratla. In 1867 one Sagi Jagannadaraju became the proprietor of Uratla. In 1875 he granted these villages to his maternal uncle, K. Chinna Narasaraju, by Exhibit H-1, dated the 7th April 1875. Portions of the estate passed by alienation to some of the present plaintiffs under Exhibits F and F-4, dated 1917 and 1925, respectively. These two villages were separately registered in 1875 (*vide* Exhibit A, dated the 11th December 1875). Exhibit B is the proceedings of the Board of Revenue, dated the 15th September 1875, fixing the peishcush on the subdivided estate. In 1852, certain lands in the village of Mallavaram now in the possession of the contesting defendants were alleged by them to have been given to one Pushpati Subhadrayya by the then proprietrix of Uratla in exchange for some other lands. Though the exchange is not clearly proved, the Subordinate Judge found that the defendants are the owners of the lands. On the 18th May 1903 the plaintiffs' predecessor-in-title as proprietor of Panduru Mallavaram applied to the Collector of Vizagapatam for the separate assessment and registration of the defendants' land. The Collector issued a notice under section 2 of Madras Act I of 1876. The father of defendants 2 and 3 did not consent to the separate assessment and registration and the Collector accordingly rejected the application

on the 20th June 1904. Again, in May 1924 the present plaintiffs applied to the Collector for separate registration and defendants 2 and 3 did not agree and the Collector refused to allow the separate registration by proceedings, dated the 13th October 1925 (Exhibit G). The plaintiffs therefore bring the present suit praying that the Court may direct the separate registration of the suit land from the Panduru Mallavaram estate. The District Munsif of Yellamanchilli decreed the suit and the Subordinate Judge on appeal confirmed that decree. The third defendant filed this second appeal. The second defendant did not appear in the Court below and it appears that he is not interested in the suit land.

Three questions were raised before the Courts below and were all decided against the third defendant and they are repeated before us.

The first question raised is that the alienation of the suit lands to the defendants' predecessor-in-title in 1852 by the proprietrix of Uratla was not such an absolute alienation as to entitle the present plaintiffs to get them separately registered under Madras Act I of 1876. Section 1 of that Act provides that the alienor or alienee of a permanently settled estate or the representative of any such alienor or alienee may apply to the Collector for its separate assessment in respect of land-revenue. But it has been held in *Maharaja of Vizianagram v. The Collector of Vizagapatam*(1) by WALLIS C.J. and KUMARASWAMI SASTRI J. that grants of lands in permanently settled estates subject to a small rent such as *jodi*, *kattubadi* or *poruppu* are not liable to be proceeded against

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(1) (1914) I.L.R. 38 Mad. 1128.

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under Madras Act I of 1876. They followed a previous unreported decision of MILLER and MUNRO JJ. in Appeal Suit No. 141 of 1905 from the same district. In the two decisions referred to, the alienated lands were subject to payment of *kattubadi* to the zamindar and hence it was held that the zamindars were not entitled to get them subdivided. But in the present case the land alienated in 1852 was not subject to any *kattubadi*. The plaintiffs therefore allege that the defendants are the absolute owners and that they are entitled to a subdivision of the suit land, and the defendants argue that the suit lands were obtained by exchange for some inam lands. The Subordinate Judge finds the defendants are the absolute owners of the suit lands. We agree with this conclusion.

The second point argued is that, as the suit lands were alienated in 1852 to the defendants' predecessor and the Panduru Mallavaram estate was carved out of the Uratla estate in 1875, the present plaintiffs are not entitled to claim a separate registration and subdivision of the suit lands. That the suit lands were alienated prior to the carving out of the Panduru Mallavaram estate is true. But whether the proprietor of the Panduru Mallavaram estate or whether the proprietor of the Uratla estate is entitled to the subdivision depends upon how the suit lands should be regarded. Geographically the suit lands are in the village of Mallavaram which is a part of the Panduru Mallavaram estate. If the Board of Revenue in fixing the *peishcush* of the Panduru Mallavaram estate in 1875 regarded the suit lands as part of the Panduru Mallavaram estate for the

purpose of sub-dividing that estate from the main Uratla estate though as a matter of fact they had been previously alienated in 1852, then the proper persons to obtain the separate assessment of the suit lands would be the owners of the Panduru Mallavaram estate, namely, the plaintiffs. But if the suit lands were excluded from Panduru Mallavaram estate in fixing the *peishcush* in 1875 and only the income of the rest of the estate was considered for taking the proportions, then the proprietors of Uratla would be the persons to obtain the separate assessment and subdivision of the suit lands. Now on turning to Exhibit B we find this that, though the Collector excluded from the income of Panduru Mallavaram the *dharmila* inams, i.e., the inams granted after the Permanent Settlement, the Board included them and accordingly fixed the *peishcush* as Rs. 952-14-11 instead of Rs. 938-14-2 as recommended by the Collector. So long as the *dharmila* inams had not been separately registered, they have to be regarded as part of the Mallavaram estate, the Board having proceeded on that footing. That being so, the present plaintiffs are entitled to maintain the suit.

The third question argued before us is the question of limitation. It is argued that the separate registration was refused by the Collector so early as 1904, that the cause of action accrued to the plaintiffs or their predecessors immediately after the Collector's refusal in 1904 and the suit ought to have been filed within six years after the Collector's refusal and it is therefore barred. The reply for the respondents is that there is nothing to prevent the proprietor from making further

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applications before the Collector for a subdivision after 1904. Under the Act so far as the Collector's functions are concerned his duty is to refuse registration if the defendants do not agree. His work is of a mechanical nature and does not partake of the nature of a decision. If there is a decision by him and the suit before the Civil Court is in the nature of an appeal from his decision then no doubt his order would become final and conclusive against the plaintiffs. It would have decided a matter of substantial right and if no immediate action is taken the plaintiffs' suit will be barred, but the Collector's order is not in the nature of a decision. There is nothing to prevent the plaintiffs from making a fresh application. The defendants may now agree and simply because the owners of the suit lands in 1904 did not agree it does not follow that they may not agree in 1924. But apart from the possibility of defendants agreeing to a separate registration the matter can be looked at in a different way. The only effect of separate registration is to take a portion of the burden on the main estate, i.e., Panduru Mallavaram, from its owners and transfer it to the owners of the alienated lands, i.e., the defendants. So long as the subdivision is not done the owners of the main estate have to go on paying the full peishcush. Now, even if they go on paying the full peishcush, i.e., submitting to the whole burden without seeking separate registration for any length of time, it cannot be urged that there is any bar of limitation against the plaintiffs' rights. Thus in the present case though the predecessor of the plaintiffs was bearing the full burden from 1875 to 1904, i.e., twenty-eight years, it cannot be suggested that

their claim in 1904 was barred and supposing they filed the first application in 1924 it cannot be argued that it is barred. So that the objection to the defendants' right is not an objection based on lapse of time for we see that for whatever length of time the plaintiffs bear the whole burden and the defendants enjoy the land free of the burden there is strictly no limitation to the plaintiffs' claim for subdivision. How can then there be any difference in the matter simply because the plaintiffs made an effort before the Collector in 1903 and did not bring a suit within six years? The defendants, while conceding that there is no bar of limitation if no prior petition was filed before the Collector, still say that the cause of action in the civil suit is the Collector's refusal and that therefore the suit must be filed within six years. But if the matter is put in this way the cause of action for this suit is the Collector's refusal of 1924 and therefore the suit is not barred by limitation. If a suit based on the Collector's refusal of 1904 be filed more than six years from 1904 it may be it is barred by limitation, but the present suit is not that. To this the learned Advocate for the appellant says that the plaintiffs are not entitled to file a second application before the Collector for the purpose of conferring on themselves another cause of action. He may be right in this contention if a finality is given to the prior order of the Collector. When there is no such finality I do not see any objection to filing a second application. Between 1903 and 1924 both the parties were enjoying the lands but subject to a common burden. The common burden is such that by its very nature it is capable of separation

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and being split up and because an attempt to split it up was made in 1903 but was not pursued it cannot be said that the defendants have acquired a right by prescription that it should never be split up at all for section 29 of the Limitation Act does not apply. If the argument of the defendants is that because it was once attempted and lost therefore a second attempt cannot be made it is really an objection in the nature of *res judicata* and not in the nature of limitation. But *res judicata* there cannot be because there is really no decision by the Collector. The Collector's duty is merely mechanical and to give effect to the objection of the appellant is to give it a greater effect than is intended by the Act.

Again, the matter might be looked upon in a different way. Even before Madras Act I of 1876 was passed there was a right in the alienor or the alienee of lands from a permanently settled estate to obtain a subdivision of the alienated lands. The right was implied in sections 8 and 9 of Permanent Settlement Regulation XXV of 1802 before the passing of Madras Act I of 1876 and it was held by this Court that if a Collector refuses a subdivision the alienor or alienee is entitled to a redress in a Civil Court, *Ponnusami Tevar v. Collector of Madura*(1). The object of Madras Act I of 1876 is not to confer a right upon the alienor or alienee but to separate the duties of the Civil and Revenue Courts in respect of separate assessment. It would seem that prior to Madras Act I of 1876 where a Collector refused separate registration there was a right of action before a Civil Court and the Civil Court could make the separate

assessment and direct the separate registration. The Legislature, while desiring to keep up the jurisdiction of a Civil Court to direct separate assessment when the Collector refuses it or to declare that there should be no separate assessment where the Collector has granted it, decided that the actual work of subdivision in settling the proportions of peishcush between the main estate and the alienated portion should be worked up by the Collector and it is not for the purpose of conferring the right (which formerly existed) that Madras Act I of 1876 was passed. The passing of this Act and the mechanical act of a Collector in refusing to register can make no difference in the rights of parties. The object of the procedure prescribed by Act I of 1876 is that after obtaining a declaration in a Civil Court the party has got to go to the Collector again to obtain the settlement of the actual figures. Again the matter may be looked at in another way. In *Ananda Razu v. Viyyanna*(1), which was a suit for separate assessment of a portion of an inam, it was held that there is no bar of limitation. It is true that there is no statute corresponding to Act I of 1876 in the case of inams, but, if the object of Act I of 1876 is as described above, that makes no difference. But otherwise the matter is similar, for, though one person goes on submitting to the whole burden for however long a time and the other person enjoys his portion free of the burden, there is no objection to getting the burden sub-divided in the case of inams and, if there is no bar of limitation for the subdivision of quit-rent in the case of inams, what difference can it make for

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(1) (1863) 3 M.H.C.R. 35.

(1) (1892) I.L.R. 15 Mad. 492.

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the subdivision of peishcush? The matter is similar in both cases. It would appear that even if there is no subdivision if one person pays the whole peishcush to which his own estate and the alienated portion are jointly liable he can recover a proportionate part of the amount paid by a suit for contribution; vide *Rajah of Vizianagram v. Rajah Setrucherla Somasekhararaj*(1). But it would seem that that is possible only where the payment is made to save the whole estate from sale. But that shows that there is also in the owner of one estate an inherent right to get a contribution from the owner of the alienated portion to a proportionate part of peishcush. Such a right must involve a right to get it split up. If such a right cannot be lost by any amount of inaction it cannot be lost by an adverse order of the Collector mechanical in its nature. I therefore hold that the suit is not barred by limitation.

In the result, the second appeal is dismissed with costs of the plaintiffs-respondents.

Second Appeal No. 502 of 1929.

This second appeal is connected with Second Appeal No. 450 of 1929. In this case also the plaintiffs are the registered proprietors of Panduru Mallavaram estate. Defendants 3 and 4 are the contesting defendants, the second defendant not having appeared. In this case the land in respect of which subdivision is sought was granted by a patta dated 8th April 1859 (Exhibit IV) executed by Subhadrayya the then proprietrix of the Uratla estate to B. V. Narasimharaju from whom it passed to the present defendants. This land also

(1) (1903) I.L.R. 26 Mad. 686 (F.B.).

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is situate in the Mallavaram village. The same three points that were urged in the connected second appeal were also urged in this case. So far as the second and third points are concerned my judgment in the other second appeal governs this. Only the first point in respect of which a distinct argument has been urged has to be dealt with.

It is contended that the defendants are not the absolute owners of the suit lands because it has been argued that Exhibit IV does not confer the right to the minerals in the suit lands on the grantee, and in respect of this contention a series of Calcutta decisions have been cited. In *Hari Narayan Singh v. Sriram Chakravarti*(1) it was held that the lessees of a village in a zamindari were not entitled to the mineral rights unless they were expressly granted. The lease was subject to an annual rent of Rs. 22-15-6. The decision in *Durga Prasad Singh v. Braja Nath Bose*(2) related to a case of Digwari tenure and it was held that though the Digwari tenure resembled in some respects the Ghatwali tenure they were different in respect of minerals. As to the right to the minerals it was held that though the Ghatwal was entitled to the minerals under Act V of 1859 the Digwar was not so entitled, the zamindar being the person *prima facie* entitled to them. In *Shashi Bhushan Misra v. Jyoti Prasad Singh Deo*(3) a village was granted at a fixed rent prior to the Permanent Settlement by the Raja of Pachete. The grant was described as a Talabi Brahmottar grant. According to the decision of

(1) (1910) L.R. 37 I.A. 136; I.L.R. 37 Calc. 723 (P.C.).

(2) (1912) L.R. 39 I.A. 133; I.L.R. 39 Calc. 696 (P.C.).

(3) (1916) L.R. 44 I.A. 46; I.L.R. 44 Calc. 585 (P.C.).

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the Privy Council modifying the definition in Wilson's Glossary such a grant is land granted either rent-free or on a fixed rent to Brahmans for their support and that of their descendants as a reward for sanctity or to enable them to devote themselves to religious duties and education. The Privy Council found that the tenure was permanent and heritable. The statement of facts at page 586 shows that the tenure was subject to the payment of a fixed rent. In *Raj Kumar Thakur Giridhari Singh v. Megh Lal Pandey*(1) it was held that the lessee under a mokarari lease does not acquire the rights to minerals unless they are expressly transferred. Though the patta purports to grant the lease "with all rights" it appears that it was subject to an annual jumma of Rs. 59 and some payment in kind. In *Raghunath Roy Marwari v. Durga Prashad Singh*(2), the Raja of Jheria made a Brahmottar grant of a mouzah in 1791. It was held that the grantee did not acquire the mineral rights in the mouzah. The patta says: "You should enjoy it comfortably by cultivating, and getting the same cultivated by others." In this case the language of the patta is somewhat similar to that of Exhibit IV. The appellant therefore strongly relied upon this decision. But the grant in that case was described as a Brahmottar grant, and the word Brahmottar implies some kind of tenure between the grantor and the grantee though in other respects full rights are conferred on the grantee. At page 102 their Lordships say :

"But the patta in question here was a grant by a zamindar in India of a holding creating a tenure within his

zamindari, and must be construed as such grants by zamindars have been construed by the Board."

Again at page 104 it was observed :

"In the present suit no evidence was produced as to what was done at the permanent settlement in respect of Mouzah Chandkuia, but the absence of such evidence does not lead to a presumption that the zamindar had not then vested in him the mineral rights in Mouzah Chandkuia."

They therefore held that only the Raja was entitled to the mineral rights in the mouzah. The decision in *Rajeswar Prosad Bhakat v. Anil Kumar Roy* and *Bhupendra Narain Sinha v. Rajeswar Prasad Bhagat*(1) refers to a Patni Taluk, patni being a permanent transfer of the interests in the zamindari subject only to the payment of rent. It was held that the patnidar was not entitled to remove mounds of earth out of the patni because such a right was similar to mineral rights.

As to all these decisions the respondents distinguish them on the ground that they relate to tenures and wherever there is a tenure whether subject to a rent or not subject to a rent, the reversion being in the zamindar, the grant cannot be considered to be such an absolute grant as to include the right to minerals, but where there is no tenure the right to minerals also passes and the grant must be regarded as an absolute grant in every sense of the term. To this the appellant replies by relying on *Govindanarayan Singh v. Shyamlal Singh*(2), another decision of the Privy Council, in which the junior branch of a family held a village of the zamindari from 1700 and the representative of the junior branch paid to the zamindar an annual sum of Rs. 21-4-0 in respect

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(1) (1917) I.L.R. 45 Calc. 87 (P.C.).
(2) (1919) L.R. 46 I.A. 158; I.L.R. 47 Calc. 95 (P.C.).

(1) (1927) I.L.R. 55 Calc. 35.
(2) (1931) L.R. 58 I.A. 125; I.L.R. 58 Calc. 1187 (P.C.).

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of it. The plaintiff's case was that the grant was a khorposh or maintenance grant and it was resumable by custom. Whether it was resumable or not the annual payment to which it was subject shows that it was also a case of tenure. At page 1195 their Lordships observe :

" If the village has been subject to an annual payment to the zamindars, their Lordships must conclude that the burden which is upon the respondents has not been discharged. The payment may, in its inception, have been a contribution towards the revenue assessed by the paramount power upon the parent estate, but it may equally as well have been a rent-charge reserve to the grantor."

An argument by the junior branch relying on a former partition was found against by the Privy Council. Finally another argument based on adverse possession was held not to be conclusive as to sub-soil rights, the enjoyment being only of surface rights. The latter two grounds being excluded, the *prima facie* position, i.e., tenure, remained. It seems to me therefore that this case also is distinguishable on the ground that it is a case of tenure.

But apart from it it seems to me that the right to subdivision should not be made to depend upon the test whether the grantee has got the right to minerals. If in all other respects the grant is absolute I think the grantee is entitled to subdivision. In the case of inams it is now established in this Presidency that the inamdar has no right to minerals, *The Secretary of State for India v. Srinivasa Chariar*(1), and yet as between the main inamdar and an alienee there can be a suit for subdivision of the quit-rent ; vide *Ananda Razu v. Viyyanna*(2). That being so, there is no

(1) (1920) I.L.R. 44 Mad. 421 (P.C.). (2) (1892) I.L.R. 15 Mad. 492.

reason why the same principle should not be applied in the case of an alienee of a zamindari. It is unnecessary to decide in this case whether the defendants are entitled to the minerals in the land granted.

The result is that the second appeal fails and is dismissed with costs of the plaintiffs-respondents.

VENKATASUBBA RAO J.—The first question that arises is, whether the plaintiffs are entitled to apply under the Act for separate registration.

The zamindar of Uratla made an absolute grant in 1875 of the villages of Panduru and Mallavaram comprised in his estate, in favour of his maternal uncle Sree Rajah Kakarlapudi China Narasaraju. We are concerned in these second appeals with Mallavaram alone. The defendants in Second Appeal No. 450 of 1929 are in possession of some lands in that village in virtue of a transaction of 1852 : similarly the defendants in Second Appeal No. 502 of 1929 obtained certain other plots in 1859. The grant in favour of the maternal uncle was thus subsequent to the alienations by the proprietor of Uratla, under which the defendants claim. The date of the grant is 7th April 1875, and later in that year, on an application made under the Madras Land Revenue Assessment Act (Act I of 1876), the Collector registered the villages in the name of the alienee (the maternal uncle) and apportioned the assessment payable thereon. The final order runs thus :

" At the request of the proprietor of the Uratla estate and with the sanction of the Board of Revenue communicated in their proceedings, dated the 15th September 1875, No. 2574, the villages of Panduru and Mallavaram have this day been

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subdivided from the Uratla proprietary estate and registered in the name of Sri Raja Kakarlapudi China Narasaraaju Garu, the peishcush payable on the villages subdivided as aforesaid being apportioned and fixed at Rs. 1,608-14-11 per annum."

The Board's proceedings to which reference is made in the aforesaid order show that in the proposal originally submitted by the Collector the value of the alienated inams had not been taken into account. The peishcush recommended by him on that footing in regard to Panduru was Rs. 938-14-2, and in regard to Mallavaram, Rs. 507-9-3. The Board observes :

"The Collector has not taken the value of inams granted subsequent to the permanent settlement into account in calculating the assets upon which the peishcush has to be apportioned. With the necessary correction of this account the peishcush on the subdivided estates will be as shown below."

In other words, the Board revised the Collector's valuation, by including the subsequently alienated inams in the villages in question. Thus they raised the peishcush fixed on Panduru from Rs. 938-14-2 to Rs. 952-14-11 and on Mallavaram from Rs. 507-9-3 to Rs. 656-0-0. The total of the two figures as revised is Rs. 1,608-14-11, the sum mentioned in the final order of the Collector quoted above apportioning the peishcush.

The plaintiffs acquired the villages in question in or about 1917, and they applied under the Act, as against the defendants, for separate registration and apportionment. Section 1 of the Act provides :

"The alienor or alienee of any portion of a permanently settled estate, or the representative of any such alienor or alienee, may apply to the Collector of the district in which such portion is situate for its registration in the name of the alienee and for its separate assessment in respect of land revenue."

The defendants' title, as I have said, is derived from the alienations made by the zamindar of Uratla previous to the grant of 1875. On the date of the grant the zamindar's position was that of an alienor and the defendants were his alienees. The zamindar, the alienor, having subsequently made a grant to the plaintiffs' predecessor-in-interest, the plaintiffs must be regarded as the alienor's representatives. The terms of the section are thus satisfied. The defendants contend that the section does not apply, as the alienation in their favour was not subsequent to, but prior to, the separate registration of 1875. I fail to see how this makes any difference. The section does not say "the alienor or *his* alienee"; the argument overlooks that the word "*his*" is not there. The application was made by the plaintiffs, the alienor's representatives, against the defendants, the alienees. There is thus no legal bar as is contended for the defence.

It is next contended by the defendants in Second Appeal No. 502 of 1929 that they are not the owners of the property within the meaning of that expression in section 2 and that the Act does not therefore apply. Their title to the land was obtained under Exhibit IV, dated 12th December 1863, which is in the following terms :—

"Patta written and given on Friday 5th Chaitra Sudda of the year Siddarti by Sagi Subadrayya to Bhupathiraju Venkatanarasimharaju: I have this day given to you the land of the total extent of 3/16 plus 1/64 bearing a cist of Rs. 44 which is made up of wet land of the extent of about 3/16 being the eastern portion in Boorugumanu Isthuvu in Mallavaram village, Vuratla, Hunda within our zamindari and of the dry land of the extent of about 1/64 known as Mariamunnappatti Mukka in Mallavaram old village."

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Then the last clause may be translated thus :—

“Therefore you may as you please render the land fruitful and enjoy the fruits thereof hereditarily from son to grandson and so on.”

The argument is put thus : Under this deed the right to the minerals does not pass, and, in the absence of such right, the grantee does not possess full ownership. The following passage in the judgment of the Privy Council in *Raghunath Roy Marwari v. Durga Prashad Singh*(1) is strongly relied upon by the defendants' learned Counsel :

“The construction of the patta of 1791 contended for on behalf of the plaintiffs would doubtless be the construction to be placed upon it if the patta had been a grant of freehold lands in England by an owner in fee, but the patta in question here was a grant by a zamindar in India of a holding creating a tenure within his zamindari and must be construed as such grants by zamindars have been construed by the Board.”

In that case what was granted by the zamindar was a village rent-free *brahmottar* land. The grant contained the words that the grantee was “to enjoy it comfortably by cultivating and getting the same cultivated by others”. It was held that the subjacent minerals did not pass to the grantee. After reviewing the previous decisions of the Board, their Lordships held that the principle applied as much to rent-free tenures (the case before them being one such) as to grants of tenures at fixed rents. The defendants go on to contend that under these decisions the mineral rights did not pass to them by the instrument and that they cannot therefore be regarded as the “owners”. In answer, the plaintiffs urge that these authorities, if carefully examined, would show that in each case the grantee's sub-soil rights were

negatived on the footing that *the grant was only of a tenure*, but what was conveyed in the present instance in the defendants' favour was not a mere tenure but an interest in fee ; and the plaintiffs further suggest that by “grant of a tenure” is meant that there is a certain residuary ownership retained by the zamindar. Whether the decisions support this theory is a point which I need not decide, but I may remark that it is difficult to reconcile at least one decision of the Privy Council, namely, *Gobindanarayan Singh v. Shyamlal Singh*(1), with the view put forward by the plaintiffs. The real point to decide is, supposing the right to minerals does not pass, is the grantee on that account any the less “an owner” within the meaning of the Act? The object of the enactment is to make better provision for the separate assessment to land revenue of the alienated portions (see the preamble). The revenue payable to the State is not in respect of any mineral or sub-soil rights. It therefore follows that a person can be an owner for the purpose of the Act without possessing such rights. The position of a lessee even under a permanent lease is different ; he can in no sense be called the owner and that is the *ratio decidendi* of *Maharaja of Vizianagaram v. The Collector of Vizagapatam*(2). In the present case, though the word “patta” is used, the grant conveys an absolute interest ; not only is no rent reserved but, under the express terms of the grant, the grantee is to enjoy the land “from son to grandson and so on in succession”.

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(1) (1931) L.R. 58 I.A. 125 ; I.L.R. 58 Calc. 1187 (P.C.).

(2) (1914) I.L.R. 38 Mad. 1128.

(1) (1919) L.R. 46 I.A. 158 ; I.L.R. 47 Calc. 95 (P.C.)

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It is next urged that the suit is barred by limitation. In 1903 the plaintiffs' predecessor-in-title applied to the Collector for separate registration. Under section 2, unless all the parties to the alienation concur, the Collector cannot make an order in favour of the applicant. On the ground that the other parties did not concur, the Collector rejected the application of 1903. The defendants' contention in effect is that the order, not having been set aside in time, would preclude any further application. This raises the question, was it an order that needs to be set aside? The application of 1903 was rejected merely on the ground that the other party did not concur. The order followed as a matter of course, the Collector having no option under the section and no discretion. Where both parties do not concur, the Collector is not required to apply his mind to the question at all. An order made in such circumstances cannot possess any legal validity and does not therefore require to be set aside. The position may be thus tested. Supposing, shortly after the passing of such an order, both parties make a joint request, can the Collector refuse to entertain the application on the ground that the previous order operates as a bar? Supposing again it is the other party that now applies with the concurrence of the previous applicant, can the Collector reject the application? The Act contemplates several kinds of orders, but, in the case of an order of the kind in question, it is perfectly clear that it need not be set aside. That being so, the party's right to make a further application exists and what gives one of the parties a right to apply is the continued existence of his liability to pay the assessment in

respect of the share of the other. Unless by the force of the Act that right is taken away, it must exist. The party, if he chooses, may ignore the order; that may result in his having to pay the assessment in respect of the other man's share, but that does not debar him from making a second application. If an application is in this way repeated a second time and is again rejected, even then the party may ignore it, for, as I have said, there is nothing in law to compel him to get such an order vacated. But if he chooses to come to Court to have it set aside, he must bring his action under article 120 within six years from the date of the order. The lower Court's view therefore that the application in question (made in 1925) was legally sustainable is perfectly right. That application was disposed of by the Collector in 1925; he rejected it on the ground that his previous order had not been set aside. The present suit was filed within a year of the order of 1925 and is therefore in time.

In the result, the second appeals are dismissed with costs of the plaintiffs-respondents.

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APPELLATE CIVIL.

Before Sir Vepa Ramesam, Kt., Officiating Chief Justice, and
Mr. Justice Venkatasubba Rao.

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September 13.

THE BANK OF HINDUSTAN, LIMITED, MADRAS
(PLAINTIFF), APPELLANT,

v.

N. GOVINDARAJULU NAIDU (FIRST DEFENDANT),
RESPONDENT.*

Negotiable Instruments Act (XXVI of 1881), sec. 37—Accommodation note—Liability of maker and of payee in case of, as regards holder—"Contract to the contrary" in the section—What is a—Indulgence given by holder of accommodation note to payee—Discharge of maker by—Principal and surety—Indulgence given to principal debtor with reservation of rights against surety—No discharge of latter by—Rule as to—Applicability of, to all negotiable instruments—Effect of sec. 39 of the Act.

If the holder of an accommodation note having no notice of its true character at the time of his taking the note but after notice thereof gives indulgence to the payee (the party accommodated), he does not thereby discharge the maker (the accommodation party).

By reason of section 37 of the Negotiable Instruments Act (XXVI of 1881) the maker, even in the case of an accommodation note, remains liable as principal and the payee as surety only, from the point of view of the holder's rights, in the absence of a contract to the contrary. The words "a contract to the contrary" in that section refer to a contract which displaces the normal right which the holder possesses in law.

Distinction between the law under section 37 of the Negotiable Instruments Act and the English Law pointed out.

Even if, in the case of an accommodation note, the payee must be treated as the principal, an agreement between the holder and the payee by which the former gives indulgence to the

latter does not discharge the maker if under the agreement the holder's right to proceed against the maker has been reserved.

Section 39 of the Negotiable Instruments Act does not by necessary implication abrogate the law as to the reserving of rights in the case of all negotiable instruments other than bills of exchange dealt with by it.

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APPEAL against the decree of the District Court of North Arcot at Vellore in Appeal Suit No. 167 of 1931 preferred against the decree of the Court of the District Munsif of Vellore in Original Suit No. 476 of 1930.

S. Parthasarathi and V. K. Tiruvenkatachari
for appellant.

K. Rajah Ayyar and K. Subramaniam for
respondent.

Cur. adv. vult.

JUDGMENT.

RAMESAM OFFG. C.J.—The facts of this second appeal may at first be stated. The first defendant executed a promissory note dated the 28th April 1930 in favour of the second defendant for Rs. 2,500 payable seventy-four days after date, i.e., on or after the 11th July 1930. The second defendant endorsed it to the plaintiff, the Bank of Hindustan, Limited, on the 1st May 1930. The plaintiff's case is that he paid full consideration and that he is a holder in due course. He presented the note (which is described as a hundi in the judgment of the lower Courts) to the first defendant for payment after the due date but the first defendant dishonoured it; hence the suit under appeal. The District Munsif gave a decree against both the defendants.

On appeal by the first defendant alone, the appeal was allowed so far as the first defendant is

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concerned. The plaintiff files this second appeal against the first defendant. The first defendant's plea was that the suit hundi was an accommodation note, that no consideration passed under it and he was only a surety for the second defendant and that as the plaintiff entered into a composition deed with the second defendant he was exonerated from liability in the transaction. To this argument the plaintiff's reply was that the first defendant was not merely a surety and that, even if he was, under the composition deed of the second defendant the rights against the first defendant were reserved. The District Munsif decided in favour of the plaintiff on the second plea. On appeal the District Judge also found that the money was really taken by the second defendant and that therefore the note was really an accommodation note; and he therefore held that the second defendant was the principal debtor and the first defendant was the surety. He next held, differing from the District Munsif, that section 39 of the Negotiable Instruments Act does not apply to the case of a note and that therefore the reservation in the composition deed does not help the plaintiff. He refers to three cases, viz., a decision of the Oudh Chief Court, *Bellew, F. W. v. Bank of Upper India, Ltd.*(1); a decision of this Court, *Ramakistnayya v. Kassim*(2); and the decision of the House of Lords in *Overend, Gurney & Co. v. Oriental Financial Corporation*(3), and he finally observes in paragraph 5:

"This case, although it relates to English Law, does in my opinion, govern the present case and it has not been shown

(1) (1910) 7 I.C. 727.

(2) (1889) 1 L.R. 13 Mad. 172.

(3) (1874) L.R. 7 H.L. 348.

that on this point there is any difference between the English and Indian Law."

In second appeal it is contended for the plaintiff that the first defendant is the principal debtor and the second defendant is the surety and that therefore the composition with the second defendant cannot have the effect of discharging the first defendant who is the principal debtor. The respondent's reply to the argument is substantially the same as the reasoning of the District Judge, namely, that the principle of English Law applies to this case, that the English Law does not differ from the Indian Law in this matter, that under the English Law the second defendant would be the principal debtor and the first defendant the surety and that, if so, he is discharged by the further transaction between the plaintiff and the second defendant. The respective contentions about the plaintiff's rights against the first defendant being reserved urged in the lower Court have also been repeated here.

Taking up the first point, it is desirable now to notice what the English Law on the subject is and to see how far, if at all, the Indian Law differs from the English Law. It seems to me that, on the question who is the principal debtor and who is the surety in an accommodation note or accommodation bill, the English Law has fluctuated through five different stages. The earliest case is the decision in *Mallet v. Thompson*(1). In that case the endorsee of the payee for whose accommodation the note was made knowing that it was an accommodation note entered into a composition deed with him. It was held by Lord

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(1) (1804) 5 Esp. 178; 170 E.R. 778.

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ELLENBOROUGH that the maker was not discharged. But soon after Lord ELLENBOROUGH seems to have arrived at a different conclusion in two *nisi prius* cases.

In *Laxton v. Peat*(1) the endorsee of a bill received it knowing that it was accepted for accommodation of the drawer and he then gave time to the drawer when it became due upon his paying a part. It was held by Lord ELLENBOROUGH that the acceptor was discharged. He held that, as the bill was an accommodation bill to the knowledge of the endorsee, the acceptor should be considered only as a surety for the drawer and he was therefore discharged by the endorsee giving time to the principal debtor. Again in another case, *Collott v. Haigh*(2), Lord ELLENBOROUGH held that the acceptor is a surety and the drawer is the principal debtor and giving time to the acceptor would not discharge the drawer. The doctrine of Lord ELLENBOROUGH was soon doubted by GIBBS J. in *Kerrison v. Cooke* (3) and by Lord MANSFIELD in *Raggett v. Axmore*(4) and *Fentum v. Pocock*(5) and held not to apply where the acceptor promised to pay the bill when demand was made at maturity. The decision in *Fentum v. Pocock*(5) was in the Court of Common Pleas and up to 1853 this judgment of Lord MANSFIELD was regarded as the settled doctrine of the Courts of Common Law in England, the last of such decisions being the one in *Manley v. Boycot*(6) decided just before

- (1) (1809) 2 Camp. 185; 170 E.R. 1123.
(2) (1812) 3 Camp. 281; 170 E.R. 1382.
(3) (1813) 3 Camp. 362; 170 E.R. 1411.
(4) (1813) 4 Taunt. 730; 128 E.R. 517.
(5) (1813) 5 Taunt. 192; 128 E.R. 660.
(6) (1853) 2 El and Bl. 46; 118 E.R. 686.

the introduction of equitable pleas, all the decisions between 1813 and 1855 being noticed in the footnote "t" at page 5 of Rowlatt on "The Law of Principal and Surety". The doctrine of the Common Law was only limited to cases where the creditor at the time of taking the instrument agreed to regard the drawer or the maker of the bill or the note as surety and the acceptor or the payee as the principal debtor. In equity a wider rule of law prevailed according to which the creditor was constrained to regard the drawer or the maker as a surety only even when there is no express contract but by notice of the fact that it is an accommodation bill or note; and it was also held that notice even after the endorsement in favour of the principal debtor will do. One such decision is the case of *Ewin v. Lancaster*(1). In the course of the argument CROMPTON J. observed that the decision of Lord MANSFIELD in *Fentum v. Pocock*(2) must be regarded as virtually overruled. In this case the holder knew by the time of the composition that the note was really an accommodation note. All the cases are noticed at page 5 of Rowlatt's book. This state of uncertainty with some conflict between the Common Law and Equity seems to have continued in England until 1894 when *Rouse v. Bradford Banking Company*(3) was decided by the House of Lords finally establishing the law. Until that decision, as Rowlatt observes at page 6 of his book,

"it was doubtful whether a notification to the creditor, after the contract, of the fact that one of a number of debtors

- (1) (1865) 6 B. & S. 572; 122 E.R. 1306.
(2) (1813) 5 Taunt. 192; 128 E.R. 660.
(3) [1894] A.C. 586.

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had since the contract become, as between himself and the others, a surety only, would bind the creditor to respect his position as a surety, if it could not be made out that the creditor had consented to a modification of the original position and actually agreed to regard him as surety."

See *Swire v. Redman*(1). Meanwhile the Indian Legislature passed the Negotiable Instruments Act in 1881. What rule did the Indian Legislature adopt in this state of uncertainty which prevailed in England? An attempt must have been made to adopt the better of the two doctrines. In Daniel on Negotiable Instruments, Vol. II, paragraph 1334, it is observed:

"And even where the holder knew that the apparent principal party was really signing for the accommodation of another at the time when he received the instrument, the better opinion is that that circumstance does not alter his rights or duties, as such party has held himself out and obligated himself in a certain character, and has no just ground to demand or expect greater consideration than that legally incident to that character which he has assumed. If he intended to insist on the privileges of a surety, he should have refused to bind himself except in a recognised form of suretyship. Furthermore, it may be observed, that while the indulgence or release of an acceptor (or other principal) materially affects the remedies of the drawer (or other surety) who is thereby delayed or entirely deprived of recourse against the acceptor upon the bill itself, to which he would be entitled and upon which he might sue the acceptor on making payment, no such injury can possibly be inflicted on the acceptor for accommodation by indulgence to or release of the drawer. The acceptor may at any time at or after maturity of the bill pay it, and, no matter what may be the arrangements between the holder and the drawer, sue the latter not upon the bill but for money paid to his use."

Again in paragraph 1335 it is observed:

"There is strong authority for what seems to us the better doctrine, that even if the holder knew at the time he received the bill or note that it was accepted or made for accommodation his rights and duties are in no respect altered; and

(1) (1876) 1 Q.B.D. 536.

no indulgence to or release of a drawer or endorser will discharge the acceptor or maker."

That is, so early as 1873, when the first edition of Daniel was published, in spite of weighty English and American decisions to the contrary, this view was considered the better doctrine. This was also the opinion of Story on Promissory Notes, section 418, and Story on Bills, section 253. Now let us turn to what the Indian Legislature has done. Section 37 of the Negotiable Instruments Act says:

"The maker of a promissory note or cheque, the drawer of a bill of exchange until acceptance, and the acceptor are, in the absence of a contract to the contrary, respectively liable thereon as principal debtors, and the other parties thereto are liable thereon as sureties for the maker, drawer or acceptor, as the case may be."

This section makes no distinction between an accommodation note or bill and other notes and bills. One rule of law is laid down for all kinds of notes and bills. It sweeps away the distinction which seems to have troubled the English Courts between accommodation notes and bills and other notes and bills. The second circumstance which appears in the section is that the only method of changing the position of the parties is by "a contract to the contrary". This provision sweeps away the doctrine of notice prevailing in the English Courts. Mere knowledge on the part of the endorsee of the fact that the bill or note is an accommodation note or bill, whether the knowledge is at the time of the endorsement or afterwards, has become absolutely irrelevant. All that we have got to see is whether there is a "contract to the contrary". Knowledge at the time but not amounting to such contract has got

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the same result as if there is no knowledge at all or as if the knowledge is sometime after the endorsement. It is obvious in the face of section 37 that the rule of law prevailing in the English law Courts prior to 1853 was adopted by the Indian Legislature and if we are left to conjecture perhaps because it was thought to be the better doctrine by eminent jurists. But, whatever the reason may be, that the Indian Legislature adopted the Common Law doctrine of Lord MANSFIELD in *Fentum v. Pocock*(1) is plain from section 37. It is noticeable that, so far as the application of the law of guarantee to the relations between parties to negotiable instruments is concerned, the subject has not been codified in England, there being no sections like sections 37 and 39 of the Negotiable Instruments Act in the Bills of Exchange Act. So that, though the law of negotiable instruments is now codified in the Bills of Exchange Act of 1882, so far as the application of the law of suretyship to parties to negotiable instruments is concerned, it is left open for evolution and development by case-law; and we have seen that it was finally settled only by the decision of the House of Lords in 1894 by adopting the doctrine of the Equity Courts. But, long before 1894, the Indian Legislature has adopted the doctrine of the Common Law Courts. Not only has it not adopted the doctrine that even if the fact relating to accommodation is not known it is immaterial but it has also gone to the extent that even if it is known at the time of the endorsement it is equally immaterial. Not knowledge but actual contract to the contrary is

(1) (1813) 5 Taunt. 192; 128 E.R. 660.

the only thing that will effect a reversal of the *prima facie* position, namely, that the maker or the acceptor is the principal debtor and the payee or the drawer is the surety. A perusal of section 37 plainly shows that in this matter the Indian Law differs from the English Law and that the conclusion of the learned District Judge that there is no difference between the two is erroneous. The decision in *Ramakistnappa v. Kassim*(1) appears on a superficial reading to support the respondent but, if the judgment of SHEPHARD J. is carefully perused, it is plain that he was perfectly alive to the change made in the Indian Law. In that case at the time of the endorsement all the facts were known to the endorsee and the circumstances appearing from the evidence were such that the learned Judge was able to infer that the endorsee agreed to regard the maker as the surety and the payee as the principal debtor. He actually found that there was "a contract to the contrary". At page 175 the learned Judge observed :

"It is for the defendant to show that he is not, as he *prima facie* appears to be, the principal debtor. I think he has sufficiently proved this."

The learned Judge starts on the basis of section 37 and finally finds "a contract to the contrary" and that by reason of that contract the position of creditor and principal debtor is reversed. At page 177 he observes :

"That section (section 135 of the Contract Act) has to be read with the provisions of the Negotiable Instruments Act; and, as here there was—within the meaning of the Negotiable Instruments Act, section 37—'a contract to the contrary'

(1) (1889) I.L.R. 13 Mad. 172.

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making the defendant a surety of the principal debtor, the defendant is entitled to be discharged if he can bring the case within the terms of section 135 of the Contract Act."

It seems to me that these observations in SHEPHARD J.'s judgment in *Ramakistnayya v. Kassim*(1) far from being an authority in favour of the respondent are really an authority against him. That decision conclusively shows that we must start with the position that the maker of an accommodation note is the principal debtor and the payee is only a surety and that until "a contract to the contrary" appears that is the *prima facie* position. In that case there was "a contract to the contrary" found on the facts. There is no such "contract to the contrary" that has been pleaded or that can be found in this case. The decision of the lower appellate Court must, therefore, by reason of my conclusion on the first point, be reversed and the plaintiff given a decree against the first defendant also with costs here and in the lower appellate Court and the decree of the District Munsif restored.

Coming to the second point, I observe that my learned brothers, VENKATASUBBA RAO and REILLY JJ., held in *Annadana Jadaya v. Konam-mal*(2) that entering into an agreement with a principal debtor granting him time will not discharge the surety if the right against the surety is reserved. Mr. Rajah Ayyar has not contended that that decision is erroneous. He only relies on section 39 of the Negotiable Instruments Act. The mere fact that section 39 of the Negotiable Instruments Act provides in respect of a bill of exchange for such reservation does

(1) (1889) I.L.R. 13 Mad. 172.

(2) (1932) I.L.R. 56 Mad. 625.

not show that the main principle recognised as part of the law of contracts does not apply to other negotiable instruments. Section 39 would, therefore, seem to be a provision inserted *ex abundanti cautela*. On this point also the appeal has got to be allowed.

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VENKATASUBBA RAO J.—This second appeal has been referred to a Bench by KRISHNAN PANDALAI J. on the ground that it raises important questions of law. The lower Courts have found, and quite rightly, that the promissory note executed by the first defendant in favour of the second is an accommodation note. The note was endorsed by the payee (the second defendant) in favour of the plaintiff-Bank. At the time when it was so endorsed, the Bank had no notice that it was an accommodation note; but on a later date they obtained knowledge of the true character of the note. Subsequent to their obtaining such knowledge, the plaintiffs entered into an arrangement with the second defendant, the effect of which was that the Bank agreed not to proceed against him but reserved their rights against the maker of the note. The first defendant's plea is that, by reason of the agreement referred to above, he became discharged. The trial Court has disallowed his plea and passed a decree in favour of the plaintiff, but the learned District Judge has reversed the trial Court's decision and dismissed the suit. The plaintiff-Bank have filed the present second appeal.

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The question raised is, whether if the holder of an accommodation note having no notice of its true character at the time of his taking the note but after notice thereof gives indulgence to the

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payee (the party accommodated), he thereby discharges the maker (the accommodation party).

Section 37 of the Negotiable Instruments Act runs thus :

“The maker of a promissory note or cheque, the drawer of a bill of exchange until acceptance, and the acceptor are, in the absence of a contract to the contrary, respectively liable thereon as principal debtors, and the other parties thereto are liable thereon as sureties for the maker, drawer or acceptor, as the case may be.”

Under this section the maker of a promissory note is, in the absence of a contract to the contrary, liable to the holder as principal debtor and the payee as surety. Mr. Rajah Ayyar has most strenuously contended that where, between the parties to the note, the normal position is reversed (i.e., where the payee is the principal debtor and the maker, the surety as in the case of an accommodation note) the holder, by giving time to or releasing the payee, discharges the surety. The short question to be decided is, whether this is the true effect of section 37.

To sustain his position, Mr. Rajah Ayyar has had to contend that the words “a contract to the contrary” in the section refer to a contract between the maker and the payee. The section deals with the rights of the holder and provides that at his instance the maker shall be liable as principal debtor. What, then, can the contract to the contrary mentioned in the section have reference to? It must refer to a contract which displaces the normal right which the holder possesses in law. Moreover, according to this contention, the section goes further than even the rule as understood in English law, for, under the English decisions, a contract between the maker

and the payee is not by itself sufficient, but further the holder must have notice of it. If Mr. Rajah Ayyar's argument be accepted, the question of notice on the part of the holder becomes immaterial, as the moment a note is shown to be an accommodation note, the payee *vis-a-vis* the holder becomes the principal debtor. As the section stands, it does not provide that in the case of an accommodation note a different rule shall prevail; it recognises no exception but enacts in general terms that at the instance of a holder the maker shall be liable as principal debtor and the other parties (the payee being one such party) as sureties.

The learned Counsel contends that the section must be interpreted in the light of the English law on the point. This cannot be done for two reasons; first, the terms of the section being plain and unambiguous, it is not desirable or proper to turn to the English law for guidance and secondly, it is difficult to say with any degree of certainty what the English law was understood to be by the framers of the Act.

The English law was fluctuating and the textbooks treat the doubts on the point as having been entirely removed only recently by the House of Lords in *Rouse v. Bradford Banking Company*(1). There are four stages noticeable in the development of the law, so far as the English decisions go. It was held by Lord ELLENBOROUGH at *nisi prius* that, where a bill was accepted for the accommodation of the drawer, the drawer was to be considered the principal debtor, and the acceptor as his surety; and, therefore, that time

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(1) [1894] A.C. 586.

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given to the drawer by a holder with knowledge of the accommodation acceptance would discharge the acceptor, but time given to the acceptor would not discharge the drawer; *Laxton v. Peat*(1) and *Collott v. Haigh*(2). This marks the first stage. But this view was afterwards overruled at law, the acceptor even in the case of accommodation bills being considered as the principal debtor, though the holder, at the time of making the agreement (i.e., giving the indulgence), or even of taking the bill, knew the acceptance to have been without value; *Fentum v. Pocock*(3). See also *Harrison v. Courtauld*(4) and *Price v. Edmunds*(5). It was otherwise where the holder at the time of taking the instrument *actually agreed* to treat the accommodation party as surety only; *Manley v. Boycot*(6). This marks the second stage. But the equitable doctrine slowly gained ground that the holder discharges the accommodation party, if after knowledge of his true character he gives indulgence to the party accommodated; in other words, "the creditor was constrained to regard the position of the surety not by contract but by notice only." Rowlatt on Principal and Surety, second edition, page 5. Vide *Davies v. Stainbank*(7), *Pooley v. Harradine*(8), *Greenough v. McClelland*(9) and *Overend, Gurney, & Co. v. Oriental Financial Corporation*(10). This marks

(1) (1809) 2 Camp. 185; 170 E.R. 1123.

(2) (1812) 3 Camp. 281; 170 E.R. 1382.

(3) (1813) 5 Taunt 192; 128 E.R. 660.

(4) (1832) 3 B. & Ad. 36; 110 E.R. 14.

(5) (1830) 10 B. & C. 578; 109 E.R. 566.

(6) (1853) 2 El. & Bl. 46; 118 E.R. 686.

(7) (1855) 6 De G. M. & G. 679; 43 E.R. 1397.

(8) (1857) 7 El. & Bl. 431; 119 E.R. 1307.

(9) (1860) 30 L.J.Q.B. 15.

(10) (1874) L.R. 7 H.L. 348.

the third stage. The last and the fourth stage was reached when the decision was given by the House of Lords in *Rouse v. Bradford Banking Company*(1) already referred to. Owing to the loose reporting of *Oakley v. Pasheller*(2) and the decision in *Swire v. Redman*(3), it was regarded doubtful whether a notice to the holder given not at the time of his taking the bill but later would bind him to respect the position of the accommodation party as surety only. But the doubt seems to have been set at rest finally by the decision in *Rouse v. Bradford Banking Co.*(1). It is now indisputable that, irrespective of any actual assent by the holder, any indulgence given by him after obtaining knowledge of the real position to the party accommodated has the effect of discharging the accommodation party, whether the knowledge was obtained at the time of his taking the note or later; see Byles on Bills of Exchange, nineteenth edition, page 276, where the subject is most lucidly treated; also Rowlatt on Principal and Surety, second edition, pages 4 to 6.

At the time of the enacting of the Negotiable Instruments Act, the English law was thus in a state of flux; that being so, it is difficult to impute to the Legislature an intention which is not strictly in accordance with the wording of the section. As I have shown above, the strict doctrine at Common Law was that there should be an *actual agreement* by the holder at the time of taking the instrument to regard the accommodation party as surety only; see Rowlatt on

(1) [1894] A.C. 586.

(2) (1836) 4 C. & F. 207; 7 E.R. 80.

(3) (1876) 1 Q.B.D. 536.

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Principal and Surety, page 4. The plain construction of section 37 of the Negotiable Instruments Act leads one to suppose that it was this view of the English law that was adopted by the framers of the Act. It must be remembered that in the present case the creditor obtained knowledge that the note was an accommodation one, not at the time of his taking it but subsequently. In any event, where the obtaining of the knowledge was after the taking of the note, it cannot be said that the English Law at the time of the passing of the Indian Act could be regarded as having been finally settled; *Swire v. Redman*(1).

I may in passing refer to section 132 of the Contract Act (although that section, as it refers to joint debtors, does not apply to the case in hand) for the purpose of showing that the framers of the Indian Acts have not, as regards the law of suretyship, always adhered to the English principles.

I therefore hold that the agreement entered into between the plaintiff and the payee of the note did not have the effect of discharging the first defendant, the maker.

I have so far held that by reason of section 37 the maker, even in the case of an accommodation note, remains liable as principal and the payee as surety only, from the point of view of the holder's rights. If that be so, as a discharge of the surety does not result in a discharge to the principal, it follows that the maker, the first defendant, continues liable. Granting, however, that Mr. Rajah Ayyar's contention is well-founded that the position is inverted in the case of an accommodation note, that is to say, that the second

(1) (1876) 1 Q.B.D. 536.

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defendant (the payee) must be treated as the principal, it is conceded that under the agreement in question the holder's right to proceed against the maker (on this hypothesis, the surety) has been reserved. In such a case by giving indulgence to the principal, the creditor does not discharge the surety. I dealt with this point at length recently in *Annadana Jadaya v. Konammal*(1), decided by REILLY J. and myself. Mr. Rajah Ayyar accepts the correctness of this decision, but contends that the general law as to the reservation of remedies has no application to the case of negotiable instruments, except to the limited extent recognised in section 39 of the Act. That section runs thus :

"When the holder of an accepted bill of exchange enters into any contract with the acceptor which, under section 134 or 135 of the Indian Contract Act, 1872, would discharge the other parties, the holder may expressly reserve his right to charge the other parties, and in such case they are not discharged."

Why the Legislature has thought fit to enact a special section in these terms it is not easy to tell ; but I am not prepared to hold that section 39 by necessary implication abrogates the law as to the reserving of rights in the case of all negotiable instruments other than bills of exchange dealt with by it. I think that the proper canon of construction is that contended for by Mr. Parthasarathi, the learned Counsel for the plaintiffs (appellants). Maxwell states this rule of interpretation thus:

"Provisions sometimes found in statutes enacting imperfectly or for particular cases only that which was already and more widely the law have occasionally furnished ground for

(1) (1932) I.L.R. 56 Mad. 625.

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the contention that an intention to alter the general law was to be inferred from the partial or limited enactment, resting on the maxim, *expressio unius est exclusio alterius*. But that maxim is inapplicable in such cases. The only inference which a Court can draw from such superfluous provisions (which generally find a place in Acts to meet unfounded objections and idle doubts) is that the Legislature was either ignorant or unmindful of the real state of the law, or that it acted under the influence of excessive caution. If the law be different from what the Legislature supposed it to be, the implication arising from the statute, it has been said, cannot operate as a negation of its existence, and any legislation founded on such a mistake has not the effect of making that law which the Legislature erroneously assumed to be so.”;

Maxwell on the Interpretation of Statutes, seventh edition, page 268. I therefore hold that, even assuming that the payee is the principal debtor and the maker surety only, the plaintiffs are entitled to a decree against the first defendant, their rights having been expressly reserved by the agreement in question.

In the result, the second appeal is allowed and the suit is decreed with costs throughout.

A.S.V.

APPELLATE CIVIL.

Before Sir Vepa Ramesam, Kt., Officiating Chief Justice,
and Mr. Justice Venkatasubba Rao.

PRATIVADI BHAYANKARAM THIRUVENKATACHAR-
YULU AND TWO OTHERS (PLAINTIFFS 1 AND 3 AND LEGAL
REPRESENTATIVE OF SECOND PLAINTIFF), APPELLANTS,

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL,
REPRESENTED BY THE COLLECTOR, GUNTUR DISTRICT
(DEFENDANT), RESPONDENT.*

Resumption of inam and levying of full assessment—Proceedings by Government for—Legality of—Condition precedent to—Localising of inam if and when a—Ultra vires nature of resumption proceedings—Declaration of, and injunction restraining Government from recovering full assessment—Suit for—Limitation—Limitation Act (IX of 1908), arts. 14 and 120—Madras Revenue Recovery Act (II of 1864), sec. 59—Applicability of—Distraint pursuant to resumption proceedings and levying of full assessment—Effect—Refund of amount of full assessment illegally recovered—Suit for—Limitation—Limitation Act, art. 16—Applicability of.

An agrapharam village which was originally part of an estate comprised an extent of 388 acres 47 cents which was enfranchised and which was liable to pay a quit-rent of Rs. 26-8-2 and a jodi of Rs. 89-7-10 (total Rs. 116) to Government and an extent of 40 acres 90 cents which was unenfranchised inam. The three plaintiffs who instituted the suit out of which the appeal arose were co-sharer agrapharamdars and owned only fractions of the agrapharam. A large portion of the agrapharam had been alienated to others and they were in possession of the same. In October 1921 the Government, purported to resume the unenfranchised inam land and to levy the full assessment of Rs. 97-2-0 on the whole agrapharam. A demand for Rs. 66-7-0 was served upon the second plaintiff. He failed to pay the amount, his property was thereupon distrained, and he then

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* Second Appeal No. 389 of 1929.

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paid the same on 23rd May 1923. On 23rd March 1925 the plaintiffs instituted the suit for a declaration that the resumption proceedings were *ultra vires* and illegal, for an injunction restraining the Government from recovering the amount of the new assessment of Rs. 97-2-0 and for a refund of the amount of Rs. 66-7-0 paid by the second plaintiff. The plaintiffs were neither alleged nor proved to be in possession of the resumed lands.

Held: (1) The Government were not justified in imposing the new assessment of Rs. 97-2-0 for the 40 acres 90 cents unenfranchised inam on the whole aghaharam indiscriminately and taking distraint proceedings against the aghaharamdars without previously taking steps for localising the inam and apportioning the liability and the resumption proceedings were therefore *ultra vires* and illegal.

Where there is only one owner of the whole inam land, the unlocalisability of the inam may not be of much importance at any rate so long as the inamdar is willing to retain the land and merely contests his liability to pay the heavier assessment. If the inamdar wants to exercise his option of throwing up the land with the heavier burden so that it may be free for the Government to take it up and give it to some other person, the unlocalisability is a serious impediment for imposing a wholesale assessment upon the land without distinguishing the portion subject to the lighter burden and the portion subject to the heavier burden and without distinguishing the separate ownerships of the various parts of the village.

(2) Article 16 of the Limitation Act barred the claim for the actual refund of the amount paid by the second plaintiff as the suit was brought more than one year from the accrual of the cause of action, and

(3) Article 120 of the Limitation Act and not either article 14 of that Act or section 59 of the Madras Revenue Recovery Act (II of 1864) applied to the claim for a declaration and injunction.

Sankarappa Naicken v. Secretary of State, (1910) 20 M.L.J. 977, dissented from.

Where the act of the Government in respect of which a declaration and injunction is sought is an act which is illegal or *ultra vires* and the declaration is sought on that basis, in such a case neither section 59 of the Madras Revenue Recovery Act nor article 14 of the Limitation Act applies.

An act done in pursuance of an order which is *ultra vires* is *ultra vires* too and under article 14 of the Limitation Act the *ultra vires* act need not be set aside.

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APPEAL against the decree of the Court of the Subordinate Judge of Guntur in Appeal Suit No. 231 of 1927 (Appeal Suit No. 230 of 1926, District Court, Guntur) presented against the decree of the Court of the Additional District Munsif of Guntur in Original Suit No. 215 of 1925.

V. Suryanarayana and *M. Appalachariar* for appellants.

Government Pleader (P. Venkataramana Rao) for respondent.

Cur. adv. vult.

JUDGMENT.

RAMESAM OFFG. C.J.—The facts out of which this second appeal arises may be shortly stated. There used to be an ancient estate known as the estate of Bellamkonda in Sattenapalli Taluk of the present Guntur District but formerly Kistna District. This estate belonged to the Malraju family. Sometime in the eighteenth century the then holder of the estate, namely, Deshmukh Desh Pandya Malraju Ramarayanam Garu, granted an aghaharam of the village of Palidevarlapadu to one Prativadi Bhayankaram Vedantacharyulu Garu. The grant was an absolute one but liable to pay kattubadi of Rs. 89-7-10. The Kistna District Manual by Mr. Mackenzie, page 318, shows that in the year 1818 the then owner of Bellamkonda estate gave away his estate to Government by his will. His descendants are now in receipt of an allowance from Government. The Government thereby stepped into the Zamindar's shoes

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and were in receipt of the kattubadi. At the time of the Inam Commission, 1860, the village was enfranchised. Exhibit V-a is the inam register for the whole village. This document shows that the extent of the whole village was 521 acres 37 cents. The porambokes in the village were of the extent of 56 acres 22 cents and there were minor inams of 132 acres 90 cents. Deducting the porambokes and the minor inams amounting to 189 acres 12 cents the extent of the rest of the village was 332 acres 25 cents. Details are given in column 5 of the dry extent (327 acres 15 cents) and the wet extent (5 acres 10 cents). Of the dry 209 acres 55 cents were cultivated and the rest was waste. The wet was all waste. The annual collections from the cultivated dry lands is also given for about fifteen years, namely, Faslis 1247 and 1256-1269. The average per annum is shown at Rs. 246 and the permanent assessment is shown as Rs. 270. At the time when the register according to Regulation XXXI of 1802 was prepared, the owner of the village was Vedantacharlu, son of the original grantee. At the time of the survey the enjoyer was Kumara Vedantacharlu, son of the last person. At the time of the enfranchisement the enjoyers were two brothers, Aravamudalwar and Thirumalacharlu, sons of the last preceding person. Column 20 shows that they were divided. Exhibit I is the corresponding inam statement. It gives a pedigree and column 6 says that the aghaharam was granted in the Vaisagha Sudda of the year Vijaya which corresponds to May 1773. Under columns 7, 8 and 9 details are given of the 132 acres 90 cents of minor inams. First, there is the inam granted to the karnam 56 acres 22 cents and then there are

the inams to the village purohit 10 acres 23 cents, the Muhathad 10 acres 22 cents, the vettis 15 acres 33 cents and three private inams granted by the aghaharamdars to Kurmalla Venkatacharyulu 10 acres 23 cents, Prativadi Bhayankaram Appalacharlu 20 acres 45 cents and Kurmalla Varadacharyulu 10 acres 22 cents. The Inam Deputy Collector recommended the confirmation of the village as an inam adding a quit-rent of Rs. 26-8-2. The aghaharam was made subject to a total burden of Rs. 116 made up of the new quit-rent and the old jodi and title deed No. 1154 was issued. Alongside of this the purohit inam was also enfranchised separately. Exhibit V is the inam register. No. 1153 was the title deed for this. The Karnam, Muhathad and Vetti inams being village service inams were not then enfranchised. The other three personal inams were apparently intended to be enfranchised but the inamdars did not come forward to file inam statements and they were accordingly kept under attachment. This appears from Exhibit V-b the inam register dated the 23rd November 1865. It is not very clear whether specific lands were kept under attachment or merely a paper attachment was made. It appears as if no inamdars ever turned up asking for enfranchisement of those inams. They seem to have left the village altogether. In the year 1911 the fact that these inams of the extent of 40 acres 90 cents were omitted from enfranchisement was first brought out by the Revenue officers and after some correspondence, in which it appears that the Collector and the Board of Revenue recommended that the aghaharamdars may be

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dealt with leniently, the Government passed a final order on the 25th October 1921 as follows :

"The Government are not convinced of the necessity for the grant of any concessions to the aghaharamdars. They accordingly direct the resumption of the inam and the levy of the full assessment from the aghaharamdars who are admittedly in possession of the lands."

and the Board of Revenue was asked to issue the necessary instructions. Thereupon the Board passed a resolution dated the 31st October 1921 to the following effect :

"Resumption ordered, Government order communicated. Communicated to the Collector of Guntur for necessary action."

This was followed by the preparation of a new Inam Register, Exhibit IV, imposing an assessment of Rs. 97-2-0 as additional quit-rent on the whole aghaharam land. At this stage it may be observed that it was not suggested for anybody that any person other than the aghaharamdars were in possession of these inams. The inams were apparently mixed up with the rest of the aghaharam. They are not now localisable and are enjoyed either by all the aghaharamdars or by some one or other of them though we are not in possession of the details of the enjoyment. The Board's resolution was followed by the imposition of a seri cist of Rs. 107-6-0. This was followed by a distraint order served on the second plaintiff for Rs. 66-7-0 and the second plaintiff's property was distrained by the Government officials on the 23rd May 1923. Thereupon the present suit was filed on the 23rd March 1925 for a declaration that the proceedings of the Government are *ultra vires* and illegal and for recovering the amount of Rs. 66-7-0 paid by the second plaintiff. The three plaintiffs

filed the present plaint. According to paragraph 3 of the plaint, the first plaintiff is entitled to a half share, the second plaintiff to one-eighth share and the third plaintiff to one-eighth share, the other share (one-fourth) "being held by certain others". Paragraph 4 of the plaint alleges that a notice was served on the plaintiffs imposing the seri cist of Rs. 107-6-0 and refers to the distraint proceedings for Rs. 66-7-0 against the second plaintiff only. It alleges that the distraint order was not clear as to the nature of the demand but the plaintiffs infer that it must have related to unlocalised inam land. The old quit-rent of Rs. 116 was paid by them but not the additional demand. In paragraph 6 the plaintiffs say :

"Plaintiffs believe that they are not now in possession of the said inam and it is not possible to localise the inam. Plaintiffs are co-sharer aghaharamdars and own only fractions of the aghaharam land. A large portion of the aghaharam was alienated to others who are now in possession of the same. Some other portions are held by certain others and enjoyed by them."

The last two sentences seem to refer to the alienation of one-fourth aghaharam not held by the plaintiffs. In the written statement of the Secretary of State for India in Council it was pleaded that the aghaharamdars had no right to these inams and that they were excluded from the Inam Settlement. In paragraph 3 it is alleged that even if the plaintiffs were in possession and enjoyment for any length of time "the Crown has the right to levy the assessment at any time and there is no bar of limitation for the Crown to exercise such a right." Paragraph 4 refers to the Government Order directing the resumption and alleges that an

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assessment of Rs. 97-2-0 was imposed. The fact that the inam was unlocalisable is not denied in the written statement and in fact both the lower Courts have proceeded on the footing that the inams were unlocalisable. The District Munsif found that these inams were included in the Inam Settlement of 1860. On a construction of Exhibit V-a he has found that the whole village was enfranchised and that the agrapharam lands on which the total land-tax of Rs. 116 was imposed included the suit inam land. In paragraph 9 of his judgment he refers to the long delay and to the fact that for the first time the Tahsildar reported in 1911 that the agrapharamdars were in possession of these lands. In paragraph 10 he thinks that the Government are not entitled to resume the land and levy full assessment. In paragraph 11 he thinks there is another objection to the resumption and the levy of assessment, namely, the fact that these inams are not localisable. He accordingly finds issues 2 to 4 in the suit for the plaintiffs. The fourth issue raises the question whether the resumption order in G.O. Mis. No. 2355 is illegal and invalid and not binding upon the plaintiffs. In paragraph 13 of his judgment he finds that the claim to a refund of the amount is barred by limitation. In the result he gave a decree declaring that the Government are not entitled to levy and collect full assessment for the suit lands from the plaintiffs and dismissed the claim for refund of the specific sum of money. There was an appeal by the defendant. This appeal was disposed of by the Subordinate Judge of Guntur. In paragraph 10 of his judgment he says :

" I agree with the Court below that the Government is not entitled to resume the lands in question and levy full assessment thereon."

In paragraph 11 he says that the agrapharamdars had been enjoying the inams in question as they had merged in the agrapharam proper. In paragraph 12 he disposed of the question of limitation and comes to the conclusion that even the suit for a declaration is barred by time under section 59 of the Madras Revenue Recovery Act. In paragraph 14 he observes :

" I agree with the Court below that the Government is not entitled to proceed against the suit lands. Even if the plaintiffs are entitled to a declaration, a declaration and injunction against the Government are unnecessary. The Government would respect the findings of Courts."

These observations imply that though a relief by way of declaration and injunction was not granted by the Court the Subordinate Judge expected the Government to respect the findings of the Court and not to continue to levy the assessment on the lands. The plaintiffs have filed this second appeal.

This second appeal originally came on before my brother VENKATASUBBA RAO J. who referred it to a Bench.

In second appeal as we have come to conclusions on the various issues the opposite of those arrived at by the lower Courts, I proceed to deal with this matter in some detail.

The first question that naturally arises for discussion is—are the suit inams of 40 acres 90 cents included in the Inam Settlement of 1860 and is Government's claim to resume them or assess them now erroneous and unjustified ? This looks at first sight to be a question of fact and, if so, we

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are bound to accept the findings of the Courts below. But when we look at the materials on which the conclusions have got to be arrived at, they consist not of oral evidence but of the documents representing the proceedings of the Inam Commission.

[The learned Judge considered the documents bearing on the point and proceeded :—]

In our opinion, therefore, the suit inam of the extent of 40 acres 90 cents was not covered by Exhibit V-a or title-deed No. 1154. To this extent we differ from the conclusion of the lower Courts which were of the opinion that the Government has no right to take further proceedings for the resumption or assessment of these 40 acres 90 cents. Having come to the conclusion that the 40 acres 90 cents were not dealt with in 1860, it follows that the Government is entitled to take further steps either for the enfranchisement or for the assessment or for the resumption of these inams and whichever they choose to do cannot be questioned in Civil Courts. Nor is there any limitation for taking such a step; vide *Boddupalli Jagannadham v. The Secretary of State for India in Council*(1) where it is pointed out that there is no period of limitation prescribed by any law within which alone the Government should exercise its prerogative of imposing assessment on land liable to be assessed with public revenue. So far we are in favour of Government.

The next question that arises is—are the steps taken by the Government for the purpose of enforcing its right and carrying out its orders of

resumption legal and valid or are they *ultra vires*? On the facts found above we come to this state of things. First we have got an agra-haram of 388 acres 47 cents which is enfranchised and which is liable to pay a quit-rent of Rs. 26-8-2 and a jodi of Rs. 89-7-10 (total Rs. 116) to Government. Then we have got an agra-haram inam land of 40 acres 90 cents which is liable to pay an assessment of Rs. 97-2-0 under Exhibits III and IV. I am of opinion that the claim to impose Rs. 97-2-0 on the inam land of 40 acres 90 cents is valid, therein differing from the Courts below. But the question arises whether the proper steps and the proper proceedings have been taken by the Government for the purpose of enforcing its right and recovering this Rs. 97-2-0. The land subject to this burden of Rs. 97-2-0 is distinct (in theory) from the land which is subject to the burden of Rs. 116. The latter is a very favourable burden being Rs. 116 on 388 acres 47 cents. The former Rs. 97-2-0 on 40 acres 90 cents is a heavier kind of burden. The two cannot be mixed up and totalled up as if they are burdens of the same kind and it is not permissible to speak of a total burden of Rs. 213-2-0 upon agra-haram land of 429 acres for it is open to an inamdar to retain the land which is subject to the lighter burden of Rs. 116 and give up the 40 acres 90 cents subject to the heavier burden of Rs. 97-2-0. If he does not want to incur the heavier liability he is only to abstain from paying it and Government can resume the land and grant it to some other. Where there is only one owner of the whole inam land, it may be that the unlocalisability of the inam is not of much importance at any rate so long as the

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inamdar is willing to retain the land and merely contests his liability to pay the heavier assessment. If the inamdar wants to exercise his option of throwing up the land with the heavier burden so that it may be free for the Government to take it up and give it to some other person, the unlocalisability is a serious impediment for imposing a wholesale assessment upon the land without distinguishing the portion subject to the lighter burden and the portion subject to the heavier burden and without distinguishing the separate ownerships of the various parts of the village. The learned Government Pleader referred to my remarks in the judgment of myself and MADHAVAN NAIR J. in Second Appeals Nos. 648 to 832 of 1927 relating to the correct application of the decisions in *Secretary of State for India v. Rajah of Pittapur*(1) and *Rama Rao v. The Secretary of State for India*(2). One of these, namely, *Secretary of State for India v. Rajah of Pittapur*(1), is relied upon by the District Munsif in paragraph 11 of his judgment and by the Subordinate Judge in paragraph 9 of his judgment. In my judgment in Second Appeal Nos. 648 to 832 of 1927 I observed that that case did not support the proposition of the Subordinate Judge in that case. In *Secretary of State for India v. Rajah of Pittapur*(1) it was found by the High Court that it was not shown that the zamindar was in actual possession of the village service inams either by inference or admission or otherwise and therefore patta could not be granted to him. The decision in *Rama Rao v. The Secretary of State for India*(3) is

(1) (1913) 24 M.L.J. 530.

(2) (1912) M.W.N. 542.

(3) (1913) M.W.N. 639.

similar. But as to *Rama Rao v. The Secretary of State for India*(1) it was observed that, if it could not be shown by inference, admission or otherwise that the zamindar was in possession of village service inams, a patta could not be given to him, and both parts of the proposition were illustrated in that case. I have no desire to resile from anything I said in that judgment but the difference in the facts must be noticed. In those cases there was no question of plurality of ownership. There was only one zamindar and it was found by inference that he was in possession and it was not suggested by the zamindar that that land had got to be kept separate from the other lands because it is subject to a burden estimated on different principles from the rest of the land. On the facts of the case of *Rama Rao v. The Secretary of State for India*(1) and on the facts of Second Appeals Nos. 648 to 832 with which I was dealing, there was no suggestion of two kinds of inam lands one land being subject to one kind of quit-rent and the other land being subject to another kind of quit-rent and both being mixed up. All that we had in that case was a zamindar being in possession by inference of service inams within his zamindari and the question was whether a patta could be issued to him or not. There was no question of two owners and there was no question of different kinds of assessment being mixed up. If such a question was raised and the zamindar wanted to know the lands subject to separate quit-rent so that he might throw it up whenever he wanted to do so, it may be that he was entitled to insist on localisation. But these

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points did not arise in that case but in the present case we have got the fact that the agraaharam was held by different owners. Even if we think that the plaintiffs are not enjoying their shares of the agraaharam by metes and bounds, certainly the other one-fourth of the agraaharam is being separately enjoyed by some other alienees. There is no justification for dealing with the three plaintiffs who are owners of a distinct half, one-eighth and one-eighth shares but not divided by metes and bounds and the owners of the other separated one-fourth share as if they are all one unit. On the face of it, the question arises who enjoys the land 40 acres 90 cents. It may be that the whole of it is in the possession of the original agraahamdars and no part of it is in the possession of the alienees or it may be that the alienors and the alienees must be presumed to be in possession of parts of the inams proportionate to their own shares. Until this question is decided it is not proper nor is the Government entitled to levy an assessment of Rs. 97-2-0 upon the whole agraaharam without the several sharers of the agraaharam being able to know the portion on which the new burden falls and without, in the case of an individual sharer, the agraahamdar being able to say which portion of his land is subject to the new burden and which portion is subject to the old quit-rent. Under these circumstances it seems to me that the obvious remedy of the Government to enforce the right which they undoubtedly have of imposing the new assessment is, if they cannot make the agraahamdars agree as to the portions liable to the new assessment, to take steps by filing a kind of interpleader suit

making all the agraahamdars parties in which it could be determined which owner should be liable to this new burden and in what shares. In such a suit the alienees may perhaps plead that there was a representation to them that the land was subject only to a proportionate part of the old quit-rent and it was only on that representation that they purchased the land and that the whole burden of the new assessment should fall upon the alienors or it may be that there was no such representation and that the facts were known to both the alienees as well as the alienors and all are liable to a proportionate share of the new burden on equitable principles. Government has not very much to do in such a suit. That is a point which the alienors and the alienees have to fight out between themselves and, once the shares of the various sharers in the new burden are determined, the Government will only have to call upon each sharer to localise, according to his option, the particular part of the land liable to his share of the new burden. Once it is localised, if he is willing to pay the new assessment, he can go on paying. If he does not pay, he can throw it up and Government can resume it and grant it to a new grantee on such terms as they like. In such a case no question can arise of mixing up two kinds of assessment and indiscriminately making the new assessment a burden upon all the agraaharam land most of which is *prima facie* not liable for it. The need for localisation in a case of this kind is seen far more clearly than in a case where the facts are not complicated by difference of ownership and difference in the kind of assessment imposed upon the land. While therefore

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holding that the Government was perfectly right in claiming to impose the new assessment of Rs. 97-2-0 for the 40 acres 90 cents of unenfranchised inam, I think they are not justified in imposing it on the whole agra-haram indiscriminately and taking distraint proceedings against the agra-haramdars without localisation. For instance, in the present case there is a distraint order for Rs. 66-7-0 against the second plaintiff. Paragraph 6 of the plaint denies that the plaintiffs are in possession of the disputed inams. The denial is perhaps not wholly true. When a proper enquiry of the kind I have indicated above is made it may be that it will be found that the second plaintiff is or must be taken to be in possession of some portion but still Government cannot proceed to throw the burden indiscriminately upon any one of the agra-haramdars as they choose without determining the liabilities *inter se*. The question of throwing this burden and determining its aliquot parts upon the agra-haramdars is different from the imposition of quit-rent upon the whole inam village in 1860. The agra-haramdars, though they were enjoying the village in two shares, chose to file a joint inam statement and were content to take a joint patta. But there is no such consensus of minds between the various agra-haramdars. The new burden cannot be thrown indiscriminately without previously localising the burden not only with reference to the land but with reference to the owners. I have therefore come to the conclusion that the proceedings imposing the new quit-rent on the whole agra-haram, the demand and the distraint order for the purpose of realising it, without having previously taken steps for localising the inam, are illegal and *ultra vires*.

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On these findings the next question arises whether the suit is barred by limitation. So far as the actual refund of the amount paid by the second plaintiff is concerned, we are of opinion that the suit is undoubtedly barred by article 16 of the Limitation Act and that portion of the claim therefore fails. The distraint proceedings were on the 23rd May 1923. The suit was originally filed on the 6th March 1924. That would be in time because the two months' notice which has to be given to the Government has to be deducted, but the plaint was returned on the 23rd June 1924 for presentation to the Additional District Munsif's Court. Probably the Principal District Munsif's Court and the Additional District Munsif's Court have different jurisdictions allotted to them, though the Courts are situate in the same place. Instead of questioning the order by an appeal the plaintiffs seem to have re-presented the plaint to the same Court, on the 30th June 1924. The Court again directed its return on the 23rd March 1925. This time the plaintiffs submitted to the order and presented it to the Additional District Munsif's Court. The Additional District Munsif's Court must be assumed to be the proper Court before which the plaint had to be filed and the other Court was not the proper Court. On that assumption there is no excuse for the delay committed from the 23rd June 1924 to the 23rd March 1925. The plaint as presented on the 23rd March 1925 would be more than one year from the accrual of the cause of action. The suit for refund will be barred. But, in my opinion, the whole of this reasoning has no bearing on the question whether a prayer for a declaration and

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injunction is also barred. The proper article for a suit for a declaration and injunction is article 120 of the Limitation Act. It may be that, if the ground of such a suit is not that the act of Government was *ultra vires* or illegal but a mere irregularity which does not vitiate the main proceedings but relates only to some question of detail such as the exact amount to be collected or something of that kind which does not make the proceeding *ultra vires*, in such a case article 14 of the Limitation Act may apply or in a case falling under the Revenue Recovery Act even section 59 of the Revenue Recovery Act may apply. But where the act of the Government in respect of which a declaration and injunction is sought is an act which is illegal or *ultra vires* and the declaration is sought on that basis, then in such a case neither section 59 of the Revenue Recovery Act nor article 14 of the Limitation Act applies. So far as article 14 of the Limitation Act is concerned, myself and MADHAVAN NAIR J. have dealt with this matter at great length in our judgment in Second Appeals Nos. 648 to 832 of 1927. Only one portion of that judgment comes for notice. While dealing with *Surannanna v. Secretary of State for India*(1) and pointing out that JENKINS C.J. and CANDY J. differed and the matter was referred to PARSONS J. and after quoting the remarks of JENKINS C.J. at pages 445, 446, and 447, I happened to observe :

"According to this view the question whether the act of Government is *ultra vires* or *intra vires* arises only in the case of an order; but where a more material act like an ouster occurs, the question of *ultra vires* or *intra vires* does not arise.

(1) (1900) I.L.R. 24 Bom. 435.

There is a cause of action and the plaintiff should bring his suit within one year from the act."

These sentences refer to what I thought was the view of JENKINS C.J. There are no actual words in his judgment the effect of which is capable of being described by the above. PARSONS J. agreed with JENKINS C.J. and there are sentences in his judgment which, if they do not express, imply that where there is an act one year's period always applies and with reference to the combined effect of JENKINS C.J.'s and PARSONS J.'s remarks I must have made the above remarks. But, in my opinion, all this is beside the point in the face of the Privy Council decision in *Laxmanrao Madhavrao v. Shriniva Lingo*(1), which was discussed lower down in my judgment. According to that judgment whether it is an act or an order that is questioned the distinction between that which is *ultra vires* and that which is not *ultra vires* stands. In the case of an act or order which is *ultra vires* the action is not strictly an action to set aside but merely for a declaration that it is illegal and does not bind the plaintiff. The phrase "to set aside" is *prima facie* applicable to a case vitiated only by some irregularity but otherwise valid. But in the case of an act which is *ultra vires* it has not got to be set aside. Only for the sake of clearness a party may seek a declaration that it is invalid and not binding on him. This is the view taken by a Bench of this Court about section 59 of the Revenue Recovery Act in *Marukolandayammal v. Secretary of State for India*(2). The same view was taken in *Secretary of State v. Nagaraja Aiyar*(3). In this

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(1) (1927) I.L.R. 51 Bom. 830 (P.C.) (2) (1932) I.L.R. 55 Mad. 876.
(3) (1923) 44 M.L.J. 645.

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view it is unnecessary to discuss the applicability of the decision in *Secretary of State v. Venkatratnam*(1). The case of *Raman Naidu v. Bhassoori Sanyasi*(2) also takes the same view in a case which is plainly *ultra vires*. In the face of these recent decisions of the Privy Council and of this Court, we are not inclined to agree with the reasoning in the decision in *Sankarappa Naicken v. Secretary of State*(3). Though the decision in that case may be right as to the actual refund of the amount, in so far as it sought a declaration, the case was not correctly decided if the basis for the declaration was that the action of the Government was *ultra vires*.

A number of decisions on the Madras Land Encroachment Act (III of 1905) were referred to and cited before us by the learned Government Pleader. In my opinion, though there is some similarity of language between the sections of that Act and section 59 of the Revenue Recovery Act, it is most unsafe to use any of the decisions on that Act in connexion with article 14 of the Limitation Act or section 59 of the Revenue Recovery Act. The scope of that Act is entirely different. Provided the necessary formalities are observed, all the orders, i.e., those imposing the penalty and the levy of the penalty, would be under the Act but in the present case the act of resumption is not under the Revenue Recovery Act at all but under the general law. The prayer for declaration does not relate to a proceeding under the Act. In my opinion, it is most unsafe to use decisions under the Land Encroachment Act for the point under

(1) (1923) I.L.R. 46 Mad. 488. (2) (1903) I.L.R. 26 Mad. 638.
(3) (1910) 20 M.L.J. 977.

consideration. On the other hand in *Kamulam-mal v. Secretary of State for India*(1) BENSON and KRISHNASWAMI AYYAR JJ., while holding that the suit for refund of water-cess was barred under section 59 of the Revenue Recovery Act and article 16 of the Limitation Act, granted a declaration in favour of the plaintiff in a suit relating to water-cess. In my opinion, neither article 14 of the Limitation Act nor section 59 of the Revenue Recovery Act applies to the prayer for declaration in this case but the right of the Government to get the extra revenue by appropriate proceedings stands. They have only to resort to such proceedings, that is to say, by first getting the inam in question allotted between various aghaharamdars and next localising the land in the possession of each aghaharamdar, and the right to the extra revenue sought to be recovered by Government is then ensured and the Government can recover the new amount or proceed against the particular land subject to it as they please ; but, at present, on the ground that it is not shown that either the second plaintiff or the first and the third plaintiffs are in possession of the particular bit of land on which the Rs. 97-2-0 is newly imposed by Government, we think that a limited declaration and corresponding injunction should be issued in favour of the plaintiffs. The plaintiffs will have a declaration that the Government will not be entitled to recover the new assessment of Rs. 97-2-0 claimed by its proceedings dated the 25th October 1921 until they take proper steps to have the land localised and there will also be an injunction restraining them from recovering such

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(1) (1910) 7 I.C. 402.

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amount by proceedings against any of the agra-haramdars indiscriminately. But they will be at liberty to take such proceedings after the separate liabilities of the agra-haramdars and the lands subject to the liabilities are determined in appropriate proceedings. Each party will bear their own costs throughout.

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VENKATASUBBA RAO J.—We are in this suit concerned with a plot of land of the extent of 40 acres 90 cents in the agra-haram village of Pali-devarlapadu, which was originally comprised in the estate of Bellamkonda. This land represents three unidentifiable minor inams in the said agra-haram. The suit has been brought by three of the agra-haramdars questioning the propriety of the Government's act, which consisted of (a) the resumption of the land in question and (b) the levying on it, as a consequence thereof, of the full assessment of Rs. 97-2-0. A demand for Rs. 66-7-0 (how this figure was arrived at has not been explained) was served upon the second plaintiff, who failed to pay the amount. Thereupon his property was distrained, and he then paid the sum mentioned in the distraint order. The defendant is the Secretary of State for India, and the plaintiff asks for two reliefs: first, that it may be declared that the resumption proceedings are bad and, secondly, that a refund may be directed of the amount paid by the second plaintiff.

The material dates are the following. On the 25th October 1921 the order directing the resumption was made by the Government. The sum mentioned above, namely Rs. 66-7-0, was paid by the second plaintiff on 23rd May 1923. The plaint was originally presented on 6th June 1924 and

finally re-presented on 23rd March 1925. In computing the period of limitation, the lower Court has refused to exclude the time between these two dates, and, as I agree with its view, I do not propose to discuss the grounds on which that view is based. It may therefore be taken that 23rd March 1925 is the date when the plaint was filed. The lower Court has held that under section 59 of the Madras Revenue Recovery Act (Act II of 1864) the whole claim is barred, that is to say, both the claim to the declaration as well as to the refund.

As I have already said, two reliefs are claimed. The first question that arises is, whether both the reliefs stand on the same footing in regard to section 59 of the Revenue Recovery Act. That section runs thus:

"Nothing contained in this Act shall be held to prevent parties deeming themselves aggrieved by any proceedings under this Act, except as hereinbefore provided, from applying to the Civil Courts for redress; provided that the Civil Courts shall not take cognizance of any suit instituted by such parties for any such cause of action, unless such suit shall be instituted within six months from the time at which the cause of action arose."

As regards the order of resumption, can it properly be described as a proceeding under the Act? The plaintiffs deem themselves aggrieved by the order of resumption; only if it be held that that order amounts to a proceeding under the Act, the terms of section 59 can come into play. I fail to understand by what stretch of language the resumption order can be treated as a proceeding under the Act. It is forgotten that the resumption proceedings have nothing to do with the Act; they are conducted independently of

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that Act and a decision is arrived at. When the Government decides that the lands are resumable and levies an assessment, then and then alone it takes action under the Act, utilising its provisions for the purpose of collecting the assessment that has already been levied. That these two proceedings, namely, the decision to resume and the actual collection, are distinct and independent has been ignored by the lower Court and its view is therefore utterly unsound. The cases under the Land Acquisition Act, to which the learned Government Pleader has referred us, are not in point; the analogy is misleading, as in the case of that Act the proceedings relating to the decision as well as to the collection fall under the provisions of that Act.

It is next contended by the learned Government Pleader that it is wrong to separate the Government's decision from its collection of the assessment, and he relies for that position upon *Sankarappa Naicken v. Secretary of State*(1). The judgment in that case is very brief, and the learned Judges dispose of the point in the following short passage :—

“It is contended that, though the suit may be barred in so far as it seeks to recover the assessment levied, still it is not barred so far as the declaration and injunction prayed for are concerned.

The necessity for asking for these reliefs all arise out of the action of Government in levying the assessment, and is part of the grievance for which under section 59 the plaintiff may apply to the Civil Court for redress.”

With this observation I am unable to agree. The idea underlying the passage is that the levying of the assessment, by which is meant the

(1) (1910) 20 M.L.J. 977.

collecting of the amount, furnishes the cause of action both as to the declaration and the refund. With great deference, that assumption is wrong; the moment the order of resumption is made, the plaintiff's right to seek a declaration (if he chooses to exercise it) comes into existence. The question is, whether the order amounts to a proceeding under the Act. This has not been considered and the very point to be decided has been assumed. I therefore respectfully dissent from *Sankarappa Naicken v. Secretary of State*(1) and it is unnecessary to deal with any subsequent decision where the view expressed in it has been approved. For these reasons, so far as the prayer for declaration is concerned, I am clearly of the opinion that section 59 of the Revenue Recovery Act does not apply.

The learned Government Pleader then contends that in any event the case is governed by article 14 of the Limitation Act. Under that article a suit to set aside any act or order of an officer of Government in his official capacity must be brought within one year from “the date of the act or order”. It has been held that article 14 has no application when the order is *ultra vires* or made without jurisdiction. Such an order is a nullity and therefore need not be set aside. What orders have been regarded as *ultra vires* has been discussed in numerous cases; see Mitra on Limitation, 1932 edition, page 1105. Where a Collector, who has no right to resume or assess land which is not Chowkidhari Chakran, purports to do so, it has been held that he is acting without jurisdiction and that his order is a nullity. Again, where the Collector, who is bound to transfer

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resumed Chowkidhari Chakran land to the zamindar of the estate, transfers, in contravention of the provisions relating thereto, such land to any other person, it has been held that his order is *ultra vires* and need not be set aside within the time allowed by article 14. In the passage in *Mitra I* have referred to above, various other kinds of orders held by the Courts to be *ultra vires* are enumerated. The question then is, is the order in the present case directing the resumption *ultra vires* and without jurisdiction? This in effect raises the point whether the order made by the Government was within its competence and the proceedings resulting in it were properly conducted.

The first question that arises in this connection is, whether the agraaharam in question was or was not excluded from the assets of the zamindari at the time of the Permanent Settlement. The grant of the agraaharam in inam was made in the year 1774 (fasli 1182) by the then zamindar, subject to the payment to him of jodi or favourable quit-rent of Rs. 89-7-10. The presumption, as I have pointed out in *Secretary of State v. Sri Rajah Vasireddi*(1), is that inams granted on favourable quit-rent were at the Permanent Settlement excluded from the zamindari. About the year 1817 the then zamindar raised the jodi to Rs. 190 and that act of his led to a certain suit, with which we are not concerned. Mr. V. Suryanarayana, the plaintiffs' learned Counsel, contends that the conduct of the zamindar is consistent only with the notion that the agraaharam was included in the assets. This

(1) (1929) 30 L.W. 129.

position is clearly untenable, as the act of raising the jodi indicates nothing more than that the quit-rent or jodi (as distinguished from the agraaharam itself) was included in the assets. Moreover, the Inam Settlement of the year 1860, to which I shall presently refer, could have proceeded only upon the footing that the village was excluded from the zamindari and the Government had therefore a right to deal with it. Accordingly the contention that the agraaharam was included in the assets must be overruled.

We then proceed to the Inam Settlement of 1860. What happened then is one of the vital questions in the case. At the time of the enquiry the extent of the village was furnished by the agraaharamdars, which formed the basis of the settlement. The entire extent was shown as 521 acres 37 cents. Two deductions were made from this (i) poramboke, 56 acres 22 cents, and (ii) inams, 132 acres 90 cents. The balance was 332 acres 25 cents, made up of dry land 327 acres 15 cents and wet 5 acres 10 cents. The Deputy Collector after some calculations recommended that Rs. 270 might fairly be taken as representing the value of the village. The Inam Commissioner raised the valuation to Rs. 300 and the village was enfranchised on payment of a quit-rent of Rs. 116, inclusive of the jodi already payable of Rs. 89-7-10. I have said that the extent of the inams deducted was shown as 132 acres 90 cents.

The following are the particulars :—

			ACRES.	CENTS.
Vetti Inam ...	...	...	15	33
Karnam Inam ...	...	...	56	22
Purohit Inam ...	...	...	10	23
Muhataad Inam ...	...	...	10	22

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Then follow the three private inams with which we are concerned :—

	ACRES.	CENTS.	
Inam granted to Kurmala Venkata-charlu	10	23	} 40 acres 90 cents.
Inam granted to Prativadi Bhayan-karam Appalacharlu	20	45	
Inam granted to Kurmala Varada-charlu	10	22	
Total ...	132	90	

The suit relates to the last three items of the total extent of 40 acres 90 cents. The question we have to decide is whether the enfranchisement extended to these three items also. The plaintiffs' contention that it did so extend I am unable to accept. It is difficult to imagine that the Government included in the village confirmed in the inamdars' favour the land which on the latter's own showing had previously been granted away to third parties. But it is argued that the Inam Register shows that Rs. 270 was fixed as the value of "the village", the argument implying that what was enfranchised was the whole village. This reasoning is fallacious, as it is an admitted fact that at least some inams were excluded. The purohit service inam was simultaneously confirmed on payment of one-eighth quit-rent, the Muhatad inam, it appears, was resumed at the same time and the karnam service inam was also enfranchised. The argument therefore that any special importance attaches to the use of the words "the village" has no force. The poramboke, which was unproductive land, may well have been included, but it does not follow that the three minor personal inams, to which I have

referred, were similarly included. Then again, the terms of the title-deed issued in favour of the inamdars also throw some light. It does not say that their title to the whole village was acknowledged, but recites :

"I acknowledge their title to the agrapharam village of Palidevarlapadu * * * claimed to be of 327 acres 15 cents dry land, 5 acres 10 cents wet land * * * ."

Lastly, in 1865 an order was made directing the attachment of these three inams under Inam Rule 26. That rule is as follows :—

"When an inam has to all intents and purposes been entirely abandoned, there being no acknowledged owner in existence, or if, being in existence, he omits to come forward to claim it, and when the recorded possessor of an inam fails, after due notice, to appear to prove his title, such inam will in the first instance be placed under attachment by the Collector of the District and, after the expiration of one year from the date of the notice, will be held to be liable to be fully assessed to the public revenue under the general powers conferred on Collectors by Regulation XXXI of 1802."

It must be on one of the grounds mentioned in this rule that the inams were directed to be attached. Very probably the recorded owners of the inams failed after due notice to appear and prove their title and the inams were thereafter placed under attachment. But the rule goes on to provide that, at the end of one year from the date of the notice, the inams will be fully assessed to public revenue. In this case the matter appears to have been lost sight of and nothing was done beyond attaching the inams. There can be no doubt that what happened in 1865 was a part of the same enquiry that started in 1860. These proceedings, far from showing that the three minor inams were included in the village, prove the exact opposite. To resume the narrative, in 1911

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it was discovered that these three inams had been left out and reports were called for from the Collector. The Board of Revenue suggested to the Government that "the present agrapharamdars might be given the option of enfranchisement on the same terms as those on which the agrapharam is held". But the Government did not approve of this suggestion, and by their order dated the 25th October 1921 "declined to show any concession to the agrapharamdars" and directed the resumption of the inams and the levy of the full assessment from them. The Tahsildar of the taluk reported that the highest tharam assessment in the agrapharam was Rs. 2-6-0 per acre and the total assessment therefore on the unlocalised extent of 40 acres 90 cents might be fixed at Rs. 97-2-0. The result was that an additional quit-rent of Rs. 97-2-0 was imposed on the whole agrapharam land. I must here remark that, in the course of the enquiry that commenced in 1911, two of the agrapharamdars appeared and stated that the minor inams in question had reverted to them, the purpose of the grant having ceased.

I have just pointed out that the argument that the Government could not resume these inams on the ground that they had been included in the village at the settlement of 1860 cannot prevail. A further point, however, has been raised that the inams being unlocalised, the Government had no right to resume them. This position requires to be carefully examined. First, turning to the rulings of this Court, in *Secretary of State for India v. Rajah of Pittapur*(1) (decided by SANKARAN

(1) (1913) 24 M.L.J. 530.

NAIR and OLDFIELD JJ.) the inam lands as such had disappeared, that is to say, the Government were not able to identify or localise them. The zamindar refused to receive the pattas on the ground that he was not in possession of the inams. SANKARAN NAIR J. observed :

"It is necessary therefore for the Government before imposing quit-rent to localise the lands."

But the rule stated so generally has been qualified in a later decision. In *Rama Rao v. The Secretary of State for India*(1) SUNDARA AYYAR and AYLING JJ. lay down the test, has it been shown that the lands are in the possession of the plaintiff? If so, they can be resumed. That fact, like any other fact, may be proved by direct evidence or admission or may be inferred. The question arose in respect of three inams attached to the offices of Nattanmai, Karnam and Kavalgar. Applying the test mentioned above, the learned Judges, on the finding that the Kavalgar lands were in the plaintiff's possession, held that they were rightly resumed. As to the Karnam's inam, the lower appellate Court had found that it was in the plaintiff's possession; but the High Court, reversing that finding, set aside the resumption of that inam. In regard to the Nattanmai inam, the same test was again applied, the plaintiff was found to be in possession and the resumption was held valid. The same principle seems to have been adopted in the batch of Second Appeals (Nos. 648 to 832 of 1927, etc.), on which the learned Government Pleader has so strongly relied. In *Rama Rao v. The Secretary of State for India*(2) the resumption was set aside on the ground that the land, which

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(1) (1912) M.W.N. 542,

(2) (1913) M.W.N. 639.

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was Nattanmai inam, could not be localised. BENSON and SUNDARA AYYAR JJ. observed that there was no evidence that the plaintiff was in possession of the inam lands. So much for the authorities cited. As to the principle involved, *prima facie* what cannot be identified cannot be resumed. This is self-evident; but, if the doctrine be strictly applied, it must lead to obvious inconvenience and injustice. It has therefore been rightly held that, whether localised or not, if the land has been proved to be in the party's possession, he can be called on to pay the assessment thereon. This is the effect of the decisions; but even in such a case steps should be taken to demarcate the land. *Ex hypothesi* it is impossible to localise the plot, but that does not absolve the Government from the duty of setting apart some specific land as being liable for the quit-rent. As against the Crown a subject has an undoubted right to relinquish his holding and thus free himself from the burden of the assessment. To refuse to mark off the land would be to deny to him this right. When portions of the inam, as is alleged in the present case, have passed by alienation into the hands of third parties, the situation becomes still more complicated. It may be that the alienee is able to prove to demonstration that the portion in his possession never comprised the land sought to be resumed. To impose the assessment upon the whole village generally would be in such a case a very harsh step. If the owners consent, there can be no difficulty in Government demarcating the land. In the absence of the necessary consent, the Government is bound to take appropriate action

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with a view to setting apart the land and apportioning the liability. If the several owners or the several co-sharers prove obstructive, the Court will undoubtedly take notice of that fact when deciding the case where the question of the propriety of the Government's action is raised.

With these remarks let us examine what has happened in this case. The first plaintiff, it is stated in the plaint, is entitled to a half share in the agraharam, the second to one-eighth and the third, also to one-eighth; "the other shares", the plaint goes on to state, "being held by certain others". This statement is amplified in paragraph 6 of the plaint:

"Plaintiffs believe that they are not now in possession of the said inam and it is not possible to localise the inam. Plaintiffs are co-sharer agraharamdars and own only fractions of the agraharam land. A large portion of the agraharam was alienated to others who are now in possession of the same. Some other portions are held by certain others and enjoyed by them."

I have already said that a demand for Rs. 66-7-0 was served upon the second plaintiff, and, when the amount was not paid, his property was distrained. It does not appear how the figure of Rs. 66-7-0 was arrived at or why it was against the second plaintiff's property alone that the Government proceeded. In paragraph 9 of the plaint the plaintiffs complain:

"It was therefore improper for defendant's officers to have collected, as they have done, from second plaintiff more than the share of the rent proportional to his share in the agraharam."

It was the Government's duty to have proved that the plaintiffs were in possession; but even their written statement does not contain a denial of the

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allegation of the plaintiffs that the lands in question were not in their possession, nor was it proved at the trial that they were so in possession.

To another circumstance I may advert, which shows how necessary it was to mark off the land before directing its resumption. That is the disproportion between Rs. 116, the favourable quit-rent on the village claimed to be of the extent of about 300 acres, and Rs. 97-2-0, imposed on the comparatively small extent of 40 acres odd, to which the suit relates. If the land liable for this heavy assessment is not indicated, which of the several different owners is to be made to pay this large amount? The Government on such material as is available, having regard to such equities as arise, should come to a decision in regard to the allotting of the plot and the apportioning of the liability. Before the order in the present case was made no such steps as indicated above were taken, and I must therefore hold that the act of resumption is *ultra vires*. If that be the correct view, that order need not be set aside under article 14.

The learned Government Pleader contends that in this case there was something more than a bare order, the act of distraint, and therefore under article 14 the suit should have been brought within one year from the date of that act. If the order is *ultra vires*, the act done in pursuance of it is *ultra vires* too. If the *ultra vires* order need not be set aside, I fail to see why the *ultra vires* act should be set aside. I am not to be understood as deciding that the act need not be set aside at all; we are concerned for the present only with article 14 and under that special article I am of

the opinion that the *ultra vires* act need not be set aside. I hold that the article applicable is article 120, which prescribes a period of six years. I decide therefore that the suit, in so far as it relates to the declaration, is not barred. The lower Court's judgment to that extent is set aside.

Then as to the refund of the money actually paid, there has been some contest as to whether section 59 of the Madras Revenue Recovery Act or article 16 of the Limitation Act applies. It is unnecessary to discuss this question as, whichever of these two provisions is applicable, the suit to that extent is beyond time. The decree of the lower Court dismissing the suit, so far as it relates to the refund of the amount, must therefore be confirmed.

In the result, I agree in the order proposed by the learned OFFICIATING CHIEF JUSTICE.

A.S.V.

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Before Mr. Justice Madhavan Nair and Mr. Justice Reilly.

LAKSHMI AMMAL (PLAINTIFF), APPELLANT,

v.

SUN LIFE ASSURANCE Co. OF CANADA BY ITS MANAGER
R. J. BAKER (DEFENDANTS), RESPONDENTS.*

Married Women's Property Act (III of 1874), sec. 6—Trust created by insurance policy—Specially appointed trustee, Official Trustee and the beneficiary—Rights of, to enforce the rights of the beneficiary under the trust—Indian Trusts Act (II of 1882), sec. 59.

Under section 6 of the Married Women's Property Act, 1874, the person entitled to enforce the rights of the beneficiary is the trustee, if a trustee has been appointed, and if no special trustee has been appointed, the Official Trustee of the Presidency in which the office at which the insurance was effected is situate.

When it is not shown that such Official Trustee had declined to act, *held* that a beneficiary is not entitled to rely on section 59 of the Indian Trusts Act to institute a suit for the enforcement of the trust.

APPEAL from the judgment of BEASLEY C.J., dated 4th day of October 1932, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 576 of 1930.

C. Viswanadhan and M. V. Ramaswami Naidu for appellant.

A. V. Seshaiya for respondents.

JUDGMENT.

MADHAVAN NAIR J.—The plaintiff is the appellant. The question for determination in

* Original Side Appeal No. 99 of 1932.

this appeal is whether the suit out of which this appeal arises was properly instituted by the plaintiff.

The plaintiff is a widow. In 1906 her husband insured his life for the benefit of his wife for a sum of Rs. 2,000 with the New York Life Insurance Company whose office was situate in Calcutta. The business of the New York Life Insurance Company in India has since been taken over by the defendants, the Sun Life Assurance Company of Canada. The plaintiff's husband obtained a loan of Rs. 600 from the defendants and in 1926 he surrendered his policy receiving a sum of Rs. 700 and odd exercising an option reserved in his favour in the policy. In 1929 the plaintiff's husband died. She now claims to recover the money under the Married Women's Property Act (III of 1874) on the ground that under section 6 of the Act a trust has been created in her favour. In the present suit she asks for a declaration that a trust was created by her deceased husband and that she is the beneficiary thereunder and that the Official Trustee of Madras or such other fit and proper person be appointed to execute the trust and that a direction be given to him to pay her the sum of Rs. 3,210.

After the death of her husband the plaintiff approached the defendants for the recovery of the amount alleged to be due to her under the insurance policy effected by her husband. She was referred by them to the Official Trustee of Bengal. Having regard to the decisions of the Calcutta High Court, the view of which I may say is different to the view of our own Court, he felt a doubt whether, since the policy was effected in

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the year 1906, the Married Women's Property Act would apply and wrote to her saying that he was prepared to proceed with the matter of recovering the money from the company only if he was supplied with funds by her. She then applied to the Official Trustee of Madras. He also gave her a similar reply. Being thus defeated in her endeavours to get the money under the policy, she sued the defendant-company as a pauper. Various issues were settled in the case. The learned CHIEF JUSTICE dismissed the suit on the ground that, assuming that she has a cause of action, which was not decided, she was not the proper person to institute the suit.

In appeal it is argued before us that that decision is wrong and that in the circumstances of the case she is the proper person to institute the suit. The contention of the plaintiff is that a trust has been created in her favour by force of section 6 of the Married Women's Property Act. The second paragraph of that section says :

"When the sum secured by the policy becomes payable, it shall, unless special trustees are duly appointed to receive and hold the same, be paid to the Official Trustee of the Presidency in which the office at which the insurance was effected is situate, and shall be received and held by him upon the trusts expressed in the policy, or such of them as are then existing."

This section lays down the machinery for recovering, if a trust is created in favour of the wife, the money covered by the trust, and having regard to the words of the section it seems that the Official Trustee of the Presidency in which the office at which the insurance was effected is situate is the proper person to enforce the trust. In

Balamba v. Krishnayya(1) it was pointed out, though the question did not directly arise for decision in that case, by WHITE C.J. that under section 6

"the person entitled to enforce the rights of the beneficiary is the trustee, if a trustee has been appointed, and if no special trustee has been appointed, the Official Trustee, to whom the money is payable."

Having regard to the fact that in this case the contract was entered into by the plaintiff's husband with the New York Life Insurance Company at Calcutta, it would appear that the proper person to institute the suit would be the Official Trustee of Bengal. Reliance is placed upon section 59 of the Indian Trusts Act (II of 1882) in support of the contention that in the special circumstances of this case the plaintiff is entitled to institute a suit even though ordinarily it may be the Official Trustee of the Presidency in which the office at which the insurance was effected is situate who would be the proper person to institute the suit. Section 59 runs as follows :—

"When no trustees are appointed or all the trustees die, disclaim, or are discharged, or where for any other reason the execution of a trust by the trustee is or becomes impracticable, the beneficiary may institute a suit for the execution of the trust, and the trust shall, so far as may be possible, be executed by the Court until the appointment of a trustee or new trustees."

It is not said in this case that the Official Trustee of Bengal has declined to act though he asks the plaintiff to provide him with funds before taking the necessary proceedings ; nor has the Official Trustee of Madras declined to take

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(1) (1913) I.L.B. 37 Mad. 483, 504 (F.B.).

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proceedings if it is the case of the plaintiff that the cause of action arose in Madras. We have not been shown that the execution of the trust has become impracticable. In these circumstances the plaintiff is not entitled to rely on section 59 of the Indian Trusts Act to institute a suit in her name for the enforcement of the trust. This was the view of the learned CHIEF JUSTICE and it seems to me that that view is correct. The case as pointed out by the learned CHIEF JUSTICE is an unfortunate one for the plaintiff but as she is not the proper person to institute the suit the only order that can be passed by this Court is that the suit should be dismissed.

If the plaintiff could institute the suit and if the cause of action can be said to have arisen in Madras, then according to the decisions of the Madras High Court she would succeed in getting a decision in her favour that a trust has come into existence by force of section 6 of the Married Women's Property Act; but in the present case we are not called upon to consider the merits of the case, as the suit has to be dismissed as the plaintiff is not the proper person to institute it.

The appeal is dismissed with costs.

REILLY J.

REILLY J.—In my opinion also we cannot differ from the learned CHIEF JUSTICE's view that, if the policy in question is, as the plaintiff maintains, one to which section 6 of the Married Women's Property Act applies, the person to sue on it on behalf of the plaintiff is the Official Trustee of Bengal, unless he has disclaimed trusteeship in the matter.

In my opinion there is another reason also why the plaintiff's suit in this Court must be

dismissed. She sues for a declaration that a trust was created by her husband, Gopalaswami Nayudu, in respect of the policy on his life and that she is the sole beneficiary thereunder. The contract under that policy was that the insurance company should pay the amount of the insurance at their office in Calcutta. The policy was taken out in 1906. We are aware that it is the view of the Calcutta High Court, contrary to the view of this Court, that section 6 of the Married Women's Property Act does not apply to a policy taken out by a Hindu husband before 1923, and knowing that, I think it would be clearly improper for this Court to make such a declaration as the plaintiff asks for in respect of this particular policy merely because she chooses to bring her suit in Madras instead of Calcutta.

I agree that this appeal should be dismissed with costs.

G.R.

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APPELLATE CIVIL.

*Before Mr. Justice Pakenham Walsh.*VIJYALAKSHMI AMMAL (PLAINTIFF-PETITIONER),
PETITIONER,

v.

K. R. SRINIVASA AYYANGAR AND FOUR OTHERS
(DEFENDANTS-RESPONDENTS), RESPONDENTS.**Court Fees Act (Act VII of 1870), ss. 13, 14 and 15—Cases not covered by—Court-fee paid in excess by mistake—Order for refund—Inherent powers of Court—Civil Procedure Code (Act V of 1908), sec. 151—Form of certificate of refund—Revenue authorities whether bound by order of Court.*

The Court has power under section 151 of the Code of Civil Procedure to grant a certificate in cases not covered by sections 13, 14 and 15 of the Court Fees Act (VII of 1870). The discretion of the Court to grant such a certificate is not barred by the fact that the excess fee was paid by the mistake of the party and not in consequence of any direction by the Court.

In cases not covered by sections 13, 14 and 15 of the Court Fees Act, the Court has no power to order refund or even to grant a certificate to say that a party is entitled to it. The proper certificate the Court should give is that he has paid excess court-fee. Such being the form which the certificate should take, as a general rule the discretion of the Court should be exercised in petitioner's favour and if the Court holds it to be a fact that he has paid excess court-fee, then in the absence of special reasons it should not refuse issuing a certificate to that effect.

Order of the Court below refusing a certificate set aside in revision.

PETITION under sections 115 of Act V of 1908 and 107 of the Government of India Act praying

* Civil Revision Petition No. 669 of 1930.

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the High Court to revise the order of the Court of the District Munsif of Erode dated 2nd March 1929 and made in Interlocutory Application No. 258 of 1929 in Original Suit No. 704 of 1927.

V. Narayanan for petitioner.

T. L. Venkatarama Ayyar for respondents 1 to 4.

Government Pleader (P. Venkataramana Rao) for fifth respondent.

JUDGMENT.

The petitioner in this case filed a suit to recover possession of certain immovable properties. The suit was valued at Rs. 1,000 and a court-fee of Rs. 112-7-0 was paid thereon. The defendants contested that the market-value of the properties was Rs. 4,000 and that the plaintiff has to pay an additional court-fee. On an issue being raised as to the court-fee payable, the Court found that the correct fee was to be calculated on ten times the kist, i.e., Rs. 125 and that the court-fee payable was Rs. 14-9-0. It decreed the suit but in awarding costs only ordered a sum of Rs. 14-9-0 to be paid for stamp-fee. Petitioner then applied for a certificate for refund of the excess court-fee paid but the Court refused the application and this revision petition is filed against that order.

It appears to be well settled that the Court has the power under section 151 to grant a certificate in cases not covered by sections 13, 14 and 15 of the Court Fees Act. It does not appear to me that the discretion of the Court is barred by the fact that the excess fee was paid by the mistake of the party and not in consequence of any direction by the Court. The case of *Thammayya Naidu v.*

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Venkataramanamma(1) would appear to be one where the mistake was that of the party and not of the Court,—certainly several of the cases which the learned Judges have quoted in support of their decision are cases where the overpayment was due to the mistake of the party. I hold therefore that the Court had jurisdiction to entertain the application.

The next question is whether this Court should interfere in revision against an order refusing the certificate. One case at least of those quoted in *Thammayya Naidu v. Venkataramanamma*(1), i.e., *Girish Chandra Mali v. Girish Chandra Dutta*(2), is a case where a certificate was issued on a revision petition it having been refused by the lower Court. In considering whether the discretion of the lower Court in a matter of this sort should be interfered with in revision it is necessary, I think, to see what the certificate to be granted really is. There appears to be no doubt that the revenue authorities are not bound to make a refund to the party even if he has obtained a certificate of the Court, as they apparently are bound to do in the case of certificates under sections 13, 14 and 15 of the Court Fees Act which distinctly say that the certificates in those cases authorize the party obtaining the certificate to receive the excess court-fee paid back from the Collector. I think it is therefore clearly wrong to order a refund of the court-fee on a certificate as appears to have been done in some of the cases quoted. The Court has no power to order refund or even to give a certificate to say that a party is entitled to it. A party cannot be said by the Court to be entitled to

(1) (1932) I.L.R. 55 Mad. 641.

(2) (1931) 36 C.W.N. 190.

anything which need not be granted to him, and it appears to me that the proper certificate the Court should give is that he has paid excess court-fee. If this is the form which the certificate should take, it would appear that as a general rule the discretion of the Court should be exercised in petitioner's favour, for the discretion is merely confined to the question as to whether the Court will give a certificate that the petitioner has in effect paid excess fee. If the Court holds it to be a fact, then, in the absence of special reasons, one would expect that it would not refuse issuing a certificate to that effect.

I therefore allow this revision petition and order that a certificate of the above nature should be granted to the petitioner.

K.W.R.

APPELLATE CRIMINAL.

*Before Mr. Justice Sundaram Chetti and
Mr. Justice Pakenham Walsh.*

IN RE PATRI VENKATA HANUMANTHA RAO
AND SEVEN OTHERS (ACCUSED), APPELLANTS.*

1933,
October 6.

*Criminal Procedure Code (Act V of 1898), sec. 196-A (2)—
Sanction—Separate charges under ss. 467 and 477,
Indian Penal Code (Act XLV of 1860)—Conspiracy—
Whether includes offences under ss. 467 and 477—Joint
trial of—Legality of—Ss. 233, 235, 236 and 239 of
Criminal Procedure Code—Scope of.*

A charge framed against accused 1 to 8 stated that they were parties to a criminal conspiracy, the object of which was to commit criminal breach of trust in respect of moneys belonging

* Criminal Appeals Nos. 284, 285, 294, 359 and 417 of 1932.

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to a Bank and held by the first accused as its secretary and agent in trust for it, and to do any act which might serve to conceal the said offence, that is, the offence of criminal breach of trust punishable under section 409 of the Indian Penal Code (Act XLV of 1860), and prevent its detection, and had thereby committed an offence under section 120-B of the Code.

Held that the charge did not indicate as the object of the conspiracy the commission of the offences of forgery and destruction of records, that the mere fact that additional charges were framed against the accused under sections 467 and 477 of the Indian Penal Code, as the general object had taken such a specific turn later on, did not justify the importing into the charge of the commission of the specific offences under sections 467 and 477 of the Code as the object of the criminal conspiracy, and that there was nothing in the spirit and letter of the charge to necessitate the sanction required under section 196-A of the Code of Criminal Procedure.

Unless it can be predicated that the latter part of the charge necessarily and expressly refers to the commission of non-cognizable offences, the restriction imposed by section 196-A cannot be invoked by the accused. The fact that the accused subsequently committed the offences of forgery and attempted destruction of records for concealing the offence of criminal breach of trust does not show that these specific offences were within the contemplation of the conspirators when they entered into the conspiracy for committing criminal breach of trust.

The offence of conspiracy and the offences committed in pursuance of it can be jointly tried, as they must be deemed to form one and the same transaction.

APPEALS against the judgment of the Sessions Judge of the Court of Session of the Guntūr Division in Case No. 50 of the Calendar for 1931.

S. Vepa, E. L. Ayyar, A. B. Visvanadhan, A. Ramamurthy, and P. S. Srinivasa Ayyangar for appellants.

Advocate-General (Sir A. Krishnaswami Ayyar), K. Venkataraghava Chariar for Public Prosecutor (*L. H. Bewes*) and *Parakat Govinda Menon* for the Crown.

Cur. adv. vult.

JUDGMENT.

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Of this batch of appeals, the first four have been preferred by accused 1, 8, 2 and 3, respectively and the last one by accused 5 to 7. The persons charged and tried in the lower Court were eight, of whom the fourth accused was acquitted. The rest are the appellants before us. All these appellants were jointly charged for criminal conspiracy under section 120-B, Indian Penal Code (charge No. I). The first accused was further charged under section 409, Indian Penal Code, for criminal breach of trust in respect of moneys belonging to the Guntūr Co-operative Urban Bank and held by him in trust for the said Bank, aggregating to Rs. 25,340, between 15th February 1929 and 14th February 1930. He was charged for a similar offence to the extent of Rs. 24,607-4-9 between 15th February 1930 and 14th February 1931 (charges Nos. II-A and II-B). The rest of the appellants were charged individually for abetment of criminal breach of trust committed by the first accused in respect of various sums under section 409, Indian Penal Code, read with section 109 (charges Nos. III-A to III-D and III-F to III-L). All these offences are said to have been committed in pursuance of the aforesaid criminal conspiracy.

Charge No. IV was framed against accused 1 and 2 for an offence under section 471, Indian Penal Code, read with section 467, for using certain valuable securities (forged documents) as genuine with fraudulent and dishonest motive. The first accused was also charged under section 467, Indian Penal Code, read with section 109, for having abetted the commission of the offence of forgery

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in respect of some documents in pursuance of the aforesaid conspiracy (charge No. V-A). Accused 2, 3, and 5 to 7 were charged individually with the offence of forgery under section 467, Indian Penal Code, in respect of certain documents (charges Nos. V-B, V-C, and V-E to V-G). Under section 477, Indian Penal Code, accused 5 and 8 have been charged for having dishonestly and fraudulently attempted to destroy the Bank accounts and valuable securities and committed mischief in respect of the same by removing them from the Bank office building, treating them with sulphuric acid and throwing them into a well on 14th February 1931 (charges Nos. VI-A and VI-B). Accused 1 to 3 were charged for the abetment of this offence. The first accused was sentenced to transportation for life, and he and the other appellants were also sentenced to various terms of imprisonment ranging from five years to ten years. All the sentences were made to run concurrently.

[Their Lordships dealt with the history and the facts of the case and continued :—]

We may now consider certain objections raised by the learned Counsel for the appellants with respect to the first charge, which, if sound and tenable, would affect the jurisdiction of the Court to take cognizance of the offence of criminal conspiracy punishable under section 120-B, Indian Penal Code. Charge No. I runs as follows :—

“That between 15th February 1929 and 14th February 1931 both days inclusive at Guntūr, you the accused 1 to 8 were parties to a criminal conspiracy, the object of which was to commit criminal breach of trust in respect of moneys belonging to the Guntūr Co-operative Urban Bank and held by the first accused as Secretary and Agent of the said Bank in trust for the said Bank, which is an offence punishable under

section 409, Indian Penal Code, with transportation for life, and to do any act which may serve to conceal the said offence and prevent its detection and have thereby committed an offence punishable under section 120, Indian Penal Code.”

The offence of criminal conspiracy was made a substantive offence by the introduction of section 120-A in the Indian Penal Code by the Criminal Law Amendment Act (VIII of 1913). Before that amendment, conspiracy was treated only as one of the means for the abetment of a crime and it was made punishable as a substantive offence only in the case of an offence falling under section 121 (waging war against the Queen). As to the taking cognizance of the offence of criminal conspiracy punishable under section 120-B, a restriction is placed by section 196-A, Criminal Procedure Code. In a case where the object of the conspiracy is to commit any non-cognizable offence or a cognizable offence not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, no Court can take cognizance of that offence without the sanction of the Local Government, or a Chief Presidency Magistrate or a District Magistrate empowered in this behalf by the Local Government. In the present case, the question for consideration is whether charge No. 1 has specified as the object of the conspiracy any non-cognizable offences. We find that the dominant motive or object of the criminal conspiracy is the commission of criminal breach of trust in respect of moneys belonging to the Bank which is also expressly mentioned as an offence punishable under section 409, Indian Penal Code. This is certainly a cognizable offence, and if the commission of this offence is stated to be the real object

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of the conspiracy no sanction is necessary under section 196-A, sub-clause (2), of the Criminal Procedure Code. But Mr. Vepa, the learned Counsel for the appellants, would lay stress on the latter part of this charge and argue that it indicates as the object of the conspiracy the commission of the offences of forgery and destruction of records with which the accused have also been charged under separate heads. The offences falling under sections 467 and 477 are no doubt non-cognizable offences. According to his contention, the charge must be understood as expressing the commission of these three kinds of offences as the objects of the conspiracy. If this contention is correct, that is, if the commission of these three specific offences is meant to be stated as the object of the conspiracy, nothing would be easier than to mention all of them with the appropriate sections of the Penal Code in the charge. But we find specific mention of the offence of criminal breach of trust under section 409, Indian Penal Code, as the object of the conspiracy without any mention of any other specific offences. Sections 467 and 477 are nowhere mentioned in this charge. The wording in the latter part of the charge is very general, inasmuch as it simply states that the object of the conspiracy was to do any subsidiary act which may enable them to conceal the offence of criminal breach of trust and thus prevent its detection. Unless the particular kind of act resorted to for the concealment of the offence is specified, we cannot say whether such an act would be a non-cognizable offence. Many and various could be the means for that purpose. That purpose could be achieved by doing an act which may not

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amount to an offence known to the Indian penal law. Any of such acts may also amount to a cognizable offence. If such acts be the object of the conspiracy no sanction is necessary. Unless it can be predicated that the latter part of the charge necessarily and expressly refers to the commission of non-cognizable offences, the restriction imposed by section 196-A cannot be invoked for the aid of the defence in this case. At the time of the criminal conspiracy for the object of committing criminal misappropriations of the Bank's money, the conspirators could not have designed the particular act or acts which may become necessary in course of time for the concealment of that offence.

As it has now turned out that for such a purpose they have committed the offences of forgery and attempted destruction of records, it does not follow that these specific offences were within the contemplation of the conspirators when they entered into the conspiracy for committing criminal breach of trust. The charge simply indicates that their subsidiary object was also to employ all the necessary machinery for the concealment of the offence of criminal breach of trust which is the dominant motive for the conspiracy. We are not therefore justified in importing into charge No. I the commission of the specific offences under sections 467 and 477 as the object of the criminal conspiracy. This would be a very narrow and strained interpretation of the latter part of the charge. The learned Sessions Judge has rightly remarked in paragraph 3 of his judgment that the prosecution does not suggest that the specific

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mode of preventing detection was in contemplation at the outset, but only that the prevention of detection was also one of the original objects of the conspiracy. The mere fact that additional charges were framed under sections 467 and 477 as the general object had taken such a specific turn later on does not warrant the contention now put forward by the appellants. We are therefore clearly of opinion that both in the spirit and letter of charge No. I there is nothing to necessitate the sanction required by section 196-A of the Criminal Procedure Code. There is therefore no legal bar to the cognizance of this case by the Court. We were referred by the learned Advocate-General to a decision in *Bishambhar Nath Tondon v. Emperor*(1) (Oudh Judicial Commissioner's Court) in which there are observations pertinent to the present case. In that case the object of the conspiracy was mainly cheating. It is stated that when the main object of the conspiracy is to cheat, even if the charge says that the cheating was to be carried out by means of forgery, the charge should be deemed to be one of conspiracy for the purpose of cheating, whatever means may have been employed to effect that cheating. If cheating is carried out by means of forgery, it does not follow that the provisions of section 196-A would apply (*vide* page 711). In the present case the charge does not even specify that the offence of criminal breach of trust was to be carried out or its detection prevented by means of specific offences.

It is also argued that there is a misjoinder of charges, offending against the provisions of the

(1) (1925) 90 I.C. 706.

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Criminal Procedure Code. Section 233 is overriden by sections 234, 235, 236 and 239. In view of the comprehensive nature of the first charge relating to criminal conspiracy, the subsequent series of acts of misappropriation forming the subject of separate charges are so connected together as to form the same transaction within the meaning of section 235. The real test is whether they are so related to one another in point of purpose or as cause and effect as to constitute one continuous action. The main object of the conspiracy having been stated in the first charge, all the subsequent acts are only done in pursuance of that conspiracy which is the main link which connects all these acts and makes them part of one transaction. The facts of this case have a close resemblance to the facts of the case reported as *Abdul Salim v. Emperor*(1). It has been held that a charge of criminal conspiracy under section 120-B for the purpose of committing the offence of cheating (section 420, Indian Penal Code) between certain dates may be legally joined with individual charges of every distinct offence committed in pursuance of the conspiracy by different members of it on different intermediate dates. This view has the support of earlier decisions reported as *Amrita Lal Hazra v. Emperor*(2) and *Harsha Nath Chatterjee v. Emperor*(3). The offence of conspiracy and the offences committed in pursuance of it could be jointly tried, as they must be deemed to form one and the same transaction. There is, in our opinion, no substance in the objection raised on the ground of misjoinder. It is however

(1) (1921) I.L.R. 49 Calc. 573.

(2) (1915) I.L.R. 42 Calc. 957.

(3) (1914) I.L.R. 42 Calc. 1153.

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contended that on account of the numerous charges there was embarrassment to the accused in defending themselves. The learned Sessions Judge was fully alive to this contention, but thought that he was exercising his discretion rightly in framing the charges for the several items of misappropriation, etc., in the manner he did. Having regard to all the facilities given to the accused for meeting these charges, we are not disposed to think that there was any real embarrassment or hardship to them by the manner of the trial. The legal objections raised on behalf of the appellants are not, in our opinion, sound and they must therefore be overruled.

[Their Lordships dealt with the merits of the case and concluded by confirming the convictions and sentences with certain modifications.]

K.W.R.

APPELLATE CRIMINAL.

Before Sir Owen Beasley, Kt., Chief Justice and
Mr. Justice Bardswell.

IN RE PENUMATCHA JANAKIRAMARAJU
(ACCUSED), PETITIONER.*

1933,
December 7.

Criminal Procedure Code (Act V of 1898), sec. 403—Acquittal of offence under sec. 397, Indian Penal Code (Act XLV of 1860)—Subsequent trial on same facts for offence under sec. 307—Sec. 403 of the Criminal Procedure Code if a bar to.

An accused person who has been acquitted of an offence under section 397, Indian Penal Code (Act XLV of 1860),

* Criminal Revision Case No. 546 of 1933.

cannot be tried for an offence on the same facts under section 307, as section 403 of the Code of Criminal Procedure (Act V of 1898) bars the trial of the latter offence. JANAKIRAMARAJU,
In re.

Petitioner and nineteen others were charged with offences punishable under section 397 of the Indian Penal Code (Act XLV of 1860) and other offences relating thereto. One other charge under section 307, Indian Penal Code, was framed but was stayed. The jury returned a verdict of acquittal on the charge under section 397. On objection being raised as to the validity of a commitment under section 307,

Held, the commitment should be quashed as, under the principle of *autrefois acquit*, accused, having been tried and acquitted of an offence under section 397 which includes an offence under section 307 also, was on his trial for the latter offence and, having been found not guilty of it, he could not again be tried for it.

Pattikadan Ummaru v. Emperor, (1902) I.L.R. 26 Mad. 243, and *Re Mutyalu*, (1912) I.L.R. 37 Mad. 236, followed.

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 Session of the East Gōdāvari Division, dated 23rd June 1933, and made in Criminal Miscellaneous Petition No. 39 of 1933 in Sessions Case No. 18 of 1933.

K. S. Jayarama Ayyar and *P. Satyanarayana Raju* for petitioner.

Public Prosecutor (L. H. Bewes) for the Crown.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—The question raised in this criminal revision case is whether an accused person who has been acquitted of an offence under section 397, Indian Penal Code, can be tried for an offence under section 307, Indian Penal Code, that is to say, whether section 403 of the Criminal Procedure Code bars the trial of the latter offence. BEASLEY C.J.

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The facts of the case are that the petitioner and nineteen others were charged with dacoity and other offences relating thereto. The petitioner was charged on the second count with dacoity, using a deadly weapon, and attempting to cause the death of one Kesava Rao, punishable under section 395 read with section 397, Indian Penal Code. The charge runs as follows :—

“That you on or about the 4th June 1932, committed dacoity of movables . . . and at the time of committing the said dacoity you used a deadly weapon, to wit, a loaded revolver and attempted to cause the death of Jupudi Kesava Rao and thereby committed an offence punishable under section 395 read with section 397 of the Indian Penal Code.”

One other charge (No. 5) was originally framed against the petitioner, viz.,

“You used a deadly weapon, to wit, a loaded revolver, and attempted to cause the death of J. Kesava Rao.”

This was an offence punishable under section 307, Indian Penal Code, and the Sessions Judge scored it out and made a note to the effect that the charge relating to that offence was stayed by him as it was a charge triable by the Sessions Judge with the aid of assessors; and that charge was not put to the jury. The jury by a majority of four to one found the petitioner not guilty of the offences charged under the second count. In his charge to the jury the learned Sessions Judge in dealing with this charge against the petitioner told the jury that the point they would have to consider was whether in the course of the commission of the dacoity the first accused (the petitioner here) shot with a loaded revolver and attempted to cause the death of prosecution witness 3. This was point No. (iii), point No. (i) being whether all or any of the accused assembled for the purpose of

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committing dacoity, an offence punishable under section 402, Indian Penal Code, and point No. (ii), whether they all or any of them committed dacoity in Gangayya's house. It is clear from the charge to the jury that the jury were not directed that, even if the offence of dacoity were not proved, they could nevertheless convict the petitioner of attempt to cause the death of or grievous hurt to Kesava Rao if the evidence warranted such a finding. What the jury clearly had in their minds as a result of the learned Sessions Judge's charge to them was the question as to whether or not there had been a dacoity; and it is conceded by Mr. Jayarama Ayyar that the jury therefore never addressed themselves to the alternative that they might find the petitioner guilty under section 307 or 326, Indian Penal Code. This, however, in my view, cannot affect the question. Section 397 is a combination of several offences, namely, sections 392, 395, 323, 324, 325, 326 and 307, Indian Penal Code, and a verdict of “not guilty” to a charge under that section covers every offence which was stated in it or which could have been charged therein on the same facts. It is, I think, beyond question that the petitioner was on his trial not only with regard to section 392 but also section 307, Indian Penal Code, and that one or the other or both could be proved against him; and I am supported in this view by a Bench decision of this High Court, viz., *Pattikadan Umbaru v. Emperor*(1), which was a case of section 392 and grievous hurt in the course of robbery (section 397, Indian Penal Code), and also the decision in *Re Mutyalu*(2) in which the

(1) (1902) I.L.R. 26 Mad. 243.

(2) (1912) I.L.R. 37 Mad. 236.

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former case was followed. In that case the accused was charged with robbery under section 397, Indian Penal Code, and was tried by a jury who unanimously found him not guilty. The Sessions Judge in his charge to the jury pointed out that section 397, Indian Penal Code, was a combination of robbery and voluntary causing of grievous hurt and that it was open to the jury to find him guilty under section 326, Indian Penal Code, alone. It was held by AYLING and NAPIER JJ. that it was open to the jury to have convicted the accused of an offence under section 326, Indian Penal Code. In my view, the charge of the Sessions Judge in that case was perfectly proper and there should have been a similar direction to the jury in the present case. Mr. Jayarama Ayyar in the course of his argument suggested the test which I think is the correct one, namely, whether separate sentences could have been passed upon the petitioner on a conviction under sections 397 and 307, Indian Penal Code. The answer, I think, must be in the negative. Similarly, if the trial had ended in the conviction instead of the acquittal of the petitioner of the offence charged under section 397, i.e., attempt to cause death, I am clearly of the opinion that he would have been able to plead *autrefois convict* as a bar to his trial under section 307, Indian Penal Code, and it seems to me that the same principle must govern the plea of *autrefois acquit* as well. In the former case, the rule of law forbids a man to be punished twice for the same offence, that is to say, the same acts and omissions; and in the case of *autrefois acquit* the principle is that a man who has once been tried and acquitted may not be tried again

for the same offence in respect of which he was in jeopardy in the first trial; and in Russell on Crimes and Misdemeanours, Vol. II, page 1817, it is stated:

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"The principles on which the right to plead *autrefois convict* is based are in substance the same as in the case of the plea of *autrefois acquit*."

Under section 397, Indian Penal Code, and the charge as framed thereunder properly directed by the Sessions Judge, the jury would have to consider whether the accused used a revolver and shot at prosecution witness 3 in an attempt to

BINDER'S NOTE.

Substitute for pages 559 and 560 in July part (1934 I.L.R. 57 Mad.).

trial for that offence and having been found not guilty of it he could not again be tried for it. This commitment of the petitioner is quashed and his bail bond is discharged.

BARDSWELL J.—I agree.

K.W.R.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Madhavan Nair, Mr. Justice Jackson and
Mr. Justice Krishnan Pandalai.*

1933,
November 29.

PANJAM V. TIRUMALA REDDI (RESPONDENT 9
IN APPEAL No. 346 OF 1927 ON THE FILE OF THE
HIGH COURT), PETITIONER,

v.

C. K. ANAVEMAREDDI AND NINE OTHERS (LEGAL
REPRESENTATIVE OF APPELLANT AND RESPONDENTS 1 TO 8 AND 10
IN APPEAL No. 346 OF 1927), RESPONDENTS.*

*Indian Limitation Act (IX of 1908), sec. 12—"Time requisite
for obtaining a copy of the decree"—Meaning of.*

In section 12 of the Indian Limitation Act the words
"time requisite for obtaining a copy of the decree" mean the
time beyond the party's control occupied in obtaining the
copy which is filed with the memorandum of appeal and not
an ideal lesser period which might have been occupied if the
application for copy had been filed at some other date.

PETITION praying that in the circumstances
stated in the affidavit filed therewith the High
Court will be pleased to dismiss with costs, as it
was presented out of time, Appeal No. 346 of 1927
preferred to the High Court against the decree of
the Court of the Subordinate Judge of Cuddapah
in Original Suit No. 5 of 1926.

K. Bhimasankaran for petitioner.

*P. Venkataramana Rao, S. Ramaswami Ayyan-
gar, T. V. Muthukrishna Ayyar, N. Muthuswami
Ayyar, Kasthuri Seshagiri Rao and A. Venkata-
subba Mudaliar* for respondents.

Cur. adv. vult.

* Civil Miscellaneous Petition No. 3479 of 1933.

JUDGMENT.

MADHAVAN NAIR J.—I entirely agree with the
judgment which my learned brother JACKSON J.
will presently deliver and I have nothing useful
to add to it.

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JACKSON J.—The ninth respondent takes a
preliminary objection that this appeal is out of
time. The date of the decree and judgment of the
lower Court is 24th February 1927. On 1st March
1927 the plaintiff applied for copy and obtained it
after thirty-four days had been occupied by the
copying department. He has since died, and it is
not known what he did with that copy.

He applied again for copy on 20th April 1927,
and since the recess intervened, the time occupied
by the department was eighty-two days. The
appeal was filed on 13th August, and if this
eighty-two days be reckoned as the time requisite
for obtaining copy, the appeal is within time.
But on behalf of the ninth respondent it is argued
that the appellant himself has demonstrated the
time requisite to be only thirty-four days, and if
that figure be taken the appeal is time-barred.

The time requisite for obtaining a copy of the
decree mentioned in section 12 of the Indian
Limitation Act is the time beyond the applicant's
control occupied by the copyist department after
an application for copy has been duly made. It
is no concern of the Courts to ask when the
application was made. A party may apply
immediately the suit is decreed, or if he care
to take the risk he may wait till the ninety
days period allowed him by statute is almost
exhausted. Then the time requisite for obtaining

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a copy of the decree will be deducted, and so long as he is within his ninety days the appeal will be in time. But the respondent would have it that the applicant must discover within these ninety days at what time the copyist department can most expeditiously produce a copy, and the time requisite for obtaining a copy is this minimum period, and nothing more. Such a system would be intolerable to the parties, unworkable by the Courts, and is certainly not derived from our statutory law. For example suppose that a suit is decreed on 15th December, and the intending appellant applies for copy at once. He will be involved in the Christmas holidays and it may take forty days before his copy is ready. He then takes full advantage of the ninety days allowed him by statute, and files his appeal just within one hundred and thirty days, ninety plus forty. Meanwhile the other party has applied for copy for his own purposes after Christmas, and has obtained a copy in thirty days. Is he to be allowed triumphantly to exhibit this copy and plead that "the time requisite for obtaining a copy" in section 12 of the Indian Limitation Act is thirty days, and his opponent's appeal is time-barred. Obviously not; but that is precisely the argument advanced by the present respondent. It makes no difference whether the minimum time for obtaining copy has been demonstrated as in this appeal by the appellant himself, or, as in the above example, by the respondent. In neither case is the Court concerned with the ideal minimum. The only concern of the Court is the time occupied in obtaining the copy which is filed with the appeal; not the time which might have

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been occupied in obtaining some other copy which is not filed with the appeal.

There is no case directly in point. The respondent relies strongly upon an observation of the Privy Council in *J. N. Surty v. T. S. Chettyar, A Firm*(1):

"The word 'requisite' is a strong word; . . . It means 'properly required,' and it throws upon the pleader . . . for the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his default."

This affirms the rigid practice of our Courts, which insists that the only period to be deducted is that occupied by the official department; *Donepudi Subrahmanyam v. Narasimham*(2). No excuses will be heard about inability to apply, or to furnish papers, earlier than has been done. It could never be the "default" of the party in the example given above that he applied before instead of after Christmas, and there is nothing to the contrary in this ruling.

The argument advanced before us that the time ideally requisite had already been demonstrated by the appellant is not directly met by the ruling in *Aminuddin Sahib v. Pyari Bi*(3), although no doubt that ruling assists the present appellant by affirming that the copy actually filed with the decree is the copy with which the Court is concerned when assessing the time that has run. When the essentials of this question have been clearly grasped, *Pramatha Nath Roy v. Lee*(4) upon which the respondent also relies is really of more assistance to the appellant. On page 1003 a distinction is drawn between periods which were

(1) (1928) I.L.R. 6 Rang. 302, 313 (P.C.).

(2) (1920) 38 M.L.J. 465.

(3) (1920) I.L.R. 43 Mad. 633.

(4) (1922) I.L.R. 49 Calc. 999 (P.C.).

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and periods which were not within the appellant's control :

" No period can be regarded as requisite under the Act which need not have elapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree."

In our present case the second application on April 20th was a reasonable and proper step, and the period of eighty-two days then occupied by the department was beyond the appellant's control. Can it be said (yet this is the argument before us) that the only reasonable course was to have applied in time to avoid the recess, or that the fact of his applying abortively before the recess, instead of sitting still and doing nothing at all, has made the appellant's application of 20th April irrational and improper? There is nothing in *Pramatha Nath Roy v. Lee*(1) to support such an argument: there the facts are that the appellant had needlessly dallied before filing his application for copy. *Kamruddin Hyder v. M. N. Mitter*(2) is on lines similar to the case of *Pramatha Nath Roy v. Lee*(1).

It must be held that the time requisite in section 12 of the Act is the time beyond the appellant's control occupied in obtaining the copy which accompanies the memorandum of appeal, and not an ideal lesser period which might have been occupied if the application for copy had been filed at some other date.

The appeal therefore is not barred by limitation. Civil Miscellaneous Petition No. 3479 of 1933 is dismissed with costs.

KRISHNAN PANDALAI J.—I agree that the preliminary objection fails, but wish to briefly

(1) (1922) I.L.R. 49 Calc. 999 (P.C.).

(2) (1924) I.L.R. 52 Calc. 342.

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add my reasons, as I was first inclined to take the opposite view. The date of the decree is 24th February 1927. The appellant obtained two copies of the decree, both statedly for filing an appeal, by applications respectively dated 1st March 1927 and 20th April 1927. He did not file the appeal using the copy which he got on the former application, and there is nothing on record to show what happened to it. If he had used it for appealing, the last day for filing the appeal after making the usual allowance for the period taken by the copying department would have been 30th June 1927, which date being within the vacation of this Court, the appeal should have been filed on the re-opening on 18th July 1927. The appeal was filed on 13th August 1927 using the copy obtained on the second application according to which after making the corresponding allowance the last date for filing the appeal would be 18th August 1927. The appeal would thus be out of time if the computation be made on the first copy but would be in time on the second copy.

The objection is that the appellant having in his possession a copy of the decree granted on his first application, no more time was in fact requisite for him to get a copy for filing the appeal and the allowance given by section 12 of the Limitation Act must in this case be only that which was attributable to getting the first copy and therefore that the appeal should have been filed on 18th July 1927 and is barred as it was only filed on 13th August 1927. The "time requisite for obtaining a copy" mentioned in section 12 of the Limitation Act is not the time requisite for obtaining

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the copy actually used but the time requisite for obtaining an earlier copy, at least in cases where the appellant has obtained one.

The objection is really an attempt to use certain observations of the Privy Council in *J. N. Surty v. T. S. Chettyar, A Firm*(1), in a manner not intended by the Board. The real point decided in that case was merely that the allowance of the time requisite for getting copies of judgment and decree given by section 12 of the Limitation Act was not confined to appeals under Order XLI, rule 1, of the Code of Civil Procedure under which it is necessary to produce such copies, but applied also to appeals from the original jurisdiction of High Courts by whose rules copies of judgments and decrees are not required to be produced with the appeal memorandum. After deciding this point as above, their Lordships proceeded to refer to an observation of the High Court of Rangoon, which had upheld the contrary view, that

“the elimination of the requirement to obtain copies of the documents was part of an effort to combat the dilatoriness of some Indian practitioners; . . .”

Their Lordships observe with respect to this that they would be unwilling to discourage any such effort, but point out that all that can be done, as the law stands, is for the High Courts to be strict in applying the provision of exclusion. They further observe that the period to be excluded is that which is “requisite” and explain that word as meaning “properly required” and throwing upon the pleader or Counsel for the appellant the necessity of showing that no part

(1) (1928) I.L.R. 6 Rang. 302, 313 (P.C.).

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of the delay beyond the prescribed period is due to his default. These observations were made in a case in which the application for copies was made on the very day on which the judgment was pronounced and therefore apply only to dilatoriness of an applicant for copy after his application and in doing things necessary for obtaining them. What the Privy Council meant was that, if such dilatoriness be alleged, the applicant (appellant) must show that in promoting his application and getting copies he did everything that the rules of the Court require to enable him to do so. The Board was clearly referring to the time taken for obtaining the copy on which the appeal was actually filed and not to any default, such as the present ninth respondent is now urging against the appellant, consisting of having another copy in his possession, on which also the appeal might have been filed but was not. This case therefore does not furnish any support to the objection.

No decision supporting the objection has been cited. In *Pramatha Nath Roy v. Lee*(1) the appeal was from a decree on the Original Side of the Calcutta High Court. The time for appealing was twenty days from the date of the decree or order which was 26th July 1918. No application for a copy was made within the twenty days, nor did the appellant (defendant) promptly take the necessary steps to have the order drawn up, which were necessary according to the practice of the Court. When subsequently the draft order was drawn up on the application of the plaintiff, the appellant (defendant) retained the draft in his hands for

(1) (1922) I.L.R. 49 Calc. 999 (P.C.).

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several days before returning it. Finally on the 30th August he filed the appeal without copies of the judgment and decree which were required to be produced with every memorandum of appeal by the rules of that Court. At the hearing the appellant urged that the excess over twenty days which had elapsed before he filed the appeal must be allowed as requisite for obtaining copies of the judgment and order under section 12 of the Limitation Act. The High Court held that the delay was due to the appellant's laches in not taking the steps necessary to have the order drawn up and signed without which no copy could be granted. It is to be noted also that the copy application in that case was made long after the appeal was itself filed, namely, 9th September 1918. All that this case decided was that where, before a copy can be given, certain steps are to be taken by the appellant for preparing the original, if he does not take the necessary steps to have the original prepared and signed according to the practice of the Court, the time consumed by his laches cannot be allowed as being requisite for obtaining the copy. This opinion was affirmed by the Privy Council. It does not touch the present case which is from the mofussil where the parties are not required to take any such steps. The decision in *Kamruddin Hyder v. M. N. Mitter*(1) follows *Pramatha Nath Roy v. Lee*(2); the only difference is that in *Kamruddin Hyder v. M. N. Mitter*(1) a copy application had been made three days after the judgment but the default occurred afterwards by the appellants not taking the necessary steps to have the order drawn

(1) (1924) I.L.R. 52 Calc. 342.

(2) (1922) I.L.R. 49 Calc. 999 (P.C.).

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up and signed before a copy could be prepared. It was held that the time during which this default occurred could not be allowed as requisite for obtaining the copy. In *Aminuddin Sahib v. Pyari Bi*(1) it was held by a Bench of this Court that where an appellant had filed within the prescribed period for appealing an application for copy of the decree but allowed the application to be dismissed for non-payment of copying charges, he could subsequently file the appeal with a copy of the decree obtained by another party and claim a deduction under section 12 of the Limitation Act for the time taken in obtaining that copy. It was also held that reading Order XLI, rule 1, of the Code of Civil Procedure with section 12 of the Limitation Act, allowance for time for getting the copy mentioned in section 12 of the Limitation Act is the time required for getting the copy which actually accompanies the memorandum of appeal. In the case of appeals under the Code of Civil Procedure governed by Order XLI, rule 1, that rule requires copies of the judgment and decree to accompany the memorandum of appeal. In appeals not so governed and for which according to the rule of certain High Courts such copies are not required to accompany the memorandum of appeal, it is now decided by the Privy Council that the time for obtaining copies of judgments and orders is, where they are obtained, to be likewise allowed. It stands to reason that, in both classes of cases, the time requisite means the time requisite for obtaining the copies actually accompanying the memorandum of appeal and not

(1) (1920) I.L.R. 43 Mad. 633.

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some other copy which the appellant might or might not have got.

The respondents' argument, if allowed, would lead to great confusion and enquiries into alleged laches or dilatoriness of the appellant in respect not of copies produced with the memorandum of appeal but about other copies which he may have got and used for purposes proper or improper with which the Court has nothing to do, or not got by reason of neglect, such as non-payment of copying fees with which also the Court has no concern, provided the appellant is able to show that, in respect of the copies actually produced by him, he is within time according to law, i.e., the time for appealing together with all the time requisite for obtaining the copy of judgment and decree. It is not denied that the appellant's omission to apply for a copy till the period fixed for appealing has nearly run out cannot be used against him as a ground for not allowing him the full period requisite for obtaining the copy after he has applied. If so, why should the fact that he has in fact obtained another copy be so used? I see no reason either in the letter of the law or in any of the decisions or in convenience to adopt such a rule. We have no power to restrict the time granted by the statute by adding to it a limitation that, where an appellant has got more than one copy of judgment and decree, he ought, if he seeks exclusion of time for obtaining the copy, to use the first copy obtained by him. That is what the objection amounts to. As I understand it, all that the law requires and the decisions have laid down is, that, if an appellant invokes the aid of section 12 of the Limitation Act, he will get only

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so much time allowed in excess of the proper time for appealing as is requisite, i.e., properly required, for obtaining the copies which he actually uses for the appeal. In this case no allegation is made that more than the requisite time for obtaining the copies on which the appeal has been filed has to be allowed to sustain the appeal. I therefore agree with the judgment just delivered.

G.R.

APPELLATE CIVIL.

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

M. K. MAHOMED ASAN MARACAIR (FIRST RESPONDENT),
APPELLANT,

1933,
December 19.

v.

A. K. BIJLI SAHIB BAHADUR AND TWO OTHERS
(PETITIONER AND RESPONDENTS 3 AND 4), RESPONDENTS.*

Certiorari—Election dispute—Election Commissioner's order in—Writ of certiorari in respect of—Issue of—Grounds for—Circular of District Election Officer for gosha women electors unveiling their faces on challenge of their identity by candidate or his female agent—Legality of—Candidate insisting upon their doing so pursuant to circular—Offence under sec. 171-C of Indian Penal Code if committed by—Madras Local Boards Act (XIV of 1920), sec. 199 (2) (a) and (b)—Election Dispute Rules under—Rules 19, 21 to 23 and 12 of—Applicability and effect of.

The High Court will not interfere by a writ of *certiorari* with an order made by an Election Commissioner unless he has acted without jurisdiction or in excess of it. The High Court

* Letters Patent Appeal No. 77 of 1933.

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is only entitled to interfere if there was a want of jurisdiction at the commencement of the proceedings. Once there is jurisdiction, any errors whether of law or fact committed subsequently cannot take away the jurisdiction once obtained.

A circular issued by the District Election Officer before an election stated :

" I am directed by the Inspector to inform you that gosha ladies will have to unveil themselves in the polling booths if their identity is challenged by the candidates or their female agents."

Held (1) that the circular was not contrary to the spirit of rules 19, 20 and 23 of the Election Rules and was not illegal or *ultra vires* ;

(2) that a candidate would be acting in accordance with the circular in calling upon gosha women electors to unveil their faces before him and that, even if, as the result of his so doing, a large number of gosha electors had been scared away and had refrained from voting, no offence under section 171-C of the Indian Penal Code would be committed ; and

(3) that, where the question of the legality of the circular had to be decided before the Election Commissioner assumed jurisdiction and he was in error in holding that it was illegal and in supposing that the petition disclosed any offence, he had no jurisdiction to entertain the petition.

APPEAL under Clause 15 of the Letters Patent against the order of the High Court dated the 8th September 1933 and passed in Civil Miscellaneous Petition No. 2711 of 1933 praying for an order directing the issue of a writ of *certiorari* calling upon the third respondent therein to submit the records relating to Original Petition No. 56 of 1932 on his file, to make the writ *nisi* absolute and to quash the order and proceedings in the said Original Petition No. 56 of 1932 and also to make such other or further orders as to the High Court may seem fit.

S. Doraiswami Ayyar for *B. Pocker* and
K. T. M. Ahmed Ibrahim for appellant.

K. S. Krishnaswami Ayyangar for *S. Ramachandra Ayyar* for first respondent.

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Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—This is an appeal from an order made by RAMESAM J. on an application for a writ of *certiorari* quashing the order of the Election Commissioner in Original Petition No. 56 of 1932. The Commissioner was the Principal Subordinate Judge of Tinnevely.

The appeal arises out of an election held for the Tiruchendur circle to the District Board of Tinnevely. There were two seats for that circle, one being reserved for a Muhammadan and the other unreserved. There were three candidates for these two seats. One was Mr. Daniel Thomas Nadar who was elected and in respect of whose election no question arose. There were two other candidates for the remaining seat, namely, the petitioner before the Election Commissioner and the appellant here and the first respondent. The date fixed for the polling was the 15th October 1932. There were a large number of Muhammadans entitled to vote in the polling area in question, many of them being gosha ladies. Polling booths were set apart for women and the Inspector of Local Boards on the 3rd July 1932 issued a circular, Exhibit E, directing that the candidates themselves should be admitted to these booths or, if they employed agents on their behalf, they should be females and not males. In September 1932, a petition had been sent to the Inspector of Local Boards praying for special

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facilities to be given to women voters in the matter of recording their votes; and it is clear from the documents that the Election Authority did all that was possible to provide them. In consequence of this, five women polling officers were appointed at five of the booths. We are only concerned with three out of the five booths. The first respondent was represented by a woman agent at one booth, there being 300 purdah voters at that booth of whom 139 voted. The other two booths were in one hall and ballot boxes were placed in that hall at either end. In one of these booths there were 269 purdah voters and in the other 344 purdah voters. Only 13 voted in the former booth and one in the latter. The first respondent being a candidate sat in this room. Three days before the election, namely, the 12th October 1932, the District Election Officer sent a circular (Exhibit I) which plays a prominent part in these proceedings. That states:

"I am directed by the Inspector to inform you that gosha ladies will have to unveil themselves in the polling booths if their identity is challenged by the candidates or their female agents."

The election proceeded and it is alleged that the first respondent insisted on the gosha ladies who came to vote at the booth in which he sat showing their faces to him. The first respondent's case is that he merely insisted that they should unveil themselves to the female polling officer. The Election Commissioner does not accept the first respondent's version with regard to this. It is alleged that, as a result of this conduct of the first respondent, the gosha women voters were scared away being unwilling to unveil themselves before the first respondent through shame and

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that the first respondent was, therefore, guilty of an offence relating to elections under section 171-C of the Indian Penal Code. The petitioner prayed that the election of the first respondent should be declared void, that the petitioner should be declared to have been duly elected to the seat or that a fresh election should be ordered. The Election Commissioner set aside the election and directed that a fresh election should be held. As before-mentioned, RAMESAM J. quashed that order.

In the course of his order the Election Commissioner has very severely condemned Exhibit I which in his opinion was absolutely illegal, *ultra vires* and unwarranted. He also describes it as a curious and ill-conceived circular and as being contrary to the spirit of rules 19, 20 and 23. It is obvious that he makes Exhibit I wholly the basis of his decision. Finding that it was an illegal circular and *ultra vires*, he finds that the first respondent took advantage of it to scare away the gosha women voters by insisting on their unveiling before him and he considers that the petitioner was "enormously injured" to use his own language by the order of the District Election Officer contained in that document. RAMESAM J., however, has disagreed with this view of the Election Commissioner and is of the view that Exhibit I was not an illegal circular but on the contrary was within the spirit of the rules and a proper and reasonable facility in the interests of the women voters and the candidates themselves. He held that no offence under section 171-C, Indian Penal Code, had been committed. That being so, he was of the opinion that the Election Commissioner had acted without jurisdiction and

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he accordingly quashed his order and set the election aside.

The power of the High Court to set aside orders made by Election Commissioners which are final on Courts subject to the writ of *certiorari* has been considered in a number of decisions; and it is quite clear from them that the High Court will not interfere by a writ of *certiorari* with such orders unless the Election Commissioner has acted without jurisdiction or in excess of it. Recent decisions on this point are *Kumaraswami v. Muniratna Mudali*(1), *Shanmuga Mudaliar v. Subbaraya Mudaliar*(2) and *Govindaswami Pillai v. Ramalingaswami Pillai*(3). Where a Court has jurisdiction but is guilty of an error of law or fact, a superior Court cannot interfere. In my view, the whole case turns upon the answer to the question whether Exhibit I was illegal and *ultra vires* or not. Mr. S. Doraiswami Ayyar contends that it was and that there is nothing in the rules to warrant the issue of such a circular. We have, therefore, to consider the rules in question, namely, rules 19, 21, 22 and 23 of the Election Rules. Rule 19 says that special facilities in accordance with the instructions, if any, issued by the Election Authority in that behalf may be accorded to women electors. Rule 21 provides for the questioning of the elector and says that if the candidate or his polling agent so requires or indeed the polling officer, of his own accord, so requires, there may be put either or both of the following questions to the elector, namely, (1) "Are you the person enrolled as

(1) (1932) I.L.R. 56 Mad. 942.

(2) (1932) 63 M.L.J. 932.
(3) (1931) 62 M.L.J. 644.

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follows (reading the whole entry from the roll)?" and (2) "Have you already voted at the present election at this polling station or at any other polling station?", and that, if the answer to the first question is in the affirmative and the second in the negative, the elector shall be supplied with a ballot paper. Rule 22—a rule with which we are not here concerned—relates to the case of a person who applies for a ballot paper after another person has voted as such elector. Rule 23 provides for challenged ballot papers and says that, if any candidate or polling agent declares and undertakes to prove that any person by applying for a ballot paper has committed the offence of personation, the polling officer may require such person to sign his name and enter his address in the list of challenged votes or, if he is unable to write, to affix his thumb-impression thereto, and may further require such person to produce evidence of identification and that, if the answers to questions described in rule 21 are satisfactory, the elector is to be allowed to vote after having been informed of the penalty for personation. There is another important rule which has to be mentioned and that is rule 12 which reads as follows:

"The polling officer shall keep order at the station, shall see that the election is fairly conducted, shall regulate the number of electors to be admitted at one time and shall exclude all other persons except his own clerks, the candidates, one agent of each candidate at a time (hereinafter referred to as the polling agent) appointed in writing by the candidate, the police on duty, and such persons as may be admitted for the purpose of identifying the electors."

It is clear—and this is indeed conceded by Mr. S. Doraiswami Ayyar—that a candidate has the

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right to be in the polling booth. He can be represented by an agent if he desires or he can look after his own interests himself, and obviously to see the voters themselves is his privilege and right for the purpose of preventing impersonation. He is, therefore, entitled to be present and see that no person votes in the name of another whose name is on the electoral roll. Now it is necessary to refer to rule 19 again. Under that rule the Election Authority may provide special facilities to women electors to vote. It is quite obvious that, when the Election Authority provides such facilities for gosha women electors, he must also attach to them certain safeguards in order to prevent impersonation and, when he does so, he is acting, in my view, in accordance with those rules which are designed to prevent impersonation. Rules 21 and 23 do not provide the necessary or indeed any safeguards against impersonation by gosha women. When a veiled gosha woman elector applies for a ballot paper, upon what material is the candidate or his agent to challenge the elector? He cannot do so without seeing that person's face. Nevertheless, under rule 23 he has to undertake to prove that such person has committed the offence of impersonation. Rule 23 does not cover the case of gosha women electors. Moreover, the warning to the challenged elector, namely, as to the penalty for impersonation, would in the case of a gosha elector affixing her thumb-impression be entirely useless. How could such a thumb-impressionist thereafter be traced and the penalty enforced unless the thumb-impressions of many thousands of women were taken afterwards for comparison which is clearly

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impossible? Rule 23, therefore, whilst providing safeguards in the case of the male elector and women who are not gosha, omits to do so in the case of gosha women electors; and if, whilst granting facilities under rule 19 to those women to vote, safeguards are not at the same time provided, it would be possible for wholesale impersonation to be practised; and I am utterly unable to understand the language used by the Election Commissioner towards the Election Authority and Exhibit I which he issued. In my opinion, it was essential that provision such as is set out in Exhibit I should be made; and there is nothing whatever to justify the violent language used towards the Election Authority and Exhibit I; and I entirely agree with RAMESAM J. in the criticism of that language. Unfortunately this utterly unreasonable view taken by the Election Commissioner of Exhibit I clearly became a sort of obsession. It was the root evil of the whole case. It being an illegal and unwarranted document, in his opinion, the first respondent took full advantage of it and scared away the gosha women electors. That is what runs throughout the Election Commissioner's order. It even causes him to criticise the action of the first respondent as follows:

"There is also this further fact that the first respondent is spoken to by all the witnesses to have sat and leaned on an easy-chair in front of the booth. The respondent agrees he sat on an easy-chair. To my mind, even this conduct seems to be perfectly improper and as tending to discourage and therefore interfering with the freedom of gosha muslim women voters from moving about and coming and recording their votes. . . . Especially seeing that it was a case of gosha muslim women a more proper and decent conduct would have been to sit on an ordinary chair with as little obstruction as possible.

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The evidence is that the first respondent got a private easy-chair and leaned himself on it in front of the booth."

It is difficult to see how the selection of an easy-chair instead of an ordinary chair as a resting place by a candidate can have any possible bearing upon the question of whether an election offence has been committed. I am clearly of the opinion that Exhibit I was not illegal or *ultra vires* and that the first respondent in calling upon the gosha women electors to unveil their faces before him was acting in accordance with that circular. If by so doing a large number of gosha electors refrained from voting or if, as the appellant describes it, they were scared away, that is a difficulty, if it is one, which seems to me to be attendant upon gosha women exercising the franchise. Certainly no election offence under section 171-C, Indian Penal Code, has been here disclosed. The gosha women electors were perfectly free to vote if they wished to do so and the first respondent did nothing which in law could be held to come within that section. This finding, however, does not conclude the matter although it goes a very long way towards doing so. The question is not whether there has been here any error in law on the part of the Election Commissioner; and this Court is only entitled to interfere, as has already been remarked, if there was a want of jurisdiction at the commencement of the proceedings. Once there is jurisdiction, any errors committed subsequently cannot take away the jurisdiction once obtained. The question itself discloses an election offence which the Election Commissioner could take cognizance

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of? Reading the petition as a whole, I am satisfied that it was all based upon Exhibit I and the complaint that the first respondent was, therefore, not exercising any legal right to be present and to demand the gosha women electors to unveil before him, but was acting illegally. The question as to whether Exhibit I was illegal or not, upon which the whole case turns, was one which had to be decided before the Election Commissioner assumed jurisdiction and he was in error in supposing that the petition disclosed any offence. It certainly did not. He, therefore, had no jurisdiction to entertain the petition at all. The appeal is dismissed with costs. Advocate's fee Rs. 200.

BARDSWELL J.—I agree.

A.S.V.

APPELLATE CIVIL

Before Mr. Justice Bardswell.

T. S. SANKARANARAYANA PILLAI (RESPONDENT),
PETITIONER,

v.

A. M. AHMED MIRAN SAHIB AND THREE OTHERS
(PETITIONERS AND NIL), RESPONDENTS.*1934,
February 13.

Certiorari—Election dispute—Election Commissioner's order in—Writ of certiorari in respect of—Issue of—Grounds for—Election petition disclosing no ground for setting aside election—Legal effect of allegations in petition—Erroneous view of—Commissioner entertaining petition by taking—Finding of fact of Commissioner based on no evidence—Issue of writ in cases of—Post not vacant—Election held in respect of—Validity of—Madras Local Boards Act (XIV of 1920), sec. 17—Election Dispute Rules—Rule 12 of—Applicability and effect of.

A writ of *certiorari* can be granted if in an enquiry for which there is jurisdiction an error is made which can be regarded as something which went beyond the jurisdiction of the Election Commissioner or was done without jurisdiction and is not merely a wrong view of the law.

Shanmuga Mudaliar v. Subbaraya Mudaliar, (1932) 63 M.L.J. 932, and *Asan Maracair v. Bijli Sahib*, (1933) I.L.R. 57 Mad. 571.

Where an election petition disclosed no ground on the strength of which, if it was made good, the election could be set aside but the Election Commissioner entertained the petition by taking an erroneous view of the legal effect of what was set out therein,

held that in entertaining the petition the Election Commissioner gave to himself a jurisdiction which he properly had not got.

The decision of an Election Commissioner on a matter of fact in proof of which there is no evidence is beyond the scope of his jurisdiction.

* Civil Miscellaneous Petitions Nos. 5275 and 5276 of 1933.

It is only after an election is declared void in accordance with rule 12 of the Election Dispute Rules that a seat or a post is regarded as vacant and by section 17 of the Madras Local Boards Act there can be an election only when there is a vacancy. Where the President of a Panchayat Board who had been elected previously, at a meeting however irregularly called, was actually functioning,

held that an election held subsequently in connection with the same post could not stand.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling upon the fourth respondent therein to submit the records relating to Original Petitions Nos. 41 and 40 of 1933 on his file and to quash the order and proceedings thereon.

K. Bhashyam Ayyangar, T. R. Srinivasan and C. Rangaswami Ayyangar for petitioner.

B. Pocker and K. T. M. Ahmed Ibrahim for first to third respondents.

Cur. adv. vult.

ORDER.

These are two applications made by the same party for the issue of a writ of *certiorari* for quashing proceedings of the Election Commissioner of Tenkasi. Civil Miscellaneous Petition No. 5275 relates to Original Petition No. 41 of 1933 on the file of that officer and Civil Miscellaneous Petition No. 5276 relates to Original Petition No. 40 of 1933 on his file.

On 21st March 1933 the President of the Tenkasi Panchayat Board resigned. The Vice-President in accordance with the rules took steps for a meeting to be held to elect a new President and sent out notices on that behalf on

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the 23rd. But the President of the Taluk Board, being under the impression that the Vice-President had taken no steps, proceeded to take action such as can be taken in such an event under section 42 of the Madras Local Boards Act and wrote on the 24th to the Vice-President of the Panchayat Board asking him to convene a meeting on 30th March 1933 for the election of a President. An inadequate time was allowed to the Vice-President for replying to this letter and, as no reply was received within the time allowed, the Taluk Board President, acting under section 42, appointed a member of the Panchayat Board to convene a meeting for the election of a President on the 30th March. The Vice-President of the Panchayat Board meanwhile went on with his arrangements for holding an election meeting on the 31st March. On the 30th March an election took place and at this the petitioner to these petitions was unanimously elected. Though the first respondent herein, who was petitioner in the two original petitions, protested against the legality of the meeting, his protests were overruled and so he left it along with some others. On the following day, 31st March 1933, there was another election, this being the one for which the Vice-President had arranged, and at this again the petitioner to these two petitions was elected unanimously.

The Election Commissioner has set aside both the elections and has ordered a fresh election to be held. I shall deal first with Civil Miscellaneous Petition No. 5275 which is concerned with Original Petition No. 41 of 1933, the petition which though later in number is concerned with

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the earlier of the two elections. The Election Commissioner has held that the first election was void, in that the Taluk Board President had no jurisdiction to act under section 42 and, further, had acted with material irregularity and illegality in not giving the Vice-President sufficient time to comply with his order and had acted with undue haste by not waiting for the receipt of a reply from the Vice-President before taking action under section 42. That this finding is correct is not now disputed. What is in question is, what are the consequences that should follow therefrom?

There is one point taken for the petitioner which I cannot follow. It is contended that, as the election on the 30th March was held to be void *ab initio*, it was not an election held under the Act and therefore the Election Commissioner could not deal with it. But an election to be void has to be declared to be so and it can only be so declared by an Election Commissioner in proper proceedings, and so the logical result of this contention could only be a topsy-turvy situation such as is known as Gilbertian. The argument does not require serious consideration.

The two principal points for consideration are whether, by taking an erroneous view of the legal position arising from the facts stated in the original petition, the Election Commissioner gave himself a jurisdiction which he properly had not got and secondly whether, even allowing that he had jurisdiction, he acted in the exercise of that jurisdiction with material irregularity. Now, under rule 10 (c) of the rules framed for dealing with disputes as to the validity of elections, in

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order that the Election Commissioner could interfere with the result of the election that has been held in non-compliance with the Act or the rules framed thereunder, he had to be of the opinion that the result of the election has been materially affected by such non-compliance. The Election Commissioner seems to have been a little uncertain as to what he should hold upon this matter. At the conclusion of paragraph 18 of his judgment, which is the penultimate paragraph, he says :

"I think the election of the respondent would have to be set aside as having been made by a body of irresponsible persons."

This he evidently says with reference to the decision of SRINIVASA AYYANGAR J. in *Dwarakacharyulu v. K. Srikrishnan*(1). That decision was clearly based on the fact that the members of the Union Board had not taken the oath of allegiance and the irresponsibility was plainly due to no oath having been taken and not to any illegality in the way in which the meeting had been called. That ruling therefore has no bearing upon the present case. He also refers to *In the matter of G. A. Natesan & K. B. Ramanathan*(2) in which it is stated at page 149 that,

"if a particular act must by statute be done at a particular kind of meeting, convened in a particular way, no meeting can do that act which is not a meeting of that particular kind or has not been convened in that particular way."

This case hardly applies here, as the meeting held on March 30th would have been in order had the circumstances justified action under section 42. The case, further, has nothing to do with *certiorari* and does not override the provisions of rule 10 (c). Earlier in paragraph 18 the Election Commissioner

(1) I.R. 1925 Mad. 1152.

(2) (1916) I.L.R. 40 Mad. 125.

has taken the view that the result of the election was materially affected, but he has come to the conclusion apparently with some difficulty. At one stage he says :

"No doubt it is quite right to say that the first petitioner's chances had not been materially affected since he had never cared to compete as a candidate and the question will arise only when he had competed but had failed on account of the illegal proceedings arising from the non-compliance of the provisions of the Act."

He, however, goes on to say :

"But in this case when the non-compliance of (sic) the provisions of the Act goes to the root of the matter and affects the holding of the election itself, I do not think I can blame the first petitioner for not competing in the election which was sure to be declared to be void. I think he had wisely refrained from standing for the election and had been induced to do so by the very patent irregularity of the proceedings of 30th March 1933. Hence I find that the election itself has been affected and it must naturally be held that the result of the election has also been materially affected."

The view thus expressed has now to be considered with reference to what is set out in the petition, Original Petition No. 41 of 1933. It has been held in *Shanmuga Mudaliar v. Subbaraya Mudaliar*(1) that a writ of *certiorari* may be issued when a Court, or similar authority, gives to itself a jurisdiction which it properly has not got by taking an erroneous view of the law. It has also been held in *Asan Maracair v. Bijli Sahib*(2) that the Court is only entitled to interfere if there was want of jurisdiction at the commencement of the proceedings :

"Once there is jurisdiction, any errors committed subsequently cannot take away the jurisdiction once obtained. The question which now arises, therefore, is, did the election petition

(1) (1932) 63 M.L.J. 932.

(2) (1933) I.L.R. 57 Mad. 571.

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I was a party to both these decisions and I would qualify what is quoted in the latter of them by saying that, if in an enquiry for which there is jurisdiction an error is made which can be regarded as something which went beyond the jurisdiction of the Court or was done without jurisdiction and is not merely a wrong view of the law, then it appears that a writ can be granted. To this particular point I shall come a little later.

I shall first refer to what is set out in the petition, Original Petition No. 41 of 1933. It is stated there in paragraph 7 that the first petitioner, i.e., the present first respondent, wanted to contest for the President's post and again it is recited in paragraph 12 that

"the first petitioner wanted to contest the election to the vacant office on 30th March 1933 and, knowing that the election even if held on that day would be declared invalid, refrained from standing as a candidate that day."

I cannot see how what is thus set out shows that the first respondent was really prevented by the fact that the meeting was irregularly called from standing as a candidate. The assertion that he knew that the election would be declared invalid is not to my mind sound since, as has been held in the decision on the other petition, the result of the election on that day would have prevailed, as in fact it did prevail, unless and until it was set aside by the Election Commissioner. And, so, if the first respondent had chosen to stand for the election—it is not suggested that anyone else wanted to stand except himself and the present petitioner—then, however irregular may have been the way in which the meeting

had been called, it could not be said that the result of the election had been materially affected because of the irregularity. There is no contention that there was anything wrong with the meeting apart from the fact of its having been irregularly called. When such is the case I do not think that the petition disclosed any ground on the strength of which, if it was made good, the election could be set aside. There is, indeed, no specific allegation that the result of the election was materially affected,—but I take it that it might reasonably be held that there has been such an effect if an intending candidate has been prevented from standing, even though it would be impossible to say how the voting might have gone. The first respondent, however, does not allege that he was prevented from standing by anything but his own discretion. I must therefore take it that the Election Commissioner when he entertained the petition has given to himself a jurisdiction which he properly had not got by taking an erroneous view of the legal effect of what was set out therein.

Next as to what happened in the course of the enquiry: The allegation that the first respondent wished to stand as a candidate was disputed by the present petitioner in his counter-statement and therefore had to be proved, but there is no proof of it whatever. In fact the first respondent did not give any evidence. Exhibit C is a copy of the proceedings of the meeting held on 30th March 1933 from which it appears that the first petitioner in the lower Court raised a point of order as to the legality of the meeting and moved that it should be dissolved, that his objection was

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overruled and the present petitioner was elected President as the only candidate nominated, the first petitioner and others having left the meeting in protest. The resolution however does not show that the first respondent had any intention of standing as a candidate. It is clear to me on the authorities that this decision on a matter of fact in proof of which there was no evidence was beyond the scope of the Election Commissioner's jurisdiction. The learned Advocate for the first respondent refers me to the Privy Council case of *Rex. v. Nat Bell Liquors, Ltd.*(1), but the case is no authority for the position that there can be a valid finding of fact in the absence of any recorded evidence of any kind in support of it. All that it decides is that when there is a finding given upon evidence, even if that evidence is insufficient, a writ of *certiorari* will not be granted. There was some evidence in that case and, as shown in one passage of the judgment (page 165), when there is evidence,

"it is not competent to the Superior Court, . . . to consider . . . whether or not some evidence was forthcoming before the Magistrate of every fact which had to be sworn to in order to render a conviction a right exercise of his jurisdiction."

That is the point which the judgment brings out as to the matter of evidence. As has been stated in *Rex. v. Smith*(2), which is quoted in this Privy Council decision and is referred to in Halsbury's Laws of England (Hailsham's edition), Vol. IX, page 889, as correctly stating the law on this subject :

"If indeed there had been any evidence whatever (however slight) to establish this point, and the Magistrate who

(1) [1922] 2 A.C. 128.

(2) (1800) 8 T.R. 588.

convicted the defendant had drawn his conclusion from that evidence, we would not have examined the propriety of his conclusion; for the Magistrate is the sole Judge of the weight of the evidence . . . There was some evidence from which he might draw the conclusion."

and again at page 146 of the Privy Council judgment it is stated :

"But the general view has been that, if there is some evidence, there is jurisdiction to hear and determine and thereafter the Superior Court will not interfere."

In this case, as I have said, there is no evidence whatever as to any intention on the part of the first respondent to stand as a candidate. As already stated, I do not see how the fact that the meeting was irregularly held could prevent him from standing as such. In these circumstances I must hold that the Election Commissioner's conclusion that the result of the election was affected by the refraining of the first respondent from standing as a candidate is one at which he had no jurisdiction to arrive in that he has come to it without reference to any evidence of any kind. I cannot see how he can draw the inference, as it is suggested that he might, that the first respondent intended to stand as a candidate from the fact that he was present at the meeting or a part of it but did not stand and afterwards put in a petition stating that he had intended to stand. Nor can I agree that the election was sure to be declared void. Had first respondent chosen to stand, as the only other person who wished to do so, then, in the absence of any other irregularity, rule 10 (c) could have had no application and the election would have held good.

In the result then I find that this is a case in which a writ should be issued quashing the

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proceedings of the Election Commissioner. The Petition, Civil Miscellaneous Petition No. 5275 of 1933, is therefore allowed and the election of 30th March 1933 will stand confirmed. The petitioner is allowed his costs on this petition.

Civil Miscellaneous Petition No. 5276 of 1933 as to Original Petition No. 40 of 1933 may be quickly disposed of. I agree with the Election Commissioner that the election of 31st March cannot stand. By section 17 of the Madras Local Boards Act there can be an election only when there is a vacancy and in this case there was no vacancy. The President who had been elected on the previous day, at a meeting however irregularly called, was actually functioning and he could be removed as the result of proper proceedings taken before the Election Commissioner. It is only after the election is declared void in accordance with Rule 12 of the Election Dispute Rules that a seat or a post is regarded as vacant. The matter of there being no vacancy, in consequence of which there could be no election, is a fundamental one and it is not necessary to consider any other point with reference to this petition which is therefore dismissed except in so far as it objects to the order for a fresh election. That part of the Election Commissioner's order which directs that there should be a fresh election is set aside. No costs on this petition either in this Court or that of the Commissioner. Fee in Civil Miscellaneous Petition No. 5275, Rs. 150.

A.S.V.

APPELLATE CIVIL.

*Before Sir Vepa Ramesam, Kt., Officiating Chief Justice, and
Mr. Justice Venkatasubba Rao.*

MEERALLI AMBALAM AND ANOTHER (DEFENDANTS 2 AND 3),
APPELLANTS,

1933,
September 11.

v.

R. SHANMUGHA RAJESWARA SETHUPATHI *alias*
NAGANATHA SETHUPATHI AVARGAL, RAJAH
OF RAMNAD, AND ANOTHER (LEGAL REPRESENTATIVE OF
PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

*Madras Estates Land Act (I of 1908), sec. 3 (16) (a) and sec. 20
—Tank-bed—Land if can be both ryoti and, at same time—
Assignment of tank-bed by landholder for cultivation—Effect
of, not to convert it into ryoti land—Land within ambit of
tank-bed—Abandonment of—Effect—Cultivation or no
cultivation—Inference of land not being or being tank-bed
from—Propriety of.*

Land cannot at the same time be both tank-bed and ryoti. Section 20 of the Madras Estates Land Act reserves the right of the landholder to assign tank-beds for cultivation, but that does not mean that tank-beds by being so assigned become converted into ryoti land.

Though any specified land may be within the ambit of a tank-bed, it may on account of abandonment cease to possess that character; but there must be acts from which abandonment can be inferred. From the mere absence of cultivation it cannot be held that a certain part is tank-bed; similarly from the fact that cultivation is carried on it cannot be inferred that the portion so cultivated is ryoti.

APPEAL against the decree of the Court of the Subordinate Judge of Sivaganga in Appeal Suit No. 50 of 1927 preferred against the decree of the

* Second Appeal No. 1066 of 1931 and Civil Revision Petitions Nos. 282 to 293 of 1931.

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Court of the District Munsif of Paramakudi in Original Suit No. 836 of 1924.

Petitions under sections 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the orders of the Court of the Subordinate Judge of Sivaganga, dated 21st August 1930 and made respectively in Civil Miscellaneous Appeals Nos. 2 to 4, 7 to 11, and 13 to 16 of 1928 preferred respectively against the orders of the Court of the District Munsif of Paramakudi, dated 11th April 1927 and made in Original Suits Nos. 839, 840, 841, 845, 847, 848, 849, 851, 853, 854, 855 and 930 of 1924.

K. Rajah Ayyar and V. Ramaswami Ayyar for appellants.

Sir A. Krishnaswami Ayyar (Advocate-General) and *V. Somasundaram Pillai* for respondents.

Cur. adv. vult.

JUDGMENT.

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VENKATASUBBA RAO J.—These cases raise the question as to the meaning of the expression “tank-beds” in section 3 (16) (a) of the Madras Estates Land Act. The plaintiff, the Zamindar of Ramnad, alleges that the lands in question are in the bed of the tank (known as the Abhiramam tank) and that they are therefore outside the category of “ryoti land” as defined by the Act. Several suits were tried as a batch, and the learned District Munsif upheld the plaintiff’s contention only in two of them. Original Suit No. 836 of 1924 is one such and the District Munsif’s decision was confirmed by the Subordinate Judge in appeal. Second Appeal No. 1066 of 1931 relates to the plot in Original Suit No. 836 of 1924. From what I

shall state presently, it will appear that the appellants have no case and their second appeal is accordingly dismissed with costs.

In regard to the other plots, the District Munsif has held that they are not in the tank-bed, and his decision has been reversed by the lower appellate Court. The several civil revision petitions before us relate to those plots.

In 1870 a circular was issued in the zamindari, known as the Boyle’s Circular, fixing what are known as the “malnihidi” limits of the tank, and it is strongly contended by Mr. Rajah Ayyar for the ryots that the portion so marked off must alone be taken as constituting the bed of the tank. The lands, with which we are concerned in these civil revision petitions, are outside the “malnihidi” or “mulamal” limits. The circular in question was issued with a view to prohibit cultivation within those limits, and conditions were laid down as to how the “malnihidi” limits were to be fixed. I may point out that in the judgments of the lower Courts the words “mulamal” and “malnihidi” are used indifferently to convey the same idea. According to the defendants, a tank-bed consists of four portions: (1) Vettu-thavu, (2) Mulamal or Malnihidi, (3) Kulamkorvai and (4) Eramedu. These words are indecisive in regard to the point we have to decide and the division is arbitrary. “Vettu-thavu” merely means the deepest part and “mulamal” or “malnihidi” connotes no more than that the portion is within certain defined boundaries. By “kulamkorvai” is meant that cultivation is carried on upon that part and “eramedu” is high land. The contention for the defence is that “kulamkorvai” cannot

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be regarded as tank-bed. This argument amounts to nothing more than merely affirming that, because cultivation is carried on in a particular portion, that cannot be regarded as tank-bed. The learned District Munsif observes :

"If really the whole extent within the FTL is tank-bed and not cultivable and is prohibited, there is no reason why the mulamal should be separately pointed out."

There is a fallacy underlying this statement. The higher portion of a tank-bed may be fit for cultivation in a manner the lower portion is not, and the zamindar with a view to increase his income may well permit cultivation on the land on the higher level. The learned District Munsif himself says :

"Paragraph 388 of Ellis' Irrigation Manual lays down that the effective storage capacity of a tank is limited by the FTL but the area submerged by the tank water-spread is dependent upon the MWL, which is always higher than the FTL."

Then he goes on to point out that "malnihidi" limits are lower than the FTL, and the only ground for his conclusion is that, because cultivation is permitted in what is known as "kulam-korvai", therefore that part must be regarded as being outside the tank-bed. He does not go so far as to suggest that the "malnihidi" limits are conterminous with the bed of the tank. Between the "malnihidi" and the suit lands, there is a portion where *babool* trees abound, and the District Munsif recognises that this part at any rate must be treated as being within the tank-bed and the reason he gives for this conclusion is that, had this been ryoti land, there would necessarily have been cultivation in that region. In either case the District Munsif applies a wrong test ; merely

on the ground of absence of cultivation, he is prepared to hold that a certain part is tank-bed and similarly from the fact that cultivation is carried on, he wishes to infer that the portion so cultivated is ryoti.

In *Thames Conservators v. Smeed, Dean & Co.*(1) the bed of a river is thus described :

"The bed of the river is that portion of its soil which is alternatively covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn."

There is of course a fundamental difference between a tank-bed and a river-bed, but the passage is useful to this extent, namely, that what happens in abnormal or extraordinary times must clearly be excluded. But that is not Mr. Rajah Ayyar's contention. He admits that the suit lands are submerged in normal times after rainfall every year and that cultivation has necessarily to be stopped during those periods. The lower appellate Court's conclusion that the suit lands are tank-bed must, therefore, be affirmed.

It is next urged that land, without ceasing to be tank-bed, may yet be ryoti. The definition of "ryoti land" excludes in terms tank-beds [section 3 (16)]. To quote only the material portion of the section :

"'Ryoti land' means cultivable land in an estate other than private land, but does not include tank-beds."

A certain land is either ryoti or tank-bed and, unless it ceases to possess the character of a tank-bed, it cannot be ryoti. Mr. Rajah Ayyar contends

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that, because cultivation has been permitted, therefore the land becomes ryoti and relies upon the last clause of section 20 of the Estates Land Act. Whatever rights may have been conferred on the occupants (we are not deciding that point), it is impossible to hold that the land has become ryoti under the Act. This very Bench has held in Second Appeals 1288 to 1292 of 1929 that, though any specified land may be within the ambit of a tank-bed, it may on account of abandonment cease to possess that character; but there must be acts from which abandonment can be inferred. The defendants themselves admit that cultivation is carried on subject to the condition that the lands are liable to be submerged. That very statement implies that abandonment on the part of the zamindar cannot be inferred—even granting that a landholder without the concurrence of his ryots can convert a tank-bed into ryoti land. These lands began to be cultivated just about 25 or 30 years previous to the filing of the suits, and the lower Courts point out that, when the zamindari was in the possession of certain lessees, some persons taking advantage of that fact occupied the lands and began cultivation. Subsequently it is alleged that either the lessees or the zamindar recognised the occupants as tenants and issued pattas. What the effect of such conduct may be, is not a point that now concerns us. The order of remand made by the lower Court has left open that question and the suits have been directed to be tried on the other issues framed in the case. What is relevant to the present matter is that no abandonment has been proved. The contention that a certain land may at the same time be both

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tank-bed and ryoti cannot possibly be accepted. All that section 20 says is, that lands “set apart for the common use of the villagers”, such as threshing-floors, shall not be assigned for any other purpose except under certain conditions. The section then goes on to provide :

“Nothing in this section shall apply to the tank-beds in any estate or affect the rights of the landholder over them.”

This reserves the right of the landholder to assign tank-beds for cultivation, but that does not mean that tank-beds by being so assigned become converted into ryoti land. Tank-beds having been excluded from “ryoti land” by the definition of that term, it was considered necessary to confer certain powers in respect of tank-beds in express terms. The provision in question cannot therefore have the effect contended for. If authority be needed for this position *Bolusawmy v. Venkata-dri Appa Rao*(1) decides this point.

In the result, the civil revision petitions are dismissed with costs. The Advocate’s fee in each civil revision petition is fixed at Rs. 10.

RAMESAM OFFG. C.J.—I agree.

A.S.V.

(1) (1917) 47 I.C. 594.

APPELLATE CIVIL.

Before Mr. Justice Sundaram Chetti and
Mr. Justice Pakenham Walsh.

1933,
September 18.

HAJEE JAMAL NOOR MOHAMED SAIT AND CO.
(DEPENDANTS), APPELLANTS,

v.

A. ABDUL KAREEM AND CO. (PLAINTIFFS),
RESPONDENTS.*

"Passing off" action—Burden of proof—Instances of actual deception—Proof of, if necessary for obtaining an order for injunction—Action for infringement of trade-mark registered under a statute and "passing off" action—Mode of proof—Distinction.

In a "passing off" action the plaintiff has to prove his title to the name or get-up and the infringement of that title by the defendant by showing that the name or get-up complained of is likely to deceive the class of persons who buy such goods.

The rules and principles relating to the action of infringement of a trade-mark registered under a statute apply in general to the action for "passing off" except that in the latter case title is proved by proof of repute and in the former case by proving registration of the trade-mark.

In order to obtain an injunction in a "passing off" action it is not necessary to prove that somebody has in fact been deceived.

Nooroodeen Sahib v. Charles Sowden, (1905) 15 M.L.J. 45 (F.B.), followed.

APPEAL against the decree of the Court of the City Civil Judge, Madras, in Original Suit No. 490 of 1929.

K. Narasimha Ayyar for *T. Rangachari* and *S. Ramachandran* for appellants.

* City Civil Court Appeal No. 52 of 1930.

G. Ramakrishna Ayyar and *C. Srinivasachari*
for respondents.

Cur. adv. vult.

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PAKENHAM
WALSH J.

The JUDGMENT of the Court was delivered by PAKENHAM WALSH J.—The plaintiffs are the manufacturers and vendors of a brand of beedies known as "Kareem Beedies". The suit was for an injunction restraining the defendants and their agents from manufacturing or selling beedies in packets which are colourable imitations of plaintiffs' trade-mark and for other and similar remedies. They were given an injunction and Rupees fifty as damages. Against this the defendants have appealed.

The plaintiffs' case is that they were manufacturing and selling beedies for over twenty years, that they enclose their beedies in packets of 25, that 20 of these packets are then made up into a larger bundle and wrapped in a covering which constitutes plaintiffs' trade-mark, that plaintiffs' beedies are known as "Kareem Beedies", that their trade-mark consists, in the front, of two hemispheres with three stripes running across each hemisphere in which their trade name is inscribed, that they have registered these marks with the Chamber of Commerce, and that originally the mark was a single hemisphere but that from 1920 they have been using the present trade-mark; that the defendants describe their beedies as "Zackaria Beedies" and profess that they are manufactured in Tumsur, Gondia, but that in reality the defendants are manufacturing them in Madras; and that they are pretending that a fictitious person called Zackaria is manufacturing them in Gondia.

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The defendants deny that the plaintiffs have manufactured or sold beedies for twenty years, that their beedies have earned the popularity or reputation attributed to them and that the wrappers or designs in question have come to be associated with the plaintiffs' beedies. They say that they do not themselves manufacture beedies, that the wrappers, letter-press and designs referred to in the plaint belong to one A. M. Zackaria Sait who owns a large beedi factory in Gondia, Central Provinces, and that it was at his request and for his benefit that the defendants caused the wrappers and labels to be printed in Madras and sent to him.

The third and the fourth issues dealt with the question whether the name of A. M. Zackaria appearing on the wrapper is a fictitious name as alleged by the plaintiffs or that of a real manufacturer as alleged by the defendants, and whether the defendants caused the wrappers to be printed for and on behalf of the said A. M. Zackaria or whether they did so on their own behalf, and whether, even if they did so on behalf of A. M. Zackaria, the defendants are not liable to be restrained. The Court below found on issue number three that, though A. M. Zackaria may be the name of a real person, there is no such firm or shop separately functioning in Tumsur, Gondia. This A. M. Zackaria was examined as defendants' first witness.

[His Lordship discussed the evidence and held that it was the defendants' firm which got the wrappers printed for themselves and put their own beedies into them for sale.]

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The learned Advocate for the appellants has practically confined his argument to the following lines. He states that the plaintiffs have to prove three things : (1) that they have been using the particular mark for a number of years exclusively and that their goods have obtained a reputation in the market as being known by this mark ; (2) that the mark which they complain of must be likely to deceive the class of persons who buy such goods ; and (3) that it must be proved that somebody has been so deceived.

The first two questions are really two classes of fact bearing on a single issue, namely, whether the defendants have knowingly done that which would pass off other goods as and for the goods of the plaintiffs ; *vide* on this point Halsbury's Laws of England, volume 27, paragraph 1327 where it is said :

" In many cases the evidence can be conveniently divided into two separate heads, namely, the plaintiffs' title to a name or get-up, and the defendant's infringement of that title ; but these are not really separate issues, but classes of facts bearing on the one issue given above."

That the plaintiffs' goods have come to have an exclusive reputation in the market by this mark is, we consider, proved beyond the smallest doubt. As stated above, the plaintiffs' beedi business in Madras has been going on for twenty years and they have been using those marks since 1920. The figures of sales given by the lower Court in paragraph 5 sufficiently show how large the plaintiffs' business was and how it suffered from about October 1929 when the defendants started a rival business. The best proof of the reputation of the plaintiffs' beedies is the fact that the defendants were plaintiffs' agents for them for several years

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until 1929 and were buying each month about Rs. One thousand worth of beedies, and they therefore had ample knowledge of the plaintiffs' goods, of their trade-mark, and of the reputation of the goods in the market. They had an advance of Rs. fifty with the plaintiffs' firm and, as soon as they started to put on the market the "Zackaria Beedies", they withdrew this balance. These same plaintiffs brought a similar action with regard to their beedies against one Abdul Kareem Sahib. The appellate judgment in that case is reported as *Kareem v. Kareem*(1). There, although the period during which the plaintiffs had been selling beedies under this trade-mark was less than a year, the Court felt

"no reason to doubt that the plaintiff's wrapper had become clearly identified with his beedies in the minds of purchasers when the defendant placed his imitation upon the market."

We have no hesitation in coming to the same conclusion here.

As regards the second point that the mark complained of must be one likely to deceive the customers, there cannot be the least doubt judging merely by the two wrappers that this would be the case. The size, get-up, design and lettering are similar throughout. The colours employed on the two hemispheres are the same. In both, the latitude and longitude on the hemispheres are identical. There are three red lines on each bearing descriptions in the same languages. The defendants' wrapper has a not very conspicuous and uncoloured tiger's head drawn on it and the red bands at the top and bottom of the hemispheres are concave instead of convex. As a matter

(1) A.I.R. 1931 Mad. 461.

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of fact even this last difference is seen from the evidence to have been due to the designer not being able to fit in the tiger's head otherwise. But of course the defendants are entitled to take advantage of any difference, whether it was one which they themselves designed or not. A very striking point which shows that the defendants' wrapper was got up to imitate the plaintiffs' wrapper is that the latter has on it "post-box No. 85", whereas in an exactly similar place the defendants' wrapper has "Post-box No. " (blank), (the defendants presumably not having a post-box number which they could enter). It is in evidence that people who are not highly educated use the plaintiffs' beedies; *vide* the evidence of plaintiffs' second witness. It is however argued that the evidence of plaintiffs' fifth witness shows that the public were not mistaken between the two articles. Plaintiffs' fifth witness is an up-country dealer who sells both Kareem and Zackaria beedies. The sentence relied on is this: "Purchasers used to say when Kareem was out, 'there are also globe beedies, give us Zackaria'." The meaning of this sentence is not very clear, but the very fact that customers recognized both as "globe beedies" goes to show that in a way they identified them, no doubt from the hemispheres appearing on both. We are not prepared to say that this stray and not very clear sentence can overcome what is perfectly obvious to the eye, that the defendants' wrapper is a colourable imitation of the plaintiffs', which is likely to deceive customers, especially of the ignorant class who do not know how to read. When the plaintiffs prove that the mark is a colourable imitation, the burden of showing how they came

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to adopt it is on the defendants. There has been no attempt in the present case at any explanation by the defendants; *vide* Kerly on Trade-Marks, pages 459-460.

But it has been argued that the Court cannot act simply on its own comparison of the two wrappers. We have not been shown any case supporting this view. If it is pushed to its logical conclusion, it would follow that, even though the trade-marks and the get-ups complained of were absolutely identical and the defendants could not point out the smallest difference, nevertheless the Court should require some evidence *aliunde* to show that persons were likely to mistake the defendants' goods for those of the plaintiffs. In the very case on which the learned Advocate for the defendants seeks to prove his third point that there must have been actual deception proved there are remarks which show clearly the extent to which the Court is justified in acting on its own comparison of the exhibits before it. In *Payton & Co. v. Snelling, Lampard & Co.*(1), in dealing with what one may call "opinion evidence", it was observed:

"That is not a matter for the witness; it is for the Judge. The Judge, looking at the exhibits before him and also paying due attention to the evidence adduced, must not surrender his own independent judgment to any witness."

In *Jones Bros., Ltd. v. Anglo American Optical Co.*(2), an action for passing off and infringement of trade-mark, where it was found that there was no infringement and no evidence of any witness that the goods supplied by the defendants were accepted by him in the belief that they were of

(1) [1901] A.C. 308, 311.

(2) [1912] 29 R.P.C. 391.

the plaintiffs' manufacture, nevertheless we find COZENS HARDY M.R. at page 366 comparing the two exhibits and saying:

"All I can say is that, looking at a plain duster of the defendants, with no wording whatever round the outside and looking at the plaintiffs' with the words very conspicuously printed all round the outside, I think it is impossible for any reasonable person to say that they so resemble one another as to be calculated to deceive."

And further on:

"I say that, so far as my eyes enable me to say, and so far as it is my duty to judge by that, I can see no resemblance such as is calculated to deceive."

So also in the third case relied on by the learned Advocate for the defendants, *Lever Brothers, Ltd. v. Bedingfield*(1), we find a minute comparison by the learned Judge, LINDLEY M.R., of the two wrappers as regards their resemblances and differences.

At this point it becomes necessary to see whether a distinction which the learned appellant's Advocate seeks to draw between cases of infringement of a trade-mark registered under a statute, impairs the authority of any of the cases relied on by the plaintiffs. As there is no Registration Act in India the principles of the English Common law have to be applied; *vide Imperial Tobacco Company of India, Ltd. v. Bonnan*(2), *British American Tobacco Company, Ltd. v. Mahboob Buksh*(3) and *Imperial Tobacco Co., Ltd. v. Albert Bonnan*(4). The only difference between a suit for infringement of a trade-mark registered under the Act, and that of a trade-mark not registered, appears to be that a trade-mark registered under the Act of 1875 in England gives an immediate property in the registered trade-mark, whereas that property

(1) [1899] 80 L.T. 100, 103.

(3) (1910) I.L.R. 38 Calc. 110, 117.

(2) (1924) I.L.R. 51 Calc. 892 (P.C.).

(4) (1923) I.L.R. 50 Calc. 762, 790.

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has got to be acquired by user in a country in which there is no registration. As it is put by CURGENVEN J. in *Kareem v. Kareem*(1)

"the user acquires a property in the mark or combination which the law will protect just as much as if it were a registered trade-mark."

Kerly on Trade-Marks at page 551 says :

"It will be seen from the definition placed at the beginning of the chapter and the comparison of the two actions in the preceding pages that the rules and principles relating to the action of infringement, which are collected in the last chapter, in general apply also to the action for "passing off", substituting proof of repute for evidence of title and registration. The defences available, the relief granted, and the practice and procedure in both actions are substantially the same."

With these preliminary remarks we may come at once to what the learned Counsel for the appellants has made the sheet-anchor of his case, namely, the proposition that in order to obtain an injunction in a "passing off" action it must be proved that somebody has been deceived, and this he seeks to found on a remark of Lord MACNAGHTEN in *Payton and Co. v. Snelling, Lampard & Co.*(2) which runs as follows :

"In the next place, it is perfectly clear that no human being has been deceived. There is not a single instance of any person wishing to buy 'Royal Coffee' buying 'Flag Coffee' instead through any mistake of any sort. Mr. Warmington accounted for that by saying, 'Oh, we were bound to institute proceedings at the earliest possible moment'; but if persons come to the Court under an apprehension of that sort, they are still bound to make out their case. It will not do to say, 'we were frightened by what might happen, and therefore, you must stop the thing *in limine*.'"

We will consider this remark later on in its context. For the present let us look at the cases

(1) A.I.R. 1931 Mad. 461, 462.

(2) [1901] A.C. 308, 309.

where it has been authoritatively laid down that evidence of somebody having been actually deceived is not necessary. The first of these is a very oft-quoted case, *Johnston v. Orr Ewing*(1). This case arose on a matter which was not governed by the Registration Act of 1875-76 which Act had not come into force at the time of the suit. Even, therefore, if there can be any distinction with regard to this matter between cases of trade-marks registered under the Act and other cases, it will not be available to distinguish this case. There it was held that the use of a trade-mark calculated to mislead incautious purchasers may be restrained by injunction, although no purchaser has actually been misled,

"for the very life of a trade-mark depends upon the promptitude with which it is vindicated."

It is true that in that case a large body of evidence was let in and relied on to the effect that deception would be likely to occur, at all events with the more ignorant class of consumers (*vide* page 226), whereas in *Payton and Co. v. Snelling, Lampard & Co.*(2) it seems to have been held that such opinion evidence is not relevant. But we are not satisfied that on the point that actual deception must have occurred the authority of *Johnston v. Orr Ewing*(1) has been shaken. It has been cited with approval in *Somerville v. Schembri*(3), a case that came from Malta, where, as in India, there is no Registration Act. It is there distinctly stated that the question whether the respondents have infringed the appellants' exclusive right depends upon how far the defendants'

(1) (1882) 7 App. Cas. 219.

(2) [1901] A. C. 308.

(3) (1887) 12 App. Cas. 453.

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trade-mark bears such resemblance to that of the plaintiffs as to be calculated to deceive incautious purchasers. There is nothing said at all about any actual deception having occurred, nor does it appear that there was any evidence in that case to show that it had occurred. In *Iron-ox Remedy Co. v. Co-operative Wholesale Society, Ltd.*(1), a case subsequent to *Payton and Co. v. Snelling Lampard & Co.*(2), an injunction was granted in spite of there being no evidence of any person having been actually deceived. As we said above, on this matter we think that no distinction can be drawn between a suit for infringement of a registered trade-mark and an ordinary "passing off" suit. As a matter of fact, that suit was one under both heads. In *Juggilal-Kamalapat v. Swedeshi Mills Co., Ltd.*(3) the Privy Council again quotes *Johnston v. Orr Ewing*(4). There is nothing in the report of that case to indicate that any actual deception had been proved. In *Slazenger v. Feltham*(5) it was held that

"if it is shown to have been intended by the defendant to deceive in this way, the Court will not generally push the inquiry further."; (*vide* Kerly, page 606). There is a Full Bench decision of this Court, *Nooroodeen Sahib v. Charles Sowden* (6). In that an injunction was granted, and BENSON J. said that in order to get an injunction it is not necessary to prove that any one has in fact been deceived but that it is enough if the defendants' trade-mark bears such a resemblance to that of the plaintiffs as to be calculated to mislead incautious purchasers. If it could be stated

(1) [1907] 24 R.P.C. 425, 430.

(3) (1928) I.L.R. 51 All. 182 (P.C.).

(5) (1889) 6 R.P.C. 538.

(2) [1901] A.C. 308.

(4) (1882) 7 App. Cas. 219.

(6) (1905) 15 M.L.J. 45 (F.B.).

beyond any dispute that that particular aspect of the case was in question in the suit, this Full Bench decision, in the absence of any later and overriding decision, would preclude us from going into the question at all. It may be useful to note exactly in what shape the point arose. The suit came first before two Judges, BODDAM and BHASHYAM AYYANGAR JJ., who differed, the former holding that an injunction should be granted and the latter holding that it should not be granted. But it is to be noticed that even BHASHYAM AYYANGAR J., who was opposed to the granting of an injunction, held the view that it was not necessary that actual deception should have been proved. It is clear from the remarks of DAVIES J., the dissenting member of the Full Bench, at page 96, that no instance of actual deception was cited in that case. Nevertheless he says :

"We have to consider only the probabilities of deception and for that purpose to bear in mind who the purchasers are." He then discusses this matter at length. So, although he was against granting the injunction, it is perfectly clear that he did not consider the fact that no instances of deception had been proved concluded the matter, nor does he base his opinion at all on any such ground. As observed above, BENSON J. distinctly laid down that it is immaterial. It is difficult under all these circumstances not to hold that the Full Bench decided both by implication and expressly that actual instances of deception were not necessary. *Payton and Co. v. Snelling Lampard & Co.*(1) so strongly relied on by the appellants was also quoted before the learned Judges in that case, and

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even the passage of Lord MACNAGHTEN's judgment, which is the appellants' sheet-anchor, was referred to, though in a somewhat different connection. Bearing in mind all this case law, both previous and subsequent to *Payton and Co. v. Snelling Lampard & Co.*(1), it has to be seen whether the remark of Lord MACNAGHTEN relied on can be considered to have altered the law as laid down in *Johnston v. Orr Ewing*(2), especially when there is no indication in his judgment that that case is being overruled on this point, and when subsequent equally authoritative cases have upheld the view that proof of actual deception is not necessary. In *Payton and Co. v. Snelling Lampard & Co.*(1) there were two sets of dealers of two sorts of coffee, one called "Royal Coffee" and the other "Flag Coffee". The appellants alleged that the respondents sold their coffee in canisters with labels and colours which were calculated to deceive purchasers into the belief that they were buying the appellants' coffee. It was found that the colours would not deceive. The finding also was that one was distinctly labelled "Royal Coffee", and the other "Flag Coffee", and Lord MACNAGHTEN said:

"Nobody has been deceived, and I do not think any one will be deceived."

Therefore the remarks in the case must be read in the light of the finding that there was no colourable imitation in point of fact. Lord MACNAGHTEN then remarks:

"In the first place, the defendants did not, as it seems to me, pass off or attempt to pass off their goods as the goods of the plaintiffs. I do not see the slightest ground for

(1) [1901] App. Cas. 308.

(2) (1882) 7 App. Cas. 219.

suspecting them of any intention or design or wish to steal the trade of the plaintiffs."

In the present case we have no hesitation in holding that the defendants did wish and intend to pass off their beedies as those of the plaintiffs. Then his Lordship goes on with the sentence quoted above so much relied on. The first two sentences,

"It is perfectly clear that no human being has been deceived"

and

"There is not a single instance of any person wishing to buy 'Royal Coffee' buying 'Flag Coffee' instead through any mistake of any sort.",

are perfectly intelligible as proof that the get-up of the Flag Coffee would not lead customers to believe that it was Royal Coffee. It is the sentences that follow which give ground for the contention of the learned Counsel for the appellants.

"Mr. Warmington accounted for that by saying, 'we were bound to institute proceedings at the earliest possible moment.'"

Then Lord MACNAGHTEN says:

"But if persons come to the Court under an apprehension of that sort they are still bound to make out their case. It will not do to say, 'We were frightened by what might happen, and, therefore, you must stop the thing *in limine*.'"

We think a reasonable interpretation of this is that a person cannot substitute his apprehensions for actual proof that there is a probability of the defendants' goods being mistaken for his goods. If Lord MACNAGHTEN meant that an action could not be brought until some person has been actually deceived, it would conflict with the law

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as laid down from the time of *Orr Ewing & Co. v. Johnston & Co.*(1) wherein JAMES L.J. said :

"The very life of a trade-mark depends upon the promptitude with which it is vindicated.",

which remark is quoted in *Johnston v. Orr Ewing*(2) in the following context:

"But in this case the plaintiffs judged it necessary to proceed without waiting till actual deceit was proved and I think they judged rightly, for as JAMES L.J. said "

and then follows the quotation cited above. There appears to be no equitable principle on which the plaintiffs should have to wait till the deception has actually been successful and we do not think that Lord MACNAGHTEN could possibly have intended by his remark to imply that they must so wait. Even on what we must consider the very remote supposition that he did, the remark would have been an *obiter dictum* on the facts of the case before him.

The other cases quoted for the appellants do not support the proposition at all. *Jones Bros., Ltd. v. Anglo-American Optical Co.*(3) was not decided on the point that no witness was called to show that he accepted the goods supplied by the defendants in the belief that they were of the plaintiffs' manufacture. That fact was merely used as an additional argument to support the Court's conclusion that the two articles were not so similar in get-up and appearance as would be likely to deceive customers and to create the probability of customers confusing them. As regards *Lever Brothers, Ltd. v. Bedingfield*(4) there is no

(1) (1880) 13 Ch.D. 434, 464.

(2) (1882) 7 App. Cas. 219.

(3) [1912] 29 R.P.C. 361.

(4) (1899) 80 L.T. 100, 103.

doubt one point of resemblance to this case, that the defendant to a certain extent copied the plaintiffs' wrapper, but it was held that

"the defendant's wrappers are in truth extremely dissimilar from those of the plaintiffs. The prominence of the word 'Sunlight' on the plaintiffs' wrappers and the substitution in equally large type of the words 'Red Maid' on the defendant's wrappers, coupled with the other differences between the wrappers, make the dissimilarities so obvious as to draw attention from the resemblances. The differences, not the resemblances, are what catch the eye."

Perhaps when there is only some resemblance between the two trade-marks actual instances of deception may be of some help to the Court in deciding whether the articles are likely to be mistaken for each other.

In the result we hold that the decree awarding an injunction and damages to the plaintiffs was correct. The appeal therefore fails and is dismissed with costs.

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APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Bardswell.

1933,
October 17.

N. A. AIYASWAMY CHETTY (RESPONDENT), APPELLANT,

THE OFFICIAL ASSIGNEE OF MADRAS (APPLICANT),
RESPONDENT.*

Insolvency—Foreign adjudication—Straits Settlements Bankruptcy Ordinance No. 44—Adjudication under—Effect of, on immovable property in British India—Attachment of immovable property in British India after foreign adjudication—Assignment of property by bankrupt to foreign Official Assignee—Conflict between attaching decree-holder and foreign Official Assignee—Priority.

On 9th January 1931 a person was adjudicated an insolvent at Penang, a part of the Straits Settlements. After this an unsecured creditor filed a suit in Ramnad, a part of British India, against the insolvent, attached before judgment a property of the insolvent in British India, obtained a decree, and applied for sale of the attached property. On the 24th October 1932 the insolvent executed a conveyance of all his properties in favour of the Official Assignee of Penang including the property above-mentioned. On the 5th December 1932, at the request of the Supreme Court of Penang, an order was made in Madras by the High Court, directing the Official Assignee of Madras to act as auxiliary to the Official Assignee of Penang and take possession of the properties of the insolvent and realise the same. The Official Assignee of Madras applied to the Insolvency Court in Madras for stay of the execution proceedings by the attaching decree-holder, which was ordered.

Held on appeal, (1) that the Straits Settlements Bankruptcy Ordinance No. 44 had no binding force in British India where the immovable property was situate, and, if it purported to cause a vesting of extra-territorial immovable property, it was *ultra vires* and as such the insolvent's immovable properties did not vest in the Official Assignee of Penang *vi statuti*.

* Original Side Appeal No. 64 of 1933.

Callender, Sykes & Co. v. Colonial Secretary of Lagos and Davies, [1891] A.C. 460, followed;

(2) that the execution proceedings were properly stayed since the attachment was later than the date of the adjudication in Penang, and the test to be applied in such cases was whether, on the date of adjudication, the insolvent was free to dispose of the property, or, in other words, whether the property formed part of his free assets on that date or whether there was anything which affected his power of disposal over that property.

APPEAL from the order of STONE J., dated 1st May 1933 and made in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 99 of 1933 in Bankruptcy No. 2 of 1931 on the file of the Supreme Court of the Straits Settlements, Penang.

S. Doraiswami Ayyar and *A. D. Seetharaman* for appellant.

A. Ramachandra Ayyar and *A. Sundaresa Ayyar* for respondent.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—This appeal raises a very interesting question of law which is not an easy one to decide.

The facts are that the insolvent was adjudicated an insolvent at Penang on the 9th January 1931. Penang is a part of the Straits Settlements. On the 15th March of the same year the appellant who is a resident of Ramnad filed a suit against the insolvent in the Sub-Court of Ramnad and obtained an attachment before judgment of his immovable property on the 24th July 1931 and a decree on the 28th November 1931. On the 19th July 1932 he attached in execution the insolvent's immovable property in Ramnad. On the 24th October 1932 the insolvent executed a conveyance

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in Penang of his property in British India including the property under attachment in favour of the Official Assignee in Bankruptcy of Penang. On the 5th December 1932 at the request of the Supreme Court of Penang an order was made by this High Court for the Official Assignee of Madras to act as auxiliary to the Official Assignee of Penang and take possession and realise the properties of the bankrupt. The Official Assignee of Madras having heard of the proceedings in execution taken by the appellant applied to the Insolvency Court for an order under section 18 of the Presidency-towns Insolvency Act staying the appellant's execution proceedings. On the 1st May 1933 the learned trial Judge ordered a stay of those proceedings. Hence this appeal.

STONE J. considered first of all whether the insolvent's property in India vested or should be deemed to have vested in the Official Assignee of Penang subject to the performance of any act of transfer required by the law of India as from the date of adjudication. If yes, then the attachment would be ineffective because it came into force after the date of the adjudication. It was argued in the Insolvency Court and here that the effect of the adjudication in Penang was to vest in the Official Assignee there the immovable property of the insolvent in British India and in this connection the Bankruptcy Ordinance in the Straits Settlements vesting an insolvent's property in the Official Assignee there must be examined. This is Ordinance No. 44. Section 24, clause 4 which reads as follows :—

“When a debtor is adjudged bankrupt, his property shall become divisible among his creditors and shall vest in the Official Assignee.”

In section 2 “property” is defined as including, amongst other things, property whether real or personal “and whether situate in the Colony or elsewhere”. Thus section 24 (4) and the latter definition correspond to section 17 of the Presidency-towns Insolvency Act except that in the former case it is property “situate in the Colony or elsewhere” and in the Presidency-towns Insolvency Act it is “wherever situate”. It was contended for the Official Assignee that the words “situate in the Colony or elsewhere” are sufficiently wide to vest the immovable property of the insolvent in British India in the Official Assignee of Penang merely by reason of the adjudication there. STONE J. was of the opinion that this contention was wrong and I agree. The Straits Settlements Bankruptcy Ordinance is clearly without force in Madras where the insolvent's immovable property is; and, if it purports to cause a vesting of extra-territorial immovable property, it is *ultra vires*; *Macleod v. Attorney-General for New South Wales*(1). The insolvent's immovable property here did not vest in the Official Assignee of Penang *vi statuti* and the learned trial Judge correctly points out the distinction between this case and *Callender, Sykes & Co. v. Colonial Secretary of Lagos and Davies*(2). In the latter case the English Bankruptcy Act of 1869 applied to all Her Majesty's Dominions and the insolvent's title to the property “in England or elsewhere” vested in the Trustee in Bankruptcy by reason of the adjudication. That Act had operative force in Lagos which had no Bankruptcy Act of its own. The position is clearly quite

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(1) [1891] A.C. 455.

(2) [1891] A.C. 460.

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different where the immovable property is situate in a Colony or part of the Dominions which had a Bankruptcy Act of its own. The insolvent's immovable property here, therefore, did not vest in the Official Assignee of Penang on the adjudication by reason of the Straits Settlements Bankruptcy Ordinance. STONE J. has based the order appealed against on another ground, namely, that this Court is acting in aid of and auxiliary to the Penang Court and that, since it is clearly the duty of a Court within the Empire to aid other jurisdictions as effectively as possible, this Court will deem, pursuant to the rules of private international law, there to have been a vesting, in other words, this Court will deem the insolvent's immovable property here to have vested in the Official Assignee of Penang on the date of the adjudication just as other immovable property of the insolvent in the Straits Settlements would have done. If this Court is entitled to deem such a vesting, then clearly the appellant's attachment of the insolvent's immovable property was after the date of the vesting and is ineffective. In my view, however, it is not necessary for the Court to fall back upon any fiction as to the date of vesting. There is no direct authority upon the point. *Galbraith v. Grimshaw*(1) and *Anantapadmanabhaswami v. Official Receiver, Secunderabad*(2) are different from the present case in a very important respect. In the former case the garnishee order and in the latter case the attachment were prior in date to the adjudication; in this case the attachment was after. But there are observations in both

(1) [1910] A.C. 508.

(2) (1933) I.L.R. 56 Mad. 405 (P.C.).

cases which are of the greatest assistance to us upon this difficult question. In *Galbraith's case*(1), at page 513, Lord DUNEDIN says :

"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."

In the latter case Lord THANKERTON, after referring to the before-mentioned observations of Lord DUNEDIN in *Galbraith's case*(1), says at page 412 :—

"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."

The test, therefore, is whether at the date of adjudication the insolvent was free to dispose of this property. Did this property form part of his free assets on that date or was there anything which affected his power of disposal over that property? If his power of disposal of the property was at that date unaffected, then the rule of international law will prevent any interference in the territory where the immovable property is with the right of the Official Assignee to get hold of the property. If that test is to be applied here, then STONE J. was right in making the order staying the appellant's execution having regard

(1) [1910] A.C. 508.

(2) 2 R. 150.

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to the date of the adjudication and the fact that on that date the insolvent was free to assign this property though, as I have already said, it is not, in my opinion, a question employing any fiction but one of the Court acting in aid recognizing the foreign adjudication as effective from that date by a rule of international law. DICEY in his "Conflict of Laws", fourth edition, page 478, says :

"While there is no provision in any Imperial Act giving Colonial Acts as to the vesting of immovables in the trustee of a bankrupt extra-territorial validity the requirement in the Bankruptcy Act, 1914, that Courts throughout the Empire should aid each other in effect enables a bankrupt's immovable property to be made available for his creditors in whatever part of the British Dominions it is situate subject of course to all charges on it valid by the *lex situs*."

This passage, it is true, does not say whether regard is to be had only to such charges on the property as exist at the date of the adjudication, but *Galbraith's case*(1) and *Ananthapadmanabhaswami v. Official Receiver, Secunderabad*(2) are certainly authority for saying that it is the date of the adjudication and no later date. Being of this view, I think it is unnecessary for me to consider any other contentions raised on behalf of the Official Assignee.

This appeal must, therefore, be dismissed with costs Rs. 250.

BARDSWELL J.

BARDSWELL J.—On 9th January 1931 M. P. Khader Ibrahim was adjudicated an insolvent in Penang of the Straits Settlements. After this the appellant, an unsecured creditor, who was the respondent to the Application No. 99 of 1933 in the Insolvency Side of this High Court to which

(1) [1910] A.C. 508.

(2) (1933) I.L.R. 56 Mad. 405 (P.C.).

this appeal relates, filed a suit (Original Suit No. 29 of 1931 on the file of the Subordinate Judge, Ramnad) against Khader Ibrahim and obtained a decree. He got an attachment before judgment and applied in Execution Petition No. 81 of 1932 for sale of the attached properties. On 24th October 1932 the insolvent executed to the Official Assignee of Penang a transfer of his immovable property in the Madras Presidency. The learned Judge in Insolvency has ordered, on an application by the Official Assignee of Madras acting as auxiliary to the Official Assignee of Penang, that proceedings in Execution Petition No. 81 of 1932 be stayed, holding that he could implement the order under which the transfer had been effected by preventing the attachment from being realized. He took the view that in this case the Court when acting in aid should render available the insolvent's immovable property situated in this Presidency as existing at the date of the adjudication in Penang, subject to all charges then on it valid by the *lex situs*. He emphasized that at the date of the adjudication the attachment had not been made. Alternatively he was of opinion that the assignment, though in form a transfer from an insolvent to an Official Assignee, was not a private transfer and was effective to defeat the claim enforceable under an attachment.

To deal first of all with the alternative finding. There has been little argument as to this and the learned Advocate for the respondent, Official Assignee of Madras, is not relying upon it. The judgment under appeal was passed on 1st May 1933 and subsequently to it there has been published, in the Indian Law Reports (June part),

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the Privy Council decision in *Anantapadmanabhaswami v. Official Receiver, Secunderabad*(1) in which, reversing the decision of two learned Judges of this High Court, *Official Receiver of Secunderabad v. Lakshminarayana*(2), it was held that a transfer effected under a foreign adjudication order was a private transfer in that it operated in British India not *vi statuti* but only under the rule of private international law. That the transfer so operated in the present case has indeed been held by STONE J. in the case now under notice and there can be no doubt but that such is the fact. The insolvent was adjudged by the Supreme Court of Penang which is, in respect of British India, a foreign Court within the definition of section 2 (5), Civil Procedure Code. It cannot, therefore, be a case of section 64, Civil Procedure Code, having no application in that the transfer was not of the nature of a private transfer.

This case really turns upon a decision of from what date the transfer by the insolvent of his property to the Official Assignee took effect. It is as to this point that much learned argument has been addressed to us on the hearing of this appeal. There appears to be no decided case that directly bears upon it. As pointed out by STONE J. there is an important distinction between this case and the cases of *Galbraith v. Grimshaw*(3) and *Anantapadmanabhaswami v. Official Receiver, Secunderabad*(1). They relate respectively to a garnishee order taken and an attachment effected prior to the adjudication in a foreign Court, and it was held that the adjudication was subject to the

(1) (1933) I.L.R. 56 Mad. 405 (P.C.). (2) (1930) I.L.R. 54 Mad. 727.
(3) [1910] A.C. 508.

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garnishee order in the one case and to the attachment in the other. But here we have an attachment taken out in British India after there had already been an adjudication in the foreign Court of Penang. What is the position in such a case? STONE J. in the course of his judgment remarks:

"It appears to me that there can be no vesting of property here by force of an ordinance passed by the Legislature of the Straits Settlements. It follows that, unless some other law having binding force here can be prayed in aid, there is no vesting *vi statuti* and as to this being the correct view there is no dispute. It is true that by section 24 of Ordinance 44 which lays down the law as to Bankruptcy in the Straits Settlements, the property of a debtor on his being adjudged bankrupt vests in the Official Assignee and that in section 2 of the same Ordinance property is defined as including 'money, goods, things in action, land and every description of property, whether real or personal, and whether situate in the Colony or elsewhere'."

The words, however, "or elsewhere", if they are intended to apply to property outside the Straits Settlements, are *ultra vires* of the Colony's legislative jurisdiction on the principle of "*Extra territorium jus dicenti impune non paretur*". There is clear authority for this in *Macleod v. Attorney General for New South Wales*(1). That was a case in which a man was convicted of bigamy at the Court of Quarter Sessions at Sydney, New South Wales, the bigamy having been committed in the United States of America. The Privy Council in reversing the conviction held that the words "whosoever being married" in the Colonial Statute could only be taken as meaning for the purposes of the statute "whosoever being married and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New

(1) [1891] A.C. 455.

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South Wales". Similarly it was held that "where-soever" should be read as "wheresoever in this Colony the offence is committed". To give to the words "whosoever" and "wheresoever" an extended extra-Colonial application would be to allow to the Colony a legislative authority that it did not possess. It has also been held in *Waite v. Bingley*(1) that real estate in England does not vest in an assignee under an insolvency adjudged in Victoria in accordance with the law of bankruptcy in force in that Colony, though it might have been got at by some separate and independent proceedings to be taken in Australia under which the insolvent could have been called upon to make it over to the Australian Assignee. It would be different if there had been an adjudication under the English Bankruptcy Act and if there was no local legislation to be considered as to insolvency and as to the passing of property. Such was the case in *Callender, Sykes & Co. v. Colonial Secretary of Lagos and Davies*(2), but the circumstances are altogether different here, where the adjudication has been under a Colonial Ordinance and British India has its own laws as to insolvency and the transfer of property.

We must take it, then, that there was no vesting of the immovable property of the insolvent situated in British India by the mere fact of the adjudication, but that there was such vesting only after the insolvent had effected a transfer of it to the Official Assignee. But the question remains whether any right which the Official Assignee of Penang can have over the insolvent's property in British India is to date only from the date of

(1) (1882) 21 Ch.D. 674.

(2) [1891] A.C. 460.

the conveyance, or whether it is to be dated back to the time of the adjudication. What is argued for the Official Assignee of Madras, as respondent to this appeal, is that the Official Assignee of Penang got some sort of title to the Indian property at the time of the adjudication, in that the insolvent from that time was in such a position that he could be compelled to execute a conveyance of it at any time, and that the conveyance is only a perfecting of this title. This line of argument receives some support from what appears in the judgment of KAY J. in *In re Levy's Trusts*(1), that the real estate in England of a man who had been adjudged insolvent in New South Wales

"became liable at once, or rather would have so become liable, if it had belonged to him indefeasibly for his life, to be attached and taken possession of by the proper authority in New South Wales for the purposes of his bankruptcy there."

But the judgment does not say that the rights of the Official Assignee date from the time when the liability began or whether it could only have begun later after the necessary steps had been taken. It is, however, important to observe that the liability was held to have begun at the time of the adjudication and that the bankruptcy in the Colony was recognized in an English Court as being a bankruptcy even though no English Court of Bankruptcy had been called upon to act in aid in respect of it.

We have been referred to *Gibbs & Sons v. Societe Industrielle et Commerciale des Metaux*(2) and *Bartley v. Hodges*(3), the effect of which two decisions is that the discharge of a bankrupt adjudicated under a foreign law in the one case

(1) (1885) 30 Ch.D. 119.

(2) (1890) 25 Q.B.D. 399.

(3) (1861) 30 L.J.Q.B. 352.

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and under a Colonial law in the other is no answer to an action against him as a party to a contract made and to be performed in England. These decisions, however, have no direct bearing on the point that is now before us. The strongest authority quoted for the appellant is to be found in paragraph 80 of Mulla's Law of Insolvency (1930 edition) in which he discusses section 122 of the English Bankruptcy Act of 1914. That is the section under which all British Courts acting in insolvency are bound to give effect to the orders of every other British Court in Bankruptcy matters. He remarks that an order in aid in order to help an Official Assignee in India in the realization of property

"would be made as a matter of course, but the title of the Official Assignee in such cases would commence from the date of the order of the English Court of Bankruptcy."

But this view of the learned commentator, though entitled to very great respect, is only his own opinion and is not supported by reference to any decided case. And along with it, and by way of contrast to it, must be considered the view of that very eminent authority, A. V. Dicey, at page 478 of his Conflict of Laws (1927 edition):

"It may, indeed, be laid down in broad terms that, according to the doctrine maintained by English Courts, a bankruptcy in one country has no effect as an assignment or otherwise (except, of course, where the bankruptcy takes place under an Act of Parliament) on land in another country. But this statement is a little broader than the facts warrant. There is no reason to suppose that English Courts would decline to recognize the extra-territorial effect, as an assignment, of a bankruptcy in one country, e.g., Victoria, on land of the bankrupt in another country, e.g., New Zealand, which was given to a Victorian bankruptcy by the *lex situs*, i.e., by an Act of the New Zealand Legislature. Further, while there is no provision in any Imperial Act giving Colonial Acts as to the vesting of

immovables in the trustee of a bankrupt extra-territorial validity, the requirement in the Bankruptcy Act, 1914, that Courts throughout the Empire should aid each other in effect enables a bankrupt's immovable property to be made available for his creditors in whatever part of the British Dominions it is situate, subject, of course, to all charges on it valid by the *lex situs*. There is at least a strong suggestion here that such availability is immediate on adjudication."

Mr. Doraiswami Iyer quotes a passage from the judgment of Lord MACNAGHTEN in *Galbraith v. Grimshaw*(1):

"It may have been intended by the Legislature that bankruptcy in one part of the United Kingdom should produce the same consequence throughout the whole Kingdom. But the Legislature has not said so. The Act does not say that a Scotch Sequestration shall have effect in England as if it were an English bankruptcy of the same date. It only says that the Courts of the different parts of the United Kingdom shall severally act in aid of and be auxiliary to each other on all matters of bankruptcy."

But these remarks by no means conclude the matter. They were made with particular reference to an attachment that had taken place before the adjudication. LOREBURN L.C. in his judgment in the same case has remarked:

"If the attachment is prior in date, then I do not think it will be affected by the title of the trustee in a foreign bankruptcy. I think 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 debts 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."

And to supplement this we have further in the judgment of Lord DUNEDIN:

"Now so far as the general principle is concerned it is quite consistent with the comity of nations that it should be a

(1) [1910] A.C. 508.

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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."

This passage has been quoted by the Privy Council in *Anantapadmanabhaswami v. Official Receiver, Secunderabad*(1) in which it has been shown to mean that after the date of the foreign adjudication order it will be recognized as effective though 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. Lord MACNAGHTEN too, in another part of his judgment above referred to, has said that the foreign Court

"must take the assets of the bankrupt such as they were at that date (i.e., of the Scotch Sequestration) and with all the liabilities to which they are then subject."

Now the only liability to which the properties in British India were subject in the present case was their liability to the Official Assignee of Penang. That there was this liability has already been shown. I think that it can clearly be deduced from the authorities that the contention of the Official Assignee is a proper one, and that, though the liability that arose as against the Indian properties immediately on the Penang adjudication had to be followed by the taking of steps to have those properties conveyed to the Penang Official Assignee, the right of the Official Assignee over the properties has to be dated back to the date of

(1) (1933) I.L.R. 56 Mad. 405 (P.C.).

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the adjudication and is subject only to such liabilities as then existed. The Official Assignee of Madras, acting in aid of him, was therefore entitled to the order which has been granted to him under section 18 of the Presidency-towns Insolvency Act staying further proceedings in execution against the attached property.

The learned Advocate for the respondent Official Assignee has argued that this case is analogous to one in which there has been a contract of sale. It has been held in *Savithri Ammal v. Ramasami*(1) and *Venkata Reddi v. Vellappa Chetty*(2) that a mere contract of sale, though it does not confer an interest in the subject-matter of the contract, still creates an obligation (annexed to the ownership of the property within the meaning of section 40, Transfer of Property Act), that it should be conveyed to the promisee under the contract so that a creditor who attaches the property subject to that obligation is *prima facie* entitled to sell the property subject only to that obligation. But the analogy does not hold as an adjudication does not create an obligation annexed to the ownership of property which obligation can be enforced by an action taken on that behalf.

On the contrary if the insolvent fails in his duty of making over his property to the Official Assignee or Official Receiver or similar official, however named, the only remedy is to proceed against him for contempt. There are provisions as to this, in language that is almost identical in each case, alike in section 22 of the English Bankruptcy Act, section 33 of the Presidency-towns Insolvency Act, and section 27 of the

(1) (1898) 8 M.L.J. 266.

(2) (1916) 5 L.W. 234.

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Straits Settlements Bankruptcy Ordinance. With the main contention, however, put forward for the respondent I am in agreement for the reasons above stated and I, therefore, agree with my Lord the CHIEF JUSTICE that the decision of the learned Judge in insolvency should be upheld and that this appeal should be dismissed with costs.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Krishnan Pandalai and
Mr. Justice Curgenven.

1933,
October 2.

VENKATARAMA SASTRIGAL AND TWO OTHERS (SIXTH
DEFENDANT AND NIL), APPELLANTS,

v.

SABAPATHI THEVAR (PLAINTIFF), RESPONDENT.*

*Court-fees—Preliminary mortgage decree—Dispute as regards
personal liability only—Appeal by defendant—Court-fee
payable.*

The value of the subject-matter in appeal by a defendant from a preliminary mortgage decree ordering the sale of the mortgaged property and enabling the plaintiff to apply for a personal decree for any balance left after the sale is, when the appellant does not dispute the liability of the property but disputes only his personal liability, the excess amount over the net sale proceeds for which alone he is by the decree likely to be made liable.

APPEAL against the decree of the Court of the Subordinate Judge of Tiruvalur (East Tanjore) in Original Suit No. 4 of 1927.

* Appeal No. 381 of 1928.

The facts of the case material for the purpose of this report are as follows:—The first appellant was the sixth defendant in the suit and the other appellants were his legal representatives. The plaintiff was the respondent. Defendants one and two mortgaged a certain property to the plaintiff and thereafter sold the same to the sixth defendant and, out of the consideration, left certain funds in the hands of the sixth defendant for discharging the mortgage, which was not done. The plaintiff filed a suit on his mortgage impleading the purchaser as the sixth defendant therein and seeking to make him personally liable for the debt on the allegation that he requested the plaintiff to grant three months' time for the payment of the amount to which he (plaintiff) agreed and granted time. The mortgagors remained *ex parte*. The sixth defendant denied the agreement and disputed his personal liability. The trial Court found the agreement in favour of the plaintiff and gave a personal decree against the sixth defendant also. On appeal by the sixth defendant, their Lordships found that the appellant (sixth defendant) was not personally liable and posted the appeal to be spoken to for the purpose of determining the court-fee payable on appeal.

V. V. Srinivasa Ayyangar and L. S. Viraraghava Ayyar for appellants.

P. R. Ganapati Ayyar and S. Sankara Ayyar for respondent.

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

The JUDGMENT of the Court was delivered by KRISHNAN PANDALAI J.—The matter of court-fees payable on this appeal has been argued before

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us and we have had the assistance of the learned Government Pleader. The question is what is the value of the subject-matter in appeal by a defendant from a preliminary mortgage decree ordering the sale of the mortgaged property and enabling the plaintiff to apply for a personal decree for any balance left after the sale, when the appellant does not dispute the liability of the property but disputes only his personal liability. The appellant in this case, though himself not a mortgagor but a purchaser from the mortgagors, has been by the decree put on the same footing of liability as the mortgagors. One possible view is that the subject-matter in appeal is the whole mortgage amount. But against that there is the obvious answer that the appellant is not disputing the liability of the mortgaged property for the whole debt but only his personal liability for the excess over the net sale proceeds for which alone he is by the decree likely to be made liable. No authority either way has been cited. On the whole we prefer the latter view, though it involves the difficulty that in many such cases at the time of appealing from the preliminary decree the amount of the net sale proceeds will not be ascertainable as the sale has not been held and the valuation must therefore be more or less conjectural. The opposite view would lead to the greater inconvenience and injustice of requiring the appellant to pay court-fees on an amount which he does not dispute, i.e., the mortgage amount so far as it can be satisfied out of the mortgaged property.

In this case the sale has been held and the mortgaged properties fetched Rs. 3,600. The appellant must therefore pay court-fees in this Court on the

decree amount less that sum. Two days after intimation is given by the office to the appellant's Advocate to pay any deficit amount that may be found due.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Pakenham Walsh.

K. L. KRISHNA AYYAR (RESPONDENT-DEFENDANT),
PETITIONER,

v.

T. BALAKRISHNA AYYAR (PETITIONER-PLAINTIFF),
RESPONDENT.*

1933,
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*Civil Procedure Code (Act V of 1908), sec. 151—Scope of—
O. XVI, rr. 10 and 16—O. XXXIX, r. 1 (b)—
Indian Evidence Act (Act I of 1872), sec. 165—Production of document under order of Court—Powers of Court under section.*

Where there is a prescribed remedy, the Court cannot go beyond such remedy by using its inherent powers under section 151 of the Code of Civil Procedure (Act V of 1908).

Pending a suit for recovery of money alleged to be due on settlement of account, the plaintiff applied for the appointment of a receiver and at the same time asked for an order that the defendant should produce his own accounts (which had nothing directly to do with the suit account) into Court so that if plaintiff got a decree he might be in a better position to realize his decree debt. The Court, even before notice had gone to defendant, directed him to produce these accounts into Court under section 151 of the Code of Civil Procedure (Act V of 1908). Against this order a revision petition was filed.

Held, that the order was without jurisdiction. The Court below had no power to pass such order either under section 151

* Civil Revision Petition No. 998 of 1933.

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of the Code of Civil Procedure, or under Order XVI, rules 10 and 16 or Order XXXIX, rule 1 (b) of the Code, or under section 165 of the Indian Evidence Act (I of 1872).

The power of the Court to direct production of any document under section 165 of the Indian Evidence Act (I of 1872) is subject to the plain proviso at the beginning of that section that the direction must be "in order to discover or obtain proper proof of relevant facts".

PETITION under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the City Civil Judge, Madras, dated the 3rd August 1933 and made in Civil Miscellaneous Petition No. 1453 of 1933 in Original Suit No. 582 of 1933.

O. P. Venkataraghavachari for petitioner.

K. Aravamudu Ayyangar for respondent.

Cur. adv. vult.

JUDGMENT.

The plaintiff, counter-petitioner, sued the petitioner for the recovery of Rs. 2,111-6-3 as due on settlement of accounts in the purchase of silk sarees from the plaintiff from 24th April 1931.

He put in an application for the appointment of a receiver and at the same time he asked for an order that the defendant should produce the account books of his own sales of silk sarees, etc., into Court on the ground that if he were allowed to collect the amounts he would (paragraph 6 of affidavit) keep "them in cash to cheat the plaintiff" and further that (paragraph 8)

"it is quite likely that the defendant is trying to keep false accounts and unless the account books are brought into the Court and a receiver is appointed to collect the amounts due, there will be no way of realizing the money thereafter, after the decree is passed".

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Admittedly the account books in question have nothing directly to say to the suit accounts on which the suit is brought. The Court ordered the defendant to produce these accounts into Court. His Advocate refused to produce them. Wherefrom the Court passed the order in question in which it says:

"Under section 151, I have the power to compel the production of account books. I hereby direct the defendant to produce the account books in Court on Monday the 7th instant, failing which a complaint will be laid against him for disobedience of this Court's orders. The question as to whether plaintiff will be permitted to see the account books will be considered after the books are produced into Court."

Against this order the present revision petition is filed on the ground that it is beyond the jurisdiction of the Court.

The learned Advocate for the petitioner states before me that a further reason was also given for the non-production of the accounts, that they were in Mysore. This does not appear on the records in the suit, and as I think that the order is clearly *ultra vires*, I do not consider it necessary to go into this matter. The petition for a receiver was made, as stated above, in the same application as that in which the production of accounts was asked for. Although no section is quoted in the petition that for a receiver would of course be under Order XL, rule 1, and there is no difficulty as regards that part. The question is whether, before the appointment of a receiver, and in this case in the very application for a receiver, when notice has not yet gone to the defendant, the plaintiff can ask or the Court can compel the defendant to produce accounts, which are not connected with the suit, simply in order that the

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plaintiff, if he gets a decree, may be in a better position to realize his decree debt.

From the order of the Court itself it is clear that it was asked to exercise this power and did so under its inherent powers under section 151. It is well established that where there is a prescribed remedy the Court cannot go beyond this remedy by using its inherent powers under section 151. Now the object of appointing a receiver is to provide a machinery by which the Court can take charge of the general property of the defendant during the trial. This is the suitable remedy in a case like this and it is the object with which the plaintiff asks for a receiver to be appointed. If the Court can, without any notice to the defendant and, without appointing any receiver, directly take charge of the defendant's property the whole procedure of appointing a receiver, and the well-known principles which should govern the discretion of the Court in doing so vanish; for by this short-cut they are all avoided. There is no provision at all in the Civil Procedure Code in the order about appointing a receiver that pending the appointment of a receiver the Court can exercise these powers. The learned Advocate for the counter-petitioner made a feeble attempt to justify the order under Order XVI, rule 10 and rule 16 and also under the Injunction Rules, Order XXXIX, rule 1 (b).

Order XVI, rules 10 and 16 do not determine the powers of the Court to call for documents but only the procedure to be followed when they are called for. They are irrelevant to the present question.

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In my opinion Order XXXIX, rule (1) cannot possibly be extended to cover a case of this kind. Rule 1 (a) is inapplicable because the account books are neither the property in the suit nor connected with it. They are the accounts of defendant's trade, and plaintiff only wants them in order that if he gets a decree he may get all that defendant has really collected in his own business. Rule 1 (b) is I consider also inapplicable to the circumstances of this case. It states that

"where in any suit it is proved by affidavit or otherwise . . . that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors, the Court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders."

Now the allegation in paragraph 6 of the affidavit is that "defendant is collecting the amounts due from his customers and keeping them in cash to cheat the plaintiff and other creditors". It is not even stated that he is going to dispose of this cash and it is indeed difficult to see how he is going to collect the amounts from his creditors in most cases except in cash. If petitioner therefore really wants anything under this paragraph it would be an order to prevent the defendant from collecting his dues in cash. That would be a very unreasonable order and, so far from preventing waste of the property, would be much more likely to cause it by creating bad and time-barred debts; in any case it is not the relief which has been asked for or granted. Paragraph 7 of the affidavit says that "after the

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amounts are collected, there will be no use of any decree being got against the defendant unless the sums are got into the Court". That is the justification, if it can be made out, for appointing a receiver but not for taking a short-cut by ordering the defendant to produce all his cash or property into Court at once. Now it is not alleged that the defendant is going to "waste, damage, alienate or sell" his account books. There remains therefore the question whether the words "removal or disposition of the property" can authorize the order passed. The only allegation on this point is that "it is quite likely that the defendant is trying to keep false accounts". Now the property which plaintiff wants to realize is not the defendant's accounts which are useless *per se* to him, but the money which defendant may collect by realizing dues on the basis of his accounts. In my opinion he cannot by injunction be ordered at this stage to produce those accounts into Court. Even if Order XXXIX, rule 1 (b) could in terms apply it is clearly overridden by the special provisions of another Order and rule.

This is Order XXI, rule 41, and it comes into effect only after a decree has been passed. Then the decree-holder may apply for an order to the Court that the judgment-debtor

"be orally examined as to whether any or what debts are owing to the judgment-debtor, and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor", and

"for the production of any books or documents".

This Order and rule which definitely restricts the rights of the party to call for such accounts

till after a decree is obtained will, on the principle that a more particular overrides a more general provision, limit the application of Order XXXIX, rule 1 (b) even if the latter is in its terms applicable, nor can the inherent powers of the Court be invoked to justify the issue of such an order at an earlier stage and thereby completely nullify the restriction laid down in Order XXI, rule 41. It may be noted that nobody seems to have contended before the lower Court that the order sought for could be regarded as an injunction under Order XXXIX, rule 1 (a) or (b). The Court states expressly that it is passing the order in virtue of its inherent power under section 151. I am clearly of opinion that this section does not authorize it to extend the provisions of Order XXI, rule 41.

The learned Advocate for the respondent did not in fact base his chief argument on the Civil Procedure Code at all, but fell back on, or rather put in the forefront, section 165 of the Evidence Act.

This section runs :—

"The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question."

Then follow certain provisos which admittedly do not apply to the present case.

From this the learned Advocate argues that the Court can order the production by a party of

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any document or thing, no matter how irrelevant, into Court. This is indeed a startling doctrine, and if correct would authorize the Court to say to the defendant in a simple money suit "Although they are not of the slightest relevance to the suit you must bring your entire possessions into Court on a certain date and if you do not you will be criminally prosecuted." In fact on this reading the defendant might be asked to bring into Court something that did not belong to him at all, or which was absolutely unobtainable.

These grotesque results arise from overlooking the plain proviso at the beginning of the section by which the whole is governed that the direction must be "in order to discover or to obtain proper proof of relevant facts". The commentaries show clearly that the object of allowing the Judge to ask irrelevant questions under this section is to obtain "indicative evidence" which may lead to the discovery of relevant evidence. It is not alleged in this case that the object of the order is to discover or obtain proof of any relevant fact in any matter then before the Judge. The stage at which these accounts would be relevant facts so as to enable the Court to order their production is after decree under Order XXI, rule 41. If the meaning put on this section by the learned Advocate for the counter-petitioner be correct, there is no need at all for any rules about appointment of receivers, or discovery of documents. In fact a Court has absolute power to lay a criminal complaint against a party, and get him convicted for disobedience to any arbitrary demand to produce any property whether his own or not, if it cannot be brought under sections 120 to 130 of the

Evidence Act and most property does not fall under these sections.

I cannot accept the argument raised under this section. The order I consider is plainly without jurisdiction and must be set aside. The petition is allowed with costs in both Courts. (Fee Rs. 50.)

K.W.B.

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APPELLATE CRIMINAL.

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

IN RE PONNIAH LOPES AND SEVEN OTHERS (ACCUSED),
 PETITIONERS.*

1933,
 December 18.

Indian Penal Code (Act XLV of 1860), ss. 147 and 323 and ss. 149 and 325—Separate convictions and separate sentences—Legality of—Ss. 71 and 149 of Indian Penal Code—Sec. 35 of Criminal Procedure Code (Act V of 1898) after amendment—Effect of.

Separate sentences for an offence under sections 147 and 323, Indian Penal Code (Act XLV of 1860), on the one part and sections 149 and 325 on the other or indeed any constructive offence with reference to section 149 are illegal under the first paragraph of section 71, Indian Penal Code, even though the sentences are made to run concurrently.

Petitioners were convicted of offences under sections 147 and 323 and under sections 149 and 325, Indian Penal Code. For each of the convictions under sections 147 and 323 each of them was sentenced to six months rigorous imprisonment, and for each of the convictions under sections 149 and 325 each of them was sentenced to six months rigorous imprisonment, and the sentences were made to run concurrently.

Held, that the separate convictions in such cases were proper, but that the separate sentences though made to run concurrently should not have been passed.

* Criminal Revision Case No. 359 of 1933.

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Nilmony Poddar v. Queen-Empress, (1889) I.L.R. 16 Calc. 442 (F.B.), and *Keamuddi Karikar v. Emperor*, (1923) I.L.R. 51 Calc. 79, affirmed and followed. *Emperor v. Piru Ram*, (1925) I.L.R. 49 Bom. 916, dissented from.

Section 149, Indian Penal Code, creates a specific offence and deals with the punishment of that offence.

Barendra Kumar Ghosh v. King Emperor, (1924) 29 C.W.N. 181 (P.C.), referred to.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Sessions of the Tinnevely Division in Criminal Appeal No. 5 of 1933 preferred against the judgment of the Court of the First-class Sub-Magistrate of Tuticorin in Calendar Case No. 714 of 1932.

N. S. Mani for A. Swaminatha Ayyar for petitioners.

A. Narasimha Ayyar for Public Prosecutor (L. H. Bewes) for the Crown.

Cur. adv. vult.

JUDGMENT.

BARDSWELL J.

BARDSWELL J.—The petitioners were convicted by the First-class Magistrate of Tuticorin of offences punishable under sections 147, 323, 149 and 325, Indian Penal Code. For each of the convictions under sections 147 and 323 each of them was sentenced to six months rigorous imprisonment, and for each of the convictions under sections 149 and 325, Indian Penal Code, each of them was sentenced to twelve months rigorous imprisonment and the sentences were made to run concurrently. On appeal the Sessions Judge confirmed the convictions but reduced the sentences under sections 149 and 325 to six months rigorous imprisonment, the sentences, of course, to run

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concurrently with those under sections 147 and 323, Indian Penal Code. An order to execute bonds for keeping the peace was set aside and with this we have nothing to do. The only point that has to be considered is whether there can be separate convictions and separate sentences for an offence punishable under section 147 and one punishable under sections 149 and 325 or indeed any constructive offence with reference to section 149.

As to the separate convictions in such cases being proper there appears to be no doubt. Such offences can be tried together under section 235, Criminal Procedure Code, and if they are tried together there can be convictions on them together. No authority that we have been referred to or that I have found for myself in this connection points to any other conclusion. Indeed the illustrations to section 235 make the matter plain. What remains then to be considered is whether, when there have been such separate convictions, separate sentences can be passed. A Bench of this Court in *Krishna Ayyar v. Emperor*(1) has remarked as follows:—

“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.”

There however was no discussion of the matter in that decision, but merely a statement that the matter had been well settled. As a matter of fact there has been a conflict of opinion between one High Court and another as to whether separate

(1) (1918) 20 Cr. L.J. 145.

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sentences can be passed in such a case. There has been a general agreement amongst all the High Courts except that of Lahore that if a person is convicted of rioting and of a substantive offence of hurt of some kind he can be awarded separate sentences and this is what was held by this Bench in a case reported as *Sothavalan v. Rama Kone*(1). But that decision left undecided the point that is now before us, and it seems never to have been the matter of any authoritative decision in this Court.

A leading case on the subject is that in *Nilmony Poddar v. Queen-Empress*(2). There a majority of four Judges out of five held that separate sentences passed upon persons for the offences of rioting and grievous hurt were not legal where it was found that such persons individually did not commit any act which amounted to voluntarily causing hurt, but were guilty of that offence under section 149, Indian Penal Code. In the majority judgment it was remarked that

"the offence of voluntarily causing hurt under section 324, coupled with section 149, Indian Penal Code, is primarily made up of two parts, viz.: (i) of their (the appellants in that case) being members of an unlawful assembly, by which force and violence were used in prosecution of its common object and the members of which were armed with deadly weapons; and (ii) of the offence of voluntarily causing hurt being committed by the two other members of the unlawful assembly in prosecution of the common object. The first of these two parts is itself an offence, viz., rioting armed with deadly weapons, under section 148, Indian Penal Code. It is nowhere expressly provided in law that, under the circumstances set forth above, the offender may be punished separately for the two offences constituted by the whole and the part respectively. Therefore we find that all the conditions laid down in paragraph 1 of section 71, Indian Penal Code, are present here. Consequently

(1) (1932) I.L.R. 56 Mad. 481.

(2) (1889) I.L.R. 16 Calc. 442 (F.B.).

the infliction of separate punishments for the two offences is illegal under it."

What is said will apply equally if the conviction as to rioting is under section 147 and not under section 148. More recently in *Keamuddi Karikar v. Emperor*(1), in which the Full Bench decision in *Nilmony Poddar v. Queen-Empress*(2) was followed, it was held that separate sentences under section 147 and sections 325 and 149, Indian Penal Code, are illegal under the first paragraph of section 71 even when they are made to run concurrently.

Another view has been taken in Bombay. In *Queen-Empress v. Bana Punja*(3), a Full Bench held that it was not illegal when a person is convicted of rioting and of hurt, and the conviction for hurt depends upon the application of section 149, Indian Penal Code, to pass two sentences one for rioting and one for hurt though at the same time it was held that, whether section 71, Indian Penal Code, applied or not, the total punishment that could be given should not exceed the maximum which the Court might pass for any one of the offences. In *Queen-Empress v. Malu*(4), however, another Full Bench held that a Court, in awarding punishment under the provisions of section 71, Indian Penal Code, should pass one sentence for either of the offences in question and not a separate one for each offence, though if two sentences were passed and the aggregate of these did not exceed the punishment provided by law for any one of the offences, or the jurisdiction of the Court, it would be only an irregularity. This view of section 71 was with reference to the

(1) (1923) I.L.R. 51 Calc. 79.

(2) (1889) I.L.R. 16 Calc. 442 (F.B.).

(3) (1892) I.L.R. 17 Bom. 260. (F.B.). (4) (1899) I.L.R. 23 Bom. 706 (F.B.).

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illustration to section 35, Criminal Procedure Code, as it then stood, and the explanation to that section. Section 35, Criminal Procedure Code, however, has now been amended and it has been held in *Emperor v. Piru Rama*(1) that the result of that amendment has restored the previous view of the law as taken in *Queen-Empress v. Bana Punja*(2).

Section 35, Criminal Procedure Code, before its amendment in 1923 provided that, when a person is convicted at one trial of two or more distinct offences, the Court may sentence him, for such offences, to the several punishments prescribed therefor which such Court is competent to inflict. And there was the explanation that separable offences which come within the provisions of section 71, Indian Penal Code, are not distinct offences within the meaning of this section. As amended, the section provides that when a person is convicted at one trial of two or more offences the Court may, subject to the provisions of section 71, Indian Penal Code, sentence him, for such offences, to the several punishments prescribed therefor which such Court is competent to inflict, and the explanation and illustration have been omitted. The Bombay High Court as has been shown finds that the alteration in the section has restored the previous view of the law. *Emperor v. Piru Rama*(1) does not, indeed, deal with section 149, but it is clear from the context and from the reference to *Keamuddi Karikar v. Emperor*(3), in which section 149 was directly under consideration, that its view was that the whole of what

was laid down in *Queen-Empress v. Bana Punja*(1) was now good law. The Patna High Court, however, has held in *Bajo Singh v. King Emperor*(2) that there has been no such change in the law and that the reasoning in the passage from *Nilmony Poddar v. Queen-Empress*(3) that has already been quoted has not been invalidated by reason of the alteration in the section. The first part of section 71, Indian Penal Code, runs thus :—

“Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences, unless it be so expressly provided.”

The view taken in Bombay is that section 71 is not one that gives directions about mere sentences, but that it only deals with punishments and that therefore, as long as the sentences passed on a conviction for rioting and some form of constructive hurt do not exceed the term that can be awarded for one of those offences, the provisions of section 71 are complied with, in that the offender is not in the aggregate punished with more than the punishment which can be given to him for one of his offences. With respect I do not think the words

“the offender shall not be punished with the punishment of more than one of such offences”

should be so interpreted but think rather that the correct view is that taken in Calcutta. Taking it that in the constructive offence with reference to section 149 the offence of rioting is included, as in my opinion it is, then a person who is sentenced for rioting receives by that sentence his punishment for that offence. Any further

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(1) (1925) I.L.R. 49 Bom. 916.

(2) (1892) I.L.R. 17 Bom. 260 (F.B.).

(3) (1923) I.L.R. 51 Calc. 79.

(1) (1892) I.L.R. 17 Bom. 260 (F.B.). (2) (1928) I.L.R. 8 Pat. 274.
(3) (1889) I.L.R. 16 Calc. 442 (F.B.).

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punishment that is given for a constructive offence under section 149 will again be a punishment for the rioting in that the rioting is included in the latter offence. I do not think that section 71 is intended to refer to the aggregate punishment, even though the section does not contain the word "sentence" but only speaks of punishments.

TOTTENHAM J. in his dissenting judgment in *Nilmony Poddar v. Queen-Empress*(1), at 447, felt himself unable to adopt the view of the majority and remarked :

"I could perhaps do so if section 149 defined and made punishable any specific offence ; but it does not do this. It simply declares that under certain circumstances every person who is a member of an unlawful assembly is guilty of the offence committed by some other member of it, whatever that offence may be ; and, if he is guilty, I apprehend he is liable to be punished for it."

His view as to this was similar to that of a Bench of the Allahabad High Court in *Queen-Empress v. Bisheshar*(2), in which the view was taken that section 149 created no offence but was merely declaratory of the principles of Common Law which have prevailed at any rate in England. The Privy Council however has now held in *Barendar Kumar Ghosh v. King Emperor*(3) that section 149 creates a specific offence and deals with the punishment of that offence, and we have to regard the matter from that point of view. This pronouncement considerably affects the point of view from which this matter was regarded by TOTTENHAM J. and by the Allahabad High Court in the cases just referred to. We have to regard

(1) (1889) I.L.R. 16 Cal. 442 (F.B.).

(2) (1887) I.L.R. 9 All. 645.

(3) (1924) 29 C.W.N. 181 (P.C.).

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section 149 not merely as stating a principle but as constituting an offence as was indeed the view of the majority of the Judges in *Nilmony Poddar v. Queen-Empress*(1). My conclusion then is that that decision expresses the correct view of the law even as it stands to-day after the amendment of section 35, Criminal Procedure Code, which section is still subject to the provisions of section 1, Indian Penal Code.

The separate sentences, therefore, passed on the petitioners under sections 147 and 323, Indian Penal Code, on the one part and sections 149 and 325, Indian Penal Code, on the other are legal. As, however, the sentences have been made to run concurrently and are both of the same length and such as the Court could legally pass, it is not necessary to make any reduction of sentence from the point of view of what should legally have been done. It is sufficient to state that separate sentences should not have been passed. Nor can the sentences for either conviction be deemed excessive in themselves. The seventh and eighth petitioners have served out their sentences. The remaining petitioners have only served out about two months of their terms. The riot in which they were concerned resulted in one man having his left arm fractured and it was they themselves who deliberately originated the riot. No reduction of punishment is called for in their case. They must serve out the unexpired portion of their terms of imprisonment.

BEASLEY C.J.—I agree.

K.W.R.

(1) (1889) I.L.R. 16 Cal. 442 (F.B.).

PRIVY COUNCIL.

* J.C.
1934,
January 16.

SECRETARY OF STATE FOR INDIA IN COUNCIL
AND OTHERS, APPELLANTS,

v.

RAMESWARAM DEVASTHANAM (BY ITS TRUSTEES)
AND OTHERS, RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Appeal to High Court—Jurisdiction in Second Appeal—Inference of fact—Documentary evidence—Irrigation—Easement—Code of Civil Procedure (Act V of 1908), sec. 100.

The rule that the High Court has no jurisdiction under section 100 of the Code of Civil Procedure, 1908, to reverse the findings of fact of a lower appellate Court, unless the findings are vitiated by error of law, applies although the findings are inferences of fact drawn, wholly or in part, from documents.

A channel, completed in 1872, carried water from a river for the irrigation of two riparian villages, S and A, of which S was the upper riparian property. The channel left the river higher up than a channel which had existed for a long time. In 1910 a Collector made an order regulating the flow of water in the 1872 channel so that village A should receive a supply when the water was low. The inamdar of S sued the Government and the A ryots, contending that S village had a prior right of supply, and claiming a declaration. The trial Judge, and the District Court on appeal, dismissed the suit. Both Courts found that village S had never had any share in the water from the old channel, and that village A had the exclusive right to the customary supply of water through the old channel by long user, going back, the District Judge thought, for some 200 years:

Held, that the High Court had no jurisdiction to reverse the finding, which amounted to a finding that the A ryots had acquired an easement and was fatal to the plaintiff's claim.

* *Present*: Lord THANKERTON, Sir JOHN WALLIS, and Sir GEORGE LOWNDES.

Wali Muhammad v. Muhammad Bakhsh, (1929) I.L.R. 11 Lah. 199, 207; L.R. 57 I.A. 86, 92, applied.

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v.
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APPEAL (No. 91 of 1931) from a decree of the High Court (August 27, 1925) modifying on second appeal a decree of the District Judge of Tinnevely (November 10, 1919) which affirmed a decree of the Subordinate Judge of Tuticorin (January 3, 1917).

The suit raised a question as to the respective rights of the inamdar of the Sethukkuvoithan estate (plaintiff-respondent No. 1) and the ryots of Attur, a Government ryotwari village (appellants Nos. 2 to 4, and *pro forma* respondents Nos. 2 to 23), in the distribution of the water of the river Tambraparni by a Government scheme of irrigation; both the inam and the ryotwari villages were situate upon the right or south bank of the river, the former being higher up than the latter.

The facts appear from the judgment of the Judicial Committee.

The Subordinate Judge dismissed the first respondent's suit and his decree was affirmed by the District Judge upon grounds which appear in the present judgment. Upon a second appeal to the High Court the learned Judges (RAMESAM and VENKATASUBBA RAO JJ.), modifying the decree, made a declaration that the plaintiff was entitled to low water to the extent adequate to irrigate 228 acres of single crop land and 178 acres of double crop land, provided that at least this quantity of water was available in the channel JK; it was also directed that the Government should remove a drop at point Q.

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DeGruyther K.C. and Pringle for first appellant.

Dunne K.C. and Narasimham for first respondent.

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The JUDGMENT of their Lordships was delivered by Sir JOHN WALLIS.—This is an appeal from the concurrent judgments of a Bench of the Madras High Court modifying, on second appeal, the decree of the lower appellate Court which had dismissed the suit, and giving the plaintiff a decree for the principal relief claimed in the plaint. The question is mainly one of fact, and it is well settled that under section 100 of the Code of Civil Procedure the High Court has no jurisdiction to reverse the findings of fact arrived at by the lower appellate Court, however erroneous, unless they are vitiated by some error of law. Subsequently to the date of the judgments under appeal, the Board has had occasion to emphasise the fact that this rule is equally applicable to cases, such as this, in which the findings of the lower appellate Court are based on inferences drawn from the documents exhibited in evidence. [See *Anup Mahto v. Mita Dusadh*(1).] This question is dealt with in the third and fourth propositions laid down in the judgment delivered by Sir BINOD MITTER in *Wali Muhammad v. Muhammad Bakhsh*(2):

“(3) Where the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundations of rights, but were really historical materials, have

to be construed for the purpose of deciding the question: see *Midnapur Zamindary Company v. Uma Charan Mandal*(1).

In the last cited case the question the Board had to decide was the date of the origin of an under-tenure. The first appellate Court fixed the date from the contents of some documents. No oral evidence had been called in this case.

(4) A second appeal would not lie because some portion of the evidence might be contained in a document or documents, and the first appellate Court had made a mistake as to its meaning: see *Nowbut Singh v. Chutter Dharee Singh*(2).”

The first question, therefore, for their Lordships' consideration is whether in the light of this ruling the High Court had any jurisdiction to reverse the judgment of the lower appellate Court.

The Rameswaram temple in the narrow straits between India and Ceylon, which is regarded by Hindus as one of their most important shrines, is the owner of a revenue-free inam for the performance of certain services in the temple on the south bank of the Tambraparni river in the extreme south of the peninsula, known as the Sethukkuvoithan estate, and hereinafter referred to as the *S* village; and the present suit was instituted by the temple trustee against the first defendant, the Secretary of State for India in Council, in respect of an order passed by Mr. Lionel Davidson, then Collector of Tinnevely, regulating the distribution of water under the Tambraparni project between the *S* village and the adjoining village of Attur, which is situated lower down the river. The Attur ryots were subsequently impleaded as supplemental defendants 2 to 21. Defendants 2, 4 and 8 have joined with the first defendant, the Secretary of State

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(1) (1933) L.R. 61 I.A. 93, 102.
(2) (1929) I.L.R. 11 Lah. 199, 207; L.R. 57 I.A. 86, 92.

(1) (1923) 29 C.W.N. 131 (P.C.).

(2) (1873) 19 W.R. 222 (P.C.).

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for India in Council, in preferring this appeal to His Majesty in Council, and the other defendants have been cited as respondents.

Prior to the introduction of the Tambraparni project the lower portion of the river, which here flows from west to east, had been harnessed for irrigation by six anicuts or dams with channels taking off above the anicuts ; and on the south bank, below the last of these anicuts but higher up than the two suit villages, there had been a sluice *C* and a channel *CG* known as the Attur channel, which, after passing through some Government villages and the *S* village, discharged into the Attur tank.

The Tambraparni project, which was first put forward in 1855 and taken up in 1868, consisted in the construction of a seventh anicut at a place called Srivaikuntam, sixteen miles from the mouth of the river and three or four miles above the sluice *C* of the Attur channel, with north and south main channels taking off above the new anicut and leading to the coast towns of Tuticorin and Tiruchendur, and branch channels taking off from these main channels.

The present case is only concerned with the branch channel *JK*, which took off from the south main channel, crossed the old Attur channel by an aqueduct *E*, seven miles below the new anicut, and, after passing through certain villages which it was intended to irrigate between the Attur channel and the river, discharged into the *S* village tank, in which a vent was constructed to pass the water into the Attur channel for the supply of the Attur tank. This method of supplying the Attur tank was adopted because when the

water in the river was low the new anicut diverted the supply which the Attur tank had till then received through the sluice *C*. This system remained in force from 1872, when the anicut was completed, until 1877, when, owing to complaints of the Attur ryots, one of the walls of the aqueduct *E* was lowered so as to allow water to drop into the Attur channel at this point. There were further changes in 1882, when a Government order was passed directing the destruction of the aqueduct *E*, the closing of the vent in the *S* tank, and the construction near the point *E* of a sluice *N* for the supply of the channel discharging into the *S* tank and a drop to pass water into the Attur channel. The result would have been that all water not drawn off through the sluice *N* would have passed into the Attur channel and supplied the Attur tank.

Instead of a drop, what was constructed was a dam *M* which entirely cut off the Attur supply when the water was low until an opening was made in the dam a year later. In 1893 the Chief Engineer for Irrigation, in the course of an inspection tour, condemned this dam, which, he said, had been erroneously styled a drop, as entirely disturbing the Attur regime, with the result that, in place of the sluice *N* and the dam *M*, shutters were constructed which enabled the supplies to the channels leading to the *S* tank and to the Attur channel to be regulated. According to the finding of the District Judge, at first the shutters were so worked as to give the Attur ryots a supply of the low water, but after March 1901 the Attur shutters were kept closed until there was a head two feet nine inches of water in the channel, with the

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result that the Attur supply of low water was cut off. The Attur ryots thereupon presented a petition to Mr. Buckley, then Collector of Tinnevely, who directed that this system should cease and that, as the Attur old channel appeared to have taken off above the old *S* village channel, the Attur ryots should be given the preference when water was not sufficient for the standing crops under both tanks. On the 26th April 1909, the Attur ryots presented a further petition to Mr. Lionel Davidson, the then Collector, in which they complained that effect had not been given to Mr. Buckley's order, and intimated that, if the existing invasion of the rights were allowed to continue, they would be obliged to seek redress in a Court of law. Mr. Davidson referred this petition to the District Executive Engineer, an officer belonging to the Public Works Department, for early remarks, with the observation that the petitioners' sole request was that Mr. Buckley's order should be duly enforced. This incident was closed some months later by an official letter from the Executive Engineer of the District on the 12th February 1910, submitting proposals which he considered would give the Attur ryots a somewhat better supply of low water than they had received through the opening in the dam *M*. This he considered would be only fair in view of their prior rights and the larger area they had under cultivation. These proposals were accepted by Mr. Davidson, who passed the following order of the 21st April 1910, which has given rise to the present suit and is the subject of this appeal :—

"I have inquired into this question, hearing orally the arguments of Kuppa Avadhani on behalf of the Attur ryots and Minakshisundaram Pillai on behalf of Sethukkuvoithan ryots.

It is not disputed that there was originally an open space of some 3 square feet in the dam existing before the present regulator was constructed, and the low water-supply admittedly flowed through that opening to Attur. The Attur ryots have without proper authority for some eight or nine years past been denied that supply by an order of the Public Works Subdivisional Officer. This order was repudiated by the late Executive Engineer, Mr. Lutman, and Mr. Buckley as Collector definitely set it aside and recorded his opinion that the Attur ryots had preferential claims. In these circumstances I approve the Executive Engineer's proposal, which is that when the depth of water above the sill of the Attur regulator falls to a level of 2 feet 6 inches, one of the present shutters shall be completely closed and the other lowered to a level 6 inches above the sill so as to leave an open vent-way of 3 square feet (6 feet by 6 inches)."

The case made in the plaint was that as upper riparian proprietor the plaintiff had a prior right to a supply of water from the river; that his village *S* had been irrigated by a channel taking off from a sluice *A*, and the Attur village by a channel taking off from a sluice *B* lower down; that the Attur irrigation through sluice *B* having become impracticable, owing to the deepening of the river bed, a sluice *C* had been constructed higher up the river, and a channel, *CG*, leading to the Attur tank; that this sluice and channel had been constructed for the benefit of both villages, and that the *S* village had always enjoyed prior rights of supply when the water in the channel was low. After setting out the changes that had taken place under the Tambraparni project, which have already been sufficiently described, the plaint alleged that the Collector's order of the 21st April 1910, which prevented water flowing as usual into the *S* tank, was illegal, and a cause of damage to the plaintiff. The plaint

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accordingly prayed for a declaration of the plaintiff's right to have a head of two feet nine inches of water maintained as before for the supply of the *S* tank and for damages. There were also prayers for other reliefs which were either not pressed, or arose out of the plaintiff's claim to share in the waters of the Attur channel before the introduction of the project which was rejected by the District Judge, whose finding on this point has not been disturbed by the High Court.

The case was tried before the Subordinate Judge of Tuticorin, who dismissed the suit, and his decree was affirmed on appeal by the District Judge of Tinnevely. It was found by both Courts, on a careful consideration of the available evidence, that the plaintiff's *S* village had never had any share in the waters of the old Attur channel, and that the Attur village had acquired the exclusive right to the customary supply of water through the sluice *C* and the old Attur channel by long user, going back, the District Judge thought, for some two hundred years.

The Attur sluice *C*, being situated higher up the river than both villages, this, in their Lordships' opinion, amounted to a finding that the Attur ryots had acquired an easement against all the lower riparian proprietors, including the plaintiff, to draw off their customary supply of water through this sluice and channel, a right in no way depending on their position as riparian proprietors lower down the river. The District Judge also found that the plaintiff had failed to prove that the Government had contracted with him to give the *S* village a priority of supply. These findings, in their Lordships' opinion, are

sufficient to dispose of the case, as the plaintiff has failed to prove that he sustained any damage by reason of Mr. Davidson's order, which was based on the priority as to the supply of low water in the river which the Attur ryots had enjoyed before the introduction of the Tambraparni project interfered with their customary supply. Far from being prejudiced by the project, the plaintiff's *S* village, as found by the District Judge, on the evidence before him, obtained thereby a supply of river water for the *S* tank which it had been unable to obtain in the exercise of the plaintiff's riparian rights within the limits of the *S* village by the sluice *A* and the channel leading therefrom.

Unless the District Judge's aforesaid findings were contrary to law within the meaning of section 100 of the Civil Procedure Code, the High Court had no jurisdiction to modify his decree, and, after hearing this question fully argued for the respondent and considering the judgments of the lower appellate Court and the High Court in the light of the decision referred to at the beginning of the judgment, their Lordships are of opinion no such error of law has been made out.

Their Lordships are therefore of opinion that the judgments and decree of the High Court should be set aside and the decree of the District Judge restored, and they will humbly advise His Majesty accordingly. The plaintiff-respondent will pay the appellants' costs, both here and in the High Court, but one set only.

Solicitors for first appellant: *Solicitor, India Office.*

Solicitors for first respondent: *T. L. Wilson & Co.*
A.M.T.

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APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Butler.

PONNUSWAMI GOUNDAN AND ANOTHER (APPELLANTS),
APPELLANTS,

v.

KALYANASUNDARA AYYAR AND NINE OTHERS
(RESPONDENTS), RESPONDENTS.*

Indian Evidence Act (I of 1872), sec. 67—Attesting witness who is either dead or cannot be produced—Secondary evidence of attestation by—Admissibility—Proof of such attestation by secondary evidence—If proof of execution of document by its alleged executant.

The alleged executant of a document was a marksman and besides the document-writer there were two other attesting witnesses. The evidence of one of them was contradictory and was not relied upon. Of the other two attesting witnesses one was dead and the other could not be produced. A person was called who proved that the signature of one of those attesting witnesses was his.

Held that that person's evidence was sufficient proof of the execution of the document by its alleged executant.

The Evidence Act permits secondary evidence to be given with regard to the attestation of an attesting witness who is either dead or cannot be brought to Court. The signature of the attesting witness when proved is evidence of everything on the face of the document and that he saw the executant make his mark. Section 67 of the Indian Evidence Act requires nothing more than proof of the handwriting or signature of the writer of the document or its executant. The section does not specify or limit the kind of evidence required and only requires proof by admissible evidence.

APPEAL under Clause 15 of the Letters Patent against the judgment of ANANTAKRISHNA AYYAR J., dated 14th October 1929 in Second Appeal No. 1852 of 1925 preferred to the High Court

* Letters Patent Appeal No. 12 of 1931.

against the decree of the District Court of Salem in Appeal Suit No. 115 of 1922 (Original Suit No. 250 of 1916, District Munsif's Court of Salem).

K. S. Krishnaswami Ayyangar for V. N. Venkatavaradachariar for appellants.

D. Ramaswami Ayyangar for A. Srirangachariar for respondents.

JUDGMENT.

BEASLEY C.J.—This is an appeal from a judgment of ANANTAKRISHNA AYYAR J. in second appeal. The suit under appeal was an ejectment suit. The plaintiff claimed to be landlord and owner of the suit property claiming that the defendants were mere tenants from year to year. The defendants, however, claimed that they had a permanent right of occupancy and, therefore, could not be ejected. The whole question turned on Exhibit M, the document under which the defendants occupied the premises. If it was a genuine document, then they had no defence because the document establishes the fact that the tenancy was one from year to year. Its genuineness was denied by the defendants who said that it was a forgery. No question in this case turns upon the identity of the person who is alleged to have executed the document. It is conceded that it is supposed to refer to the first defendant. The first defendant was a marksman and besides the document-writer there were two other attesting witnesses. One of them was P.W. 10 whose evidence was discredited. He admitted his attestation but said that the document had not been executed in his presence. This was in direct contradiction to the evidence which he had given

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in another case where he admitted that the document was executed in his presence. Faced with this contradictory evidence, the evidence of that witness was not relied upon and of course quite rightly. Of the other two attesting witnesses one of them was dead and the other one could not be produced. Therefore, secondary evidence could be admitted with regard to that attestation; and admittedly P.W. 3 who was called proved that the signature of one of the attesting witnesses was his. Both the lower Courts and the second appellate Court accepted that evidence as proof of the execution of the document by the first defendant. In second appeal and here it was contended that by reason of section 67 of the Indian Evidence Act that proof was insufficient to establish the execution of the document by the first defendant. Section 67 of the Indian Evidence Act reads as follows:

"If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting."

It is contended that that section relates only to the proof of the handwriting of the executant and not to the proof of the signature of an attesting witness. It is quite true that it does not mention the signatures of attesting witnesses but to accept the contention put forward by the appellants that the section has that restricted meaning would be to override the provisions of the Evidence Act with regard to the reception of secondary evidence. All that that section requires is that the writing or the signature of the executant should be proved to be his writing or

his signature. In the case of a signature how is that to be proved? It is to be proved either by means of a witness who saw the person write and was present necessarily when he did write or if such a person is not available—I am talking of course of the case where the executant denies execution of the document—by calling somebody who is familiar with the handwriting of the executant and who proves that it is his handwriting. In this case the latter alternative cannot be considered because the first defendant was a marksman and therefore such proof would be dependent upon the proof of a witness who actually saw him make his mark. Such a witness cannot be produced for the reasons already stated. Such witnesses would be the attesting witnesses; and they would be the best witnesses as their presence is guaranteed by their signatures. In this case neither of the remaining attesting witnesses can be called and secondary evidence with regard to their attestation obviously is admissible. What is the secondary evidence? The evidence of somebody who either saw them attest or is familiar with their signatures. We have that evidence here because, as already stated, there is a witness whose evidence has been believed. He states that the signature of one of the attesting witnesses is his signature. What follows from that? It follows that it is proved that that attesting witness attested the document. What follows from that? A passage from Mr. Starkie in his *Law of Evidence*, fourth edition, page 519, is set out in the judgment of our learned brother as follows:

"The signature of the attesting witness when proved is evidence of everything upon the face of the instrument, since it

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is to be presumed that the witness would not have subscribed his name in attestation of that which did not take place."

Therefore the signature of the attesting witness having been proved is evidence of everything on the face of the document and that he saw the executant make his mark. The argument put forward before us by the appellants directly gives the go-by to this very obvious inference which in the English law arises and I see no reason whatever for excluding that inference from the Indian Law of Evidence. It gives the go-by entirely to the provision of the Evidence Act which permits secondary evidence to be given in the absence of witnesses who are either dead or cannot be brought to Court. Section 67 of the Indian Evidence Act requires nothing more than proof of the handwriting or signature of the writer of the document or its executant. The section does not specify or limit the kind of evidence required. It clearly only requires proof by admissible evidence. For these reasons our learned brother's judgment in second appeal was right and this Letters Patent appeal must be dismissed with costs.

BUTLER J.—I agree.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

DAMARAJU SIVARAMAMURTHI (SECOND DEFENDANT),
APPELLANT,

1934,
January 16.

v.

ATYAM VENKAYYA AND FIVE OTHERS (PLAINTIFF AND
NIL), RESPONDENTS.*

Hindu Law—Joint family—Purchaser of an undivided share of a co-parcener—If entitled to past mesne profits and when.

In order to entitle a purchaser of an undivided share of a co-parcener in a joint Hindu family to get a decree for past mesne profits it is not necessary to show that the properties of the family had been divided by metes and bounds. It is enough if a division in status is established among the members of the family

Maharaja of Bobbili v. Venkataramanjulu Naidu, (1914)
I.L.R. 39 Mad. 265, distinguished.

APPEAL against the decree of the Court of the Subordinate Judge of Ellore in Original Suit No. 117 of 1922.

P. Somasundaram for appellant.

P. Satyanarayana Rao for respondents.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—This is an appeal by the second defendant against the revised judgment of the learned Subordinate Judge after remand in Original Suit No. 117 of 1922. The only point argued relates to the decree passed against the second defendant for the past mesne profits. The second defendant is the son of the first defendant

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who is now dead and defendants 3 and 4 are his uncles, being the brothers of the first defendant. The plaintiff has become the purchaser of the one-third undivided share belonging to the first defendant in the suit items.

The appellant says that no decree should have been passed against him as he and his father were not in possession of the family properties and as the profits of the properties were all along being enjoyed by defendants 3 and 4. The learned Judge did not accept this view of the case. Defendants 3 and 4 say that the profits of the properties were being enjoyed in shares by the defendants. The leases of the properties were sometimes given by the third defendant and sometimes by the fourth but the profits were enjoyed by all the brothers each taking his share. How they were enjoying the properties is detailed in the evidence of the third defendant. The written statement of one of the tenants (see the written statement of the eleventh defendant) also supports this version. Mr. Somasundaram emphasises that part of the plaintiff's evidence wherein he says that "the profits are being enjoyed by defendants 3 and 4." This no doubt at first sight would support the case of the second defendant, but we have to take this evidence along with the evidence of the third and the other defendants, and we have also to remember that the plaintiff is a stranger and is hardly likely to know the details about the actual enjoyment of the produce. The evidence of defendants 3 and 4 shows that they collected the produce with respect to certain lands and that the brothers divided it in shares. Read in this light the plaintiff's evidence does not hurt his case. It

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is also unlikely that the first and second defendants would have given up their share of the produce of the family lands. The learned Judge has accepted the evidence of the third and fourth witnesses for the defendants. We see no reason to reject their evidence on this question.

Another point argued by the appellant is that since the family of defendants 1 to 4 is admittedly undivided the purchaser of an undivided share of its properties is not entitled to claim past mesne profits. Reliance in support of this proposition is placed on *Maharaja of Bobbili v. Venkataramanjulu Naidu*(1), but that case is distinguishable, because in this case the evidence shows that, though the properties are not divided by metes and bounds, the brothers were enjoying them in definite shares and were living also separately. A division in status is thus established between the members. In such a case a decree for mesne profits may be given to the purchaser of the undivided share; see *Palaniakkal v. Ramana Koundan*(2) and also the observations on the point in *Sheodan Kurmi v. Balkaran Kurmi*(3).

We overrule both the points urged by the appellant's learned Counsel and dismiss this appeal with costs.

G.R.

(1) (1914) I.L.R. 39 Mad. 265.

(2) (1910) 7 I.C. 695.

(3) (1920) I.L.R. 43 All. 193, 195.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

1933,
December 7.

THE INDIAN BANK, LTD., MADRAS, AND ANOTHER
(NIL AND DEFENDANT), APPELLANTS,

v.

SETH BANSIRAM JESHAMAL FIRM THROUGH ITS
MANAGING PARTNER, LILARAM, AND ANOTHER
(PLAINTIFFS), RESPONDENTS.*

Appeal—Right of—By a person not a party to suit.

Neither under the general principles of law nor under the Code of Civil Procedure can a person who was not a party to a suit prefer an appeal against the decree therein on the ground that the Official Receiver who was a party to the suit representing the general body of creditors had not appealed and that he, the appellant, as one of the creditors represented by the Official Receiver, was aggrieved by the decree.

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

APPEAL against the decree of the Court of the Subordinate Judge of Madura in Original Suit No. 116 of 1927.

Civil Miscellaneous Petition No. 1571 of 1929 was put in praying that in the circumstances stated in the affidavit filed therewith the High Court may be pleased to permit the petitioner, the Indian Bank, Ltd., to appeal against the decree of the Court of the Subordinate Judge of Madura in Original Suit No. 116 of 1927 on behalf of itself and the general body of creditors of the insolvent, P. M. K. Somasundara Nadar, as representing whom the defendant (second appellant

* Appeal No. 138 of 1929 and Civil Miscellaneous Petition No. 1571 of 1929.

therein), the Official Receiver, was sued in the lower Court, and to permit the petitioner to use the name of the defendant as second appellant therein, and to conduct the appeal for the benefit of the second appellant and the general body of creditors.

S. Panchapagesa Sastri for appellants.

K. S. Krishnaswami Ayyangar for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—This appeal has been filed against the decree in Original Suit No. 116 of 1927 on the file of the Court of the Subordinate Judge of Madura.

The Indian Bank, Ltd., Madras, is the appellant in this Court. The appellant was not a party to the suit or to the decree passed in it. A preliminary objection to the hearing of the appeal is taken by the respondents that, since the appellant was not a party to the suit or decree in the lower Court, this appeal is incompetent and should be dismissed.

The first plaintiff in the suit is a money-lender. The second plaintiff is the purchaser of the suit properties from him. The defendant is the Official Receiver of Madura. There are no other parties to the suit.

The suit out of which this appeal arises was instituted by the plaintiffs under Order XXI, rule 103, Civil Procedure Code, to declare their title to two items of property and for a temporary injunction to restrain the defendant from taking possession of them.

On the 22nd March 1923 a hypothecation bond, Exhibit A, was executed in the first plaintiff's

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favour by one Somasundara Nadar, his adult son, and five minor sons represented by their father. In September 1923 the first plaintiff sued upon the bond. Somasundara Nadar and his sons remained *ex parte* and a preliminary decree was passed on the 27th October 1923. The day before the decree Somasundara Nadar filed Insolvency Petition No. 63 of 1923 in the District Court and on the same date the Official Receiver of Madura was appointed as the interim receiver. Somasundara Nadar was adjudicated insolvent in January 1924 and the District Court passed a vesting order in favour of the Official Receiver on 25th January 1924. In the meanwhile, the first plaintiff had applied for final decree and on the 1st February he obtained it without impleading the Official Receiver in whom the properties of the insolvent had already vested. He executed the decree and himself purchased the hypothecated properties which consisted of three items and sold them to the second plaintiff. The suit related only to two items. After his purchase the first plaintiff obtained possession of one item but he was obstructed by the Official Receiver with respect to the other item. Then two petitions were filed before the Subordinate Judge, one by the first plaintiff for removal of the obstruction caused by the Official Receiver and the other by the Official Receiver for delivery to him of the item already delivered to the first plaintiff. The two petitions were tried together and were decided in favour of the first plaintiff. He accordingly obtained delivery of the remaining item also. But the judgment of the Sub-Court was set aside by the High Court on revision, and before the defendant, the

Official Receiver, could apply for redelivery of the two items the suit under appeal was instituted by the plaintiff under Order XXI, rule 103, Civil Procedure Code.

The lower Court decided that the first plaintiff has acquired a valid title under the sale certificate to six-sevenths of the suit properties. As regards the remaining one-seventh it held that the defendant's title should be upheld. In the result the second plaintiff (that is, the purchaser from the first plaintiff) and the defendant, the Official Receiver, were declared entitled to joint possession of the two suit items for the respective six-sevenths and one-seventh shares. In the memorandum of appeal the appellant has amongst other grounds raised the question that the lower Court should, even on its finding, have dismissed the suit with a declaration of the plaintiffs' rights as purchasers and should have referred them to a suit for a general partition to work out such rights as they may have.

It will appear from what has been stated above that besides the plaintiffs and the Official Receiver there were no other parties to the suit, and that having regard to his written statement the decree in so far as it related to joint possession and the declaration of title as regards the six-sevenths share was against the Official Receiver. If he was aggrieved by the decree he should have preferred an appeal against it. But this he did not do. What actually happened was this. The last day for filing the appeal was the 1st November 1928. On that date the Indian Bank, admittedly one of the creditors of Somasundara Nadar, the first plaintiff, presented an appeal to this

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Court against the lower Court's decree in so far as it related to the Official Receiver. The Bank also filed on the same date an application supported by an affidavit in which it prayed that

"the Court may be pleased to give liberty to the appellant to appeal against the decree in Original Suit No. 116 of 1927 on the file of the Sub-Court of Madura, on behalf of itself and the general body of creditors of the insolvent P. M. K. Somasundara Nadar as representing whom the defendant, the Official Receiver, was sued in the lower Court and to permit the petitioner to use the name of the defendant as second appellant herein and to conduct the appeal for the benefit of the second appellant and the general body of creditors."

At the end of the memorandum of appeal the appellant stated that

"... if the first appellant's petition to use the name of the defendant as second appellant is not allowed, the first appellant impleads him merely as the third respondent." the other two respondents being the first and the second plaintiffs. In the cause title of the memorandum the defendant, the Official Receiver, is included as the second appellant—the bank being the first appellant—and is described as the defendant in the lower Court and in the High Court as the second appellant or the third respondent (if the first appellant's petition is not allowed). On the 6th November 1928 a letter was written by the Official Receiver of Madura to the Sub-Court asking permission to "adopt" the appeal filed by the Indian Bank and to continue it. From the letter it would appear that probably the Official Receiver did not prefer any appeal as it was thought that

"it was open to the creditor himself to prefer an appeal under the ruling in *Chowdappa Gounder v. Kathaperumal Pillai*(1)."

(1) (1926) I.L.R. 49 Mad. 794.

The learned Subordinate Judge gave him the permission asked for and observed in his order that

"this is only an administrative order and is made without prejudice to any contentions of the respondent in the appeal as to the validity of the procedure as against him."

On the 24th November 1928 the Official Receiver gave a vakalath to the first appellant's pleader authorizing him to conduct the appeal. On the petition filed by the Indian Bank (numbered as Civil Miscellaneous Petition No. 1571 of 1929) for permission to file the appeal no order was passed by the Court as the petition was never put up for orders. We find an office note on the back of the petition to this effect :

"The Official Receiver having since joined in the prosecution of the appeal it should be stated whether this petition is still necessary."

This is signed by the Deputy Registrar and the date of it seems to be 22nd March 1929. The petition was returned to the Office with the Counsel's endorsement :

"The petition seems to be unnecessary, but it is better, to avoid technical objection, that it is not withdrawn. So this may be posted with the appeal. Re-presented."

This was on 25th March 1929. This petition is now before us for orders along with the appeal, after a lapse of five years. It is to be regretted that this petition was not posted for orders earlier. Having regard to the fact that the appeal is presented by a person not a party to the suit, the petition asking for permission to file the appeal should have been put up for orders before the Court without any delay.

It is not now argued that there is an appeal before this Court filed by the Official Receiver.

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What is argued is that the Official Receiver representing the general body of creditors was a party to the suit, and that though the appellant, a creditor, was not an actual party, he being aggrieved by the decision is competent to prefer the appeal when the Official Receiver does not file any appeal. In support of this contention reliance is placed on the decision of this Court in *Chowdappa Gounder v. Kathaperumal Pillai*(1). In that case it was held that

“under section 75 (2) of the Provincial Insolvency Act (V of 1920), a creditor of an insolvent can appeal against an order of a District Court dismissing an application of the Official Receiver to set aside, under sections 53 and 54 of the Act, an alienation by the insolvent, even though the creditor was not an actual party to the application and had not previously moved the Official Receiver to file an appeal and the latter had not refused to do so; but the creditor must prefer an appeal on behalf of all the creditors.”

It will be observed that the case of *Chowdappa Gounder v. Kathaperumal Pillai*(1) arose under the Insolvency Act and the appeal was preferred under the specific provision of section 75 of the Provincial Insolvency Act, which says:

“Any such person aggrieved by any such decision or order of a District Court . . . may appeal to the High Court.”

The present appeal not being one under the Insolvency Act, the decision in *Chowdappa Gounder v. Kathaperumal Pillai*(1) is obviously inapplicable. So also is the decision in *Ananthanarayana Ayyar v. Sankaranarayana Ayyar*(2), referred to in *Chowdappa Gounder v. Kathaperumal Pillai*(1). The question whether the appellant though not a party to the suit can prefer an appeal

against the decree on the ground that the Official Receiver who was a party to the suit representing the general body of creditors has not appealed, and that he, the appellant, as one of the creditors represented by the Official Receiver, is aggrieved by the decree, must be answered with reference to the provisions of the Civil Procedure Code under which the appeal has been filed or the general principles of law. The relevant provisions of the Code are section 96, Order XLI, and section 146. Clause 1 of section 96, the section under which appeals are filed, says:

“ . . . an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.”

None of the three clauses of the section says who may prefer the appeal. Order XLI, rule 1, refers to the form in which every appeal should be preferred, what should accompany the memorandum and the contents of the memorandum. This provision also does not state who may prefer the appeal. Section 146 refers to proceedings by or against representatives. It says:

“ . . . where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.”

Under this section, if a person who is entitled to prefer an appeal is dead his legal representative may prefer the appeal. The proceeding contemplated by this section would include an appeal and the expression “claiming under” is wide enough to cover cases of devolution, etc., mentioned in Order XXII, rule 10; *Sitaramaswami v. Lakshmi Narasimha*(1). It is not argued that the

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(1) (1926) I.L.R. 49 Mad. 794.

(2) (1928) I.L.R. 47 Mad. 673.

(1) (1917) I.L.R. 41 Mad. 510.

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appellant in this appeal claims under the Official Receiver. In his Commentaries under section 96, Civil Procedure Code, under the heading "Who may appeal" Sir Dinshaw Mulla says :

"An appeal under this section may be preferred by any of the following persons:—

1. Any party to the suit adversely affected by the decree, or, if such party is dead, by his legal representative.
2. Any transferee of the interest of such party, who, so far as such interest is concerned, is bound by the decree, provided his name is entered on the record of the suit.
3. An auction-purchaser may appeal from an order in execution setting aside the sale on the ground of fraud.

No person, unless he is a party to the suit, is entitled to appeal under this section." (The italics are ours.)

The appellant does not fall under any of the three classes mentioned above.

It would thus appear that under the Civil Procedure Code no person who is not a party to the suit can prefer an appeal under section 96. In *Mihin Lal v. Imtiaz Ali*(1), the learned Judges observed:

"... we think it right to say that a person who has been a stranger to the suit in the Court of first instance ought not to be brought on the record of an appeal, unless he is brought on as a representative under the sections applying to the bringing on to the record of a representative in case of the death of a party to the suit or the devolution of title."

Order XXXI, rule 1, referred to in this connection by the appellant does not help him. The rule says :

"In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made parties."

(1) (1896) I.L.R. 18 All. 332.

There is no such special provision in the Civil Procedure Code regarding representation of creditors in suits concerning properties vested in Official Receivers.

The appellant not being entitled to prefer the appeal as not being a party to the suit can it be said that, because the Official Receiver represents the general body of creditors in matters relating to insolvency, the appellant as a creditor though not a party to the suit can prefer the appeal when the Official Receiver does not prefer one? We think not. Some help in deciding the question may be obtained from a decision of the Bombay High Court in *Jan Mahomed v. Syed Nurudin*(1). In that case it was held that

"a suit having been brought by the Advocate-General, he was the proper party to appeal and not the relators who have filed the appeal. They were not parties to the suit and as relators they have no right to step in when the Advocate-General, who was plaintiff, has not thought fit to appeal against the dismissal of the suit."

and the appeal was dismissed on the ground that the appeal does not lie at the instance of relators. On an analogous reason it may well be held that the Official Receiver not having filed the appeal, one of the creditors, though their general body is represented by the Official Receiver, cannot step in and file the appeal as he is not a party to the suit. The right of appeal is a special creature of statute and it can be exercised only by those in whom the power is vested expressly or implied by the statute. In *In re Markham* ; *Markham v. Markham*(2), relied on by the appellant, leave to a person interested in, but not

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(1) (1907) I.L.R. 32 Bom. 155.

(2) (1880) 16 Ch. D. 1.

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party to an action, to appeal from an order was given by the Court; but it will appear from the report that such leave could be obtained according to the practice before the Judicature Acts. In *In re Securities Insurance Company*(1)—

“a Judge having made an order sanctioning an arrangement under the Joint Stock Companies Arrangement Act, 1870, an appeal was presented by persons whose interests as creditors were affected by the scheme, but who had not opposed the scheme at the meeting of creditors, nor appeared before the Judge when his sanction was applied for, nor obtained leave to appeal”—it was held “that the right of appeal under the Act is governed by the Companies Act, 1862, section 124, which gives a right of appeal subject to the same conditions as appeals from decisions in the ordinary jurisdiction of the Court; and that, as according to the practice of the Court of Chancery a person not a party to the proceedings could not appeal from an order without the leave of the Court, the present appeal must be dismissed, the appellants not having obtained leave, and the case not being one in which the Court thought that leave ought to be given.”

These decisions do not help the appellant as they do not directly bear on the question and relate only to powers of the appellate Court to grant leave to appeal. Further the powers of the appellate Court in these cases are rested on the practice prevailing in the English Courts.

For the above reasons, we must hold that this appeal by the appellant is incompetent.

The next question is whether leave may be granted to the appellant. No provision of law, or rule of practice, was shown to us entitling him to claim such leave. When the Official Receiver, who was a party to the suit, and whose statutory duty is to institute, defend or continue any suit or other legal proceeding relating to the property

(1) [1894] 2 Ch. 410

of the insolvent [see section 58(d) of the Provincial Insolvency Act], has not preferred the appeal, we cannot see how a creditor can on general grounds ask the appellate Court to grant him leave to appeal. Even if such permission may be asked, we are not satisfied that this is a proper case in which the permission should be given. The Indian Bank had obtained its decree against Somasundara Nadar long before he was adjudicated an insolvent. It does not appear that it intervened in any of the proceedings subsequent to the insolvency at any time; it did not even make an application to the lower Court for permission to appeal. In these circumstances, Civil Miscellaneous Petition No. 1571 of 1929 is dismissed.

In the result the appeal is dismissed with costs.

G.R.

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APPELLATE CIVIL.

Before Mr. Justice Curgenven and
Mr. Justice Sundaram Chetti.

TULASI AMMAL (APPELLANT), PETITIONER,

v.

DANALAKSHMI AMMAL AND SIX OTHERS (FIRST
RESPONDENT AND NIL), RESPONDENTS.*

1933,
November 3.

Code of Criminal Procedure (Act V of 1898), sec. 476—Complaint under—Civil Court's power to make—Registration of deed—Suit to enforce—Deed found to be a forgery in—Complaint of offences under ss. 471 and 193, Indian Penal Code, against writer and attestors and against principal beneficiary under deed and plaintiff in suit—Writer and attestors not examined in civil suit which was disposed of on their depositions given before District Registrar—Plaintiff in suit examined on commission in civil suit but not taking any physical part in preparation of deed—Section 195 (1) (b) and (c) of Criminal Procedure Code—Applicability and effect of.

The registration of a settlement deed purporting to have been executed by one G, attested by five persons and written by a sixth person was refused by the District Registrar on the ground that its genuineness was not established. G's second wife who was also a substantial beneficiary under that deed thereupon instituted a suit to enforce registration thereof. The trial Court passed a decree directing that the deed should be registered but on appeal the High Court found that it was a forgery, allowed the appeal and dismissed the suit. On an application to the High Court to exercise its power under section 476 of the Code of Criminal Procedure to make a complaint in respect of the alleged fabrication of the settlement deed,

Held that the intervention of the Court was unnecessary so far as the writer and the attestors were concerned but that a complaint of offences under sections 471 and 193 of the Penal Code should be made against G's second wife.

* Civil Miscellaneous Petition No. 3639 of 1933.

Under sub-section 2 of section 195, Criminal Procedure Code, the term "Court" as employed in that section does not include a Registrar under the Indian Registration Act.

PETITION praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to direct that a complaint be filed against the first respondent and the other persons concerned in respect of the offences which appear to have been committed by them, namely, the concoction of the settlement deed and its use in Court as evidence as well as the evidence adduced in support thereof in Appeal No. 18 of 1928 preferred to the High Court against the decree of the Court of the Subordinate Judge of Tanjore in Original Suit No. 21 of 1926.

K. Desikachari for petitioner.

K. Bhashyam Ayyangar and T. R. Srinivasan for respondents.

The ORDER of the Court was delivered by CURGENVEN J.—This is an application to this Court to exercise its power under section 476 of the Code of Criminal Procedure to make a complaint in respect of the alleged fabrication of a certain document. In Appeal Suit No. 18 of 1928 a settlement deed, Exhibit B, figured as having been executed by one Govindaswami Naidu. The document bore the alleged signature of Govindaswami in seven places and it appeared to have been attested by five persons and to have been written by a sixth person. The suit out of which the appeal arose was to enforce registration of this document and the plaintiff (now first respondent) was Govindaswami's second wife and a substantial beneficiary under the settlement deed, much to the prejudice of the first wife who was

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the first defendant in the suit. Proceedings had taken place before the District Registrar, who had refused to register this document on the ground that its genuineness was not established. The trial Court passed a decree directing that the settlement deed should be registered, relying upon a considerable amount of evidence given before the District Registrar and filed in the Civil Court instead of by fresh examination of the witnesses to prove execution by Govindaswami. When the case came before this Court it was discovered, as the judgment will be found to state, that each of the seven signatures could be ascribed to tracing from one or another of three signatures in another document, an adoption deed Exhibit A. The conclusion was accordingly reached that the document must be a forgery and the appeal was allowed and the suit dismissed.

In this application we may deal first with the position of the writer and attestors. Section 476, Criminal Procedure Code, deals with offences referred to in section 195, sub-section 1, clause (b) or clause (c) "which appear to have been committed in or in relation to a proceeding in that Court", i.e., the Court whose sanction is sought. Turning then to section 195 (1) and dealing with sub-clause (b), the offence so far as the attestors are concerned would fall under section 193, Indian Penal Code, viz., either giving false evidence in a judicial proceeding or, it is suggested, fabricating false evidence for the purpose of being used in any stage of a judicial proceeding. So far as the former offence is concerned the objection has been raised that the depositions in question were given not before the Civil Court at all but before the

Registrar in the course of his enquiry, and that under sub-section 2 of section 195 the term "Court" as employed in that section does not include a Registrar under the Indian Registration Act, 1877. Accordingly the qualification which sub-clause (b) contains that such offence must be alleged to have been committed in or in relation to any proceeding in any Court has no application, with the result that the matter is not such as this Court would be justified in making a complaint of under section 476, Criminal Procedure Code. Similarly with regard to fabricating false evidence, section 193 of the Penal Code itself requires that the false evidence should be fabricated for the purpose of being used in any stage of a judicial proceeding, and the corresponding qualification in sub-clause (b) requires that the fabrication must be with a view to the production of the document in Court. There is no reason to suppose that the primary purpose of the forgery of the document was production in Court or that it would necessarily be produced in Court at all.

There remains sub-section (c) of section 195, which deals with the act of forgery or of using as genuine a forged document. Attached to this is the qualification that the offence, whichever it is, must be alleged to have been committed by a party to the proceeding before the Court and it has been held in a series of cases which one of us has summarised in *Ponnuswami Udayar, In re*(1) that the language of section 195 must be read in conjunction with the terms of section 476, so that it is only in the case of offences committed by a party to the proceeding that the Court should

(1) (1928) 28 L.W. 769.

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CURGENVEN J. take action under the latter section. The consequence therefore is that without expressing any view as to the merits of the application against these persons, the writer and the attestors of the document, we must find that the intervention of the Court is unnecessary for their prosecution for the offences specified.

There remains the case of the plaintiff in the suit, who is the second widow and the first respondent here. This lady took no physical part in the preparation of the document and the action imputed to her is that in the first place she produced or caused to be produced in Court the forged document, and thereby committed an offence under section 471, Indian Penal Code, by using it as genuine, and in the second place that she gave false evidence in support of its genuineness. As regards the former charge it has been said that an application was made to the Registrar to register the document. It was doubtless produced before him and impounded and at the instance of the plaintiff in the subsequent suit produced before the Court. We think that a *prima facie* case under section 471, Indian Penal Code, dependent of course upon proof of the falseness of the document, is made out upon these grounds.

As regards the offence of giving false evidence an offence under section 193, Indian Penal Code, this lady's position was different from that of the other witnesses because she was examined in the civil suit on commission. The same difficulty that arises with regard to the others therefore under the terms of sub-section (b) does not exist

in her case. When so examined she deposed as TULASI AMMAL
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CURGENVEN J. follows :—

“Before the death of my husband, he executed a settlement deed in my favour. He wrote the deed of settlement in this house at the northern hall. I know when it was written. I was at the doorway leading from the hall to the inner room ten feet off. I saw his signing it (Exhibit B settlement deed dated 26-10-1925 opened from the sealed cover in the presence of the parties and their Vakils). He affixed his signature to Exhibit B. He executed it 4 or 5 days prior to his death. The day was Monday. He directed me to bring money for stamp paper for the document. I brought the cash box and placed it with him. He took out money therefrom and gave it. On the day when the settlement deed was written he was in possession of sound mind and power of disposition. He was ailing from fever. He was ailing from fever for 10 or 15 days.”

It has been urged that the interests of justice do not require that we should make a complaint in the case of the first respondent and in an affidavit it has been alleged that some improper pressure has been placed upon her by the other side by threatening these proceedings in order to induce an unfair division of the property. This, if true, is regrettable but at the same time it cannot conclusively decide whether this is a fit case or not for us to take action under the section. The forgery, if true, was of an iniquitous kind because it was designed to defraud one widow in the interests of the other, who was not merely a co-wife but also her niece. The means adopted to this end were so ingenious as to induce the Court of first instance actually to give a decree. In these circumstances we think that it is expedient in the interests of justice that a complaint should be made against the first respondent in the terms indicated above to the Sub-Divisional Magistrate,

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Tanjore. Under the proviso to sub-section 1 of section 476, Criminal Procedure Code, we appoint the Deputy Registrar, Appellate Side, to make the complaint. The settlement deed, Exhibit B in the appeal and the adoption deed, Exhibit A, and another document, viz., a plaint containing the admitted signature of Govindaswami, Exhibit L, will be forwarded with the complaint.

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APPELLATE CIVIL.

Before Mr. Justice Sundaram Chetti and
Mr. Justice Pakenham Walsh.

PL. RM. KR. KARUPPAN CHETTIAR (SURETY),
APPELLANT,

v.

A. CT. N. NAGAPPA CHETTIAR AND ANOTHER
(PLAINTIFF AND DEFENDANT), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 145 (a); O. XXI, r. 40 (1) and (5) proviso—Time allowed to judgment-debtor, arrested in execution, for satisfaction of decree—Security bond executed as condition of, surety undertaking to pay decree amount on failure of judgment-debtor to pay within time allowed—Release of judgment-debtor upon—Default of judgment-debtor to pay within time allowed—Execution of decree against surety—Decree-holder's right of—Security bond if intra vires of Court—Enforceability of bond—Contract Act (IX of 1872), sec. 126—Applicability and effect of.

A judgment-debtor who was arrested in execution of a decree entered into a private arrangement with his judgment-creditor by which the latter agreed that the former should have

* Appeal against Order No. 522 of 1932.

a month to pay the decree amount on condition of furnishing a surety who would pay the decree amount if the payment was not made within that period. The appellant executed in favour of the Court a security bond undertaking to pay the decree amount in full if the judgment-debtor did not pay the same within the month allowed; and thereupon the Court passed an order releasing the judgment-debtor and dismissing the petition. The amount not having been paid within the period allowed the judgment-creditor applied for execution of his decree against the appellant as well as against the judgment-debtor.

Held that the security bond was *intra vires* of the Court, that, even if it did not come under either Order XXI, rule 40 (5) proviso, or under Order XXI, rule 40 (1), of the Code of Civil Procedure, it was enforceable under the Contract Act and its terms directly brought it within section 145 (a) of the Code and that the order of the Court below allowing execution against the surety was correct.

Joyma Bewa v. Easin Sarkar, (1926) I.L.R. 53 Calc. 515, followed.

APPEAL against the order of the Court of the Subordinate Judge of Devakottah, dated the 8th December 1932 and made in Execution Petition No. 159 of 1932 in Original Suit No. 93 of 1930.

V. Ramaswami Ayyar for appellant.

M. Patanjali Sastri for first respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by PAKENHAM WALSH J.—The plaintiff in this case applied for execution of his decree against the judgment-debtor as well as against the latter's surety. Execution was granted against the surety and against this order the surety appeals.

In the lower Court there was a ground taken that the decree had been satisfied. This was found against and, though it has been raised in

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the memorandum of appeal, it was given up in argument before us.

The circumstances in which the security bond came to be taken are as follows. The decree-holder put in Execution Petition No. 252 of 1931, dated the 4th December 1931, to arrest the judgment-debtor. Notice was sent and finally the judgment-debtor was arrested on the 18th January 1932. He prayed for one week's time for the purpose of settling the decree with the plaintiff and for making arrangements for paying the amount. The order of the Court on this, dated the 25th January 1932, was: "3 days' time more allowed; to be produced on the 28th January." On that date the judgment-debtor put in a petition, Execution Application No. 86 of 1932, to release him from arrest on the strength of the surety. This was accompanied by an affidavit. The surety-appellant executed on the same date in favour of the Court a security bond the material part of which is as follows:—

"The defendant in the above suit, viz., P. M. R. M. Perianan Chettiar was arrested, and he was produced before this Court. He agreed with the plaintiff to discharge the decree debt within a month and he requested time for a month. The said Perianan Chettiar requested me to stand surety therefor, and I agreed to it and executed this bond. If the above Perianan Chettiar does not discharge the said decree to the plaintiff within one month, I hereby agree that myself, my heirs and the successors to my title are bound to pay the amount in full due upon the said decree, and I have executed this surety bond."

On this the Court passed the following order on 29th January 1932:—"Debtor arrested but released on security. Petition is dismissed." The decree amount not having been paid within a month the plaintiff sought to recover it from the surety.

The argument raised in appeal is that this bond must be held to have been given under Order XXI, rule 40, clause (5) proviso. This proviso runs as follows:—

"Provided that, in order to give the judgment-debtor an opportunity of satisfying the decree, the Court before making the order of committal may leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding ten days, or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied."

This proviso and the new rule 40 were substituted by the Madras High Court for rule 40 in the Code. Now there is no doubt that, if the Court had meant merely to release the judgment-debtor from arrest on security that if he did not satisfy the debt before the expiration of the specified period he should appear in Court, this proviso was the proper proviso to apply. But in point of fact the Court was neither asked to do this nor did it do it; nor did the surety bind himself at all that the judgment-debtor should appear before the Court on any date. In this connection it is useful to note not only what has been stated in the bond quoted above but in the affidavit of the judgment-debtor to the Court. The material portion thereof runs as follows:—

"2. I have been arrested in respect of the decree in the above suit and I have arranged with the plaintiff to discharge the decree. Plaintiff too has consented to have it settled and has asked me to have time for one month on producing a surety. To that effect, I have obtained a letter from the plaintiff and given it to the plaintiff's Vakil.

3. I have got a house at Pudukkottai. I have no other properties. I owe also certain other debts. In this circumstance, I have to arrange with the plaintiff, get a loan on the

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mortgage of the said house, and I have to pay the amount to him. I am unable to pay off the decree in any other manner.

The plaintiff knows all the above matters and he has agreed that I may take time for a month and that the decree may be satisfied within that time. If the decree amount is not paid to the plaintiff within the period of a month, the surety has consented to pay the decree amount.

4. P. L. R. M. K. R. Karuppan Chettiyar Avargal of Pallathur has consented to stand as surety and I have submitted herewith his surety bond. The plaintiff has accepted his suretyship by the plaintiff's letter.

It is therefore just and necessary that the Court may be pleased to release me from the arrest on the strength of the surety of the above person."

It is perfectly clear from this that after the arrest of the judgment-debtor he made a private arrangement between himself and his judgment-creditor by which the latter agreed that he should have a month to pay the decree amount on condition of furnishing a surety who would pay the decree amount if the payment was not made within that period. There was no condition that the judgment-debtor should appear before the Court, and it was natural that, as the judgment-creditor was foregoing this hold upon the judgment-debtor, he required full security for the decree amount being paid. So we find that on this the Court passed the appropriate order of unconditional release and dismissal of the petition.

The cases quoted for the appellant do not, we consider, establish the legal case put forward for him. In *Raja Raghunandan Prasad Singh v. Raja Kirtyanand Singh Bahadur*(1), the Privy Council held that, where a bond was executed by a surety in pursuance of an order of Court, the

(1) (1932) 63 M.L.J. 85 (P.C.).

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bond should be considered in the light of the order directing the security to be given, and that the circumstances in which it was executed may be looked at. In the present case the circumstances are perfectly clear. The prayer of the judgment-debtor in his affidavit, the bond executed by the appellant, and the order of the Court are all in entire conformity with one another. In *Chandi Charan Sen v. Ram Coomar Chakravarti*(1), there was an order of the Court for appearance, which quite differentiates it from the present case. It may also be noted that it was found in that case that the bail bond was in Burmese which was not the language of the surety and it was held that he did not understand its terms. *Janki Das v. Ram Partab*(2), the decision of a single Judge, was under section 336 of the old Code corresponding to section 55 of the present Code. There again there was an order for appearance made by the Court. And it has also to be noticed that under the old Code and even under the new Code until Act III of 1921 the Court was bound to release the judgment-debtor on his expressing his intention to apply for being declared an insolvent, and on his furnishing security to the satisfaction of the Court. Hence it is clear that any bond which went beyond this might be attacked as void for want of consideration. *D. Manackjee v. R.M.N. Chettyar Firm*(3) is not relevant. In that case the liability under the surety bond was held to have come to an end when the attachment in connection with which it was

(1) (1912) 23 I.C. 349.

(2) (1893) I.L.R. 16 All. 37.

(3) (1926) I.L.R. 5 Rang. 492.

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given ceased on the dismissal of the suit. The lower Court has held that the bond in question comes under Order XXI, rule 40 (1). It certainly does not come under Order XXI, rule 40, clause (5) proviso. We do not think it necessary to discuss whether the release of the judgment-debtor in this case can or cannot be brought under the words "unable from poverty or other sufficient cause to pay the amount of the decree", because, assuming that it is within the power of the Court to take a bond like the present, though it is not specially provided for by any Order or rule in the Code, then there is ample authority for holding that it can be enforced. The case of *Joyina Bewa v. Easin Sarkar*(1) is exactly in point. There, in execution of a decree, the decree-holder, the judgment-debtor and the surety agreed that the decretal amount should be paid within a certain time by the judgment-debtor, failing which the decree-holder should be entitled to proceed against the surety to realize the decretal amount in execution of the decree. These terms were embodied in a petition signed by the parties and filed before the Court with a stamp appropriate to a petition, but insufficiently stamped either as a contract of suretyship or as a security bond. It was held that the contract contained in the petition signed by the three parties concerned amounted to a contract of guarantee within section 126 of the Contract Act, and that the failure duly to stamp a document which must be stamped by reason of the provisions of the Stamp Act does not affect the validity of any contract therein contained, but renders the document inadmissible

(1) (1926) I.L.R. 53 Cal. 515.

in evidence; and with regard to section 145, Civil Procedure Code, it was held that it is not necessary that a contract of suretyship should be in the form of a security bond, or in writing, or that the contract of suretyship should be in favour of the Court for the purpose of execution as against a surety under section 145 of the Code of Civil Procedure. Execution against the surety was allowed. The present case is a very much stronger case than that, for here the bond is to the Court and all that can be said about it is that such a bond does not fall within the express terms of any Order or rule in the Code, with regard to the power of the Court to take it. As regards the applicability of section 145 it was not denied before us that the bond in its terms directly falls under section 145 (a)—"for the performance of any decree or any part thereof". Even had the bond not fallen exactly under any of the terms of section 145, the Privy Council decision in *Raj Raghubar Singh v. Jai Indra Bahadur Singh*(1), which has been followed in *Sankunni Variar v. Vasudevan Nambudripad*(2), shows that such a bond can be enforced by order of the Court. It has not been argued seriously that the present bond is not *intra vires* of the Court and it is clear enough that, if the liability undertaken in the bond cannot be enforced when the condition as stated in the bond under which it is to be enforced has arisen, the bond cannot be enforced in default of appearance because (i) there is no order for appearance and (ii) there is no undertaking in the bond making the surety responsible for appearance. The bond therefore, as stated above, is not one given under

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(1) (1919) I.L.R. 42 All. 158 (P.C.).

(2) (1926) 51 M.L.J. 239.

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Order XXI, rule 40, clause (5) proviso. If it can be held to come under Order XXI, rule 40 (1), as to which it is not necessary to express any decided opinion, then it would be enforceable. But if it comes under neither of these, it is enforceable under the Contract Act in view of the decision in *Joyma Bewa v. Easin Sarkar*(1), quoted above, and its terms directly bring it within section 145 (a), Civil Procedure Code.

We consider therefore that the order of the lower Court was correct. The appeal fails and is dismissed with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Sundaram Chetti and
Mr. Justice Pakenham Walsh.

1933,
November 14.

V. N. MUTHUSAMY AYYAR, MANAGING PARTNER OF
V. N. SUNDARAM AYYAR AND BROTHERS (FIRST RESPONDENT),
APPELLANT,

v.

V. S. NARASIMHA AYYAR AND THREE OTHERS (PETITIONERS
AND RESPONDENTS NOS. 2 TO 4), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXI, rr. 1 and 15
—Firm—Hindu joint family constituting a—Suit and
decree in name of firm represented by its managing partner
—Discharge of decree debt in case of—Payment to another
member of family who is also partner of firm if constitutes
—O. XXX, r. 1, of Code—Applicability and effect of.

A suit was filed in the name of a firm, consisting of the
brothers of a joint Hindu family, represented by its managing
partner and the decree therein was obtained in the name of the

(1) (1926) I.L.R. 53 Calc. 515.
* Appeal against Appellate Order No. 172 of 1929.

firm represented by the managing partner. Subsequent to the decree another brother of the family and a partner of the firm received a sum in full satisfaction of the decree and put in a memorandum requesting the Court to record satisfaction.

Held that the payment to that brother alone was not a valid discharge of the decree debt so as to bind the other partners of the firm.

A decree standing in the name of a firm must nevertheless be treated as a decree in favour of all the partners jointly even for the purposes of Order XXI, rule 15, of the Code of Civil Procedure. One of several joint decree-holders though they are partners cannot, by reason of the provisions of rules 1 and 15 of Order XXI of the Code, give a valid discharge by receiving the decree amount out of Court without the concurrence of the other decree-holders. Rule 1 of Order XXX of the Code has no reference to a decree passed in the suit or to any proceedings in execution of the decree and there is nothing in that rule which would take away the effect of the provisions of rules 1 and 15 of Order XXI.

Mahomed Silar Sahib v. Nabi Khan Sahib, (1916) 31 M.L.J. 93, followed; *Pitchakkuttiya Pillai v. Doraiswami Mooppanar*, (1924) 47 M.L.J. 498, referred to.

APPEAL against the decree of the District Court of Salem, dated 6th October 1928 in Appeal Suit No. 314 of 1927 preferred against the order, dated 27th August 1927, of the Court of the Subordinate Judge of Salem in Interlocutory Application No. 126 of 1927 in Original Suit No. 31 of 1925.

C. S. Venkatachariar for V. N. Venkatavaradachariar for appellant.

K. S. Sankara Aiyar for T. B. Balagopal for respondents.

The JUDGMENT of the Court was delivered by SUNDARAM CHETTI J.—This is an appeal against the order of the District Judge of Salem directing satisfaction of the decree to be recorded to the extent of Rs. 2,100. The decree was obtained in the name of the firm styled as V. N. Sundaram

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Ayyar & Brothers represented by the managing partner V. N. Muthuswami Ayyar. The suit itself was filed in the name of the firm represented by the aforesaid managing partner. Subsequent to the decree another brother of the family received a sum of Rs. 2,100 in full satisfaction of the decree and put in a memorandum requesting the Court to record satisfaction. The firm consists of the brothers of a joint Hindu family, and, as such, the person who received the payment and who applied to the Court to enter up satisfaction is not only one of the members of the joint family, but also one of the partners of the firm. This petition was opposed by Muthuswami Ayyar who filed this suit as the managing partner of the firm. The question is whether by reason of the payment of the decree amount to V. S. Narasimha Ayyar, one of the partners of the firm, a valid discharge of the decree debt has been given so as to bind the other partners of the firm. The learned District Judge seems to have taken the decision reported as *Ghulam Muhammad v. Sohna Mal*(1) as authority for the position that Narasimha Ayyar can give a valid discharge when the decree is in favour of the firm. The correctness of that view is now challenged in this appeal.

In the first place, we have to see what is the effect of the decree given in favour of the firm. There is abundant authority for holding that the description of the decree-holder as the firm tantamounts to a decree being given in the names of those who are partners of the firm. That description is only a compendious way of mentioning all those who are really the partners of that firm ;

(1) A.I.R. 1927 Lah. 385.

vide *Administrator-General v. Sultan Alli Sush-tary*(1), *Ram Prosad Chimonlal v. Anundji & Co.*(2) and *Brojo Lal Saha Banikya v. Budh Nath Pyarilal & Co.*(3). The mere fact that the decree stands in the name of the firm does not preclude us from holding that it is virtually a decree in favour of all the partners jointly. A later decision of the Lahore High Court, *Abdul Hamid v. Dhanpat Mal*(4), is in conflict with the view expressed in *Ghulam Muhammad v. Sohna Mal*(5) (which was followed by the lower Court in this case), but no reference was made to the earlier decision itself. Both those decisions are decisions of single Judges. In the later decision, it is clearly stated that a decree in the name of a firm is a decree passed generally in favour of all the partners and that any one or more of the partners can take out execution for the benefit of all the partners under Order XXI, rule 15, Civil Procedure Code. It follows that, though the decree stands in the name of the firm, it must be treated as a decree in favour of all the partners jointly even for the purposes of Order XXI, rule 15, Civil Procedure Code.

Now the question is, whether the aforesaid Narasimha Ayyar who is one of the joint decree-holders can give a valid discharge in respect of the whole decree by any payment received by him alone. It may be conceded that he fills two capacities, viz., that of a partner in a firm and that of a joint decree-holder. In the latter capacity, what are his rights ? A payment towards a

(1) (1926) 29 Bom. L.R. 396. (2) (1921) I.L.R. 49 Calc. 524, 527.
(3) (1927) I.L.R. 55 Calc. 551, 557. (4) A.I.R. 1931 Lah. 507.
(5) A.I.R. 1927 Lah. 385.

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decree in order to be valid must be made to the decree-holder, if made out of Court; *vide* Order XXI, rule 1, clause (b), Civil Procedure Code. The term "decree-holder" therein used in the singular includes also the plural "decree-holders". If there are two or more decree-holders the payment must necessarily be made to all of them according to this rule. Having regard to the terms of rule 15, one of the joint decree-holders cannot as a matter of right execute the whole decree without reference to the other decree-holders. It is in the discretion of the Court to allow one of such decree-holders to execute the whole decree and when so doing the Court should make such orders as are necessary for protecting the interests of the persons who have not joined in the application. If one of two or more joint decree-holders takes it upon himself to certify satisfaction of the whole decree, then the Court can make no provision for safe-guarding the interests of the other decree-holder or decree-holders as required by Order XXI, rule 15, Civil Procedure Code. If satisfaction of the whole decree should be entered on the report of one of the joint decree-holders alone, it would amount to a violation of the provisions of rule 15 of Order XXI. This is the view expressed in a decision of the Allahabad High Court reported as *Moti Ram v. Hannu Prasad*(1).

An attempt has been made by the learned Advocate for the respondents to show that under Order XXX, rule 1, clause 2, it would be open to any one of the partners though they are joint decree-holders to certify satisfaction of the whole decree so as to bind the others. Rule 1 obviously

(1) (1904) I.L.R. 26 All. 334.

deals with the form in which a suit by or against a firm can be laid. Any two or more persons claiming as partners may sue in the name of the firm. When the suit is so filed, all that sub-clause 2 says is that as to any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff, it would be sufficient if such pleading or other document is signed, verified or certified, by any one of the partners. This rule has no reference to a decree passed in the suit or to any proceedings in execution of the decree. We are not convinced that there is anything in rule 1 of Order XXX, Civil Procedure Code, which would take away the effect of the provisions contained in rules 1 and 15 of Order XXI, Civil Procedure Code. We have no doubt that one of the joint decree-holders though they are partners cannot give a valid discharge by receiving the decree amount out of Court without the concurrence of the other decree-holders. A payment to one of them may under the general law relating to partnership be valid and binding on the firm, but that circumstance is not enough to validate the payment made to one of them as against the other joint decree-holders, according to the principle of the decision of the Privy Council reported as *Ganesha Row v. Tuljaram Row*(1), though the particular provision of the Civil Procedure Code which their Lordships had to consider was rule 6 of Order XXXII. It is observed at page 303 as follows :

"The Courts in India seem to think that because Rajaram was a party to the suit of 1886 and was also guardian *ad litem*

(1) (1913) I.L.R. 36 Mad. 295 (P.C.).

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for his minor son, who was a member of the joint family whom Rajaram was representing, it was open to him to enter into the compromise in his personal capacity, and, as it was a *bona fide* settlement of a disputed claim, it became binding on the minor by virtue of his having acted as the managing member of the family But they consider it to be clear that when he himself is the next friend or guardian of the minor, his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court. To hold otherwise would be to defeat the object of the enactment."

After such a clear pronouncement by the Privy Council, the fact that Narasimha Ayyar happened to be one of the partners in the present case does not help to make the payment to him of the decree amount a valid discharge binding on the other decree-holders. The distinction between the right under the general law and a right open to one of the joint decree-holders according to the provisions of the Civil Procedure Code has been well pointed out in a decision of a Division Bench of this High Court reported as *Mahomed Silar Sahib v. Nabi Khan Sahib*(1). SADASIVA AYYAR J. observes as follows :

"The right of two out of three partners to receive on behalf of the partnership a partnership debt which has not merged into a decree so as to bind the third partner has no bearing on the decision of the question whether when the three partners have become joint decree-holders (and are not merely joint private creditors) two of them as such decree-holders can receive the joint decree debt so as to release the judgment-debtor from liability in execution for even a portion of the decree-debt The status as such agent must either appear expressly in the decree or should be expressly created after the passing of the decree and cannot merely be inferred from the position of the payee as managing member of the joint

Hindu family of the decree-holders or as one of several partners-decree-holders."

We are in entire agreement with these observations. The view taken by the Allahabad High Court in *Lachman Das v. Chaturbhuj Das*(1) is also the same. These observations receive additional strength from the principle laid down clearly by the Privy Council in *Ganesha Row v. Tuljaram Row*(2). The principle of that decision was also followed by a later decision of this High Court reported as *Letchmana Chetty v. Subbiah Chetty*(3). The decision in *Mahomed Silar Sahib v. Nabi Khan Sahib*(4) was also followed in a later decision in *Pitchakkuttiya Pillai v. Doraiswami Mooppanar*(5). That is the decision of a single Judge. At page 502, that learned Judge says that the law on the subject is clear that payment to one of several joint decree-holders will not be satisfaction of the decree even in part, unless (i) the payee is an agent of the others entitled in law to receive the whole amount on their behalf or (ii) the distinct shares of each joint decree-holder were determined and known. For this proposition, the decision in *Mahomed Silar Sahib v. Nabi Khan Sahib*(4) is quoted as authority. Though the above observations appear to be somewhat ambiguous and may lead to an inference that it is enough if the payee is an agent of the others according to the general law, still it must be taken, in view of the fact that the decision in *Mahomed Silar Sahib v. Nabi Khan Sahib*(4) is relied on as the authority, that the

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(1) (1905) I.L.R. 28 All. 252.

(2) (1913) I.L.R. 36 Mad. 295 (P.C.).

(3) (1924) I.L.R. 47 Mad. 920.

(4) (1916) 31 M.L.J. 93.

(5) (1924) 47 M.L.J. 498.

(1) (1916) 31 M.L.J. 93, 95.

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agency under the general law is not enough, but it must be a special agency created subsequent to the decree for the purpose of receiving the decree amount on behalf of all or an agency expressly declared in the decree itself. That seems to be the correct view point, if regard be had to the principle laid down in the Privy Council decision. It is unnecessary for us to refer to certain decisions quoted in the course of the arguments as those decisions were given before the pronouncement of the Privy Council in *Ganesha Row v. Tuljaram Row*(1). In the present case, the validity or otherwise of the payment made to Narasimha Ayyar is to be judged in the light of the provisions of the Civil Procedure Code and not under the general law relating to partnership.

That being so, we have to hold that the payment to one only of the six joint decree-holders is not a valid discharge of the decree debt. For these reasons, we set aside the order of the lower Court and dismiss Interlocutory Application No. 126 of 1927 in Original Suit No. 31 of 1925. The appellant's costs throughout will be paid by the respondents.

A.S.V.

(1) (1913) I.L.R. 36 Mad. 295 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Pakenham Walsh.

RAJAGOPALU PILLAI (PETITIONER-DEFENDANT),
PETITIONER,

v.

KASIVISVANATHAN CHETTIAR (RESPONDENT-
PLAINTIFF), RESPONDENT.*

1933,
November 9.

Civil Procedure Code (Act V of 1908), O. XXVI, r. 1—Examination of witness on commission—Application for, by defendant—Jurisdiction of Court in—Distinction between applications by plaintiff and by defendant.

The mere advantage of observing the defendant's demeanour in the witness-box is not a sufficient reason for refusing a commission for his examination. Delay is not material in refusing the issue of a commission for the examination of a defendant. Failure to distinguish between applications for the issue of a commission on the part of the plaintiff and of the defendant is an irregular exercise of jurisdiction in which the High Court can interfere in revision.

Where the Court below refused to issue a commission for the examination of the defendant on the grounds (1) that it was necessary to observe his demeanour in Court and (2) that the defendant had filed a set off, and there was no allegation or finding that the application for issue of commission was not *bona fide*,

Held that there had been an irregular exercise of jurisdiction and that the order of the Court below must be set aside.

PETITION under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Sivaganga, dated the 4th day of March 1932 and made in Interlocutory Application No. 129 of 1932 in Original Suit No. 199 of 1931.

* Civil Revision Petition No. 861 of 1932.

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v.
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CHETTIAR.

S. R. Muttuswami Ayyar for the petitioner.
K. Ramanatha Chettiar and S. Venkatakrishnan
for respondent.

Cur. adv. vult.

JUDGMENT.

The plaintiff-respondent in this petition filed a suit against the petitioner to recover a sum of money as commission under the usual Nattukottai Chetti custom. The petitioner was the respondent's agent at Thaiping in the Malay States. The plaint alleged that on the 14th of December 1929 the petitioner agreed to go out as agent for another term to the said Thaiping, that in respect of the aforesaid commission he agreed to return 750 rings with interest, and that if he broke the contract and defaulted to go out as agent he should return another 725 rings. But the petitioner defaulted to go out as agent. Consequently the suit was laid for the value of 750 rings with interest. The defendant stated that the breach of the contract was on the plaintiff's side and counterclaimed damages assessed at the difference between the pay which he had to accept under another principal and the pay which he would have received from the plaintiff. The suit was filed on the 26th August 1931, four days before the defendant left for Thaiping which, it is not disputed, is his usual place of residence. The defendant applied to be examined on commission which the lower Court refused. Against this order the present revision petition is filed. The order of the Court is very brief and the material portion runs as follows:—

“The petitioner is the defendant in the suit and he has also filed a counter-claim against the plaintiff. It is very

essential that he should be examined in Court as the question involved is whether there was a breach of contract on his part. Under these circumstances I do not think his evidence can be allowed to be taken on commission. Petition dismissed.”

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The ground taken in revision is that the lower Court has failed to observe the distinction between an application by a plaintiff to be examined on commission and an application by a defendant. The two grounds which induced the lower Court to refuse the commission appear to be (i) that it was necessary to observe the defendant's demeanour in Court and (ii) that the defendant has filed a set off. It has to be observed that there has been no allegation or finding that the application was not made *bona fide*.

As regards the English cases the leading case is *Ross v. Woodford*(1). This was followed in *Visvanatha Chetty v. Somasundaram Chetty*(2) in revision (a decision of a single judge), in *Elvers v. The American Motor Co.*(3) in revision and in *Sarat v. Ram*(4); while the converse case where permission to examine the plaintiff on commission is allowed is discussed in *Nawab Syed Muhammad Akbar Ali Khan v. Herbert Francis*(5). From these cases it would appear that the mere advantage of observing the defendant's demeanour in the box is not a sufficient reason for refusing a commission and that the failure to distinguish between applications of the plaintiff and of the defendant in such a matter is an irregular exercise of jurisdiction in which the High Court can interfere in revision.

(1) [1894] 1 Ch. 38.

(2) (1923) 46 M.L.J. 131.

(3) A.I.R. 1924 Lah. 475.

(4) (1921) 35 Cal. L.J. 78.

(5) (1924) I.L.R. 3 Pat. 863.

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As regards the set off there is one English case quoted before me, *Hartmont v. Daly*(1), where the fact that a set off was claimed was held to be no good reason for refusing commission. I do not wish to discuss here (as I understand it is going to be raised in the suit) the question whether the parties fill the same capacity so as to enable the counter-claim to be entertained in this suit. Nor does any delay appear to be material in refusing the issue of a commission to examine the defendant, vido *Sitamma v. Subraya*(2), where, after the plaintiff's case was closed, an application was made on behalf of the defendant.

On behalf of the counter-petitioner are quoted two cases; *Mowji v. Nemchand*(3) and *Veerabadran Chetty v. Nataraja Desikar*(4). In the first of these cases the plaintiff had applied for letters of administration and the defendants filed caveats setting up a will. The will so set up was not forthcoming, each caveator alleging that it was in the possession of the other and producing only a copy of it. The learned Judge refused to issue a commission quoting certain remarks in *In re Boyse, Crofton v. Crofton*(5) where it was said by BAGGALLAY L.J.:—

"In considering whether the examination of a witness should be taken by commission, we must have regard, at any rate, to the possibility of his not being a credible witness. If the witness is a credible witness, it is hardly material whether he gives his evidence *viva voce* in Court or before a commission, or by affidavit, or in any other form. But we must assume the possibility of his not being a credible witness, and then it becomes of the most extreme importance that the jury or the

(1) (1896) 12 Times Law Reports 170.
(2) (1911) 21 M.L.J. 880.
(3) (1899) I.L.R. 23 Bom. 626.
(4) (1904) I.L.R. 28 Mad. 28.
(5) (1882) 20 Ch. D. 760.

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Court which has to decide the question should have the opportunity of seeing the demeanour of the witness, and observing the way in which the various questions which are put to him in cross-examination are answered."

In the same case COTTON L.J. said:

"But we ought to consider not merely what the plaintiff's case requires but what justice to the defendant as well as to the plaintiff requires. And in such a case as this, it is, in my opinion, eminently important that the demeanour of the witness should be seen and his precise answers to the questions put to him should be heard by the Judge, or the Judge and jury, who have to decide the case, and that the defendants should have the fullest opportunity of cross-examining him, they being really only able to do that effectually when the witness is in Court, and his demeanour, and the way in which he answers the questions can be judged by the Judge and by the jury."

(This latter quotation shows that the application in that case was made by plaintiff.)

The learned Judge in *Mowji v. Nemchand*(1) held:

"Taking into account the case of the plaintiff and also that of the defendants, taking into account the fact that the will itself is not forthcoming, and that the copies which are alleged to exist do not agree with each other, and taking into account the fact that these witnesses will not give their evidence nor be cross-examined *viva voce*, taking also into account the fact that two of the witnesses now sought to be examined on commission have recently been in Bombay and only went away on last Saturday morning, so that it is evident that if the applicant had been so minded, he might have had them examined here *de bene esse* last week: also taking into account that it is not clear on the affidavits that it will be impossible to get the witnesses to come to Bombay for the trial, or that the applicant may not be able to examine some of them *de bene esse* in the meantime, if they should visit Bombay, and applying to these facts the principles laid down in the case I have already cited, I have come to the conclusion that it is not in the interests of justice that these witnesses should be examined in the way it is

(1) (1899) I.L.R. 23 Bom. 628.

APPELLATE CIVIL.

Before Mr. Justice Sundaram Chetti and
Mr. Justice Pakenham Walsh.

1933,
October 5.

GNANAMBAL AMMAL (FIRST RESPONDENT), APPELLANT,

v.

S. VADIVELU PILLAI AND TWO OTHERS (PETITIONER AND
RESPONDENTS 2 AND 3), RESPONDENTS.*

Guardians and Wards Act (VIII of 1890), sec. 43 (1) — Order directing guardian to advance loan—Application under section 43 (1) for—Locus standi to present—Debtor if has—Application by debtor treated as one under sec. 43 (1) and question decided under that section—Appeal from order by aggrieved party—Competency of—Question of debtor's competency to apply under sec. 43 (1) if open in appeal.

A debtor, who has no concern with a minor, either as a relation or as one occupying a fiduciary position, and who desires to get a loan from out of the funds of the minor, has no *locus standi* to apply under section 43 (1) of the Guardians and Wards Act for an order directing the guardian to advance the loan.

Where the Court, without dismissing the application of the debtor *in limine*, purports to decide the question under section 43 (1) treating it as one under that section, the party against whom the order is passed is entitled to appeal, and also raise the question of the competency of the petitioner to apply under that section.

APPEAL against the order of the District Court of South Arcot, dated 30th August 1933 in pursuance of its order dated 11th August 1933 and made in Interlocutory Application No. 248 of 1933 in Original Petition No. 333 of 1925.

* Appeal against Order No. 325 of 1933 and Civil Revision Petition No. 1347 of 1933.

T. M. Krishnaswami Ayyar for appellant.
S. Muthiah Mudaliar and N. Somasundaram
for first respondent.

Cur. adv. vult.

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The JUDGMENT of the Court was delivered by SUNDARAM CHETTI J.—This civil miscellaneous appeal has been preferred by Gnanambal Ammal, the mother of the minor Subbaraya Chetty, who was also appointed as the guardian of the person of the minor. By way of caution, a civil revision petition is also filed. The order appealed against was passed by the District Judge of South Arcot on a petition filed by S. Vadivelu Pillai (first respondent) praying that a loan of Rs. 30,000 may be ordered to be given out of the minor's funds on a first mortgage of immovable properties. The Court issued notices to the personal guardian, the outstandings guardian and the immovable properties guardian of the minor, in respect of that application. All the guardians stoutly opposed the petition on the ground that the proposed investment is neither safe nor calculated to promote the best interests of the minor in view of the present economic depression in the country. The learned District Judge made an investigation and came to the conclusion that the apprehension of the guardians was not well founded, and ordered the grant of the loan by according his sanction reserving the question of settlement of the details regarding the terms of the mortgage to another date. Against this order the present appeal and the revision petition have been filed by the personal guardian.

While the learned Advocate for the appellant wanted to urge a technical objection that a petition

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of this kind by a stranger desiring to secure a loan of the minor's money is not maintainable under section 43 of the Guardians and Wards Act, he was met with a counter-objection that this appeal itself is incompetent. Both sides have addressed elaborate arguments on these points, but, in our opinion, the real question arising in this case is in a narrow compass, and therefore we confine our remarks to it. The petition in question was filed by Vadivelu Pillai under rule 21 of the Rules framed under the Act. When the objection that he had no *locus standi* was raised, he stated in his reply affidavit that his application was under sections 32 and 43 of the Act. There is no doubt that the Court purported to act under section 43 on this application, for it directed the issue of notices to all the guardians of the minor as required by sub-clause 3 of that section, with a view to hear their objections, before passing an order on the petition. Moreover, the order passed on the petition is substantially one coming within the purview of sub-clause 1 of section 43. An order sanctioning the loan and directing the issue of it is doubtless one to be carried out by the act of the outstandings guardian. In continuation of the said order passed on 30th August 1933, an order was passed on 2nd September 1933 directing that guardian to get the document drawn up. It means that he must receive the mortgage bond after its execution and registration and draw the sum and pay the consideration for the mortgage. That being so, the order is one regulating the conduct or proceedings of the guardian appointed by the Court, as contemplated in section 43, against which an appeal lies to the High Court

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under section 47, clause 1, of the Act. It is argued by Mr. Krishnaswamy Ayyar for the appellant that it is open to him in this appeal to show that the petitioner had no *locus standi* to make an application under section 43, clause 1, and the lower Court was wrong in entertaining it and proceeding with its investigation, without dismissing it *in limine*. Though the application was not maintainable, the Court, however, purported to decide the question under section 43, clause 1, treating it as one under that section, and therefore the party against whom the order was passed would be entitled to appeal, and also raise the question of the competency of the petitioner to apply under that section; vide *Latchmanan Chetty v. Ramanathan Chetty*(1).

According to section 43, clause 1, of the Act, the application has to be made by any person interested. This evidently means a person interested in the minor. But the petitioner can in no sense be deemed to be one interested in the minor. He is a stranger having no concern with the minor, either as a relation or as one occupying a fiduciary position. He has therefore no *locus standi* to file an application under that section. If every debtor who wants to get a loan from out of the funds of the ward is held to be competent to apply to the Court for an order directing the guardian to advance the loan, he should also have the right to appeal against the order, if it turns out to be adverse to him. The door will be open to persons in need of loans to file applications to the Court for sanctioning them. When a debtor cannot claim the grant of a loan as a matter of right, it

(1) (1904) I.L.R. 28 Mad. 127.

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stands to reason that he should have no remedy when the loan is denied to him. It seems to us that a petition of this kind by a debtor (in his interests) would not lie under section 43, clause 1.

An attempt was made by the learned Advocate for first respondent to get over this difficulty by suggesting that the application in question may be treated merely as information furnished to the Court, so that it may of its own motion make the necessary order under section 43 (1). But the fact is otherwise. The first respondent was not content with merely supplying information, but made a specific prayer for an order in his favour. Nor did the Court purport to act *suo motu* in passing the order appealed against. This suggestion seems to be futile. Another ingenious argument was put forward to give a new turn to the whole proceeding. It is now urged that the order of the District Judge should be taken to be an administrative order against which neither an appeal nor a revision petition lies. This suggestion is bereft of any foundation. When the petitioner himself stated that his application was under sections 32 and 43 of the Act, and when the Court evidently purported to deal with it as such, how can it now be urged that the order was merely an administrative one? In the face of his own averment in his affidavit, the petitioner is estopped from raising such a contention now.

We are of opinion that the lower Court should have dismissed this petition on the ground that the petitioner had no *locus standi* to present it under the aforesaid section.

Even on the merits, we think that the learned District Judge did not give due weight to the

apprehension expressed by all the three guardians of the minor, which, in view of the depression in the economic conditions of the country, cannot be slighted as chimerical.

[His Lordship then considered the objections to the sanction of the mortgage loan and concluded as follows :—]

That being so, the sanction of this mortgage loan is one which we do not think fit to uphold.

In the result, the appeal is allowed, and the application of the first respondent is dismissed. He will pay the costs of the appellant in this Court.

No orders are necessary on the civil revision petition.

The typing charges will be included in costs.

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APPELLATE CIVIL.

Before Mr. Justice Sundaram Chetti and
Mr. Justice Pakenham Walsh.

1933,
October 19.

KRISHNAN CHETTIAR (DIED),
GAVARAMMAL (MINOR) LEGAL REPRESENTATIVE BY GUARDIAN
N. KANDASAMI CHETTIAR (RESPONDENT), APPELLANT,

v.

MANIKAMMAL AND ANOTHER (PETITIONERS),
RESPONDENTS.*

*Hindu Law of Inheritance (Amendment) Act (II of 1929)—
Retrospective operation of—Hindu male dying intestate
before coming into force of Act—Succession opening after
passing of Act by death of limited owner—Act inapplicable
to case of.*

The Hindu Law of Inheritance (Amendment) Act (II of 1929) does not apply to cases of Hindu males who died intestate before its coming into force. In determining the order of succession to the estates of such persons, the Hindu Law as it stood before the Act should be applied.

The mere circumstance of the succession opening after the passing of the Act by the death of a limited owner is not enough to attract the provisions of the Act. It must also be shown that the opening of the succession is in respect of the estate of a Hindu male dying intestate after the passing of the Act.

APPEAL against the order of the Court of the District Judge of North Arcot at Vellore, dated the 23rd day of December 1930 and made in Original Petition No. 31 of 1930.

B. C. Seshachala Ayyar for appellant.

T. R. Ramachandran for respondents.

Cur. adv. vult.

* Appeal against Order No. 192 of 1931.

The JUDGMENT of the Court was delivered by GAVARAMMA
SUNDARAM CHETTI J.—This is an appeal preferred v.
by one Krishnan Chettiar against the order of the MANIKAMMA
District Judge of North Arcot for the grant of a SUNDARAM
succession certificate in favour of the respondents CHETTI J.
in Original Petition No. 31 of 1930. The last male owner was Ponnusami *alias* Subbu Chetti who died unmarried in or about 1916. His mother (Muthammal) succeeded to his estate as a limited owner under the Hindu Law and died on 14th September 1929. The present respondents who are the sisters of the last male owner claiming to be the nearest heirs by virtue of Act II of 1929 sought for the issue of a succession certificate in their favour, in order to enable them to collect the debts due to the estate of the last male owner. This present appellant, Krishnan Chettiar, opposed this application, contending that, under the Hindu Law, he as the paternal uncle of the last male owner Ponnusami is entitled to succeed to the estate on the death of his mother and that Act II of 1929 would not apply to this case. The learned District Judge held that, as sisters, the respondents have a preferential right over the paternal uncle, as the Hindu Law of Inheritance (Amendment) Act II of 1929 had come into force when the last limited owner (Muthammal) died. The correctness of that finding is challenged in this appeal.

This appeal raises an important question of law. This question does not appear to have come up for decision in this High Court till now. The point for consideration is whether this Act has retrospective operation in the sense that the change of law introduced in this Act affects also

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the estate of persons who have died before the Act. As this Act is not expressed to come into operation on a particular day, it must be deemed to have come into force on the day on which it received the assent of the Governor-General, i.e., on 21st February 1929. The preamble of the Act is as follows:—

“Whereas it is expedient to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate; it is hereby enacted as follows:—”

By section 1 of the Act, it is made applicable to the whole of British India and to the property of Hindu males governed by the Law of Mitakshara not held in coparcenary and not disposed of by will. The change effected in the order of succession of certain heirs is declared in section 2, whereby a son's daughter, daughter's daughter, sister and sister's son, should, in the order so specified, rank next after a father's father and before a father's brother.

The question is, in respect of whose estate or property the altered order of succession among the heirs as fixed by this Act should apply. There is nothing in section 1 to clarify the doubt whether it covers also cases of male owners who died even before the passing of this Act. There is nothing explicitly stated to indicate that the Act has such a retrospective operation. When there is some doubt in this respect in the enacting part, we may legitimately look to the wording of the preamble of the statute for solving the doubt. The following passage in Maxwell on the Interpretation of Statutes, seventh edition, at pages 37 and 38, is instructive:

“The preamble of a statute has been said to be a good means of finding out its meaning, and as it were a key to the

understanding of it; and as it usually states or professes to state the whole object and intention of the Legislature in passing the enactment, it may legitimately be consulted to solve any ambiguity or to fix the meaning of words which may have more than one or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt.

In this Act, the preamble says that it is in respect of the estate of a Hindu male *dying intestate*. According to the plain meaning of the words employed, it seems to us that the Act is intended to apply to cases of Hindu intestate males who died after the passing of this Act. We can perceive no ambiguity in the preamble. The expression “a Hindu male dying intestate” connotes a person whose death is to occur and not one who had already died. If it was meant that the Act should operate retrospectively so as to affect the estate of persons who died even before the Act, we must find clear words signifying such an intention. On the other hand, the wording of the preamble indicates that the scope of the Act is otherwise.

It is argued that, if succession opens after the passing of this Act even by the death of a limited owner, the provisions of this Act should apply in fixing the priority among the heirs of the last male owner. But in our view the mere circumstance of the succession opening after the passing of this Act is not enough to attract the provisions of this Act, but it must also be shown that the opening of the succession is in respect of the estate of a Hindu male dying intestate after the passing of this Act, as would be clear from the preamble. Section 2 of the Act merely refers to certain heirs taking precedence over others,

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but the query is whose heirs are meant in it. It is not clear from section 1 whether they are the heirs of a Hindu male who died before or after the Act, but the answer is found in the preamble, and the doubt, if any, is solved by it.

The view that we take of the Act as it now stands receives strength, if we turn to the wording of the original Bill and the way in which it was amended by the Select Committee in which form the Act now stands. The Bill was introduced in the Legislative Assembly on 22nd March 1928. Its preamble ran thus :

"Whereas it is expedient to alter the order in which certain heirs of a *deceased* Hindu dying intestate are entitled to succeed to his estate; it is hereby enacted as follows :—"

In sub-clause 2 of clause 1 of the Bill the latter portion is worded as follows :—

"But it applies only in the case of the property of Hindus, not being held in coparcenary and not having been disposed of by will, to which the succession opens after the 31st day of July 1928."

In the Bill as amended by the Select Committee, the word "*deceased*" in the preamble was dropped out and the reference to the opening of succession was also omitted. The reason for the omission is stated thus in the report of the Select Committee :—

"We are also of opinion that it is unnecessary either to assign retrospective effect to the provisions of the Bill or to defer the coming into operation thereof, and we have therefore omitted the reference to the date on which the succession opens."

These omissions appear to be very significant and it seems to us that with the object of not extending the operation of this Act to all cases of succession opening after the Act, irrespective of

the time of the death of the last male owner, but to limit its operation only to the cases of a Hindu male dying intestate after the Act coming into force, the aforesaid amendments have been effected. The fact that succession opens after the passing of this Act is not therefore the only test for the applicability of the provisions of this Act.

The general rule is that an Act should not be construed to have retrospective operation unless such a construction is clearly warranted by the express terms of the Act. At page 186 of Maxwell's book, it is observed that a fundamental rule of English Law is that no statute shall be construed to have retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. At page 187, the learned author observes that a testator is presumed to have in view the state of the law when he made his will. If it be so, we can reasonably presume that a person competent to make a will is satisfied with the state of the law regarding the order of succession to his estate among his heirs, if he prefers to die intestate without making a will. If he wishes to prefer a remoter to a nearer heir he will certainly have recourse to the making of a will. If he does not make a will, it may be because he wishes that his property should devolve according to the existing law of succession. The policy of the Legislature is not to make a subsequent enactment operative against the estate of such a man and thus frustrate his presumed intentions, unless for special and weighty reasons such a retrospective operation is found to be necessary. If Act II of

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1929 is given such a retrospective operation, it would be frustrating the intentions of the last male owner who preferred to die intestate before the passing of this Act. Such an anomaly will not arise if this Act should be held to apply only prospectively.

We have been referred to a decision of the Lahore High Court reported as *Shib Das v. Nand Lal*(1) and to another decision of the Allahabad High Court reported as *Bandhan Singh v. Daulata Kuar*(2). A similar question arose in both those cases, and the learned Judges have held that the provisions of this Act as to the order of succession are applicable to the estate of the last male owner though he died before the passing of this Act. In the latter case, it seems to have been almost taken for granted that the Act has such a retrospective operation. There is no discussion of the matters involved in the solution of this question in either of those judgments, and, for the reasons which we have stated, with great respect we express our dissent from those decisions. On the other hand, there is a later decision of the Lahore High Court holding a contrary view which is in accordance with the view we have taken. It is the decision of a single Judge reported as *Mt. Janki v. Mt. Sattan*(3). In that case also, there is no discussion, but the contention that Act II of 1929 is not retrospective and the sister was no heir at all previously and is not a preferential heir under the Act, as the Hindu male through whom she claims died before the passing of the Act, is stated to be correct.

(1) (1931) I.L.R. 13 Lah. 178.

(2) (1932) 30 A.L.J. 384.

(3) A.I.R. 1933 Lah. 777.

In view of what we have stated above, we come to the conclusion that Act II of 1929 does not apply to cases of Hindu males who died intestate before its coming into force. In determining the order of succession to the estate of such persons, the Hindu Law as it stood before this Act should be applied. By so doing, the appellant Krishnan Chettiar would be a preferential heir (as the paternal uncle of the last male owner) to the respondents who are his sisters.

We accordingly allow this appeal and dismiss Original Petition No. 31 of 1930 with costs in both Courts.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Reilly.

THATHAMANGALATH ALIAS MALLISSERI ILLATH
DECEASED KRISHNA NAMBUDRI'S DAUGHTER DEVA-
SENA PATHANTHADI ANTHARJANAM'S CHILDREN
NARAYANAN NAMBUDRI, DECEASED AND THREE OTHERS
(PLAINTIFFS AND NIL), APPELLANTS,

1933,
October 5.

v.

KATTAMATATH MANAKKAL KUMARASWAMI NAM-
BUDRIPPAD'S SON KRISHNA NAMBUDRIPPAD AND
ANOTHER (DEFENDANTS), RESPONDENTS.*

*Malabar Law—Nambudri illom—Sole surviving widow of—
Powers of, to appoint an heir to the illom—Conditions.*

The sole surviving widow of a Nambudri illom can make an adoption, i.e., appoint an heir to the illom to prevent its extinction, when the only attaladakkam heir of the illom had, before the adoption, ceased to be such an heir by becoming an

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outcaste by excommunication and had also authorized the adoption while severing all his ties with the illom.

Vasudevan v. The Secretary of State for India, (1887) I.L.R. 11 Mad. 157, discussed.

APPEAL against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in Original Suit No. 48 of 1926.

P. Govinda Menon for appellants.

C. S. Swaminadhan for *T. S. Anantaraman* and *P. Narayanan Nair* for first respondent.

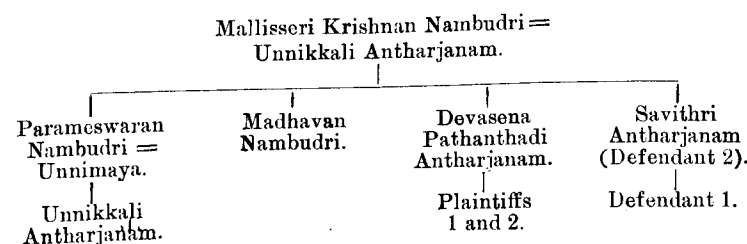
K. Kuttikrishna Menon for second respondent.

Cur. adv. vult.

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The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—This appeal arises out of a suit instituted by the plaintiffs to recover properties which are in the possession of the defendants. These properties belong to the well-known Mallisseri illom—an ancient and historic Nambudri family in South Malabar. This illom possesses considerable properties both in the British territory of South Malabar and in the Cochin State. The suit properties form only a very small portion of those situated in South Malabar. The first defendant claims right to the properties under Exhibit A, a settlement deed executed by one Unnikkali Antharjanam, wife of Mallisseri Krishnan Nambudri, by which he was adopted to the illom. The second defendant is the mother of the first defendant. The plaintiffs dispute the validity of the adoption and claim the properties as the reversionary heirs to the Mallisseri illom. The learned Subordinate Judge of South Malabar at Calicut upheld the adoption and dismissed the plaintiffs' suit.

The following genealogical tree will explain the relationship of the parties :—



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One Krishnan Nambudri was the karnavan of the Mallisseri illom about forty years ago. He died leaving behind him his widow Unnikali Antharjanam and children, Parameswaran Nambudri, Madhavan Nambudri, Devasena Pathanthadi Antharjanam and Savithri Antharjanam. Parameswaran Nambudri married Unnimaya Antharjanam and Unnikkali is their daughter. Madhavan Nambudri died unmarried in the year 1921-22. Plaintiffs and the first defendant are the children of Devasena and Savithri, sisters of Parameswaran and Madhavan. At the time of the death of Krishnan Nambudri, the Mallisseri illom consisted of his widow Unnikkali Antharjanam, his sons Parameswaran Nambudri and Madhavan Nambudri, Unnimaya, the wife of Parameswaran Nambudri, and their minor daughter Unnikkali.

The circumstances which led to the adoption of the first defendant by Unnikkali Antharjanam may now be briefly narrated. In 1904 the Raja of Cochin held a Kalavicharam, a Court of Inquiry, in which a considerable number of persons were accused of having had illicit intercourse with a Nambudri lady named Savithri Antharjanam. As a result of this enquiry both Parameswaran Nambudri and Madhavan Nambudri

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of the Mallisseri illom were outcasted. As Unnikkali, the daughter of Parameswaran Nambudri, was born after the date of Parameswaran Nambudri's illicit intimacy with Savithri Antharjanam, according to usage she was also expelled from caste along with her father. Thus after the enquiry, the only members of the illom who retained caste were Unnikkali Antharjanam and her daughter-in-law Unnimaya. In 1908—see Exhibit I, dated the 6th August—the five members constituting the illom executed a family karar by which certain properties were set apart for the maintenance of the expelled members, Parameswaran Nambudri, Madhavan Nambudri and Unnikkali. The remaining properties were handed over to the management of Unnikkali Antharjanam and Unnimaya. Besides this arrangement relating to the properties, the karar contained also another arrangement and this related to the adoption of a boy. This arrangement is referred to in paragraph 12 which is as follows:—

“Nos. 1 and 2 (i.e., Parameswaran Nambudri and Madhavan Nambudri) have authorised Nos. 3 and 4 (Unnikkali Antharjanam and Unnimaya) to adopt a boy by the process of adoption or otherwise so that the illom may have a male issue and may prosper. If No. 4 did not consent to take an adoption as aforesaid, No. 3 shall have the exclusive right to it.”

It was also arranged in the karar that after the death of Nos. 1 and 2 the properties held by them should lapse to the illom. Parameswaran Nambudri died some time in 1908-09. After his death, in 1911 a “partition karar” was entered into by Madhavan Nambudri, his brother, Unnikkali Antharjanam, the widow of Krishnan Nambudri, Unnimaya Antharjanam, the widow of

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the deceased Parameswaran Nambudri, and her daughter Unnikkali. As stated in the karar, it was executed as it was found that it was not possible or convenient for Madhavan Nambudri and the rest of the executants to continue as members of a joint family. By the advice of well-wishers and relatives of the family No. 1 (Madhavan Nambudri) was freed from all kinds of ties with the illom “in order that the intention of paragraph 12 of the karar (see paragraph 1) may be fulfilled”. The karar referred to here is Exhibit I executed in 1908. It was also stated that No. 1 relinquished all the rights which he possessed over the illom, its properties, dignities, etc., in order that he should remove the obstacle that stands in the way of “acting in accordance with the stipulations contained in paragraph 12 of the karar”; see paragraph 3. Under the karar Madhavan Nambudri and Unnikkali were given some properties with entire rights of alienation in respect thereto. As Unnikkali was a minor, Madhavan Nambudri was to manage the properties on her behalf and hand them over to her on her attaining majority. In paragraph 6 of the karar it was stated specially that Madhavan Nambudri “surrendered all the rights which he possessed over all the properties situated in the British territory and the Cochin State . . .” and in paragraph 7 it was stated

“that all these stipulations shall be binding on us as well as on the heirs who may come in succession to the illom in accordance with paragraph 12 of the karar . . .”

Parameswaran Nambudri having died and the rights of Madhavan Nambudri and Unnikkali to the illom properties having been relinquished

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under the partition karar, the only persons who retained rights to the properties after Exhibit II were Unnimaya, the widow of the deceased Parameswaran Nambudri, and her mother-in-law, Unnikkali Antharjanam, the widow of Krishnan Nambudri. Though she was allowed to undergo purification ceremony Unnimaya did not like to remain apart from her daughter Unnikkali who had been expelled from caste. She therefore by a "deed of surrender" (Exhibit III) (Avakasam Ozhimuri) surrendered her rights to the family properties and dignities for a money consideration and this was executed in favour of the only remaining member of the illom, Unnikkali Antharjanam. Madhavan Nambudri died in 1921-22. In 1915 Unnikkali Antharjanam executed a deed of settlement, Exhibit A, and by it adopted the first defendant. After stating in paragraph 1 that she has become the exclusive heir and manager to the Mallisseri illom and its properties, she stated in paragraph 2 of Exhibit A that, in order to avert the line becoming extinct and in order to carry out the stipulations of paragraph 12 of the karar of 1908, that is Exhibit I, she has appointed—"adopted" in the document is wrong translation—and accepted the minor named Krishnan . . . as heir to the Mallisseri illom and its properties and to the titles and dignities such as exclusive urayma, joint urayma and so forth. This adopted boy is the first defendant. In paragraph 3 of the karar it was stated that

"the adopted Krishnan when he attains marriageable age should enter into marriage so as to beget heir to the said Mallisseri illom."

The adoption of the first defendant effected in the above circumstances was upheld by the

learned Subordinate Judge on various grounds. He held that what Unnikkali Antharjanam did was not to adopt the first defendant to any particular individual as under the Hindu Law, but what she did was to appoint him an heir to the Mallisseri illom and that she was entitled to do this both under the various documents above referred to and also, apart from them, under the special law applicable to the Nambudris, she happening to be the last female member of the illom. He also held that Unnikkali Antharjanam became the full owner of the Mallisseri illom properties under Exhibits II and III and as such she had absolute rights to convey them to the first defendant and that

"even if Exhibit A is not to be treated as a deed of adoption it can be treated as a deed of conveyance under which the last owner of the suit properties assigned all her interest in the same in favour of the first defendant."

He ended the judgment by pointing out various other difficulties which the plaintiffs had to meet before they could succeed in the suit.

In appeal, Mr. Govinda Menon on behalf of the appellants contended that so long as Madhavan Nambudri was in existence Unnikkali Antharjanam could not adopt, that she had not become the last female member of the Mallisseri illom to entitle her to appoint an heir to the illom even under the Nambudri Law, and that, as power to adopt was given both to her and Unnimaya jointly, adoption by Unnikkali alone is invalid. He also contended that Unnikkali Antharjanam had only a widow's estate in the illom properties and that Exhibit A as a deed of conveyance is invalid. His other contentions related to the difficulties which according to the learned Subordinate Judge

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stood in the way of the plaintiffs' success even in the event of the adoption being held invalid.

At the very outset it may be mentioned that if the first defendant's adoption were governed by the principles of the Mitakshara Law then the adoption would be invalid, for under that law the adoption by a widow is made to an individual and no adoption can be made so long as Madhavan Nambudri was alive; and further, it will be a question whether the widow, i.e., the mother, could be validly authorized to adopt by her children as in the present case. It is unnecessary to discuss these questions as it is conceded that if the adoption is to be tested by the principles of the ordinary Hindu Law then it may be held to be invalid on one or all of the grounds urged by the appellants' Counsel; but what is argued by the respondents' Counsel is that what has taken place in the present case is not adoption as understood in Hindu Law but appointment of an heir to an illom by its last female member to prevent its extinction, and that this is justified under the law applicable to the Nambudris. Having regard to the above arguments the questions arising for determination are:

(1) What is the true nature of the adoption of the first defendant by Unnikkali? that is, is it an adoption as understood in the Law of the Mitakshara or is it something different, to which considerations arising under the Mitakshara Law will not apply? (2) Whether the adoption is valid in whichever sense it is understood?

To grasp the true nature of what was done by Unnikkali Antharjanam under Exhibit A, we have first to see what she and Unnimaya, the wife of Parameswaran Nambudri, were authorized to do by the male members under Exhibit I.

Paragraph 12 of that document is very explicit. It says that

"Nos. 1 and 2 have authorized Nos. 3 and 4 to adopt a boy by the process of adoption or otherwise, so that *the Illom may have a male issue*". (The italics are ours.)

It follows from this direction that the object of the adoption was to get an heir to the illom and not to any particular *individual* as under the Hindu Law, so that if a boy is adopted he will be the illom's heir and not the heir of the last male owner. This stipulation contained in the karar is referred to again in Exhibits II and III. It was under Exhibit A, styled a "deed of settlement", that Unnikkali acted on the authority conferred upon her by Exhibit I and adopted the first defendant. What she purported to do and actually did appears to be perfectly clear from its terms which have been already quoted. After stating that by virtue of Exhibits II and III she has become the "exclusive heir and manager to the illom (Mallisseri) and its properties" she says in paragraph 2 that

"in order to avert the Illom becoming extinct as there is no chance of any heirs being born to it she consulted her relatives who advised her to act in accordance with the stipulations contained in paragraph 12 of the karar (Exhibit I)".

The paragraph concludes with this important statement:

"Hence I have appointed and accepted the minor named Krishnan (first defendant) the son of the said Nambudri *as heir to the Mallisseri Illom and its properties*." (The italics are ours.)

The portion italicised shows that what Unnikkali Antharjanam did was this, viz., that she appointed the first defendant as heir to the illom as she was authorized to do so under paragraph 12 of Exhibit I. In paragraph 3 of Exhibit A there

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is a direction that when the first defendant attains marriageable age he should marry so as to beget heir to the said Mallisseri illom. The first defendant was appointed an heir to the illom under Exhibit A and he in his turn was asked to get heirs to the illom by marriage. Thus from the documents it becomes clear that what really took place under the designation of adoption was the appointment of an heir to the illom by Unnikkali Antharjanam.

The learned Counsel for the respondents argues that this form of adoption consisting in the appointment of an heir to an illom by the last female member for begetting issues to perpetuate the illom, invalid though it is under the Hindu Law, is sanctioned by the law and usage prevailing amongst the Nambudris and is therefore valid. The appellants' learned Counsel meets the argument by saying that, even under what is claimed to be the Nambudri Law, the appointment of an heir to perpetuate an illom when there is an attaladakkam heir in existence is invalid. On this point he further contends that Unnikkali Antharjanam was not the last surviving female member of the illom when she made the adoption.

The important question for determination is what is the law applicable to the Nambudris generally and whether the adoption in question, the nature of which we have explained above, is sanctioned by the law prevailing amongst them. The whole question of the law relating to the Nambudris was very fully discussed in *Vasudevan v. The Secretary of State for India*(1). In

(1) (1887) I.L.R. 11 Mad. 157.

that case the question arose in a suit to declare the Crown to be entitled to the property of one Thammarassori illom on the death of defendant 1 notwithstanding the disposition made by that defendant in favour of defendant 2. The defendants were Nambudri Brahmans. In 1872 defendant 1 and her mother, the sole surviving members of their illom—there being no attaladakkam heirs—appointed defendant 2 to be heir to their illom and to marry and raise up issue for it. Defendant 1 had previously been given in sarvaswadhanam marriage to a member of another illom who however had died without issue. The case of the plaintiff was that the appointment of defendant 2 was invalid, that defendant 1 was without heirs, and that therefore the property of the illom would escheat on her death to the Crown. In deciding the point which they decided against the plaintiff the learned Judges discussed the general question, viz., what was the law applicable to the Nambudri Brahmans of Malabar and whether under that law the appointment of defendant 2 as heir to the illom by defendant 1 was valid? On the first point they came to the conclusion that the Nambudri Brahmans migrated to Malabar before the Mitakshara had been written and that they are governed by Hindu Law,

“except so far as it is shown to have been modified by usage or custom having the force of law, the probable origin of the usage being either some doctrine of Hindu Law as it stood at the date of the settlement, though now obsolete, or some Marumakkathayam usage.”

This statement of the law has been accepted in the subsequent decisions of this Court; see

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Vishnu Nambudiri v. Akkamma(1) and *Narayanan Nambudri v. Ravunni Nair*(2). This being their view, before deciding the second point, they issued a commission to the Munsifs in South Canara and in North and South Malabar to take evidence as to

“ what are the rights and powers of a lady in a Brahman illom who has survived all the male members of the illom, and who has no known attaladakkars, as to the disposal of the property of the illom and the adoption of members to continue the family.”

A commission was also issued from the High Court to the High Court of Travancore and the Appeal Court of Cochin for the elucidation of this question. After receiving the evidence elaborately discussed in the judgment, they came to the conclusion that there was a custom to the effect that the sole surviving Antharjanam of a Nambudri illom is entitled to appoint an heir in order to perpetuate her illom. This form of affiliation is referred to both by Mr. Ramachandra Ayyar (*see* chapter V, section 85) and Mr. Wigram (*see* chapter I) in their books on Malabar Law. Both these writers refer to the appointment of an heir as akin to the Kritrima form of adoption in force in the Mithila country. The learned Judges refer to these facts in the course of the judgment. If the decision in *Vasudevan v. The Secretary of State for India*(3) applies to this case, there can be no doubt that the adoption of the first defendant should be held to be valid.

But it is contended that the decision is inapplicable because in the case before us when

(1) (1910) I.L.R. 34 Mad. 496.

(2) (1924) 47 M.L.J. 686.

(3) (1887) I.L.R. 11 Mad. 157.

Unnikkali Antharjanam made the adoption an attaladakkam heir did exist, which was not the case in *Vasudevan v. The Secretary of State for India*(1), and further, the widow cannot be said to be the sole surviving member of the illom as there were also other members living at the time. It is true that there were no attaladakkam heirs in *Vasudevan v. The Secretary of State for India*(1) and the learned Judges did not decide the question whether a widow can adopt when there are such heirs as it was not necessary for the purposes of the case before them. But it is interesting to note the opinion of the learned Judges as regards the evidence bearing on the point. After saying “ it is not suggested that there are attaladakkam heirs in this case”, they say that “ the bulk of evidence is in favour of her power”. The inclination of the learned Judges’ view, though the question is left open, seems to be that, even though an attaladakkam heir exists, the sole surviving widow of a Nambudri illom can appoint an heir to the illom; *see* Mr. Justice Sundara Ayyar’s book, page 227. It is not necessary to discuss this point any further as in our view, having regard to the circumstances that took place before the adoption, it must be held that Madhavan Nambudri has ceased to be an attaladakkam heir who can object to the adoption because of the important fact that he had become an outcaste as a result of excommunication and also of the further fact that he had authorized the adoption severing all his ties with the illom under the documents already referred to. Here it may be stated it is nobody’s case that either Madhavan Nambudri or for that

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matter any other members of the family objected to the adoption. The following passage from the Hindu Law of Adoption by Sircar has a bearing on the question under discussion. The learned author says (page 197) :

"You will bear in mind that the character of sonship consists in the capacity to take the heritage and the capacity to present funeral oblations, the two together constitute the status of a son ; apostates and outcastes who do not possess the latter capacity, cannot, therefore, fill the full character of a son according to Hindu Law. A man having a son of that description cannot but be regarded as 'sonless' in the contemplation of Hindu Law. It would therefore appear that the existence of such a son does not debar the father from adopting a son."

It would therefore follow that the existence of Madhavan Nambudri cannot be considered to be a legal impediment to the adoption of the first defendant.

The next question is whether Unnikkali Antharjanam when she adopted the first defendant was the last surviving female member of the illom. Having regard to the circumstances of the case there cannot be any doubt on this point. From the facts already narrated at the commencement of the judgment it will appear that, at the time of the adoption, Parameswaran Nambudri had died, Madhavan Nambudri was alive but being an outcaste had left the illom renouncing, as we have seen, all his rights and dignities and taking away some properties for his maintenance. So also Unnimaya, the wife of Parameswaran Nambudri, and her daughter had left the illom renouncing their rights. In the very first arrangement effected, that is, Exhibit I, soon after the excommunication, the only unpolluted members of the family, namely, Unnikkali, the widow, and

her daughter-in-law Unnimaya, were authorized to adopt a boy by all the members. In the next arrangement Madhavan Nambudri and Unnikkali, the excommunicated daughter of Parameswaran Nambudri, severed their connection with the illom. Then there remained in the illom only two female members, the wife of the deceased Parameswaran Nambudri, and Unnikkali, the widow. These had not come under the ban of excommunication. But of these two, in 1911 Unnimaya, feeling herself polluted by having taken prohibited food in company of her child, left the family surrendering her rights for a consideration. It is clear that all these arrangements were made to facilitate the adoption of a boy, and when Unnimaya left the illom the adoption of a boy by Unnikkali and his subsequent life in a pure atmosphere were the uppermost thoughts in her mind. All the members of the illom having surrendered their rights and left the illom, the only person who could adopt an heir to the illom to perpetuate it was Unnikkali, the widow of Krishnan Nambudri, and being thus left the sole individual to give effect to paragraph 12 of Exhibit I she adopted the first defendant. We cannot accede to the argument of Mr. Govinda Menon that to become the sole surviving member of the illom all its other members should have ceased to exist by reason of death. In our opinion the present case clearly falls within the principle of the decision in *Vasudevan v. The Secretary of State for India*(1), and therefore it should be held that the adoption of the first defendant is valid. In this connection we may observe, as held in a subsequent decision,

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viz., *Kesavan Unni v. Nicholas*(1), that the usage among Nambudris permitted a male and two females of an illom to validly affiliate another by requiring a member of another illom to marry and beget issue for the first illom.

It being our view that, apart from the documents which authorized her to adopt, Unnikkali Antharjanam had inherent power to adopt under the Nambudri Law, the question raised by Mr. Govinda Menon whether the authority to adopt jointly given to Unnimaya and Unnikkali can be legally exercised by Unnikkali alone, does not arise for consideration. But it may be stated that Unnimaya had surrendered all her rights in the illom properties under Exhibit III.

In the view that we take of the case it is also not necessary to decide the question whether Exhibit A, the deed of adoption, can be regarded as a deed of settlement entered into between Unnikkali and the first defendant, the alternative ground on which the lower Court has based its decision.

For the above reasons the decision of the lower Court is confirmed and this appeal is dismissed with costs. It is interesting to note that the validity of the adoption has been upheld in the Cochin Courts.

G.R.

(1) (1912) 23 M.L.J. 165.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair.

BYYA REDDI (DECREE-HOLDER, PLAINTIFF, PETITIONER),
APPELLANT,

1933,
December 5.

v.

T. S. GOPAL RAO (JUDGMENT-DEBTOR, SECOND DEFENDANT,
SECOND RESPONDENT), RESPONDENT.*

*Indian Limitation Act (IX of 1908), art. 182 (2)—Appeal—
Memorandum of appeal rejected as being out of time—Limitation for execution of decree in case of—Starting point of—
O. XLI, r. 1 (3), Code of Civil Procedure (Act V of 1908).*

It cannot be said that "there has been an appeal" within the meaning of article 182 (2) of the Indian Limitation Act (IX of 1908) when the appellate Court has refused to receive the appeal memorandum on its file.

Where an appeal memorandum presented to the High Court was rejected as being out of time,

Held accordingly that there was no appeal and that the decree-holder was not entitled to take advantage of the provision contained in article 182 (2).

Akshoy Kumar Nundi v. Chunder Mohan Chathati, (1888) I.L.R. 16 Calc. 250, dissented from.

Krishnaswami Panikondar v. Ramaswami Chettiar, (1917) I.L.R. 41 Mad. 412 (P.C.), distinguished.

APPEAL against the appellate order of the Court of the Subordinate Judge of Salem, dated the 27th day of January 1930, and made in Appeal Suit No. 108 of 1929, preferred against the order of the Court of the District Munsif of Krishnagiri, dated the 8th day of February 1929, and made in

* Appeal against Appellate Order No. 153 of 1930.

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GOPAL RAO. Renewal Execution Petition No. 524 of 1928 in
Original Suit No. 533 of 1921.

B. Somayya for appellant.

S. S. Ramachandra Ayyar for respondent.

Cur. adv. vult.

JUDGMENT.

This civil miscellaneous second appeal arises out of an application for execution made by the appellant. He obtained a decree in Original Suit No. 533 of 1921 on the file of the Court of the District Munsif of Krishnagiri on 5th September 1922. This decree was confirmed on appeal by the District Judge of Salem in Appeal Suit No. 275 of 1922 on the 20th April 1925. The judgment-debtor preferred an appeal against the appellate decree to the High Court. This appeal was filed four days out of time. The High Court in Civil Miscellaneous Petition No. 3943 of 1925 refused to excuse the delay in presenting the second appeal. In consequence, the civil miscellaneous petition and the Stamp Reference (the second appeal sought to be preferred to the High Court) were dismissed on the 5th March 1926. The decree now sought to be executed is the decree passed on first appeal on 20th April 1925. The present application to execute that decree was filed on 6th September 1928, that is after the lapse of more than three years. The respondent, the judgment-debtor, contended that the application is barred by limitation. The decree-holder contended that the application is not barred inasmuch as it was filed within three years from 5th March 1926, the date when the High Court rejected the second appeal. The question in this civil miscellaneous second appeal is which view is right. Both the

lower Courts held that the execution application is barred by limitation.

The appellant-decree-holder relies on article 182, clause 2, of the Limitation Act which says that the period of limitation for the execution of a decree is three years to be computed "where there has been an appeal" from "the date of the final decree or order of the appellate Court, or the withdrawal of the appeal". It is argued on behalf of the appellant that inasmuch as "there has been an appeal" to the High Court, the date of the final order of the High Court, that is 5th March 1926, should be taken to be the starting point for computing the period of limitation and that it should therefore be held that his application is not barred by limitation. The respondent on the other hand contends that, as the appeal to the High Court was not *admitted* as having been filed out of time, it should not be held that there has been an appeal against the decree of the appellate Court as contemplated by clause 2 of article 182 of the Limitation Act. The appellant's contention is supported by the decision in *Akshoy Kumar Nundi v. Chunder Mohan Chathati*(1), where the precise point we are now considering arose for decision. In that case it was held that in the execution of a decree against which an appeal has been presented but rejected on the ground that it was after time, limitation begins to run from the date of the final decree or order of the appellate Court. The learned Judges pointed out that the words "where there has been an appeal" in article 179, clause 2, of Schedule II of the Limitation Act of 1877, corresponding to

(1) (1888) I.L.R. 16 Calc. 250.

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the present article 182, clause 2, mean where a memorandum of appeal has been presented in Court. They rejected the contention that the words "where there has been an appeal" mean "where there has been an appeal presented and admitted". This decision no doubt supports the appellant very strongly. The appellant also relies on the decision of the Privy Council in *Nagendra Nath Dey v. Suresh Chandra Dey*(1) which contains observations which are *prima facie* in his favour. I shall refer to these observations presently.

It seems to me that the decision in *Akshoy Kumar Nundi v. Chunder Mohan Chathati*(2) should not be applied in deciding the present case having regard to the new sub-section 3 added in this Presidency to rule 1 of Order XLI of the Code of Civil Procedure. According to the procedure which prevailed in Madras prior to the decision of the Privy Council in *Krishnaswami Panikondar v. Ramaswami Chettiar*(3), the question whether the delay in filing the appeal should be excused or not was decided only after admitting the appeal memorandum. This practice is now altered by the new sub-section 3 added to rule 1 of Order XLI, which says that

"when an appeal is presented after the period of limitation prescribed therefor, it shall be accompanied by a petition supported by an affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period, and the Court shall not proceed to deal with the appeal in any way (otherwise than by dismissing it either under rule 11 of this Order or on the ground that it is not satisfied as to the sufficiency of the

(1) (1932) 63 M.L.J. 329 (P.C.).

(2) (1888) I.L.R. 16 Calc. 250.

(3) (1917) I.L.R. 41 Mad. 412 (P.C.).

reasons for extending the period of limitation) until notice has been given to the respondent and his objections, if any, to the Court acting under the provisions of section 5 of Act IX of 1908 have been heard."

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Under this rule the question of delay is decided beforehand and the appeal is not admitted till that point has been decided in the appellant's favour. This was not the procedure before the amendment. Whether the decision in *Akshoy Kumar Nundi v. Chunder Mohan Chathati*(1) can be distinguished on the ground I have pointed out or not, it seems to me difficult to hold that there has been an appeal when the Court has refused to receive the memorandum on its file. Ordinarily in cases where this question of delay in filing the appeal does not arise, the mere presentation of the memorandum of appeal would amount to acceptance or admission of the appeal on the Court's file. As pointed out by the learned Subordinate Judge, if the contention of the decree-holder were to prevail, any decree-holder who has allowed his decree to be barred by limitation may circumvent the rule by filing an appeal and getting it rejected for not satisfactorily explaining the delay. I can see no satisfactory answer to this objection. If possible, such an interpretation should be put on the words "where there has been an appeal" as would enable us to avoid the above conclusion. Mr. Somayya on behalf of the appellant has relied strongly on certain observations contained in the decisions in *Maharajadhiraj Kameshwar Singh Bahadur v. Beni Madho Singh*(2) and *Nagendra Nath Dey v. Suresh Chandra Dey*(3),

(1) (1888) I.L.R. 16 Calc. 250.

(2) (1931) I.L.R. 11 Pat. 430.

(3) (1932) 63 M.L.J. 329 (P.C.).

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which seem to support him very strongly ; but if properly understood I do not think they lend him much support. In *Maharajadhiraj Kameshwar Singh Bahadur v. Beni Madho Singh*(1), the appeal in question was admitted on the 4th November 1921 and was eventually dismissed on the 14th May 1923 on the ground that it was barred by limitation. The decree-holder contended that under clause 2 of article 182 of the Limitation Act the period of three years should be computed from the 14th May 1923. The judgment-debtor contended that in order that he, the decree-holder, may take advantage of article 182, clause 2, of the Limitation Act it must be shown that the appeal was a "competent appeal" and that the order disposing of the appeal was one which disposed of the appeal on the merits. The learned Judges overruled this contention observing

"that the article speaks of the 'decree or order' and it does not say that that decree or order must be passed in an appeal which was a competent appeal."

It is this observation that has been relied on by Mr. Somayya, but I do not think it helps him at all. No one can say in that case that there has been no appeal. In the judgment it is expressly stated that the appeal was admitted and ultimately it was disposed of on the ground that it was barred by limitation. The question with which we are concerned did not arise in that case as the memorandum of appeal *was accepted on its file by the Court* and the appeal was admitted. Having regard to the point now urged it cannot be said that there has been no appeal in that case. In *Nagendra Nath Dey v. Suresh Chandra Dey*(2),

(1) (1931) I.L.R. 11 Pat. 430.

(2) (1932) 63 M.L.J. 329 (P.C.).

which is a decision of the Privy Council, the appeal was "irregular in form" and was "insufficiently stamped" but it was admitted and heard in due course. It was argued that time should not be computed from the final order passed in appeal because "the appeal was by reason of its irregularity not an appeal at all but merely an abortive attempt to appeal." This contention was overruled by their Lordships. They state :

"There is no definition of appeal in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a Subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent. The 1920 appeal was admitted and was heard in due course, and a decree was made upon it."

Further on their Lordships again observe thus :

"They think that the question must be decided upon the plain words of the article: 'where there has been an appeal', time is to run from the date of the decree of the appellate Court. There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide."

These observations may seem to support the appellant ; but having regard to the fact that the appeal with which they were concerned was admitted, which fact is stated in the judgment, the observations should not be made to apply to the question that I am called upon to consider. These observations must be understood with reference to the special arguments which were

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addressed to their Lordships in connection with the meaning of the term "where there has been an appeal". The decision in *Khan Sahib Abdulla Ashgar Ali v. Ganesh Das Vig*(1), another Privy Council decision relied upon by the appellant, also does not help me in solving the present question. It was there held that

"an order of the appellate Court holding that the appeal had abated and refusing to set aside the abatement is a 'final order' within the meaning of article 182 (2) of the Limitation Act since it deals judicially with the matters before the Court."

For the above reasons I hold that since the appeal memorandum presented to the High Court was rejected as being out of time there has been no appeal to the High Court and the appellant is not entitled to take advantage of the provision contained in article 182, clause 2, of the Limitation Act in support of his contention that the execution petition is not barred by limitation. If time is calculated from the date of the appellate decree it is not disputed that the execution application is time-barred. I would therefore confirm the order of the lower Courts and dismiss this civil miscellaneous second appeal with costs.

K.W.R.

(1) (1932) 64 M.L.J. 421 (P.C.).

PRIVY COUNCIL.

VYTILA SITANNA (PLAINTIFF), APPELLANT,

v.

MARIVADA VIRANNA AND OTHERS (DEFENDANTS),
RESPONDENTS

[AND CONNECTED APPEAL.]

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Hindu Law—Widow's estate—Relinquishment—Acceleration of reversion—Relinquishment to female reversioner—Limitation—Claim after death of widow and transferee—Indian Limitation Act (IX of 1908), Sch. I, art. 141—Family arrangement—Award of village panchayat.

The principle of Hindu law that a widow can accelerate the succession to her husband's estate by relinquishing to his reversionary heir the whole, or the whole less what is necessary for her maintenance, applies although the heir to whom the estate is transferred is a female and consequently takes a life estate only.

Sartaji v. Ramjas, (1923) I.L.R. 46 All. 59, approved.

On the death of a Hindu in 1880 a dispute as to succession which arose between his widow and a claimant was referred to a panchayat which awarded that the property should be divided between them. In 1888 the widow conveyed half the property to the claimant, and the other half, reserving about six acres for her own maintenance, to her daughter who was reversionary heir to the deceased. The daughter died in 1894. On the death of the widow in 1921 the heir of her husband claimed the whole estate:

Held (1) that the award of the panchayat should not be interfered with, as it appeared to be a fair and reasonable settlement of a doubtful claim based on both legal and moral grounds;

(2) that the suit failed also as to the property conveyed by the widow to her daughter, as it was not instituted within

* *Present*: Lord 'THANKERTON, Sir JOHN WALLIS and Sir GEORGE LOWNDES.

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twelve years of the daughter's death, and was therefore barred by the Indian Limitation Act, 1908, Schedule I, article 141.

Decree of the High Court affirmed.

CONSOLIDATED APPEAL (105 of 1931) from a decree of the High Court (March 19 and 25, 1929) modifying a decree of the Additional Subordinate Judge of Cocanada.

In 1921 the appellant instituted a suit for possession of the properties of Tirupayya who died in 1880; he claimed as heir upon the death of Venkataramanamma, the widow of Tirupayya, which occurred earlier in 1921. In 1888 the widow had conveyed half the property of her husband to Ammanna, and the other half (less 6.42 acres which she reserved for her own maintenance) to her daughter Nagamma, who was reversionary heir to Tirupayya. Nagamma died in 1894. The defendants were in possession of the properties, some through the conveyance to Ammanna, some through the conveyance to Nagamma.

The facts appear from the judgment of the Judicial Committee.

The trial Judge made a decree for the properties which had been conveyed to Nagamma holding that they were merely a gift from the widow; otherwise he dismissed the suit.

Both the plaintiff and the defendants appealed to the High Court which dismissed the plaintiff's appeal but allowed the defendants' appeal as to the properties conveyed by the widow to her daughter. The learned Judges (PHILLIPS and REILLY JJ.), following *Sartaji v. Ramjas*(1), held that there had been a surrender of the estate

which operated as an acceleration of Nagamma's reversion, and that consequently the suit as to those properties was barred by the Indian Limitation Act, 1908, Schedule I, article 141. They gave the plaintiff a decree for the 6.42 acres which the widow had retained for her maintenance.

Sidney Smith for appellant.—The alienations effected in 1888 were invalid against the plaintiff as reversionary heir. Both Courts held that it was not proved that Ammanna was an illatom son-in-law of Dorayya. His claim was not *bona fide* and was therefore not one which the widow had authority to compromise; *Kondama Naicker v. Kandasami Goundar*(1). The conveyances of 1888 did not purport to be made under the award of 1880; they were gifts and valid only during the widow's life. The two conveyances should be read together as in *Ramgowda Annagowda v. Bhausahab*(2); so read the transaction was a division of the estate between Ammanna and Nagamma. Read as separate transactions the alienation to Ammanna was invalid, and consequently the conveyance to Nagamma was not a surrender of the estate. The deed did not purport to be a surrender of the estate. In any case there is no decision of the Board that there is an acceleration of the reversion upon surrender to a female heir. The daughter was not a reversioner but merely personal heir to her father upon her mother's death. It has been held that a widow does not accelerate the succession by relinquishing to a co-widow; *Chengappa v. Buradagunta*(3). For the validation of an alienation by the consent of reversioners a distinction has been drawn between male and female heirs; *Raja Dei v. Umed Singh*(4).

De Gruyther K.C. and *Subba Row* for respondents.—The widow could bind the reversioners by a compromise of a claim against the estate: *Ramsumran Prasad v. Shyam Kumari*(5), *Mt. Hiran Bibi v. Mt. Sohan Bibi*(6) and *Raoji Rupa v. Kunjalal Hiralal*(7). There is no ground for supposing

(1) (1923) I.L.R. 47 Mad. 181; L.R. 51 I.A. 145.

(2) (1927) I.L.R. 52 Bom. 1; L.R. 54 I.A. 396.

(3) (1920) I.L.R. 43 Mad. 855. (4) (1912) I.L.R. 34 All. 207.

(5) (1922) I.L.R. 1 Pat. 741; L.R. 49 I.A. 342.

(6) (1914) 18 C.W.N. 929 (P.C.).

(7) (1930) I.L.R. 54 Bom. 455; L.R. 57 I.A. 177.

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that the award of 1880 was not honestly made; it shows that Ammanna's claim was *bona fide* and that half the property was a reasonable compromise. The conveyance to him was pursuant to the title which he had already obtained under the award; only half the property of the deceased was left subject to the reversionary rights. If Nagamma had been a male the conveyance to her would have accelerated her succession; *Rangasami Gounden v. Nachiappa Gounden*(1) and *Bhagwat Koer v. Dhanukhdhari Prashad Singh*(2). The latter of those cases shows that it is not material that the conveyance was not in terms a relinquishment to her. Nor would the retention by the widow of a small part for her maintenance alter the effect; *Sureshwar Misser v. Maheshwari Misra*(3). In *Sartaji v. Ramjas*(4) the Allahabad High Court held that the principle of acceleration of the reversion applies although the reversionary heir is a female. That decision and the grounds upon which it was based were right. In the result, Ammanna and those claiming through him obtained a good title under the award and the conveyance to him, and the suit was barred as to the properties conveyed to Nagamma by the Indian Limitation Act, 1908, Schedule I, article 141, since it was not instituted within twelve years of her death. [With regard to an illatom adoption reference was made to *Narayudu v. Venkamma*(5).]

Sidney Smith replied.

SIR JOHN
WALLIS.

The JUDGMENT of their Lordships was delivered by SIR JOHN WALLIS.—These are two appeals from judgments and decrees of the Madras High Court on appeal from the Subordinate Judge of Cocanada which have been consolidated and heard together. In 1880 one Tirupayya, son of Dorayya, died leaving a widow Venkataramanamma (hereinafter referred to as the widow) who survived him for forty-one years. On her death the plaintiff, as next reversioner to her husband's estate, instituted the present suit to recover the properties

(1) (1918) I.L.R. 42 Mad. 523; L.R. 46 I.A. 72.
(2) (1919) I.L.R. 47 Cal. 466; L.R. 46 I.A. 259.

(3) (1920) I.L.R. 48 Cal. 100; L.R. 47 I.A. 233.
(4) (1923) I.L.R. 46 All. 59.

(5) (1890) 22 M.L.J. 265.

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that had stood in his name. The family belonged to the agricultural caste of Kammas, among whom the illatom custom obtains. After Tirupayya's death there were disputes which were referred to a panchayat who gave an award under which the estate was partitioned between the widow and one Ammanna, who was married to Tirupayya's sister and according to the defendants' case had been adopted by Tirupayya's father Dorayya as an illatom son-in-law, and had thereby acquired a share in the family properties.

In 1888 the widow executed a conveyance to Ammanna of the properties which had been awarded to him, and conveyed the remaining properties to her daughter Nagamma on the occasion of her marriage, reserving only six acres odd for her own maintenance. On Nagamma's death in 1894 these properties descended to her daughter Ramalakshamma, who died in 1896, when her father Muncyya took possession of them without title, and they subsequently passed into the possession of some of the defendants. If the widow's conveyance to her daughter Nagamma amounted to a surrender of the whole estate to the next reversioner and so accelerated the succession, then the male reversioners' right to sue arose on her death in 1894, and the present suit as regards these properties is barred. If it did not, their right of suit arose on the widow's death in 1921 and the suit is in time.

The Additional Subordinate Judge of Cocanada gave the plaintiff a decree for the properties conveyed by the widow to her daughter and otherwise dismissed the suit. The plaintiff and the defendants both appealed to the Madras High Court, who

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dismissed the plaintiff's appeal. On the defendants' appeal with reference to the properties conveyed by the widow to her daughter it was held that the suit was barred, and the decree of the lower Court was modified accordingly.

From these two appellate decrees of the High Court the plaintiff has preferred these appeals to His Majesty in Council.

As regards the properties awarded to the first defendant's father Ammanna by the panchayat and subsequently conveyed to him by the widow, both Courts held that Ammanna had acquired a good title but for different reasons.

The Subordinate Judge found that Ammanna was not adopted by Dorayya as an illatom son-in-law, and that the question of the adoption was not referred to the panchayat, but that the subsequent conveyance to him by the widow was good, because, as recited in the deed, it was made in accordance with her husband's directions. In the High Court both the learned Judges rejected this contention, which had not been pleaded, and it has not been put forward in the present appeal.

PHILLIPS J. observed that it was not surprising that the evidence as to Ammanna's illatom adoption was unsatisfactory, seeing that it must have taken place some fifty or sixty years before the suit. He had admittedly married Dorayya's daughter, but it was uncertain whether the marriage occurred in Dorayya's lifetime and whether Dorayya adopted him as an illatom son-in-law as the evidence was conflicting. Ammanna seemed to have been treated as one of the family, as he gave up his rights in his own family

and looked after the affairs of Dorayya's family. On the whole the learned Judge came to the conclusion that the award was a *bona fide* settlement of disputes which was binding on the estate which had been represented by the widow. REILLY J. expressed himself with more hesitation. He agreed with the Subordinate Judge that the illatom adoption was not proved, and had not been set up at the time of the award. What had been referred to the panchayat was, he thought, the claim put forward by Dorayya's widowed sister Venkamma, who had lived in his family, that on account of the additions to the estate which had been made by her she was entitled to a share and wished that it should be given to Ammanna. Ammanna had assisted her by taking part in the cultivation, and there was therefore a moral claim which had been urged in good faith and should not be disturbed.

Their Lordships find themselves most in agreement with PHILLIPS J. The panchayatdars refrained from stating in their award the contentions of the parties or the reasons for their decision; and this way of dealing with the case appears to have satisfied everybody at the time, as the widow and Ammanna both signed a muchilika addressed to the Sub-Collector of the Godavari District informing him of the award and binding themselves to abide by it, and it was never questioned until the widow's death forty-one years later. The award did not in terms decide that Ammanna was Dorayya's illatom son-in-law, which the widow had not admitted or there would have been no dispute, and she apparently preferred to base the conveyance which

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she executed eight years later in Ammanna's favour on the grounds that he had been brought up "in our house" from his infancy, and had married her husband's sister and Dorayya's daughter, and that the conveyance was "in accordance with the arrangements made by my husband and the directions given to me". These statements are borne out by the fact that in the muchilika already mentioned Ammanna is described as Venkamma's foster son.

What seems to have happened is that, when she came to live in her brother's house as a childless widow, there was no male child in the house, and Ammanna, one of their sister's children who was then an infant, was taken to live with them and brought up by Venkamma. As Dorayya afterwards had a son, Tirupayya, Ammanna could not be adopted, but it was only natural that he should be married to Dorayya's daughter and go on living in the family. As to whether he was married during Dorayya's lifetime the evidence, as observed by PHILLIPS J., is conflicting, and there may also have been some question as to whether after Tirupayya's birth there could be a valid illatom adoption; see "Mayne's Hindu Law", ninth edn., page 278. Dorayya is said by one of the witnesses to have died in the year of the great cyclone of the 1st November 1864, when Tirupayya, who was about thirty in 1880, was still a minor; and this would be an additional reason for taking Ammanna as an illatom son-in-law. However this may be, the fact that Ammanna never troubled about his share in the property of his own family and went on living jointly with Tirupayya, attending to the cultivation while

Tirupayya attended to his duties as village munsif, coupled with the widow's statements, suggests that he enjoyed the status of an illatom son-in-law, during Tirupayya's lifetime, and that it was only to be expected that he should claim a share after Tirupayya's death.

The plaintiff's case that the increase in the estate, from 8 to 44 acres, was the work of the widowed Venkamma, and that the disputes arose because she claimed on this ground that a share should be given to her foster son, rests mainly on the evidence of the second witness for the plaintiff, a niece of Dorayya but a member of the plaintiff's branch of the family, who went so far as to depose that Ammanna was not Venkamma's foster son and that he was not taken into the family until after Dorayya's death. Venkamma was no doubt a party to the arbitration, but this is accounted for by the fact that, as stated in the award, the widow claimed that the jewels in Venkamma's possession belonged to the estate. This claim was upheld by the panchayat, who directed that they should be included in the partition "with the exception of the jewels which the panchayatdars had ignored", that is to say, left in Venkamma's possession, without going into the question of her title to them. That the main dispute was between Ammanna and the widow is further suggested by the fact that it was they who each nominated two panchayatdars, the fifth being nominated by the village munsif and the karnam.

The illatom custom among the Reddis and Kmmas of the Madras Presidency is based on the necessity of having men in the family to look

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after the cultivation, and the case that the increase in the property was due not to Dorayya himself and to Ammanna and Tirupayya after him, but to Venkamma, a widow, who is not shown to have had any property of her own, appears highly improbable and may well have been set up owing to the fact that, as already mentioned, the award does not show what were the claims put before the panchayat.

Reference to a village panchayat is the time-honoured method of deciding disputes of this kind, and has these advantages, that it is generally comparatively easy for the panchayatdars to ascertain the true facts, and that, as in this case, it avoids protracted litigation which, as observed by one of the witnesses, might have proved ruinous to the estate. Looking at the evidence as a whole their Lordships see no reason for doubting that the award was a fair and honest settlement of a doubtful claim based both on legal and moral grounds, and are therefore of opinion that there are no grounds for interfering with it. This appeal must therefore fail.

The question in the other appeal is merely one of limitation and may be very briefly dealt with. Assuming, as their Lordships have now decided, that the award in Ammanna's favour was good, it is not disputed that the conveyance by the widow of the rest of the property, reserving only a few acres for her own maintenance, would have amounted to a surrender of her estate and accelerated the succession of her husband's next heir if he had been a man, as held by the Board in *Bhagwat Koer v. Dhanukdhari Prashad Singh*(1)

(1) (1919) I.L.R. 47 Calc. 466; L.R. 46 I.A. 259.

and *Rangasami Gounden v. Nachiappa Gounden*(1), but it has been held by the Subordinate Judge that this rule does not apply when the conveyance is made by a widow to her daughter who though her husband's next heir only takes an estate for life. This he considered was not a surrender to the next reversioner. But though the doctrine of surrender by a widow has undergone considerable development in recent years, it must be remembered that the basis of it is the effacement of the widow's interest, and not the *ex facie* transfer by which such effacement is brought about. The result is merely that the next heir of the husband steps into the succession in the widow's place. There is, in their Lordships' opinion, nothing in the Hindu law which would exclude the succession of a female heir in such cases, and no reason for differentiation according to the nature of the estate she would take. This question has been fully considered in the judgment of BANERJI J. in *Sartaji v. Ramjas*(2) which does not appear to have been brought to the Subordinate Judge's notice, and in which it was held that there was no sufficient reason for making any difference between surrender to a daughter and surrender to the nearest male reversioner. The learned Judges of the High Court have followed this decision and their Lordships think that they were right.

It follows therefore that the widow's conveyance to her daughter Nagamma in 1888 was a surrender of her estate and an acceleration of her daughter's succession, and that on the daughter's death in 1894, the succession opened to her father's

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(1) (1918) I.L.R. 42 Mad. 523; L.R. 46 I.A. 72.

(2) (1923) L.R. 46 All. 59.

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male reversioners, and that the present suit filed by the plaintiff as next reversioner is barred under article 141 of the Limitation Act.

Their Lordships are therefore of opinion that both appeals should be dismissed and will humbly advise His Majesty accordingly. The appellant will pay the respondents' costs.

Solicitor for appellant : *Hy. S. L. Polak & Co.*

Solicitor for respondents : *Harold Shephard.*
A.M.T.

APPELLATE CIVIL.

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

RAI BAHADUR B. MOPURAPPA (PLAINTIFF), APPELLANT,

v.

K. RAMASWAMI GRAMANI (DEFENDANT), RESPONDENT.*

*Transfer of Property Act (IV of 1882), ss. 105 and 107—
Agreement in respect of immovable property—Whether it
amounts to a transfer of an interest in immovable property,
that is to say a present demise, or an agreement to grant a
lease, that is to say a future letting—Tests to be applied.*

A purchased certain immovable property on 5th September 1930. B was then in possession of the same under a previous tenancy agreement which was to terminate on 30th September 1931. On 13th July 1931 A entered into an oral agreement with B to give a lease of the property for three years, commencing from 1st October 1931, at a fixed monthly rent. Two months' rent was also paid by B as advance. All the terms of

* Original Side Appeal No. 32 of 1933.

the agreement were finally settled on 13th July 1931. It was also agreed that a formal deed should be executed at a later date, which however, owing to some differences, was not executed.

Held that the oral agreement amounted to a present transfer of an interest in immovable property within the meaning of section 105 of the Transfer of Property Act and being for a term exceeding one year was affected by the provisions of section 107 of the Transfer of Property Act which compulsorily requires a registered instrument.

APPEAL from the judgment and decree of STONE J., dated the 10th day of January 1933 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 228 of 1932.

K. S. Krishnaswami Ayyangar for *M. Ramachandra Rao* for appellant.

G. Krishnaswami Ayyar for *K. Gopalaswami* and *C. Brooke Elliot* for *K. Subramanyam* for respondent.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—This is an appeal from a judgment of STONE J. which, as our learned brother says, raises a very interesting point of law. It relates to an oral agreement or arrangement entered into on the 13th July 1931 between the plaintiff-appellant and the defendant-respondent. This agreement was for a lease for three years ; and the question for consideration is whether it is an agreement within the provisions of section 107 of the Transfer of Property Act which provides that a lease of immovable property for any period exceeding one year can be made only by a registered instrument and that all other leases of

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immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. Turning to section 105 a lease is therein defined as follows :—

“ A lease of immovable property is a transfer of a right to enjoy such property.”

In this case the lease was of immovable property for a term of three years ; and it was contended on the defendant's behalf at the trial that the agreement in question was a present transfer of a right to enjoy immovable property within the provisions of section 105 and, therefore, being for a term exceeding one year, necessitated a registered document by reason of section 107 of the Transfer of Property Act. This was raised as a preliminary question. STONE J. upheld the defendant's contention.

It is necessary, first of all, to state a few facts. The appellant purchased the property in question on the 5th September 1930. The respondent was then in possession of the property from the vendor under a tenancy which was to end on the 30th September 1931. On the 13th July 1931 the respondent entered into the oral agreement in question here. That agreement, according to the appellant's evidence, was, as already stated, to give the respondent a three years' lease. At the same time it was agreed that the rental was to be three hundred and fifteen rupees per month, that the respondent should pay the cost of manuring the trees and ploughing the garden, that he should also pay the appellant an advance of two months' rent, and that the monthly rent should be paid thereafter by the

second of every succeeding month. The lease was to commence on the 1st October 1931. All these matters were settled on the 13th July 1931 and on the same date the advance of two months' rent was paid to the appellant amounting to six hundred and thirty rupees being the rent for October and November 1931. Later on a draft lease deed was prepared. This was sometime in August 1931. According to the appellant, it was at the request of the respondent that he prepared the draft lease deed. It was hand-written and sent to the respondent for his approval on the 22nd August 1931. The respondent came with it to the appellant and wanted certain alterations to be made in it. These alterations he had already made but in addition to those he wanted two other alterations as well and these were made ; and the deed never got beyond that stage. The respondent refused thereafter to execute the lease.

The question is what were the intentions of the parties when the oral agreement of the 13th July was entered into ? The appellant's contention is that it was on that date agreed that a lease should be given, that is to say, at some future date. The respondent's contention, on the other hand, is that all the details were agreed upon on that date and that the only agreement as regards the future was that a deed in pursuance of this agreement should formally be drawn up. I think that from the evidence on the plaintiff's side it is quite clear that all the details were settled orally on the 13th July 1931. STONE J. received evidence in order to ascertain whether on the facts the oral agreement in question was an agreement of lease within section 105 of the Transfer of Property Act

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or whether it was an agreement which on certain authorities before him could be distinguished from a lease or transfer so as to take the case of out of section 107 of the Transfer of Property Act. The authorities to which he referred were, amongst others, *Chunilal Dutt v. Gopiram Bhotica*(1) where it was held that a verbal agreement of lease notwithstanding the fact that the parties were intending to execute a formal lease deed does not contravene the provisions of sections 105 and 107 of the Transfer of Property Act and is not therefore a nullity; *Nanda Lal Ghose v. Sarat Chandra Banerji*(2) where it was held that the word "lease" in section 107 of the Transfer of Property Act must be read as speaking of leases as defined in section 105 and that it did not include an agreement to lease and that, even in the absence of a registered lease, the contract, namely, the agreement to lease, is valid; and *Sm. Baranashi Dassi v. Papat Velji Rajder*(3) where it was similarly held that an oral agreement to lease is valid and that section 107 of the Transfer of Property Act refers to leases, i.e., actual transfers of property, and not to agreements to lease. (On the other side the decision of PAGE J. in *Ranjoo Mahomed v. Haridas Mullick*(4) was strongly relied upon. In that case all the decisions bearing upon this question were very fully discussed in the judgment; and what clearly emerges from that discussion is that the question is whether it is intended to give an immediate right to the party to be from that moment and before the execution of any lease a tenant from a future day. If it is,

(1) (1926) 100 I.C. 404.
(3) (1919) 25 C.W.N. 220.

(2) (1910) 5 I.C. 562.
(4) (1925) I.L.R. 52 Cal. 695.

then it is a lease. If otherwise, it is an agreement not of present demise but of future demise. The rule is stated in *Gore v. Lloyd*(1) by BARON ALDERSON as follows :—

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"That you must look at the whole of the instrument, to judge of the intention of the parties as declared by the words of it, for the purpose of seeing whether it is an agreement or a lease. And, looking at the whole of this instrument, it appears to me that it was not intended to give an immediate right to the party to be from that moment, and before the execution of any lease, a tenant from a future day, but that the true construction of the instrument is, an agreement between the parties that at a future time one of them shall become the tenant, provided certain things are intermediately done by the landlord or his agent, so as to put the premises into a certain state, which the agreement describes . . . Where, indeed, by an agreement of this sort, one person agrees to take certain premises at a certain rent from a certain time, and both parties sign the paper; looking at the whole of such an instrument together, nobody can doubt, that, though it contains no words of demise by the party who signs it as landlord, such an instrument would amount to a lease, because you cannot give effect to the signature, unless by supposing that there is an implied agreement to demise, besides the express words by which the tenant agrees to take . . . It appears to me, therefore, that there is an obvious distinction between the two cases, and that, upon the whole, this instrument is not an agreement of demise, but it is an agreement that there shall be, under certain circumstances, at some future time, if certain things be done, a demise; it is an agreement between the parties, the terms of which, undoubtedly, were to regulate the future tenancy, if a future tenancy should exist."

It is clear from this quotation that the fact that the tenancy is to commence from a future date does not prevent the agreement being one of present demise which was a circumstance strongly relied upon by the appellant. On the other hand,

(1) (1844) 12 M. & W. 463; 152 E.R. 1279, 1286.

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there are two other circumstances which, in my opinion, tell very strongly against the appellant's case, namely, that the respondent was already in possession at the date of the oral agreement and also paid two months' rent in advance on the same date. Nor can the fact that the formal document was to be executed in the future assist the appellant; and it is quite clear from the evidence of the appellant himself that there really was a concluded agreement on the 13th July 1931. He says: "The writing that was to come into being was to express the terms we had really agreed upon, and no other terms."

This is also made clear in the evidence of Mr. T. Rajagopalachari, the appellant's second witness, who says: "The matter was as good as finally agreed at that one interview."

STONE J. was of the opinion that the oral agreement in question amounted to a present transfer of an interest in the immovable property, that is to say, it was a present demise or lease and not an agreement to grant a lease or a future letting. Having regard to the circumstances to which I have already referred, in my view, STONE J. was right; and we have here an agreement which comes within the provisions of section 107 of the Transfer of Property Act and it being unregistered, the appellant's suit upon it must fail. For these reasons, this appeal must be dismissed with costs.

BARDSWELL J.—I agree.

G.R.

APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice.

KATARI LAKSHMI BAI (PLAINTIFF), PETITIONER,

v.

BANDUBODE RUKMAJI RAO AND FOUR OTHERS
(DEPENDANTS), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), ss. 78 (2) proviso and 49—Proof of debt—"Proved"—"Provable"—Distinction between.

A debt "proved" under the Provincial Insolvency Act (V of 1920) in the proviso to section 78 (2) means a debt in respect of which a proof has been lodged and all the requirements of section 49 of the Act fulfilled.

It is not also necessary that the debt must have been admitted by the Official Receiver under the provisions of the Act.

"Provable" in the said proviso means a debt due to a creditor in respect of which he has not put in a claim in the shape of lodging a proof.

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 Guntūr, dated the 30th day of June 1930 and made in Small Cause Suit No. 1507 of 1929.

N. Rama Rao for petitioner.

K. Ramamurthy for *Konda Kotayya* and *B. T. M. Raghavachari* for *V. Pattabhirama Sastri* for respondents.

JUDGMENT.

The question raised in this civil revision petition is whether the words used in the proviso to section 78 (2) of the Provincial Insolvency Act

* Civil Revision Petition No. 69 of 1931.

Munsif held against the petitioner's contention stating that

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"in the absence of anything definitely to show that the claim was admitted I do not think that it can be contended that the debt has been proved within the meaning of section 78. No doubt section 49 prescribes the mode of proof but under the rules the Receiver has to either admit the debt or reject it. If it is rejected the debt could not be deemed to have been proved. So unless the plaintiff shows that the debt has been admitted by the Official Receiver and included in the schedule of liabilities it cannot be taken that the debt has been proved."

On behalf of the petitioner it is argued here that a debt "proved" under the Act means a debt in respect of which a proof has been lodged under section 49 (1) and (2) and that as soon as a proof has been lodged the debt has been "proved". The contention therefore is that the word "proved" in the Insolvency Act has a different meaning to be given to it to that in the Indian Evidence Act. Turning to section 49 of the Provincial Insolvency Act the marginal note is "Mode of proof" and sub-section (1) says :

"A debt may be proved under this Act by delivering or sending by post in a registered letter to the Court an affidavit verifying the debt";

and sub-section (2) says :

"The affidavit shall contain or refer to a statement of account showing the particulars of the debt and shall specify the vouchers (if any) by which the same can be substantiated. The Court may at any time call for the production of the vouchers."

In this case the petitioner filed an affidavit as required by sub-section (1) in the approved form verifying the debt and in the schedule to the affidavit set out the amount of the debt and that it was on a promissory note further stating that the promissory note was missing but would be produced later. The date of the promissory note

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RUKMAJI RAO. Act," are to be read as meaning that the debt must have been admitted by the Official Receiver under the provisions of the Act, that is to say, satisfactorily established before him or whether "proved" means that a proof of the debt has been lodged within the provisions of section 49. The question arose on a plea of limitation. The petitioner here, a woman, was the payee of a promissory note alleged to have been executed in her favour by a person who subsequently became insolvent. The promissory note was for Rs. 100 and after the execution of the promissory note the drawer was adjudicated insolvent. The adjudication was on 8th December 1923; and it is alleged that the promissory note was executed about the middle of 1922. The adjudication was annulled on the 8th March 1929, the Official Receiver not having passed any orders with regard to the proof lodged by the petitioner, either admitting it or rejecting it. The suit on the promissory note was filed in 1929. That was clearly time-barred unless it could be saved from the bar of limitation. It was claimed by the petitioner that it was not barred because of the adjudication of the insolvent, as the time between the order of adjudication and the date of the annulment should be excluded. It is here that the proviso to which I have already referred becomes important, because in it are excepted from that sub-section debts which are merely provable but which have not been proved under the Act, that is to say, if a debt has been "proved" under the Act that debt gets the benefit of sub-section 2 to section 78 and the exclusion of the time therein specified. The learned District

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was not given. The Official Receiver, as he was entitled to do under sub-section (2), called for the production of the promissory note. The question arises here whether a person who has lodged a proof and fulfilled all the requirements of section 49 has "proved" his debt under the Act. Some assistance upon this point is to be got from the English Bankruptcy Act and the rules which are set out in the second schedule of that Act. Rule 23 deals with the admission or rejection of proofs and the Trustee has to examine every proof and may admit or reject it in whole or in part or require further evidence in support of it. Rules 24, 25 and 28 also speak of proofs. What therefore the English Bankruptcy Act is dealing with is a proof, that is to say, the formal claim lodged by the creditor in the insolvency. The position is similar under the Provincial Insolvency Act; and the Official Receiver after proof has been lodged has either to admit it or reject it and can, if he requires, ask for further evidence in support of the proof. Has a person who has lodged a proof "proved" within the meaning of the Insolvency Act? In my opinion, he clearly has, and that is the meaning to be given to the word "proved" in the proviso to sub-section (2) of section 78 of the Act. "Provable", in my view, means a debt due to a creditor in respect of which he has not put in a claim in the shape of lodging a proof. I am supported in this opinion by the fact that the proviso must clearly have in view merely a claim by the creditor and not a claim which has been substantiated. No question of limitation could arise—and this is admitted on behalf of the respondents—in respect of a proof which has been

admitted by the Official Receiver. The proviso, therefore, must apply to some other kind of debt and, in my opinion, clearly applies to a debt of which proof has been lodged within the provisions of section 49. The further question is whether the requirements of that section have been satisfied here. For the respondents it is argued that the affidavit did not give the required details and that therefore the requirements of that section were not complied with. In my view, that contention is wrong and sufficient information was given in the affidavit and the schedule thereto to comply with the requirements of that section. No argument can, in my opinion, be based upon the words in section 49 (2), namely :

"The Court may at any time call for the production of the vouchers."

That, in my view, only deals with the admissibility or the rejection of the proof. It is power given to the Official Receiver to call for evidence in support of the proof. For these reasons, in my view, the learned District Munsif was wrong in holding that the suit was barred by limitation. This civil revision petition must, therefore, be allowed with costs here and in the District Munsif's Court and the suit remanded to the District Munsif's Court for disposal according to law. The seventh respondent here raises the point that he is entitled to his costs on the ground that he has been brought here unnecessarily. In my view, that is so. He will, therefore, be entitled to his costs from the petitioner.

K.W.R.

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Butler.

1934,
February 14.

YELLAMRAJU VENKATASUBBA RAO (FIRST DEFENDANT—
FIRST RESPONDENT), APPELLANT,

v.

LAKKARAJU ANANDA RAO AND TWO OTHERS (PLAINTIFF,
SECOND DEFENDANT AND PLAINTIFF'S LEGAL REPRESENTATIVE),
RESPONDENTS.*

*Hindu Law—Widow—Sale by—Reversioners if and when bound
by—Necessity justifying sale by her—Daughter's son's
thread and marriage ceremonies if and when.*

When a sale by a Hindu widow is of a reasonable portion of her husband's estate and the occasion of the disposition is reasonable and proper according to the common notions of the Hindus, it is justifiable and cannot be impeached by the reversioner.

Held, accordingly, that a sale by a Hindu widow of a reasonable portion of her husband's estate for debts contracted for the thread and marriage ceremonies of one of her daughter's sons was binding on the reversioners, even in a case in which the daughter's sons were not so indigent as to be dependent upon their grandmother.

Sardar Singh v. Kunj Bihari Lal, (1922) I.L.R. 44 All. 503 (P.C.), relied upon.

APPEAL under Clause 15 of the Letters Patent against the decree of ANANTAKRISHNA AYYAR J., dated the 7th day of October 1929 and made in Second Appeal No. 250 of 1926 preferred to the High Court against the decree of the Court of the Subordinate Judge (Additional) of Bapatla in Appeal Suit No. 89 of 1925 (Appeal Suit No. 271 of 1924, District Court, Guntur)—Original Suit No. 361 of 1922, District Munsif's Court, Repalli at Tenali.

* Letters Patent Appeal No. 10 of 1930.

P. Satyanarayana Rao for appellant.
G. Lakshmanma for respondents.

Cur. adv. vult.

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The JUDGMENT of the Court was delivered by JACKSON J.—One Lakshmayya died leaving a widow (defendant No. 2) and daughter Subbamma mother of two sons, third defendant and plaintiff, who are the nearest reversioners to Lakshmayya's estate.

On 20th November 1918 with the assent of third defendant, the widow, defendant 2, sold a parcel of the estate for Rs. 1,500 for debts contracted for family expenses and the thread and marriage ceremonies of the plaintiff. Four years later the plaintiff with more sense of humour than of decency sued to invalidate this sale on the ground that the estate had been dissipated for improper purposes.

The District Munsif decreed, the Subordinate Judge dismissed, and this Court decreed the suit : and it now comes up for final decision with the vendee as appellant.

The facts as stated above are not in dispute. The elder brother's participation in the transaction has precluded any question of fraud, and there is the plain first issue : "Whether the suit alienation in favour of first defendant was made for legal necessity and for purposes binding on third defendant and plaintiff?"

The third defendant and plaintiff were not so indigent as to be dependent upon their grandmother ; and it cannot be said that her giving them this help was an act of compelling necessity. The question is whether the act was conducive to the spiritual welfare of Lakshmayya when

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admittedly it would be justifiable. That this is a question which admits of no simple answer is clear not only from the conflict of decisions in the reported cases, but from this case itself; for it so happens that we have on this very case the opinion of two learned Judges of this Court, either of whom we should have been prepared unhesitatingly to follow in a matter of Hindu Law, *cf.* the judgment under appeal and the comment upon it in *Mallayya v. Bapi Reddi*(1).

An ancient text of Brihaspathi runs:

"A widow inheriting her husband's estate should honour with food and presents . . . a daughter's son."

As pointed out in *Mallayya v. Bapi Reddi*(1), it is the daughter's son who offers the funeral oblation, and who therefore is particularly worthy of honour. Mr. Lakshmanan argues that this is mere sentiment, but it is just here that the line of cleavage appears. Who is to distinguish positively between sincere religious feeling and idle sentiment? All that can safely be said is that, where the point is doubtful and where there is not the slightest suspicion of ulterior motive or fraud, the benefit of the doubt should be given to religious feeling. It is not for a Court of law to disparage the pious acts of devout people. And this principle has been followed by the Judicial Committee. In *Sardar Singh v. Kunj Bihari Lal*(2) an alienation by a widow was being considered where its avowed object was to offer food to an idol; and the following passage from *Tatayya v. Ramakrishnamma*(3) was quoted with approval:

(1) (1931) 62 M.L.J. 39, 44.

(2) (1922) I.L.R. 44 All. 503 (P.C.).

(3) (1910) I.L.R. 34 Mad. 288, 291.

"We think we are warranted in holding that if the property sold or gifted bears a small proportion (which it is impossible to define more exactly) to the estate inherited, and the occasion of the (disposition or) expenditure is reasonable and proper according to the common notions of the Hindus, it is justifiable and cannot be impeached by the reversioner."

And the Judicial Committee proceeds:

"In the present case the purpose for which the alienation was made was undoubtedly not for the performance . . . of any such duty as might be regarded as obligatory under the Hindu law. But at the same time there can be no question that it was a pious act."

And accordingly the alienation was allowed.

The quantitative ratio approved in this judgment is not at first sight easy to understand. If a small gift to an idol is conducive to the husband's spiritual bliss, would not a larger gift be still more conducive? Probably, human nature being what it is, Courts are not prepared to sanction transactions which offend ordinary common sense and good husbandry. If a widow devotes the whole of her estate to an idol, there may be suspicion of fraud or undue influence. In our present case there is no suggestion of undue extravagance, and it must be remembered that the quantitative ratio works in both directions. Her pious duty for her husband's satisfaction is to honour the daughter's son, and some meagre gift for his ceremonies which would only make him ridiculous in the eyes of the neighbours would not fulfil this obligation. It may be taken then that the quantum of this alienation is reasonable, and one need not embark on an argument as to whether feeding an idol is or is not more meritorious than honouring a daughter's son. Both involve an expenditure "reasonable according to the common

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notions of Hindus" and that is sufficient justification for the impugned sale.

In the judgment under appeal it is stated: "we have here no purpose connected with the husband's spiritual welfare"; a proposition which we should not think of questioning as an authoritative statement of Hindu doctrine, but we are not so much concerned with what is the correct doctrine as with "the common notions of the Hindus". The pious endeavour of this widow to promote her husband's spiritual bliss by honouring his daughter's son may for aught we know in its result fall short of her intention; but so long as she acted with piety and in consonance with prevalent notions we do not think it incumbent upon us to interfere any more than the Judicial Committee interfered with the gift to the idol. No doubt there is much conflict in the authorities as observed by our late Chief Justice in *Srinivasa-raghavachariar v. Rajagopalachariar*(1), and little will be gained by attempting to piece them together into a coherent pattern—for instance discussing whether if a daughter's daughter may be honoured at marriage, the same does or does not apply to a son and so on. We prefer to base our judgment simply upon *Sardar Singh v. Kunj Bihari Lal*(2), with the satisfaction that substantial justice has been done; and the result is not, as is candidly admitted in the judgment under review, one which a Court of law would like to avoid.

The appeal is allowed with costs throughout.

A.S.V.

(1) (1926) 54 M.L.J. 618.

(2) (1922) I.L.R. 44 All. 503 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Butler.

RAMAN NAMBYAR AND FOUR OTHERS (APPELLANTS),
APPELLANTS,

1934,
February 14.

v.

KIZHAKKEKOOTIL PULASSERI THEKKK KOVILAKATH UNNIKATUNGI
NEDUNGETHIRIPAD styled RAYIRAM NAMAN AND
FOUR OTHERS (RESPONDENTS), RESPONDENTS.*

Order—Appeal from—Right of—Test of—What Court purported to do and not what it should have done.

When a Judge purports to act under an Order which is appealable, an appeal lies, even though he ought to have acted on some other Order which is not appealable. The right of appeal is determined by what the Court purported to do, and not by what the Court should have done.

APPEAL under Clause 15 of the Letters Patent against the judgment of CURGENVEN J., dated 21st October 1931 and passed in Appeal against Order No. 248 of 1929 preferred to the High Court against the order of the Court of the Subordinate Judge of South Malabar at Ottapalem dated 26th November 1928 and made in Original Suit No. 7 of 1928.

C. S. Venkatachariar for *C. S. Swaminathan* for appellants.

K. Kuttikrishna Menon and *K. Kunhikrishnan Nair* for respondents.

The JUDGMENT of the Court was delivered by JACKSON J.—In the case under appeal the learned Judge passed an order under rule 21 of Order XI which is appealable under Order XLIII, rule 1. This Court on civil miscellaneous appeal held that

JACKSON J.

* Letters Patent Appeal No. 104 of 1931.

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the order should have been one following upon non-compliance with Order VI, rule 5, which presumably would be under section 151. The question for our determination is whether when a Judge purports to act under an Order which is appealable, an appeal lies, even though he ought to have acted on some other Order which is not appealable. No doubt in considering whether an appeal is admissible the Court always looks to the substance rather than the form of the order so as not to deny a party his right of appeal. But it would be a very dangerous analogy to deny a party the right of appeal on the ground that only the substance and not the form can be looked into. Because, although the form may be technically wrong, until it is appealed against, it is substantially effective. That is to say, a party confronted with an order purporting to be under rule 21 of Order XI is bound by that order unless he appeals against it, and it will be an absolute negation of justice when he does appeal to tell him that he has no appeal because it ought to have been an order under some other rule. This principle which in itself is fairly obvious is abundantly supported by the reported cases of which it is only necessary to cite *Nasir Khan v. Itwari*(1), *Basumati Debi v. Taritbasani Dasi*(2), *Agent, Bengal Nagpur Railway v. Behari Lal Dutt*(3) and *Gopal Singh v. Mangal Singh*(4). The learned Judge who has decided the last of these cases puts the matter clearly and succinctly :

"It has been urged by Counsel for the respondent that the remand is not under Order XLI, rule 23, but under section

(1) (1923) I.L.R. 45 All. 669.
(3) (1925) I.L.R. 52 Calc. 783.

(2) (1918) 31 C.L.J. 354.
(4) (1927) 107 I.C. 284.

151 and, therefore, no appeal lies. But the right of appeal is determined by what the Court purported to do, and not by what the Court should have done and, therefore, this objection has no force."

We therefore find that an appeal lies and the Subordinate Judge will be directed, if necessary, to put his order into proper form. We say, if necessary, because it has been suggested that in the present circumstances this question has become academic ; but that is a matter upon which we have no precise information. The appellant is allowed his costs in this appeal. The costs in the appeal before CURGENVEN J. will abide the result.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

PEDDA VENKATA REDDI AND ANOTHER (DEFENDANTS),
APPELLANTS,

v.

VITTA HUSSAIN SETTI (PLAINTIFF), RESPONDENT.*

Indian Stamp Act (II of 1899), sec. 36—Applicability of, to documents which form the foundation of the suit—Promissory note admitted as a bond on payment of penalty—Effect of.

In a suit on a document described as a "promissory note bond" the trial Court found that the document was a "bond" within the meaning of the term under the Indian Stamp Act and levied a penalty on the document and admitted it in evidence.

Held, in appeal, that, even assuming that the suit document was a promissory note, it having been admitted in evidence by

* Appeal No. 26 of 1929.

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the payment of a penalty, its admission could not thereafter be called into question.

Held, further, that section 36 of the Indian Stamp Act applies not only to documents admitted in the course of evidence in support of subsidiary points arising in the suit but also to cases where the documents in question form the foundation of the suit.

APPEAL against the decree of the Court of the Subordinate Judge of Kurnool in Original Suit No. 24 of 1926 (Original Suit No. 3 of 1925 on the file of the District Court of Kurnool).

The Advocate-General (Sir A. Krishnaswami Ayyar) and P. Srikantan for appellants.

S. Varadachariar for P. C. Parthasarathi Ayyangar for respondent.

Cur. adv. vult.

THE JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—Defendants are the appellants. In this appeal we are concerned only with the decree passed against the defendants for one of the suit amounts, namely, the amount due under Exhibit J, called “the promissory note bond,” executed on the 25th March 1921 by the father of the defendants. That “note-bond” was in renewal of a previous “note-bond” Exhibit H, executed on the 8th September 1917. The defendants’ contention on the merits of the case is that both these notes are concoctions by the plaintiff and that they are therefore not liable to pay the amount claimed. They also raise a legal objection that Exhibit J is a promissory note, and that being insufficiently stamped it should not have been accepted in evidence by the lower Court. The learned Subordinate Judge overruled both the contentions and gave a decree in favour of the

plaintiff. On the question of law he held that the suit note is a “bond” within the meaning of the term under the Stamp Act. Accordingly he levied a penalty on the document and admitted it in evidence.

The document is in these terms :

“On the 25th March 1921 the promissory note bond executed in favour of Vitta Hussain Setti of Gadikota village by Peruma Reddi Bussa Reddi of Ravipadu village is as follows:—Under the note-bond executed ere now on the 8th September 1917 the balance found due as per accounts settled in person up to date is Rs. 5,080; I shall pay (this) sum of Rupees five thousand and eighty with interest thereon at 7 annas per cent per mensem, the principal and interest within a year from this date. If I fail so (as) to pay I shall pay with interest at 8 annas per cent per mensem the principal and interest to you or to your order on demand. Such is the pro-note bond executed willingly of my own free will.”

The first issue in the suit was whether the suit document dated 25th March 1921 is a bond or a promissory note. On this issue the learned Judge held, as already stated, “the document in question cannot be treated as a promissory note, but is to be treated as a bond. The issue is found for the plaintiff.” On the third issue, “if a pro-note, whether it is not invalid for want of proper stamp”, the learned Judge held, “if the document is to be taken as a pro-note there can be no denying that it is invalid for want of proper stamp.” Having regard to the finding on the third issue the learned Advocate-General argues that it cannot be taken that the learned Judge has definitely found that the suit note is a bond and has admitted it in evidence as such. We cannot accept this argument. The finding on the third issue which is conditional cannot detract from the definiteness of the finding on the first issue. In our opinion the lower Court

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has definitely found that the suit note is a bond and has admitted it in evidence levying penalty on it. This having been done, the question whether the suit note is a promissory note or a bond, which is really a debatable one, does not necessarily arise for decision, for, under section 36 of the Stamp Act,

“where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61 (this exception does not apply to the present case) be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.”

In this connection attention may also be drawn to section 42, clause 2, of the Act. After referring to endorsements on instruments on which duty has been paid under sections 35, 40 or 41, clause 2 of section 42 says :

“Every instrument so endorsed shall thereupon be admissible in evidence, and may be registered and acted upon and authenticated as if it had been duly stamped, and shall be delivered on his application in this behalf to the person from whose possession it came into the hands of the officer impounding it or as such person may direct: Provided, etc.” (The provisos do not apply to the present case.)

Even assuming that the suit document is a promissory note, it having been admitted in evidence by the payment of a penalty, its admission cannot thereafter be called into question. This law is well-settled; see *Ramasami v. Ramasami*(1), *Venkatarama Aiyar v. Chella Pillai*(2) and *Venkateswara v. Ramanatha*(3). The learned Advocate-General sought to draw a distinction namely, that section 36 does not apply to case where the document in question forms the foundation for the suit but only applies to instrument

(1) (1882) I.L.R. 5 Mad. 220.

(2) (1920) 40 M.L.J. 479.

(3) A.I.R. 1929 Mad. 622.

admitted in the course of evidence in support of subsidiary points arising in the case. There is no authority in support of this distinction. We therefore hold that it is not now open to the appellants to argue that Exhibit J should be rejected on the ground that it is a promissory note and was insufficiently stamped at the time of its production.

The next question relates to the merits of the case. Basing his arguments on some of the findings of the lower Court, the learned Advocate-General was able to put forward a case *prima facie* somewhat strong; but on closer examination of the facts it will be found that the appeal has no merits to support it.

[His Lordship discussed the evidence and agreed with the conclusions of the Subordinate Judge and dismissed the appeal with costs.]

G.R.

APPELLATE CIVIL.

Before Mr. Justice Jackson.

VENKATAKRISHNA REDDI (PLAINTIFF), PETITIONER,

v.

BATCHA REDDI (DEFENDANT), RESPONDENT.*

Indian Stamp Act (II of 1899), sec. 36—Understamped promissory note admitted in evidence—Effect of—Such document admitted by trial Court as an acknowledgment—If could be treated as a promissory note by appellate Court.

When once a document has been admitted, the question of its admissibility on fiscal grounds is finally set at rest under section 36 of the Indian Stamp Act. Where a trial Court admits

* Civil Revision Petition No. 1199 of 1930.

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VENKATA-KRISHNA REDDI v. BATCHA REDDI. an understamped promissory note merely as an acknowledgment, it is open to the appellate Court to treat it as a promissory note.

Gopala Padayachi v. Rajagopala Naidu, A.I.R. 1926 Mad. 1148, dissented from.

Venkata Reddi v. Hussain Setti, (1933) I.L.R. 57 Mad. 779, followed.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the decree of the District Court of South Arcot, dated 12th September 1929 and passed in Appeal Suit No. 127 of 1929, preferred against the decree of the Court of the District Munsif of Cuddalore in Original Suit No. 465 of 1928.

T. E. Ramabhadrachariar for petitioner.

T. V. Ramanathan and *T. D. Srinivasachariar* for respondent.

Cur. adv. vult.

JUDGMENT.

Plaintiff sues defendant for Rs. 300 on the allegation that he advanced this amount to defendant who agreed to repay it at twelve per cent interest. "In support of this" he executed a document understamped for a promissory note. The District Munsif admitted the document as an acknowledgment, found the agreement to be proved and decreed the suit.

The District Judge disbelieved the story of the prior agreement and held it to be an ordinary promissory note transaction. Accordingly he dismissed the suit.

In revision it is pleaded that he was not entitled to reverse the decree on the mere ground of an improper admission of the promissory note.

The lower Court dismissed the suit because it did not believe the evidence of the prior contract,

not on the mere ground that the document was improperly admitted; and if the Deputy Registrar had read the papers he would never have admitted this civil revision petition.

Now two points are taken. Firstly, that the cause of action was merely the defendant's possession of plaintiff's money under a contract which had become void, and the money was recoverable under section 65 of the Contract Act. That is not the case which plaintiff brought to Court; for he pleaded a definite agreement, and only failed because the Judge thought his evidence false.

Secondly, that, having found it to be a promissory note transaction, the Judge should have decreed it as such. Again this fails on the short ground that it is not plaintiff's original plea. A party cannot plead an antecedent debt and acknowledgment, and then complain of gross irregularity because he is not given a decree upon a promissory note.

The argument in this Court has ranged over the question whether when the trial Court admits an understamped promissory note merely as an acknowledgment, the appellate Court can treat it as a promissory note. In the light of what has been stated above this question is merely academic but it requires an answer because the cases cited are not consistent. The correct view of the law is undoubtedly that once a document has been admitted, the question of its admissibility on fiscal grounds is finally set at rest. The appellate Court may apply its mind to the nature of the document unfettered by any extraneous consideration. But in *Gopala Padayachi v. Rajagopala Naidu*(1) it

(1) A.I.R. 1926 Mad. 1148.

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has been ruled by a single Judge that the appellate Court is not bound under section 36 of the Stamp Act to admit the document any further or for any other purposes than the lower Court has admitted it. Of course it was never suggested that the statute bound the Court to go further; what is meant is that under the statute if the lower Court has admitted a document say as an acknowledgment, the appellate Court is free to refuse to consider whether it is a promissory note. It may take the view of the lower Court as final not only as regards the admissibility but as regards the character of the document. As observed just above this passage:

"I am not at present prepared to go further and admit the respondent's contention that, once it has been admitted it can be used for any purpose."

Then as the learned Judge points out the Full Bench decision in *Devachand v. Hirachand Kamaraj* (1) is against him, but he satisfies himself that he can distinguish that case. It is, however, indistinguishable. In the Bombay case the lower Court admitted a khata as a bond, and the appellate Court was asked to treat it as a promissory note. In the Madras case the document was admitted as an acknowledgment and the appellate Court was asked to treat it as a promissory note. Bombay agreed, Madras refused; and both cannot be right. It is not easy to discover the principle upon which the Madras ruling is founded. Starting with the general presumption that an appellate Court has an unfettered mind, how can it be said that when the Judge picks a certain document out of the record which he holds to be a promissory

(1) (1889) I.L.R. 13 Bom. 449 (F.R.)

note, he is constrained to rule that it is an acknowledgment? In his dissenting judgment in *Devachand v. Hirachand Kamaraj* (1) BIRDWOOD J. frankly reverts to the question of admissibility, and refuses to admit the khatas as promissory notes because they are not stamped as such, and are

"waste paper absolutely inadmissible in evidence" (page 474).

And that seems to be the only possible reason for the rejection; but it drives a coach and four through a whole mass of statutory and case law.

As the point was academic yet not without practical interest, I consulted my learned brother ANANTAKRISHNA AYYAR J. and his note is so valuable that I have no hesitation in placing it upon this record.

He says:—

It seems to me that when the principle underlying the section is properly appreciated, the answer to the question is clear. As remarked by BOWEN L.J., in a similar matter relating to stamp objection, "the rule has a historic origin."

Section 31 of the Common Law Procedure Act, 1854—17 and 18 Vict. C. 125—enacted as follows:—

"No new trial shall be granted by reason of the ruling of any Judge that the stamp upon any document is sufficient or that the document does not require a stamp."

Order XXXIX, rule 8 of the Rules of the Supreme Court (England) 1883, enacts as follows:—

"A new trial shall not be granted by reason of the ruling of any Judge that the stamp upon any document is sufficient or that the document does not require a stamp."

Accordingly, it was held in *Blewitt v. Tritton* (2) by the Court of Appeal that "where a Judge trying an action, without a jury, rules that the stamp upon any document is sufficient, or that the document does not require a stamp, the decision is

(1) (1889) I.L.R. 13 Bom. 449 (F.B.).

(2) [1892] 2 Q.B. 327.

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final, and no appeal lies to the Court of Appeal by way of application for a non-suit, or to enter judgment, or for a new trial."

It was in that case that BOWEN L.J. stated that "the rule has a historic origin".

After quoting the provisions of section 31 of the Common Law Procedure Act, 1854, his Lordship observed as follows:—

"The Courts put on that enactment the construction that the Legislature intended that that should not be done indirectly which could not be done directly and that the decision of the Judge that a stamp was sufficient must be final in all cases."

The observation of WILLES J. in *Siordet v. Kuczynski*(1) to the following effect is then referred to:—"When once a document has passed the ordeal of an investigation at *Nisi Prius* as to its liability to stamp duty or the sufficiency of the stamp, it should be subjected to no further discussion"; and the learned Lord Justice concluded the discussion as follows:—"I therefore come to the conclusion that the rule intended that the decision of the Judge in favour of the sufficiency of the stamp should be final and not open to review."

LORD ESHER M.R. and KAY L.J. were also of the same opinion.

As observed by WILLES J. in *Siordet v. Kuczynski*(1): "It may be otherwise, if the Judge rules against the admissibility of the document and the party offering it in evidence prefers to take the opinion of the Court,"

Therefore, as remarked by WILLIAMS J. in the same case: "If there is enough to induce the Judge to admit the document at *Nisi Prius*, I think the Legislature intended that his decision should be final, but that, if the Judge ruled against its admissibility, the party aggrieved has the right of appeal with a view to have the document admitted." See also *Mander v. Ridgway*(2) and *Lowe v. Dorling*(3); [*Sharples v. Rickard*(4)—appeal lies if document be rejected].

This principle has been evidently followed by the Indian Legislature also.

(1) (1855) 17 C.B. 251; 139 E.R. 1067.

(3) (1905) 74 L.J. K.B. 795.

(4) (1857) 2 H. and N. 59; 157 E.R. 24.

(2) [1898] 1 Q.B. 501.

The ruling of the Full Bench of the Bombay High Court in *Devachand v. Hirachand Kumaraj*(1) was given under section 34 of the Stamp Act I of 1879. There were various rulings of the Indian High Courts to the effect that "when a document was once admitted as evidence overruling the plea raised on ground of insufficiency of stamps, the question could not be raised in the appeal Court."; see *Khoob Lall v. Jungle Singh*(2), *Enayetoolah v. Shaikh Meajan*(3) and *Reference under section 46 of the Indian Stamp Act*(4).

A Full Bench of five learned Judges of our High Court held in *Reference under section 46 of the Indian Stamp Act*(4): "Where a document has been admitted in evidence as duly stamped, such admission could only be called in question by the appellate Court under section 50"; that is, only with a view of levying penalty.

The reasoning is found in *Enayetoolah v. Shaikh Meajan*(3), where the learned Judges observed as follows:—"We think that the provisions of the stamp law by which unstamped or insufficiently stamped documents are excluded were never intended to create or put an end to the rights of the parties to a suit, but primarily in the interests of the Government revenue. It is perfectly immaterial as between the parties to a suit whether a certain document does or does not bear a certain mark which goes to show that the Government dues had been paid. The only thing which is necessary to be seen as between them is whether the document is genuine or not." The Court accordingly held that "where a document is admitted by the first Court as not requiring a stamp, its admissibility cannot be questioned in appeal." Section 35 uses the words "no instrument chargeable with duty shall be admitted for any purpose unless such instrument is duly stamped." The inference from the wide wording of section 36 is that when once a writing has been admitted in evidence, no question of stamp relating thereto could be raised in connection with the same, in those proceedings either in the first Court, or in the Court of appeal in which the same proceedings are continued or carried to. Section 36 removes the bar completely, regarding the admissibility of the document in the case contemplated by it.

(1) (1889) I.L.R. 13 Bom. 449 (F.B.).

(2) (1878) I.L.R. 3 Calc. 787.

(3) (1871) 16 W.R. (Civ. Rul.) 6.

(4) (1885) I.L.R. 8 Mad. 564 (F.B.).

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As remarked by RANKIN C.J. in *Nirode Basini Mitra v. Sital Chandra Ghatak*(1), "these stamp matters are really no concern of the parties, and if the objection was taken at the time when the record was made up by the trial Court, there it might be rejected; if not the matter stopped there."

There are similar observations of MOOREJEE and BEACHCROFT JJ. in *Sitaram v. Ramprasad Ram*(2) at page 90:—"The document must thus be treated as part of the evidence on the record."

This is the idea underlying various decisions of the Indian High Courts, including decisions of Benches of this Court. It seems to me, therefore, that the observation in *Gopala Padayachi v. Rajagopala Naidu*(3) that "the appellate or revisional Court is not bound to admit the document any further or for any other purpose than the lower Court has admitted it", is (speaking with all respect) not tenable, and should not be followed.

For our present purposes it is sufficient to emphasize the dictum of WILLES J.—

"When once a document has passed the ordeal of an investigation at *Nisi Prius* as to its liability to stamp duty, it should be subjected to no further discussion."

Obviously in the light of these rulings an appellate Court cannot say that it would like to interpret a document as a promissory note, but is precluded from so doing because it is not properly stamped.

The latest pronouncement upon the question is the Bench ruling in *Venkata Reddi v. Hussain Setti*(4) to which I myself was a party.

"Even assuming that the suit document is a promissory note, it having been admitted in evidence by the payment of a penalty its admission cannot thereafter be called in question."

This really would have been sufficient to decide the question; but seeing how often it is raised, I have discussed it in full. The civil revision petition is dismissed with costs.

G.R.

(1) (1930) 51 C.L.J. 563.
(3) A.I.R. 1926 Mad. 1148.

(2) (1913) 19 C.L.J. 87, 90.
(4) (1933) I.L.R. 57 Mad. 779.

APPELLATE CIVIL.

Before Mr. Justice Curgenvven and Mr. Justice
Pakenham Walsh.

THIRUMALA CHETTIAR, PETITIONER,

v.

CHELLAM PILLAI, RESPONDENT.*

Election dispute—Order of Election Commissioner declaring election void and directing re-election—Writ of certiorari against, if lies—Local Board Rules—R. 6 and amended r. 1 (3) of—Effect of—Presentation of election petition to Election Commissioner—What amounts to.

A writ of *certiorari* lies against the order of an Election Commissioner declaring an election void and directing a re-election. The amended rule 1 (3) of the Local Board Rules does not exclude the jurisdiction of the High Court to issue such a writ. The amendment has had no effect in altering the character of the inquiry which the Election Commissioner has to undertake or in making it any the less a proceeding of a judicial character.

The rule requiring an election petition to be presented to the Election Commissioner is sufficiently complied with by so presenting it as to enable it to reach the hands of the Election Commissioner. It is not necessary that it should be placed in his hands.

PETITION praying that in the circumstances stated therein the High Court will be pleased to issue an order calling for the records in Original Petition No. 72 of 1932 on the file of the Court of the District Munsif of Ambasamudram and directing the issue of a writ of *certiorari* vacating the order of the said Court of the District Munsif of Ambasamudram acting as Election Commissioner dated the 19th day of July 1933 and passed in the said Original Petition No. 72 of 1932 declaring the

* Civil Miscellaneous Petition No. 3918 of 1933.

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election of the petitioner therein void and directing a re-election in the said Original Petition No. 72 of 1932 on his file.

B. Sitarama Rao for petitioner.

T. M. Krishnaswami Ayyar and K. V. Ramachandra Ayyar for respondent.

CURGENVEN J. The JUDGMENT of the Court was delivered by CURGENVEN J.—This is an application for a writ of *certiorari* to vacate the order of the District Munsif of Ambasamudram as Election Commissioner in Original Petition No. 72 of 1932 on his file. The order declared the election of the petitioner void and directed a re-election.

We have heard some argument as to whether a writ of *certiorari* lies against the order of an Election Commissioner. Mr. T. M. Krishnaswami Ayyar has scarcely contested that on all ordinary principles such a writ would lie, the test of course being whether the officer against whose proceeding it is directed was acting in a judicial capacity. A construction of that phrase which we think we may adopt here has been given by SCRUTTON L.J. in *Rex v. The London County Council; The Entertainments Protection Association, Ex parte*(1) where he says :

“It is enough if the tribunal in question is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition.”

In the present case it is clear that the tribunal was exercising functions of a judicial character and indeed by rule 6 of the Local Board Rules for the decision of disputes it is provided that every election petition shall be enquired into as nearly

(1) [1931] 2 K.B. 215.

as may be in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits. The only case decided on this point is a decision of BARDSWELL J. in *Shanmuga Mudaliar v. Subbaraya Mudaliar*(1). But the learned Judge was not there called upon to discuss whether a writ would lie.

A more specific objection has been raised that the amended rule 1 (3) of the Local Board Rules has been so framed as intentionally to exclude the jurisdiction of this Court to issue a writ. What appears to have happened is that the Full Bench ruling in *Parthasaradhi Naidu v. Koteswara Rao*(2) held that an Election Commissioner was not a *persona designata* but a Court, so that the ordinary revisional procedure of this Court would have application. The amendment was evidently designed to exclude that jurisdiction. But it has had no effect in altering the character of the inquiry which the Election Commissioner has to undertake or in making it any the less a proceeding of a judicial character. And we think it is not arguable that the Legislature can directly or indirectly deprive this Court of the jurisdictional powers which it has in the case of all such judicial proceedings, or indeed that any such result was contemplated by the amendment. Accordingly we think that a writ will lie in a case of this character.

It is not to be disputed however that it is of a purely discretionary character and only to be resorted to where the merits of the case call for it. We can find no such merits in the present instance. The first point raised is that the petition was presented not directly to the District

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(1) (1932) 63 M.L.J. 932.

(2) (1923) I.L.R. 47 Mad. 369 (F.B.).

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Munsif in his capacity as Election Commissioner but to his Head Clerk. The rule certainly says that it shall be presented to the Election Commissioner but it does not, like, for instance, the Civil Procedure Code in the case of a plaint, require any intermediary for this purpose to be specially appointed by the Officer. There is no question that in the present case the petition reached the hands it was intended for and we think that the rule was sufficiently complied with by so presenting it and that it would be too strict a construction to require that it should be placed in the hands of the District Munsif himself. The objection that the deposit of Rs. 25, which has to be made with the application, was not so made appears to be without any foundation because we find that it was tendered on the date of presentation, 11th June, and accepted on that date. It is lastly said that the learned Election Commissioner has not recorded a definite finding upon the question whether the petitioner committed an offence described in rule 10 of the rules, viz., that he should have committed or abetted the commission of any election offence falling under section 58 of the Act. The finding appears to be that in the case of three voters the present petitioner stated to the Polling Officer that they were the real voters and this was found to be untrue, and the cases were found to be cases of false personation. The learned District Munsif has not stated this in very clear language but that undoubtedly is the finding at which he has arrived and we cannot interfere with it. The application is accordingly dismissed with costs. Vakil's fee Rs. 100.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Sundaram Chetti and Mr. Justice Pakenham Walsh.

THIAGARAJA THEVAR (SECOND RESPONDENT), APPELLANT,

1933,
November 9.

v.

SAMBASIVA THEVAR (PETITIONER), RESPONDENT.*

Execution Petition—Jurisdiction to deal with—Court having no jurisdiction at time of presentation of petition but acquiring jurisdiction before it comes up for disposal.

A Court is not obliged to dismiss an execution petition which it has jurisdiction to deal with when the matter comes up for decision merely because it had not jurisdiction at the time when the petition was filed.

APPEAL against the order of the Court of the Subordinate Judge of Tiruvarur, dated 24th February 1933 and made in Execution Petition No. 108 of 1931 in Original Suit No. 55 of 1920 (on the file of the Court of the Subordinate Judge of Negapatam).

A. V. Viswanatha Sastri for appellant.

T. M. Krishnaswami Iyer for *T. D. Srinivasa-chari* for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by PAKENHAM WALSH J.—A final mortgage decree was passed in Original Suit No. 55 of 1920 on 3rd August 1922 by the Sub-Court of Negapatam which had then jurisdiction over the hypotheca. On the 1st October 1923 territorial jurisdiction was vested in the Sub-Court of Tiruvarur. The

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* Appeal against Order No. 191 of 1933.

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original decree-holder filed in the latter Court an execution petition on 28th April 1924 which was dismissed for non-payment of batta. He filed another execution petition on 11th September 1924 before the same Court which was dismissed for a similar reason. The assignee decree-holder filed an execution petition before the same Court on 17th August 1926 asking for recognition of the transfer and an order for execution. It was numbered as Execution Petition No. 31 of 1927. On this application the assignment was recognized and execution was ordered; but as no steps were taken the petition was dismissed. On 18th October 1929 the assignee decree-holder put in another execution petition which was dismissed for non-payment of batta. Finally the present execution petition was put in on 15th July 1931 also before the Sub-Court, Tiruvarur. Various objections were taken to its execution, but they were overruled and execution was ordered. Against this order the second defendant has appealed. The view as to which is the proper executing Court, when territorial jurisdiction over the hypotheca has been transferred to another Court, has varied so far as this High Court is concerned. The original view taken in *Subbiah Naicker v. Ramanathan Chettiar*(1) was that it was the Court having territorial jurisdiction, and not the Court which passed the decree, which had the power of execution. The next stage was the view taken in the Full Bench case of *Seeni Nadan v. Muthusamy Pillai*(2) that both the Courts had concurrent jurisdiction. That is the view which prevailed until the Bench

(1) (1914) I.L.R. 37 Mad. 462. (2) (1919) I.L.R. 42 Mad. 821 (F.B.).

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case reported in *Subramanya Iyer v. Swaminatha Chettiar*(1), dated 17th February 1928, in which RAMESAM and DEVADOSS JJ. held that, when the Court having territorial jurisdiction was situated in a different district from the Court which passed the decree, it had no jurisdiction unless the decree was transmitted to it. This was followed by the Full Bench case of *Ramier v. Muthukrishna Ayyar*(2), dated 18th January 1932. In that case both the Courts were in the same district but, for reasons to be noted presently, it is not clear whether the Full Bench held that the Court in whose territory the hypotheca lay was entirely devoid of jurisdiction or merely exercised it irregularly as the decree had not been transferred to it by the Court which passed it. It will be noticed that in the present case the first three execution petitions were put in at a time when the view was that such an application could be made directly to the Court in whose territory the hypotheca lay.

Various contentions, as noted above, were raised against the execution of the present petition, such as, that the decree had been satisfied, that the minor was not properly represented in the suit, etc. But the only points taken in appeal are legal ones. It is contended that all the execution petitions, including Execution Petition No. 31 of 1927, were made to a Court entirely devoid of jurisdiction. Therefore they were incompetent. The present execution petition even if competent would be barred by limitation. Even assuming that Execution Petition No. 31 of 1927 was merely entertained irregularly, it was

(1) (1928) 28 L.W. 885. (2) (1932) I.L.R. 55 Mad. 801 (F.B.).

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contended that service by affixture was not certified by the Court, and the order passed on it was not therefore *res judicata* and further even if it were *res judicata* the irregular exercise of jurisdiction and the passing of orders on it would not enure to the benefit of the assignee decree-holder in subsequent execution petitions. With regard to the question whether the Tiruvarur Sub-Court was totally devoid of jurisdiction to entertain the petition, Execution Petition No. 31 of 1927, in which case it is not disputed that no order passed on it would bind the appellant, the lower Court relied on the remarks of RAMESAM J. in *Subramanya Iyer v. Swaminatha Chettiar*(1) that

“if both the Courts are situated in the same district, seeing that the transfer might be made directly from the first Court to the second Court without the intervention of any superior Court, it may be said that the objection by reason of the language of section 38 or, in other words, by reason of the irregularity that the decree has not been formally sent to the second Court which has territorial jurisdiction, is not fatal to the competency of the second Court to pass the order.”

RAMESAM J. delivered the Full Bench judgment in the case of *Ramier v. Muthukrishna Ayyar*(2) and he several times alludes to his judgment in *Subramanya Iyer v. Swaminatha Chettiar*(1). As stated above, this Full Bench case of *Ramier v. Muthukrishna Ayyar*(2) related to Courts in the same district. It arose out of an objection which had been taken at the time to the jurisdiction of the Court to entertain the petition, and the decision would therefore have been justifiable even had this exercise of jurisdiction been a mere irregularity, unless indeed section 99 of the

(1) (1928) 28 L.W. 885, 894-95.

(2) (1932) I.L.R. 55 Mad. 801 (F.B.).

Code of Civil Procedure had been held to apply. But the point whether section 99 applied or not does not appear to have been raised and consequently we find no clear expression of opinion in the judgment that it was a case of total want of jurisdiction. Such an opinion would have run counter to that expressed by RAMESAM J. himself in *Subramanya Iyer v. Swaminatha Chettiar*(1). Subsequent to this Bench case there has been a decision of the Privy Council in *Jang Bahadur v. Bank of Upper India, Limited, in Liquidation*(2) with regard to section 50 (1). In that case a decree had been transferred by the Court which passed it. It was held that the original Court which passed the decree was still the proper Court to order execution to proceed against the representative of the deceased judgment-debtor, but that the transferee Court doing so was a mere irregularity in procedure and not a matter of want of jurisdiction. For reasons to be given presently we find it is unnecessary in the circumstances of the present case to decide either the question whether the order on Execution Petition No. 31 of 1927 was invalid for want of jurisdiction or was a mere irregularity, and whether in the latter case the order passed on it was *res judicata* only for the purpose of that execution petition, or would also be *res judicata* in subsequent execution petitions in the sense that the Sub-Court, Tiruvarur, had jurisdiction to execute this decree. The reasons which render it unnecessary to determine these somewhat difficult questions are (i) that the Sub-Court, Nega-patam, was abolished in June 1932 so that the

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(1) (1928) 28 L.W. 885.

(2) (1928) I.L.R. 3 Luck. 314 (P.C.).

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final order now appealed against, dated 24th February 1933, was passed by the Tiruvarur Sub-Court when it had full jurisdiction to entertain an execution petition; (ii) it becomes unnecessary to determine the question of limitation because the judgment-debtor put in a petition to amend the decree and this was ordered on the 18th August 1932. Subsequently limitation under the 4th clause of article 182 of the Limitation Act will begin to run from the date of amendment. The Privy Council decision in *Nagendranath De v. Sureshchandra De*(1) shows that the words in that column against article 182 of the Limitation Act must be read in their exact sense. That was a stronger case for it was one of an appeal which had been dismissed as insufficiently stamped. Their Lordships held that it was nevertheless an appeal. They say that the question must be decided upon the plain words of the article "where there has been an 'appeal'" and that the time is to run from the date of the decree of the appellate Court:

"There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide."

This ruling was followed in the case of review by JACKSON and MOCKETT JJ. in *Ramayya v. Kotayya*(2).

(1) (1932) I.L.R. 60 Calc. 1 (P.C.).

(2) (1932) 64 M.L.J. 75.

It is therefore clear that if the assignee decree-holder had put in the present petition subsequent to the abolition of the Negapatam Sub-Court there would have been no question as to the jurisdiction of the Tiruvarur Sub-Court to entertain it, and, as the order was passed after the amended decree, it is the amended decree which the decree-holder must execute and limitation to apply for execution would begin from the date of the amendment, 18th August 1932. There remains therefore only the question whether, assuming that the Court was totally without jurisdiction or could only exercise its jurisdiction irregularly at the time when the present execution petition was filed, if it afterwards obtained jurisdiction before passing the order, it is bound to dismiss the petition merely on the ground that the Court had not jurisdiction at the time when the petition was filed. It has been argued that, because in the converse case, a party who has instituted a suit before a Court has lost jurisdiction is still entitled to have the suit determined by that Court, the same principle must be applied to the case when the Court is vested with jurisdiction subsequent to the filing of the application, and the Court is bound to dismiss the petition in spite of having jurisdiction to decide it. In our opinion the two cases are quite distinct. In the former case the party is not owing to subsequent changes to be deprived of the rights which he had when he began proceedings. But we have been shown no case which holds that the Court is obliged to dismiss a petition which it has jurisdiction to decide at the time when the matter came up for decision merely because it had no jurisdiction at

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the time the petition was wrongly entertained. This would not of course mean that limitation could be extended so as to start from the day on which the Court obtained the jurisdiction, but, apart from the question of limitation, we do not see why a Court which has jurisdiction to pass orders on a petition is bound to dismiss it on the ground that at the time of the presentation it had not jurisdiction. As regards limitation we have said above that limitation against the amended decree, which is the only decree which can be executed, begins to run from the date of the amendment so that from that point of view execution is well within time.

The lower Court has recognized the transfer on the merits even apart from its finding that the former order rendered it *res judicata*.

The order of the lower Court is therefore confirmed and the appeal is dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Sundaram Chetti and Mr. Justice
Pakenham Walsh.

C. V. RARAN AND ANOTHER (PETITIONERS), PETITIONERS,
v.

K. T. KANDAN AND NINE OTHERS (COUNTER-PETITIONERS),
RESPONDENTS.*

1933,
November 10.

*Code of Civil Procedure (Act V of 1908), O. XXXII, r. 6—
Security bond executed by sureties under, undertaking
liability for minor plaintiff's claim against his next friend
in respect of monies of minor drawn from Court by next
friend and not properly accounted for—Enforcement of—
Mode of—Application under sec. 145 of the Code—Main-
tainability—Security bond not executed in favour of any
named officer of Court—Sureties not personally liable under
bond.*

The next friend of two minor plaintiffs was allowed to draw the decree amount on their behalf on furnishing security. A security bond was executed by certain sureties, whereby certain items of immovable property were hypothecated in respect of the amount drawn by the next friend and those properties were made liable for any claim of the minors as against their next friend in respect of the money drawn by the latter and not properly accounted for. The bond was not executed in favour of any named officer of the Court, nor was there any specific description indicating the person in whose favour the bond was executed. The sureties did not make themselves personally liable for any amount. On an application filed by the minor plaintiffs under section 145 of the Code of Civil Procedure for the enforcement of the security bond in respect of the amount drawn by their next friend and not properly accounted for by him,

Held (1) that the application under section 145 was clearly unsustainable;

(2) that, on that application, the Court might order the sale of the properties mentioned in the bond if the liability of the next friend was an unquestioned one;

* Civil Revision Petition No. 936 of 1930.

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(3) that, as no order for the sale of the properties could be made without determining the extent of the next friend's liability and the amount which the petitioners would be legitimately entitled to claim from him, and the Court was not competent to make such an enquiry and give a finding on the point on the application under section 145, any order for the sale of the properties on such an application would be premature, and the petitioners had only to file a separate suit for the purpose of having the question of the liability of the next friend determined.

PETITION under section 25 of Act IX of 1887, praying the High Court to revise the order of the Additional Subordinate Judge of the Court of the Subordinate Judge of South Malabar at Calicut, dated 17th July 1929 and made in Execution Petition No. 670 of 1928 in Small Cause Suit No. 730 of 1911.

K. P. Krishna Menon for petitioners.

P. S. Narayanaswami Ayyar for respondents.

SUNDARAM
CHETTI J.

The JUDGMENT of the Court was delivered by SUNDARAM CHETTI J.—This revision petition has been filed by two of the plaintiffs (decree-holders) under section 145, Civil Procedure Code, for the enforcement of the security bond executed by certain sureties, whereby three items of immovable property were hypothecated in respect of a certain amount drawn by the next friend of the minor plaintiffs on their behalf. Under the security bond, the properties would be liable for any claim of the minors as against their next friend in respect of the money drawn by the latter and not properly accounted for. The security bond is evidently one executed under Order XXXII, rule 6, Civil Procedure Code. The Court allowed the next friend to draw the decree amount after the aforesaid security was furnished. This

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security bond is not executed in favour of any named officer of the Court. In the absence of any specific description indicating the person in whose favour the security bond is executed, it must be deemed, according to the trend of this document, that it is one executed in favour of the Court. The lower Court held following the decision in *Kurugodappa v. Soogamma*(1) that this security bond is not enforceable under section 145, Civil Procedure Code. In the first place, unless the sureties have made themselves personally liable for any amount, they could not be proceeded against in execution by applying section 145. There is another reason in the present case for holding that section 145 is not applicable. It is only when a person has become liable as surety for the performance of any decree, or for the restitution of any property taken in execution of a decree, or for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon, that the Court can order execution against such a person. In the present case, none of these requisites is satisfied. The question is between the minor plaintiffs on the one hand and their next friend, on the other, in respect of the money drawn by the next friend on their behalf. This matter is not connected with the execution of the decree; nor is it a question between the parties to the suit. That being so, the application under section 145 for the enforcement of the security bond is clearly unsustainable.

(1) (1917) I.L.R. 41 Mad, 40.

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The next question is, what is the remedy open to the petitioners for the realisation of the amount due to them from their guardian? The lower Court seems to be of opinion that their remedy is only by a separate suit. In order to enable them to realise the amount due to them by the sale of the properties by means of a separate suit, an assignment of the aforesaid bond in their favour is necessary. The nature of the security bond has already been referred to. In the case of a bond like this, their Lordships of the Privy Council have held in *Raj Raghobar Singh v. Jai Indra Bahadur Singh*(1) that the Court not being a juridical person cannot take property and consequently cannot assign any security bond executed in its favour. It is observed that, where there is an unquestioned liability, there must be some mode of enforcing it and the only mode of enforcing it must be by the Court making an order in the suit upon an application to which the sureties are parties, and then the properties charged can be sold for the realisation of the amount due. This, according to their Lordships, would be the proper procedure and, although there is no specific provision in the Civil Procedure Code, the security bond has to be enforced by the Court in the exercise of its inherent powers. On the authority of this ruling, we can hold that, upon the present application by the petitioners, the Court may order the sale of the properties mentioned in the security bond, if the liability of the guardian is an unquestioned one. The difficulty in this case is that no order for the sale of the properties offered as security can be made

(1) (1919) I.L.R. 42 All. 158, 167 (P.C.).

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without determining the extent of the guardian's liability and the amount which the petitioners would be legitimately entitled to claim from him. Is the Court competent to make such an enquiry and give a finding on this point on the present application? As we have already observed, this is not a matter relating to execution, discharge or satisfaction of the decree, in which case under section 47, Civil Procedure Code, the Court would be justified in making an enquiry. Any order for the sale of the properties on an application like this would be premature, till the question relating to the liability of the next friend is determined. For that purpose, the petitioners have only to file a separate suit. It may be a suit for an account or for a declaration of the extent of the guardian's liability. On the strength of a declaration so obtained, the petitioners, in order to realise the amount found due to them, have to come up to the Court to which the security bond was given and apply for an order directing the sale of those properties for the realisation of that amount. We cannot express any definite opinion on the question whether a suit of that kind, if instituted, will be barred by limitation or not. All that we can say is that the petitioners may invoke for their aid section 14 of the Limitation Act for the exclusion of the time occupied in the prosecution of the present application, and the Court trying the suit will have to decide whether such exclusion is permissible or not. With these observations we dismiss the petition with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Cargenven and Mr. Justice Pakenham Walsh.

1934,
January 12.

CHATHANGALI RARICHAN *alias* APPU (PETITIONER),
(PETITIONER),

v.

PUVVAMPARAMBATH KUNHAMU AND ANOTHER
(RESPONDENTS), RESPONDENTS.*

Indian Limitation Act (IX of 1908), art. 182—"Proper Court" in column 3 of—Meaning of—Application to proper Court within meaning of art. 182—Provincial Insolvency Act (V of 1920), sec. 28 (2)—Application to Insolvency Court under, for leave to execute decree—Application to proper Court within meaning of art. 182 if—Judge in two Courts the same—Effect—Art. 182 (5) of Limitation Act—Step in aid of execution—Application to be a—Pending execution petition if necessary for—Sec. 78 (2) of Provincial Insolvency Act—Applicability of—Adjudication not annulled but leave granted to a person to pursue his remedy in ordinary Court.

"Proper Court" in column 3 of article 182 of the Indian Limitation Act means the Court whose duty it is to execute the decree or order. The Insolvency Court which is entirely a creature of the Provincial Insolvency Act is a different Court from the Court which is to execute a decree obtained independently of the Insolvency Act and the mere fact that the Judge is the same person will not make the two Courts the same. An application made by a decree-holder to the Insolvency Court for leave to execute his decree against the defendant under section 28 (2) of the Provincial Insolvency Act of 1920 is not an application made to the "proper Court" within the meaning of article 182 of the Limitation Act and is not therefore available to save limitation.

Semble: For an application to be a step in aid of execution it is not necessary that it should be made in a pending execution petition. The balance of decisions in the Madras High

* Civil Revision Petition No. 8 of 1933.

Court confirms the correctness of the view taken in *Sankara Nainar v. Thangamma*, (1921) I.L.R. 45 Mad. 202.

Quaere whether section 78 (2) of the Provincial Insolvency Act will or will not apply when the adjudication has not been annulled but leave merely granted to a particular person to proceed with his remedy in the ordinary Court.

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 Calicut, dated 21st June 1932 in Execution Petition No. 1480 of 1932 in Small Cause Suit No. 234 of 1922.

The petition came on for hearing before ANANTAKRISHNA AYYAR J. on 17th November 1933 when his Lordship made the following

ORDER OF REFERENCE TO A BENCH.

The application filed by the decree-holder on 17th March 1932 for execution of the decree in Small Cause Suit No. 234 of 1932 has been dismissed by the learned District Munsif on the ground that execution of the decree is barred by limitation. The learned District Munsif held that Execution Petition No. 173 of 1930 should not be taken to be a step in aid of execution because the defendant was an undischarged insolvent at that time. In this revision petition filed by the decree-holder, it is argued that there was an Interlocutory Application No. 424 of 1930 filed by the decree-holder on the 23rd July 1930 for leave to execute the decree against the defendant under section 28 (2) of the Provincial Insolvency Act, and that leave was granted to the decree-holder on the 26th August 1930. It is argued by the petitioner, decree-holder, that, assuming that Execution Petition No. 173 of 1930 would not be available as the starting point for limitation, yet, as Interlocutory Application No. 424 of 1930 was filed within three years of final orders passed on 5th January 1928 in the previous Interlocutory Application No. 210 of 1927, the present application was not barred as it was filed within three years from the orders passed on Interlocutory Application No. 424 of 1930. As the respondent is unrepresented, the learned Advocate for the petitioner very properly (and I am obliged to him for that) drew my attention to the fact that in *Kuppuswami Chettiar v.*

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Rajagopala Aiyar(1) it was decided by a Bench of this Court that an application to be a step in aid of execution should be made in a pending execution application. RAMESAM J.'s view to the contrary in *Sankara Nainar v. Thangamma*(2) was dissented from by the learned Judges in *Kuppuswami Chettiar v. Rajagopala Aiyar*(1). In *Krishna Patter v. Seetharama Patter*(3), however, the learned Judges seem to be inclined to hesitate to accept the view indicated in *Kuppuswami Chettiar v. Rajagopala Aiyar*(1) and remarked that if they really had to decide the question they should hesitate to accept that decision without further consideration of the matter in the light of the decided cases in our Court which have not been referred to in the decision in *Kuppuswami Chettiar v. Rajagopala Aiyar*(1). The learned Judges were however able to dispose of the matter before them in *Krishna Patter v. Seetharama Patter*(3). Having regard to the observations at page 54 of *Krishna Patter v. Seetharama Patter*(3) referred to above, I refer this civil revision petition to a Bench for disposal. At the request of the learned Counsel for the petitioner, and seeing that twelve years from the date of the decree would expire in a few months, this civil revision petition will be posted before a Bench next week.

ON THIS REFERENCE :—

C. S. Swaminathan for petitioner.

Respondents unrepresented.

Cur. adv. vult.

PAKENHAM
WALSH J.

The JUDGMENT of the Court was delivered by PAKENHAM WALSH J.—The petitioner in this case obtained a decree in Small Cause Suit No. 234 of 1922 on the file of the District Munsif's Court, Calicut. The decree was subsequently transferred for execution to the Court of the District Munsif, Vayitri. An execution petition, Execution Petition No. 1480 of 1932, dated 17th March 1932, was put in and was dismissed on the ground that it

(1) (1921) I.L.R. 45 Mad. 466.

(2) (1921) I.L.R. 45 Mad. 202.

(3) (1926) I.L.R. 50 Mad. 49.

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was barred by limitation. This revision petition has been preferred against that order. It came before ANANTAKRISHNA AYYAR J. and, on account of a difference in opinion between the view taken in *Sankara Nainar v. Thangamma*(1) "that an application to be a step in aid of execution need not be made in a pending execution application" and a doubt thrown upon that view in *Krishna Patter v. Seetharama Patter*(2), he referred the matter to a Bench.

It is necessary to state some further facts. It is not disputed that up till the date when Execution Petition No. 210 of 1927, dated 12th November 1927, was filed in the Court of the District Munsif of Vayitri execution proceedings had been kept alive. That petition was dismissed on 5th January 1928 because the judgment-debtor had applied to be adjudged an insolvent. The exact date of the insolvency does not appear on the records before us but, as it was registered as Insolvency Petition No. 2 of 1927, it must have been some time between 12th November 1927 and the close of that year. On 18th June 1930 the petitioner put in Execution Petition No. 173 of 1930 to arrest the judgment-debtor. That petition was ultimately dismissed on 26th August 1930 on the ground that no leave of the Insolvency Court had been obtained under section 28, clause 2, of the Provincial Insolvency Act. Meanwhile, on 23rd July 1930, the petitioner applied to the Insolvency Court by Interlocutory Application No. 424 of 1930 for permission to execute his decree. Leave was granted on 26th August 1930.

(1) (1921) I.L.R. 45 Mad. 202.

(2) (1926) I.L.R. 50 Mad. 49.

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This was also the date on which Execution Petition No. 173 of 1930 was dismissed. The next execution petition put in was the present one, Execution Petition No. 1480 of 1932, on 17th March 1932. That part of the petition which shows the previous steps taken is somewhat involved and obscure and on one point it is clearly incorrect. The material portion so far as it concerns the matter before us is as follows :

"Afterwards execution of the decree was applied for in Execution Petition No. 210 of 1927 and the decree was sent to the District Munsif's Court of Vayitri at Calicut. Under the orders of the said Court on Execution Petition No. 173 of 1930, the defendant was arrested and produced before the Court. The surety produced the security bond and caused the defendants to put in Insolvency Petition No. 2 of 1927. As discharge was not applied for afterwards, the insolvency petition was dismissed."

Now it is quite clear that it was not on the petition, Execution Petition No. 173 of 1930, that the defendant put in his insolvency petition as this is correctly enough described even in the application as being Insolvency Petition No. 2 of 1927. In the counter the plea of limitation was taken and it is clear both from the petition itself and from the counter, as well as from the way in which the matter was argued before the learned District Munsif, that it was Execution Petition No. 173 of 1930 which was relied on to save limitation. The learned District Munsif had dismissed that execution petition as noted above on 26th August 1930 following a Bench decision of this Court to which one of us was a party, *Ghouse Khan v. Bala Subba Rowther*(1), viz., that the petition was not in accordance with law as

(1) (1927) I.L.R. 51 Mad. 833.

leave of the Insolvency Court had not been obtained. He held that prior leave must be obtained to institute a suit during the pendency of the insolvency proceedings and that failure to do so cannot afterwards be cured. On this latter point he followed *Langtu Pande v. Baijnath Saran Pande*(1). In the revision petition before ANANTAKRISHNA AYYAR J. what was relied on was Interlocutory Application No. 424 of 1930, which petition does not at all appear to have been relied on before the lower Court, and was not even mentioned in the discussion of the previous proceedings in paragraph 6 of the present execution petition. It was on account of the difference in view between *Sankara Nainar v. Thangamma*(2) and *Krishna Patter v. Seetharama Patter*(3), as it affected Interlocutory Application No. 424 of 1930, that ANANTAKRISHNA AYYAR J. referred the matter to a Bench. Before us a third ground has been taken to save limitation, namely, that the petition, Execution Petition No. 210 of 1927, was suspended in its operation from 5th January 1928 till 26th August 1930 when leave was obtained by the operation of section 28, clause 2, of the Provincial Insolvency Act. Whether that ground was at all urged before ANANTAKRISHNA AYYAR J. we do not know. It is not mentioned in his order of reference, but it is of course possible that, having decided to refer the matter to a Bench in so far as it affected the plea of the saving of limitation of Interlocutory Application No. 424 of 1930, he has not thought it necessary to discuss a plea based on Execution Petition No. 210.

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(1) (1906) I.L.R. 28 All. 387.

(2) (1921) I.L.R. 45 Mad. 202.

(3) (1926) I.L.R. 50 Mad. 49.

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There are therefore three questions before us : (i) whether the view taken by the learned District Munsif that Execution Petition No. 173 of 1930 could not be relied on because, being in its inception illegal, that defect could not subsequently be cured by the leave granted by the Court is correct; (ii) whether Interlocutory Application No. 424 of 1930 will save limitation; and (iii) whether the effect of section 78, clause 2, of the Provincial Insolvency Act will enable the petitioner to rely upon Execution Petition No. 210 of 1927 to exclude the period from 5th January 1928 to 26th August 1930.

On the first point there is no decision of this Court, either before or after, dissenting from the Bench decision in *Ghouse Khan v. Bala Subba Rowther*(1) which decision followed *In re Dwarkadas Tejbandas*(2). The only decision of any Court quoted to the contrary is another Bombay decision reported as *Bhimaji v. Chunilal*(3). This is a decision by a single Judge which mentions *Ghouse Khan v. Bala Subba Rowther*(1) but does not discuss it. Assuming that the actual point in question was here decided, and this is not quite clear, we cannot certainly interfere in revision with the correctness of a decision based upon a Bench decision of this Court.

Next comes the question of Interlocutory Application No. 424 of 1930 which is the matter referred to us, but for reasons to be given we think it unnecessary to canvass the question whether such an application must be made in a

(1) (1927) I.L.R. 51 Mad. 833. (2) (1915) I.L.R. 40 Bom. 235.
(3) A.I.R. 1932 Bom. 344.

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pending execution petition. We may say however that the balance of decisions in this Court certainly appears to confirm the correctness of the view taken in *Sankara Nainar v. Thangamma*(1). This was not only that of RAMESAM J. in that case (though for some reason in subsequent cases it is only his *dictum* that was referred to) but also that of SPENCER J. in the same case. *Kunhi v. Seshagiri*(2), *Annamalai Mudaliar v. Ramier*(3) and *Kannan v. Avvulla Haji*(4) upheld the view that there need not be any execution petition pending and in *Krishna Patter v. Seetharama Patter*(5) the matter was not quite essential for the determination of this case. The reason why we consider it unnecessary to canvass the question actually referred to us further is that, looking at the explanation at the end of column 3 of article 182 of the Limitation Act which states "proper Court" means the Court whose duty it is to execute the decree or order, we are clear that Interlocutory Application No. 424 of 1930, which was made to the Insolvency Court, was not an application made to the proper Court and hence this application cannot be invoked at all under article 182 of the Limitation Act to save limitation. As against this view the learned Advocate for the petitioner (the counter-petitioner is unfortunately not represented before us) argues that under section 5 of the Provincial Insolvency Act the Insolvency Court is not a distinct Court but that insolvency is merely a branch of the jurisdiction which it exercises in its ordinary capacity

(1) (1921) I.L.R. 45 Mad. 202. (2) (1882) I.L.R. 5 Mad. 141.
(3) (1908) I.L.R. 31 Mad. 234. (4) (1926) I.L.R. 50 Mad. 403.
(5) (1926) I.L.R. 50 Mad. 49.

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as some other sort of Court. Reliance is placed by him on the expression in section 5, Provincial Insolvency Act :

"The Court, in regard to proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction."

It is further pointed out by him that, while section 33 of the Provincial Small Cause Courts Act specifically lays down that

"a Court invested with the jurisdiction of a Court of Small Causes with respect to the exercise of its jurisdiction in suits of a civil nature which are not cognizable by a Court of Small Causes shall, for the purposes of this Act and the Code of Civil Procedure, be deemed to be different Courts.", there is no such provision in the Provincial Insolvency Act. Two cases in support of this view are quoted. *Laxmiram Lallubhai v. Balashankar Veniram*(1) is a Bench decision which held that

"an application by mortgagee-judgment-creditor in execution of his decree, opposing the insolvency proceeding of the mortgagor-judgment-debtor, is a step in aid of execution under article 179, Schedule II, of the Limitation Act (XV of 1877) and article 182, Schedule I, of the Limitation Act (IX of 1908)."

But the explanation to article 182 which defines what is the "proper Court" is not at all alluded to in the judgment and this omission is pointed out by Rustomji in his Commentary on the Act. The other decision is the one reported as *Baldeo Singh v. Ram Sarup*(2). Here also the explanation of the proper Court given in article 182 is not at all referred to. Moreover in that case this was only one of the two grounds on which the bar of limitation was held to be

(1) (1914) I.L.R. 39 Bom. 20.

(2) (1921) 19 A.L.J. 905.

avoided, and the other ground appears to have been unassailable, namely, that the executing Court itself stopped the transmission of the decree to the Collector till judgment in the suit instituted to set aside the order on the claim petition had been received. Consequently this stay, which the petitioner could not avoid, was held to save limitation. The Bombay High Court has itself held in *Govinddas Rajaramdas v. Ganpatdas Narotamdas*(1) following *Nand Kishore v. Sipahi Singh*(2) that even an appeal against an order in execution is no application to the proper Court under article 182 because the appellate Court is not the executing Court. That is a very much stronger case than where the application is to an Insolvency Court. In *Raghunandun Pershad v. Bhugoo Lall*(3) it was held that a suit against an order in a claim petition was not an application under article 179 (of the old Act) and consequently would not save limitation. It seems to us to be clear that the Insolvency Court which is entirely a creature of the Provincial Insolvency Act is a different Court from the Court which is to execute a decree obtained independently of the Insolvency Act, and that the mere fact that the Judge is the same person will not make the two Courts the same. The learned Advocate for the petitioner conceded before us that, had the decree in this case been transmitted to some other Court for execution, then the Insolvency Court before which Interlocutory Application No. 424 of 1930 was filed would not have been the same Court whose duty it was to execute the decree, and it can hardly be that

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(1) (1923) I.L.R. 47 Bom. 783.

(2) (1904) I.L.R. 26 All. 608.

(3) (1889) I.L.R. 17 Calc. 268.

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the mere accident that the decree was or was not transferred could affect the question whether the Insolvency Court before which the interlocutory application must in any case have been made was the "proper Court" within the meaning of article 182. We must therefore hold that Interlocutory Application No. 424 of 1930 was not made to the proper Court within the meaning of the explanation to article 182 of the Limitation Act and is not therefore available to save limitation.

The third point which has been argued before us resting on Execution Petition No. 210 of 1927 by invoking section 78, clause 2, of the Provincial Insolvency Act has now got to be considered. Section 9 of the Limitation Act states that

"when once time has begun to run no subsequent disability or inability to sue stops it,"

the sole exception being in the matter of Letters of Administration where the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues. The effect of the grant of permission under section 28, clause 2, of the Insolvency Act with regard to limitation was considered in *Ramaswami Pillai v. Govindasami Naicker*(1). The learned Judges there held :

"As we read section 16 (2) [corresponding to section 28 (2) of the new Act] of the Provincial Insolvency Act, what the order of adjudication effects is not an absolute stay, but a direction that, before a suit is brought, a condition precedent should be complied with, namely, the obtaining of leave to sue from the Court. In our opinion section 15 of the Limitation Act does not operate to save limitation in cases where the suit could have been instituted on complying with a preliminary requisite in that behalf."

(1) (1918) I.L.R. 42 Mad. 319.

This decision was passed prior to the Provincial Insolvency Act V of 1920 and section 78, clause 2, is new so that the effect of that section did not arise for consideration. In that case the adjudication had been annulled and probably under those circumstances the decision might have been different had the matter been decided under the new Act. Nevertheless the reasonings are still worthy of consideration. As regards the cases decided after the new Act, in *Sita Ram v. Kishan Lal*(1) it was held that though section 78, clause 2, did not apply to that case as the debt was not proved nevertheless some force must be given to the proviso to section 31. That was a case where an application for arrest was made shortly after the cessation of the protection order which had been passed, and it was held that if the application was made promptly after the cessation of the protection order the applicant would be entitled to the exclusion of the period during which the protection order was in force. In another case, *Mulchand v. Rajdhas*(2), permission had been granted under section 28, clause 2, but it was found to have been impossible to act. It was held that

"such permission was ineffectual to exclude the unfettered operation of section 78 and that the period between the adjudication and annulment should be deducted from the period allowed for limitation."

In *M. R. M. Rama Pillai v. Kasamuthu Nadar and others*(3) the application was one to execute a decree in favour of the insolvent and it was held that section 78, clause 2, had no application to such cases. There are remarks in that

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(1) A.I.R. 1930 All. 580.

(2) A.I.R. 1925 All. 735.

(3) A.I.R. 1929 Mad. 715.

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case which go to show that section 78, clause 2, imposes a limitation on section 9 of the Limitation Act. Now it is by no means clear in the present case that there has been any annulment of the adjudication order and if there had been a clear annulment it is very remarkable that the provision in section 78, clause 2, should not have been relied on at all in the lower Court nor so far as we can see even before our learned brother ANANTA-KRISHNA AYYAR J. It was the duty of the petitioner to state clearly in his petition the ground on which he relied to save the bar of limitation. It is obvious, on a mere comparison of the dates we have quoted, what was the bar of limitation which he thought he had to meet and it is quite clear that he relied on Execution Petition No. 173 of 1930 and on nothing else for that purpose. The learned District Munsif remarks in his order on Interlocutory Application No. 424 of 1930 :

"The respondent was adjudged insolvent in 1928 and was given six months' time to apply for discharge. He has not applied for discharge. He now says that he intends to apply for an extension of time for applying for discharge. He has admittedly not applied for any extension till now. I do not see sufficient ground therefore for not allowing the petition. Leave prayed for is therefore granted."

So it is clear that the failure to apply for discharge was brought to the Court's notice, and yet it passed no orders annulling the adjudication or dismissing the insolvency petition. It apparently should have done so and the position would have been much simpler had it annulled the adjudication, but it merely gave leave to the petitioner to execute his decree. Even in arguing the case before us no reference was made to the allegation in the execution petition that the insolvency petition had been dismissed nor was it even

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asserted in this petition that the adjudication had been annulled. On our noticing the allegation in the execution petition that the insolvency petition had been dismissed we asked the learned Advocate for the petitioner whether this was so and he was not able to inform us definitely on the point.

In these circumstances, and especially when section 78, clause 2, was not relied upon before the lower Court as a ground for saving limitation, we are not prepared in revision to interfere, especially by what will be an *ex parte* order based on a somewhat difficult question of law, when the most important fact which would justify such interference, viz., that the adjudication had been actually annulled, is not established. It is quite a debatable point whether section 78, clause 2, will or will not apply when the adjudication has not been annulled but leave merely granted to a particular person to proceed with his remedy in the ordinary Court. Had the matter been raised and discussed before the learned District Munsif and had he given a decision either for or against the petitioner based on section 78, clause 2, of the Provincial Insolvency Act the position would have been very different, but we feel that at this stage it would be unsafe and unwise for us to interfere in revision when we are not in possession of the actual facts on which this plea in bar of limitation is sought to be raised.

In the result therefore we are not prepared on any of the three grounds alleged before us to interfere in revision with the findings of the lower Court. The revision petition is therefore dismissed but with no costs as there is no appearance of the counter-petitioners.

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APPELLATE CIVIL.

1934,
March 5.*Before Mr. Justice Jackson and Mr. Justice Butler.*THANDAVAN CHETTIAR AND ANOTHER (PLAINTIFFS 2 AND 1),
APPELLANTS,

v.

U. K. UNNALACHAN (LEGAL REPRESENTATIVE OF DEFENDANT),
RESPONDENT.**Code of Civil Procedure (Act V of 1908), O. XXI, rr. 58, 63,
and sec. 47—Party to suit and a person not a party to suit
—Claim by—Order rejecting—Remedies of respective
claimants against.*

If two persons one of whom is a party to the suit and one not a party prefer a claim under Order XXI, rule 58, of the Code of Civil Procedure, the party to the suit must proceed by way of appeal by virtue of section 47 of the Code and the non-party by way of suit by virtue of Order XXI, rule 63, of the Code.

U Kala v. Ma Hnin U and one, (1927) I.L.R. 5 Rang. 110, distinguished.

APPEAL under Clause 15 of the Letters Patent against the judgment and decree of PAKENHAM WALSH J., dated 12th day of December 1932 and passed in Second Appeal No. 1667 of 1928, preferred to the High Court against the decree of the Court of the Subordinate Judge of South Malabar at Palghat and made in Appeal Suit No. 20 of 1927 (Original Suit No. 369 of 1924 on the file of the Court of the Additional District Munsif of Palghat).

T. A. Anantha Ayyar for appellants.
K. Kuttikrishna Menon for respondent.

* Letters Patent Appeal No. 42 of 1933.

The JUDGMENT of the Court was delivered by JACKSON J.—We are not prepared to hold that PAKENHAM WALSH J. has erred.

If two persons one of whom is a party to the suit and one not a party prefer a claim under Order XXI, rule 58, of the Code of Civil Procedure, the party to the suit must proceed by way of appeal by virtue of section 47 and the non-party by way of suit by virtue of Order XXI, rule 63.

In the *obiter dictum* at the end of *U Kala v. Ma Hnin U and one*(1) it is assumed that the claim was not made in execution, (*see* bottom of page 114) which distinguishes it from our case, though why this assumption is made we do not understand. *Goba Nathu v. Sakharan Tepi Patil*(2) proceeds on the rights of the auction purchaser.

We see no absurdity in one party proceeding by way of suit and another by way of appeal—the two proceedings could ordinarily be linked; while if it is a District or Subordinate Court that is executing the decree against a party to the suit, its jurisdiction should not be taken away at the party's own instance by coupling himself with a non-party.

The importance of giving due scope to section 47 is noted by the Judicial Committee in *Prosunno Kumar Sanyal v. Kali Das Sanyal*(3).

This Letters Patent appeal is dismissed with costs.

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(1) (1927) I.L.R. 5 Rang. 110. (2) (1920) I.L.R. 44 Bom. 977.
(3) (1892) I.L.R. 19 Calc. 683 (P.C.).

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APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Lakshmana Rao.

NARAPPA NAICKEN (COUNTER-PETITIONER,
DECREE-HOLDER), APPELLANT,

v.

GOVINDARAJA NAICKEN, MINOR RESPONDENT BY GUARDIAN
MUTHAMMAL (LEGAL REPRESENTATIVE OF THE
PETITIONER), RESPONDENT.*

*Foreign Court—Jurisdiction of—Submission to, before judgment
if must be—Submission afterwards—Effect of—Inference
of submission before judgment from—When not proper.*

To give jurisdiction and therefore validity to the decree of a foreign Court against a resident of British India there must be submission before judgment is pronounced. Submission afterwards except as supporting an inference that there was submission before is only effective as creating a sort of estoppel. A mere order made by the foreign Court that the original decree stand can add nothing to its validity or in any way extend the jurisdiction of the Court with regard to it.

An *ex parte* decree of a Court of Travancore against the respondent, a resident of British India, was sought to be executed in British India. In the Court of execution the respondent did not repudiate the decree, but took time to have it set aside, as being *ex parte*, in the Travancore Court (with the result that the decree was affirmed). The lower appellate Court and a single Judge of the High Court inferred that he did not submit to the jurisdiction of the foreign Court at the beginning and that his subsequent action was due to ignorance of his rights.

Held that that inference of fact could not be said to be wrong.

APPEAL under Clause 15 of the Letters Patent against the judgment and order of CURGENVEN J., dated the 23rd day of November 1932 and passed in Appeal against Appellate Order No. 132 of 1928

* Letters Patent Appeal No. 20 of 1933.

preferred to the High Court against the order of the District Court of Coimbatore, dated the 6th day of March 1928 and made in Appeal Suit No. 214 of 1927 (Execution Appeal No. 280 of 1927 in Execution Petition Register No. 89 of 1927 on the file of the Court of the District Munsif of Tiruppur in Original Suit No. 929 of 1098 M.E. on the file of the Court of the District Munsif of Quilon).

T. M. Krishnaswami Ayyar for appellant.

K. Bhashyam Ayyangar and *V. C. Veeraraghavachari* for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by JACKSON J.—The appellant is seeking to execute in British India against a resident of British India a decree obtained in a Court of Travancore. In these circumstances it is admitted that the decree is only executable if the respondent submitted to the Travancore jurisdiction. It is a question of fact. The respondent never appeared at the trial of the suit in Travancore but it is argued that his submission may be inferred from the fact that in the Court of execution he did not repudiate the decree, but took time to have it set aside, as being *ex parte*, in the Travancore Court (with the result that the decree was affirmed). If, it is said, he submitted to the jurisdiction at the end of the transaction how can it be said he did not submit to it at the beginning? The lower appellate Court and this Court have preferred to infer that he did not submit at the beginning, and his subsequent action was due to ignorance of his rights and we are not prepared to say at this stage that this inference of fact is

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wrong. This disposes of the appeal but as so often happens the argument has been more substantial than its matter and much case-law has been cited. The law is correctly stated in *Sheo Tahal Ram v. Binaik Shukul*(1) and Dicey as quoted fully in this case seems to be correctly understood at page 753, only we should excise "probably" (two lines from bottom). To give jurisdiction and therefore validity to the decree there must be submission before judgment is pronounced. Submission afterwards unless, as in our case, supporting an inference that there was submission before, is only effective as creating a sort of estoppel such as that in *Malhar Narayan Prabhu v. Vishnu Sonu Ganada*(2). There the judgment-debtor took no objection to the execution, and allowed it to proceed to sale, and the Court held that to allow him subsequently to protest would seem very strange either in law or in equity. But in our case the respondent has all along opposed the execution. It is not very clear what the learned Chief Justice means at the bottom of page 750 in *Sheo Tahal Ram v. Binaik Shukul*(1). By adverse order he may be thinking of an appellate decree such as there is in *Guiard v. De Clermont & Donner*(3). A mere order, as in our case, made by the foreign Court that the original decree stand can add nothing to its validity or in any way extend the jurisdiction of the Court with regard to it. But an appellate decree which is the decree in the suit is quite another matter. *Hari Singh v. Muhammad Said*(4) in terms follows *Guiard v. De Clermont & Donner*(3)

(1) (1931) I.L.R. 53 All. 747.
(3) [1914] 3 K.B. 145.

(2) (1924) 80 I.C. 754.
(4) (1926) I.L.R. 8 Lah. 54.

(see page 92). It may be questionable whether the facts of these two cases run altogether on all fours; but that is not a question which we need discuss. And, of course, an order after judgment has been passed is not the same as an order before the suit. In *Boissiere v. Brockner*(1) it was held that an appearance in the foreign Court before the suit in order to protest against its jurisdiction involves the defendant in the necessity of submitting to its jurisdiction if the plea to the jurisdiction should be disallowed. But appearance after the suit is decreed need not involve any such necessity. It is not as though after refusing to set aside the *ex parte* decree the Court proceeded to pass a fresh decree.

The appeal is dismissed with costs.

A.S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Bardswell.

THE PUBLIC PROSECUTOR, APPELLANT,

v.

T. P. SHANMUGA NADAR AND ANOTHER (ACCUSED),
RESPONDENTS.*

*Criminal Procedure Code (Act V of 1898), sec. 192 (1)—
Transfer—Magistrate empowered to—Can do so at any stage
of case.*

A Sub-Divisional Magistrate to whom a private complaint of offences under sections 485 and 486, Indian Penal Code, was made, after hearing the prosecution evidence found that a *prima facie* case was made out only of an offence under section 482,

(1) (1889) 6 T.L.R. 85.

* Criminal Appeal No. 598 of 1933.

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Indian Penal Code, and accordingly, after framing a charge under that section, he transferred the case to the file of a Second-class Magistrate.

Held, that the transfer was justified under section 192 (1) of the Criminal Procedure Code (Act V of 1898).

There is nothing in section 192 (1) to justify the restriction that a transfer by a Magistrate empowered under that clause can be made only when he first takes cognizance of a case and that he cannot do so at a later stage.

APPEAL under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondents (accused) by the Stationary Sub-Magistrate of Ambasamudram in Calendar Case No. 123 of 1933 on his file.

A. Narasimha Ayyar for Public Prosecutor (L. H. Bewes) for the Crown.

Nugent Grant and K. R. Rangasamy Ayyangar for respondents.

Cur. adv. vult.

JUDGMENT.

This is an appeal by Government against the acquittal of the two respondents. There was a private complaint made against them to the Joint Magistrate of Shermadevi of offences punishable under sections 485 and 486, Indian Penal Code. The Joint Magistrate after hearing the prosecution witnesses found that a *prima facie* case was made out only of an offence under section 482 which offence is triable by a Second-class Magistrate and so, having framed a charge of an offence punishable under that section, he transferred the case to the file of the Second-class Stationary Sub-Magistrate at Ambasamudram. The Stationary Sub-Magistrate proceeded with the case and acquitted the respondents.

If the transfer could be effected at all it must have been under section 192, Criminal Procedure Code, (clause 1) which runs as follows :—

“Any Chief Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate may transfer any case, of which he has taken cognizance, for inquiry or trial to any Magistrate subordinate to him.”

The learned Public Prosecutor argues that the words “for inquiry or trial” are merely put in so far as to cover both warrant and summons cases, that it is permissible for a Magistrate empowered under this clause only to transfer a case when he first takes cognizance of it and that he cannot transfer it at any later stage even though in the matter of a warrant case the stage of trial is not reached till the charge is framed. I cannot see anything in the clause itself which indicates that any such restriction is intended to be made. Nor is any authority shown me for there being such a restriction. The learned Public Prosecutor has referred me to two rulings. One of these is that in *Tota Venkanna and others, In re*(1). In that case a Joint Magistrate enquired into a case that was brought as one of robbery but found that the prosecution evidence could make out only offences punishable under section 353, Indian Penal Code, and section 24 of the Cattle Trespass Act. He therefore transferred it to the file of the Stationary Sub-Magistrate who proceeded to dispose of it from the point at which it reached him without taking evidence afresh. It was held that he acted illegally in so doing ; but clearly the point of the illegality was the fact that, under the law as it was then understood in this Court, it was the

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(1) (1900) 2 Weir 152.

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duty of the Sub-Magistrate on the case being transferred to him to take the evidence afresh. This, however, is no longer the law, by reason of clause 3 to section 350. This ruling therefore is not in point. The other case to which I have been referred is *Mahabir Singh v. Giribala Dassi*(1). That case too has no application. What it decided is that the provisions of section 192 do not entitle a Magistrate after he has proceeded under section 202, Criminal Procedure Code, to make an order transferring the case for the purpose of being dealt with under section 203 or section 204 without a fresh investigation as contemplated by section 202, Criminal Procedure Code, and that section 192 does not empower him to transfer a case simply for the purpose of considering the report of an investigation under section 202, Criminal Procedure Code, which he has himself ordered. In the absence of any authority to the contrary I must take it that the first clause of section 192 means what it clearly appears to mean and that the action of the Sub-Divisional Magistrate in transferring the case to the file of the Stationary Sub-Magistrate was perfectly correct. There is no other possible ground for interference with the order of acquittal. The appeal is therefore dismissed.

K.W.R.

(1) (1924) 29 C.W.N 508.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson and Mr. Justice Butler.

H. D. RAJAH, PETITIONER,

1934,
March 14.

v.

C. H. WITHERINGTON AND ANOTHER, RESPONDENTS.*

Contempt of Court—High Court's jurisdiction as to—Contempt arising within its territorial jurisdiction—Offender residing outside it.

The High Court as a Court of Record has jurisdiction in all matters of contempt of Court arising within its territorial jurisdiction even if the offender happens to reside outside it. The jurisdiction of the Court is determined by the place where the offence is committed, and not by the place where the offender may happen to reside.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to take contempt proceedings against the respondents therein and commit them for contempt of this Court.

Advocate-General (Sir A. Krishnaswami Ayyar) for respondents.—The jurisdiction of this Court must not be assimilated to that of the Supreme Court in England. The King's Court came into being as part of the Common Law of England. The King's Bench Court is a Common Law Court and not a statutory Court, i.e., the creature of any statute. The jurisdiction of the King's Bench Court is a Common Law jurisdiction and extends to the dominions of His Majesty; Halsbury's Laws of England, Vol. VIII, page 180. As regards the jurisdiction of the English Court to issue a writ of *Habeas Corpus*, see Encyclopædia of the Laws of England, Vol. VI, page 472, and *Rex v. Pinckney*(1).

* Criminal Miscellaneous Petition No. 1354 of 1933.

(1) [1904] 2 K.B. 84, 87.

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The Indian High Courts, on the other hand, are creatures of statute and their jurisdiction is limited by the terms of the statutes creating them. Section 8 of the Charter of our High Court does not mean that our High Court has all the jurisdiction of the King's Bench Court. The earlier part of the section shows the limits within which the Supreme Court was to have jurisdiction and the latter part of that section says that within such limits the Supreme Court was to have the jurisdiction of the King's Bench Court. The fact that some limit to the territorial jurisdiction should be placed has never been disputed, though there has been some conflict between Madras and Calcutta as to whether the limit is to be the Presidency or the Presidency-town. On the general question of jurisdiction, see *Legal Remembrancer v. Motilal Ghose and others*(1). As to contempt of Court in the mofussal, see *Emperor v. Balakrishna Govind*(2). The Supreme Court had by the terms of its Charter the same jurisdiction as the King's Bench to the extent of its territorial limits; *ibid.*, page 619. As to the meaning of territorial limit, see the same page. This Court has no jurisdiction where the publication and the residence of the person publishing are outside the territorial jurisdiction of this Court.

K. Rajah Ayyar for *P. S. Raghavaraman* (with him, *R. Ramamurti* and *G. Ranga Rao*) for petitioner.—The jurisdiction of the Superior Courts to commit for contempt is arbitrary and unlimited; Halsbury's Laws of England, Vol. VII, page 2. As to the origin of jurisdiction to commit for contempt in the case of the Superior Courts, see *The Queen v. Lefroy*(3). The contempt is not of the Court but of the Sovereign. Therefore the jurisdiction of the Court is co-extensive with that of the Sovereign; see also Stephen's Commentaries on the Laws of England, Vol. III, pages 276-7. The jurisdiction is not territorial. The principles of general jurisdiction are stated by Lord MANSFIELD in *Mostyn v. Fabrigas*(4). The jurisdiction is unlimited in point of territorial limits but limited in respect of its being effective. There is no distinction between a case of libel and a case of contempt of Court. Contempt of Court is only libel of an

(1) (1913) I.L.R. 41 Calc. 173, 202, 205, 208.
 (2) (1921) I.L.R. 46 Bom. 592. (3) (1873) L.R. 8 Q.B. 134, 137.
 (4) (1774) 1 Cowp. 161; 98 E.R. 1021, 1028.

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aggravated kind; *Surendra Nath Banerjee v. The Chief Justice and Judges of the High Court*(1). The ordinary rule is that jurisdiction to try an offence is determined by the area within which the offence is committed and not the area within which the offender may be found; *In re Kochunni Elaya Nair*(2). Publication within jurisdiction by a person owing allegiance to the Sovereign gives jurisdiction; *Emperor of India v. McLeod*(3) and *The King v. Johnson*(4) referred to.

Cur. adv. vult.

The ORDER of the Court was delivered by JACKSON J.—The respondents, the editor and JACKSON J. printer of a magazine called "Review of India", have been ordered to show cause why they should not be committed for contempt of Court.

The facts are not in dispute.

An order was issued by the Presidency Magistrate, Madras, against one Harihar Dharma Rajah under section 112, Criminal Procedure Code, to show cause why he should not be bound over under section 110 (f), Criminal Procedure Code. The learned Magistrate, finding that Harihar Dharma Rajah was instilling revolutionary ideas in the minds of young persons, ordered him to find security and on his failure committed him to jail on 20th September 1933. He appealed to this Court and in order not to undergo imprisonment he furnished the required security on 25th October 1933. While the appeal was pending a paragraph appeared in the November number of the respondents' review to the effect that a terrorist who was in jail in connection with a scheme in Madras to

(1) (1883) I.L.R. 10 Calc. 109, 125, 129, 134 (P.C.).
 (2) (1921) I.L.R. 45 Mad. 14, 18. (3) (1880) I.L.R. 3 All. 342, 345.
 (4) (1805) 6 East 583; 102 E.R. 1412.

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send poisoned handkerchiefs to officials as Christ-mas presents had been released on bail presumably to enable him to proceed with his plan of preparing poisoned handkerchiefs. Neither in the findings nor in the evidence in the security proceedings is it suggested that Harihar Dharma Rajah was intending to send out poisoned handkerchiefs, and of course the suggestion that the Court had released him on bail in order to enable him to proceed with this plan is in the highest degree offensive. The respondents have filed affidavits tendering their sincere regret, and stating that they were not aware that an appeal was pending. It might have occurred to them that there would be no question of bail unless proceedings were pending, and, no matter what false opinion of the facts they may have conceived, there could be no possible justification for their saying that the Court had released the prisoner to enable him to prepare poisoned handkerchiefs.

We find that the respondents have committed a contempt of Court, and order that they each pay a fine of Rs. 100 to His Majesty the King-Emperor and do pay the costs of this motion—special costs since a legal argument was raised, Rs. 250.

It might have been hoped that the proceedings would have terminated with this unqualified apology and submission to the authority of the Court, for apology is not as a rule coupled with argument; but the respondents have further instructed the learned Advocate-General to challenge our jurisdiction and a whole afternoon has been occupied with this question, although in the affidavits filed by the respondents no such

question of jurisdiction has been raised. There can be no doubt but that this Court as a Court of Record has jurisdiction in all matters of contempt of Court arising in the Madras Presidency. So much is conceded; but the learned Advocate-General argues that because the offenders happen to reside in Calcutta, the hands of this Court are tied. A party can malign prisoners and insult Courts to the top of his bent, so long as he is careful to be beyond the territorial jurisdiction of the Court when notice issues. We find no warrant for this view of the law. Contempt of Court is not an offence within the ambit of the Penal Code, but nevertheless it conforms to the ordinary rule that the jurisdiction of the Court is determined by the place where the offence is committed, and not by the place where the offender may happen to reside. (*Cf.* section 177, Criminal Procedure Code.) If an offender has removed himself beyond the territorial jurisdiction of the Court, there may be difficulty both in securing his appearance and in executing his sentence, but that is not to deprive the Court of jurisdiction over the offence. Nor in the present case is there any difficulty over the appearance of the party, because the respondents have appeared, and apologized, and submitted to the jurisdiction. The only possible difficulty that can arise is if they succeed in removing themselves from the Court's jurisdiction before the execution of the penalty, and that is not a matter which need be considered at this stage. The learned Advocate-General finds an analogy between this case and a case where the Court of King's Bench in London may issue a writ of *Habeas Corpus* to some remote

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place which is not otherwise within the jurisdiction of a Court of Record ; but that is rather to assume that the present contempt has been committed outside the territorial jurisdiction of this Court. If the respondents had confined the circulation of their review to Oates Land the analogy might be more happy and it would be necessary to follow the learned Advocate-General along his excursus into the origin of the Court of King's Bench and its relation to other Courts of Record ; but in the present circumstances it seems to be rather beside the point.

Attorneys for respondents : *King and Partridge.*

A.S.V.

PRIVY COUNCIL.

MAHARAJA OF JEYPORE, SINCE DECEASED (PLAINTIFF),
APPELLANT,

v.

RAJA LAKSHMINARASIMHA, SINCE DECEASED,
AND OTHERS (DEPENDANTS), RESPONDENTS.*

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Land Revenue—Transfer of portion of zamindari—Separate registration and apportionment of peishcush—Holders of transferred mokhasa and aghaharam villages—Madras Land Revenue Assessment Act (I of 1876).

Upon an application under the Madras Land Revenue Assessment Act (I of 1876) for separate registration and apportionment of the peishcush in respect of a portion of a permanently-settled estate transferred to the applicant, the holders of transferred mokhasa and aghaharam villages cannot object ; so far as they are concerned the transfer is only the substitution of one zamindar for another, and in no way affects their rights. The presumption is that the villages are the property of the zamindar, but if the holders are in a position to rebut that presumption and wish to obtain separate registration, thereby making themselves directly liable for a portion of the peishcush, their right to do so will not be affected by the order applied for.

Decree of the High Court modified upon a compromise, made after appeal, by the appellant and respondent No. 1.

APPEAL (No. 22 of 1927) from a decree of the High Court (26th March 1923) affirming a decree of the Subordinate Judge of Vizagapatam (23rd July 1917).

The suit giving rise to the appeal was instituted by the appellant's father, since deceased, claiming under Madras Act I of 1876 separate registration and apportionment of the peishcush

* Present : Lord BLANESBURGH, Lord SALVESEN and Sir JOHN WALLIS.

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in respect of villages, part of the zamindari of Pachipenta, which the plaintiff had bought at a sale by the Court of the Agency Tracts in execution of a decree of the District Court made upon a mortgage of the zamindari. The zamindar and his two minor sons were defendants, also the holders of various mokhasa and aghaharam villages in the zamindari.

The High Court (SPENCER and DEVADOSS JJ.) dismissed the suit on the ground that the villages in suit were found to be situate in the jurisdiction of the Civil Court, and that therefore the Agency Court had no jurisdiction to sell them.

Pending the hearing of his appeal to the Privy Council the appellant entered into a compromise with the former zamindar, on behalf of himself and his two minor sons, whereby, *inter alia*, they formally transferred the suit villages to the appellant.

The facts appear more fully from the judgment of the Judicial Committee.

Upjohn K.C., Parikh and Subba Row for appellant.

Narasimham for respondents Nos. 2 to 11, 13 to 19 and 22 to 24.

Sidney Smith for respondent No. 21.

The former zamindar and his sons were not represented.

[Reference was made to *Vencataswara Yetti-
apah Naicker v. Alagoo Moottoo Servagaren*(1),
*Ramabhadra Raju Bahadur v. Maharaja of Jey-
pore*(2), *Nilkanth Balwant v. Vidya Narasinh*(3),

(1) (1861) 8 M.I.A. 327.

(2) (1919) I.L.R. 42 Mad. 813; L.R. 46 I.A. 151.

(3) (1930) I.L.R. 54 Bom. 495; L.R. 57 I.A. 194.

Code of Civil Procedure, 1908, section 1, sub-section 3, and Scheduled Districts Act, 1874.]

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The JUDGMENT of their Lordships was delivered by SIR JOHN WALLIS.—By a well-advised compromise made between the appellant, the Maharaja of Jeypore, a zamindar in the Madras Presidency, and the principal respondents, the Zamindar of Pachipenta and his two minor sons, and ordered to be recorded by an Order of His Majesty in Council of the 10th November 1932, the Maharaja has succeeded in perfecting his title to the greater part of the Pachipenta zamindari, which his father had purchased at a court sale held in execution of a mortgage decree obtained by the late Maharaja of Bobbili against the Zamindar of Pachipenta on the 14th April 1903, in Original Suit No. 1 of 1903 in the Court of the District Judge of Vizagapatam. Part only of the Pachipenta zamindari was within the jurisdiction of the District Court, the rest of the zamindari being situated in Hill or Agency Tracts of this District which, under a Governor-General's Act of 1839, were withdrawn from the jurisdiction of the Civil Courts owing to their disturbed and backward condition and are still administered by the Collector as Governor's Agent and his subordinates who discharge both judicial and executive duties. In the present case, the fact that part of the mortgaged property was situated within the jurisdiction of the District Judge was apparently deemed sufficient to give him jurisdiction as to the whole of the property in suit, and he made the usual decree for sale. After selling in execution of the decree four villages which were within his jurisdiction, the District Judge,

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purporting to act under the provisions of the Code of Civil Procedure, transferred the decree for further execution to the Court of the Agent of the Governor at Vizagapatam. The Agent's Court then proceeded to sell the rest of the zamindari, including certain villages which were within the jurisdiction of the District Judge. The Maharaja of Jeypore became the purchaser, and the sale to him was confirmed as appears from the certificate of sale on 2nd May 1908.

The purchaser's troubles then began. An objection that the villages did not include certain hamlets was decided in his favour on 21st March 1912 by the Madras High Court on a reference made to it under the Agency Rules.

The Maharaja then, on 21st August 1913, applied, under Madras Act I of 1876, to the Collector of Vizagapatam for registration in his name of the properties purchased by him in the register of the permanent settlement holders, and for apportionment of the peishcush, or permanently-settled revenue due thereon. This order was necessary to make him the registered proprietor, and secure a reduction of the peishcush. On 10th May 1915, the Collector made the order as to sixty-nine jeroyati villages or villages in the purchaser's possession, but held that as regards the mokhasa and aghaharam villages he had only purchased a right to collect the kattubadi or quit-rents issuing out of such villages and had not become their owner, so as to be entitled to separate registration under Act I of 1876. On 17th June 1915, the Collector refused to review this order, and referred the Maharaja to a separate suit.

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As some of the villages in question were in the jurisdiction of the District Court and some in the jurisdiction of the Agent's Court, the Maharaja proceeded to file suits for separate registration in both Courts. In the Court of the Agent, the Special Assistant Agent, Mr. A. C. Duff, I.C.S., held that by the purchase at the court sale the auction purchaser had acquired the ownership of these villages and not merely the right to collect kattubadi or quit-rent, and ordered separate registration as to the villages in the Agency Tracts.

In the suit in the Civil Court, which is the subject of this appeal, the Subordinate Judge took the other view, and held that the auction purchaser had only acquired the right to collect the kattubadi arising out of the villages, and was not entitled to separate registration under Madras Act I of 1876. He accordingly dismissed the suit.

The High Court on appeal framed an additional issue as to how many of the mokhasa and aghaharam villages included in the sale held by the Agent's Court were within the jurisdiction of the Civil Court. Being satisfied on the finding that the villages which are the subject of this suit were within that jurisdiction, they held, following the decision of the Board in *Ramabhadra Raju Bahadur v. Maharaja of Jeypore*(1), that the Agency Court had no jurisdiction to sell them and that no title had passed to the auction purchaser, and dismissed this suit for separate registration on that ground.

It is unnecessary to consider these questions, because the compromise which has been entered into between the appellant, as representative of

(1) (1919) I.L.R. 42 Mad. 813; L.R. 46 I.A. 151.

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the auction purchaser, and respondents 1 to 3, the Zamindar of Pachipenta and his two sons, affirms the title acquired by the purchaser to the properties included in schedule A of the compromise, and that title being now in the plaintiff, he is entitled to separate registration of such properties under Madras Act I of 1876.

The objection taken by some of the respondents, who are the owners of mokhasa villages in the zamindari, that they are entitled to object to the separate registration of the villages as they were not parties to the compromise is, in their Lordships' opinion, based on a misconception. The effect of the permanent settlement of the land revenue made with the predecessor of the Zamindar of Pachipenta pursuant to Madras Regulation XXV of 1802 was that he was recognized by the Government as the proprietor of that zamindari for the purposes of that Regulation, and that, as such, he engaged with the Government for the payment of the permanently-settled land revenue of the lands included in the zamindari. Under section 8 of the Regulation, he has full powers of transfer but is not relieved from his obligation to pay the full land revenue or peishcush until the transfer has been registered and the peishcush duly apportioned; and by Madras Act I of 1876 either alienor or alienee may apply for separate registration of any portion of a permanently-settled estate which has been transferred and for its separate assessment to peishcush.

In their Lordships' opinion the holders of mokhasa or agraharam villages in the zamindari have no right to object to the transfer by a zamindar of the whole or part of his zamindari,

or to the separate registration and apportionment which is necessary to give full effect to it. So far as they are concerned, it is a mere substitution of one zamindar for another, and in no way affects their rights. It is well settled that these villages, being situated in the zamindari, are presumably the property of the zamindar, but if the holders are in a position to rebut this presumption and should desire to obtain separate registration and thereby make themselves directly liable for a portion of the Government peishcush, their right to do so will not be affected by this case.

Their Lordships therefore, giving effect to the compromise which has been reached, are of opinion that the decree of the lower Court should be modified by giving the plaintiff a declaration of his right to separate registration and apportionment of peishcush in respect of the properties comprised in paragraphs 1 to 5 of the compromise, and by setting aside, pursuant to the compromise, the orders as to costs made in the Courts below in favour of the first defendant and his representative. As regards the costs of this appeal, the justice of the case will be met if the respondents who have filed cases and appeared by Counsel have one set of costs between them. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Hy. S. L. Polak & Co.*

Solicitors for respondents: *Harold Shephard ;
T. L. Wilson & Co.*

A.M.T.

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APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Butler.

1934,
February 2.

IN THE MATTER OF THE INDIAN COMPANIES ACT (VII OF 1913),
THE UDUMALPET NIDHI LIMITED, BY ITS SECRETARY,
SYED DIWAN KHAJA MOHIDEEN SAHIB (PETITIONER),
APPELLANT.*

*Lottery—What amounts to—Prize chit transaction—Prize
winner ascertained by drawing lots—No liability on prize
winner to pay future subscriptions after prize is won—
Extent of his gain depending on chance of the draw.*

A prize chit transaction, in which the prize winner is ascertained by drawing lots and is under no liability to pay future subscriptions after the prize is won and whose extent of gain depends upon the chance of the draw, amounts to a lottery.

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

APPEAL from the order of STONE J., dated 7th April 1933, and made in the Ordinary Original Civil Jurisdiction of the High Court in Original Petition No. 74 of 1933.

M. Krishna Bharati and T. G. Ramaswami Ayyar for appellant.

JUDGMENT.

BEASLEY C.J.

BEASLEY C.J.—This is an appeal from an order of STONE J. made upon a petition by the appellant Nidhi for leave to alter clause 3 of the Memorandum of Association of the Nidhi. Clause 3 sets out the objects for which the Nidhi is established; and a resolution was passed

* Original Side Appeal No. 90 of 1933.

approving of the alteration of the objects of the Nidhi as set out in schedule B, viz.,

“to lend at interest monies received from shareholders and others to shareholders and others on the security of deposits, immovable property, goods and sureties, to receive deposits, etc., when necessary and to pay interest and do other banking business, to conduct various kinds of trade should directors decide to establish branches outside, to conduct various kinds of auction chits and prize chits as will be determined by the Board from time to time and to do all acts which will be helpful to the above objects.”

The alteration was approved by STONE J. subject to the deletion of those parts of the clause relating to the conduct of various kinds of trade and prize chits.

With regard to the latter, which, in my opinion, was the most important alteration proposed, the conditions of the prize chit are set out; and it is only necessary to refer to conditions Nos. 1 to 4 which are as follows :—

1. All persons who have attained the age of majority whether males or females irrespective of caste can become members.

2. The prize chits should be subscribed for 50 months continuously at the rate of Rs. 3 a month.

3. The chit amount should be paid by the 15th of every month. Prizes will be drawn on the 19th of each month at 4 p.m. in the presence of subscribers present.

4. The subscriber that gets the prize will be paid the prize amounts as undermentioned after getting from him a receipt for the same. Thereafter he need not pay future subscriptions.

(a) Amount payable to the prize-drawer inclusive of subscriptions paid between—

1 to 15 months	...	...	Rs. 100.
16 to 30 months	...	...	Rs. 150.
31 to 45 months	...	...	Rs. 175.
46 to 50 months	...	...	Rs. 200.

Therefore, any members of the public, subject to their having attained majority, can join the

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chit and, should a subscriber's name be drawn before the termination of the chit, he gets a prize and is no longer liable to subscribe to the chit. Thus the luckiest subscriber, suppose his name or number to be drawn in the first month's drawing, has only subscribed Rs. 3 and nevertheless gets a prize of Rs. 100, and deducting the Rs. 3 he has paid, he gets Rs. 97 as prize. On the other hand, taking the period 1 to 15 months, another subscriber's name may be drawn in the fifteenth month and he also gets Rs. 100. He has paid for 15 months, at the rate of Rs. 3 a month, Rs. 45, and gets Rs. 100 for it. Taking that section 1 to 15 months, the subscriber whose name is drawn earlier gains a very large benefit over the other subscribers whose names or numbers have not been drawn. As the chit progresses, the benefit to the subscriber whose name is drawn earlier becomes further emphasised. It is contended here that this prize chit is not a lottery. If it is a lottery, obviously our learned brother was quite right in deleting that object of the Nidhi from the proposed altered rule. In support of the appellant's argument we were referred to the Full Bench decision in *Narayana Ayyangar v. Vellachami Ambalam*(1). I myself was a member of that Full Bench. It is relied upon as supporting the argument that this prize chit is not a lottery. It does not support that contention at all. The question there considered was whether the chit fund in that case amounted to a contract which was void because it was a wagering contract and not because it was a lottery. In the Full Bench judgment the whole discussion is whether that contract was or

(1) (1927) I.L.R. 50 Mad. 696 (F.B.).

was not a wagering contract. That that is so is clear from a Bench decision of this Court in *Universal Mutual Aid and Poor Houses Association, Ltd., v. Thoppa Naidu*(1). In that case in the judgment it is pointed out that what the Full Bench were considering was whether or not there was there a wagering contract and not whether the scheme was a lottery or not. The scheme in *Universal Mutual Aid and Poor Houses Association, Ltd., v. Thoppa Naidu*(1) was a lottery; and a lottery is there defined as a distribution of prizes by lot or chance without the use of skill, and it is pointed out that a lottery is different from a wager which is a contract between two persons that on the termination of a future uncertain event one shall win from the other and the other shall pay or hand over to him a sum of money or other stake. In the course of the judgment reference was made to a definition of lottery in Webster's Dictionary, viz., a distribution of prizes by lot or chance. Reference was also made to *Sykes v. Beadon*(2), where JESSEL M.R. said at page 190 :

"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 between them by chance and unequally."

It appears to me that the conditions laid down by JESSEL M.R. are present here. The subscribers to this chit fund are investing in a fund which is to be divided amongst them by lot and clearly

(1) (1932) I.L.R. 56 Mad. 26.

(2) (1879) 11 Ch. D. 170.

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divided unequally. The conditions of the fund have only got to be examined, as they have already been, to make this abundantly clear. The persons who got the benefit of the drawings got a prize and the benefit which such persons get from the drawings gives them different advantages from the persons whose names or numbers are not drawn and this benefit depends upon chance. Chance decides which of the subscribers gets the greater or lesser advantage. Clearly here what is proposed is a subscription by a number of persons to a fund for the purpose of dividing that fund amongst them by chance and unequally. Where those conditions exist, in the opinion of JESSEL M.R., there is a lottery. I am unable to distinguish the conditions of this prize chit fund from what was stated by JESSEL M.R. In my opinion the proposed prize chit is clearly a lottery. That being so, it is quite obvious that the Court cannot sanction a proposal to run such a prize chit. Under these circumstances, this appeal must be dismissed.

We are asked, however, to extend the time for filing documents with the Registrar of Joint Stock Companies. Ordinarily, three months are allowed under section 15 of the Indian Companies Act for that purpose. However, sub-clause 3 of that section gives the Court power to extend the time. Under these circumstances, as the appellants are probably out of time now in which to file the documents, we extend the time for filing documents by three months from this date.

BUTLER J.—I agree.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Curgenvven and
Mr. Justice Pakenham Walsh.

M. P. PALANIAPPA CHETTIAR AND FIVE OTHERS
(PETITIONERS NOS. 1 TO 3 AND 5 TO 7), APPELLANTS,

1934,
January 12.

v.

S. A. RAMANATHAN CHETTIAR AND ANOTHER
(RESPONDENT AND FOURTH PETITIONER), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), ss. 144 and 151—Restitution—Money improperly drawn out under a decree—
• Restitution—Power to order—Declaratory decree of another Court modified in appeal—Necessity for restitution arising from—Applicability of sec. 144—Inherent power to order restitution—Court to which application for restitution to be made.*

The appellants obtained a decree upon a promissory note in the Court of the Subordinate Judge of Ramnad and pursuant to that decree the judgment-debtors paid a sum of money into Court. The first respondent filed a suit in the Court of the Subordinate Judge of Sivaganga for a declaration that he was entitled to the amount of that decree, the appellants being only his representatives, and obtained a decree to that effect and further that he was entitled to continue the execution proceedings of the said decree. An appeal was preferred to the High Court against the decree of the Subordinate Judge's Court of Sivaganga and pending that appeal an application was made for an injunction restraining the first respondent from executing the decree of the Subordinate Judge's Court of Ramnad and drawing the money in deposit, and an order was made that he might draw it on furnishing security to the satisfaction of the Ramnad Sub-Court. The security was furnished and the money was drawn. In the appeal against the decree of the Sivaganga Sub-Court, that decree was modified the first respondent being declared entitled only to a 5/17ths share in the decree of the Ramnad Sub-Court and the appellants to the

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remaining 12/17ths share. In an application filed by the appellants in the Ramnad Sub-Court for restitution,

held: (1) that the application was properly made to that Court; and

(2) that that Court had inherent power, and was under a duty, to accord restitution.

Rajjabali Khan Talukdar v. Faku Bibi, (1930) I.L.R. 58 Cal. 1070, and *Shiam Sundar Lal v. Kaisar Zamani Begam*, (1906) I.L.R. 29 All. 143, followed.

Subbarayudu v. Yerram Setti Seshasani, (1916) I.L.R. 40 Mad. 299, distinguished.

Semble: section 144 of the Code of Civil Procedure was inapplicable to the case and the Court below had no power to order restitution under that section. The words "where and in so far as a decree is varied or reversed, the Court of first instance shall . . ." are directed to the ordinary case where the decree of the executing Court has been varied or reversed.

Mrs. Burn Murdoch v. Ma Saw Kyi, A.I.R. 1931 Rang. 21, dissented from.

APPEAL against and petition under sections 115 of Act V of 1908 and 107 of the Government of India Act to revise the order of the Court of the Subordinate Judge of Ramnad at Madura, dated 1st February 1932 and made in Execution Petition No. 77 of 1931 in Original Suit No. 6 of 1911.

K. Rajah Ayyar and V. Ramaswami Ayyar for appellants.

A. Swaminatha Ayyar and K. S. Rajagopalachari for respondents.

Cur. adv. vult.

THE JUDGMENT of the Court was delivered by CURGENVEN J. CURGENVEN J.—The appellants in the miscellaneous appeal, who are also the petitioners in the revision petition, applied to the Subordinate Judge of Ramnad for restitution in the following circumstances. In Original Suit No. 6 of 1911 on the file of the same Court they obtained a decree

upon a promissory note for a sum of Rs. 28,575 and as a result of adjustment between the parties the judgment-debtors paid into Court a sum of Rs. 17,618. The first respondent filed the suit, Original Suit No. 14 of 1921 in the Subordinate Judge's Court of Sivaganga, for a declaration that he was entitled to the amount of this decree, the appellants being only his representatives, and obtained a declaration to this effect and further that he was entitled to continue the execution proceedings of the said decree. An appeal (Appeal Suit No. 135 of 1924) was preferred to this Court and this judgment was modified, the respondent being declared entitled only to a 5/17ths share in the promissory note and therefore in the decree. In connection with this appeal an application was made for an injunction restraining the respondent from executing the decree in Original Suit No. 6 and drawing the money in deposit and an order was made that he might draw it on furnishing security to the satisfaction of the Ramnad Sub-Court. The security was furnished and the money was drawn. The result of Appeal Suit No. 135 of 1924 was that the present appellants were entitled to recover 12/17ths of this amount. They accordingly filed this petition before the Subordinate Judge of Ramnad for restitution. Six issues were framed, the first of which enquired whether the Court had jurisdiction to entertain the application. The learned Subordinate Judge has found upon this in the negative. The judgment is not very clear, but he appears to hold that section 144, Civil Procedure Code, will not apply and that apart from that provision the Court has no inherent powers to order restitution. The appeal

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before us relates to the finding under section 144 and the revision petition has been filed in case the facts should not come within that section but should justify the Court in exercising its inherent powers.

We propose first to consider the position apart from the circumstance that the respondent has bound himself by the execution of a security bond to obey any orders that may be passed for the refund of the money. It will be observed that the decree in Original Suit No. 14 of 1921 declared that the plaintiff in that suit was entitled to continue the execution in Original Suit No. 6 of 1911. In such circumstances it has been held in *Sethurayar v. Shanmugam Pillai*(1) that he occupies the position of a transferee-decree-holder under Order XXI, rule 16, Civil Procedure Code, i.e., he possesses an interest which has been transferred to him by operation of law. He may thus be regarded as a party to Original Suit No. 6 of 1911 and the general question which arises is whether when execution has been wrongly taken by a transferee-decree-holder, the Court can upon discovering the error accord restitution to the rightful decree-holder. Some attempt has been made to argue that if such a power exists it should be exercised not by the Court which passed the decree in Original Suit No. 6 of 1911 but by the Sivaganga Court, which made the declaration of the respondent's title. This is a wholly untenable position. The latter Court was only concerned with making the declaration and had no power to allow the decree-holder to draw the money lying to the credit of the other suit.

(1) (1897) I.L.R. 21 Mad. 353.

This was the function of the executing Court and, if execution was taken by the wrong person, it is that Court, if any, that should rectify the mistake.

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It is first for consideration whether the case can be brought within the terms of section 144, Civil Procedure Code. The section has replaced section 583 of the Code of 1882 and is drafted in noticeably wider terms. But we hesitate to say whether a case of this nature was in contemplation when it was so drafted. The words "where and in so far as a decree is varied or reversed, the Court of first instance shall . . ." seem to us to be directed to the ordinary case where the decree of the executing Court has been varied or reversed, the use of the phrase "the Court of first instance" supporting this construction. In more than one case, see for instance *Ashutosh Nandi v. Kundal Kamini Dasi*(1) and *Sohnun v. Mast Ram*(2), it has been held that while a wide interpretation should be given to the section, it only applies where restitution is sought owing to a change in the decree under which execution has been taken. There is indeed a case, *Mrs. Burn Murdoch v. Ma Saw Kyi*(3), which has taken the contrary view. That too related to a declaratory decree out of the modification of which in appeal the necessity for making restitution arose. With due respect to the reasoning employed in that case, we find it quite unnecessary to strain the language of the section, and would prefer to base our decision upon the alternative ground that a matter of this sort lies within the inherent

(1) A.I.R. 1929 Cal. 814.

(2) A.I.R. 1929 Lah. 657.

(3) A.I.R. 1931 Rang. 21.

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jurisdiction of the Court. It is a general principle, recognized in a number of decisions, that when a Court has wrongly paid out money it has not only the power but also a duty to recover it from the person so paid. In *Jai Berhma v. Kedar Nath Marwari*(1) their Lordships of the Privy Council make the following observations :—

“ It is the duty of the Court under section 144 of the Civil Procedure Code to ‘ place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed ’. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved.”

And quotation is made from CAIRNS L.C. in *Rodger v. Comptoir d' Escompte de Paris*(2) :—

“ One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and, when the expression ‘ the act of the Court ’ is used, it does not mean merely the act of the primary Court or any intermediate Court of Appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case.”

This statement of the law would appear general enough to cover a case where the executing Court has been made to take a wrong step by an erroneous decision passed by another Court. The same principles underlie the judgment of the Calcutta High Court in *Rai Charan Bhuiya v. Debi Prasad Bhakat*(3), where it was found necessary to make adjustment of certain sums overpaid to a mortgagee-decree-holder by his judgment-debtor. It was recognized that the case would not fall under

(1) (1922) I.L.R. 2 Pat. 10 (P.C.).
(2) (1869) L.R. 2 P.C. 393.

(3) (1921) 26 C.W.N. 408.

the express terms of section 144 and the question then arose whether it was “ competent to the execution Court, in the exercise of its inherent power, to make an order for restitution with a view to secure complete justice between the parties concerned ”. Reference was made to *Prag Narain v. Kamakhia Singh*(1), in which Lord MACNAGHTEN, delivering the judgment of the Judicial Committee, summarily dismissed an argument based upon the terms of the Civil Procedure Code in a case where mesne profits were claimed from a mortgagee-decree-holder who had purchased the property. It was further held that section 144 is not exhaustive of the powers of the Court but may be taken as a guide to determine in what class of cases an order of restitution may be made. *Rajjabali Khan Talukdar v. Faku Bibi*(2) was another case not of the normal kind, in which restitution in respect of benefits acquired by certain third parties was disallowed. The judgment fully recognizes the inherent jurisdiction of the Court but holds that it cannot deal with persons other than the parties on the record. We have already given our reason for treating the respondent as a party to Original Suit No. 6 of 1911. A case which bears some resemblance to the present one inasmuch as it relates to the effect of a declaratory decree is *Shiam Sundar Lal v. Kaisar Zamani Begam*(3). Certain property was attached under a decree as the property of the judgment-debtor and a claim petition filed and allowed. The decree-holder thereupon sued for a declaration that the property was liable to sale

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(1) (1909) I.L.R. 31 All. 551 (P.C.).
(2) (1930) I.L.R. 58 Calc. 1070. (3) (1906) I.L.R. 29 All. 143.

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in execution of the decree and obtained a decree in the first Court. The claimant however succeeded in appeal and sought and obtained restoration of the property. The learned Judges held that, whether an order could be made under the provisions of section 583 (the present section 144) or by virtue of the Court's inherent jurisdiction, the order was a right and proper one to make. The correctness of this decision has been questioned in *Subbarayudu v. Yerram Setti Seshasani*(1), but perhaps if the declaration had declared the decree-holder's competence to execute the decree in the other suit the doubt would not have arisen.

These decisions are, we think, enough to show that quite apart from section 144 it is a power inherent in the Court, and a duty laid upon it, to accord restitution in any case, such as the present, where money has been improperly drawn out under a decree. That would be so even where execution has been taken in the ordinary course. Where, as here, permission to draw the money was subject to the execution of a bond embodying an undertaking to repay it if so ordered, it need scarcely be said that the right to claim restitution is at any rate not weakened. We find it unnecessary therefore to decide whether or not repayment could be enforced in execution under the bond, apart from the general powers of restitution which the Court possesses.

Since we are basing our decision upon the inherent powers of the Court rather than upon the terms of section 144 we may agree with the lower Court in its finding as to the inapplicability of that section and dismiss the appeal. But we allow

(1) (1916) I.L.R. 40 Mad. 299.

the civil revision petition and we answer the first issue in the affirmative and remand the case for further disposal according to law. The first respondent will pay the appellants' costs of the proceedings in this Court including the printing charges incurred in the appeal. (One pleader's fee.)

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APPELLATE CIVIL.

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

R. T. RANGACHARI (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN
COUNCIL (DEFENDANT), RESPONDENT.*

*Government of India Act (1919), sec. 96-B (1) and (2)—
Civil servant under the Crown—Tenure of office of—
Statutory Rules framed under sec. 96-B (2), viz., rules
XIII, XIV, XV and XVI—Non-observance of—Dis-
missal of civil servant by the Crown—Effect of—Suit for
damages for wrongful dismissal—Secretary of State—Non-
maintainability—Rule delegating power of dismissal to an
authority subordinate to the appointing authority—Intra
vires—Suit for declaration of wrongful dismissal against the
Crown—Pensions Act (XXIII of 1871), sec. 4—Effect of—
Public Servants (Inquiries) Act (XXVII of 1850), sec. 25.*

R, a Sub-Inspector of Police, was first discharged on an invalid pension but was afterwards dismissed with the consequence of his pension being withdrawn for misconduct prior to his discharge. V, a Reader in the Government Press, Madras, was dismissed from service without any proper enquiry in that

* Original Side Appeals Nos. 1 and 18 of 1931.

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the procedure prescribed by Rule XIV of the rules made under section 96-B (2) of the Government of India Act was not followed. Each filed a separate suit against the Secretary of State for India in Council, claiming, *inter alia*, damages and a declaration that he was wrongfully dismissed. The trial Court dismissed both the suits and each filed a separate appeal. The appellate Court heard both the appeals together.

Held, on appeal,

(i) that the suits against the Secretary of State for India in Council were not maintainable,

(ii) that, under section 96-B of the Government of India Act, every person in the Civil Service of the Crown in India holds office during His Majesty's pleasure and no different effect is produced by the words "subject to the provisions of this Act and of the rules made thereunder" appearing in the sub-section to the above section and that the rules framed under the section do not take the service out of the category of one at the pleasure of the Crown,

(iii) that the rules framed under section 96-B, sub-section (2), of the Government of India Act by the Local Government delegating the power of dismissal of Sub-Inspectors of Police to the Deputy Inspector-General of Police, though the appointing authority was the Inspector-General of Police, are not *ultra vires*,

(iv) that, inasmuch as Article 351 of the Civil Service Regulations only enables pension to be withdrawn if the pensioner has been guilty of misconduct subsequent to retirement, the action of the Secretary of State for India in withholding R's pension was irregular but that R was not entitled to have a declaration to that effect since it would offend against section 4 of the Pensions Act and also because the Courts should be averse to granting declarations which would become futile.

APPEALS from the judgments of WALLER J., passed in the exercise of Ordinary Original Civil Jurisdiction of the High Court in Civil Suits Nos. 549 of 1929 and 650 of 1927.

K. S. Krishnaswamy Ayyangar for N. Srinivasa Ayyangar for appellant in Original Side Appeal No. 1 of 1931.

S. Doraiswami Ayyar for T. S. Anantarama Ayyar and T. A. Ramachandra Rao for appellant in Original Side Appeal No. 18 of 1931.

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Advocate-General (Sir A. Krishnaswami Ayyar) and R. Ramamurti Ayyar for respondent in both appeals.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—These two appeals can be dealt with together. Although the facts are different, the main point for decision is common to both.

The facts in each appeal may be briefly stated. In Original Side Appeal No. 1 of 1931 the appellant brought a suit against the Secretary of State for India in Council, the respondent in this appeal. In that suit he asked for a declaration that he was wrongfully dismissed after he had been discharged on an invalid pension and for damages amounting to Rs. 9,900. His case was that he was discharged in October 1927 on an invalid pension and, whilst a pensioner, was dismissed in February 1928 on the ground that he had been found guilty of misconduct before his retirement. The result of this was that his pension was withdrawn. His case was and is that under Article 351 of the Civil Service Regulations a pension can be withdrawn only if the pensioner has been guilty of misconduct subsequent to his retirement. He next contends that his dismissal was contrary to the provision in sub-section (1) of section 96-B of the Government of India Act that no civil servant can be dismissed by any authority subordinate to that by which he was appointed. The defendant's case as regards the first plea is that the charges of

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misconduct against the plaintiff were still awaiting disposal at the time when his pension was sanctioned and that the sanctioning authority was not informed of this fact. WALLER J. negatived that defence holding that the charges had already been found by a competent authority, that is to say, the District Superintendent of Police, not to have been sufficiently established to justify the plaintiff's dismissal. As regards the plaintiff's second plea, the defendant contends that the power of punishment as under the rules framed under sub-section (2), section 96-B, of the Government of India Act, 1919, has been delegated to Local Governments under Rule XIII, that Rule XV authorizes the Local Government to delegate, in their turn, the disciplinary powers under Rule XIII to any subordinate authority, and that in the exercise of the delegated power the Local Government have conferred on Deputy Inspector-Generals of Police the right to dismiss officers of the rank of Sub-Inspector. It is conceded of course that at the material time the Sub-Inspectors were appointed by the Inspector-General of Police. This contention of the defendant, WALLER J. upheld.

In this case as well as in the other case the question whether a person in the Civil service of the Crown in India can sue the Secretary of State for damages for wrongful dismissal was elaborately argued and in both cases WALLER J. held that no such suit would lie, and with this question I will deal later. Before doing so, I will state as briefly as possible the facts in Original Side Appeal No. 1 of 1931. In July 1927 the Assistant Superintendent Police of Salem District,

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Mr. Charsley, under whom the plaintiff was serving, started a disciplinary enquiry against him. He framed charges and had examined all the witnesses by the 22nd August. The plaintiff did not examine any witnesses in his defence and the enquiry seems to have been closed on the 7th September. On the 31st August Mr. Kalimullah had taken charge as District Superintendent and on the 7th September the plaintiff applied to Mr. Charsley to be sent before the District Medical Officer with a view to his being invalided out of the service. Mr. Charsley sent this application on to Mr. Kalimullah recommending that the request should be granted. Two days later, Mr. Kalimullah and Mr. Charsley at Salem discussed the plaintiff's case and went through all the evidence against him. Mr. Charsley's opinion, however, did not coincide with that of Mr. Kalimullah who took the view that the evidence against the plaintiff did not justify his dismissal and that it would be better to get him invalided if he was certified to be physically unfit for further service. On the 14th September the plaintiff renewed his request and on the 16th September was given a certificate of unfitness by the District Medical Officer and on the 24th his pension papers were forwarded to the Accountant-General by Mr. Kalimullah. On the 2nd October Mr. Charsley sent to the District Superintendent of Police his minute on the charges against the plaintiff in which he found him guilty of grave misconduct. The cover in which the minute was enclosed reached Salem on the 4th October and was endorsed to be kept pending till the pension was received. This endorsement was

made by the District Superintendent's camp clerk according to Mr. Kalimullah without any authority from him. Mr. Kalimullah also says that he never saw the cover at all although both as regards the authority to make the endorsement and his seeing the cover he was contradicted by the manager of his office and by the camp clerk. WALLER J. has accepted Mr. Kalimullah's statement and rejected those of the latter two persons. The fact is that the cover remained unopened and was discovered in the manager's confidential almirah when Mr. Kalimullah was succeeded by another District Superintendent of Police, Mr. Loveluck, which was after the plaintiff had been invalided and granted a pension. When Mr. Loveluck saw Mr. Charsley's minute he was of the opinion that the charges were of a serious nature and should have been disposed of and the plaintiff not allowed to retire on an invalid pension. An enquiry followed and as a result of it the plaintiff was dismissed. The question before WALLER J. was, therefore, whether Mr. Kalimullah failed to dispose of the charges against the plaintiff and deliberately concealed the circumstances from the Deputy Inspector-General when he forwarded the pension papers. WALLER J. was of the opinion that Mr. Kalimullah did not deliberately conceal the fact that charges against the plaintiff had not been disposed of and came to the conclusion that at the interview between Mr. Kalimullah and Mr. Charsley the former had decided to drop the charges, that as a result he sent the plaintiff to the doctor, and that he had never seen Mr. Charsley's minute. On this, WALLER J., as before stated, held that

Mr. Kalimullah had found the charges not to have been sufficiently established to justify the plaintiff's dismissal and that Mr. Kalimullah was the proper and competent authority to come to that finding. The plaintiff as a result of WALLER J.'s finding asked for a declaration that he had been wrongly dismissed. WALLER J. declined to grant him that relief for the following reason that, although undoubtedly the plaintiff's suit was for a declaration that he had been wrongly dismissed and for damages on that account, the latter was not his real remedy because, if the order dismissing him was wrongful, he was entitled to be restored to the position in which he was when dismissed, in other words, to become a pensioner once more. If his claim is really for the latter then in WALLER J.'s opinion it is a claim for a pension and that being so such a suit is barred by section 6 of the Pensions Act which prohibits Courts of law from making any order or decree

"by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly."

As regards both the claim for a declaration and for damages for wrongful dismissal, he held that such a suit did not lie against the Secretary of State, he having come to a similar conclusion in the other suit in which the relief sought was merely damages for wrongful dismissal.

I propose, first of all, to deal with the question of whether the appellant's contention is right that he can only be dismissed by the authority by which he was appointed and not by any authority subordinate to that. This contention is founded upon a construction of section 96-B (1) and the

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appellant contends that no power is given in that sub-section to delegate the power of dismissal to any authority subordinate to that which makes the appointment and invites us to say that the opening words of the section, namely,

“subject to the provisions of this Act and of rules made thereunder”,

only apply to the earlier half of that sub-section and not to the latter. If that construction of the section is correct, then it was not competent to make any rules thus delegating the power of dismissal. I am unable to accept the appellant's contention with regard to this because, in my opinion, the words, “subject to the provisions of this Act and of rules made thereunder”, refer to the whole section and not only to a part of it. If that is so, the Secretary of State, under sub-section (2), could make rules regulating the conditions of service and discipline and conduct of the civil servants to whom the Act applies. That sub-section expressly provides that rules may be made delegating the power of making rules to Local Governments. Such rules have been made and in the exercise of the delegated powers the Local Government has given the Deputy Inspector-Generals of Police the right to dismiss officers of the appellant's rank.

The next question to be considered is whether WALLER J. was right in holding that the charges against the appellant had been disposed of by a competent authority previous to the grant of an invalid pension to the plaintiff. In the sense that no final order was passed by Mr. Kalimullah on Mr. Charsley's minute the charges had not been disposed of ; but, in my opinion, it is necessary to

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see what Mr. Kalimullah's decision would have been had the minute been put before him instead of being laid on one side by the manager or the camp clerk until after the appellant had been retired on an invalid pension. I think that it is quite clear that Mr. Kalimullah considered that such of the charges which in his opinion had been proved against the appellant would not justify dismissal and that he thought it would be better to invalid the plaintiff. But it is evident also that he regarded the latter as an alternative to awarding some punishment of a lesser nature than dismissal. Mr. Kalimullah, therefore, decided to await the result of the medical examination. If that resulted in the appellant being granted an invalid pension, then he intended to drop the disciplinary proceedings. Mr. Kalimullah was admittedly competent to dispose of the disciplinary proceedings ; and after the grant of the invalid pension had Mr. Charsley's minute been put before him, he would obviously have disposed of it by an order discontinuing those proceedings ; but Mr. Charsley's minute unfortunately was not put before him. In my view, this cannot really alter the position as the result, so far as Mr. Kalimullah was concerned, of the grant of the invalid pension was to render further disciplinary proceedings unnecessary. I do not altogether agree with WALLER J.'s view that all the charges were dropped by Mr. Kalimullah as a result of his decision before he sent the plaintiff to the doctor, because I do not think that the evidence justifies that view which, as I have already stated, shows that the invaliding of the appellant out of the service was an alternative to proceeding with

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some of the charges against him. I do not think that it is right therefore to say that those charges were not kept pending by Mr. Kalimullah in order to see what the result of the medical examination would be. I am satisfied that he intended to deal with those charges and award the suitable punishment short of dismissal if the medical examination did not result in the retirement of the appellant on an invalid pension. But, nevertheless, I arrive at the same conclusion as that reached by WALLER J., namely, that the charges were dropped as the result of the medical certificate although no orders were passed with regard to them. It was further contended by the learned Advocate-General that Mr. Kalimullah had no authority to act in this manner, that is to say, to give the appellant the alternative of getting out of the service in this way in order to avoid a decision in the disciplinary proceedings; but he was unable to quote any rule showing the contrary; and whilst I fully agree that it is undesirable that such a method of disposal of pending charges of misconduct should be adopted, there is nothing, in my view, to prohibit it. The result is that I agree with WALLER J.'s finding that the appellant was dismissed and deprived of his pension on charges that had already been found by a competent authority not to have been sufficiently established to justify his dismissal; and that the appellant, therefore, ought not to have been dismissed as Article 351 of the Civil Service Regulations only enables a pension to be withdrawn if the pensioner has been guilty of misconduct subsequent to his retirement. The respondent's action, therefore, was irregular.

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That being so, the appellant asks for a declaration that he has been wrongfully dismissed and for damages. With regard to the former relief, I am satisfied that the appellant is not entitled to it. What is the real remedy for which the appellant sues? I agree with WALLER J. that the appellant's real object is to get himself restored to the position in which he was before he was dismissed, in other words, to become a pensioner once more; and this observation must also apply to the claim for damages which is for his pension in another shape. It cannot be supposed for a moment that the declaration sought for would be used for any purpose by the appellant other than to influence Government to restore to him his pension. Before us Mr. K. S. Krishnaswami Ayyangar stated that the appellant did not intend to use the declaration in that way. He suggested that he would use it for the purpose of trying to influence the Government to make him an *ex gratia* payment; and at the same time he conceded that on such a basis the declaration could not be made effective by any process of law. This concession seems to me at once to dispose of the appellant's claim for that relief as Courts have always been averse to granting declarations which may end in a futility. Much reliance, however, was placed by the appellant upon Fischer's case, viz., *Robert Fischer v. The Secretary of State for India in Council*(1), a decision of the Privy Council. There the Collector of Madura had made a separate registration of a certain village belonging to the appellant in that case which was formerly a part of a zamindari. The Government of Madras, however, directed the

(1) (1898) I.L.R. 22 Mad. 270 (P.C.).

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Collector to cancel that separate registration and the appellant sued for a declaration that the Government's order cancelling the Collector's order was invalid; and it was held that this declaration should be decreed and that no further relief could have been required by the plaintiff, the effect of the declaration being sufficient to maintain the Collector's original order which was valid in law whilst the Government's order directing its cancellation was not legal and was void. In the course of the judgment of their Lordships of the Judicial Committee, which was delivered by Lord MACNAGHTEN, it is said that it was at least open to doubt whether that suit was within the purview of section 42 of the Specific Relief Act and that there could be no doubt as to the origin and purpose of that section which was intended to introduce the provisions of section 50 of the Chancery Procedure Act of 1852 as interpreted by judicial decisions, and that before that Act it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer. And on page 282 in the judgment it is stated :

" But the present suit is one to which no objection could have been taken before the Act of 1852. It is, in substance, a suit to have the true construction of a statute declared and to have an act done in contravention of the statute, rightly understood, pronounced void and of no effect. That is not the sort of declaratory decree which the framers of the Act had in their mind. But even assuming that the Specific Relief Act applies to such a suit as this, what is the result? What further relief can be required? If the so-called cancellation is pronounced void the order of the Government falls to the ground and the decision of the Collector stands good and operative as from the date on which it was made. "

And on page 283 it is stated :

" What remedy would the appellant have if he had omitted to ask for specific relief against the Collector? It is highly improbable that any officer of Government would set the Court at defiance. It is impossible to suppose that the Government would countenance such conduct as that. But the remedy in such a case, if it did occur, would be simple enough. Every order such as that which the appellant asks for carries with it liberty to apply. On a proper application and on proper notice being given, it would be found that the arm of the Court would be long enough to reach the offender whatever his position might be. "

That is certainly not the position here. As already stated the appellant does not intend to enforce the declaration by any process of law and the declaration is not of any real value to him unless it can be enforced against Government. The declaration asked for is that the appellant was not liable to be removed from service subsequent to his retirement. The appellant says that he does not want any order from the Court consequent upon that declaration. It is, therefore, a futility so far as the Court is concerned, and *Barwick v. South Eastern and Chatham Railway Companies*(1), which was also relied upon, is of no real assistance to the appellant. That was an exceptional case which had arisen during the War and in consequence of the exceptional conditions caused by the War; and in granting the declaration asked for it was said by the Earl of READING C.J. that the High Court ought to pronounce a decision " which will set at rest a controversy arising in consequence of the Government's occupation of the Railways ".

The facts in that case were that certain land below the low water-mark was reclaimed from the

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(1) [1921] 1 K.B. 187.

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sea by a Harbour Board under the powers of a special Act for the purpose of making a railway station on it. By the terms of the special Act the Harbour Board was required to grant a lease of the reclaimed land to the defendants. Upon the outbreak of the War in 1914 and before any lease was granted to the defendants, the Government took possession of the reclaimed land and were ready to make a payment in lieu of rates to the overseers of the poor of the adjoining parish if certified that the land was part of that parish. In 1917, while the Government were still in possession of the land, the then overseers of the adjoining parish brought an action in the High Court against the defendants claiming a declaration that the reclaimed land was part of that parish for all civil and parochial purposes within the meaning of section 27 of the Poor Law Amendment Act, 1868. Government objected to make the contribution until the question of whether the reclaimed land was extra-parochial or not was decided and suggested an early decision. Such a decision it is apparent could have been obtained in no other way than by the suit under appeal in that case and the remedy by way of a declaration sought for in that appeal because the rating machinery could not be used as Government was not rateable and the railway company was not in beneficial occupation. In my view, that was an extreme case. On the other hand, if the Court is to give a declaration to which it can give effect it can only be that the order of dismissal of the appellant is void (and that is what the appellant says in paragraph 12 of his plaint). This means that he is entitled to have his pension

restored to him. That remedy, in my view, would be clearly barred by section 6 of the Pensions Act which prohibits Courts of law from making any order or decree

“by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly.”

Clearly the Government's liability would by such a declaration be directly affected; and even if the declaration is intended to be used to influence Government to restore the pension to the appellant, it would, in my opinion, rightly be described as indirectly affecting the liability of Government to do so. As regards the claim for damages, it is conceded by the appellant that these would be exceedingly difficult to assess; and, certainly, if these were to take the shape of so many years' pension, this again would be barred by section 6 of the Pensions Act; and I can see no other basis of assessment. The alternatives seem to me either the restoration of the pension or in lieu thereof so many years' pension capitalised.

I next address myself to the very important question which arises mainly in Original Side Appeal No. 18 of 1931. In that case the plaintiff-appellant was employed in the Government Press, Madras, as a reader. He was alleged to have been implicated in the leakage of pleaders' examination papers and his immediate superior, the Superintendent of the Government Press, dismissed him from service. He appealed to the Government against that order of dismissal but his appeal was rejected. WALLER J. held that the procedure prescribed by Rule XIV of the rules made under section 96-B (2) of the Government of India

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Act was not followed and that therefore there had been no proper enquiry. The appellant therefore, claimed that he had been wrongfully dismissed from Government service and asked for damages for that wrongful dismissal. The question as to whether there was a wrongful dismissal and, if so, whether a suit for damages for wrongful dismissal against the Secretary of State for India is maintainable was elaborately argued by Mr. K. S. Krishnaswami Ayyangar and also by Mr. Doraiswami Ayyar. In the course of the former's argument, in my opinion, the crucial question in the case, namely, what was the appellant's tenure of service under the Crown, became obscured by learned arguments upon issues really extraneous to it. It seems to me that the only question is whether the appellant held his appointment at the pleasure of the Crown. If yes, then it is clear that the Secretary of State cannot be sued for damages for breach of contract for dismissing a servant who holds his appointment or office under such a tenure because the contract of service being at the pleasure of the Crown has not been broken by such dismissal. But it is also contended that, if, as in this case, there are rules made under the Act, and therefore statutory rules, which have to be observed before a person in the civil service of the Crown is dismissed, then a breach of those rules will give the right to a suit and in this connexion a number of cases dealing with the question of a breach of statutory rules or powers were referred to, such as, amongst others, *Ganesh Mahadev v. The Secretary of State for India*(1) and *Gaekwar Sarkar of Baroda*

(1) (1918) I.L.R. 43 Bom. 221.

v. *Gandhi Kachrabhai*(1). These cases, in my opinion, have no bearing on this suit which is a suit for damages for wrongful dismissal, that is to say, for a breach of contract. This is not a suit for breach of a statutory rule but purely one relating to a contract of employment in which the question is what the contract of service between the parties was and no other. There are certain sections of the Government of India Act of 1919 and rules made thereunder to be considered in this connexion and the effect of one of them, viz., section 32 (2) was considered by WALLER J. That reads as follows :—

“ Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company if the Government of India Act of 1858 and this Act had not been passed.”

This means that, if the plaintiff could have brought a similar suit against the East India Company before the year 1858, he would be entitled to bring this suit. I do not propose to go into the numerous authorities bearing upon this aspect of the case—I mention only one of them, namely, *The Secretary of State v. Cockcroft*(2)—and it is sufficient to say that these clearly show that the East India Company could only have been sued in its capacity of a trading corporation and that it could not have been sued for acts of state or sovereignty and, although the dismissal of a servant of the Crown may not perhaps strictly speaking be described as an act of state, it can certainly be more properly put in that class of acts of sovereignty rather than in the class of cases embraced by transactions carried on by

(1) (1903) I.L.R. 27 Bom. 344 (P.C.). (2) (1914) I.L.R. 39 Mad. 351.

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private individuals and trading corporations, as the control of the departments of the state must be in the exercise of certain sovereign rights. That, in my view, is a section which is a complete bar to both the suits under appeal. But when the contract between the appellant and the Crown here is examined—and it is section 96-B (1) of the same Act—I am satisfied that the appellant's suit is not maintainable. That section states that every person in the civil service of the Crown in India holds office during His Majesty's pleasure. It is, however, argued on behalf of the appellant that His Majesty's pleasure is qualified by the opening words of the sub-section, namely,

“subject to the provisions of this Act and of rules made thereunder.”

and that the rules made thereunder place a limitation upon the exercise of the otherwise unlimited pleasure in the Crown because where the dismissal, removal or reduction of any officer is ordered, the order must be preceded by a properly recorded departmental enquiry resulting in a finding upon all the charges preferred against the officer. The relevant rules are Rules XIII, XIV, XV and XVI. By Rule XIII the Local Government may, for good and sufficient reasons, amongst other things, remove or dismiss any officer holding a post in a provincial or subordinate service or a special appointment. Rule XIV sets out the procedure to be followed in cases of dismissal, removal or reduction and provides that there shall be a properly recorded departmental enquiry before the order of dismissal is made and also sets out the procedure to be followed at the enquiry. Rule XV provides for the delegation of

the powers conferred by Rule XIII to any Subordinate authority and Rule XVI gives a right of appeal to every officer against whom an order may be passed under Rules XIII and XV. It is contended for the appellant that Rules XIII and XIV limit the power of the Crown to dismiss at pleasure and in support of this argument a decision of the Privy Council, namely, *Gould v. Stuart*(1), is relied on. In that case the plaintiff, who was the respondent in the appeal, was in the service of the Government of New South Wales under and in accordance with the provisions of the Civil Service Act of 1884 of that Colony. In Part III of the Act there were certain disciplinary regulations governing the dismissal of the servant and laying down the procedure to be adopted prior to any order of dismissal. The plaintiff alleged—and it was common ground—that, before his service had been determined in the manner prescribed by the Act, the Government dismissed him and he accordingly brought a suit for damages for wrongful dismissal against the appellant. It is clear that the procedure prescribed by the Act was not followed by the Government but it was argued on their behalf that the rule was that civil servants of the Crown held office only during pleasure, that the Act did not either expressly or by implication change the nature of the civil servants' tenure of office and that the disciplinary regulations in Part III of the Act to which reference has already been made were not inconsistent with the continuation of the general common law rule as to tenure. It was held that the Crown had by law whether in

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England or New South Wales power to dismiss at pleasure either a civil or military officer a condition to that effect being an implied term of the contract of service except where it was otherwise expressly provided but that as the provisions in Part III of the Act were manifestly intended for the protection and benefit of the officer, they were inconsistent with such condition and that consequently the power of the Crown to dismiss at pleasure was restricted in that respect. There is, however, the all-important distinction between that case and this, namely, that in this case section 96-B (1) of the Government of India Act does expressly state that the tenure is at the pleasure of the Crown whereas in the former case there was no such express enactment and, that being so, in the face of the provisions in Part III which were inconsistent with any such tenure, there could not be imported by implication into the contract of service the term that the Crown may put an end to it at its pleasure; and with great respect to another decision relied upon by the appellant, namely, *J. R. Baroni v. The Secretary of State for India in Council*(1), I think that CUNLIFFE J., who decided that case and relied upon *Gould v. Stuart*(2), misapprehended the grounds for that decision. COSTELLO J., in *Bimalacharan Batabyal v. Trustees for the Indian Museum*(3), in my view, correctly interprets the decision in *Gould v. Stuart*(2). It seems to me that the tenure of the officer is either at pleasure or some other higher tenure; and if the contention of the appellant is correct, then section 96-B (1)

(1) (1929) I.L.R. 8 Rang. 215.

(2) [1896] A.C. 575.

(3) (1929) I.L.R. 57 Cal. 231.

whilst expressly stating that the tenure is at the pleasure of the Crown, in the same section makes a provision for rules which alter that tenure into one of good behaviour, because Rule XIII and the procedure laid down in Rule XIV clearly relate only to the conduct of the officer. Mr. K. S. Krishnaswami Ayyangar does not concede this latter alternative but is unable to say what the tenure of the officer is except that it is at the pleasure of the Crown the exercise of which is limited by rules laying down that he cannot be dismissed except for proved misconduct. With all respect to that argument, I am unable to distinguish the latter tenure from one of good behaviour; and the Legislature cannot have intended in the same section to provide for such an obvious inconsistency as is contended for by the appellant. In my opinion, the tenure of a civil servant under the Crown in India is, as is stated, one at the pleasure of the Crown and the rules referred to in no way abrogate that right. Rule XIV merely lays down the procedure to be followed and is in fact headed "Procedure in cases of Dismissal, Removal or Reduction". In *Shenton v. Smith*(1), where it was held that a Colonial Government was on the same footing as the Home Government as to the employment and dismissal of servants of the Crown and that in the absence of special contract they held their offices during the pleasure of the Crown, it was stated by Lord HOBHOUSE on pages 234 and 235 :

"They consider that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special

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prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law-suit, but by an appeal of an official or political kind"; and as regards the regulations :

"As for the regulations, their Lordships again agree that they are merely directions given by the Crown to the Governments of Crown Colonies for general guidance and that they do not constitute a contract between the Crown and its servants . . . They are alterable from time to time without any assent on the part of Government servants, which could not be done if they were part of a contract with those servants"; and again :

"The difficulty of dismissing servants whose continuance in office is detrimental to the state would, if it were necessary to prove some offence to the satisfaction of a jury, be such as seriously to impede the working of the public service. No authority, legal or constitutional, has been produced to counteract the doctrine that persons taking service with a Colonial Government to whom the regulations have been addressed, can insist upon holding office till removed according to the process thereby laid down. Any Government which departs from the regulations is amenable, not to the servant dismissed, but to its own official superiors, to whom it may be able to justify its action in any particular case."

It is quite true that in that case their Lordships were dealing merely with regulations; but this judgment is of importance because it defines what the contract between the civil servant and the Government is; and applying the observations before referred to, I think that it cannot be said that Government by its rules only has laid down the terms of service of the officer. As stated by Lord HOBHOUSE, if the Government at any time desires to alter the procedure provided in the rules, it can do so without the assent of the officer; and it cannot be argued, therefore, that the rules made under section 96-B (1) have any contractual

force. If the rules are not followed or for any other reason a remedy is provided by Rule XVI by way of an appeal; and that is the only remedy provided and the appellant in Original Side Appeal No. 18 resorted to this remedy. There is, in addition to this, a further objection to the appellant's argument, namely, section 25 of the Public Servants (Inquiries) Act of 1850. The very rule relied upon by the appellant, namely, Rule XIV, affords a complete answer to his contention. The opening words of that rule are:

"Without prejudice to the provisions of the Public Servants (Inquiries) Act of 1850".

Section 25 of that Act reads as follows :—

"Nothing in this Act shall be construed to affect the authority of Government, for suspending or removing any public servant for any cause without an inquiry under this Act."

For the reasons stated, in my view, both the appeals must be dismissed with costs. We certify for two Counsel.

With regard to the memoranda of objections with regard to the order as to costs passed by WALLER J., namely, in Civil Suit No. 650 of 1927 ordering that the costs should be borne by the defendant (respondent), and in Civil Suit No. 549 of 1929 ordering no costs, I see no reason whatever for interference. The memoranda of objections will, therefore, be dismissed without costs. The appellant in Original Side Appeal No. 18 of 1931, who appeals as a pauper, will pay the court-fee to Government.

BARDSWELL J.—The appellant in Appeal No. 1 of 1931 was a police Sub-Inspector. He was first discharged on an invalid pension but was afterwards dismissed, with the consequence of his

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pension being withdrawn for misconduct prior to his discharge. There had been an enquiry about this misconduct as to what happened to which there will be more to be said later. The appellant in Original Side Appeal No. 18 of 1931 was a Reader in the Government Press, Madras, and was dismissed from service without any enquiry. The suit brought by the appellant in Original Side Appeal No. 18 of 1931 was for damages for wrongful dismissal. That filed by the other appellant was for a declaration that he was not liable to removal after his retirement and for damages.

In both these appeals, which have been argued together, the question has to be decided whether the suits are maintainable as against the Secretary of State. By section 32 (2) of the Government of India Act of 1919

"every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company if the Government of India Act of 1858 and this Act had not been passed."

WALLER J. has pointed out in the two suits under appeal that the Company was not merely a trading corporation but also exercised sovereign powers. He has referred to *Jehangir M. Cursetji v. Secretary of State*(1), and the cases referred to therein and has held that the effect of the authorities is that the Company could only be sued for acts done by it in its capacity as a trading corporation but could not be sued for acts of sovereignty. The dismissal of an officer in his view was an act of sovereignty and therefore he held that the suits under appeal could not lie. It has been pointed out in the course of arguments that this Bombay

(1) (1902) I.L.R. 27 Bom. 189.

decision when it lays down that no action lies against the Secretary of State in respect of acts of state and acts of sovereignty goes too far. The same is the case with the decision in *Nobin Chunder Dey v. The Secretary of State for India*(1) in which a decision of the Supreme Court of Calcutta, reported as *Peninsular and Oriental Steam Navigation Company v. Secretary of State for India*(2) has been construed as deciding more than it actually decided. This has been shown by TURNER C.J. and MUTTUSWAMI IYER J. in *The Secretary of State for India v. Hari Bhanji*(3), in which it was held that, where an act complained of is professedly done under the sanction of Municipal law and in the exercise of powers conferred by that law, the fact that it is done by the sovereign power and is not an act which could possibly be done by a private individual does not oust the jurisdiction of the civil Court. WALLIS J., as he then was, in *Ross v. Secretary of State*(4), and RANKIN C.J. in the leading judgment in *Secretary of State for India in Council v. Shreegobinda Chaudhuri*(5) have also in like manner shown what is the true effect of the decision of the Calcutta Supreme Court. I do not think it necessary to go into any detailed examination of these cases as what has to be seen here is whether, allowing that a suit can, in some circumstances, be brought against the Secretary of State in respect of acts done in exercise of the powers of a Sovereign, a suit can be brought against him in India by a public servant who has been

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(1) (1875) I.L.R. 1 Calc. 11. (2) (1861) 5 Bom. H.C.R. Appx. 1.
(3) (1882) I.L.R. 5 Mad. 273. (4) (1913) I.L.R. 37 Mad. 55.
(5) (1932) I.L.R. 59 Calc. 1289.

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dismissed, on the ground of the dismissal being wrongful. There can be no doubt as to the dismissal of a public official being an act of sovereignty and normally, as held by RANKIN C.J. in the case above cited, no remedy in tort lies against the Secretary of State for any act done by an officer of Government in exercise of powers which cannot be exercised save by the sovereign power. The suits under appeal, however, are not actions in tort but actions for damages for breach of contract, and there is no doubt but that proceedings may be taken against the Crown for breach of contract in some cases. Instances of such cases are to be found in *Thomas v. The Queen*(1) and *Windsor and Annapolis Railway Co. v. The Queen and the Western Counties Railway Co.*(2). But neither of these cases had to do with the dismissal of a public servant. In England the power of the Crown to dismiss a public servant who holds an appointment at its pleasure is absolute. The position is thus stated in Halsbury's Laws of England (1932 edition) Vol. 6, paragraph 782:

"Except where it is otherwise provided by statute, all public officers of the Crown hold their appointments at the pleasure of the Crown and all, in general, are subject to dismissal at any time without cause assigned; nor will an action for wrongful dismissal be entertained even though a special contract be proved."

It is, however, argued that, though normally in all parts of the British Dominions the Crown has the power to dismiss any of its officers at its pleasure, yet, that power may be limited by statute in which case an action can be brought by any officer who has been dismissed contrary to the

statutory provisions by which the power of dismissal has been restricted. The section of the Government of India Act which has to be considered in this connection is section 96-B, the essential part of which for the purpose of these appeals runs as follows:—

"Subject to the provisions of this Act and of rules made thereunder, every person in the Civil Service of the Crown in India holds office during His Majesty's pleasure and may be employed in any manner required by a proper authority within the scope of his duty, but no person in that service may be dismissed by any authority subordinate to that by which he was appointed."

The rules framed under this section which have to be looked into in connection with dismissals of public servants are Rules XIII, XIV, XV and XVI. Rule XIII lays down:

"Without prejudice to the provisions of any law for the time being in force, the Local Government may for good and sufficient reasons . . . dismiss any officer holding a post in a provincial or subordinate service."

Rule XV allows Government to delegate to any subordinate authority, subject to such conditions as it may prescribe, any of the powers conferred by Rule XIII in regard to officers of the subordinate service.

Rule XVI provides that every officer against whom an order may be passed under Rules XIII and XV and who thinks himself wronged thereby shall be entitled to at least one appeal against such order.

Rule XIV is as to the procedure in cases of dismissal, removal or reduction and runs thus:

"Without prejudice to the provisions of the Public Servants (Inquiries) Act, 1850, in all such cases in which the dismissal of any officer is ordered . . . the order shall, except when it is based on facts or conclusions established at a

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(1) (1874) L.R. 10 Q.B.C. 31.

(2) (1886) 11 App. Cas. 607.

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judicial trial or when the officer concerned has absconded with the accusation hanging over him, be preceded by a properly recorded departmental enquiry. At such an enquiry a definite charge in writing shall be framed in respect of each offence and explained to the accused, the evidence in support of it and any evidence which he may adduce in his defence shall be recorded in his presence and his defence shall be taken down in writing. Each of the charges framed shall be discussed and a finding shall be recorded on each charge."

In the case of the appellant in Original Side Appeal No. 18 of 1931 the procedure prescribed by this rule was not followed at all. In the case of the other appellant charges were framed and an enquiry was made, but no order had been passed disposing of the case by the time when he was granted his pension, which was an invalid pension. The circumstances which led to his dismissal after he had been granted the pension have been fully set out in my Lord's judgment and it is not necessary for me to state them again. I shall only deal on this part of the case with the point that has been taken on this appellant's behalf with reference to section 96-B that, though he had been appointed by an Inspector-General, his dismissal was by a Deputy Inspector-General, an officer of a lower rank. This appellant, I would observe, has not chosen to appeal against the order of dismissal to the constituted authority, that is to the Inspector-General. The appellant in Original Side Appeal No. 18 of 1931 preferred an appeal which was dismissed.

The authority on which the appellants rely for their contention that the right of the Crown to dismiss its officers at its pleasure can be restricted is *Gould v. Stuart*(1). They rely further on some

(1) [1896] A.C. 575.

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Indian decisions as showing that there is such a restriction in British India under section 96-B. In *Gould v. Stuart*(1) there was an Act of New South Wales which prescribed the procedure to be followed in matters of discipline. It was held that the provisions as to this were manifestly intended for the protection and benefit of the officer and were inconsistent with importing into the contract of service the term that the Crown might put an end to it at its pleasure. In the opinion of their Lordships of the Privy Council this was an exceptional case, and it was held that an action would lie. This decision has been referred to, in each case by a single Judge, in two cases, the judgments in which are reported as *Satish Chandra Das v. Secretary of State for India*(2) and *J. R. Baroni v. Secretary of State for India*(3) respectively. In both these cases it was held that a dismissed civil servant had a cause of action if the procedure laid down by the rules was not followed. An important point that has not been noted in the Calcutta case is that the New South Wales Act contained no words to the effect that the tenure of an office was during His Majesty's pleasure. In the Rangoon case, however, the omission was noticed but still it was held that, despite the fact that such words occurred in section 96-B, it was clear that

"subject to the provisions of this Act and the rules framed thereunder"

indicated that certain formalities must be observed before a civil servant could be dismissed; and that in so far as those formalities were alleged

(1) [1896] A.C. 575.

(2) (1926) I.L.R. 54 Calc. 44.

(3) (1929) I.L.R. 8 Rang. 215.

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not to have been followed the plaintiff was not precluded from bringing an action. Another single Judge, however, of the Calcutta High Court has in *Bimalacharan Batabyal v. Trustees for the Indian Museum*(1), in which *Gould v. Stuart*(2) is again referred to and discussed, distinguished *Satish Chandra Das v. Secretary of State for India*(3) and taken the view that section 96-B did not take away from the Crown the right to dismiss its civil servants at its pleasure which existed before its enactment; see also *Ram Das Hazra v. Secretary of State for India in Council*(4). With respect, I am of opinion that this is the correct view. In *Shenton v. Smith*(5) it was held by the Privy Council that a civil servant in Western Australia held his office at the Crown's pleasure and that there was no contract to the contrary because of certain regulations which constituted directions given by the Crown for the guidance of its officers. It was pointed out that the regulations were alterable from time to time without any assent on the part of Government servants, which could not be done if they were part of the contract with those servants. Those regulations, indeed, were not statutory whereas the rules framed under section 96-B are framed under a statute, but none the less they can be altered from time to time without reference to or consent from the officers concerned. But apart from that, Rule XIV is specifically without prejudice to the provisions of the Public Servants (Inquiries) Act,

(1) (1929) I.L.R. 57 Cal. 231.

(3) (1926) I.L.R. 54 Cal. 44.

(2) [1896] A.C. 575.

(4) (1912) 18 C.W.N. 106.

(5) [1895] A.C. 229.

1850. I take this to mean that the rule is governed by that Act, section 25 of which says that "nothing in this Act shall be construed to affect the authority of the Government, for suspending or removing any public servant without an enquiry under this Act."

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When that is the case I find it impossible to say that the Government, or the authority to whom it delegates its power in the matter, cannot with reference to Rule XIV dismiss its Civil servants even without an enquiry. That the appellant in Original Side Appeal No. 18 of 1931 was doing work, as a reader in a press, which could have been done by a private person does not make him any the less a public servant or limit the right of Government to dismiss him at its pleasure. As to his remedy, one is provided for in the rules by way of appeal. The statutory rules give him no right of suit, and the general rule is that no remedy can be taken but the particular remedy prescribed by the statute. I agree with WALLER J. that this appellant has no right of action.

In the case of the appellant in Original Side Appeal 1 of 1931 it is part of the statute itself, that is of section 96-B, that an officer is not to be dismissed by an authority lower in rank than the authority which appointed him. The appellant was certainly dismissed by an officer lower in rank than the Inspector-General by whom he was appointed. There is now a rule giving a Deputy Inspector-General of Police the power to dismiss a Sub-Inspector as well as to appoint him but it is argued that this rule, in so far as it allows an officer who has been appointed by an Inspector-General to be dismissed by a Deputy Inspector-General, overrides the provisions of the statute.

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The whole, however, of section 96-B appears to me to be governed by its opening words,

"subject to the provisions of this Act and the rules made thereunder".

This is the view that has been taken by WALLER J., as I think, correctly. Throughout the section no stop occurs bigger than a comma, and I do not see how these opening words can be applied to only one part of it and not to another. In my view, then the dismissal of the Sub-Inspector cannot on this ground be taken as contrary to the statute.

But it has been argued by Mr. Krishnaswami Ayyangar that the rules framed under section 96-B are as to disciplinary action to be taken against Government servants who are still in service and that a man not in service cannot be dealt with under them. Equally it may be said that section 96-B cannot apply in such circumstances. Accepting this as the position, then the dismissal of the appellant cannot be considered from the point of view of its being a breach of contract with reference to that section. The dismissal has rather to be viewed as part of the order by which he has been deprived of his pension and it is from this point of view that it has to be considered. The damages prayed for, for the breach of contract set up, can only be for the loss of pension. The prayer for a declaration to the effect that the dismissal order was *ultra vires* and was not valid under the rules has to be considered in the same connection. This brings us to the provision of section 4 of the Pensions Act (XXIII of 1871) by which, except in certain cases that do not apply here, no Civil Court shall entertain any suit

relating to any pension. It is now argued that this provision is *ultra vires* of the legislative authority of the Government of India, in that it extends the scope of Regulation IV of 1831, and therefore is not in compliance with section 32 (2) of the Government of India Act which has already been quoted. Under Regulation IV of 1831 the Courts of Adawlat were prohibited from taking cognizance of any claim to personal grants of money conferred by the authority of the Governor-General in Council as a pension, as also of any claim for the renewing or continuation of such a grant, without a special authorisation from a Secretary to Government. There is, of course, no such authorisation here. It is argued that in respect of the prayer for a declaration which may affect a claim to a pension a suit was not barred by the Regulation and therefore could not be barred by the Act. The declaration if granted could not have the result of the pension being restored but it is asked for with the idea that it might induce the Government to re-consider their position and restore the pension or at least grant a gratuity. I do not think that the contention that section 4 is *ultra vires* has any force. Though the declaration may not be prayed for as one that will have the immediate or necessary consequence of the pension being restored or a gratuity being given, yet it is sought for in the hope of such a result ensuing indirectly and so, in my opinion, a suit for it would be covered by the prohibition against taking cognizance of a claim for a pension or its recovery or continuation. The Act in my opinion only makes matters more explicit but does not add anything to the Regulation. Another

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objection to the granting of a declaration is that such a relief will not be granted unless it is intended and expected to be effective. The Privy Council decision in *Fischer's Case*(1) and that of this Court in *The Secretary of State for India in Council v. Subba Rao*(2) have been referred to as showing that a declaration can be given outside the scope of section 42 of the Specific Relief Act, but those cases do not help this appellant who wants the declaration on the mere chance that it may help him to get his pension back or at any rate to get something. This appellant may have a grievance in that his pension has been taken away after it had been granted, for misconduct that had occurred before the grant had been made, which is contrary to Article 351 of the Civil Service Regulations. The charges too, on which he was dismissed, though no orders were passed on them, were regarded by the District Superintendent of Police as no longer pending; and it is argued that they should be regarded as having been disposed of by implication. I do not, however, think it necessary to go in detail into these matters which have been fully dealt with by my Lord. It is to my mind clear that this appellant is debarred by the Pensions Act from bringing any suit that may affect his right to the pension.

I agree that both these appeals should be dismissed with costs.

WALLER J. in Civil Suit No. 549 of 1929 which is appealed against in Original Side Appeal No. 1 of 1931 has ordered that each party was to bear his own costs as each had succeeded in part. It is

(1) (1898) I.L.R. 22 Mad. 270 (P.C.).

(2) (1933) 65 M.L.J. 186.

clear from what has been stated above that the appellant in that appeal has been deprived of his pension in circumstances that were not regular. In the other suit it was ordered that the costs should be borne by the defendant Secretary of State. Had there been a regular enquiry, and it is not now contended that there was one though it was so contended at first, there would have been no suit. Admittedly there could have been no cause of action had the proceedings been regular. Both orders as to costs are therefore proper and I agree that the memoranda of objections must be both dismissed without costs. I agree that two Counsel should be certified for in the two appeals taken together; and also that the appellant in Original Side Appeal No. 18 of 1931 who has appealed as a pauper should pay the court-fee to Government.

Attorney for respondent in both appeals:
The Government Solicitor.

G.R.

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APPELLATE CIVIL.

Before Mr. Justice Sundaram Chetti and Mr. Justice
Pandrang Row.

1934,
February 9.

SEETHAI ACHI (PLAINTIFF), PETITIONER,

v.

MEYYAPPA CHETTI AND THREE OTHERS (PROPOSED FOURTH
DEPENDANT AND DEFENDANTS 1 TO 3), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXIII, rr. 1 and 3—Withdrawal of suit—Plaintiff's right of—Absolute or controlled by existing rights—Compromise between parties to suit conferring benefit on stranger and providing that he should be made a party to suit so that he might be bound by and participate in the compromise—Stranger's applications for being made party to suit and for enforcing compromise—Pendency of—Plaintiff's application for withdrawal of suit made during—Refusal of, till disposal of stranger's applications—Court's power of—Sec. 146; O. XXII, r. 10, and O. I, r. 10—Applicability and effect of.

The plaintiff, the widow of a deceased Hindu, instituted a suit against defendants 1 to 3 for recovery of possession of her husband's estate and for a decree directing them to render an account for the period during which the estate was in their enjoyment. Defendants 1 and 3 were brothers of plaintiff's deceased husband and defendant 2 was the son of defendant 1. During the course of the suit a compromise was said to have been entered into by way of a family arrangement settling all the matters in controversy between the parties to the suit and the first respondent. One of the terms of the alleged compromise was that a third share in the estate which the plaintiff surrendered in favour of defendants 1 and 3 was to be conveyed to the first respondent. Another term was that the first respondent should be made the fourth defendant in the suit so that he might be bound by and participate in the family arrangement and compromise. The first respondent intervened in the suit with an interlocutory application in which he sought

to be added as a party to the suit in order to enforce the said compromise. The compromise deed itself was put into Court along with the said application and, as it contained a prayer that a decree should be passed according to the terms thereof, it was numbered as an independent interlocutory application. Both those applications were opposed by plaintiff as well as defendants 1 and 3. While the Court below was proceeding with the first respondent's application to be added as a party and after some oral evidence had been recorded and documents filed, the plaintiff filed a petition in which she reported to the Court her withdrawal from the suit and asked the Court to strike the suit off the file. Defendants 1 to 3 did not object to the withdrawal. The Court below held that the proper stage for considering whether the suit should be dismissed or not was after the disposal of the first respondent's interlocutory applications, and dismissed the plaintiff's petition, suggesting that she might renew the same if necessary after the disposal of the first respondent's applications.

Held in revision that the withdrawal of the suit by the plaintiff did not deprive the first respondent of his right to obtain an adjudication on his applications and that plaintiff's application for the unconditional dismissal of the suit by reason of the withdrawal could not be granted till after the disposal of the first respondent's applications but that the Court below ought not to have dismissed the plaintiff's petition and ought to have kept it pending till the disposal of the first respondent's applications.

A plaintiff's right to withdraw the suit is not absolute but is controlled by other existing rights. The mere making of an application by the plaintiff to withdraw the suit does not amount to a termination of the suit. The Court does not become *functus officio* on the mere making of such an application but has power to consider and decide any objections that may be made to the withdrawal of the suit before passing final orders on the application to withdraw.

The first respondent, though a stranger to the suit, had a right to be made a party to the suit for the purpose of enforcing the compromise in spite of the plaintiff's withdrawal of the suit and he should not be denied that right merely because his application to be made a party happened to be undisposed of when the suit was withdrawn.

* Civil Revision Petition No. 328 of 1933.

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Ram Churn Bysack v. Mrs. Ripsimah Harmi, (1868) 10 W.R. (Civ.) 373, considered.

Kunju Kombi Achan v. Ammu, (1931) 34 L.W. 548, and *Raj Kumari Debi v. Nrityakali Debi*, (1910) 12 C.L.J. 434, relied upon.

Per SUNDARAM CHETTI J.—Order XXII, rule 10, of the Code of Civil Procedure is not confined to cases of undisputed assignment, creation or devolution of interest.

PETITION under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Devakottah, dated 23rd February 1933 and made in Interlocutory Application No. 249 of 1933 in Original Suit No. 56 of 1930.

T. R. Venkatarama Sastri (with him, *T. M. Krishnaswami Ayyar*, *V. Rajagopala Ayyar* and *T. V. Ramiah*) for petitioner. —Under Order XXIII, rule 1, Civil Procedure Code, a plaintiff, if he so chooses, can withdraw the suit. His right is subject only to claims of parties already on the record. A person not already a party to the suit and applying to be made a party is not entitled to resist the withdrawal. As to the general rule in regard to such cases see *Ram Churn Bysack v. Mrs. Ripsimah Harmi*(1).

[Was there any provision corresponding to Order XXIII, rule 1, at the time of that judgment?—PANDRANG ROW J.]

The judgment proceeds upon the footing that the principle applied. Section 97 of the Code of 1859 corresponds to Order XXIII, rule 1, of the present Code.

[It does not expressly provide for withdrawal—PANDRANG ROW J.]

The English practice of non-suit enabled a person to bring as many suits as he liked and get them non-suited. The procedure was changed there to get rid of this result. Order XXIII, rule 1, of the present Code has been enacted to prevent a plaintiff withdrawing his suit and bringing a fresh suit by providing that he cannot do so without the leave of the Court. Both under the old Code and under the present one, on an

(1) (1868) 10 W.R. (Civ.) 373.

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application made by the plaintiff to withdraw the suit nothing has to be done by the Court except to award costs. Plaintiff's power to withdraw is unfettered. No order of the Court is necessary to enable a plaintiff to withdraw the suit without liberty; *Mahant Biharidasji v. Parshotamdas*(1), *Lakshmanan Chetty v. Muthaya Chetty*(2), *Subbarami Reddi v. Sundararaja Aiyangar*(3), *Muthu Chettiar v. Govindasami Naidu*(4) and *Kunju Kombi Achan v. Ammu*(5).

[Was any petition for addition of party pending at the time of the application for withdrawal in the last-mentioned case?—SUNDARAM CHETTI J.]

[The anandravans were directed to be brought on the record before the application for withdrawal was decided—PANDRANG ROW J.]

The application for withdrawal was prior to the anandravans seeking to have themselves brought on the record. *Tukaram Mahadu v. Ramchandra Mahadu*(6), relied upon by the respondent, refers only to rights of persons who are already parties to the suit and does not entitle a person not a party to come on the record so as to be able to resist the withdrawal; see pages 676 and 683. Both under section 146 and under Order XXII, rule 10, the party seeking to come on the record does so as representing one of the parties to the suit or appeal, while a person seeking to come in under Order I, rule 10, does so as an utter stranger and in his own right and not as representing either of the parties already on the record. Therefore cases under Order XXII, rule 10, or under section 146 are inapplicable to cases under Order I, rule 10. *Lakshan Chunder Dey v. Nikunjamoni Dassi*(7), relied upon by the other side, is distinguishable; see page 758. So also *Sourendranath Mitra v. Tarubala Dasi*(8). *Ahmedbhoy Habibhoy v. Vullubhoy Cassunbhoy*(9) was a case of a transferee. A person not a party to a suit on whom a benefit is conferred by a compromise is not a transferee of either party to the suit and cannot seek to come on the record under section 146 or Order XXII,

(1) (1908) I.L.R. 32 Bom. 345. (2) (1919) 40 M.L.J. 126, 137.

(3) (1915) M.W.N. 1021, 1022. (4) (1929) 116 I.C. 823.

(5) (1931) 34 L.W. 548, 549. (6) (1925) I.L.R. 49 Bom. 672.

(7) (1923) 27 C.W.N. 755. (8) (1930) I.L.R. 57 Calc. 1311, 1320 (P.C.).

(9) (1884) I.L.R. 9 Bom. 323.

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rule 10, or resist the withdrawal of the suit when the withdrawal is agreed to by all the parties on the record. *Bibijan Bibi v. Abdul Jabbar Daftary*(1) and *Raja Rajeswara Muthuramalinga Setupathi Ayl. v. Secretary of State for India*(2) referred to.

[In the last-mentioned case Government who sought to come on the record claimed a right superior to either party—*PANDRANG ROW J.*]

Laraiti v. Ch. Shiam Sunder(3) was a case of the transferee himself who will come under Order XXII, rule 10. He was nevertheless treated as a third party. *Sitaramaswami v. Lakshmi Narasimha*(4), cited for the other side, shows the distinction between the scopes of section 146 and Order XXII, rule 10. *Veeraraghava Reddi v. Subba Reddi*(5) was a case in which the party resisting the recording of the compromise was already on the record. Joinder under Order I, rule 10, is permissible only when such joinder is necessary to adjudicate upon the matter in dispute between the original parties to the suit. The corresponding English rule clubs old section 31 and present Order I, rule 10, together and under it it has been held that the clue to the right construction of that rule is whether but for the joinder of the new party the suit would be bad for misjoinder or non-joinder; *Mosu v. Marsdem*(6). *Norris v. Beazley*(7) referred to. The scope of the original suit ought not to be extended by bringing in a new party. As to the test of the permissibility of joinder under Order I, rule 10, see *Banbihari Mukherji v. Bhejnath Singh Mahapatra*(8). *Sri Mahant Prayaga Doss v. Board of Commissioners for Hindu Religious Endowments, Madras*(9) followed *Mosu v. Marsdem*(6) and *Norris v. Beazley*(7) but has been doubted in later cases; see *Secretary of State v. Murugesu*(10); but in the last-mentioned case the new party was interested in the original subject-matter of the suit itself. The addition of a third party opposed by both parties to the suit is to be allowed only when the third party is a necessary party to the suit and not merely a proper party; *Sri Mahant Prayaga Doss v. Board of Commissioners for Hindu Religious Endowments, Madras*(9).

(1) (1916) 36 I.C. 919.

(3) A.I.R. 1932 All. 478.

(5) (1919) I.L.R. 43 Mad. 37.

(7) (1877) 2 C.P.D. 80, 85.

(9) (1926) I.L.R. 50 Mad. 34, 38, 39.

(2) (1925) 50 M.L.J. 59.

(4) (1917) I.L.R. 41 Mad. 510, 512.

(6) [1892] 1 Ch. 487.

(8) (1931) I.L.R. 59 Cal. 329, 332.

(10) A.I.R. 1929 Mad. 443.

Sitaramaya v. Ramappaya(1), *Chidambaram Chettiar v. Subramaniam Chettiar*(2) and *Basant Singh v. Mahabir Prasad*(3) also referred to.

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A suit may terminate either by a withdrawal, or by a compromise a term of which is the withdrawal of the suit, or by a judgment. This mode of the natural termination of the suit cannot be prevented by a third party coming on the record against the wishes of the parties to the suit when his presence on the record is not necessary for the adjudication of the matter in dispute between the original parties to the suit.

Advocate-General (Sir A. Krishnaswami Ayyar), for *K. S. Desikan* for defendants 1 and 3 (supporting petitioner).—Controversy in Order I, rule 10, must be controversy as originally laid in the plaint. It must also be a subsisting controversy between plaintiff and defendant. A controversy which has been settled between plaintiff and defendant is not a controversy within the meaning of Order I, rule 10; in other words, a dead controversy cannot be revived. The right of a third party to intervene cannot prevent the plaintiff, who is *dominus litis*, from terminating the controversy between him and the defendant by a compromise. Plaintiff's right to terminate the suit is unconditional. The effect of the new party being added against the opposition of plaintiff and defendant is to change the parties to the suit, its subject-matter and in fact its whole nature. The addition will, far from putting an end to the suit, start a new controversy with changed parties, the new party being arrayed on one side and the plaintiff and the defendant being arrayed on the other. Order I, rule 10, cannot be availed of for such a purpose. Order XXII, rule 10, is inapplicable to a case like the present. It proceeds upon the footing that the suit as originally laid is continuing. The "interest" referred to in that rule means interest in the subject-matter of the suit. The rule also assumes that the new party is the representative of either of the original parties to the suit. *Maharaja Sir Manindra Chandra Nandi v. Ram Lal Bhagat*(4), if read aright, shows that Order XXII, rule 10, does not contemplate the addition of a party. The rule is confined to cases of complete devolution and is inapplicable to cases of partial devolution. It is,

(1) (1916) 5 L.W. 207.

(2) (1927) 53 M.L.J. 269.

(3) (1913) I.L.R. 35 All. 273 (P.C.).

(4) (1922) I.L.R. 1 Pat. 581 (P.C.).

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however, unnecessary to go into that question in the present case. The suit in the present case is one for accounts against persons who had been in the management of plaintiff's property and plaintiff and defendants divide up the property between themselves. There cannot be any question of assignment, total or partial, in such a case. *Annamalai Chettiar v. Koothappudayar*(1) considers *Maharaja Sir Manindra Chandra Nandi v. Ram Lal Bhagat*(2). The enactment of Order XXIII, rule 1, is rendered necessary to show that a new suit would be barred in case of withdrawal without liberty because under section 11 of the Code a suit which is withdrawn will not operate as *res judicata* for there is no adjudication upon the merits. Order XXIII, rule 3, refers only to parties to the suit. Either the nature or the stage of the suit must permit of the joinder of a new party. Rule 3 contemplates a compromise between the original parties to the suit and in regard to the subject-matter of the suit. The introduction of controversies between third parties is alien to the spirit of that rule. In fact under that rule the Court can pass a decree only in so far as the compromise relates to the suit, though the compromise may be in reference to other matters and the Court may record the compromise as regards those matters. The addition of a party cannot be a term of a compromise under that rule. The addition of a party can be claimed only under one or other of the several provisions of the Code relating to addition of parties. A party cannot therefore claim to be added as a party to the suit merely because the parties to the suit have entered into an agreement agreeing that he should be made a party. In such a case either party to the suit must take the initiative and apply to have the new person added as a party. The new party can come in only if the original parties consent to his addition; he cannot come in against the opposition of the original parties. "Party" in Order XXIII, rule 3, means either original party or a person who could be added under other provisions of the Code as to the addition of parties.

[If the compromise relates to the subject-matter of the suit and one of its terms is the addition of a party, cannot the Court add him as a party and pass a decree?—SUNDARAM CHETTI J.]

(1) (1932) 38 L.W. 280, 283.

(2) (1922) I.L.R. 1 Pat. 581 (P.C.).

The Court can do so only if the original parties agree to the addition and either takes the initiative; it cannot do so if they both join in opposing the addition. The right of the plaintiff to withdraw the suit is unconditional and the Court's aid is not necessary.

S. Srinivasa Ayyangar (with him, *S. Parthasarathi* and *V. K. Thiruvengkatachari*) for first respondent.—When an application to be made a party is pending, plaintiff cannot defeat that right by putting an end to the suit by withdrawing it. There is nothing either in public policy or in Order XXIII, rule 3, to prevent a compromise being entered into with a term that a person should be added as a party. The only question now before the Court is whether in the case of such a compromise there is anything to prevent the third party from being added as a party. The words "so far as it relates to the suit" in Order XXIII, rule 3, are of the widest description. The question whether the compromise is within the scope of the suit and the addition of the new party would widen its scope is not necessary to be considered at the present stage. The only question now before the Court is whether the first respondent has a right to apply to be made a party.

[Who can apply under Order XXIII, rule 3?—SUNDARAM CHETTI J.]

A party to the compromise, though not a party to the suit, can apply. An assignee under Order XXII, rule 10, can be an assignee from either party to the suit only or from both parties to the suit. The suit in the present case is really one for money. As regards plaintiff's right to withdraw the suit, ordinarily a plaintiff has the right to withdraw. But it is not correct to say that an order of the Court is not necessary. Neither a petition for the withdrawal of a suit nor a petition for recording a compromise will terminate the suit without an order of Court. *Kunju Kombi Achan v. Ammu*(1) differs from *Ram Churn Bysack v. Mrs. Ripsimah Harmi*(2); see page 550.

[The Court has no doubt to do something to terminate the suit but has it an option to do anything except to terminate it?—SUNDARAM CHETTI J.]

In ordinary cases it will have no option to do anything else. But when there is a compromise and a petition is put in for recording it, the Court must inquire into the nature of the

(1) (1931) 34 L.W. 548.

(2) (1868) 10 W.R. (Civ.) 373.

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compromise before it terminates the suit by allowing its withdrawal. In other words, Order XXIII, rule 1, is overridden by rule 3 of that Order. The question then is whether a party to a compromise who is not already a party to the suit can apply to have the compromise recorded. A person who is not a party to the suit can, if he has an interest under, or is a party to, the compromise, apply to have the compromise recorded. The application need not be by either of the parties to the suit; see *Annamalai Chettiar v. Koothappudayar*(1). When either of the original parties applies and the other opposes the application, the matter could not be decided without adding the stranger-beneficiary under the compromise as a party; see page 293 of the same case.

[All the observations in that case are with reference to a person who is already a party to the suit. Do they apply to the case of a person who is not a party to the suit?—PANDRANG Row J.]

The important question for consideration is not whether a person is already a party to the suit or not but whether rights have been created by the compromise in favour of a person, whether party or not, by the plaintiff who seeks to resile from the compromise by applying for withdrawal. The observation at page 283 refers to an application by the stranger-beneficiary. As regards the first respondent's right to apply, a person claiming under a party to the suit has the right to do what the party himself can do. If a party can apply to enforce a compromise, a person who claims under him has also the right to apply and to oppose the withdrawal. And if he does apply the Court must have the power under some provision of the Code to add him as a party. That power is given by Order I, rule 10. Order XXII, rule 10, applies to alienations *pendente lite*. Order I, rule 10, is a provision of a very wide nature. "Involved in the suit" in sub-rule 2 of that rule means involved not merely between the original parties to the suit but between them and a stranger. The test under Order I, rule 10, is not whether the suit might have been dismissed for misjoinder or non-joinder; that rule is a residuary rule and can be applied even to the case of an alienee *pendente lite*. One who can come in under section 146 must apply under that rule. Section 146 and Order XXII, rule 10, are not mutually

(1) (1932) 38 L.W. 280, 283.

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exclusive. Even if they are, first respondent can come in under either provision. An assignee can be brought on the record under Order XXII, rule 10, even where the assignment is disputed; *Enday Ali v. Binodini*(1). Order I, rule 10, and Order XXII, rule 10, do not prohibit the addition of a party in cases not covered by them. Recourse can in such a case be had to section 146 or even to section 151; *Alamelu Ammal v. Rama Aiyar*(2). *Radhakrishna Aiyar v. Srinivasa Aiyar*(3) is important as being an application to be made a party and to enforce the compromise. The question of addition as a party is merely incidental to the enforcement of the right which a party has.

[If a person already on the record can have a right to apply, section 146 will also give a person claiming under him such right. But the section does not give the latter such right when the former had himself no such right.—SUNDARAM CHETTI J.]

Section 146 does not in terms give a right to apply to be made a party. It entitles the latter to enforce the right which the former had and as incidental or ancillary to such right the stranger is entitled to apply to be brought on the record.

[Recourse must be had to other appropriate provisions of the Code to see whether the stranger has the right to apply to be made a party, e.g., Order XXIII, rule 3, unless the contention of the other side that that rule applies only to the parties to the suit is correct.—SUNDARAM CHETTI J.]

Assuming that Order XXII, rule 10, applies only to cases in which a suit is pending and ceases to apply once a compromise is entered into, then section 146 would apply and a person in the position of the first respondent is entitled to apply under that section because he claims under defendants 2 and 3. "Claiming under" in section 146 is wide enough to cover cases of devolution mentioned in Order XXII, rule 10; *Radhakrishna Aiyar v. Srinivasa Aiyar*(3) and *Seshadri Reddi v. Venkata Reddi*(4). "Defendant" includes a person claiming under section 146; *Venkatasubba Aiyar v. Krishnamurthy*(5). The substance of the transaction evidenced by the compromise in the present case is that plaintiff vests property in defendants

(1) (1919) 29 C.L.J. 362.

(2) (1925) 51 M.L.J. 10.

(3) (1922) 43 M.L.J. 290.

(4) (1923) 19 L.W. 660.

(5) (1913) I.L.R. 38 Mad. 442.

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1 and 3 by means of a surrender and defendants 1 and 3 transfer a portion of the property so acquired by them to the first respondent. The compromise creates an interest in property in the first respondent within the meaning of Order XXII, rule 10. For a person to claim under a compromise it is not necessary that there should be a transfer of property to him under the compromise. He may claim under it even if the compromise contains only an agreement in his favour.

[Can the first respondent apply to enforce the compromise without applying to be made a party?—PANDRANG ROW J.]

Section 146 confers upon him a right to enforce the compromise as a person claiming under it. The section therefore necessarily involves the incidental or ancillary right to apply to be made a party. Even if he has to apply to be made a party and before seeking to enforce the compromise, he can apply under Order I, rule 10. *Radhakrishna Aiyar v. Srinivasu Aiyar*(1) shows that a person in the position of the first respondent can straightway apply to enforce the compromise. The real question is whether the first respondent can apply to enforce the compromise. *Venkatasubba Aiyar v. Krishnamurthy*(2) shows that for the purpose of the preliminary inquiry the first respondent must be deemed to be a party. If he had not properly been before the Court before an application for the withdrawal of the suit was made, he might have stood in a different position. He was properly before the Court before the application for withdrawal was made and the withdrawal petition ought not to be allowed without previously disposing of the first respondent's application; *Kunju Kombi Achan v. Ammu*(3). The present case is in fact much stronger than that case for there the application for withdrawal was prior to the application for addition of party. Plaintiff may apply for the withdrawal of the suit but the Court has to consider what order it ought to pass on the petition; and, if it finds that allowing unconditional withdrawal will prejudice the rights of other parties already before the Court, it will not allow the withdrawal without considering their rights. By reason of the application for withdrawal the Court does not become *functus officio* to dispose of the application already made by a third

party who has a right to resist the withdrawal, and pending before the Court. It is not necessary that that third person should have been made a party to the suit. The suit is not terminated by the mere filing of the withdrawal petition; plaintiff has a *locus poenitentiae*; and the Court has to pass an order on the petition after notice to the other side; *Raj Kumari Debi v. Nrityakali Debi*(1), *Lakshman Pillai v. Appalwar Alwar*(2) and *Sirajuddin Sahib v. Satari Sahib*(3). If, on the date of the first respondent's application, the Court had jurisdiction to inquire into the factum and validity of the compromise, it did not lose that jurisdiction by reason of the withdrawal petition; *Raja Rajeswara Muthuramalinga Setupathi Ayl. v. Secretary of State for India*(4).

T. R. Venkatarama Sastri and Advocate-General (Sir A. Krishnaswami Ayyar) in reply.

Cur. adv. vult.

JUDGMENT.

SUNDARAM CHETTI J.—This civil revision petition is filed by the plaintiff in Original Suit No. 56 of 1930 on the file of the Sub-Court, Devakottah, against the order passed on her petition (Interlocutory Application No. 249 of 1933) under section 151 and Order XXIII, rule 1, Civil Procedure Code, in which she reported to the Court her withdrawal from the suit as she had no longer any interest in the estate of her husband, by reason of her having adopted a son to him, and asked the Court to strike the suit off the file. That petition was dismissed by the lower Court. The correctness of that order is challenged in this revision petition.

The question arising for decision in this case is of some importance and has been elaborately argued on both sides. The aforesaid suit was filed by the plaintiff, who is the widow of the late

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(1) (1925) 51 M.L.J. 10.

(2) (1913) I.L.R. 38 Mad. 442.
(3) (1931) 34 L.W. 548.

(1) (1910) 12 C.L.J. 434.
(3) (1919) 12 L.W. 25, 33.

(2) (1922) 44 M.L.J. 77.
(4) (1925) 50 M.L.J. 59.

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Muthu Veerappa Chottiar, against two brothers of her deceased husband, viz., defendants 1 and 3, the second defendant being the son of the first defendant, for a decree directing the defendants to render an account of the assets belonging to her estate which had been in their enjoyment from 28th January 1924 and for the recovery of all the documents, securities, account books and other papers, relating to the estate, and for the execution of such documents as would be necessary to enable the plaintiff to realise the outstandings and also for the recovery of the profits that have been derived from out of the plaintiff's funds and the delivery to her of all jewels, silverware and other valuable articles appertaining to her estate in the possession of the defendants. Written statements were filed by the defendants and issues were also settled. One of the pleas was that the plaintiff disclaimed and renounced her interest in her husband's estate by virtue of the arrangement embodied in an award of 1928. This forms the subject of the first issue framed in the suit. The plaintiff's right to recover possession of her husband's estate from the defendants and to call on them to render accounts is the subject-matter of the third issue. During the course of the suit a compromise is said to have been entered into by way of a family arrangement, settling all the matters in controversy between the parties to the suit and one Meyyappa Chetti, the son of a deceased brother of the plaintiff's husband. The said Meyyappa Chetti intervened in the suit with Interlocutory Application No. 673 of 1931 in which he sought to be added as a party to the suit, in order to enforce the rajinama alleged to have been entered into as

stated above. This rajinama purporting to contain the terms of the settlement and to bear the marks and thumb impressions of the plaintiff and also the signatures of defendants 1 and 3 and the said Meyyappa Chetti was put into Court along with Interlocutory Application No. 673 of 1931 and, as it contained a prayer that a decree should be passed according to the terms thereof, it was numbered as Interlocutory Application No. 674 of 1931. Meyyappa Chetti who filed both those petitions in the lower Court is the present first respondent, and he will be referred to as such in this judgment. Both those petitions were opposed by the plaintiff as well as defendants 1 and 3. According to the case set up by the first respondent, this rajinama was entered into as a family arrangement by which all the matters in controversy between the parties to the suit and himself were settled and it was also agreed as one of the terms of the compromise that he should be made the fourth defendant in the suit so that he may be bound by and participate in the family arrangement and compromise. The plaintiff contended that she was not really a consenting party to the compromise but was made to execute it under circumstances amounting to misrepresentation, fraud and undue influence. She further pleaded that the compromise was not a lawful one, as it contained terms opposed to public policy, whereas defendants 1 and 3 alleged that it was not a completed arrangement and was intended to take effect if some other matters in dispute between the parties were also settled by the mediators. According to the case of the first respondent, not only did the plaintiff and

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defendants 1 and 3 enter into the said rajinama with their free will and consent, but they also signified their consent to his being made the fourth defendant in the suit, by the plaintiff affixing her mark and thumb impression and defendants 1 and 3 affixing their signatures to the petition filed by him for being added as a party (*vide* Interlocutory Application No. 673 of 1931). The Subordinate Judge after hearing the arguments on both sides passed an order that Interlocutory Application No. 673 of 1931 should not be rejected *in limine*, but some evidence should be gone into in order to pass an appropriate order thereon. The plaintiff filed a revision petition in the High Court against that order, but it was dismissed on the ground that such a petition did not lie, because no final order was passed by the lower Court. In respect of another order passed by the lower Court in the aforesaid petitions by way of a direction as to who should lead the evidence, the first defendant filed a revision petition in the High Court which came up before KRISHNAN PANDALAI J., who stated that the petition to implead Meyyappa Chettiar must be first disposed of on its own merits, in which one of the matters to be considered would be whether the parties had freely and genuinely agreed to that course. The further direction given by the learned Judge seems to be that the question of the suit having been adjusted wholly or in part by any lawful agreement or compromise should be taken up for decision when Meyyappa Chettiar is added as a party-defendant. In accordance with these directions, the lower Court was proceeding with the enquiry in respect of Interlocutory Application No. 673 of

1931 and some oral evidence was recorded and documents also were filed. When matters stood thus the present plaintiff filed Interlocutory Application No. 249 of 1933 on 13th February 1933, announcing her withdrawal from the suit for the reasons mentioned therein, and stating that the suit may be struck off the file. This petition was strenuously opposed by the present first respondent whose grievance was that the interest derived by him in the subject-matter of the suit by reason of the aforesaid compromise would be prejudicially affected if by reason of the plaintiff's withdrawal at such a stage the Court should simply dismiss the suit. According to him, by reason of the plaintiff's own agreement along with defendants 1 and 3, a third share in the estate which the plaintiff surrendered in favour of defendants 1 and 3 (the immediate reversioners) is conferred on him. It is alleged that he is one who has acquired valuable rights by virtue of assignment or creation of an interest under the rajinama agreement during the pendency of the suit, and that the subsequent withdrawal of the suit by the plaintiff is only a device resorted to in collusion with defendants 1 to 3 in order to burke an enquiry in respect of the rajinama put into Court and thus prejudice his interests. The learned Subordinate Judge did not think fit to dismiss the suit itself consequent on the withdrawal application, for the reasons stated by him in his order. He held that the proper stage for considering whether the suit should be dismissed or not was after the disposal of Interlocutory Applications Nos. 673 and 674 of 1931 which are pending enquiry. In this view,

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he dismissed the plaintiff's application, suggesting that she may renew the same if necessary after the disposal of those petitions.

The main contention pressed on behalf of the plaintiff (petitioner) is what is set forth in ground No. 2 of this revision petition, viz., that the lower Court ought to have dismissed the suit when the plaintiff withdrew from it unconditionally under Order XXIII, rule 1, Civil Procedure Code, and when the defendants on the record did not object to the withdrawal. The question is whether this contention should prevail, having regard to the special circumstances of this case. Sub-rule 1 of Order XXIII, rule 1, gives the plaintiff the option of withdrawing from the suit or abandoning part of his claim at any time after its institution. No permission of the Court is necessary for such a withdrawal. Sub-rule 3 says that the plaintiff who does so shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. The aforesaid rule does not specify what the Court has to do to terminate the suit after such withdrawal. No doubt, it has to provide for the costs of the defendants by passing an appropriate order. Ordinarily, the termination of a suit is brought about either by a decree or by a dismissal. Would the mere withdrawal of the plaintiff from the suit amount to a termination thereof, without any order of the Court? Does the Court become *functus officio* the moment the plaintiff announces the fact of withdrawal? Is the Court deprived of all jurisdiction over the suit for any purpose except for passing an order as to costs in the

event of such withdrawal by the plaintiff? These questions have to be answered in the affirmative, if the contention put forward on behalf of the plaintiff and defendants 1 and 3 should prevail. Reliance has been placed on the decision in *Ram Churn Bysack v. Mrs. Ripsimah Harmi*(1). No doubt, the view taken therein is that the Court is immediately deprived of authority further to entertain the claim and should then confine itself solely to the question of costs. It seems to me that, when a plaintiff so withdraws, it is not open to the defendant to resist the withdrawal and court an enquiry into the merits of the claim, if nothing else has happened which may be a bar to the dismissal of the suit. The effect of the decision in *Ram Churn Bysack v. Mrs. Ripsimah Harmi*(1) should not be carried too far to lead to the position that the Court is deprived of all jurisdiction over the case, so that it could not even pass an appropriate order indicating the disposal of the suit. This decision was considered by CURGENVEN J. in a recent case, *Kunju Kombi Achan v. Ammu*(2). The learned Judge observes that such a view is only compatible with the position that the Court has to pass no order regarding the fact of withdrawal and the disposal of the suit by that means and is of opinion that, until the Court passes such an order, it is not deprived of jurisdiction over the suit for all purposes. There is nothing in *Mahant Biharidasji v. Parshotamdas*(3) to support the extreme contention put forward on behalf of the plaintiff. All that is laid down in that decision is that the

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(1) (1868) 10 W.R. (Civ.) 373.

(2) (1931) 34 L.W. 548.

(3) (1908) I.L.R. 32 Bom. 345.

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plaintiff can withdraw from the suit on his own motion and no order of the Court is necessary. Before the final order of the Court is passed after such withdrawal, the suit cannot in my opinion be deemed to have been terminated. *Kunju Kombi Achan v. Ammu*(1) and *Raj Kumari Debi v. Nrityakali Debi*(2) are in support of this view. In the latter case, the plaintiff who first unconditionally withdrew her suit was allowed to recall her petition for withdrawal, as no final order terminating the suit had been passed.

Ordinarily, when the Court finds no impediment to the dismissal of a suit after the announcement of the withdrawal of the claim by the plaintiff, it will simply say that the suit is dismissed as the plaintiff has withdrawn from it. An order as to costs will also be passed. But several exceptions have been recognized to this general rule. In suits for partition, if a preliminary decree is passed declaring and defining the shares of the several parties, the suit will not be dismissed by reason of any subsequent withdrawal by the plaintiff, for the obvious reason that the rights declared in favour of the defendants under the preliminary decree would be rendered nugatory if the suit should simply be dismissed. So also in partnership suits and suits for accounts, where the defendants too may be entitled to some reliefs in their favour as a result of the settlement of accounts, the withdrawal of the suit by the plaintiff cannot end in the mere dismissal of the suit. Similarly, in suits for specific performance and administration suits the withdrawal by the

(1) (1931) 34 L.W. 548

(2) (1910) 12 C.L.J. 434.

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plaintiff should not necessarily lead to the dismissal of the suit, because some appropriate reliefs have to be given even in favour of the defendants. In a representative suit the Court need not dismiss the suit in spite of the withdrawal by the plaintiff, but it may add another person as a party in substitution of the plaintiff or transpose a defendant as plaintiff and direct the continuance of the suit. *Kunju Kombi Achan v. Ammu*(1) is one of such cases. Such substitution was made in appeal. In a suit where a compromise was set up by which certain rights were alleged to have been acquired by the defendants with the consent of the plaintiff and the defendants produced the agreement in Court and applied for a decree in terms of the compromise, the Court declined to dismiss the suit by reason of the subsequent withdrawal of the suit by the plaintiff; vide *Tukaram Mahadu v. Ramachandra Mahadu*(2). The terms of Order XXIII, rule 3, Civil Procedure Code, are equally imperative. The Court, if satisfied that the suit has been compromised, is bound to pass a decree in accordance with the terms thereof. That being so, it has been held that the special procedure therein laid down is not affected by the general provisions of Order XXIII, rule 1. The principle to be kept in view in a matter like this has been stated by JENKINS C.J. in *Satyabhamabai v. Ganesh Balkrishna*(3):

"It appears to us clear that when in a partition suit the defendant has by concession of the plaintiff acquired rights which otherwise could not have existed, it is not open to the plaintiff, who has made that concession, afterwards to annul its effect by withdrawing the suit in the appellate Court."

(1) (1931) 34 L.W. 548.

(2) (1925) I.L.R. 49 Bom. 672.

(3) (1904) I.L.R. 29 Bom. 13, 18.

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Another instance of the non-termination of the suit by its dismissal consequent on the withdrawal by the plaintiff is supplied in the case of *Sirajuddin Sahib v. Saturi Sahib*(1). In that case, one who filed the suit as a trustee subsequently put in a petition to withdraw the suit. In the circumstances of that case, the Court transposed a defendant as a plaintiff and allowed the suit to be continued. It is thus clear that the rule contended for by the plaintiff is not an absolute one and many an innovation has been made on that rule.

The question therefore for consideration is whether in the special circumstances of this case there is justification for not immediately dismissing the suit in consequence of the plaintiff's withdrawal, a course which the learned Subordinate Judge has thought fit to adopt by reason of the pendency of the enquiry in respect of Interlocutory Applications Nos. 673 and 674 of 1931. It is strenuously contended for the petitioner that, as the first respondent is not actually a party to the suit, he has no right to enforce the rajinama under Order XXIII, rule 3, Civil Procedure Code, by filing Interlocutory Application No. 674 of 1931, and therefore the pendency of that application should not be deemed to be a bar to the dismissal of the suit by the Court. It is however conceded that, if such an application was made by the defendants themselves who are parties on record, the principle of the decision in *Tukaram Mahadu v. Ramachandra Mahadu*(2) will apply. Rule 3 does not expressly say by whom the application itself should be put in. Presumably, it is a party to the suit that has

(1) (1919) 12 L.W. 25.

(2) (1925) I.L.R. 49 Bom. 672.

to apply to the Court to record an alleged compromise as an adjustment of the suit wholly or in part. A stranger to the suit, though he is a party to the compromise, may not be allowed to apply for its enforcement in that suit without his being impleaded in it as a party. That is why in the present case the first respondent has put in an application to be added as a party, along with the rajinama which he put in for a decree to be passed. If the Court finds that the suit has been adjusted wholly or in part by any lawful agreement or compromise, it will give effect to it by passing a decree so far as it relates to the suit. On the question whether the first respondent is entitled to be made a party in this suit for the purpose of enforcing the said rajinama, elaborate arguments have been addressed on both sides. As that petition is now pending enquiry before the lower Court, I do not think it fit to say anything which will fetter its discretion. However, something has to be said on that point, because one of the reasons urged on behalf of the plaintiff for the dismissal of the suit consequent on the withdrawal by her is that the first respondent has no *locus standi* to enforce the rajinama under Order XXIII, rule 3, Civil Procedure Code. It is argued by Mr. S. Srinivasa Ayyangar, the learned Counsel for the first respondent, that, though Interlocutory Application No. 673 of 1931 was put in under Order I, rule 10, Civil Procedure Code, which gives a very wide discretion to the Court, the right to be made a party comes even under a specific provision of the Code, viz., Order XXII, rule 10. He further contends that, by virtue of the declaration of a substantive right contained in section 146, Civil

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Procedure Code, the first respondent must be taken to be a person claiming under defendants 1 and 3, by reason of his being an assignee of one-third share of the estate which became vested in defendants 1 and 3 on account of the surrender by the plaintiff as per the rajinama. If the first respondent is a person claiming under defendants 1 and 3 within the meaning of section 146, then the application to enforce the rajinama which defendants 1 and 3 are entitled to make under Order XXIII, rule 3, Civil Procedure Code, may also be made by the first respondent. If the first respondent is an assignee of an interest in the subject-matter of the suit from defendants 1 and 3 under this compromise agreement, the suit may by leave of the Court be continued by or against him under Order XXII, rule 10, Civil Procedure Code. The acquisition of such a right may weigh with the Court in exercising its discretion for adding him as a party on his application under Order I, rule 10. In this connection, the observation of KRISHNAN PANDALAI J. in an exhaustive judgment in *Annamalai Chettiar v. Koothappudayar*(1) appears to be very pertinent. In that case one who got a mortgage from the plaintiff sought to be added as a party in order to enforce a compromise alleged to have been entered into in that case. The learned Judge says thus: "Had this compromise been completed, he might have asked the Court to carry it out by adding him and giving a decree according to it." But in that case the compromise was found to have broken down and therefore it could not be given effect to. The opinion of the learned Judge is in

(1) (1932) 38 L.W. 280, 285.

favour of adding the assignee as a party for the purpose of enforcing the compromise and passing a decree thereon. What the first respondent in the present case asks for is the same. If the Court has jurisdiction to enquire into the petitions filed by the first respondent, how does it lose that jurisdiction by reason of the subsequent withdrawal of the suit by the plaintiff? If on enquiry the Court finds that these petitions have to be dismissed, the only course left to the Court is to dismiss the suit as a consequence of the withdrawal by the plaintiff; otherwise, the Court should deal with the case under Order XXIII, rule 3, and see whether a decree can be passed in accordance with the rajinama and to what extent.

Coming now to the question whether the mere circumstance of a person not being actually a party on record is a bar to his filing an application under Order XXIII, rule 3, I can take a concrete illustration. Suppose a plaintiff has filed a suit against two persons as defendants, and a rajinama has been entered into as between them; if one of the defendants subsequently dies and his legal representative wants to apply to the Court to enforce that rajinama, what has he to do? He will apply to be made a party in the place of the deceased defendant, and put in the rajinama for its enforcement. Suppose at that stage the plaintiff files a petition stating that he withdraws the suit. Can the Court merely dismiss the suit without enquiring into those petitions put in by the alleged legal representative of the deceased defendant? That legal representative will say that he has acquired the interest which was secured to the deceased defendant under the

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rajinama, and a decree should accordingly be passed without dismissing the suit. There is in such a case no question of the dismissal of the suit being the necessary result of the withdrawal by the plaintiff. Is the first respondent in the present case in a worse position? All that can be said is that, where a legal representative applies to be made a party, the Court has no option but to add him, on finding him to be the proper legal representative, whereas in the case of an assignee applying under Order XXII, rule 10, it is in the discretion of the Court to give him leave or not. Even if he applies under Order I, rule 10, the discretion will be exercised by the Court in a judicial manner and not arbitrarily. Some cases have been cited by the learned Counsel for the petitioner to show that in the exercise of the discretion the Court refused to allow a third party to intervene in the suit, in order to dispute or oppose a compromise entered into between the parties actually on record; *Raja Rajeswara Muthuramalinga Setupathi Ayl. v. Secretary of State for India*(1) and *Laraiti v. Ch. Shiam Sunder*(2). In the latter case, a purchaser *pendente lite* sought to be impleaded as a party in order to oppose a compromise. In the former case, the Secretary of State wanted to be made a party in order to impeach the validity of a compromise entered into between the plaintiff and the defendant. A contrary view was taken in *Lakshan Chunder Dey v. Nikunjamoni Dassi*(3) where, even after the parties actually on record had reported the terms of settlement and the Court ordered that a decree should be drawn up

(1) (1925) 50 M.L.J. 59.

(2) A.I.R. 1932 All. 478.

(3) (1923) 27 C.W.N. 755.

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accordingly, an assignee was added under Order XXII, rule 10, Civil Procedure Code, to enable him to impeach the settlement. This was done in order to avoid multiplicity of suits, no decree having been actually drawn up in pursuance of the order of the Court when the assignee made the application. The present case is a converse one. In respect of the alleged rajinama, a third party, viz., the first respondent, claiming to have acquired an interest therein as assignee, wants to be added as a party for the purpose of enforcing this compromise, while the plaintiff and the defendants on record do not wish to have it enforced. But if there is a question common to the parties on record and a stranger, as regards the subject-matter of the suit or any portion thereof, it should be tried once for all by allowing the stranger to be made a party; vide *Vyodianada v. Sitarama*(1). No other enquiry need be made in the present suit besides the one connected with the rajinama petition under Order XXIII, rule 3. Moreover, Order XXII, rule 10, Civil Procedure Code, is not confined only to cases of undisputed assignment, creation or devolution of interest. It is open to the Court to make an enquiry and pass the necessary order; vide *Enday Ali v. Binodini*(2) and *Surendra v. Nityendra*(3). The lower Court has thought fit to make that enquiry in the present case, and the exercise of that discretion by it cannot be easily interfered with in revision. It is urged on behalf of the plaintiff that by pursuing this enquiry unnecessary complications will arise. It is not within the province of this enquiry to

(1) (1881) I.L.R. 5 Mad. 52.

(2) (1919) 29 C.L.J. 362.

(3) A.I.R. 1926 Cal. 173.

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determine what effect this rajinama, even if true, lawful and complete, will have on the alleged adopted son of the plaintiff. He is not a party to the suit and that question is utterly foreign to the present enquiry.

On a due consideration of the circumstances in this case, I am of opinion that the suit cannot be dismissed at this stage by reason of the plaintiff's withdrawal from it. Her application for the unconditional dismissal of the suit by reason of the withdrawal cannot now be granted. It depends upon the result of the enquiry which the lower Court has undertaken in respect of Interlocutory Applications Nos. 673 and 674 of 1931. The lower Court would have done well if it kept the plaintiff's petition (Interlocutory Application No. 249 of 1933) pending till the disposal of the other two petitions. I would set aside the order of the lower Court dismissing Interlocutory Application No. 249 of 1933 and direct its restoration to file to be disposed of in accordance with the result of the enquiry in Interlocutory Applications Nos. 673 and 674 of 1931. As the petitioner has failed in her main contention, she will pay the costs of the first respondent in this civil revision petition and bear her own.

PANDRANG
Row J.

PANDRANG ROW J.—This petition is one to revise the order of the Subordinate Judge of Devakottah, dated 23rd February 1933, dismissing the application of the petitioner, who was the plaintiff in Original Suit No. 56 of 1930, under Order XXIII, rule 1, Civil Procedure Code, for striking off the suit from the file of the Court. The Subordinate Judge dismissed the application with permission to renew it later on after the disposal of Interlocutory Applications Nos. 673 and 674 of 1931 which

had been filed by the first respondent on 22nd June 1931 to be impleaded as a party to the suit and to enforce a compromise of the suit entered into between himself, the plaintiff in the suit, and defendants 1 and 3. It was not disputed during the argument that the order of the Subordinate Judge dismissing the plaintiff's application under Order XXIII, rule 1, cannot be sustained, and that, even assuming that it was necessary to dispose of Interlocutory Applications Nos. 673 and 674 of 1931 on their merits, the proper course would have been, not to dismiss the plaintiff's application, but to postpone passing orders thereon till the disposal of the interlocutory applications filed by the first respondent. The questions that have been argued at length before us were (i) that the lower Court had no jurisdiction to deal with Interlocutory Applications Nos. 673 and 674 of 1931 after the plaintiff filed her application for withdrawal of the suit under Order XXIII, rule 1, as that application terminated the suit, and (ii) that even assuming the compromise to be lawful a stranger to the record like the first respondent cannot maintain an application to be made a party or to enforce the compromise. The first question is one of jurisdiction and the plaintiff-petitioner's contention involves the proposition that the Court becomes *functus officio* except for the purpose of making an order regarding costs once the plaintiff withdraws the suit under Order XXIII, rule 1, and loses its power to deal with any pending applications in the suit. Though this proposition finds support in the decision in *Ram Churn Bysack v. Mrs. Ripsimah Harmi*(1) there can be no doubt

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(1) (1868) 10 W.R. (Civ.) 373.

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that the absolute right of the plaintiff to withdraw the suit recognised therein has since been declared to be subject to several limitations or exceptions. It cannot be said in the light of the subsequent decisions dealing with this point that the plaintiff's right to withdraw the suit is unqualified or absolute. On the other hand, it is clear that this right is subject to all just exceptions. It does not follow that, because the plaintiff is *dominus litis* and has the right of withdrawing the suit, the Court becomes *functus officio* and is debarred from exercising any further jurisdiction in the suit except in the matter of costs. It is in my opinion open to the Court to consider and decide any objections that may be made to the withdrawal of the suit before passing orders on the application to withdraw. The two interlocutory applications referred to above made by the first respondent were being enquired into when the plaintiff applied to withdraw the suit and the delay in the disposal of these applications was due in part, at least, to the opposition offered by the plaintiff and defendants 1 and 3 who carried the matter to the High Court not less than three times in revision. It is not contended that the lower Court had no jurisdiction to entertain and decide these applications on their merits before the plaintiff applied to withdraw her suit. Can it be said that the mere making of an application by the plaintiff to withdraw her suit *ipso facto* deprived the Court of the jurisdiction which it had till then? I think the right answer to this question is in the negative. The first respondent had the right to get an adjudication on his applications when the plaintiff applied to withdraw the suit.

This existing right cannot be frustrated or destroyed by the plaintiff's application to withdraw her suit, for it is clear from the authorities that a plaintiff's right to withdraw the suit is not absolute but is controlled by other existing rights. The delay of the Court in disposing of the first respondent's applications cannot deprive him of the right which he had to obtain an adjudication in the matter. I am therefore of opinion that the lower Court had jurisdiction to deal with the interlocutory applications made by the first respondent on their merits in spite of the plaintiff's application to withdraw her suit.

In dealing with the second question it must be assumed that the compromise sought to be enforced is a lawful one; the question whether it is lawful must be left to the lower Court itself for decision after due enquiry. The first respondent's application to be made a party to the suit purports to be one under Order I, rule 10. It has however been contended before us that apart from Order I, rule 10, the first respondent had a right to apply to be made a party under Order XXII, rule 10, —and section 146, Civil Procedure Code, was also relied upon in this connection—as he claims to be a person on whom the interest of the defendants 1 and 3 under the compromise had devolved. It was conceded before us that not only any party to the suit, but even the legal representative of any party to the suit, would be entitled to apply to be made a party for the purpose of enforcing a compromise even after the plaintiff's withdrawal of the suit. It was however contended that a transferee has not the same right, because, while in the case of a legal representative his right to

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be made a party is absolute and the Court has no discretion in the matter, in the case of a transferee he has only a right to apply and the Court has discretion either to allow or to dismiss his application. This, however, is a distinction without a difference as the right to apply cannot be said to be lost merely because it is discretionary in the Court to allow the application or to dismiss it. A right to apply implies a right to have an adjudication on the application, for otherwise the right would be purely nugatory. It must also be noticed in this connection that the first respondent applied to be made a party for the purpose of enforcing the compromise. The right of a party to enforce a compromise in spite of the withdrawal of the suit is not disputed, and there is no reason why this right should be denied merely because the application to be made a party happened to be undisposed of when the suit was withdrawn. *Actus curiae neminem gravabit*, and "actus" includes delay. The application to be made a party was merely preliminary to the application to enforce the compromise, and unless the former is decided on its merits it would not be possible to dispose of the other application which involves substantial rights. I am therefore of opinion that the withdrawal of the suit by the plaintiff did not deprive the first respondent of his right to obtain an adjudication on his applications to be made a party and to enforce the compromise. I therefore concur in the order proposed by my learned brother.

A.S.V.

APPELLATE CRIMINAL.

Before Sir Owen Beasley, Kt., Chief Justice, and
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THE PUBLIC PROSECUTOR, APPELLANT,

v.

M. MUNISAMI NAIDU, ACCUSED.*

*Indian Penal Code (XLV of 1860), sec. 294-A—Lottery—
What amounts to.*

1934,
January 31.

A cycle and gramophone dealer was conducting chit transactions in his business premises. There were one hundred subscribers in each section to the chit, each paying a subscription of rupees three per month and the transaction covered a period of twenty months with monthly drawings. The subscriber whose number or name was drawn at one of the monthly drawings was given a specified article and was thereafter relieved of the liability to pay further subscriptions. At the end of the period of twenty months, each of those who had not been successful in the monthly drawings was given the specified article, with the result that those whose numbers or names were drawn earlier derived a far greater benefit than those whose numbers or names were drawn later or were not drawn at all, and the extent of the gain depended upon the chance of the draw. The above-mentioned conditions relating to the chit transactions were also published by him.

Held that the chit transaction amounted to a lottery and the person might rightly be said also to be keeping a place for the purpose of drawing a lottery and, in any view, inasmuch as he published proposals to deliver goods on an event or contingency relative or applicable to the drawing of the ticket, lot, or number, he is guilty of an offence under the latter portion of section 294-A of the Indian Penal Code.

Venkatramana v. Sanyasayya, (1933) 66 M.L.J. 76, dissented from.

APPEAL under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the

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aforesaid accused by the Taluk Magistrate of Cuddalore in Calendar Case No. 1 of 1933 on his file.

A. Narasimha Ayyar for appellant.

V. L. Ethiraj for respondent.

BEASLEY C.J. The JUDGMENT of the Court was delivered by BEASLEY C.J.—The respondent was charged before the Taluk Magistrate of Cuddalore with an offence under section 294-A, Indian Penal Code, and was acquitted. Government now appeals against that acquittal. The respondent is a cycle and gramophone dealer keeping a shop for that purpose; and the case for the prosecution is that, besides carrying on that perfectly legitimate business, he got up a lottery after having invited members of the public to take part in it and also that he kept an office or place for the purpose of drawing the lottery which was not authorized by Government. First of all, we have got to see what this scheme of the respondent, which is alleged to be a lottery, provided for. That is set out in paragraph three of the Magistrate's order. It is evident that the respondent started two chits as they are described by the Taluk Magistrate—one in February 1932 and the other in March 1932. The conditions of these chits, or whatever description the scheme merits, are contained in two documents, Exhibits D and D-1. There were to be a hundred subscribers in each section. The subscription was fixed at Rs. 3 a month and the transactions covered a period of twenty months. Every subscriber was offered a gramophone with a needle box and some records or a cycle with accessories; and when joining the chit the subscriber had to state whether he wanted a gramophone or a cycle. There was to be a drawing every month for twenty months.

The subscriber whose number or name was drawn at one of these monthly drawings was at once given the article he wanted and was relieved from liability to pay further subscriptions. In the twenty-first month the subscribers who did not win prizes, that is to say, whose names or numbers had not been drawn and who had not received a prize in the shape of a cycle or gramophone, were each given a cycle or a gramophone. The result of this is that those whose names or numbers were drawn earlier derived a far greater benefit than those whose names or numbers were drawn later. The successful subscriber whose name or number happened to be drawn in the first month would get for his Rs. 3 either a cycle or a gramophone and thereafter contribute nothing towards the scheme whereas the unsuccessful ones continued to subscribe. There, therefore, was provided for a very substantial gain to a subscriber, which gain was dependent purely upon chance, that is to say, upon his name or number being drawn at any one of the monthly drawings. In our opinion, this was clearly a lottery and, that being so, as the drawings took place in the respondent's shop, it appears to us that, although he may have kept that shop for the purpose of carrying on his legitimate business of selling gramophones and cycles to the public, he might rightly be said also to be keeping a place for the purpose of drawing a lottery. But it is not necessary to express any more definite opinion upon that part of the case than we have already expressed because, if this is a lottery as we hold it to be, we are satisfied that the respondent did publish in Exhibits D and D-1 a proposal to deliver

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goods on an event or contingency relative or applicable to the drawing of the ticket, lot or number, and, if that is so, he committed an offence under the latter portion of section 294-A of the Indian Penal Code. Some difficulty has arisen in this case by reason of a judgment of RAMESAM J. in *Venkatramana v. Sanyasayya*(1). From the facts of that case, our learned brother was dealing with a scheme similar to this. In fact we are unable to see that it differs in any important respect. Our learned brother was of the opinion that there was certainly in that scheme an element of chance and that for that reason it was in a sense a lottery; but he was of the opinion that there was no scope for an offence or an invitation to the public asking them to join as the whole transaction was started with a definite number of ascertained persons and no outsider could ever join in the transaction after it had started. Accordingly he was of opinion that no offence had been committed. It must be observed that in the case now before us the scheme provided for a division of subscribers into sections of a hundred. As the number of subscribers became one hundred, that section was closed and the subscribers who came in later were put into the next section and as those numbers exceeded two hundred those who came in after were put in still another section. That is to be found from both Exhibit D and Exhibit D-1. We do not know whether in the case referred to there was a similar provision but, in our opinion, it does not make any difference whether there was only one section containing one hundred subscribers or whether there was provision for more

(1) (1933) 66 M.L.J. 76.

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sections, each of them containing one hundred subscribers. Our learned brother bases his opinion upon the fact that the number of persons was ascertained, namely, one hundred, and it is upon that ground that, although of the opinion that the scheme was possibly a lottery, he held that no offence had been committed. With great respect to our learned brother, we are unable to see that this affects the question. The subscribers are formed into sections, obviously for the sake of convenience, and members of the public were asked to become members of the sections. Each section no doubt is limited to one hundred but the excess numbers become members of other sections. As soon as each section is complete the lottery commences. It is clearly a lottery. The public are asked to join in it and, if that is so, an offence falling within the latter part of section 294-A of the Indian Penal Code is clearly committed. We are unable to agree with the decision in *Venkatramana v. Sanyasayya*(1).

The acquittal of the respondent must, therefore, be set aside and substituted therefor there must be a conviction under section 294-A, Indian Penal Code, (latter part) and the respondent must be punished with a fine of rupees fifty, in default of payment of which he will undergo one week's simple imprisonment.

G.R.

(1) (1933) 66 M.L.J. 76.

APPELLATE CRIMINAL.

*Before Mr. Justice Bardswell.*1934,
March 22.

IN RE MALA CHENGADU alias DEVA DOSS (ACCUSED IN MISCELLANEOUS CASE No. 108 OF 1933 ON THE FILE OF THE COURT OF THE JOINT MAGISTRATE OF CHANDRAGIRI).*

Criminal Procedure Code (Act V of 1898), sec. 123—Committal to prison under, amounts to sentence of imprisonment—Madras Borstal Schools Act (V of 1926), sec. 8—Detention under, in lieu of such imprisonment—Period of detention.

By the express terms of the Criminal Procedure Code (Act V of 1898), committal to prison under section 123 in default of furnishing security ordered under section 109, clauses (a) and (b), amounts to the passing of a sentence of imprisonment; and when detention in a Borstal school is ordered in lieu of such imprisonment in the case of an adolescent offender, the period of detention cannot be for less than two years under the Madras Borstal Schools Act (V of 1926), even though the period for furnishing security ordered was only one year.

CASE referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the Sessions Judge of Chittoor in his letter No. 5819 of 1933 dated 11th December 1933.

A. Narasimha Ayyar for *Public Prosecutor* (L. H. Bewes) for the Crown.
Accused not represented.

ORDER.

One Mala Chengadu alias Deva Doss was bound over by the Joint Magistrate of Chandragiri to be of good behaviour for the space of one year with reference to section 109, clauses (a) and (b) of the Criminal Procedure Code. He failed to give security and he was then ordered by the

* Criminal Revision Case No. 3 of 1934.

Joint Magistrate to be detained in a Borstal school for a period of two years, his age being 20. Under the Madras Borstal Schools Act, the minimum period for an adolescent offender to be ordered to be detained in a Borstal school is one of two years. Had Mala Chengadu been ordered under section 123 of the Criminal Procedure Code to be committed to or detained in prison, he could only have been kept in prison for the space of one year, even if he failed altogether to furnish security, that being the period for good behaviour during which security had been ordered to be given by him. The learned Sessions Judge raises the question whether it was legal to send him to a Borstal school for two years; and he also questions whether the committal of a person to prison under section 123, Criminal Procedure Code, amounts to the passing upon him of a sentence of imprisonment. The doubt as to what is the effect of an order passed under section 123 is resolved by the second proviso to section 397 of the Code, which refers to cases where a person has been sentenced to imprisonment by an order under section 123, in default of furnishing security. Therefore, it is clear that by the express terms of the Code action under section 123 amounts to sentencing a person to imprisonment. Now, under section 2 of the Madras Borstal Schools Act (V of 1926), an adolescent offender means any person who has been convicted of any offence punishable with imprisonment or who, having been ordered to give security under section 118 of the Code of Criminal Procedure, has failed to do so and who at the time of such conviction or failure to give security is not less

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than 16 or more than 21 years of age. Section 8 of the Act defines the powers of a Court as to sending an adolescent offender to a Borstal school in lieu of passing a term of imprisonment upon him; and section 9 provides that any person detained in a Borstal school for failure to furnish security when ordered to do so under section 118 of the Criminal Procedure Code (1898), will be released on his furnishing such security or on the passing of an order under section 124. The learned Judge is doubtful whether the order passed upon Mala Chengadu could be taken as one passed under section 8 of the Borstal Schools Act. In view of what has been stated above as to what is meant by passing a sentence of imprisonment, it is clear that section 8 does apply. It also appears from section 8 that an order of detention in a Borstal school is something different from sentencing to imprisonment and that, even though the period for furnishing security is only one year, yet, when detention in a Borstal school is ordered instead of imprisonment, then that detention can only be for such period as is provided for in the Borstal Schools Act and the least period that Act provides for is two years. In my opinion, therefore, the order of the Joint Magistrate is correct.

The reference is returned.

K.W.B.

PRIVY COUNCIL.

BABU *alias* GOVINDOSS KRISHNADOSS, APPELLANT,

v.

OFFICIAL ASSIGNEE OF MADRAS AND OTHERS,
RESPONDENTS.

[AND CONNECTED APPEALS.]

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Partnership—Death of partner—Dissolution of partnership—Debts incurred after partner's death—Hindu Law—Partition—Family business—Allocation to two out of five brothers—Partnership or joint family property—Indian Contract Act (IX of 1872), ss. 247, 253, 262 and 263.

When a partnership has been dissolved under section 253, sub-section 10, of the Indian Contract Act, 1872, by reason of the death of a partner, the surviving partners can deal with, or dispose of, any asset of the partnership for the purpose of the winding up contemplated by section 263, but only for that purpose. The representative of the deceased partner is entitled to an account of the assets at the time of the dissolution free from debts, secured or unsecured, afterwards incurred by the surviving partners or partner, except so far as the debts were incurred for the purpose of winding up, or so far as the creditors *bona fide* and reasonably believed that they were so incurred. In the present case the creditors could not be held to have so believed, because the debts were all incurred eleven years or more after the date of dissolution, and the creditors admittedly thought that they were dealing with a joint Hindu family trading business.

The provisions of section 253, sub-sections 1 and 2, and section 262 of the Indian Contract Act, 1872, do not materially differ from those of sections 24 and 39 of the (English) Partnership Act, 1890.

Principles laid down by *In re Bourne*, [1906] 2 Ch. 427, applied.

* *Present*: Lord THANKERTON, Lord SALVESEN and Sir JOHN

* J.C.
1934,
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Where upon a partition between five Hindu brothers a business founded by the father had been allotted as part of the shares of the two elder brothers, and the award effecting the partition, upon its true construction, made a complete partition between each of the five brothers, the two elder brothers were held to have taken the business as partners; their subsequent actings were irrelevant to show that they took it as their joint family property; the burden of proving that there was a subsequent re-union between them was upon those who assert it. That burden was not discharged in the present case, though it was made less heavy by the facts that before the partition the two elder brothers carried on the business on behalf of the joint family and that the partition was at the instance of the three younger brothers.

Where after one of two partners, each having a half interest in a partnership business, has died the business is carried on in partnership by the son of the deceased partner, the surviving partner and his son, without an express agreement as to their shares, an agreement is to be inferred that the son of the deceased took a half, not a third share, in the partnership.

CONSOLIDATED APPEALS (Nos. 101 to 106 of 1932) from six decrees of the High Court in its appellate jurisdiction (April 1, 1931) reversing and varying six decrees of the High Court in its original jurisdiction bearing different dates.

The consolidated appeals, in each of which Babu *alias* Govindoss Krishnadoss was the appellant, raised two main questions, namely, (i) whether a firm which traded in Madras from 1890 to 1924 under the name Muralidoss Ramdoss & Co., and at the date of the litigation was in liquidation, was a joint Hindu family trading business or a partnership firm; and if the latter, (ii) whether the appellant, as representative of his father Krishnadoss, who was a member of the firm until his death in 1908, was entitled to his father's share in the assets of the partnership free

from debts, secured and unsecured, contracted by the firm long after 1908.

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

The six suits to which the present consolidated appeal related were tried together by VENKATA-SUBBA RAO J. The learned Judge held that the partition award of 1890 effected a complete partition between all five brothers, and that subsequent conduct was not admissible to show the contrary; that a re-union between the two elder brothers was legally possible, though each had a minor son, but that on the evidence no re-union was established. In his view, therefore, the business was a partnership business, and as the debts in question, whether secured or unsecured, had not been incurred for the purpose of winding up the partnership, they were not chargeable against the share of the appellant's father. [The judgment is reported as *Babu alias Govindoss Krishnadoss v. Gokuldoss Govardhandoss*(1).]

Appeals were heard by RAMESAM and STONE JJ., and were allowed. RAMESAM J. said the document of 1890 was not a deed of partition, but an award; it was peculiar in that it allotted the business without a division between the brothers. In determining the effect upon the rights of persons not parties to it he thought that the subsequent conduct of the parties could be considered. After examining the evidence the learned Judge said that, in his opinion, by November 1907, or probably earlier, "the branches of Muralidoss and Govardandoss made up their minds to be a joint family and declared

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(1) (1928) 55 M.L.J. 132 and (1929) 57 M.L.J. 404.

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themselves to be so, their conduct being consistent with either that they reunited in 1906 or continued in union from 1890" and that even apart from re-union or continuance of union, but upon the basis of partnership, the present appellant was not entitled to relief. Having referred to sections 240, 241, 262 and 263 of the Indian Contract Act, 1872, and to certain English decisions, the learned Judge said that the creditors were entitled to assume that the debts incurred to them were for the purpose of carrying on the business, and that the present appellant was not entitled to priority over charges given for such debts. He was further of opinion that, in the absence of the evidence of the appellant's mother, the appellant was to be deemed to have been admitted to the benefits of the partnership within section 247 of the Act, and that he was therefore liable in respect of debts incurred in carrying it on.

STONE J. delivered a separate but concurring judgment.

DeGruyther K. C. and *Hyam* for appellant.—The award of 1890 effected a complete partition between the five brothers, and its effect cannot be altered by the subsequent conduct of the parties: *Balkishen Das v. Ram Narain Sahu*(1). The burden of proving a re-union was upon those who asserted it: *Balabux v. Rukhmabai*(2). That burden was not discharged. After the award the two brothers referred to themselves as partners in several documents; the accounts were regarded by both Courts below as inconclusive. On the basis that the business was a partnership business, the appellant was entitled under the Indian Contract Act, 1872, section 253 (10) and section 263 to his father's share in the assets at the date of

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his father's death, subject only to debts incurred for the purpose of winding up the business. The question depends upon the terms of the Act and not upon the English authorities. As the debts in question were all incurred at least eleven years after the dissolution, and to creditors who believed that they were dealing with a joint Hindu family, they cannot be regarded as having been incurred for the above purpose, nor could the creditors have believed that they were so incurred. There was no evidence upon which it could be inferred that the appellant had been admitted to the benefits of the partnership under section 247.

Dunne K.C., *Sir Thomas Strangman* and *Mockett* for respondents in the first appeal; *Narasimham* and *J. Chinna Durai* for other respondents.—The business was the joint family business of the Muralidoss and Govardandoss branches, and consequently the appellant's share was subject to the debts incurred and charges created in carrying it on. The suit was originally instituted on the basis that the family was joint and partition was claimed. *Laldoss*, who instituted the suit on behalf of the appellant, must have known the true position. The allegation that it was a partnership business was first made by the amended plaint filed a year later. The award of 1890, on its true construction, effected a partition of the three younger brothers only; the business was dealt with by the award only for the purpose of finding their proper shares. At any rate the award was ambiguous on the point, and the subsequent conduct of the two brothers was relevant as to its true effect. The terms of the documents executed by the two brothers, and the accounts of the business, establish that they took jointly; alternatively, that there was a re-union. The fact that some of the documents used the word "partnership" does not necessarily show that the business was not a joint family business. But even if the business was a partnership business the share of the appellant's father was subject under section 262 to the debts incurred in carrying on the business. The appellant, as representative of his father, had no right in any specific item of the assets. As the creditors *bona fide* believed that the debts were incurred and the securities given for the purpose of carrying on the business the appellant's rights are subject to those of the creditors. The material provisions of the Contract Act are based upon the English law of partnership and the English decisions apply. [Reference was made to

(1) (1903) I.L.R. 30 Cal. 738; L.R. 30 I.A. 139.
(2) (1903) I.L.R. 30 Cal. 725; L.R. 30 I.A. 130.

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Knox v. Gye(1); *In re Langmead's Trusts*(2); *In re Bourne*(3); *Rodriguez v. Speyer Brothers*(4); *Hugh Stevenson & Sons v. Aktiengesellschaft fur Carton-Nagen-Industrie*(5); Lindley on Partnership, 9th edn., p. 440.]

De Gruyther K.C. replied.

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The JUDGMENT of their Lordships was delivered by Lord THANKERTON.—These are six consolidated appeals from six decrees all dated 1st April 1931, made by the High Court of Judicature at Madras in its civil appellate jurisdiction, which reversed six decrees of different dates made by the same Court in its ordinary original civil jurisdiction. As will be seen later, a decision in the leading appeal (No. 101 of 1932) will, in effect, apply equally in the remaining appeals.

Babu *alias* Govindoss Krishnadoss, who is appellant in all the appeals, was plaintiff in the principal suit (C.S. No. 622 of 1923), which was filed through his next friend Laldoss, his uncle, on account of his then minority, on 30th August 1923, and is the subject of the leading appeal. The appellant's father, Krishnadoss, died on 13th August 1908, and the main question is whether his father's interest in the business carried on under the name of Muralidoss Ramdoss & Co. was that of a partner or of a member of an undivided Hindu family. If the latter be the correct view, the appeals admittedly fail; if the business was a partnership, a question arises whether the interest of the appellant's father is affected by debts, secured and unsecured, contracted by the

(1) (1872) L.R. 5 H.L. 656.

(2) (1855) 20 Beav. 20; 52 E.R. 509.

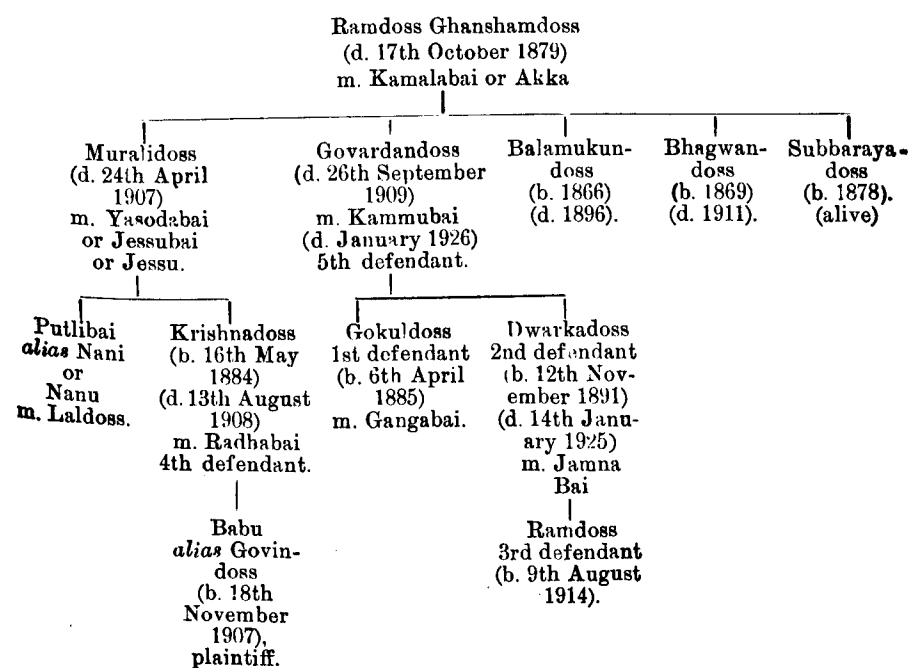
(3) [1906] 1 Ch. 113; [1906] 2 Ch. 427. (4) [1919] A.C. 59.

(5) [1918] A.C. 239.

firm some years after the date of his father's death, and, if so, to what extent?

The trial Court held that the firm at the time of the death of the appellant's father was an ordinary partnership and that the debts subsequently contracted by the firm did not affect his interest in the firm. On appeal, the High Court held that the firm was a joint Hindu family firm; they further held that, even if it was a partnership firm, the interest of the appellant's father in the firm was liable for the debts subsequently contracted.

The following pedigree shows the relationship of the appellant in the family in question and the parties to the principal suit, so far as they are members of the family :—



The following facts may be taken as beyond controversy in the appeal. The appellant's

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ancestor, Ramdoss Ghanshamdoss, came to Madras and carried on a business in cloth, money-lending and yarn, and acquired landed properties, houses and gold and silver. He died in 1879, leaving five sons, of whom two—Murali and Govardan—were then major. These two sons carried on the business as the managers of a joint Hindu family business until 1890, by which time their younger brothers, Balamukun and Bhagwan, had become major, while Subbaraya was still minor. In 1890, as the result of a demand by Balamukun and Bhagwan and their mother, Kamalabai Amma, as guardian of Subbaraya, and submissions by the parties, a panchayat award, dated 27th September 1890, was made, under which admittedly a partition was effected of the shares of the three younger brothers, and the family business was allotted to the shares of the two elder brothers, Murali and Govardan, the younger brothers ceasing to have any interest therein.

The principal matter of controversy is whether this award left Murali and Govardan as undivided co-parceners or as partners in the business, and, if they were partners, whether there was a subsequent re-union between them. But, without prejudice to those questions, it is the fact that they carried on the business until 1906 when their respective sons, Krishna and Gokul, were assumed into active management, and thereafter it was carried on by them and the survivors until about 1919 or later when the business began to get into difficulties and ultimately, on 28th November 1924, Gokul and his younger brother, Dwarka, were adjudicated insolvents. Throughout the whole period from 1879 to this date the business

was carried on under the style of Muralidoss Ramdoss & Co.

In the opinion of their Lordships, the first question to be determined is whether the award of 1890 effected a partition between the shares of Murali and Govardan, and that depends on the construction of the award, in regard to which the subsequent actings of the parties is not relevant. Their Lordships agree with the view of this matter taken by the trial Judge and they are unable to agree with the view expressed by RAMESAM J., in which STONE J. concurred. The award itself appears to contain a narrative of every material surrounding circumstance, and it divides the properties into five shares, equal in value but varying in character, and has appended to it receipts for the shares. Their Lordships are clearly of opinion that the award effected a complete partition between each of the five brothers, and they agree with the reasons given by the learned trial Judge. It follows that Murali and Govardan were left by the award as partners in the business, the interest of each partner being one-half, and the burden of proving that there was a subsequent re-union rests upon the respondents. It may be observed that there is nothing unusual in this particular burden of proof; it means that the evidence of the change from partnership to co-parcenary must be sufficient to satisfy the Court that in fact it took place. It may further be observed that the circumstances of the partition may themselves ease the burden of proof in the sense that they provide a setting not unfavourable to re-union between certain of the parties to the partition. The present case appears

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to provide an illustration of this, for the narrative in the award makes clear that the demand for separation came from the three younger brothers, who stated that they would have no concern at all with the profit and loss of the business thereafter, and, while in law the award effected a separation of the interests of Murali and Govardan in the business, it would be natural enough for them to carry it on in fact as a co-parcenary business. If, on the other hand, it had appeared that the partition had originated, at least partly, in the desire of these two brothers to separate, the burden of proof of the change would have been a heavier one.

Bearing in mind that the respondents require to establish by the evidence that a re-union had taken place prior to the death of Krishna on 13th August 1908, the documentary evidence between the date of the award of 1890 and the death of Krishna may be first considered. In the first place, there is a series of formal documents, such as plaints, sale-deeds and mortgages, beginning in 1893 and ending with a mortgage deed of 20th December 1907 which, with the exception of a mortgage deed of 4th November 1907, do not afford any positive evidence in favour of the respondents, but, on the contrary, most of these documents afford positive evidence of co-partnership. But there are two outstanding documents in this period, the first of which consists of public notices by handbills and by advertisement in the "Madras Mail" and the "Fort St. George Gazette", on 20th to 23rd October 1906, which informed the public that Krishna and Gokul had been admitted by Murali and

Govardan as "partners in our company" from 19th October 1906, and that the name of the firm would still be Muralidoss Ramdoss and Company. The other document is a letter addressed by Murali to Krishna and Gokul on 13th February 1907 in the following terms :—

"My brother Govardandoss is very ill and unable to attend to business; I am now in a poor state of health and I am advised to take rest. I am desirous of handing over the management of our business to you. You will therefore hereafter conduct the business of the firm of Muralidoss Ramdoss and Company and under the same name. I will if necessary give you any advice you may want till our partnership is dissolved by a proper deed. I will not object to buying and selling goods."

The letter is stamped with an eight annas stamp. The reference to the dissolution of their partnership by a proper deed, in their Lordships' opinion, is inconsistent with anything but partnership. The writer of the letter died less than ten weeks later. The subsequent mortgage deed of 4th November 1907 will be referred to later.

The remaining documentary evidence consists of a series of account books beginning in 1893, and, with intervals, coming down to about 1909. The various accounts and the entries have been fully reviewed in the judgments of both the Courts below, and Counsel for the respondents submitted an elaborate and able argument on them, but their Lordships are unable to draw any conclusive inferences from them, as they are not kept on any distinct system clearly based on either co-parcenary or partnership.

On the death of Krishna, he was survived by the appellant, then less than a year old, and by Govardan and his sons Gokul and Dwarka, the latter being still minor. These four would then

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have constituted the joint family alleged by the respondents. There seems to be little doubt that Govardan, who died in September 1909, was not in a condition fit for active business, and that Gokul really controlled the business from this time onwards, though Dwarka may have been associated with him in it after he became major in the end of 1909. After the death of Govardan the business appears to have been consistently described in formal deeds and plaints as a co-parcenary business, which is in striking contrast to the description in similar documents prior to the death of Krishna, with the exception of the one mortgage deed of 4th November 1907 which describes the business as that of a joint Hindu trading family. It appears clearly that the learned Judges of the appellate Court mainly based their finding of a previous re-union on this particular deed, but, in their Lordships' opinion, such an isolated instance is quite an insufficient support for such a conclusion, unless it were made clear that Krishna was an active party to it. The deed itself refers to a previous mortgage deed of 5th January 1907, and wrongly narrates that the parties had been described in the earlier deed as "members of a joint Hindu trading family merchants carrying on business in co-partnership", whereas the actual description was only "merchants carrying on business in co-partnership". It is proved that by 4th November 1907 Krishna was already afflicted by the wasting disease from which he died nine months later, and, though he may have been mentally unaffected, it is quite probable that he was not involved in the revisal of this particular deed. It may be further noticed that there

is a subsequent mortgage deed of 20th December 1907 in which Govardan, Krishna and Gokul are described as the only surviving partners of the firm, and that, after Krishna's death, there is a series of plaints, in which the business was described as a partnership, and which were all amended a month after Govardan's death so as to assert that it was a co-parcenary. If suspicion were a legitimate source of evidence, there is as much room for its consideration in these contemporaneous circumstances, as in the other circumstances to which the learned Judges in the Courts below appear to have attached some importance. Their Lordships desire to observe that, in their opinion, such circumstances as the basis on which the appellant's plaint was originally framed, or the absence of Gokul and Laldoss from the witness box, or the absence of the accounts from 1890 to 1893, there being no evidence of their being wilfully withheld, are insufficient to overcome the positive evidence afforded by the documents or to prove sufficiently any re-union prior to the death of Krishna.

Their Lordships are of opinion that the respondents have failed to prove any such re-union, and that accordingly, at the time of Krishna's death, the business was a co-partnery, in which Krishna, Govardan and Gokul were partners. The appellant claims that Krishna then held a half share, Govardan and Gokul being each entitled to a one-fourth share. The respondents contended that, the presumption being for equality, Krishna was only entitled to a one-third share. Their Lordships are of opinion that the appellant's view is the correct one. At the death of Murali in the

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previous year, Krishna became entitled to his share, and, in their Lordships' opinion, the proper inference is that the surviving partners agreed that this share should be left in the business, thus giving Krishna a one-half interest in it. It follows that the appellant is entitled to call the surviving partner, Gokul, who also represents Govardan, the other partner who survived Krishna, to account for Krishna's one-half share as it stood at the latter's death.

In the present suit the appellant seeks to recover a one-half share of, *inter alia*, certain immovable properties which were owned by the partnership prior to Krishna's death. Certain of the respondents are secured creditors of Gokul who hold one or more of these properties as part of their security. The other respondents are the Official Assignee of Gokul's estate and certain unsecured creditors of Gokul. The main question is whether the appellant is entitled to have his claim satisfied out of the assets of the dissolved partnership, including the immovable properties in suit, in preference to the claims of any creditors, secured or unsecured, in respect of debts incurred by the firm long subsequent to the dissolution of the partnership by the death of his father Krishna, or whether his claim is merely that of a creditor on the insolvent estate of the firm. If the latter be held to be the correct view, the respondents further contended that the appellant's claim fell to be postponed to the claims of the other creditors by virtue of section 262 of the Indian Contract Act.

There being no contract of partnership, the provisions of the Indian Contract Act, 1872, apply

to this case without qualification, and the partnership was therefore dissolved by the death of Krishna (section 253, sub-section 10). Provision is made for the winding up of the business so dissolved by section 263, which provides as follows :—

“After a dissolution of partnership, the rights and obligations of the partners continue in all things necessary for winding up the business of the partnership.”

In substance this is identical with section 38 of the English Partnership Act of 1890. As regards the partnership property and its application, the following provisions of the Indian Act are material, viz :—

“253. (1) All partners are joint owners of all property originally brought into the partnership stock, or bought with money belonging to the partnership, or acquired for purposes of the partnership business. All such property is called partnership property. The share of each partner in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss.

(2) All partners are entitled to share equally in the profits of the partnership business, and must contribute equally towards the losses sustained by the partnership.

262. Where there are joint debts due from the partnership, and also separate debts due from any partner, the partnership property must be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner must be applied in payment of his separate debts or paid to him. The separate property of any partner must be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.”

These provisions are among the rights and obligations which are continued after dissolution for the purposes of winding up by section 263, and, in their Lordships' opinion, there is no

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material difference between them and the provisions of sections 24 and 39 of the English Act, except that section 262 of the Indian Act is in more absolute terms than section 39 of the English Act.

The English authorities are fully and carefully reviewed by the learned trial Judge, and, in their Lordships' opinion, the principle laid down in them is equally applicable to the present case.

It is clear on these authorities that the right of the representatives of the deceased partner is one of property and does not rest merely on contract, and that the surviving partners, who have the right and duty to realise the partnership property, hold a fiduciary relationship towards the deceased partner's representatives as regards his interest in the partnership property, though the latter have no such right in any individual asset of the partnership property as will entitle them to interfere with the surviving partners' right to deal with and dispose of any such asset, for the purpose of realisation. But it must be particularly noted that the surviving partners' right of dealing with and disposing of such asset is limited to the purposes of realisation. The most recent case on the nature of the relationship is *Hugh Stevenson & Sons v. Aktiengesellschaft fur Carton-Nagen-Industrie*(1). It follows that the appellant is entitled to an accounting for the assets of the partnership property free from debts, secured or unsecured, incurred by the surviving partners or partner, except in so far as these were incurred for the purpose of winding up, or so far as the creditors *bona fide* and reasonably believed that they

(1) [1918] A.C. 239.

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were so incurred. The case of *In re Langmead's Trusts*(1) is not inconsistent with this principle, for in that case the retiring partner had already received an amount representing his share of the partnership assets, and the only right left to him was a contractual right to have the debts of the dissolved firm paid out of the assets of the firm by his late partner, to whom he had assigned his interest in them. Though the creditor had notice of this arrangement it was held, in view of the lapse of six years, that he was entitled to assume that the firm's debts had been already discharged. That case does not bear on the right of a deceased partner's representative to have an account for such partner's share.

Both the Courts below have rightly regarded the case of *In re Bourne*(2) as illustrating the application of the principle in circumstances most analogous to those affecting the secured creditors in the present case, and their Lordships agree with the view of that decision taken by the trial Judge, but they are unable to accept the view expressed by the High Court. The principle is thus expressed in *Bourne's case*(2) by ROMER L.J. :—

“When a partner dies and the partnership comes to an end, it is not only the right, but the duty, of the surviving partner to realise the assets for the purpose of winding up the partnership affairs, including the payment of the partnership debts. It is true that in a general sense the executors or administrators of the deceased partner may be said to have a lien upon the partnership assets in respect of his interest in the partnership on taking the partnership account, but that lien is not one which affects each particular piece of property belonging to the partnership so as to affect that property in the hands of any

(1) (1855) 20 Beav. 20; 52 E.R. 509.

(2) [1906] 2 Ch. 427.

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person dealing with the surviving partner in good faith. It is really what one may call a general lien upon the surplus assets, and does not affect each particular property so as to interfere with the right of the surviving partner to deal with the separate properties belonging to the partnership for the purpose of realisation and to give a good title to persons dealing in good faith with him in respect of those properties. The power of the surviving partner of course extends to a sale, and it also extends to giving a mortgage on any particular part of the property belonging to the partnership to secure in good faith one of the partnership debts." (Pages 431, 432).

That statement, in their Lordships' opinion, rightly makes clear that the good faith must be good faith that the transaction is incident to, and for the purpose of, the winding up of the partnership business, and their Lordships are unable to agree with the wider meaning attributed to it by the High Court. In that case the bank was held entitled to retain the security for their account, which had been given to them by the surviving partner, on the ground that they were entitled to consider the debt as a partnership debt. It was the continuation of the partnership account still under the partnership name. ROMER L.J. says :—

"When you find an account of that kind continued—and here it is only continued for something like nine months before the charge is given—the bankers, it appears to me, are entitled, in the absence of evidence showing the contrary, to assume and to be credited with the belief that the surviving partner is continuing it for the purpose of realisation, and that sums paid into that account and sums drawn out of that account in the name of the partnership are paid in and drawn out for the purpose of the partnership." (Page 433).

In the present case, as pointed out by the trial Judge, the earliest debt, in respect of which any of the respondents hold the properties in security, was not incurred before 1919—eleven years after

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the dissolution of the firm—and the earliest of these securities was given in November 1921. Further, those respondents admittedly dealt with Gokul as the manager of a joint Hindu family trading business. It is not possible for any of them, in that view, to suggest that they thought, and had reason to think, that Gokul was incurring the debt and giving the security as the surviving partner of a co-partnery engaged in winding up the business of a firm which had been dissolved in 1908. It follows that the appellant is entitled to have the properties in suit brought into account, free of incumbrances created subsequent to the dissolution of the partnership, along with the other assets of the firm. In this view, the respondents' contention under section 262 of the Contract Act does not arise.

Reference should be made to an alternative ground on which the High Court were prepared to base their decision against the appellant, viz., that the Court was entitled, in the state of the evidence, to infer that, after the death of Krishna, the appellant, though a minor, was admitted to the benefits of the partnership in terms of section 247 of the Indian Contract Act. RAMESAM J. states : "We must therefore infer, in the absence of any member of the family giving us information on the point, that the mother agreed and therefore the other partners admitted him to the benefits of the partnership at any rate."

The respondents' Counsel was not prepared to support this ground. In their Lordships' opinion, no such inference could legitimately be made from the absence of the appellant's mother from the

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witness box. Such an act of admission to partnership must be proved, but, in the present case, the possibility of such an act of admission appears to be completely negatived by the evidence as to the joint family basis on which the business was carried on subsequent to the death of Krishna.

On the whole matter their Lordships agree with the conclusions of VENKATASUBBA RAO J., the trial Judge, and they will humbly advise His Majesty that the six decrees of the High Court, dated 1st April 1931, should be set aside, and that the six decrees of the High Court in its ordinary original civil jurisdiction which were thereby set aside should be restored. The appellant is entitled to his costs in these appeals, and also his costs of the appeals before the High Court in its civil appellate jurisdiction.

Solicitors for appellants: *Barrow, Rogers & Nevill.*

Solicitors for respondents: *Sanderson, Lee & Co.; Hy. S. L. Polak & Co.; Douglas Grant & Dold.*

A.M.T.

APPELLATE CIVIL.

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

P. M. BALASUBRAMANIAM MUDALIAR (NIL),
APPELLANT,

1934,
March 27.

v.

MARIAN RODRIGUES AND SIX OTHERS (PLAINTIFFS
1 TO 5 AND NIL), RESPONDENTS.*

*Indian Succession Act (XXXIX of 1925), sec. 306—Damages—
Suit for, under the Fatal Accidents Act (XIII of 1855)—
Defendant—Death of—Cause of action—If survives
against his legal representatives.*

Section 306 of the Indian Succession Act enables a suit for damages against a person under the Fatal Accidents Act to be continued, after his death, against his legal representatives.

APPEAL from the orders of STONE J., dated the 24th day of February 1933, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 3938 of 1932 in Civil Suit No. 594 of 1930 and Original Petition No. 266 of 1932.

C. Krishnaswami Ayyar for appellant.

S. Rajamanickam for respondents 1 to 5.

A. M. Krishnaswami Mudaliyar for *V. Varadaraja Mudaliyar* for respondents 6 and 7.

JUDGMENT.

BEASLEY C. J.—This is an appeal from a BEASLEY C.J. judgment of STONE J. The question here is whether section 306 of the Indian Succession Act can avail the respondents here who were the plaintiffs in the suit in the trial Court and who claimed

* Original Side Appeal No. 61 of 1933.

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damages from the defendant alleging that through his negligence he had caused the death of the first plaintiff's husband. During the pendency of the suit the defendant died ; and the question in the trial Court and here was whether the action could be continued against the legal representatives of the deceased defendant. If section 306 of the Indian Succession Act is of application, then clearly the right to continue the suit against the legal representatives of the deceased defendant survives. This being a case of a fatal accident, without statutory provision such an action could not be brought against the wrong-doer. But, as in England, the Fatal Accidents Act (XIII of 1855) here enables an action for compensation to be brought by the family of a person for loss occasioned to it by his death by actionable wrong. There is another Act—Act XII of 1855—which gives the executors a right to sue and be sued in certain cases for wrongs committed in the lifetime of a deceased person, those wrongs being ones which occasioned pecuniary loss to the estate of the deceased person. Therefore, it is the Fatal Accidents Act (XIII of 1855) which gave the plaintiffs in this case the right to sue for damages occasioned by the negligence of the defendant causing the death of the first plaintiff's husband. What is the position when the defendant dies ? It is contended here for the appellant that the suit abates. On the other hand, the contention which found favour with our learned brother was that section 306 of the Indian Succession Act allows the suit to be continued, even after the death of the defendant, against his legal representatives. One authority quoted in support of the

appellant's argument is the decision in *Ramchode Doss v. Rukmany Bhoj*(1), which was approved by a Full Bench of this High Court in *Rustomji Dorabji v. Nurse*(2). It is very fairly admitted that the latter case does not support the appellant's argument in its entirety. That, I think, is obviously so. Both the Full Bench case, *Rustomji Dorabji v. Nurse*(2), and the case which it approves of, viz. *Ramchode Doss v. Rukmany Bhoj*(1), were cases where suits had been brought claiming damages for malicious prosecution. When section 306 of the Indian Succession Act is examined, it will be seen that there are excepted from that section actions for defamation, assault and other personal injuries not causing the death of the party. In both the cases referred to, it was held that they were actions within the excepted class in section 306. We are here dealing with the case of personal injuries which caused the death, it is not accurate to say, of the party, but caused the death of the husband of the first plaintiff, and we are, therefore, *prima facie* not dealing with a case which is excepted from the latter part of section 306 of the Indian Succession Act. What does section 306 do ? It deals, first of all, with an existing action. That is what we are dealing with here. The Fatal Accidents Act (XIII of 1855) allows such an action, and such an action has been brought. It is an action or demand against someone, the wrong-doer. We are not considering here any case of a survival of a right to the plaintiffs because they had a right of action to start with. We are dealing with its

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(1) (1905) I.L.R. 28 Mad. 487

(2) (1920) I.L.R. 44 Mad. 357 (F.B.).

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survival against a person who has died. The opening words of the section are:

"All demands whatsoever (that is wide enough) and all rights to prosecute or defend any action or special proceedings existing in favour of (these are the important words) or against a person at the time of his decease, survive to (and here again are the important words) and against his executors or administrators."

At the time of the death of the defendant there was an action against him pending. That, therefore, comes within the earlier words of the section. That action survives, according to the words which next follow, "against his executors or administrators". Reading those words of the section and the section itself, it seems to me that that is the natural construction to put upon the section. So far as we are aware, there is no authority upon the point, there being no cases of a similar nature; and in the absence of any authority, in my opinion, we should follow the reasoning of the learned trial Judge and the result he has arrived at. Under these circumstances this appeal must be dismissed with costs.

MADHAVAN NAIR J.—I entirely agree.

Attorneys for appellant:—*Messrs. King and Partridge.*

Attorney for respondents 1 to 5:—*K. Rajagopalan.*

G.R.

APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice, and Mr. Justice Pandrang Row.

NARAYANDAS GIRDHARDAS, THE OFFICIAL LIQUIDATOR
OF THE MADRAS CLOTH MARKET, LIMITED AND REDUCED
(RESPONDENT), APPELLANT,

1934,
February 28.

v.

THE P. & O. BANKING CORPORATION, LIMITED,
MADRAS (APPLICANT), RESPONDENT.*

Company—Fully paid-up shares—Lien on, in respect of debts due to company by holder of such shares—Company's right to—Articles of Association of company empowering company to refuse to register transfer of shares generally whilst transferor-shareholder indebted to company but giving company lien only on other than fully paid-up shares in respect of shareholder's indebtedness to company—Effect—Equitable mortgagee of fully paid-up shares of shareholder indebted to company—Priority over debts due to company by such shareholder—Mortgagee's right to—Contributory—Holder of fully paid shares, if a—Indian Companies Act (VII of 1913), sec. 192—Adjustment of rights of contributories—Proceedings for.

Article 20 of the Articles of Association of a company gave the company a first and paramount lien upon all the shares other than fully paid-up shares registered in the name of each member whether solely or jointly with others for moneys from time to time due or payable on any account whatever to the company. Article 22 stated that the company should not be bound to recognise any equitable interest in shares other than that of a registered holder. Article 28 gave the Board power to refuse to register or acknowledge any transfer of shares whilst the shareholder executing the transfer was indebted to the company on any account whatsoever.

The Managing Directors of the company were the firm of C & Sons whose sole proprietor was R.C. He held 5,000

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fully paid-up shares in the company in his own name. In September 1924 he, being at the time indebted to the company to the extent of Rs. 36,000, borrowed two lakhs of rupees from the respondent Bank and gave them an equitable mortgage of, *inter alia*, the said 5,000 shares as security for the loan. The respondent Bank filed a suit against C & Sons on the equitable mortgage and obtained a final decree. Subsequently the liquidation of the company was ordered by the High Court. Up to that time no notice of the equitable mortgage had been given by the respondent Bank to the company. Such a notice was given after the company went into liquidation. A few years afterwards C & Sons became insolvents and the assets of that firm became vested in the Official Assignee of Madras. In the course of the winding up the liquidator got in the assets of the company and collected and discharged debts; and he paid Re. 1 per share to the contributories of the company except R.C. or the respondent Bank. The respondent Bank, as equitable mortgagee, applied to the liquidator for the 5,000 shares covered by the equitable mortgage. Up to the date of that application the respondent Bank had not applied to have the transfer of those shares to them registered.

Held that under the Articles of Association no lien was given to the company over fully paid shares, that the respondent Bank were entitled to have the transfer to them of the shares registered and their claim to them recognized and that the company having no lien were not entitled to set up R.C.'s indebtedness to them in priority to the claim of the respondent Bank.

It could not have been intended to give the company any right to refuse to register a transfer of shares unless the company had a lien on those shares.

A holder of fully paid shares is a contributory without any qualification.

The proceedings in question were clearly an adjustment of the rights of contributories.

On appeal from the order of STONE J., dated 27th April 1933 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 274 of 1933 in Original Petition No. 149 of 1925.

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S. Doraiswami Ayyar (with him, *V. Balarama Ayyar* and *U. Ramachandran*) for appellant.—The question is whether the rule of law laid down in *In re Peruvian Railway Construction Co., Ltd.*(1) governs the present case. Articles 20, 22 and 28 of the Articles of Association of the company referred to. According to the decisions the transferee's right to have his name registered in the company's books is subject to the articles of association of the company; *Ex parte Stringer*(2). In that case the indebtedness of the transferor to the company arose not in respect of the shares transferred but in respect of an independent matter.

[In Article 28 the language is "indebtedness on any account whatever".—The CHIEF JUSTICE.]

By reason of articles containing such a provision the company virtually gets a lien on the shares; *see* BRETT L.J. The transferee cannot have better rights after than before the winding up.

[No application was made to register and the company never declined to register. Why should we go into the question whether the company has the right to decline to register?—The CHIEF JUSTICE.]

The question is whether the Official Assignee is entitled to be paid as against the company; if so, the respondent Bank will be entitled. According to the principle of the decision in *In re Peruvian Railway Construction Co., Ltd.*(1) the winding-up order being prior to the adjudication, the liquidator is entitled as against the Official Assignee to appropriate the disputed amount to the debt due to the Company.

[Mr. Nugent Grant stated to the Court that he did not propose to rely upon *In re Peruvian Railway Construction Co., Ltd.*(1).]

Section 192 of the Indian Companies Act provides for the mode of distributing the surplus. It corresponds to section 211 of the English Act of 1929 which is the same as section 170 of the English Act of 1908. Buckley on the Companies Acts, eleventh edition, page 445, referred to. Fully paid-up shareholders are contributories; *see* same page. *See also In re Anglesea Colliery Company*(3).

(1) [1915] 2 Ch. 144.

(2) (1882) 9 Q.B.D. 436.

(3) (1866) L.R. 2 Eq. 379, 386.

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[That does not mean that a fully paid-up shareholder is liable to contribute anything. He may be a contributory for certain purposes.—PANDRANG ROW J.]

Ex parte Harrison. In re Cannock and Rugeley Colliery Company(1) shows that without coming on the register the transferee has no remedy. The relevant articles are set out at page 364.

[The company's right to refuse to register was never questioned.—THE CHIEF JUSTICE.]

Bottom of page 370 referred to ; also page 369.

[Your point is that you do not recognize the transfer because it has not been registered. Your case is not that you claim a lien.—THE CHIEF JUSTICE.]

Ex parte Stringer(2) shows that the company has virtually a lien. Although no lien is in terms granted, the right to refuse to register virtually operates as a lien. The right to lien can be claimed only by a contributory on the register. The respondent is not on the register. An equitable mortgagee of a share is not in the position of a shareholder. He is *cestui que trust* of the share ; Buckley on the Companies Acts, 10th edition, page 65. As between the company and the registered holder the title is in the registered holder. *In re Perkins. Ex parte Mexican Santa Barbara Mining Company*(3) and *New London and Brazilian Bank v. Brocklebank*(4) referred to. The articles of association must be deemed to be a contract between the company and the shareholders ; section 21 of the Indian Companies Act. A transferee of shares is bound by the contract between the company and the shareholders. In the present case the transferee purchased the shares with the knowledge of the Articles. Therefore he is bound as much as the transferor. The mortgagee of shares obtains a decree for sale and in execution of that decree the shares are sold and the purchaser applies to the company, the company may refuse to recognise his purchase unless he is on the register. *Bradford Banking Company v. Briggs*(5) is distinguishable. It does not appear whether the company in that case had any article corresponding to

(1) (1885) 28 Ch. D. 363.

(3) (1890) 24 Q.B.D. 613.

(2) (1882) 9 Q.B.D. 436, 439.

(4) (1882) 21 Ch. D. 302.

(5) (1886) 12 App. Cas. 29.

Article 28 in the present case. Secondly, the nature of action was an action for foreclosure or sale.

[Mr. Nugent Grant referred to page 35 to show that the action was not an ordinary mortgage action.]

The final decree in the case was one for foreclosure or sale ; see page 40. *Bradford Banking Company v. Briggs & Co.*(1) and *Bradford Banking Company v. Briggs & Co.*(2) were the judgments of the Courts below in *Bradford Banking Company v. Briggs*(3). The equitable right claimed in that case was the equitable right of priority as between two persons both of whom claimed from the shareholder. There was no contest between the shareholder and the company. Even on the question of priority the claim of the company is prior to the mortgage to the P. & O. Bank ; page 36. If the claim of the company is, as submitted by me, of the nature of security, its claim is prior to the mortgage and therefore entitled to priority. The remedy of an equitable mortgagee of shares is the same as that of a mortgagee of any other property ; *Harrold v Plenty*(4).

Nugent Grant (with him, *O. T. G. Nambiar*) for respondent : The company's debt being prior in date to the mortgage of the P. & O. Bank the question of notice is immaterial. Fully paid-up shares are expressly excluded by Article 20 of the Articles of Association. If Article 20 applied the company would have no lien. Articles 20 and 28 must be read together. Article 28 must be limited to shares of which the calls have not been fully paid-up. The company has no lien in respect of fully paid-up shares. In *Ex parte Stringer*(5) there was no article corresponding to Article 20 in the present case. There was no provision giving the company any lien either in respect of wholly paid-up or partly paid-up shares.

[Why do you say that Article 28 applies only to partly paid-up shares ?—THE CHIEF JUSTICE.]

Because Articles 20 and 28 ought to be read together. Article 20 expressly excludes any lien in respect of fully paid-up shares. A subsequent article like Article 28 cannot give a lien which is expressly excluded by the earlier Article 20. In *re Stockton Malleable Iron Company*(6) referred to. The corresponding articles in the English Act are articles 9 and 20 in

(1) (1885) 29 Ch. D. 149.

(3) (1886) 12 App. Cas. 29.

(5) (1882) 9 Q.B.D. 436.

(2) (1885) 31 Ch. D. 19.

(4) [1901] 2 Ch. 314.

(6) (1875) 2 Ch. D. 101.

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Table 8. Refusal to register under Article 28 in the present case can only be in regard to those shares in respect of which the company has a lien under Article 20. That is the effect of the decision in *In re Stockton Malleable Iron Company*(1) approved and distinguished in *Ex parte Stringer*(2). In the latter case there was no article corresponding to Article 20 in the present case; see page 437.

[Is there any other authority for the position that without a lien there can be no refusal to register?—PANDRANG ROW J.]

According to JESSEL M.R. the principle underlying an article like Article 28 in the present case is to enable the company to perfect its lien. *Matheran Steam Tramway Co. v. Lang*(3) follows *In re Stockton Malleable Iron Company*(1). If the company could not refuse to register, the mere fact that the transferee never applied for registration would not deprive him of his rights. On the other hand, the authorities are to the effect that, where a shareholder transfers his shares in the manner required by law, he has done all that is required of him and the transferee becomes the owner of the shares, though his name is not registered on the company's register, subject to the paramount claims of the company. No question of priority arises in this case and therefore the question of notice is immaterial. The only question is whether the company is entitled to a lien. If it has not, it has no right to refuse to register. As to the position of an equitable mortgagee of shares who has not registered his shares, see *Bank of N. T. Butterfield & Son, Ltd. v. Golinsky*(4). The title of the assignee is complete and notice to the company is not necessary to perfect the title of the transferee. Article 103 in *Bradford Banking Company v. Briggs*(5) is identical with Article 20 in the present case; page 33. All the cases lay down that an equitable assignee of shares has a perfected right to come in on the register; Halsbury's Laws of England, Vol. V, page 284, paragraph 489. Notice is not necessary in the respondent's case because he had merely to send the transfer form. *Ex parte Harrison. In re Cannock and Rugeley Colliery Company*(6) is authority for the position that title is complete without registration. Registration is proof of ownership but is not an incident of ownership. Registration comes in only after completion of

(1) (1875) 2 Ch. D. 101.

(3) (1927) 33 Bom. L.R. 184.

(5) (1886) 12 App. Cas. 29.

(2) (1882) 9 Q.B.D. 436.

(4) [1926] A.C. 733.

(6) (1885) 28 Ch. D. 363, 367.

title. *In re Perkins. Ex parte Mexican Santa Barbara Mining Company*(1) is distinguishable. In the present case the question of lien arose after liquidation. The company had no lien under the Articles of Association or outside the Articles. At the time when the company's debt was sought to be set off the shareholder had parted with all his rights in the shares in favour of the transferee and his title had become perfect.

S. Doraiswami Ayyar in reply.—In *In re Stockton Malleable Iron Company*(2) and *Matheran Steam Tramway Co. v. Lang*(3) the article giving the lien and the article giving the company the right to refuse to register related both to the same class of cases. In the present case the company claims no lien. All that it claims is a right to set off in the course of winding up. Article 28 in the present case gives the company the right to refuse to register and the exercise of that right enables it to claim a set off in course of liquidation which it otherwise would not have. The right of set off given by the Articles is a right enforceable by the company in bankruptcy proceedings even if the company had no lien; *Ex parte Harrison. In re Cannock and Rugeley Colliery Company*(4). Article 28 cannot be said to be supplementary to Article 20 because the subject-matters dealt with are not the same.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—This is an appeal from an order of STONE J., and arises out of the liquidation of the Madras Cloth Market, Ltd. The Managing Directors of the company were the firm of Callianjee & Sons whose sole proprietor was Ramjee Callianjee. He held 5,000 fully paid-up shares in the company in his own name. On 10th September 1924 he, being on that date indebted to the company to the extent of Rs. 36,000, borrowed Rs. 2,00,000 from the P. & O. Bank and gave them an equitable mortgage of some of his immovable property and the 5,000 shares already referred to

(1) (1890) 24 Q.B.D. 613.

(3) (1927) 33 Bom. L.R. 184.

(2) (1875) 2 Ch. D. 101.

(4) (1885) 28 Ch. D. 363.

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as security for the loan. In 1925 the Bank filed a suit (Civil Suit No. 283 of 1925) against Callianjee & Sons on the equitable mortgage, obtaining a preliminary decree for sale on 4th September 1925 and a final decree on 9th October of the same year. On 22nd February 1926 the liquidation of the Madras Cloth Market, Ltd. was ordered by the High Court. Up to this time no notice of the equitable mortgage had been given by the Bank to the company. Such a notice was given after the company went into liquidation. On 7th October 1929 Callianjee & Sons became insolvents and the assets of that firm became vested in the Official Assignee of Madras. In the course of the winding up the liquidator got in the assets of the company and collected and discharged debts; and he has paid Re. 1 per share to the contributories of the company except Ramjee Callianjee or the Bank which got the equitable mortgage over Ramjee Callianjee's shares. The P. & O. Bank, as equitable mortgagees, applied to the Liquidator for the 5,000 shares covered by the equitable mortgage. The Official Liquidator contended and contends here that the Bank are not entitled to be paid the value of those shares because the company are entitled to set off those shares of Ramjee Callianjee against the Rs. 36,000 owing to the company by Ramjee Callianjee. It is admitted that the Official Liquidator has a sufficient fund out of which to pay the Bank's claim should this appeal be dismissed. STONE J. held that the company in liquidation had no lien on these shares or right to set off Ramjee Callianjee's debt to them against those shares and that the Bank were entitled to the shares by reason of the

equitable assignment of the shares to them by Ramjee Callianjee. He expressed some doubt as to whether the case was within the principle enunciated in *In re Peruvian Railway Construction Co., Ltd.*(1), and held that that case did not govern this. Mr. Grant on behalf of the respondents stated here that he did not base his claim on that case at all and that it need not be considered. We have had some difficulty in this case because there is nothing but the briefest order to help us, but, as I understand it, the learned trial Judge has allowed the Bank's claim because the equitable assignment was prior in date to the liquidation. The case has been argued before us as if it were in the Court of first instance and unquestionably the point raised here is one of very considerable importance. It is necessary to refer to the material Articles of Association of the company. The first of them is Article 20 which gives the company a first and paramount lien upon all the shares other than fully paid-up shares registered in the name of each member, whether solely or jointly with others, for moneys from time to time due or payable on any account whatever to the company. It is conceded by the appellants that the company could not under this article claim a lien on Ramjee Callianjee's shares because those are fully paid-up shares whereas Article 20 deals only with partly-paid shares. Then Article 22 says that the company shall not be bound to recognize any equitable interest in shares other than that of a registered holder. Then Article 28, which is the important article here, gives the Board power to refuse to register or acknowledge

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any transfer of shares whilst the shareholder executing the transfer is indebted to the company on any account whatsoever. In the present case, Ramjee Callianjee's indebtedness of Rs. 36,000 was not one in respect of his shares but on an entirely independent account; and it is clear from *Ex parte Stringer*(1) that a company which has an article of association similarly worded would be entitled to decline to register a transfer if the member is indebted to them on any account whatsoever, and that this power is not limited to an indebtedness for calls and indeed that point is not contested here by the respondent. One of the contentions put forward by the appellants here, and indeed it was put in the forefront of their case, was that the proceeding, in which the Bank's claim to the shares and the company's claim to set off against those shares Ramjee Callianjee's debt to them should be settled, was the adjustment of rights of contributories under section 192 of the Indian Companies Act (VII of 1913) which corresponds to section 211 of the English Companies Act of 1929 which is the same as section 170 of the Act of 1908. It is contended that the Bank are not contributories because the transfer to them by Ramjee Callianjee of his shares was never registered and no application for registration was ever made and, if it had been, the company would have been entitled to refuse to register the transfer by reason of Article 28 of the Articles of Association because Ramjee Callianjee was indebted to them to the extent of Rs. 36,000. The respondent, besides contesting the argument that this is a matter arising out of section 192 of the Indian

(1) (1882) 9 Q.B.D. 436.

Companies Act, argues that Ramjee Callianjee is not a contributory because he is the holder of fully paid-up shares. This argument, however, appears to me not to be correct because in Buckley on the Companies Acts, tenth edition, in the notes to section 170 of that Act at page 401, it is stated :

" A holder of fully paid shares is a contributory within the meaning of the Act; when all debts have been paid, a call may be made upon the partly-paid shareholders to adjust the rights between them and the fully-paid shareholders ",

and the case referred to in support of that statement is *In re Anglesea Colliery Company*(1). Mr. Grant contends that on the particular facts of that case fully paid shareholders were held to be contributories but it is quite clear that in the opinion of the learned author of Buckley on the Companies Acts fully paid shareholders are contributories without any qualification. This point was definitely raised in the argument of Counsel in the case referred to, as appears from page 385 of the report, and at page 388 Wood V. C. in his judgment says :

" No doubt the argument is a fair one, ' You who have fully paid up your shares are not contributories, and therefore your rights cannot be required to be adjusted; you have paid your £5 per share, and having fully paid up the amount, it is unnecessary to adjust your rights; although if there are any shareholders who have paid only £4-19-6 they will, in that state of circumstances, have a claim to have their rights adjusted.' The result would be that those who have paid in full would have no voice or controlling power in disposing of the assets; and these being distributed, the company is dissolved. They would therefore have no remedy whatever. I think that is not the scope of the Act. It appears to me that the sound construction of the Act requires that there should be given to that word ' contributory ' the effect of providing for the final adjustment of the rights of all persons, who, if their shares

(1) (1866) L.R. 2 Eq. 379.

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were not paid up, would be in the position of contributing members."

On appeal, in *In re Anglesea Colliery Company*(1) TURNER L.J. expressed the same opinion at page 560. He there says :

"Now it seems to me to be clear, beyond all doubt, that the purpose of the Act is, *inter alia*, to adjust the rights of all the members of companies which should be wound up under it. Indeed, I do not see how the rights of those members who have not paid up in full could be adjusted without the rights of those members who have paid up in full being taken into account."

The proceedings before us were clearly an adjustment of the rights of the contributories but the Bank are not contributories because they are not the registered holders of these shares and up to the date of this application in the trial Court as I understand it had not applied to have the transfer of these shares to them registered. But it seems that a suggestion was made that they should apply for a rectification of the register by getting the transfer of the shares registered; it is argued by the appellants that the Bank are not entitled to have the transfer registered. That they must become the registered holders of the shares is clear beyond all question. They cannot be recognised as owners unless they are registered as such; *In re Perkins*. *Ex parte Mexican Santa Barbara Mining Company*(2) and *New London and Brazilian Bank v. Brocklebank*(3). It is, therefore, important to see whether the company would be entitled to refuse to register the transfer of the shares to the Bank. For the appellants it is contended that, as Ramjee Callianjee was indebted to the company on the date of the transfer of the

(1) (1866) L.R. 1 Ch. A. 555.

(2) (1890) 24 Q.B.D. 613.

(3) (1882) 21 Ch. D. 302.

shares by him to the Bank, the company could, under Article 28 of the Articles of Association, decline to register the transfer. Against this there is the contention that the company would be only entitled to do so provided they had a first and paramount lien upon these shares. In support of the appellants' contention that the company were entitled to refuse to register the transfer of the shares, the case of *Ex parte Harrison*. *In re Cannock and Rugeley Colliery Company*(1) was relied upon. There by article 17 of the articles of association of the company the directors might decline to register a transfer of any share or shares whilst the member making the transfer was, either alone or jointly with any other person, indebted to the company on any account whatsoever or if they should consider that the transferee or transferees was or were an irresponsible person or irresponsible persons. The company refused to register a transfer made by a shareholder to the nominees of a bank as a security for advances on the ground that the transferor was indebted to the company. Subsequently, the transferor filed a liquidation petition and a trustee in liquidation was duly appointed. The trustee with the consent of the bank and their nominees applied to the directors of the company to be registered as the owner of the shares. This application was refused. This case was really a question as between the transferees and the trustee and, the transfer not having been registered, it was held that the trustee was not entitled to be registered as the title of the transferees was subject to the right of the company

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under Article 17 which was to refuse to transfer on account of the indebtedness to them of the shareholder-transferor. On page 369 the Earl of SELBORNE L.C. stated :

"The 17th article of association says that the directors may decline to register a transfer if the member making the same is indebted to the company, or if they shall consider that the transferee is an irresponsible person. The two cases thereby provided for are, to my mind, essentially different. The first case is that in which the transferor is indebted to the company. That provision is made for the company's benefit. I do not think that the declining to register under that provision is a non-approval of the transfer in the sense in which the term 'non-approval' is used in a subsequent article. The company only decline to register so as not to lose the right they have against the registered owner in respect of their debt. That refusal might be put an end to at any moment by payment of the debt."

In the course of the argument the Earl of SELBORNE L.C. asked the question :

"Would not the bank's nominees (transferees) be entitled to be registered on satisfying the company's claim?" and on page 370 the consent of the bank to the proposed registration of these shares in the name of the trustee in liquidation is stated by the Earl of SELBORNE to have been in order to get rid of the right of the company to a set off in respect of their claim. This case certainly supports the appellants' contention. But it must be observed that there were there no articles of association giving the company a lien on shares on account of the shareholder's indebtedness to the company. The position in that case was that as between the transferee and the trustee in liquidation the former was the true owner but as between the transferee and the company the transferee could only become the registered owner of the shares on

paying off the transferor's debt to the company. On the other side, there is a decision ten years earlier in date, viz., *In re Stockton Malleable Iron Company*(1), where it was held by JESSEL M.R. that a company could only refuse to register a transfer of shares belonging to a debtor-shareholder in cases where under the articles they have a lien on those shares by reason of that indebtedness. Two articles of association were in question there. The 7th article gave the company a first and paramount lien on all shares of any member for any monies due to the company, etc., and article 16 enabled the company to decline to register any transfer of shares whilst the member making the transfer was indebted to the company on any account whatever. It was held that these two articles related to the same subject-matter and that the 16th article was a mere supplement to the 7th and not independent in the sense that the members whose shares could be dealt with under the 7th were different from the members whose shares could be dealt with under the 16th. On page 103 JESSEL M.R. says :

"Then, as I read the 16th article, it is that they may decline to register that for which they have a lien under the 7th article. The 16th article says they may decline to register any transfer of shares by a man who is indebted to them. Why may they decline to register? Because they have a lien. That seems to me the only reason why they may decline to register. It is against the interest of companies to fetter transfers. The more free the companies make the transfers the better for them, and the better for their shareholders, and therefore the only object of fettering the transfer is to secure the lien of the company."

Where that case differs from the present one is that the 7th article gives the company a lien on

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all shares and the 16th article speaks clearly of shares and therefore the same class of shares as in the earlier article. In the present case Article 20 gives a lien only on partly paid-up shares, whereas in Article 28, the refusal to register transfers article, merely shares are mentioned; and in *Bradford Banking Company v. Briggs*(1) under the articles the company was given a first and permanent lien and charge upon every share. The question in that case was whether the company which had under article 103 of its articles of association a first and permanent lien and charge available in law and in equity on every share for all debts due from the shareholder to the company could claim priority over the bankers who held the shares deposited with them as security for the balance due from the shareholder on current account even in respect of money which became due from the shareholder to the company after notice of the deposit had been given to the company. It was held that the company could not claim such priority but could only do so by reason of their lien in respect of debts due to them before notice of the deposit. There was no question in that case as to the company's right to refuse to register transfers and there was no article similar to article 28 in the present case although article 100 of the articles of association of the company provided that no transfer of shares could take place without the approval of the Board of Directors. The appellants there claimed in the suit (i) an account of what was due to them for principal, interest and costs on the securities and to have their securities realised by foreclosure and sale

(1) (1886) 12 App. Cas. 29.

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and (ii) a declaration that the securities had priority over all lien (if any) of the respondent company on the shares created by their articles of association or otherwise. The point established was that a creditor cannot give credit on the security of property belonging to the debtor after he has notice that the property has so far been parted with by the debtor. If the creditor does so, his claim cannot prevail against the earlier claim. If in the present case the appellants had a lien on their shares by reason of the indebtedness of Ramjee Callianjee to them, then, as that indebtedness was prior in date to the equitable mortgage of the shares with the respondents, and further, as no notice of that deposit was given, they would be entitled clearly to priority over the respondents. But it is clear that under the Articles of Association no lien is given to them over fully paid shares and it is conceded by Mr. S. Doraiswami Ayyar that the appellants do not claim to refuse to register the transfer by reason of any lien but it is because Article 28 gives them a right to set off Ramjee Callianjee's indebtedness to them against his shares and Lord SELBORNE's observations in the course of his judgment in *Ex parte Harrison. In re Cannock and Rugeley Colliery Company*(1) do describe the right of the company under the articles as a right to set off their claim. The difficulty in this case is caused by the use of the description in Article 20 of shares not fully paid-up and in Article 28 of shares merely; but I think that it cannot have been intended to give the company any right to refuse to register a transfer of shares unless the company had a lien

(1) (1885) 28 Ch. D. 363, 370.

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on those shares and it is only because of that right that the company would be entitled to refuse to transfer as was stated by JESSEL M. R. in *In re Stockton Malleable Iron Company*(1). If this is the correct view, then the respondents are entitled to have the transfer to them of the shares registered and their claim to them recognised and the company having no lien are not entitled to set up Ramjee Callianjee's indebtedness to them in priority to the claim of the respondents. Therefore the learned trial Judge arrives at the correct result and this appeal must be dismissed with costs.

Certify for two Counsel on both sides. The Official Liquidator will take his costs out of the estate as provided for in Order VI, rule 19, of the High Court Fees Rules, 1933.

PANDRANG ROW J.—I agree.

Attorneys for respondents: *Messrs. Moresby and Thomas.*

A.S.V.

(1) (1875) 2 Ch. D. 101.

APPELLATE CIVIL.

Before Mr. Justice Sundaram Chetti and
Mr. Justice Pandrang Row.

RAO BAHADUR SUNA. ANA. RAMANATHAN
CHETTIAR (DEFENDANT), APPELLANT,

1934,
February 13.

v.

MEYNA. PANA. PALANIAPPA CHETTIAR AND
SIX OTHERS (PLAINTIFFS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXXII—Provisions as to minor defendant in—Applicability of, in suit instituted in firm's name—O. XXX, r. 10, of Code—Applicability and effect of—Minor sued in firm's name—Guardian ad litem for—Appointment of—Compromise affecting minor—Leave of Court for—Necessity—Absence of—Effect of.

A suit was instituted *inter alia* against the S.A. firm under which name and style S had during his lifetime carried on a money-lending business as the sole proprietor. The second defendant was adopted by the widow of S and was at the time of the institution of that suit a minor. No guardian *ad litem* was, however, appointed for him. A decree was passed in that suit on the basis of a compromise but no petition for leave of the Court to compromise on behalf of the minor second defendant was ever put in.

Held that there was no representation at all of the second defendant in that suit and that the decree passed therein was a nullity as against him and therefore was unenforceable.

Rule 10 of Order XXX of the Code of Civil Procedure simply justifies the introduction of the assumed name instead of the real name of the defendant, but does not absolve the plaintiff from his liability to propose a proper guardian if the defendant represented by such a name is really a minor.

Quaere whether the words "any person carrying on business" in rule 10 of Order XXX should be taken to mean one who is himself actually carrying on business and whether they

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apply to one who as the guardian or agent or representative of another person is carrying on the business.

APPEAL against the decree of the Court of the Temporary Subordinate Judge of Devakottah in Original Suit No. 33 of 1927.

V. V. Srinivasa Ayyangar and *A. Swaminatha Ayyar* for appellant.

S. Srinivasa Ayyangar for *K. Rajah Ayyar* and *V. Ramaswami Ayyar* for respondents.

SUNDARAM
CHETTI J.

The JUDGMENT of the Court was delivered by SUNDARAM CHETTI J.—This appeal arises out of a suit filed by the plaintiffs (respondents) for the recovery of a sum of Rs. 15,446 alleged to be due on account of the payment of a decree debt in C.R. No. 55 of 1912 in the Chief Court of Lower Burma instituted by the Bank of Rangoon against the present plaintiffs' firm as first defendant and S.A. firm as the second defendant. The suit is one for contribution and interest also is claimed at what is called the Rangoon Nadappu rate, namely, 0-13-6 per cent. per mensem. In paragraph 4 of the plaint, it is alleged that in respect of a joint loan of Rs. 20,000 contracted by the aforementioned two firms from the Bank of Rangoon the said decree was obtained. The defendant in his written statement raised several pleas, one of which is that he was not really a party to the said suit, as there was no S.A. firm as a legal entity and no business was carried on under that style by the defendant or by any persons on his behalf. He further stated that the plaintiffs should strictly prove the truth, the validity and the binding character of the loan and the decree passed thereon. The lower Court passed a decree in favour of the plaintiffs.

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The way in which the suit proceeded to trial and the nature of the issues framed clearly show that the plaintiffs wanted to enforce the defendant's liability for contribution on the basis of the decree alleged to have been obtained against both the firms. It is curious that the plaint is silent as to who was really represented by the S.A. firm mentioned as the second defendant in that suit. We find from the evidence that the defendant's late adoptive father Subramaniam Chetti was carrying on the money-lending business as the sole proprietor under the name and style of S.A. firm. He died leaving a will in which he gave authority to his widow to make an adoption. Sometime after his death, the present defendant, while he was a minor, is said to have been adopted by the widow in pursuance of her husband's authority. There is no doubt that at the time of the institution of the former suit the present defendant was a minor. This fact is not alleged in the plaint at all, but is indicated in the written statement. However, the question of his minority arises for consideration in determining his objection that he was not a party at all to the said suit. The evidence adduced on the plaintiffs' side is to the effect that subsequent to the death of Subramaniam Chetti the business of the S.A. firm was slowly wound up and they had to run that business for sometime before winding it up. One Chinniah Chettiar is said to have been the executor appointed under the will of Subramaniam Chetti, and his power-of-attorney agent was Chokkalingam Chettiar (P.W. 2). The loan of Rs. 20,000 referred to in the plaint was borrowed by P.W. 2 as the agent appointed by the

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executor. He was succeeded by another agent Murugappa Chettiar who was mentioned in the former suit as the agent of the S.A. firm. The question is whether the present defendant who was then a minor was really represented at all in the former suit as the second defendant. It is argued that under Order XXX, rule 10, Civil Procedure Code, any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name. The rule may probably justify the suit as against Subramaniam Chettiar or the executor appointed by him, if the words "any person carrying on business" occurring in the aforesaid rule 10 should be taken to mean one who is himself actually carrying on business. It is doubtful if those words apply to one who as the guardian or agent or representative of another person is carrying on the business. Be this as it may, the question that is pertinent to the present case is, whether the defendant who was really a minor at the time of the institution of that suit could be simply sued in the name of S.A. firm, and if so, whether the other requisites laid down in the Civil Procedure Code for a proper representation of a minor by the appointment of a guardian by the Court need not be fulfilled. There is nothing to obviate the necessity of fulfilling the other mandatory provisions of the Civil Procedure Code. That rule simply justifies the introduction of the assumed name instead of the real name of the defendant, but does not absolve the plaintiff from his liability to propose a proper guardian, if the defendant represented by such a name is really

a minor. From the available records in this case, we are satisfied that the idea of the present defendant having been a minor at that time never occurred to the plaintiff in that suit, nor was that fact brought to the notice of the Court that passed the decree. The decree, we find, was one passed on a compromise. The B Diary in that case shows that no petition for leave of the Court to compromise on behalf of the second defendant was ever put in. That being so, we must hold that there was no representation at all of the present defendant who was then a minor, when the former suit was instituted or when the compromise decree in that suit was passed. If one who was a minor at the time of the suit is sought to be made liable on a decree passed in that suit, it is open to him to plead that that decree was a nullity and might be disregarded by him without instituting a suit to set aside that decree. This principle has been clearly laid down by the Privy Council in the decision in *Khiaraj-mal v. Daim*(1). If the present defendant was really no party to the former suit, it goes without saying that the decree passed in that suit would be a nullity as against him and therefore would be unenforceable.

Even if the decree as such is not binding on the present defendant, it is open to the plaintiffs in a suit for contribution like this to enforce the defendant's liability on the strength of the original joint loan of Rs. 20,000 alleged in paragraph 4 of the plaint on proof of facts necessary for the establishment of such liability.

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(1) (1904) I.L.R. 32 Cal. 296, 312 (P.C.).

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[After observing that that was the main point for determination in the suit but that the Court below missed it and that the trial of the suit was therefore defective, their Lordships proceeded as follows :—]

We therefore think fit to set aside the decree of the lower Court and remand the suit for fresh trial and disposal, after allowing the plaintiffs an opportunity to amend the plaint by making the necessary allegations as regards the nature and binding character of the original loan, which subsequently was sued upon, and by allowing the defendant also to put in an additional written statement to traverse those allegations. The necessary issue or issues arising from the additional pleadings will have to be framed and tried. With these observations, we remand the suit to the lower Courts for its restoration to file. Having regard to the indulgence we are showing to the plaintiffs and the success of the appellant on the question involved in the first issue, we direct the plaintiffs (respondents) to pay one half of the appellant's costs in this appeal. The court-fee paid on the memorandum of appeal will be refunded to the appellant. Costs of the lower Court will abide the result.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Krishnan Pandalai.

[REFERENCE UNDER CLAUSE 36 OF THE LETTERS PATENT ON A
DIFFERENCE OF OPINION BETWEEN MR. JUSTICE SUNDARAM
CHETTI AND MR. JUSTICE PAKENHAM WALSH.]

DASUREDDI, MINOR BY GUARDIAN AUDILAKSHMI AMMAL
(DEFENDANT), APPELLANT,

1933,
November 14.

v.

M. VENKATASUBBAMMAL (PLAINTIFF), RESPONDENT.*

*Indian Succession Act (XXXIX of 1925), sec. 63 (a)—Will—
Signing of, by some other person in the presence and by the
direction of the testator—Proper form of signature in case
of—Signing of name of other person—Necessity—Practice
—Reference to third Judge under Cl. 36 of Letters Patent or
sec. 98 (2) of Civil Procedure Code as now amended—
Pronouncing of judgment by referee Judge in case of—
Propriety of—Point referred only a preliminary point.*

A will alleged to have been executed by Rangammal was in the handwriting of one K. The execution of the will which also was in the handwriting of K consisted of the words in Tamil equivalent to the English, "this scratch—the mark of Rangammal". Rangammal was an illiterate lady and she touched the pen and handed it over to K who made the mark and added the memorandum that that was the mark of the executant. It was proved that he did so in the presence and by the direction of Rangammal. After the attestation there was a memorandum by the writer that the will was in the handwriting of K.

Held by KRISHNAN PANDALAI J. (agreeing with SUNDARAM CHETTI and PAKENHAM WALSH JJ.) that K signed Rangammal's name to the will and (agreeing with SUNDARAM CHETTI J. and differing from PAKENHAM WALSH J.) that as K did so in the presence and by the direction of Rangammal the execution was sufficient according to section 63 (a) of the Indian Succession

* Appeal against Order No. 201 of 1932.

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Act XXXIX of 1925 and could not be said to be invalid because it did not contain the signature of K himself.

According to the proper construction of the words "it shall be signed by some other person in his presence and by his direction" in section 63 (a), the proper form of signature is for the other person to sign the name of the testator and not his own. It is no doubt usual to add that the testator's signature was made by the other person in his presence and by his direction and then for the other person to sign. But this is a matter of furnishing *prima facie* evidence that the signature by the other person is, as it should be in order to be valid according to the section, affixed in the presence of the testator and by his direction and does not form an integral part of the signature itself. The evidence of presence and authority might be given otherwise than by such an addition to the signature.

Held further by KRISHNAN PANDALAI J.—When a point is referred under Clause 36 of the Letters Patent, the Judge or Bench hearing the reference may, where there is nothing else to be decided but the point referred to enable a decision in the case to be pronounced, pronounce judgment in the case in accordance with the opinion of the majority without sending the case to the Bench. The referee Judge or Bench cannot, however, do so where the point referred is only preliminary to the decision of points which are not referred. In such a case both under Clause 36 of the Letters Patent and the analogous words of the proviso to section 98 (2), Civil Procedure Code, as now amended, the case has to go back to the Bench for decision.

APPEAL against the order of the District Court of Chingleput dated the 26th September 1931 and made in Original Suit No. 1 of 1931 (Original Petition No. 72 of 1930).

The appeal originally came on for hearing before SUNDARAM CHETTI and PAKENHAM WALSH JJ. when their Lordships delivered the following

JUDGMENT.

SUNDARAM CHETTI J.—This appeal arises out of a testamentary suit filed by the plaintiff-respondent for the grant of

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probate of a will dated 22nd July 1930 and alleged to have been executed by the late Rangammal. Plaintiff is Rangammal's husband's brother's daughter. Plaintiff's brother is the late Subbaroya Reddi, the father of the minor-defendant. According to the case of the plaintiff, she and her elder brother Subbaroya Reddi were living with Rangammal after their parents' death, but after the marriage of Subbaroya Reddi he went over to his mother-in-law's house and the plaintiff alone continued to live with Rangammal throughout. Plaintiff has a daughter Muthiammal. Under the will in question (Exhibit A), Rangammal bequeathed a debt due to her on a pro-note amounting to Rs. 1,900 together with movables worth Rs. 25 in favour of the plaintiff to be held and enjoyed by her for her life, the remainder to be taken by her daughter Muthiammal with absolute rights. Rangammal had an attack of smallpox some days before the execution of the alleged will. She died on 26th July 1930, about four days after the execution of the will. Defendant resisted the plaintiff's claim by denying the genuineness of the will and also urging that it was not validly executed by Rangammal, even if the will be found to be genuine. The learned District Judge found both these points in favour of the plaintiff.

As regards the fact of execution of the will, there is, in my opinion, satisfactory proof of the truth of the will.

[His Lordship considered the evidence on the point and held agreeing with the Court below that there was sufficient evidence to show that the will was executed by Rangammal when she was in a sound and disposing state of mind.]

The next question is, whether the will was validly executed by Rangammal within the meaning of section 63 of the Indian Succession Act XXXIX of 1925. That section describes three modes of execution of a will. Clause (a) runs thus: "The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction." Under clause (c) there is the necessity for the attestation of the will by two or more witnesses in the manner stated therein. In the present case the requisites of clause (c) have undoubtedly been complied with. The question is, whether Exhibit A can be deemed to have been executed in one of the modes specified in clause (a). It is clear that Rangammal has not herself signed the will. The evidence shows that she did not herself affix her mark to the will, for

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she simply touched the pen and asked the scribe to affix her mark to the will. It cannot therefore be deemed that the execution of the will, Exhibit A, was in either of the first two modes. The point for consideration is, whether Exhibit A can be taken to have been executed in the third mode specified in clause (a). What appears in the will Exhibit A is in this form: "இந்த கீரல் ரங்கம்மாள் கையாட்டு—"(— this scratch Rangammal's mark). All this was written by P.W. 2 and besides him four others have attested the will. It is argued on behalf of the plaintiff that what appears in Exhibit A can reasonably be taken to be the signature of the testatrix written in the hand of P.W. 2 in her presence and under her direction. The question is whether this will come under the third mode of execution specified in section 63, clause (a). In this connection, the observations in *Nirmal Chunder Bandopadhyaya v. Saratmoni Debya*(1) about "signing" and "affixing the mark" are relevant. "The word 'signing' has been held to mean the writing of the name of a person so that it may convey a distinct idea to somebody else that the writing indicates a particular individual whose signature or sign it purports to be, whereas a 'mark' is a mere symbol and does not convey any idea to a person who notices it." Adopting these interpretations, I must hold that the scratch in the form of a line appearing in Exhibit A is a mark. Along with this mark, the name of Rangammal was also written by P.W. 2 with the view to authenticate the will by conveying a distinct idea to others as to who the particular individual was that executed the will. Instead of Rangammal herself writing her name (which she was unable to do), P.W. 2 wrote her name for the express purpose of authenticating the will in her presence and with her concurrence. As observed in *Nirmal Chunder Bandopadhyaya v. Saratmoni Debya*(1), when somebody else writes the name of the testator for him he should write the name or put it in such a manner as would lead anybody else to see at once who the person was that executed the document. The evidence of P.W. 4 is that, when the will was read over to Rangammal, she agreed to its terms and touched the pen telling the karnam (that is, the scribe) to put the mark for her, and that the karnam then put the mark and wrote her name. In cross-examination, this witness says explicitly in one portion

(1) (1898) I.L.R. 25 Cal. 911, 915, 916.

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that she asked the karnam to put her mark and signature for her, though in answer to some other question he would say that she did not ask the karnam to sign her name. P.W. 3 would say that it was written in the document that someone signed for her and that was how the karnam read it out. There is no doubt that Rangammal asked the karnam to put the mark for her. It is equally beyond doubt that the karnam wrote her name, besides putting her mark, for the purpose of authenticating the will in the presence of Rangammal and with her knowledge and concurrence. From the circumstances disclosed in the evidence, it can safely be inferred that the writing of her name by P.W. 2 while putting the mark was one done with her authorisation; vide *Ramanamma v. Viranna*(1).

The further question is, whether the writing of the name of the testator by some other person in his presence and by his direction for the purpose of authenticating the will is a mode of execution coming within the purview of clause (a) of section 63. It is contended on behalf of the appellant that the third mode of execution referred to in clause (a) covers only the case of some other person signing his own name and not signing the name of the testator. If this is correct, clause (a) should have stated that the other person should purport to sign his name as proxy for or on behalf of the testator. If some other person should simply sign his name without such an indication the will would not show who the real executant was. Such a signature would be misleading. What is stated in clause (a) is simply that the will shall be signed by some other person in his presence and by his direction, as distinguished from the testator himself signing the will or affixing his mark to it. In the case reported as *In the matter of the Petition of Hemlota Dabee*(2) the execution of the will was taken to be according to the third mode specified above (section 50 of the old Succession Act X of 1865 being the same as section 63 of the new Act). In that case, the testator was blind and one of the witnesses signed the testator's name at his request by writing out the name of the testator and stating that it was by the pen of the writer. If the writing of the testator's name by some other person was thought to be not a valid mode of execution, there was no need to enter into the further question whether the will contained the attestations of two other persons

(1) (1931) 61 M.L.J. 94, 99 and 100.

(2) (1882) I.L.R. 9 Cal. 226.

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at least or not, and the case could have been disposed of on the short ground that the execution of the will was not in any of the modes fixed in section 50. But the learned Judges evidently treated it to be a valid mode of execution and went on investigating the further question whether the will was also attested by two other persons besides the person who signed the testator's name. That case is, to my mind, not a case of some other person signing his own name for the testator. In the case reported as *Nirmal Chunder Bandopadhyaya v. Saratmoni Debya*(1) this question should be taken to have been directly decided. The testator was in the habit of using a name-stamp (a *facsimile*) as he was unable to read or write. His servant who used to keep that name-stamp would impress that stamp on any document in token of its execution by him. The same process was adopted in a will. The learned Judges held that it amounted to the affixing of the testator's signature by some other person within the meaning of section 50 of Act X of 1865 and that it was not the mere affixing of the testator's mark. This decision is, in my opinion, an authority for holding that the writing of the testator's name in token of the execution of the will by him by some other person in his presence and under his direction is a valid mode of execution. My learned brother thinks that the execution of the will in that case is in the first mode. There are, in my opinion, some striking observations in the judgment indicating that the learned Judges treated it as the third mode of execution. It is stated that the impression of the *facsimile* of the name of the testator is really the affixing his name. If the testator himself attached the *facsimile* stamp to the will, it would be the first mode of execution. But it was the servant who put the name-stamp, and so it is a case of some other person signing the testator's name in his presence and under his direction (the third mode). In my view, the opinion expressed in *Radhakrishna v. Subraya*(2) is to the same effect. In that case, the mark of the testatrix was put by some other person and her name also was written by the side of the mark by the same person, but the person who did so put his signature also below that writing. In respect of such a document, it was observed that this may amount to a signature by some other person in her presence and by her direction within the meaning of the section, and, if attested by

(1) (1898) I.L.R. 25 Cal. 911.

(2) (1916) I.L.R. 40 Mad. 550.

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two witnesses other than the signatory, it would be sufficient. At page 556, we find this passage: "If the signature as distinct from the mark of the testatrix is taken to have been affixed by Doraiswami Ayyangar in her presence and by her direction, the will fails for want of due attestation." As I understand this passage, the signature therein referred to is the name of the testatrix written for her by somebody else and not the signature of that other person. The wording in clauses (a) and (b) of section 63 is not altogether free from ambiguity on this point. But to say that the third mode of execution necessarily means, and is confined only to, some other person signing his own name on behalf of the testator would be too narrow a construction and is also against the view taken in the decisions quoted above. I have no doubt that, when some other person signs for the testator, by writing out the testator's name in his presence and by his direction, it is within the third mode of execution specified in section 63, clause (a), of the Act. In the present case such was the mode of execution which can be reasonably inferred from the evidence and from a perusal of Exhibit A itself. I therefore find, agreeing with the learned District Judge, that the will Exhibit A was also validly executed.

In the result, I would dismiss this appeal with costs.

PAKENHAM WALSH J.—On the questions of fact I am not prepared to differ from the conclusion of my learned brother, and will therefore deal very briefly with this aspect of the case.

[His Lordship considered the evidence bearing on the question of the genuineness of the will and agreed with SUNDARAM CHETTI J. in holding that it was genuine.]

But on the legal aspect of the case I regret that, after giving my best attention to the matter, I find myself unable to agree with the view of my learned brother that the will is validly executed.

The matter has been dealt with in paragraph 5 of the judgment of the lower Court. Admittedly the mark was not put by Rangammal herself and it is not denied [on the authority of *Radhakrishna v. Subraya*(1)] that if a testator is to affix his mark he must actually do so himself. The argument before the lower Court merely turned on the point as to whether the signature of Rangammal appearing at the foot of

(1) (1916) I.L.R. 40 Mad. 550.

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the will was made by P.W. 2 in her presence and under her direction. In the earlier stages of the argument before us the ground taken was that this does not amount to her signature at all being merely a statement that it was her mark, and that if it amounts to her signature the evidence did not prove that she had authorised P.W. 2 to make it. But at a later stage in the argument a wider question came up whether, even assuming that this amounts to her signature and she had authorised P.W. 2 to make it, it is in compliance with section 63 of the Indian Succession Act of 1925, the argument being that a person signing for the testator must affix his own signature and indicate that he is signing for the testator. We have first to see what the actual words of the section are. Section 63 (a) says:—"The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction."

Section 63 (b) says:—"The signature or mark of the testator or the signature of the person signing for him shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will."

Section 63 (c) says:—"The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, etc." In this case we are not much concerned with section 63 (c), because independently of P.W. 2 who affixed what is contended to be the signature and also the mark of Rangammal there were two other attestors who saw him do what he actually did.

Taking section 63 (a), it is perfectly clear that the word "it" there refers to the will. It cannot possibly refer to the signature of the testator. Therefore the later clause means "the will shall be signed by some other person in his presence and by his direction." Apart altogether from the fact that to write down another person's name pure and simple as a method of "signing for another person" is quite unknown even in an ordinary document, let alone in a will, the plain meaning to my mind of "the will shall be signed by some other person in his (i.e., the testator's) presence and by his direction" would be that this other person shall put his own signature indicating that he is signing for the testator. If the framers of the Act had meant otherwise they could easily have worded section

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63 (a) thus: "The testator shall sign or shall affix his mark to the will, or his name shall be signed by some other person in his presence and by his direction." Clause (b) appears to me to put the matter beyond dispute. It says that "the signature or mark of the testator or the signature of the person signing for him shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will." Now "the signature or mark of the testator" in the first clause means his own signature made by the testator himself or his mark affixed by himself. Then follows the third alternative, distinctly saying that the signature of the person signing for him shall be so placed that it shall appear that it was intended thereby to give effect to the writing of the will. The words seem to me to be perfectly clear.

I shall now consider the cases which my learned brother holds to have taken an opposite view. Taking first the case of this Court, *Radhakrishna v. Subraya*(1). There the testatrix touched the pen and gave it to one Doraiswami Ayyangar who wrote in Tamil "This mark x Papathiammal" and below "this mark was taken by D. V. Doraiswami Ayyangar." As noted above, it was held that the mark not having been affixed by the testatrix herself was invalid as a means of execution by mark. The execution of the will through the hand of Doraiswami Ayyangar was held to be invalid on the ground that in addition to the person so signing for the testator there were not two other attestors, as the Act requires, who saw him do so. In this case the probate asked for was refused on these two grounds and hence the remarks on other points are *obiter* and unnecessary for the decision of this case. What are after all these remarks? In the first place, I may note that the last clause of the headnote which runs "considered as a signed will, as it might be, it was equally invalid as the testator's signature was put by another and there were not two other testators besides the one so signing", while it gives a perfectly correct idea of the *ratio decidendi*, cannot be regarded as an exact resume of what their Lordships said on the matter before us and goes beyond their actual words. We must turn to the judgment itself. There are two remarks bearing on the point. The first is: "In this case . . . the testatrix touched the pen and gave it to Doraiswami Ayyangar who wrote in Tamil:

(1) (1916) I.L.R. 40 Mad. 550.

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'This is the mark of Papathiammal. This mark was taken by D. V. Doraiswami Ayyangar.' This may amount to some other person signing in her presence and under her direction It is by no means certain to my mind whether the learned Judges mean that it was the name Papathiammal or the signature D. V. Doraiswami Ayyangar which might amount to the signature of some other person signing in her presence and under her direction within the meaning of the section. Certainly, even on the view I take of the section, there was a complete compliance with the section except that two more witnesses who had seen D. V. Doraiswami Ayyangar sign for the testatrix were required. Even if the construction of their Lordships' words adopted by my learned brother be correct, the opinion is a mere hypothetical conjecture on a point on which no finding was given or was necessary, the execution being invalid for another reason.

The other sentence relied on by my learned brother is: "If the signature as distinct from the mark of the testatrix is taken to have been affixed by Doraiswami Ayyangar in her presence and by her direction the will fails for want of due attestation." I admit this part of the sentence lends some verbal support to his view, but the sentence continues: "as the section requires that the will should be attested by two or more witnesses each of whom must have seen the testator affix his mark, or have seen the other person *sign the will* in the presence and by direction of the testator". It may equally I consider be argued that "sign the will" in the end of the sentence must mean "put his own signature".

The whole sentence is not merely hypothetical but the present point was not as I said under discussion at all. As, even on my view, the section would have been complied with in substance had there been two proper attesting witnesses, this sentence, even if it had run quite affirmatively thus: "The signature, as distinct from the mark of the testatrix, affixed by Doraiswami Ayyangar is in accordance with the terms of the section, but the execution fails for want of proper attestation", would not have touched the present point at all. In effect what the learned Judges say is this: "Of the three modes of execution that by affixture of mark is bad in this case, and the method of signing through another person, even if it is valid as regards the mere signing (with regard to which we do not express a positive opinion), fails for want of proper attestation."

This case is not, therefore, I consider any authority for holding that the meaning of section 63 (a) and (b) is not what, it seems to me, the plain English indicates.

Next I will take *In the matter of the Petition of Hemlota Dabee*(1). This turned precisely on the same question as arose in *Radhakrishna v. Subraya*(2). In this case it was held that where the testator does not himself sign the will, but some other person signs it in his presence and by his direction, then, besides this other person, there must be two witnesses who must sign the will in the presence of the testator. In that case the will was written by the Magistrate's clerk and was signed by seven witnesses. The testator and the witnesses then went to the Sub-Registrar's office; the Sub-Registrar then requested the testator to sign, but he said "I am blind". Then one of the witnesses, Chundar Coomar Chatterji, signed the testator's name at his request in the following manner "Girish Chunder Banerji, by the pen of Chundar Coomar Chatterji of Amelia" and then wrote under this "Identified by Chundar Coomar Chatterji, Local Fund Clerk, Ranaghat Sub-divisional Office. Chundar Coomar Chatterji, Local Fund Clerk, Ranaghat." Then followed the signature of the Sub-Registrar. The District Judge refused probate on the ground that the witnesses had signed before the testator's signature was affixed at his request, and that there must have been two or more witnesses who saw Chundar Coomar Chatterji sign for the testator. This view was upheld. So in this case the question whether the signature required was the name of Girish Chunder Banerji or the signature of Chundar Coomar Chatterji for the testator was not discussed nor was the point raised, but even if it had been raised the section would have been, on the interpretation which I put upon it, satisfied because the name of the testator is not only followed by the words "by the pen of Chundar Coomar Chatterji, Local Fund Clerk, Ranaghat Sub-divisional Office", but the latter then proceeds to put his signature "Chundar Coomar Chatterji, Local Fund Clerk, Ranaghat". The section might well I consider have been held to have been satisfied in substance even if the first sentence only had been there "Girish Chunder Banerji by the pen of Chundar Coomar Chatterji of Amelia". The actual signature

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(1) (1882) I.L.R. 9 Cal. 226.

(2) (1916) I.L.R. 40 Mad. 550.

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of Chundar Coomar Chatterji made the compliance with the section complete had the necessary attestation been there.

The last case is *Nirmal Chunder Bandopadhyaya v. Saratmoni Debya*(1). There the testator for a number of years was, as he was unable to write, in the habit of using a name-stamp, which used to be attached by a servant to any document or paper he wanted to sign. He executed a will, and under his direction a servant affixed the impression of his name-stamp on the said document. It was held that the execution of the will in this case was proper and came strictly within the meaning of the words used in section 50 of the Indian Succession Act of 1865 (section 63 of the present Act). There the learned Judges held that the affixing of the *facsimile* of the name is not making the mark, but really the affixing the name to the document.

My learned brother considers that the method of execution in that case was held to be signing it through another person, i.e., the third mode, but, with respect, I differ and consider that it was held to be actual signing by the testator himself. The learned Judges quote *Jenkyns v. Gaisford*(2) where the Judges indicate that the use of pen and ink is not necessary for signing and they say that "a person may sign or put his name down by means of types, or, if he uses a *facsimile* for signing his name, he may use it for his signature." (The italics are mine.) There is, no doubt, earlier on the page, a sentence which lends some support to the view that the writing of the testator's name by another person is what the section requires where the learned Judges say: "In the case of somebody else writing for him, it requires that he should write the name or put it in such a manner as would lead anybody else to see at once who the person was who executed the document."

But, as I read the judgment as a whole, the learned Judges considered the execution in that case to have been by the first mode, namely, the testator signing the will himself. Otherwise the remark that pen and ink are not necessary and that the person (person here clearly being testator) may sign or put his name by types or *facsimiles* seems irrelevant. I would also rely on the final words in the judgment: "Now let us see what the facts . . . are. It appears that for a number of years Janaki had been in the habit of using a name-stamp as he was unable to read or write. That name-stamp used to be kept by

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a servant, and, under Janaki's direction, used to be attached to any document or papers he wanted to sign. That being so, it appears to us that the learned District Judge was perfectly right in holding that the execution of the will in this case was proper and came strictly within the meaning of the words used in section 50."

If my view of that case is correct the matter before us did not arise, and the sentence which supports the view of the law taken by my learned brother is *obiter*. Even otherwise the words of the section appear to me so plain that I should feel bound by their natural meaning. Nor does the signature of this other person appear to me a mere technical requirement. If this other person puts his own signature as having signed for the testator at the latter's request, in his presence, and by his direction, his signature not only indicates who this other person is, but fixes him with the responsibility of the assertion that the will has really been executed by the testator through his hand. If the mere writing of the testator's name, without anything more, is sufficient, then parties may forge the signature of the testator, and subsequently, fearing that it may not pass as genuine, may allege that it is not, as it appears to be, his name signed by himself but that his name was written on the document by some other person in his presence and under his direction, and this in spite of the fact that there is no indication of anything of the sort in the document. The proof would then rest only on oral evidence and it might easily be said that this third person was dead or had turned hostile.

It may be argued that an execution of the testator by means of affixing his mark must similarly rest on oral evidence. To that I think there is a twofold reply. Firstly, "*ex necessitate rerum*" if the affixing of his mark by the testator is allowed as a means of execution, then the proof must generally be oral and the choice lies between disallowing such a method of execution altogether and accepting it with its necessary infirmities in the way of proof. As a matter of fact there might be cases where a forged mark might be proved not to be that of the testator by comparison with some uniform mark which he had always used. So that it is not quite correct to say that the truth or otherwise of execution by mark must always depend entirely on oral evidence.

But where another person is allowed to sign for the testator, and the implication of the section clearly is that this other

(1) (1898) I.L.R. 25 Calc. 911.

(2) (1863) 11 W.R. (Eng.) 854; 3 Sw. & Tr. 93; 164 E.R. 1208.

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person is able to sign his own name, why should the precaution that his signature must appear be omitted? I therefore do not consider that any argument against the view I take of the section can be raised from the fact that execution by affixture of mark must in most cases depend on oral evidence.

If my view on this question of law is incorrect, there still remains the second question of law discussed by my learned brother whether "this scratch Rangammal's mark" is the same as writing Rangammal's name. The solution of this point depends on whether the words are to be read as a whole, and equivalent to putting the signature of Rangammal, or in parts and as meaning no more than a statement that this is Rangammal's mark. Here I agree with my learned brother, but I would add that the nicety of this distinction affords to my mind another indication why this method of execution (when the party does not himself affix his mark) is not likely to have been that intended by the Legislature as a compliance with the third method of signing. *Radhakrishna v. Subraya*(1) is not of much use to us on this point though it would have been of help had Doraiswami Ayyangar not signed his own name.

An attempt was made to argue that, because at the foot of the document P.W. 2 has signed as the writer, this is a sufficient compliance with the section, no matter which view of the section is taken. This argument certainly cannot be accepted. There is no indication in the document that P.W. 2 signed for the testatrix nor can it even be concluded that because at the foot he describes himself as the writer of the document, and signs as such, he wrote her name or wrote anything more than the body of the document. Many documents which the executant signs himself are described at the foot as being written by the writer who then signs, but that is no indication that he wrote the executant's name also. It might as well be argued that he either signed for, or wrote the names of, the attestors which appear above his signature.

I would also agree with my learned brother that, if the writing of Rangammal's name in this manner is sufficient execution, there is enough evidence that it was done under her direction and in her presence.

On the view which I take of the first legal point I hold that the appeal should be allowed with costs.

(1) (1916) I.L.R. 40 Mad. 550.

BY COURT:

As we are differing on the following question of law, viz., "Whether the execution of the will (Exhibit A), in the circumstances of this case, by Rangammal, can be deemed to be in conformity with section 63 of the Indian Succession Act XXXIX of 1925", we refer this case under Clause 36 of the Letters Patent, so that His Lordship the Chief Justice may have it posted for hearing before another Judge.

ON THIS REFERENCE:

Ch. Raghava Rao for appellant.

T. M. Krishnaswami Ayyar and *T. E. Ram-
bhadrachariar* for respondent.

Cur. adv. vult.

OPINION.

The question referred to me on account of a difference of opinion between the learned Judges who heard this appeal is whether the execution of the will, Exhibit A, in the circumstances of this case, by Rangammal, can be deemed to be in conformity with section 63 of the Indian Succession Act XXXIX of 1925. Reading the two judgments, the question on which this difference of opinion arose lies within a narrow compass. Both the learned Judges have held that the will, Exhibit A, is genuine in the sense that it was a testamentary disposition in fact made by Rangammal in her lifetime when she was of sound disposing mind. It is in the handwriting of the plaintiff's second witness Kothandarama Pillai who is the Village Munsif and Karnam of the village, Ulaivetti. The execution of the will which also is in the handwriting of Kothandarama Pillai consists of the words in Tamil equivalent to the English, "this scratch—the mark of

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Rangammal." It is attested by four witnesses one of whom being dead the others have been examined as witnesses 3, 4 and 5. After the attestation there appears the customary memorandum by the writer that the will is in the handwriting of Kothandarama Pillai, Village Munsif and Karnam of the village of Ulaivetti. About the genuineness of all this the learned Judges were both satisfied, as was the learned District Judge who heard the case in the first Court. The point on which they differed was one which had been taken before the District Judge, viz., that the execution by Kothandarama Pillai's writing "this scratch—the mark of Rangammal", although it was done in the presence and by the direction of Rangammal, was not sufficient execution under section 63 of the Indian Succession Act. The District Judge overruled it relying on certain Indian decisions. SUNDARAM CHETTI J. also relying on the same decisions overruled it; but PAKENHAM WALSH J. upheld it.

The point of difference is this: whereas the former learned Judge is of opinion that, when an execution of a will by a person other than the testator in his presence and by his direction takes place, it is sufficient for that other to affix the signature of the testator himself, the latter learned Judge thinks that this is not the effect of the section or of the authorities relied upon but that a proper execution under the section requires that the other person executing the will under the direction of the testator must sign in his own name with sufficient indication to show that he has executed it under the testator's direction. The difference of opinion is in short about the

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form of execution by another person executing the will under the direction of the testator. There is no difference of opinion at all on the facts because as I have said both the learned Judges agree with the District Judge that when Kothandarama Pillai executed the will he did so in the presence and by the direction of Rangammal.

The difference of opinion being thus narrowed down to the form of execution, I may at once share the regret of the learned Advocate for the propounder of the will here that the authorities cited by him before me were not referred to at the hearing before the learned Judges because, if they were, perhaps the reference would have been unnecessary. Before I come to them, I may at once say that the three Indian decisions as to the effect of which the learned Judges have differed are not of much help to decide the point. The case of *Radhakrishna v. Subraya*(1) was not a decision on the form of execution by another person because there the form was sufficient according to the view of either learned Judge. There was in that will both the name of the testator and the name of the other person written one above the other by that other person. This question therefore could not then have been decided. What was held was that, if that other person's signature to the execution be taken as part of the execution, the will failed because there were no two other attestors as required by section 63 of the Indian Succession Act. There were only the other person who executed the will and one other attestor. That was the ground of the decision and it is of no help now.

(1) (1916) I.L.R. 40 Mad. 550.

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The case of *In the matter of the Petition of Hemlota Dabee*(1) was exactly the same. There also there were not two other attestors besides the other person who executed the will for the testator and on that ground the will was held invalid.

The case of *Nirmal Chunder Bandopadhyaya v. Saratmoni Debya*(2) was one where the testator, who for a number of years was, as he was unable to write, in the habit of using a name-stamp which used to be attached by a servant to a document or paper he wanted to sign, directed that servant to affix the name-stamp to his will and the question was whether that was sufficient execution. It was held that it was on the ground that affixing the name-stamp was equivalent to signing. It is not clear whether the Court held that the signature was affixed by the testator himself and treated the servant as a mere mechanical aid or whether they treated the signature as having been affixed by another person in the presence and under the direction of the testator which is the alternative mode provided by section 63 (a). That decision also is therefore not a clear authority. It may however be pointed out that the reliance in that case on *Jenkyns v. Gaisford*(3) appears to be hardly justified as supporting the proposition that affixing the name-stamp is equivalent to a signature. Sir CHARLES CRESSWELL said that affixing a name-stamp is marking and, as marking is held to be included as a form of execution in the expression "signing" according to the

(1) (1882) I.L.R. 9 Cal. 226.

(2) (1898) I.L.R. 25 Cal. 911.

(3) (1863) 11 W.R. (Eng.) 854; 3 Sw. & Tr. 93; 164 E.R. 1208.

English Wills Act, marking by means of a stamp is sufficient execution. To quote the language of the learned Judge :

"Whether the mark is made by a pen or by some other instrument cannot make any difference, neither can it in reason make a difference that a *facsimile* of the whole name was impressed on the will instead of a mere mark or X. The mark made by the instrument or stamp used was intended to stand for and represent the signature of the testator."

It is clear therefore that the use made of this decision in *Nirmal Chunder Bandopadhyaya v. Saratmoni Debya*(1) was not accurate.

But the decisions on the English practice of executing wills by others under the direction of the testator upon the words of the English Wills Act, section 9, which are practically identical with those of section 63 of the Succession Act, leave no room for doubt that execution by another is sufficient if he signs the name of the testator. In *Jarman on Wills*, seventh edition, page 96, it is stated that it is immaterial that the other person signed his own name instead of the name of the testator, meaning that signing the name of the testator is the more approved and common method. To the same effect is the statement in *Tristram and Cootes' Probate Practice*, seventh edition, page 29, where it is stated that

"when a person signs for a testator by his direction, he may sign either the testator's name or his own name for the purpose of giving effect to such direction."

The decisions fully bear this out. In *In the Goods of James Clark*(2) the signature to the will was "signed on behalf of the testator, in his presence, and by his direction, by me. C. F. Furlong, Vicar of Warfield, Berks." The question

(1) (1898) I.L.R. 25 Cal. 911. (2) (1839) 2 Curt. 329; 163 E.R. 428.

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was, as the signature did not contain the name of the testator but only that of the other person, Furlong, whether the execution was good. In answer Sir HERBERT JENNER said :

“The statute allows a will to be signed for the testator by another person, and it does not say that the signature must be in the testator’s name; here, this gentleman, at the testator’s request, signed the will for him not in the testator’s name but using his own name.”

He held that the will was validly executed. Such a question could not possibly arise if it were the law that it was essential for the purpose of execution by another person that the signature of the other person must be there and the signature of the testator need not be put. This was the converse case to the present one. In *In the Goods of Thomas Marshall*(1) the will was signed by another person in the name of the testator. The question was never raised that that was not enough but the question was whether there was sufficient authority for the other person. In *Smith v. Harris*(2) also the will was signed by the direction of the testator with the name of the testator, Elizabeth Beard; and it never was questioned that the execution was invalid because the signature was not of the other person, signing by direction. In *Clery v. Barry*(3) there are some observations on this subject. It appeared from the affidavit of one Maryanne Maguire that at the request of the testator, a gentleman 92 years old, she had put his signature upon his will. The question was not whether the signature by her of the testator’s name would invalidate the execution but whether the execution was before or

(1) (1866) 13 L.T. 643.

(2) (1845) 1 Rob. Ecc. 262; 163 E.R. 1033.

(3) (1887) 21 L.R. (Ir.) 152, 166.

after the attesting witnesses had signed. As to the method of other persons executing a will by direction of the testator, CHIEF BARON PALLES said:

“The law permits a signature to be either in the handwriting of the testator, or in that of another person, if proved to have been affixed by his direction. No doubt, when the handwriting of the signature is that of the alleged testator, it is more easy to arrive at the presumption (of valid execution) than where it is that of another; because proof of direction in the former case is often unnecessary; but once the Court is clearly satisfied by evidence that the signature, although not in the testator’s own handwriting, was affixed by his direction, I cannot see why the same presumption should not apply as if he had written it himself.”

It is clear that the signature spoken of is of the name of the testator although affixed by another person at his direction. The principle is that, according to the proper construction of the words in the English Statute corresponding to section 63 (a) “it shall be signed by some other person in his presence and by his direction”, the proper form of such signature is and has always been recognised to be for the other person to sign the name of the testator and not his own. It is no doubt usual to add that the testator’s signature was made by the other person in his presence and by his direction and then for the other person to sign. But this is a matter of furnishing *prima facie* evidence that the signature by the other person is, as it should be in order to be valid according to the section, affixed in the presence of the testator and by his direction and does not form an integral part of the signature itself. The evidence of presence and authority might be given otherwise than by such an addition to the signature. It is no doubt usual and regular to avoid disputes that the other person should add

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when signing the testator's name that he does so according to the section. The absence of such an addition however does not invalidate the signature of the testator's name if in fact it was made as the law requires in the presence and by the direction of the testator.

In *In re Whitley Partners, Limited*(1) some other than one of the proper signatories signed on his behalf without the addition to the memorandum showing the authority by which he was signing. COTTON L.J. described the signature as irregular for it ought to have been "P. Callan by Oakley his attorney". He said that the irregularity will not make the signature invalid if there was authority to affix it.

The Queen v. Justices of Kent(2) was a case where notice of an appeal was signed in the name of the appellant by the clerk to his attorney. The case also confirms the point that according to the practice of lawyers the signature by one man at the request of another and on his behalf is usually of the latter's name without the name of the former.

On the above authorities it is clear that if this will was signed by Kothandarama Pillai with the name of the testatrix the execution was sufficient according to section 63 (a) of the Succession Act and cannot be said to be invalid because it did not contain the signature of Kothandarama Pillai himself.

On the question whether the writing at the foot of the will "This scratch — the mark of

(1) (1886) 32 Ch. D. 337.

(2) (1873) 8 Q.B.C. 305.

Rangammal" admittedly written by Kothandarama Pillai amounts to his signature of the testatrix's name both the learned Judges have agreed that it is to be so regarded and I entirely agree. The habit of illiterate persons in the Tamil country who can only make marks but who wish to authenticate their documents by the instrumentality of others is precisely what happened in this case. The pen is touched and handed over to the person who makes the mark and adds the memorandum that this is the mark of the executant. The meaning and object of that act is to authenticate the document as that of the person whose name is written. Such being the case there can be no doubt as the learned Judges have held that Kothandarama Pillai did sign Rangammal's name to the will. As already stated that he did so in her presence and under her direction is proved. The will was therefore validly executed and that is my answer to the point referred.

[The case was again set down for being spoken to when his Lordship made the following further observation :—]

On the above opinion the point has been raised whether I should now pronounce judgment in the appeal or send the opinion to the Bench for decision by them. It has been brought to my notice that in some cases a Judge or Bench to whom a point under Clause 36 of the Letters Patent is referred has pronounced judgment in the case in accordance with the opinion of the majority without sending the case to the Bench for that decision to be pronounced by them. Although this may be possible in a case like the present, where there is nothing else to be decided

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but the point referred, to enable a decision in the case to be pronounced, yet it would not be possible for the referee Judge to decide the case where the point referred is only preliminary to the decision of points which are not referred; for in such a case obviously both under Clause 36 of the Letters Patent and the analogous words of the proviso to section 98 (2), Civil Procedure Code, as now amended, the case has to go back to the Bench for decision. The matter may seem technical in the present case but, to be strictly in accordance with the procedure which I am persuaded must be the same as to both classes of cases, I think the opinion I have pronounced must go to the Bench for the appeal to be decided. It has the advantage of informing the referring Judges of the opinion of the third Judge on the point referred.

[The appeal again coming on for hearing before SUNDARAM CHETTI and PAKENHAM WALSH JJ., their Lordships dismissed the appeal with costs.]

A.S.V.

APPELLATE CIVIL.

*Before Mr. Justice Krishnan Pandalai and
Mr. Justice Sundaram Chetti.*

GODAVARTI SOBHANADRAMMA (PLAINTIFF),
APPELLANT,

v.

GODAVARTI VARAHA LAKSHMI NARASIMHASWAMI
AND ANOTHER (DEFENDANTS), RESPONDENTS.*

*Hindu Law—Widow—Maintenance—Principles underlying the
grant of—Significance of—Non-payment of maintenance—
Effect of—Abandonment, waiver or estoppel—Absence of
plea of—Power of Court to limit the period for which
arrears of maintenance should be awarded.*

The claim of a Hindu widow for arrears of maintenance which arises when it is unlawfully withheld is a legal right. A demand and refusal is not necessary to create the right. They are only of evidentiary value to show that afterwards the withholding must have been wrongful or that there could not be any support for the theory of abandonment or waiver. In the same way mere non-payment of maintenance, though by itself it does not constitute the withholding unlawful, is still evidence to show that the withholding was wrongful. The only legal answer to a claim by a widow for arrears of maintenance is either abandonment or waiver or such conduct on her part as may have misled the other party into thinking that such a claim would not be made, thereby inducing him not to make any provision for it, especially as maintenance is a provision to be made out of the current income of the estate or of the person liable. The Court has no discretion, irrespective of proof of circumstances which might prove abandonment, waiver or estoppel, to limit the period for which arrears of maintenance could be awarded.

The considerations that should guide the Courts in fixing the rate of maintenance to be awarded as laid down by the Privy Council in *Ekradeshwari Bahuasin v. Homeshwar Singh and others*, (1929) I.L.R. 8 Pat. 840 (P.C.), followed.

* Appeal No. 257 of 1929.

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APPEAL against the decree of the Court of the Subordinate Judge of Rajahmundry, dated 26th November 1928 in Original Suit No. 15 of 1928.

K. Bhimasankaran for appellant.

Ch. Raghava Rao for first respondent.

G. Lakshmanan and *G. Chandrasekhara Sastri* for second respondent.

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The JUDGMENT of the Court was delivered by KRISHNAN PANDALAI J.—The plaintiff appeals from a decree in a suit for maintenance brought by her against the first respondent, her husband, and the second respondent, her husband's elder brother by birth. Her suit was based upon the allegation that both the respondents form members of an undivided family, that she had been deserted by her husband and that therefore she was entitled to future maintenance and arrears of maintenance for twelve years before suit at the rate of Rs. 50 a month. The learned Subordinate Judge of Rajahmundry found that the defendants though brothers by birth no longer belonged to the same family, because the first defendant had been adopted away by the widow of his paternal uncle, Raghavacharyulu, and that therefore the plaintiff had no claim for maintenance against the second defendant whose father had himself been adopted away to another family. As against the first defendant the learned Judge found on the first issue that the plaintiff was the second wife of the first defendant, the first wife having pre-deceased the second marriage, that soon after the plaintiff came of age quarrels arose, as a result of which the plaintiff was taken away by her father to his own house in or about 1909, that in

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1914 the plaintiff and her father made attempts to bring her back to the protection of the first defendant as they learnt that he was preparing to marry for a third time, that this attempt did not succeed because the first defendant and his elder brother, the second defendant, who was living with him were not serious and put conditions upon the proposals, that thereafter the plaintiff had all along lived with her father, and that the first defendant had at any rate after 1914 abandoned the plaintiff. He therefore held that the plaintiff was entitled to separate maintenance. He awarded her future maintenance from the date of suit at the rate of Rs. 100 a year and three years' arrears at the same rate. He declined to give arrears for any longer period.

In this appeal the first question argued is that the Judge's finding as to the adoption of the first respondent (first defendant) is not supported by sufficient evidence. We have been taken through the evidence and it is sufficient to say that it fully supports the Judge's finding that the first defendant was taken in adoption by Venkatamma, the widow of Raghavacharyulu, the brother of defendants' natural father, Sobhanadracharyulu, who had himself been adopted away. As a result of these adoptions, the family of the first defendant and that of the second defendant have become entirely distinct and therefore the second respondent (second defendant) and the properties of his family are not liable for the plaintiff's claim. To that extent the appeal fails and must be dismissed.

The appeal as against the first defendant comprises two parts, first, as to the rate of maintenance

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if any to be awarded after the suit, secondly, for what period before suit the appellant is entitled to arrears and at what rate.

As to the plaintiff's right to separate maintenance we agree with the learned Judge who has dealt with all the relevant facts in an exhaustive manner without condoning any of the faults of the plaintiff or her father.

[His Lordship discussed the evidence and proceeded:]

We agree with the learned Judge that the only conclusion to be arrived at on the facts is that after she came and offered to live with him (first defendant) and he refused the request, he has reconciled himself to the position that he could no longer live with the plaintiff as his wife and both parties have acted accordingly. This is sufficient to entitle a wife to demand separate maintenance from her husband. There is no doubt an offer in the written statement of the first defendant that he is willing to take back the plaintiff. This, in the circumstances stated, was in our opinion merely tactical, for after all that has happened we cannot believe that the first defendant seriously desires that the plaintiff should go back to live with him and, in raising the plea as stated, was only anxious to avoid the legal consequences of abandoning his wife.

The next question is whether the plaintiff's appeal as to the rate of maintenance awarded is justified. The plaintiff claimed Rs. 50 a month in the plaint on the footing that the property of the family of the second defendant was also liable to her claim. This being now negatived, the only person against whom she has a claim is her own

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husband, the first defendant, who had no family property at the date of the suit, as he had sold what remained of it in 1914 for Rs. 2,000 to finance his third marriage and to pay advance made for his education by his elder brother. The first defendant began life as a teacher on Rs. 60 and on the date of suit was drawing Rs. 108 a month. The Judge has awarded Rs. 100 a year to the plaintiff which works out Rs. 8-5-4 a month. We consider this award as inadequate in all the circumstances. The plaintiff is the senior wife of the first defendant and is entitled, having regard to the circumstances of the family, to treatment as such. The considerations which determine the rate of maintenance to be awarded have lately been summarised by the Privy Council in *Ekra-deshwari Bahuasin v. Homeshwar Singh and others*(1) in these terms :

"Maintenance depends upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of the condition and necessities and rights of the members, on a reasonable view of change of circumstances possibly required in the future, regard being, of course, had to the scale and the mode of living, and to the age, habits, wants and class of life of the parties. In short, it is out of a great category of circumstances, small in themselves, that a safe and reasonable induction is to be made by a Court of Law in arriving at a fixed sum."

That case was in respect of a widow, and their Lordships adopted with slight additions, not now material, the following measure adopted by the Subordinate Judge in that case:

"This sum (of maintenance) would enable the lady to live as far as may be consistently with the position of a widow (wife) in something like the same degree of comfort and with

(1) (1929) I.L.R. 8 Pat. 840 (P.C.).

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the same reasonable luxury of life as she had (should have) in her husband's lifetime (household)."

We have added the words in brackets to suit the proposition to the case of a wife. It is obvious that the plaintiff cannot live in anything like the position of the first defendant's wife on four annas a day. No misconduct of any character has been imputed to the plaintiff. Whatever faults may have been attributed to her father when she was still a minor, it has been found that, when she came of mature years and offered to live with her husband and requested to be taken into his household, he declined to do so. The position of a young Brahmin wife reduced by no fault of hers to the condition of a widow in her husband's lifetime needs no elaboration and it must not be made profitable for husbands deserting their wives and marrying again, so to say, in revenge in order to spite their former wives, to do so. At the same time we have to remember that the first defendant has to live by his profession and that he had at the time of the trial three children by his third wife and may have more. Taking all these things into consideration, including, *inter alia*, the present state of the economic depression through which the whole country is passing, we think we should be doing substantial justice to both parties by increasing the award to Rs. 15 a month from the date of suit.

We next come to the question of arrears. The learned Judge has awarded arrears for three years, 1923 to 1926. In 1923 there was a written lawyer's demand for maintenance and as we shall show presently from the authorities the plaintiff was clearly entitled to arrears at least as from that date. But it has been argued that the plaintiff is

entitled to arrears for the whole period of twelve years for which the suit was brought. In this connection numerous authorities have been cited on both sides. For the respondent the contention has been that in awarding arrears of maintenance the Court has a discretion to limit the period and the lower Court having so limited it to three years, this Court will not interfere with that discretion. For the appellant the argument was that the Court has no such absolute discretion irrespective of circumstances which might prove abandonment, waiver, or estoppel, to limit the period of arrears of maintenance, but can only, if so satisfied, reduce the rate. We have been referred to numerous authorities in this discussion. The respondent's argument has been supported by the decision in *Karbasappa v. Kallava*(1), followed by RAMESAM J. in *Lakshamma v. Venkatasubbiah*(2) and to a certain extent by the Allahabad High Court in *Mt. Jamwati v. Mt. Maharani*(3), and the unreported decision of this Court in Appeal No. 75 of 1922. On the other hand the appellant's argument is sought to be supported by the decision of the Privy Council in *Raja Yarlagadda Mallikarjuna Prasada Nayadu v. Raja Yarlagadda Durga Prasada Nayadu*(4), *Panchakshara v. Pattammal*(5) to which one of us was a party, *Srinivasa Ayyar v. Lakshmi Ammal*(6) a decision of another Bench of this Court, *Pushpavalli Thoyarammal v. Raghaviah Chetty*(7) a decision of WALLIS J. (as he then was) now a member of the

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(1) (1918) I.L.R. 43 Bom. 66.

(3) A.I.R. 1931 All. 227.

(5) A.I.R. 1927 Mad. 865.

(2) (1924) 48 M.L.J. 766.

(4) (1909) I.L.R. 24 Mad. 147 (P.C.).

(6) A.I.R. 1928 Mad. 216.

(7) (1913) 15 M.L.T. 95.

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Privy Council, *Subramania v. Muthammal*(1), *Rangathayi Ammal v. Munuswami Chetty*(2) and *Krishnamachariar v. Chellammal*(3). We think the better view is that to be deduced from the latter catena of cases. In the leading case of the Privy Council, *Raja Yarlagadda Mallikarjuna Prasada Nayadu v. Raja Yerlagadda Durga Prasada Nayadu*(4), it was held that

“although the withholding maintenance did not necessarily give a right to sue for the arrears there was therein *prima facie* evidence of wrongful withholding, and that such evidence, supported as it was in this case by evidence of the Zamindar's unwillingness to pay for their maintenance and his denial of their rights, led to the conclusion that the withholding was proved to be wrongful. The arrears, for the period within limitation, were accordingly claimable, and were decreed.”

No question of abandonment or waiver arose in the case. But at page 157 their Lordships state that

“it may well be that, if he (the zamindar) had been misled into the belief that the claim for maintenance was abandoned and had in consequence not set aside any portion of his annual income to meet such a claim, he would have had a good defence to the present action.”

The principle of this and the subsequent decisions appears to be that the claim to maintenance which arises when it is unlawfully withheld is a legal right. A demand and refusal is not necessary to create the right. They are only of evidentiary value to show that afterwards the withholding must have been wrongful or that there could not be any support for the theory of abandonment or waiver. In the same way mere non-payment of maintenance, though by itself it does not constitute the withholding wrongful, is

(1) (1911) 21 M.L.J. 482.
(3) A.I.R. 1928 Mad. 561.

(2) (1911) 21 M.L.J. 706.
(4) (1909) I.L.R. 24 Mad. 147 (P.C.).

still evidence to show that the withholding was wrongful. The only legal answer to such a claim is either abandonment or waiver or such conduct on the part of the plaintiff as may have misled the defendant into thinking that such a claim would not be made, thereby inducing him not to make any provision for it, especially as maintenance is a provision to be made out of the current income of the estate or of the person liable. For the rest the discretion of the Court when applied to the grant of arrears of maintenance will be found to have either been exercised in adjusting the rate at which the arrears have been awarded or in limiting the period by inference from facts of an implied waiver or abandonment or conduct such as above mentioned. The language of the authorities is not in all cases careful to make this distinction clear. But the judgments read as a whole can be reconciled on the principle suggested. In *Panchakshara v. Pattammal*(1) the principle of the Privy Council decision was followed and repeated, where it is stated that

“there is no doubt that the plaintiff's claim for past maintenance is a legal right, and unless adequate grounds are shown for inferring that she has waived or abandoned that claim the defendants cannot escape liability.”

To the same effect is *Srinivasa Ayyar v. Lakshmi Ammal*(2). At page 541 it is stated that the authorities are clear that, unless there was any waiver or abandonment of her right to maintenance by the widow, she is entitled to maintenance from the death of her husband and also that the waiver cannot necessarily be inferred from the circumstance that she is living in her paternal

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(1) A.I.R. 1927 Mad. 865, 867.

(2) (1927) 54 M.L.J. 530.

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home. In *Pushpavalli Thoyarammal v. Raghaviah Chetty*(1) WALLIS J. said:

"Arrears will be refused only in cases where the person liable to make the payment had justifiable grounds for inferring that the claim was abandoned."

He cites *Rangathayi Ammal v. Munuswami Chetty*(2). To the same effect is the decision of another Bench in *Krishnamachariar v. Chellammal*(3).

As against this course of decisions which lays down a principle which is logical and easy to follow, there are two decisions of this Court following the decision in *Karbasappa v. Kallava*(4) which seem to hold that there is some other and paramount discretion in awarding or refusing arrears of maintenance. The decision in *Karbasappa v. Kallava*(4) opens with the remark that on the point of arrears of maintenance the case-law yields no definite principle upon which all cases of this kind can be decided. In the next paragraph the Court affirms the award of the three years' maintenance instead of six years which had been demanded on a ground which is described as

"the balance of the most general and shifting considerations, arrived at on what must be called rather common sense than any other conclusion upon the point before us".

We must observe that, as that judgment itself says, we fail to find any definite principle on which it is founded. It is possible to uphold the actual decision upon the ground that by the widow having been actually maintained in her father's house and not making any demand during that period, the Court drew the inference as a fact that

(1) (1913) 15 M.L.T. 95.
(2) A.I.R. 1928 Mad. 561.

(2) (1911) 21 M.L.J. 706.
(4) (1918) I.L.R. 43 Bom. 66.

the widow abandoned her claim. If so, the principle is quite intelligible although whether the inference was justified on the facts or not is a matter of opinion. This case was followed by RAMESAM J. in *Lakshamma v. Venkatasubbiah*(1). That decision is also intelligible and explicable upon the facts stated by the learned Judge. The facts were that a widow whose husband had died twenty-seven years ago had made a demand for maintenance only three years prior to the suit.

"In these circumstances",
said the learned Judge,

"I think a discretion remains with the Courts, while not disallowing totally the arrears claimed by the plaintiff, to cut down the period for which arrears may be granted."

All the exception we can raise to this language is that, although the facts may have been sufficient from which a Court might infer abandonment of arrears for a period before a formal demand, even as to which there is considerable room for doubt in view of the decision of the Privy Council already referred to, yet the authorities do not establish the foundation for any discretion in the Court, in the absence of proof of abandonment or waiver or conduct estopping the plaintiff, to cut down, in other words to deny, relief to a plaintiff who is entitled to it. Reference is made in this decision to the unreported case, Appeal Suit No. 75 of 1922. We have examined that decision in which no authorities are referred to but the facts were that the plaintiff went away from the family about nine years prior to the suit. But there was no satisfactory evidence that she ever made a demand for this maintenance

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(1) (1924) 48 M.L.J. 266.

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until she filed the suit and then the Court said that, considering the long time that she kept silent and the fact that she was being adequately maintained in her parent's house, she should not be allowed the whole of the arrears claimed although they added that that was not a sufficient reason for disallowing her claim *in toto*. Another ground stated in that judgment is that if a demand is made for arrears for a very long period the claim may be refused on the ground that the payment would be a very heavy burden on a family which has not made any provision for the expenditure. We beg respectfully to differ from this, because the family might have omitted to make any provision for maintenance although it had been demanded, and hardship to the defendant in meeting a lawful claim can hardly by itself be made a ground for refusing a right. But the decision itself is to be explained and was probably intended to be founded upon the inference that by the silence and omission to demand, the Court was in a position to infer implied waiver or abandonment. These are all the cases which have been cited on this point and on the best consideration we can give to the subject we are of opinion that the principle as to arrears is as we have stated in the earlier part of this judgment and as laid down in the several cases to which we have referred.

The really important point in the case is how to apply the principle to this case. It is the case that the defendant, upon whom lies the burden of alleging and proving waiver or abandonment or such conduct on the part of the plaintiff as to lead to estoppel, did not raise the point in explicit

terms, nor for that matter is there any decision upon the point by the learned Judge. But the facts are undisputed that the plaintiff, no doubt under the advice of her father, who is described as a person in affluent circumstances by the lower Court, has lived away from her husband, practically during all her married life without making any claim for maintenance against him, who has no property which can be charged with the maintenance and whose only income is his salary earned by his profession. It is not unreasonable in these circumstances to infer, though we are not prepared to say that such an inference is necessary in other such cases, that the plaintiff has either impliedly abandoned or waived the claim for the greater part of the period for which arrears are now claimed or at least that her conduct has been such as to lead the first defendant to believe that he would not be called upon to meet suddenly a claim for a large sum of money which he would not reasonably be able to pay and which ordinarily he ought to have found from the current income and the enforcement of which would only lead to the result, disastrous alike to him and to his wife, of making him a pauper. We have therefore come to the conclusion that, although the principle for which the appellant has contended is sound, the application of it to the facts leaves us in the position that the learned Judge arrived at a substantially just conclusion when he awarded the plaintiff only arrears of maintenance from the date of the demand, that is 1923. But having regard to what we have said as to the rate of future maintenance the arrears will also be at the rate of Rs. 15 a month.

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In the result the decree of the learned Judge is modified to the extent stated above, the date of payment to remain as ordered by the lower Court, 1st June 1929. The appellant must pay the second respondent's (second defendant's) costs. The relationship between the appellant and the first respondent being wife and husband they will suffer their respective costs of the appeal.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

V. M. MEERKANNI ROWTHER ((PLAINTIFF),
APPELLANT,

v.

A. V. PERIYAKARUPPAN (DEFENDANT), RESPONDENT.*

*Burden of proof—Vendor and purchaser—Covenant for title—
Breach of—Cause of action.*

In a suit by a purchaser against his vendor for damages for breach of covenant for title, *held*, the purchaser is not bound to wait till he is evicted or his possession is disturbed before filing the suit inasmuch as the covenant, if broken, is necessarily broken immediately upon the execution of the assurance which contains it. In such a suit the burden lies upon the plaintiff to allege and prove a breach of the covenant.

APPEAL against the decree of the Court of the Subordinate Judge of Madura in Appeal Suit No. 70 of 1928 preferred against the decree of the Court of the District Munsif of Melur in Original Suit No. 803 of 1925.

G. Krishnaswami Ayyar for appellant.

T. P. Gopalakrishna Ayyar for Watrap
S. Subramania Ayyar for respondent.

* Second Appeal No. 1074 of 1929.

JUDGMENT.

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This appeal raises two questions of law : first, in a suit by a purchaser against his vendor for breach of covenant of title, is he bound to wait till his possession is disturbed? ; secondly, in such a suit, on whom is the onus of proof? Although I am upholding the lower appellate Court's judgment, I must say that its view on the first point is wrong. Covenants for title must be distinguished from covenants for quiet enjoyment ; in the case of the former, they are, if broken, " necessarily broken immediately upon the execution of the assurance which contains them ". (Dart's Vendors and Purchasers, eighth edition, page 663.) The purchaser may bring an action immediately without waiting to be evicted or disturbed (page 665). The law is stated in the same terms by Sugden. A covenant for title, says the learned author, is broken immediately after the execution of the deed, if the seller does not possess the estate professed to be granted, and the purchaser is not bound to wait till he is evicted ; but a covenant for quiet enjoyment affords no right of action until a disturbance (Sugden's Vendors and Purchasers, thirteenth edition, page 498). The view of the learned Subordinate Judge therefore that the plaintiff was not entitled to sue, as his possession was not disturbed, is clearly wrong.

As regards the question whether the defendant had good title or not, the lower Courts have come to opposite conclusions. The property sold is said to be a shop with some vacant space adjoining it. The north to south measurement of the entire site is given in the deed of sale as sixty-two feet. The District Munsif finds that the defendant's title to

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the shop has been made out but that he is not entitled to more than twenty-eight feet, north to south. The Subordinate Judge, differing from the Munsif, seems to think that the entire property belongs to the defendant. The District Munsif bases his conclusion upon the fact that the rent deeds, Exhibits I and II, executed by the defendant previous to the sale did not comprise the entire property; but those deeds expressly exclude the two vacant sites on the north and on the south, whereas the sale deed includes them. In the rent deeds the two vacant sites are stated to belong to the defendant. The reasons given therefore by the District Munsif for his judgment are wrong. The Subordinate Judge's finding is a somewhat halting one. What then is the position? There is very little evidence on the plaintiff's side to show that the defendant is not the owner of the entire plot; so far as the defendant is concerned, his evidence is merely to the effect that the property descended to him from his ancestors and that he was in undisturbed possession. In these circumstances, it seems to me that the case ultimately depends upon the question, on whom is the onus of proof? No Indian decision bearing on the question has been cited, but the point has been fully discussed in a case decided by the Court of Appeal in England; *Stoney v. Eastbourne Rural Council*(1). In the action damages were claimed for breach of an implied covenant for title. It is pointed out in the judgment, firstly, that under the Conveyancing Act, 1881, the covenant of title does not extend to all persons through whom the

(1) [1927] 1 Ch. 367.

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vendor derives title, but only to a limited class of such persons, in other words, the purchaser is protected against acts done by the vendor or by some person through whom he derives title otherwise than by purchase; and, secondly, (this is the point with which we are concerned) in order to succeed in the action, the plaintiff must allege and prove a breach of the covenant. The question of onus was directly raised in the case, and ROMER J. held that it lay upon the plaintiff; the point was fully considered by the Judges of the Court of Appeal and they concurred with his decision. In *Howard v. Maitland*(1), though the point was not expressly decided, this is assumed to be the law. The evidence in this case is, as I have said, inconclusive, but the onus being upon the plaintiff, I must hold that he has failed to discharge it.

In the result, the second appeal fails and is dismissed with costs.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Bardswell.

IN RE RAMALINGAM PILLAI (ACCUSED), PETITIONER.*

1934,
March 8.

Criminal Procedure Code (Act V of 1898), sec. 350—Transfer of Magistrate trying case—Successor ordering a de novo trial and directing issue of summonses—Transfer of case thereon to original Magistrate—Further hearing if must be de novo.

Where, after a trial was nearly completed, the Magistrate hearing the case was transferred, and his successor ordered a

(1) (1882) 11 Q.B. 695.

* Criminal Miscellaneous Petition No. 258 of 1934.

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de novo trial and directed summonses to issue to the prosecution witnesses,

held, that the succeeding Magistrate had taken cognizance of the case and that whoever heard the case thereafter, even if it was the Magistrate who originally held the trial, must hear the case *de novo*. That there had been no fresh examination of witnesses by the succeeding Magistrate makes no difference.

Sardar Khan Sahib v. Athanlla, (1924) 47 M.L.J. 926, and *Sriranga Chettiar v. Subramania Asari*, A.I.R. 1927 Mad. 81, followed.

Aynam Muthuriyan, In re, (1928) 1 Mad. Crl. C. 74, dissented from.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing the transfer of Calendar Case No. Nil of 1934 from the file of the Court of the Sub-Magistrate of Panruti (Calendar Case No. 707 of 1933 on the file of the Court of the Stationary Second Class Magistrate of Vridhachalam), to the file of the Court of the Stationary Second Class Magistrate of Vridhachalam.

K. S. Jayarama Ayyar and *G. Gopalaswami* for petitioner.

Parakat Govinda Menon for Public Prosecutor (*L. H. Bewes*) for the Crown.

ORDER.

Calendar Case No. 707 of 1933 on the file of the Stationary Sub-Magistrate of Vridhachalam was heard by one officer and nearly completed when that officer was transferred to Panruti. On the new Magistrate taking charge, the accused asked for the case to be tried *de novo*, and the new Magistrate issued summonses to the prosecution witnesses. After this the complainant applied to

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the District Magistrate for the transfer of the case to the Sub-Magistrate, Panruti, who had heard most of the evidence. This transfer has been ordered by the District Magistrate whose opinion was that the new Magistrate of Vridhachalam had not taken cognizance of the case and that it was open to the original Magistrate after his transfer to Panruti and on the case being transferred to him there to continue the case from the stage at which he had left it. It is against this order of the District Magistrate that this petition has been brought by the accused in the case.

The view of the District Magistrate that cognizance had not been taken of the case by the new Magistrate appears to be wrong. In precisely similar circumstances it has been held by WALLACE J. in *Sriranga Chettiar v. Subramania Asari*(1) that the succeeding Magistrate had taken cognizance of the case before it had been ordered to be transferred to the file of the other Magistrate by whom the enquiry had been begun and that therefore the latter Magistrate had no jurisdiction to proceed with the case. In a similar case it was held by MADHAVAN NAIR J. in *Sardar Khan Sahib v. Athanlla*(2) that the grant of a *de novo* trial by the successor of the Magistrate had the effect of wiping out the prior proceedings and hence even the old Magistrate could not proceed with the trial from the point where he had left it. These decisions have been considered by DEVADOSS J. in *Aynam Muthuriyan, In re*(3) and he has differed from them with reference to the decision in *Queen-Empress v. Sri*

(1) A.I.R. 1927 Mad. 81.

(2) (1924) 47 M.L.J. 926.

(3) (1928) 1 Mad. Crl. C. 74.

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Ahobalamatam Jeer(1). That case, however, apart from the fact that section 350, Criminal Procedure Code, has now been amended, does not apply as it was not one in which the succeeding Magistrate had allowed a *de novo* enquiry and ordered fresh summonses to be issued. DEVADOSS J. appears to take the view at page 78 that, by ordering a *de novo* enquiry and directing summons to issue, the succeeding Magistrate had not taken cognizance of the case. From that view I must respectfully dissent. I agree with the decisions of WALLACE and MADHAVAN NAIR JJ. that the succeeding Magistrate had taken cognizance of the case and that whoever is to hear the case, in such circumstances, must hear it *de novo*. That there had been no fresh examination of witnesses by the succeeding Magistrate makes no difference. It is, therefore, not better on the balance of convenience that the case should be further heard by the Magistrate who began the enquiry. It is more convenient for the Magistrate who has local jurisdiction to hear it and so his is the Court which should properly deal with it. In these circumstances the petition is allowed, the order of the District Magistrate is set aside and the case is directed to be heard by the new Sub-Magistrate of Vridhachalam.

K.W.R.

(1) (1898) I.L.R. 22 Mad. 47.

INCOME-TAX REFERENCE.

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

THE COMMISSIONER OF INCOME-TAX, MADRAS,
PETITIONER,

1934,
May 2.

v.

SRI RAJA VYRICHERLA NARAYANA GAJAPATHI
RAJU BAHADUR GARU, ZAMINDAR OF
CHEMUDU, ETC., RESPONDENT.*

Indian Income-tax Act (XI of 1922), sec. 14 (1)—Hindu undivided family—Member of—Sum received by assessee as a—Impartible estate—Holder of—Maintenance received by assessee as brother of—Liability to assessment of.

A sum received as maintenance by an assessee as the brother of the last holder of an ancestral impartible estate entitled under the law to receive maintenance out of such estate is a sum received by him as a member of a Hindu undivided family within the meaning of clause 1 of section 14 of the Indian Income-tax Act (XI of 1922).

The right to maintenance which the son of a zamindar still possesses is not the creature of custom but it is an incident to the ordinary joint family property which has been left untouched by custom despite its encroachment on the other incidents.

PETITION under section 66 (2) of the Indian Income-tax Act (XI of 1922).

Advocate-General (Sir A. Krishnaswami Ayyar) with him, *P. Somasundaram* for assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

Cur. adv. vult.

* Original Petition No. 15 of 1934.

JUDGMENT.

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RAMESAM J.

RAMESAM J.—The facts of this case are not the subject of dispute. The Zamindari of Kurupam is an impartible estate in the Vizagapatam District being one of the zamindaris mentioned in the schedule to the Impartible Estates Act. The assessee is a brother of the last Zamindar of Kurupam (being the second son of his predecessor) and uncle of the present zamindar who is a minor under the Court of Wards. By an award in 1920, he was given an annual maintenance of Rs. 6,000 by his elder brother; and this award was made the subject of a decree. The question now referred to us is :

“Whether the sum of Rs. 6,000 received as maintenance by the petitioner as the brother of the late Raja of Kurupam entitled under the law to receive maintenance out of the ancestral impartible estate of Kurupam is a sum received by him as a member of a Hindu undivided family within the meaning of clause 1 of section 14 of the Act.”

This identical question has been the subject of a decision by a Bench of the Allahabad High Court in *Maharaj Kumar of Vizianagram, In re*(1) in connection with another zamindari in the same district, viz., Vizianagram, and, as we substantially agree with the conclusion arrived at there, it is not necessary to deal with the matter very elaborately. It will be enough to indicate the salient points. The nature of an impartible estate has been the subject of consideration in a series of decisions by the Privy Council. In *Bajinath Prasad Singh v. Tej Bali Singh*(2) Lord DUNEDIN considers these decisions and groups them in chronological order. The first group extending from

(1) (1934) 149 I.C. 306; A.I.R. 1934 All. 818.
(2) (1921) I.L.R. 43 All. 228 (P.C.).

1865 to 1888 need not be referred to now. In that year the decision in *Sartaj Kuari v. Deoraj Kuari*(1) was passed by the Judicial Committee and it was held that an impartible zamindari is alienable at the pleasure of the holder of the zamindari. This was followed and applied in the case of a zamindari from this Presidency, viz., *Sri Raja Rao Venkata Surya Mahipathi Rama Krishna Rao Bahadur v. The Court of Wards*(2), where it was held that the holder of an impartible estate can devise the whole of the estate or a portion of it by will. In spite of these decisions there are other decisions passed alongside of these holding that the impartible estate still continues to be joint family property. It is enough to refer to one of such decisions, viz., *Sri Raja Lakhshmi Devi Garu v. Sri Raja Surya Narayana Dhattrazu Bahadur Garu*(3). There Lord DAVEY observed :

“Even if impartible it may still be part of the common family property and descendible as such . . . The real question, therefore, is whether it has ceased to be part of the joint property of the family of the first zamindar.”

These observations of Lord DAVEY were relied on with approval by Lord DUNEDIN in *Bajinath Prasad Singh v. Tej Bali Singh*(4). The next decision to which one may refer is another decision of Lord DUNEDIN in *Rama Rao v. Raja of Pittapur*(5) known as the *Second Pittapur case*. At page 784 we have got the following observation :

“It follows that the right to maintenance, so far as founded on or inseparable from the right of coparcenary, begins where coparcenary begins and ceases where coparcenary ceases.”

(1) (1888) I.L.R. 10 All. 272 (P.C.). (2) (1898) I.L.R. 22 Mad. 383 (P.C.).
(3) (1897) I.L.R. 20 Mad. 256 (P.C.). (4) (1921) I.L.R. 43 All. 228 (P.C.).
(5) (1918) I.L.R. 41 Mad. 778 (P.C.).

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The learned Advocate for the Commissioner of Income-tax relies on this sentence and argues that, as there is no coparcenary, therefore, there is no undivided family. The inference does not follow. Though persons may not have coparcenary rights in joint family property they may still be members of an undivided family, for instance, the female members of an undivided family and disqualified heirs, such as persons who are blind, deaf, dumb, and so on. However, at page 785, Lord DUNEDIN observes :

"Just as the impartibility is the creature of custom, so custom may and does affirm a right to maintenance in certain members of the family."

Lower down he says :

"In the matter in hand their Lordships do not doubt that the right of sons to maintenance in an impartible zamindari has been so often recognised that it would not be necessary to prove the custom in each case . . ."

For example, in the case of *Raja Yarlagadda Mallikarjuna Prasada Nayadu v. Raja Yarlagadda Durga Prasada Nayadu*(1) the judgment says :

"As to the zamindari estate, the Board held that it was impartible and the consequence is that the plaintiffs as the younger brothers of the zamindar retain such right and interest in respect of maintenance as belong to the junior members of a raj or other impartible estate descendible to a single heir."

These quotations show that in the view of Lord DUNEDIN the right to maintenance which the son of a zamindar still possesses is not the creature of custom but it is an incident to the ordinary joint family property which was left untouched by custom, despite its encroachment on the other incidents. The next quotation from *Nilmony Singh Deo v. Hingoo Lal Singh Deo*(2), viz.: "We

(1) (1900) I.L.R. 24 Mad. 147 (P.C.).

(2) (1879) I.L.R. 5 Calc. 256.

can find no invariable or certain custom that any below the first generation from the last raja can claim maintenance as of right" shows that beyond the first generation there is the possibility that custom has made some encroachment. There it was held by their Lordships that in each case the custom must be proved. The decisions in *Konammal v. Annadana*(1) and *Shibaprasad Singh v. Prayag Kumari Debee*(2) do not carry the matter further. The result is that we must find that there is a joint family. It has been argued that the income from which the maintenance is paid belongs solely to the zamindar but we have nothing to do with this. The question in the case is not whether the income belongs to the zamindar or whether it belongs to the joint family of which the assessee is a member but whether the assessee received his payment as a member of a Hindu undivided family. Undoubtedly he does receive this payment of Rs. 6,000 because he is a member of the undivided Hindu family. The question must therefore be answered in the affirmative. This is substantially the same as the answer given by the Allahabad High Court. The assessee will have Rs. 250 costs from the Income-tax Commissioner and the deposit of Rs. 100 will be returned to him.

BEASLEY C.J.—I agree and have nothing to add.

SUNDARAM CHETTI J.—I agree.

A.S.V.

(1) (1927) I.L.R. 51 Mad. 189 (P.C.).

(2) (1932) I.L.R. 59 Calc. 1399 (P.C.).

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RAMESAM J.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Curgenvven.

1934,
April 3.

CHIDAMBARAM CHETTIAR (PLAINTIFF), APPELLANT.*

*Court Fees Act (VII of 1870)—Court-fee—Refund of—
Grant of—Conditions.*

The Court can order a refund of court-fees (1) where the Court Fees Act applies, (2) where there is an excess payment by mistake or (3) where, on account of the mistake of a Court, a party has been compelled to pay court-fees either wholly or in part. Outside these cases the Court has no power to order a refund.

J. C. Galstaun v. Raja Janaki Nath Roy, (1933) 38 C.W.N. 185, not followed.

APPEAL against the decree of the Court of the Subordinate Judge of Salem in Original Suit No. 15 of 1929.

This appeal came on for orders as to withdrawal and the Advocates for the appellant, while requesting permission to withdraw the appeal, also prayed for a refund of the court-fee paid on the memorandum of the appeal.

*C. S. Venkatachari and D. Ramaswami Ayyan-
gar* for appellant.

The JUDGMENT of the Court was delivered by
RAMESAM J. RAMESAM J.—This appeal is withdrawn and is therefore dismissed. The appellant has filed an application for amendment of the decree which was allowed. The opposite party filed a revision petition in this Court. For fear that the amendment will be disallowed the appellant filed this

* Appeal No. 68 of 1933.

appeal. Now that the revision petition is dismissed, the appellant is willing to withdraw the appeal.

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RAMESAM J.

In these circumstances the appellant asks for a refund of court-fees. He admits there is no section of the Court Fees Act which he can rely on. He relies on *C. T. A. M. Chettyar Firm v. Ko Yin Gyi and another*(1), *Mohammad Sadiq Ali Khan, Nawab Mirza v. Saiyid Ali Abbas*(2) and *J. C. Galstaun v. Raja Janaki Nath Roy*(3).

In our opinion, the Court can order a refund (i) where the Court Fees Act applies, (ii) where there is an excess payment by a mistake or (iii) where, on account of the mistake of a Court, a party has been compelled to pay court-fees either wholly or in part. Outside these cases we are not satisfied that we have authority to direct a refund. Once a case like *J. C. Galstaun v. Raja Janaki Nath Roy*(3) is recognised, we ought to permit refund in all cases where appeals are dismissed on the ground of limitation. We are not prepared to go so far. The fact that the delay in *J. C. Galstaun v. Raja Janaki Nath Roy*(3) is due to the fault of the legal adviser has no bearing on the right of the Crown to the court-fee paid. We cannot direct a refund of the court-fees.

G.R.

(1) (1929) I.L.R. 7 Rang. 88.

(2) (1932) I.L.R. 7 Luck. 588.

(3) (1933) 38 C.W.N. 185.

APPELLATE CIVIL.

*Before Mr. Justice Jackson and Mr. Justice Butler.*1934,
March 14.VEDAVATHI alias LAKSHMI AMMA (PETITIONER),
APPELLANT,

v.

S. SADASIVA RAO AND ANOTHER (RESPONDENTS),
RESPONDENTS.**Provincial Insolvency Act (V of 1920)—Official Receiver—Proof of person's debt—Order of Receiver rejecting—Appeal from—Limitation—Starting point—Notice of order not sent as per rules framed under the Act but aggrieved party having knowledge of order.*

Time for an appeal from an order passed by the Official Receiver rejecting the proof of a person's debt runs from the date of his knowledge of that order, even though formal notice of the order was not sent to him as required by the rules framed under the Provincial Insolvency Act V of 1920.

APPEAL against the order of the District Court of South Kanara, dated 28th October 1930 and made in Original Petition No. 71 of 1930.

K. Srinivasa Rao for appellant.

K. P. Sarvothama Rao for respondents.

JACKSON J. JACKSON J.—In this case the appellant knew of the order passed by the Official Receiver rejecting the proof of her debt in 1926 by 1927 and did not appeal till 1930. She argues that her knowledge was immaterial so long as formal notice was not conveyed to her, under this Court's rules. None of the cases cited before us go so far as this; cf. *Swaminathan v. Latchmanan*(1) and *Secretary of*

* Appeal against Order No. 292 of 1931.
(1) (1929) I.L.R. 53 Mad. 491.

State for India in Council v. Gopisetti Narayana-swami Naidu(1). And it is clear from the dictum of BLACKBURN J. quoted on page 506 that an order is complete and appealable before notice is issued. When an order has been duly issued, and a party is apprised of that order, time will run, even though it is directed that a notice of an order shall be sent.

The appeal is dismissed with costs.

A.S.V.

APPELLATE CIVIL.

*Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.*S. R. M. A. R. RAMANATHAN CHETTIAR (PLAINTIFF),
APPELLANT,

v.

RAJA SIR ANNAMALAI CHETTIAR AND FOURTEEN
OTHERS (DEFENDANTS 1 TO 12 AND 14 TO 16),
RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. I, r. 3—Applicability of, to joinder of causes of action—Minor—Trustee of estate of—Fraud committed by—Minor's remedies in case of—Agent of trustee aiding and abetting trustee in breach of trust—Suit for account by minor against trustee and agent in case of—Bad for multifariousness if—Dismissal of suit for multifariousness—Power of—Discretion as to—Liberal exercise of—Necessity—Plea of multifariousness tried as a preliminary issue—Finding as to multifariousness on—Election to amend plaint—Giving plaintiff opportunity for—Necessity—Application by plaintiff—Absence of—Effect—O. VI, r. 17.

The plaintiff's father, a money-lender with branches of his business in several places, died in 1915 leaving a widow,

(1) (1910) I.L.R. 34 Mad. 151.

* Appeal No. 418 of 1932.

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defendant 5, and their son, the plaintiff aged 3. The father's cousins were *R* and the first defendant. The plaint alleged that the plaintiff's guardian was his widowed mother, defendant 5, but she let the two cousins manage the estate; that they managed jointly till October 1918, when *R* died and the first defendant assumed sole management and became *de facto* guardian; that from the time that the cousins assumed management they acted in fraud of the plaintiff's estate, and, in order to promote that fraud, the first defendant appointed as agents defendants 6 to 13 who colluded with him and participated in his breach of trust. Defendant 4 was the son of *R* and the plaint alleged that monies from the plaintiff's firms were sent to the fourth defendant's firm under the direction of the first defendant. The fourth defendant's firm was accused of wrongfully absorbing into its assets assets which belonged to the plaintiff. The plaint prayed for a decree against the first defendant and such other defendants as might be found jointly and severally liable for accounts, and payment of such monies as they might be found liable to pay. Accounts were specifically demanded from defendants 1, 4 and 6 to 13.

Held that the suit was not bad for multifariousness because the transaction as disclosed in the plaint was that originally *R* and defendant 1, and then defendant 1 alone, proceeded to embezzle the plaintiff's estate and were aided and abetted by defendants 6 to 13 who connived at the breach of trust and if separate suits were brought against the respective defendants one common question at least would arise.

Order I, rule 3, of the Code of Civil Procedure applies to joinder of causes of action as well as joinder of parties.

Govindaraja Mudaliar v. Alagappa Thambiran, (1926) I.L.R. 49 Mad. 836 (F.B.), followed.

The whole of a transaction need not be involved in each of the causes of action joined.

A minor may elect to sue a fraudulent trustee either for damages or for an account.

A *cestui que trust* can call upon an agent who fraudulently mixed himself up with a breach of trust for an account and the proper suit is by the *cestui que trust* against both the trustee and his agent seeking to make both liable.

The Court has the power of dismissing a suit for multifariousness; but its power generally should be exercised with a liberal discretion.

When the defendants insisted upon the question of misjoinder being taken up as a preliminary issue and the Court below agreed that it was only after the question of misjoinder was settled one way or the other that the real hearing of the suit would begin,

held that as soon as the Court below had decided that the plaint in its original form was unsustainable it should have given the plaintiff an opportunity to elect.

Under Order VI, rule 17, of the Code of Civil Procedure the initiative must no doubt come from the party and a Court cannot compel an amendment. But a Court should not prevent what it is empowered to allow.

APPEAL against the decree of the Court of the Subordinate Judge of Devakotta in Original Suit No. 109 of 1930.

S. Srinivasa Ayyangar (with him, *V. Ramaswami Ayyar*) for appellant.—Where a person who is not the lawful guardian of a minor enters upon the minor's property, the minor's remedy is either (i) a suit in trespass, or (ii) a suit for an account. A suit for an account in which persons who joined with the intermeddler are not joined as parties is liable to be dismissed for non-joinder; see *Wyllie v. Ellice*(1). In cases of breach of trust, etc., the law does not recognise the principle of agency; see *Sharland v. Mildon*(2). Defendant 1 is a wrong-doer and he has appointed the other defendants for the purpose of despoiling the plaintiff's estate. Therefore all of them stand on the same footing and are in the position of co-trustees within the principle of *Wyllie v. Ellice*(1). See also *Dormer v. Fortescue*(3), *Morgan v. Morgan*(4), *Hicks v. Sallitt*(5), *Howard v. Earl of Shrewsbury*(6) and *Wilson v. Moore*(7). A person who colludes with a guardian is himself liable, and the proper suit in such a case is either by the trustee against the agent or by the *cestui*

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(1) (1848) 6 Hare 505; 67 E.R. 1264. (2) (1846) 5 Hare 468; 67 E.R. 997.
(3) (1744) 3 Atk. 124; 26 E.R. 875, 878. (4) (1737) 1 Atk. 489; 26 E.R. 310.
(5) (1854) 3 De. G.M. & G. 780; 43 E.R. 307, 315.
(6) (1874) L.R. 17 Eq. 378, 399.
(7) (1833) 1 My. & K. 125; 39 E.R. 629, 637.

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que trust against the trustee and his agent; *Soar v. Ashwell*(1). As to when agents become liable to the minor, see *Suyamprakasam v. Murugesu Pillai*(2). The defendants other than defendant 1 are proper and even necessary parties and the suit would have been bad for non-joinder if they had not been joined. In the case of equitable remedies we do not think of causes of action. The remedy sought by the plaintiff is an equitable remedy; the cause of action is the same against all the defendants and there is no misjoinder.

[Is it your contention that this is a single transaction?—MADHAVAN NAIR J.]

Yes; the assumption of management by the first defendant and his joining with the other defendants and despoiling the property of the plaintiff is one transaction. Even if the causes of action be different, they arise out of a single transaction, viz., the management of the first defendant along with the others. Even if separate suits were filed, a common question would arise and the evidence would be the same. O. I, r. 3, C.P.C., contemplates cases in which separate suits could be brought on the plaint allegations. Joinder of defendants is permitted even though the reliefs claimed against them may be different. "Transaction" in the rule includes possession. The test is whether the evidence is the same. All the defendants need not be interested in all the reliefs; O. I, r. 5, C.P.C. O. I, r. 3, C.P.C., deals with joinder of causes of action as well as joinder of parties. The words "in respect of etc." in the rule are wider than the words "relating to the transaction". O. XVI, r. 1, of the Rules of the Supreme Court uses the expression "any right to relief" and not "right to any relief". Therefore, the reliefs claimed against the different defendants need not be the same. The words "act or series of acts" in O. I, r. 1, C.P.C., show that that rule is wider than the English rule. Under that rule it is not necessary that the transaction should be the same. O. I, r. 3, C.P.C., is unambiguous; cf., O. XVI, r. 4, R.S.C. The present English view is that O. XVI, r. 4, R.S.C., should be construed in the same way as O. XVI, r. 1. Under O. I, r. 3, C.P.C., no link is necessary between all the defendants. In the present case, however, there is such a link, viz., that they acted in collusion with defendant 1. "Transaction" in the rule is not confined to dealings between

(1) [1893] 2 Q.B. 390, 394, 403. (2) (1924) I.L.R. 47 Mad. 774, 778 (F.B.).

two parties. The taking of possession or assumption of management is a "transaction" within the meaning of the rule. The common question is who managed—defendant 5 or defendant 1.

[The following cases were referred to: *Ramendra Nath Roy v. Brajendra Nath Dass*(1), *Harendra Nath Singha Ray v. Purna Chandra Goswami*(2), *Govindaraja Mudaliar v. Alagappa Thambiran*(3), *Papamma v. Ramaswami*(4), *Bhagvan Gokulji & Co. v. Balku Babaji*(5), *Allu Ramalingier v. Subramania Pillai*(6), *Sri Govinda Krishna Yachendra Bahadur v. Srinivasa Ramacharu*(7), *Degamber Mozumdar v. Kallynath Roy*(8), *Mohamed Ali Sultan v. Hajee Abdul Khaelvi Routhar*(9), *Payne v. British Time Recorder Co.*(10), *Thomas v. Moore*(11), *Beck, In re*(12), *Oesterreichische Export A. G. v. British Indemnity Insurance Company, Limited*(13) and *Compania Sansinena de Carnes Congeladas v. Houlder Brothers & Co., Ltd.*(14).]

Even if the Court below was right in holding that there was misjoinder it had no power to dismiss the suit on that ground. Section 53 of the old Code expressly provided for the return of the plaint for amendment in such a case, and section 54 for rejection of the plaint. Even under the old Code it is very doubtful whether a proper interpretation of section 31 of that Code authorized the dismissal of the suit, because the section referred to joinder of plaintiffs and not to joinder of defendants or of causes of action. The decisions under that Code are conflicting, but the preponderance of authority is against dismissal. Order VI, rule 17, of the present Code does not include misjoinder of parties and causes of action. Further, the proviso to section 31 of the old Code has been omitted in the present Code. Misjoinder is not fatal to the suit, and the Court below ought to have directed the plaintiff to amend the plaint or to elect to proceed against some of the defendants only. [*Ramanuja v. Devanayaku*(15), *Harendra Nath Singha Ray v. Purna Chandra Goswami*(2), *Behari Lal v. Kodu Ram*(16),

(1) (1917) I.L.R. 45 Calc. 111. (2) (1927) I.L.R. 55 Calc. 164.
(3) (1926) I.L.R. 49 Mad. 836 (F.B.). (4) (1932) 37 L.W. 681.
(5) A.I.R. 1932 Bom. 1. (6) (1922) 17 L.W. 25.
(7) (1925) 49 M.L.J. 420. (8) (1881) I.L.R. 7 Calc. 654.
(9) (1911) 9 M.L.T. 233. (10) [1921] 2 K.B. 1, 7, 9, 10, 13.
(11) [1918] 1 K.B. 555, 565, 569. (12) [1918] 87 L.J. Ch. 335.
(13) [1914] 2 K.B. 747, 752, 756. (14) [1910] 2 K.B. 354, 364, 367, 368.
(15) (1885) I.L.R. 8 Mad. 361, 363. (16) (1893) I.L.R. 15 All. 380, 381.

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Salima Bibi v. Sheikh Muhammad(1), *Rahim Bakhsh v. Amiran Bibi*(2), *Rajjo Kuar v. Debi Dial*(3), *Shyam Behari Mal v. Maha Prasad*(4), *Gur Prosad v. Gur Prosad*(5), *Limaya v. Watve*(6), *Junokinath Mookerjee v. Ramrunjun Chuckerbutty*(7), *Rangayya Reddy v. Subrahmania Ayyar*(8), *Lingammal v. Venkattammal*(9), *Ganeshi Lal v. Khairati Singh*(10) and Mulla's Commentary on the Civil Procedure Code, 9th Edition, page 459, referred to.] *Muthappa Chetty v. Muthu Palani Chetty*(11), relied upon by the Sub-Judge, has been explained away in *Meyappa Chetti v. Perianan Chetti*(12). The general principle is laid down in *Aiyathurai Ravuthan v. Santhu Meera Ravuthan*(13). In *Ramanathan Chetty v. Mallaka Anjappan*(14) and *Namasivaya Gurukkal v. Kadir Ammal*(15), also relied upon by the Sub-Judge, the dismissal was after the trial of the whole suit and upon the merits and not *in limine*. Even if the Court below had power to dismiss the suit, the dismissal is not proper in the circumstances of the present case. It ought to have allowed the plaintiff to elect as to one of the several causes of action suggested by it.

The Advocate-General (Sir A. Krishnaswami Ayyar, with him M. Patanjali Sastri and K. Umamaheswaran) for first respondent.—There is a difference in language between the English and Indian rules as to defendants. O. XVI, r. 4, R.S.C., refers to defendants; and O. XVI, r. 1, to plaintiffs. After the case of *Smurthwaite v. Hannay*(16), O. XVI, r. 4, applies to joinder of causes of action. The rule as to defendants is much wider. In r. 1 the limitation is that it should arise out of the same transaction. There is however no such limitation as to joinder of defendants. O. XVI, R.S.C., applies also to joinder of causes of action. R. 4 of that Order is much wider. The limitation of rule 1 has been imported into rule 4 by decisions by way of analogy to rule 1. But there is no such limitation in the language of rule 4 itself. Therefore, even if joinder of defendants is proper under the English rule, it would not be permissible under the Indian rule. O. I, r. 3,

(1) (1895) I.L.R. 18 All. 131.

(3) (1896) I.L.R. 18 All. 432.

(5) (1914) 19 C.L.J. 316.

(7) (1879) I.L.R. 4 Calc. 949, 953.

(9) (1882) I.L.R. 6 Mad. 239.

(11) (1903) I.L.R. 27 Mad. 80, 84.

(13) (1908) I.L.R. 31 Mad. 252.

(15) (1893) I.L.R. 17 Mad. 188.

(2) (1896) I.L.R. 18 All. 219.

(4) A.I.R. 1930 All. 180.

(6) (1923) 76 I.C. 950.

(8) (1917) I.L.R. 40 Mad. 365.

(10) (1894) I.L.R. 16 All. 279.

(12) (1905) I.L.R. 29 Mad. 50.

(14) (1914) 4 L.W. 399.

(16) [1894] A.C. 494.

C.P.C., is a repetition of O. I, r. 1; in the English Rules, however, there is a difference between the wordings of rules 1 and 4 of Order XVI. There is no statutory limitation in rule 4 while there is such a limitation in rule 1. In relying upon English decisions as to joinder of defendants, the difference in the language between the corresponding rules has to be kept in view. Then as to the meaning of "same act or transaction or series of acts or series of transactions"—

[Appointment of agents, assumption of management and disposing of property is the same transaction relied upon by the appellant.—JACKSON J.]

Plaintiff has adopted first defendant's agents as his agents and has called upon them to account. He cannot at the same time treat them as trespassers. The two positions are inconsistent. Plaintiff's case is that defendant 1 was lawfully in as manager by delegation of defendant 5 and that the agents were lawfully in as agents under particular contracts of agency. The management of each agent cannot be the same act or transaction within O. I, r. 3, C.P.C. "Same act or transaction" cannot mean anything which may originate in an appointment. "Matter" or "transaction" according to English decisions means really causes of action in a wider sense consisting of a number of technically different causes of action against different individuals. First defendant's management may be a transaction; so also the management of each of the agents. As to meaning of "transaction", see Oxford Dictionary and Bouvier's Dictionary.

[Plaintiff refers to the scheme to despoil plaintiff as a transaction.—JACKSON J.]

There must be unity in such a case to constitute the "same transaction". Appointment of agents at different times and in different places under different contracts cannot be said to be the same transaction because it was done by defendant 1 with a motive to despoil plaintiff.

[Is it necessary according to you that the different agents should have been appointed at the same time?—JACKSON J.]

Yes; it would be an important element though by itself not conclusive. The action in the present case is one in contract and not in tort. "Transaction" is used in the sense of cause of action in a larger sense of the term. *Hannay & Co.*

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v. *Smurthwaite*(1) shows how the word "transaction" came to be introduced into the English rule and *Smurthwaite v. Hannay*(2), the judgment on appeal, illustrates what is meant by the "same transaction".

[The question is whether a scheme of fraud is a transaction. This case does not throw light on that question—JACKSON J.]

If the basis of the action is a scheme of fraud in which the different agents have participated, then the action must be for conspiracy. Assuming that each agent is alleged in the plaint to have participated in the conspiracy, there is no allegation that there was a conspiracy between the agents *inter se*. There is nothing to connect the agents with one another. There is no suggestion that all the agents were animated by the same aim and purpose. There must be unity of purpose and design; see *Drincqbier v. Wood*(3). [*Thompson v. London County Council*(4), *Frankenburg v. Great Horseless Carriage Company*(5), *Compania Sansinena de Carnes Congeladas v. Houlder Brothers & Co., Ltd.* (6) and *Stroud v. Lawson*(7) referred to.] According to these cases the test is whether the material facts forming the foundation of the liability of the different defendants are the same. Different agencies originating in different contracts cannot be said to constitute the same act or transaction or the same series of acts or transactions. The word "series" coupled with the word "same" implies unity of purpose or plan. So far as defendant 1 is concerned it may be the same series but not as regards the different agents.

As regards accountability to infants—under the English law, a stranger entering upon the property of an infant may at the option of the infant be treated as a trespasser or as a bailiff or guardian. The technicalities of English law in this respect are inapplicable in India. The recognition of a *de facto* guardian is a peculiarity of the Hindu law. *Wyllie v. Ellice*(8) is merely an illustration of O. XXXI, r. 2, C.P.C. There the infant could have treated each trustee as a trespasser and sued him individually; yet, as he had elected to treat them as trustees and to sue them for an account, it was held that the trustees

(1) [1893] 2 Q.B. 412, 420.

(2) [1894] A.C. 494, 499.

(4) [1899] 1 Q.B. 840, 843.

(3) [1899] 1 Ch. 393, 397.

(6) [1910] 2 K.B. 354, 369.

(5) [1900] 1 Q.B. 504, 509.

(7) [1898] 2 Q.B. 44, 52, 54.

(8) (1848) 6 Hare 505; 67 E.R. 1264.

should have been joined in one suit. In the present case, the plaintiff having elected to adopt the different agents as his agents, the introduction of the intermediary, defendant 1, was unnecessary, and the suit must be treated as one by the plaintiff against the different agents and as if defendant 1 had been altogether dropped out. The rule as to infants under the English law is based on some peculiarity. The infant may treat a trespasser as his guardian; Simpson on Infants, 4th edition, page 84. There is no such rule under the Indian law. In the present case, the plaint treats defendant 1 as plaintiff's *de facto* guardian, and under the Hindu law such a guardian has a recognized legal status; *Seetharamanna v. Appiah*(1). It is therefore not really necessary to import any theory of English law as to infants. As the plaintiff treats defendant 1 as his *de facto* guardian, the agents appointed by defendant 1 become plaintiff's agents and privity is established between them and plaintiff. The guardian's agent becomes the minor's agent for all purposes under the Indian law, and a suit for account lies against the agent at the instance of the minor; *Suyamprakasam v. Murugesu Pillai*(2). Such a general right of suit is not maintainable under the English law. Under that law, unless the action is for recovery of money, the *cestui que trust* has no right of action against an agent appointed by the trustee; Lewin on Trusts, 13th edition, page 470. *Dormer v. Fortescue*(3), *Morgan v. Morgan*(4) and *Hicks v. Sallitt*(5) are all summed up in *Howard v. Earl of Shrewsbury*(6). Those cases and *Wilson v. Moore*(7) and *Soar v. Ashwell*(8) are distinguishable as not bearing upon the question for decision in the present case, viz., whether, there being no question of collusion between the different agents *inter se*, the mere fact that all of them owe their appointment to defendant 1 does not make the suit not bad for misjoinder. Williams on Executors, Vol. I, page 164, states the principle in the light of which *Sharland v. Mildon*(9) has to be understood. Accounting can only be on the footing of a legal relationship subsisting between the person demanding account and the person sought to be

(1) (1925) I.L.R. 49 Mad. 768.

(2) (1924) I.L.R. 47 Mad. 774 (F.B.).

(3) (1744) 3 Atk. 124; 26 E.R. 875.

(4) (1737) 1 Atk. 489; 26 E.R. 310.

(5) (1854) 3 De. G.M. & G. 780; 43 E.R. 307.

(6) (1874) L.R. 17 Eq. 378.

(7) (1833) 1 My. & K. 125; 39 E.R. 629.

(8) [1893] 2 Q.B. 390.

(9) (1846) 5 Hare 468; 67 E.R. 997.

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made liable. Where the minor has elected to treat the intermeddler as the person accountable, he cannot at the same time treat him as a trespasser. Cases on misjoinder relied upon by the appellant are distinguishable. Supposing it is found that the agents were not appointed by defendant 1 because he never managed, the suit cannot be dismissed. His management is therefore really not material.

[*Payne v. British Time Recorder Co.*(1), *Compania Sansinena de Carnes Congeladas v. Houlder Brothers & Co., Ltd.*(2), *Beck, In re*(3), *Oesterreichische Export A. G. v. British Indemnity Insurance Company, Limited*(4), *Thomas v. Moore*(5) and *Shyam Behari Mal v. Maha Prasad*(6) referred to.] English decisions are relevant only in so far as they explain the word transaction and have upheld joinder on the ground of the transaction being the same. *Shyam Behari Mal v. Maha Prasad*(6) shows that the mere fact of the relief claimed being common is not sufficient to justify joinder and that both the conditions mentioned therein on pages 184-5 must exist. The mere fact of common questions of law or fact arising if separate suits were instituted does not justify joinder. So far as O. I, r. 3, C.P.C., is concerned, the Full Bench decision in *Govindaraja Mudaliar v. Alagappa Thambiran*(7) itself recognises that the two conditions ought to be fulfilled; see per KRISHNAN J. at page 840.

As regards the dismissal of the suit on the Court finding that it is bad for misjoinder, the Court is not under a duty to elect for the plaintiff. The Court must pronounce on the question of misjoinder and it is then the plaintiff's duty to elect. There is no duty on the Court to direct the plaintiff to elect between two sets of people. The plaintiff must apply for amendment under O. VI, r. 17. If he does not, the Court has plenary jurisdiction to dismiss the suit. Under the old Code section 53 (3) pointed out the procedure which might be adopted by the Court, and that course the Court might adopt *suo motu*. If the plaintiff does not elect to amend as directed, the Court could, under section 54 of that Code, return the plaint for amendment and, on the plaintiff's failure to amend, dismiss the

(1) [1921] 2 K.B. 1.

(3) (1918) 87 L.J. Ch. 335.

(5) [1918] 1 K.B. 555.

(2) [1910] 2 K.B. 354.

(4) [1914] 2 K.B. 747.

(6) A.I.R. 1930 All. 180.

(7) (1926) I.L.R. 49 Mad. 836 (F.B.).

suit. Even under that Code this Court held that notwithstanding the provisions of sections 53 and 54 the Court could dismiss the suit on the ground of misjoinder, that is, that the provisions of sections 53 and 54 were not exclusive. Sections 53 (3) and 54 have been omitted in the present Code, and the result of such omission is that the power to dismiss the suit for misjoinder remains. Plaintiff may no doubt apply for amendment under O. VI, r. 17. The Court is however not under a duty to allow amendment *suo motu*, i.e., apart from any application by plaintiff. This is implied in the words "allow etc." in that rule. In the Court below the plaintiff did not ask for an opportunity to amend if the Court held that there was misjoinder. The Court cannot compel a plaintiff to amend his plaint; *Venkatachella Chetty v. Narayana Aiyer*(1) and *Ujagar Mal v. Ramditta Mal*(2). O. XXIII, r. 1, C.P.C., shows that a suit may be dismissed for misjoinder. Misjoinder has been held to come under O. XXIII, r. 2 (a).

[Must there be an application by the party under O. XXIII, r. 2?—JACKSON J.]

Yes; the words, "grant the plaintiff permission etc.", show that an application is necessary.

[Does "permission" imply application?—JACKSON J.]

Yes. The proper procedure when the plaintiff makes no application for amendment, etc., is to dismiss the suit. If there is only misjoinder of parties the Court may strike out the improper parties. It cannot do so when there is misjoinder of causes of action; it cannot usurp the functions of the party. O. I, r. 9, does not deal with misjoinder of causes of action. The omission of section 31 of the old Code cannot enlarge the scope of that rule. O. II, r. 6, relates to cases of proper joinder and not to cases of misjoinder of causes of action. The cases cited for the appellant are distinguishable.

Nugent Grant for respondents 8, 11 and 15 supported the contentions of the Advocate-General.

S. Varadachariar (with him, *S. V. Venugopalachari*) for defendant 4.—The joinder of defendant 4 with the other defendants is in no view justifiable. Defendant 1 was appointed after the death of fourth defendant's father. The estate in the hands of defendant 4, even if liable to account for the period of management during his father's lifetime, cannot be held

(1) (1913) 24 M.L.J. 455.

(2) (1928) 111 I.C. 787, 789.

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liable for the acts of defendants 7 to 13, who were appointed after the death of fourth defendant's father and while defendant 4 was a minor. Even if money of plaintiff came into the fourth defendant's estate, the claim against him can only be a money claim; it cannot be a claim to account for the period subsequent to his father's death. One minor cannot make another minor accountable. The claim against defendant 4 cannot be clubbed with that against defendants 7 to 13. The suit is also bad for misjoinder as regards the claim against defendant 4 for the period of his father's management and for that after his father's death. The principle of the decision in *Beck, In re*(1) is inapplicable to a suit brought against a surviving trustee. In such a suit the *cestui que trust* need not join the representative of a deceased trustee; *In re, Harrison. Smith v. Allen*(2). *Jordan, In re. Hayward v. Hamilton*(3) is not really inconsistent with this case. [*Mohamed Ali Sultan v. Hajee Abdul Khalevi Rowther*(4), *Degamber Mozumdar v. Kallynath Roy*(5), *Stroud v. Lawson*(6) and *Frankenburg v. Great Horseless Carriage Company*(7) referred to and distinguished.]

S. Srinivasa Ayyangar in reply.—The main contention of the other side is that plaintiff has elected to treat first defendant's agents as his agents and is therefore really suing on the several contracts of agency entered into with them. But the suit is neither in contract nor in tort; it is for an equitable remedy. The only question is whether the joinder is authorised by O. I, r. 3, C.P.C. We are not concerned with the question whether the cause of action is the same. Under that rule the only question is whether it is the same transaction or series of transactions. It is not necessary that every defendant should be interested in the whole of the transaction. The words "act or transaction or series of acts or transactions" in O. I, r. 3, C.P.C., show that the words are used in a wide sense. Taking part in the reception, division and distribution of property is the transaction in the eye of the law. The cause of action in the present case is the cause of action in the popular sense though there may be several causes of action in the technical sense. The only liability sought to be imposed upon the different defendants in

(1) (1918) 87 L.J. Ch. 335.

(3) [1904] 1 Ch. 260.

(5) (1881) I.L.R. 7 Cal. 654.

(2) [1891] 2 Ch. 349, 352.

(4) (1911) 9 M.L.T. 233.

(6) [1898] 2 Q.B. 44.

(7) [1900] 1 Q.B. 504.

the present case is not a joint or several liability but a joint and several liability. The remedy against the different defendants is the same, viz., account, though the amount for which the several defendants may be liable may be different. The periods in which the several defendants may be interested need not be the same. The facts which plaintiff has to prove against the different defendants are not different but the same, though their defences may be different. If plaintiff's suit against defendant 1 fails, it fails against all the defendants unless the plaint is amended and the cause of action changed. Even if the agencies of the several defendants were different, yet, as the agencies were pursuant to the design of defendant 1 and the several agents with knowledge of that design participated in and carried out that design, the case would at any rate be one of a series of transactions with a unifying element, viz., design to defraud. The evidence being common is enough to justify joinder. [Lord ESHER's judgment at page 420 and Lord BOWEN's judgment at pages 424-5 in *Hannay & Co. v. Smurthwaite*(1), page 503 of *Smurthwaite v. Hannay*(2) upholding Lord BOWEN's view, *Beck, In re*(3), *Stroud v. Lawson*(4) and *Ramendra Nath Roy v. Brajendra Nath Dass*(5) referred to.] A principal and his agent can certainly be joined in one action; *Frankenburg v. Great Horseless Carriage Company*(6). The observations on page 510 of that case bear upon fourth defendant's case. *Universities of Oxford and Cambridge v. George Gill & Sons*(7) was a case of misjoinder of plaintiffs and of causes of action and is therefore distinguishable. See pages 60-1 of that case as to same transaction or series of transactions. *O'Keeffe v. Walsh*(8) referred to. Conspiracy need not be a substantive cause of action. [Portions of the plaint were read out to show that the suit was based on the fraudulent scheme of defendant 1 in which the other defendants participated.] The suit is not a mere suit for an account against an agent without alleging fraud. Defendant 4 is also sought to be made liable along with defendant 1. The suit against defendant 4 is not a suit for money. No ascertained amount is claimed from him. What is alleged is that his estate has been enriched by the fraudulent scheme and it is sought to

(1) [1893] 2 Q.B. 412.

(3) (1918) 87 L.J. Ch. 335.

(5) (1917) I.L.R. 45 Cal. 111, 134, 135.

(6) [1900] 1 Q.B. 504, 511.

(8) [1903] 2 I.R. 681.

(2) [1894] A.C. 494.

(4) [1898] 2 Q.B. 44.

(7) [1899] 1 Ch. 55.

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be made liable to the extent to which it has been so enriched. Where the agent of a guardian has been a party to the latter's fraud, it is open to the minor to adopt the equitable remedy and call upon the agent to account. As to the rule as to constructive trustees, see Lewin on Trusts, 13th edition, pages 203-4. As to who are accountable parties, see Ashburner on Equity, page 145. An agent of a trustee actively participating in the fraudulent conduct of the trustee is an accountable party.

The construction now to be placed upon O. XVI, r. 4, of the English rules is the same as that placed upon O. XVI, r. 1; Yearly Practice for 1934 (Red Book), notes under O. XVI, r. 4, *Oesterreichische Export A. G. v. British Indemnity Insurance Company, Limited*(1), *Payne v. British Time Recorder Co.*(2) and *Horwood v. Statesman Publishing Company, Limited*(3).

There is no difference in England between cases of joinder of plaintiffs and cases of joinder of defendants. The discretion is the same and equally absolute in both cases. Even in England unconnected transactions cannot be joined under O. XVI, r. 4. Guardianship, like trusteeship, cannot be delegated and the surrender of management by defendant 5 cannot make defendant 1's management lawful.

As regards the duty of the Court below to allow plaintiff an opportunity to amend his plaint, its view is that an application for amendment should have been made as soon as a written statement was filed pleading misjoinder and before issues were settled. No such application could be made without knowing the decision of the Court below on the question of misjoinder and in what respects it holds the suit to be bad for misjoinder. Under the present Code, the Court has power to put a party to election. O. II, r. 6, provides for separate trials being ordered. O. II, r. 9, applies also to misjoinder with reference to causes of action. Power to strike out under O. I, r. 10, exists even in cases of misjoinder of parties and of causes of action. The rule gives ample power to strike out parties even if plaintiff does not agree. Paragraph 2 of that rule says "upon or without application". "Allow" in O. VI, r. 17, does not necessarily imply application. Misjoinder tends to prejudice, etc., within the meaning of O. VI, r. 16. O. VI, r. 18, also does not justify dismissal of the suit forthwith. The normal

(1) [1914] 2 K.B. 747, 756.

(2) [1921] 2 K.B. 1, 15.

(3) [1929] 141 L.T. 54.

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course is for the Court on taking the view that there has been misjoinder to return the plaint for amendment and not to dismiss the suit without giving an opportunity to amend. If the plaintiff says in advance that he is unwilling to amend, the Court undoubtedly has power to dismiss the suit. *Venkatachella Chetty v. Narayana Aiyar*(1) was a case in which plaintiff declined to amend. *Rangayya Reddy v. Subrahmania Ayyar*(2) was a case of misjoinder and both parties and causes of action were struck out. *Ramasamy Pillai v. Marimuthu Goundan*(3) referred to for the position that in cases of misjoinder the trial of issues separately is to be ordered. *Ramendra Nath Roy v. Brajendra Nath Dass*(4) shows that plaintiff should be allowed to elect as to against which defendants he would proceed. In *Hannay & Co. v. Smurthwaite*(5) the action was stayed until plaintiff elected as to which of several claims should be proceeded with; and this procedure was approved of on appeal; see *Smurthwaite v. Hannay*(6). Plaintiff did express his willingness in the Court below to amend the plaint in the event of its being found that there was a misjoinder, though, owing to his ignorance of the Court's attitude, he could not make a formal application, written or oral.

M. Subbaraya Ayyar, K. Subramaniam, A. Subrahmaniam, P. S. Raghavarama Sastri, T. K. Sundararaman, R. Sethurama Sastri, K. G. Srinivas Ayyar, R. Swaminatha Ayyar and K. S. Rajagopala Ayyangar for other respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by JACKSON J.—The plaintiff (appellant) sues the JACKSON J. sixteen defendants on the following grounds. The plaintiff's father, a money-lender with branches of his business in Burma and Cochin China, died on 24th April 1915 leaving a widow, defendant 5, and their son, the plaintiff aged 3. The father's cousins were one Ramaswami Chetti and the present first defendant. The plaintiff's

(1) (1913) 24 M.L.J. 455.

(3) A.I.R. 1928 Mad. 764.

(5) [1893] 2 Q.B. 412, 414.

(2) (1917) I.L.R. 40 Mad. 365.

(4) (1917) I.L.R. 45 Calc. 111, 126.

(6) [1894] A.C. 494, 504.

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guardian was his widowed mother, but she let the two cousins manage the estate, and they managed jointly till October 1918, when Ramaswami Chetti died. Then first defendant assumed sole management, and became *de facto* guardian. From the time that they assumed management the cousins acted in fraud of the plaintiff's estate and in order to promote this fraud the first defendant appointed sundry agents who colluded with him and participated in his breach of trust. Defendants 6 to 13 were such agents. Defendants 2 and 3 are impleaded as sons of defendant 1; defendant 4 as son of Ramaswami Chetti. The plaintiff's mother is defendant 5, and his cousin is defendant 14, also an agent. These two are said to have had no real authority or part in the transactions, and they are merely added to assist in the determination of the facts. The sixteenth defendant is claiming right of partition with the plaintiff and is impleaded to preclude a possible plea of non-joinder. The plaintiff prays for a decree against the first defendant and such other defendants as may be found jointly and severally liable for accounts and payment of such monies as they may be found liable to pay. Accounts are specifically demanded from defendants 1, 4, 6 to 13 (13 died after the institution of the suit and his legal representative is defendant 15.).

Defendants 1 to 4, 8 to 12, and 15 took the plea that the suit was bad for misjoinder or multifariousness (issue 1) and the lower Court finding this in their favour dismissed the suit. Hence the appeal.

The learned Subordinate Judge rightly directed himself that Order I, rule 3, is the Order governing

this question of multifariousness; *Ramendra Nath Roy v. Brajendra Nath Dass*(1) has been approved and followed by our Full Bench in *Govindaraja Mudaliar v. Alagappa Thambiran*(2), and in the light of that ruling there can be no question but that Order I, rule 3, applies to joinder of causes of action as well as joinder of parties. The Subordinate Judge says that the learned Advocate-General who appeared before him for the defendants "strenuously contended that Order 1, rule 3, does not relate to joinder of causes of action". It hardly needed the assurance of the learned Advocate-General in our Court that this is inaccurate; for it would have been an unwarrantable trespass upon the time of a lower Court to argue before it that a Full Bench decision of this Court was wrong. He conceded (as indeed the Subordinate Judge also records) that *Govindaraja Mudaliar v. Alagappa Thambiran*(2) settled the matter, and the only questions before the lower Court were whether in this case there is as against the various defendants any right to relief in respect of the same transaction, and whether, if separate suits were brought against these defendants, any common question of law and fact would arise. At the end of his 44th paragraph the learned Judge correctly puts the question, Is the relief in respect of the same transaction? His task at this point is clearly to decide in his own mind what is the transaction alleged in the plaint, and whether the reliefs claimed are in respect of that transaction. Having done this he can then refer to such rulings as are relevant to see whether they throw light upon his solution of

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(1) (1917) I.L.R. 45 Cal. 111. (2) (1926) I.L.R. 49 Mad. 836 (F.B.).

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this question of fact. But unfortunately the learned Judge has no sooner stated the question than he becomes involved in a mass of reported decisions, and it is only by searching among his comments upon these decisions that one can discover what he regards the transaction to be. He says towards the end of paragraph 50 it is

"the assumption by the first defendant and his brother of the position of manager, and the subsequent sole management of the first defendant";

and again in paragraph 60 :

"The only thing that connects defendants together is that the first defendant is said to have appointed defendants 6 to 13 as agents for the plaintiff's estate."

On that finding Issue 1 could be determined without any reference to reported cases. No one could contend that reliefs claimed against defendants 6 to 13 arose out of the transaction of the two brothers assuming management, or the first defendant's appointment of agents. But the transaction as disclosed in the plaint is that originally the first defendant and his brother, and then the first defendant alone proceeded to embezzle the plaintiff's estate and were aided and abetted by defendants 6 to 13 who connived at the breach of trust. Suppose a Municipal Chairman along with sundry bill-collectors and clerks were to be charged for embezzling municipal funds. The mere fact that the Chairman had appointed the subordinates would not warrant joinder, but, if they had connived with the Chairman, then they could be jointly charged as persons committing the same offence or its abetment in the course of the same transaction. They need not each be responsible for the whole transaction. Speaking no doubt of plaintiffs but in terms which will

equally apply to defendants, VAUGHAN WILLIAMS L.J. observes in *Stroud v. Lawson*(1) :

"I do not think that the whole of a transaction must be involved in each of the causes of action joined."

The rest of the passage is cited by the Subordinate Judge in his 52nd paragraph.

The cases, *Universities of Oxford and Cambridge v. George Gill & Sons*(2) and *Saccharin Corporation, Limited v. Wild*(3), cited in paragraphs 53 and 57 throw no light on the matter and were not cited before us in this connexion by the learned Advocate-General. From *Thompson v. London County Council*(4) the Subordinate Judge in paragraph 55 has deduced the self-evident proposition that injury to the plaintiff does not by itself render every act by which he was injured the same transaction. To revert to the Municipal illustration, every one who had caused loss to the Municipality, say in one calendar year, could not be tried simultaneously. There must be a joint tort, as explained in *Bullock v. London General Omnibus Co.*(5) (paragraph 58). The Subordinate Judge himself finds that *Thomas v. Moore*(6) has no bearing on the facts of this case (it is relevant in another connexion as will be seen below); and that *Beck, In re*(7) affords him no help. At the end of twenty seven pages of analysis which must have given the learned Judge considerable trouble, he arrives at the correct conclusion that the question whether joinder is proper or not has to be determined with reference to the facts of each case; and he should have come to this determination

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(1) [1898] 2 Q.B. 44, 54.

(3) [1903] 1 Ch. 410.

(5) [1907] 1 K.B. 264.

(2) [1899] 1 Ch. 55.

(4) [1899] 1 Q.B. 840.

(6) [1918] 1 K.B. 555.

(7) (1918) 87 L.J. Ch. 335.

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before he let himself be submerged by reported cases. In fact it is difficult to understand why many of these cases were cited at all for the purpose of ascertaining whether the relief is in respect of the same transaction. But some time here and considerable time below has been occupied in explaining the genesis and development of the English rule of procedure (Order 16, rule 4, Rules of the Supreme Court) which corresponds to our Order 1, rule 3; and the cases may have been cited rather in that connexion. It is a matter more germane to the lecture-hall than to the Court; and since in India we have the clear rule for our own procedure there is no need to discuss the growth of the English rules. WALLIS J., as he then was, has also deprecated the importation of English decisions into the discussion of this question in *Aiyathurai Ravuthan v. Santhu Meera Ravuthan*(1). As regards the phrase "same transaction", the learned Advocate-General has called our attention to *Hannay & Co. v. Smurthwaite*(2) where Lord ESHER finds that the conduct of the owners with regard to loading and conveyance of certain bales is one transaction. So far it would be parallel with the alleged conduct of the first defendant in defrauding the minor. In *Smurthwaite v. Hannay*(3), when this case came up on appeal in the House of Lords, Lord HERSCHELL observed:

"The consignments were delivered in the same ship and were goods of the same description. I cannot see that this makes the transaction one . . ."

But he does not say, "I cannot see that the conduct of the owners makes the transaction one"

(1) (1908) I.L.R. 31 Mad. 252, 256.

(2) [1893] 2 Q. B. 412, 420.

(3) [1894] A.C. 494.

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and therefore Lord ESHER stands uncontradicted. The learned Advocate-General is disposed to adopt as the definition of a transaction, a group of facts so connected as to be referred to by a single name; and both conduct on the voyage, and embezzlement of the minor's estate would fall within this definition. Of the other cases cited before us, *Frankenburg v. Great Horseless Carriage Company*(1) and *Drincqbier v. Wood*(2) turn on the issue of a prospectus, and *Compania Sansinena de Carnes Congeladas v. Houlder Brothers & Co., Ltd.*(3) on damage to frozen meat, and none of these cases helps to the decision whether the fraud of a trustee and his abettors amounts to a transaction. We find the transaction or series of transactions out of which this case arises to be the scheme of embezzlement in which the first defendant, the father of the fourth defendant and defendants 6 to 13 are said to have connived and if separate suits were brought against the respective defendants one common question at least would arise. Did the first defendant ever intermeddle with the estate? Assuming as we must assume at this preliminary stage that the intermeddling is true, the next question is in what manner the relief should be sought. It is not disputed that a minor may elect to sue a fraudulent trustee either for damages or for an account; cf. *Dormer v. Fortescue*(4), *Hicks v. Sallitt*(5) and *Howard v. Earl of Shrewsbury*(6); but it is argued that defendants 6 to 13 are either the agents of the first defendant, and as such not accountable to the *cestui que trust*,

(1) [1900] 1 Q.B. 504.

(2) [1899] 1 Ch. 393.

(3) [1910] 2 K.B. 354.

(4) (1744) 3 Atk. 124; 26 E.R. 875.

(5) (1854) 3 De. G.M. & G. 780; 43 E.R. 307.

(6) (1874) L.R. 17 Eq. 378.

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or are the direct agents of the plaintiff who can be sued no doubt for account, but can never be sued all together in the same suit. But this argument overlooks the main allegations in the plaint. The first defendant acted in fraud of the plaintiff's estate and defendants 6 to 13 connived at that fraud. In these circumstances the *cestui que trust* can certainly call upon the agent who fraudulently mixed himself up with a breach of trust for an account; Lewin on Trusts, thirteenth edition, pages 203-4 and page 471; "derivative titles from a trespasser," *Ramendra Nath Roy v. Brajendra Nath Dass*(1); *Soar v. Ashwell*(2), where a person has assumed either with or without consent to act as a trustee he must discharge himself by accounting to his *cestui que trust* and again a person where he has knowingly assisted a nominated trustee in a fraudulent disposition of property will be treated as if he were an express trustee, and again page 403 "the proper suit is, . . . by the *cestui qui trusts* against both the trustees and their agent seeking to make both liable". "All parties to a breach of trust are equally liable; there is between them no primary liability." ; *Wilson v. Moore*(3). A servant is as liable as his master in the case of a wrongdoer; when the doctrine that the possession of an agent is the possession of a principal has no application; *Sharland v. Mildon*(4). Obviously then it would not be a pure suit for account as between principal and agent. But it is next contended that supposing the charge of fraud

(1) (1917) I.L.R. 45 Cal. 111, 136. (2) [1893] 2 Q.B. 390, 394.
(3) (1833) 1 My. & K. 125; 39 E.R. 629, 637.
(4) (1846) 5 Hare 468; 67 E.R. 997, 999.

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breaks down, the plaintiff will then proceed against these various agents on the contractual basis. The reiterated insistence in the plaint that the accounting should be "along with" the first defendant makes it unlikely that this was ever the plaintiff's intention, and now we have the assurance of his learned Advocate that this apprehension is illusory. The case against all the defendants must stand or fall on the allegation that the first defendant was committing fraud at which they or those whom they represent connived. It cannot therefore be said that this case is bad for misjoinder because it will develop into a mere suit against disconnected agents for account. They are sued for account each as a fraudulent trustee since the plaintiff has elected to seek equitable relief in this manner instead of bringing a suit for damages. Once (assuming the facts to be true) it is established that the plaintiff has a legitimate cause of action against the defendants, which justifies his demand for equitable relief by way of accounting, and it is also established that there is a transaction or series of transactions which would justify the joinder of these causes of action in one suit, then the only practical consideration is whether it would be more convenient for the defendants to be joined in one trial, or severally relegated to separate trials. At first blush it may seem surprising that the plaintiff did not leave this for the defendants to decide, and petition the Court to allow an amendment to that effect if defendants so desired. But the solution is not quite so simple as this. *Wyllie v. Ellice*(1), which is authority for plaintiff's suing

(1) (1848) 6 Hare 505; 67 E.R. 1264.

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the first defendant in equity as bailiff, guardian or trustee, is also authority for the dismissal of the suit if other persons who entered on the estate are not joined as parties. (Cf. Order XXXI, rule 2, Civil Procedure Code). The learned Advocate-General was prepared to argue that this rule would not apply to the facts of this case, but nevertheless, to put it no higher, the plaintiff would undoubtedly subject himself to the risk of the rule being cited against him if he failed to join defendants 6 to 13 with defendant 1 and the suit might then have been held bad not for misjoinder but for non-joinder. *Dextrum Scylla latus, laevum implacata Charybdis*. Therefore the only course open to the plaintiff was to abide the decision of the Court before he applied, if at all, for amendment. This seems to have been recognized by the parties at the time of the trial. When it became incumbent upon the defendants under Order XIII, rule 1, to produce the documents upon which they relied, the learned Advocate-General moved that the question of misjoinder should be taken up as a preliminary issue and he could then produce his documents. And the Court agreed that it was only after the question of misjoinder was settled *one way or the other*, that the real hearing would begin. Of course if they liked, the defendants could have duly filed their documents at the first hearing, and could then have fought out the first issue whether the suit is bad for misjoinder as part of the main action. Instead of this, they refrained from filing documents, and insisted that the hearing of Issue 1 should be only a preliminary skirmish. To argue afterwards that this was the main action is scarcely consistent. It is

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a surprising argument that to dismiss a suit for multifariousness is the normal course. At this preliminary stage the function of the Court is simply to see that the pieces are set up aright for a fair game. It is not necessary to argue whether in extreme cases the Court has the power to dismiss a suit for misjoinder, because to anyone who has imbibed the spirit of our Code of Procedure the Court's duty is abundantly clear. If a joinder of plaintiffs may embarrass the trial, the Court interferes (Order I, rule 2). No suit shall be defeated by reason of misjoinder of parties (Order I, rule 9); for the determination of the real matter in dispute persons may be substituted (Order I, rule 10). The Court may without the application of either party order the name of any party improperly joined as defendant to be struck out [Order I, rule 10(2)]. All objections on the ground of misjoinder of parties shall be taken before the settlement of issues (Order I, rule 13). Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried together the Court may order separate trials (Order II, rule 6). The Court may at any stage order to be amended any matter in any pleading which may embarrass the trial (Order VI, rule 16). The Court may at any stage of the proceeding allow either party to amend his pleadings (Order VI, rule 17). It was argued that under this last rule a Court can only allow upon application. Obviously the initiative must come from the party. A Court cannot compel an amendment [cf. *Venkatachella Chetty v. Narayana Aiyar*(1)] and will not draft it itself. But a Court should not

(1) (1913) 24 M.L.J. 455.

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prevent what it is empowered to allow; and having regard to the circumstances of this case, and the evident understanding between the parties that only its frame was under consideration, and the real hearing of the suit had not begun, the Court should undoubtedly have given the plaintiff an opportunity to elect, as soon as it had decided that the plaint in its present form was unsustainable. The whole trend of the leading English cases is towards liberality in this respect. SCRUTTON L.J. observes :

"The result of the later decisions is that you must look at the language of the rules and construe them liberally, and where there are common questions of law or fact involved in different causes of action you should include all parties in one action." *Payne v. British Time Recorder Co.*(1).

The whole of SCRUTTON L.J.'s remarks on page 16 have a very close bearing upon our case. And along with this may be read a summary of the whole matter by the same learned Judge leading to the same conclusion in *Horwood v. Statesman Publishing Company, Limited*(2). Cf. *Thomas v. Moore*(3).

In *Frankenburg v. Great Horseless Carriage Company*(4) the Judge in Chambers after a finding of misjoinder of defendants gave the plaintiff ten days in which to decide if he would split up his plaint into several actions, and against this order the plaintiff appealed. The MASTER OF THE ROLLS observes at page 509 :

"It would be a startling novelty and a most deplorable thing for our practice and procedure if such actions as these could be summarily disposed of and stopped in this way. Certainly we have no authority for doing anything of the kind. There is no single case which comes anywhere near it, and I

(1) [1921] 2 K.B. 1.

(3) [1918] 1 K.B. 555, 565.

(2) [1929] 141 L.T. 54.

(4) [1900] 1 O.B. 504.

will not be the first to undo and unsettle what has been the established practice for years."

"Substantial justice would be sacrificed to a wretched technicality." (Page 508). These citations suffice to dispel any illusion that in England dismissal on account of multifariousness is the normal course, and the Indian cases are not otherwise.

"We gave the plaintiffs time to consider their position." ; *Afzal Shah v. Lachmi Narain*(1).

Where a suit has been directed against a number of defendants and the allegations in the plaint disclose that the causes of action against the several defendants are not only separable but separate it is not permissible for a Court of law to dismiss the suit. Substantial justice should in no case be allowed to be sacrificed to a wretched technicality ; *Shyam Behari Mal v. Maha Prasad*(2).

When a Court is of opinion that a suit is bad for multifariousness it ought to give the plaintiff an opportunity to amend his plaint and to elect ; *Limaya v. Watve*(3).

Even in *Muthappa Chetty v. Muthu Palani Chetty*(4), which is specially relied upon by the learned Sub-Judge (paragraph 108), although the appellate Court declined to interfere with the trial Court's discretion it observed (page 84 *ad im*) :

"The proper course for the Court of first instance to have adopted would have been to have returned the plaint for amendment."

Cf. *Janokinath Mookerjee v. Ramrunjun Chuckerbutty*(5) and *Gur Prosad v. Gur Prosad*(6).

(1) (1917) I.L.R. 40 All. 7, 11.

(3) (1923) 76 I.C. 950.

(5) (1879) I.L.R. 4 Cal. 949.

(2) A.I.R. 1930 All. 180, 183.

(4) (1903) I.L.R. 27 Mad. 80.

(6) (1914) 19 C.L.J. 316.

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Cases can no doubt be found which have been dismissed for multifariousness—the lower Court cites several in its judgment; and, as observed at the outset of this discussion, no one denies that the Court has the power of dismissal; but enough has been said to show that its power generally should be exercised with a liberal discretion; and in this case there can be no question but that plaintiff should have been allowed to elect. The learned Subordinate Judge records in his 96th paragraph that the learned Advocate for the plaintiff never represented that in case the Court found the suit bad for multifariousness he should have been given this opportunity. He tells us, and this is not traversed by the other side, that he directed the attention of the Court to page 459 of Mulla's Commentary on the Civil Procedure Code (Edition 9) where it is observed that the Court may direct the plaintiffs to elect. Probably all that the Sub-Judge means is that he had received no application; but, as already pointed out, until the Court decided that there was misjoinder the plaintiff might well find a legal difficulty in separating the defendants and bringing several suits.

We have no hesitation in finding that the lower Court should have given the plaintiff an opportunity to elect, and if we had found the suit bad for multifariousness we should have ordered to that effect.

It remains to consider special pleas which were advanced on behalf of defendant 4, and also on behalf of defendants 8, 11 and 15.

It is argued by Mr. Varadachari that, even admitting that defendants 1 and 6 to 13 are liable

to account either as tort-feasors or agents, his client, the fourth defendant, fills neither part. His father may have been liable, but he took no part in the transaction. The terms of Order I, rule 3, are rather broader than that; "relief in respect of the same transaction". The plaintiff has sought relief from the fourth defendant by way of accounting, and Mr. Srinivasa Ayyangar concedes that possibly when the suit has passed beyond this preliminary stage that relief may be found to be misconceived. But at present we are dealing with the plaint as it stands, and since plaintiff is demanding a relief from the fourth defendant arising out of this transaction his joinder seems to be proper. It is difficult to see how it would convenience him to be relegated to a separate suit, and in any case it seems that he would wish to be impleaded in this suit. Because in paragraph 18 (6) of the plaint it is stated that monies from the plaintiff's firms were sent to the fourth defendant's firm under the direction of the first defendant; and it does not seem clear at this stage of the case that this is a mere matter of banking. It is possible that the fourth defendant's firm is accused of wrongfully absorbing into its assets assets which belonged to the plaintiff. Quite apart from the ultimate decision upon the merits of the claim against the fourth defendant we are not prepared to find at this stage that he is improperly joined. This accords with *Chelamanna v. Rama Row*(1), which runs very much on all fours with our case.

On behalf of defendants 8, 11 and 15 it is urged that their agencies are widely separable in time and

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(1) (1911) 10 M.L.T. 232, 233.

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place, and it is not reasonable to suppose that there is one transaction or even series of transactions. It is no fault of the plaintiff that his firm has wide ramifications or that his minority was of long duration. The only logical period to adopt would seem to be from the death of plaintiff's father up to the date of suit. If shorter periods were taken the division would be quite arbitrary, and there would be every risk of overlapping. And it is to be noted that in the course of the profuse argument that has ranged round this preliminary issue no one has ever suggested that the defendants would find it more convenient to be relegated to several suits. Their sole object has been to defeat the suit for multifariousness, not to reconstitute it upon some more rational scheme.

We see no reason therefore to treat defendants 4, 8, 11 and 15 differently from the other defendants; and find as regards all of them that there is no misjoinder.

Accordingly the appeal is allowed with costs as against defendants 1 to 4, 8 to 12 and 15 here and in the lower Court. Sixth defendant claims costs in this appeal—his claim can abide the determination of the suit when it will be considered on its merits by the lower Court. The lower Court must proceed with the suit. Since the principal Counsel engaged come from Madras there may be inevitable delays; but there should be no delay in the filing of documents. Order XIII, rule 1, is peremptory and the misunderstanding which led to its being disregarded is a regrettable feature of this case.

In our Court as in the lower Court the learned Advocate-General confines himself to registering

a protest that *Govindaraja Mudaliar v. Alagappa Thambiran*(1) is wrongly decided. The Full Bench decision is as binding upon our Bench as it was upon the Subordinate Judge, and since it was pronounced almost ten years ago nothing has arisen to shake its validity. On the contrary the Bombay High Court which once held a different opinion is now aligned with Calcutta and Madras, *Baghwan Gokulji & Co. v. Balku Babaji*(2), and even if we were so disposed we could hardly ask for a reference to another Full Bench merely on the ground that all these Courts in our opinion had failed to appreciate the law, especially when in mere questions of procedure the rule that usually prevails is *stare decisis*. This is not to imply that we ourselves have seen reason to doubt the ruling. The point has not been argued before us, and *Govindaraja Mudaliar v. Alagappa Thambiran*(1), unless it is reversed by a superior Court, must stand as the accepted law.

A.S.V.

(1) (1926) I.L.R. 49 Mad. 836 (F.B.).

(2) A.I.R. 1932 Bom. 1.

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APPELLATE CIVIL.

Before Mr. Justice Curgenven and Mr. Justice Pakenham Walsh.

1934,
January 5.

KAVERIPAKKAM BANGARAMMAL (FIRST DEFENDANT),
APPELLANT,

v.

LYDIA KENT (PLAINTIFF AND DEFENDANTS 2 AND 3),
RESPONDENTS.*

*Indian Limitation Act (IX of 1908), art. 44—"Guardian"—
Meaning and import of—Alienation by natural guardian of
a Christian minor—Character of—Suit by minor after
attaining majority—Applicability of art. 44.*

C, a Christian lady, acting as the natural guardian of her minor daughter, *L*, alienated the share of the latter in a certain house. *L* after attaining majority filed a suit, *inter alia*, for a declaration that the alienation was not binding on her.

Held that the alienation was voidable and not void and that article 44 of the Indian Limitation Act applied, inasmuch as the word "guardian" in the said article is of general import and includes natural and testamentary guardians and guardians appointed by Court.

APPEAL against the decree of the Court of the City Civil Judge, Madras, in Original Suit No. 286 of 1930.

A. Suryanarayaniah for appellant.

S. Ramaswami Ayyangar and *N. Gopala Menon* for first respondent.

T. V. Gopalaswami for second respondent.

Third respondent was unrepresented.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by CURGENVEN J.—The three appeals (City Civil Court Appeals Nos. 18, 34 and 35 of 1931) arise

* City Civil Court Appeal No. 18 of 1931.

out of three suits tried together by the City Civil Judge. The advisability of trying Original Suit No. 555 of 1929 (City Civil Court Appeal No. 18 of 1931) with the other two suits is open to question, but we propose to record our findings upon the issues which it raises quite separately. Certain facts may however be stated as common to the three cases.

We are concerned with a family of Indian Christians composed of Richard and Caroline Kent, husband and wife, and two daughters, Sarah (Mrs. Borgonah) and Lydia. Richard Kent, who was an Inspector on the Railway, owned a house No. 6, Salai Street, Vepery, Madras, in part of which he was living up to the time of his death. The house consisted of two distinct portions, a front part and a rear part, and these figure separately in the later transactions. In 1913 Richard Kent executed two successive mortgages of the whole property to a Marwari Sowcar, named Birchand, for sums of Rs. 500 and Rs. 100 respectively. In 1914, under Exhibit D, he made a gift of the property to his wife and daughters. In 1916 Birchand sued upon his mortgages (Original Suit No. 422 of 1916) and obtained a preliminary decree. Thereupon, in spite of the gift deed, on the 25th December 1916 Richard Kent executed an agreement to sell the front part of the house to one Muniswami for a sum of Rs. 1,500 and acknowledged an advance payment of Rs. 100. Less than a month later, on the 20th January 1917, Richard Kent died, and less than a month after his death, on the 17th February 1917, the widow executed a sale deed, Exhibit E, of the front part for herself and as guardian of her two

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daughters, to Muniswami's daughter, Bangarammal, for Rs. 1,500. Out of this consideration a sum of Rs. 1,150, as the receipts Exhibits V and V (a) show, was paid to Birchand in discharge of the mortgage debts of 1913 and of some smaller loans advanced to Caroline.

This sale is the subject-matter of Original Suit No. 555 of 1929. The plaintiff is Lydia Kent and she sued *in forma pauperis* for a declaration that it was not binding upon her and for partition and delivery of her one-third share in the property under the gift deed. It is probable that the elder daughter would have joined in this claim had she not allowed it to get barred against her. The lower Court has held that the gift deed, which was impugned as benami or nominal, was valid and that the sale is not binding upon the plaintiff, who has been given a declaration accordingly. The appellant is therefore the vendee, Bangarammal, who was the first defendant in the suit.

The grounds adduced for holding that the gift deed is nominal are, in view of the relationship between the parties, quite inconclusive, and it has been recognized before us that it is not open to the vendee to attack this document, forming as it does the title of the vendors relied upon in the sale deed. We agree with the lower Court in holding that the plaintiff has a valid title under that instrument.

The plea that the sale deed is not binding to the extent of the plaintiff's share is based firstly upon the contention that the mother was not in any circumstances competent to alienate her daughters' property, and secondly, that, if she was

competent to do so in circumstances of necessity, such necessity has not been proved.

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The powers of a mother, as guardian, in communities not governed by Hindu or by Mahommadan law do not appear to have formed the subject of express judicial decision. There are cases decided under Mahommadan and under Hindu law, but the principles upon which they rest are not necessarily extensible to other communities. The Mahommadan law decisions exemplified by the Privy Council cases, *Mata Din v. Ahmad Ali*(1), *Imambandi v. Mutsaddi*(2) and *Mohammad Ejaz Husain v. Mohammad Iftikhar Husain*(3), establish the proposition that a mere *de facto* guardian, i.e., a person who has charge of the minor's person and property but has no legal claim to be the guardian, has no power to convey to another any right or interest in the minor's immovable property, and that any such conveyance will be void as against the minor. Under the Mahommadan law the position of a mother is merely that of a *de facto* guardian. The position of a *de facto* guardian under the Hindu Law has been discussed by KUMARASWAMI SASTRI J. in a case to which one of us was a party, *Ramaswamy v. Kasinatha*(4), and the proposition was accepted, largely upon the principle of *stare decisis*, that such a guardian under the Hindu law is in the same position as a *de jure* guardian so far as acts done for the minor's benefit are concerned. As regards other communities, we do not think that much assistance can be obtained from an examination of the English law, as the mother's powers

(1) (1911) I.L.R. 34 All. 213 (P.C.). (2) (1918) I.L.R. 45 Calc. 878 (P.C.).
(3) (1931) 62 M.L.J. 410 (P.C.). (4) A.I.R. 1928 Mad. 226.

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have been defined by statutory enactment. No doubt, in such communities also, an act done by a mere *de facto* guardian, which means a person having none of the rights of a guardian, would not bind the minor and would be void against him. This has been decided by MADHAVAN NAIR J. in *Sudra Nadan v. Annamalai*(1). But a mother, the father being dead, does not we think fall within this category, but is certainly for many purposes the natural guardian of her minor child. She is for instance entitled to the custody of the child and to the guardianship of its property. Trevelyan (The law relating to Minors, sixth edition, pages 167-168) states that

"the law applicable to persons other than Hindus and Mahommadans does not permit guardians, other than those appointed by the Court, or having power given to them by the instrument appointing them, to sell or charge the immovable property of their wards."

But he adds that an alienation by a guardian, which does not bind the minor, is not void, but voidable at the instance of the ward. Upon such avoidance the minor would have to repay any money advanced for his benefit. The same conclusion, that such a transaction is voidable and not void, may, we think, be drawn from certain provisions in the Guardians and Wards Act. Sections 28 and 29 provide that the powers respectively of a testamentary guardian and of a guardian appointed by the Court shall be limited by the terms of the instrument or of the order appointing him. The question then arises as to the effect of an alienation of the minor's property entered into by the guardian in excess of those powers and section 30 provides that such a

(1) (1931) 60 M.L.J. 695.

disposal of immovable property is voidable at the instance of any other person affected thereby as, e.g., the minor. Upon the same principle we think that an alienation effected by a natural guardian such as a mother will be voidable and not void. If it is voidable, the question of limitation will arise in the connected appeals and may be dealt with here. The only cases cited to us relate to Hindus but we think that the same principles will apply because the reasoning is quite general. In *Dip Chand v. Munni Lal*(1) it has been held that article 44 of the Limitation Act applies, the learned Judges observing:

"The words of this article are very general and have application to every case in which a ward, on attaining majority, impugns the transfer made by his or her guardian during his or her minority, and there is absolutely no warrant for restricting the application of that article to cases of transfers made by a certificated guardian."

It is added that the word "guardian" as used in the article is of general import and includes natural and testamentary guardians and guardians appointed by Court. Similar views have been expressed by this Court in *Manugarra Satyalakshmi Narayana v. Manugarra Jagannadham*(2) and *Arumugam Pillai v. Panayadian Ambalam*(3). We conclude therefore that a minor must sue within the three years allowed by the article for a declaration that the transaction is not binding upon him.

The second question raised with regard to the sale is whether it was in the interests of Lydia Kent. The learned City Civil Judge has discussed this matter from various points of view and has

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(1) (1929) I.L.R. 52 All. 110.

(2) (1915) 34 M.L.J. 229.

(3) (1920) 40 M.L.J. 475.

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come to the conclusion that Caroline Kent was not a free agent and that the price paid for the property was inadequate.

[His Lordship discussed the evidence and held that the sale was not in the interests of the minor who was entitled to a one-third share and was not binding on her, that the vendee should have a charge upon the property to the extent of the sum paid by him for discharging a mortgage on the property which was binding on her and concluded as follows :—]

The *plaint* asks for partition as well as for a declaration and there should have been a preliminary decree for partition. We accordingly pass such a decree and the case will be remitted to the lower Court to proceed with the partition and pass a final decree. Having regard to the indivisibility of the property, recourse should, if necessary, be had to sections 2 and 3 of the Partition Act (IV of 1893). This disposes of City Civil Court Appeal No. 18 of 1931, in which the appellant has succeeded only with regard to the charge for the mortgage debt. Each party will bear their own costs throughout.

[The rest of the Judgment dealt with City Civil Court Appeals Nos. 34 and 35 of 1931 and is omitted as not being necessary for this report.]

G.R.

APPELLATE CIVIL.

Before Mr. Justice Curgenven.

KATHASWAMY CHETTIAR AND ANOTHER (RESPONDENTS
1 AND 2, PLAINTIFFS 1 AND 2), PETITIONERS,

1934,
February 8.

v.

RAMACHANDRAN AND ANOTHER (PETITIONERS,
DEFENDANTS 2 AND 3), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Minor defendant—Guardian—Non-appearance of minor defendant through wrongful default of guardian—Whether constitutes "sufficient cause".

The default of a guardian who wrongfully allows a claim against a minor defendant to be decreed *ex parte* constitutes a "sufficient cause" for the non-appearance of the minor within the terms of Order IX, rule 13, of the Code of Civil Procedure.

Neelaveni v. Narayana Reddi, (1919) I.L.R. 43 Mad. 94 (F.B.), and *Kesho Pershad v. Hirday Narain*, (1880) 6 C.L.R. 69, followed.

PETITIONS under section 115 of Act V of 1908, praying the High Court to revise the orders of the Court of the District Munsif of Coimbatore, dated 7th August 1933 and made in Interlocutory Applications Nos. 1351 and 1350 of 1933 in Original Suit No. 716 of 1932 respectively.

S. Muthiah Mudaliar and *M. Krishna Bharati* for petitioners.

K. P. Ramakrishna Ayyar for respondents.

JUDGMENT.

These two revision petitions are preferred against two orders of the District Munsif of Coimbatore (i) discharging a guardian *ad litem* and

* Civil Revision Petitions Nos. 1543 and 1544 of 1933.

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appointing another and (ii) setting aside an *ex parte* decree. The plaintiffs, who are the petitioners in both the petitions, sued three brothers to recover some money said to be due in respect of a deposit made with their deceased father. The first defendant was a major and the second and third defendants were minors. The plaintiffs applied in the ordinary way for appointment of a guardian *ad litem* to them, proposing first the mother and later the brother, that is, the first defendant. The mother declined to act but agreed that her son might act, and the first defendant undertook the duties and was appointed. In the suit he took time to file a written statement, but in point of fact he did not file one and made no defence either for himself or on behalf of his minor brothers, and the suit was decreed *ex parte*. Then followed the two applications out of which these petitions arise.

It was alleged that the brother had failed in his duties as guardian and accordingly the mother applied to be made guardian and at the same time application was made to set aside the *ex parte* decree. The learned District Munsif has granted both applications. The substantial one relates to setting aside the decree, and in the order relating to this he has given his reasons for finding that the first defendant had interests adverse to his brothers and had failed to discharge his trust with regard to them by defending the suit. He accordingly concluded that there was no representation of the minors and that the *ex parte* decree against them is invalid and he therefore set it aside.

This is not a logical way of putting the matter. If the *ex parte* decree was, as I understand the

learned District Munsif to have held, void there was no need to set it aside. On the other hand if he did set it aside he must have found that one of the reasons laid down in Order IX, rule 13, of the Code of Civil Procedure for adopting such a course existed. There are various early decisions which held that the reasons which this rule requires for setting aside an *ex parte* decree are not the only ones, and that the Court has inherent power, in appropriate circumstances, to set aside an *ex parte* decree even though summons has been duly served and it has not been shown that the defendant has sufficient cause for not appearing. The question later came before a Full Bench in *Neelaveni v. Narayana Reddi*(1), and it was there held that the Court has no power, apart from the provisions of Order IX, rule 13, Civil Procedure Code, to set aside an *ex parte* decree passed by itself. Accordingly such an early decision as that of OLDFIELD J., in *Adyapadi Ramanna Udpa v. Krishna Udpa*(2), holding on general grounds that the gross negligence of the next friend of a minor plaintiff is sufficient reason for setting aside an *ex parte* decree, can no longer be regarded as good law. It has been argued in the present case that the District Munsif has not recorded any finding as to whether the minors had sufficient cause for not appearing and allowing an *ex parte* decree to be passed and that omission *ipso facto* renders the order liable to revision. I think that, if materials exist in the record and in the lower Court's order for drawing the conclusion that such sufficient cause did exist, it is not

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(1) (1919) I.L.R. 43 Mad. 94 (F.B.). (2) (1912) 27 M.L.J. 167.

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desirable to interfere with the order although it may have been passed on incorrect grounds.

The question accordingly arises whether the default of a guardian who wrongfully allows the claim to be decreed *ex parte* will constitute a sufficient reason for the non-appearance of the minors within the terms of the rule. The case is in many respects analogous to that of an Advocate who has failed to put in an appearance after undertaking to represent a party. I have no doubt that, if it is a real case of default and the party is in no respect to blame, this would be accepted as "sufficient cause" within the rule. The case of a minor is in some respects stronger, as he has neither the option to put in an appearance himself nor power to choose his own representative. He has been declared *ex parte* in circumstances over which he had no control whatever. The position has been excellently put on behalf of the respondents in a case reported as *Kesho Pershad v. Hirday Narain*(1), by MARKBY and MITTER JJ. That too was an instance of the first defendant—in that case the mother—appearing personally and as guardian of the minor sons and allowing an *ex parte* decree to be passed. Application was made to set it aside on the ground that summons was not duly served, but this ground failed. Nevertheless the learned Judges said that it could be put upon the alternative ground that sufficient cause existed for the failure of the minors to appear. They observe:—

"We think that we may legally and fairly deal with this matter as regards the minors under the clause which provides that if the defendant be prevented by any sufficient cause

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from appearing when the suit was called on for hearing, the Court should pass an order to set aside the judgment. It is not to be expected that the defendants themselves could have appeared in person and they had a right to expect that their lawful guardian would take the proper, and what in this case was obviously a necessary, step to protect their interest. By a neglect of duty for which they are not in any way responsible, no one appeared on their behalf when the case was called on. We think it would be contrary to justice to hold that they are responsible for their non-appearance. We think they have a right to say, in the words of the Act, that they have been prevented by sufficient cause from appearing when the case was called on. That being so, whether the summons was served or not, the Court below had power to set aside these decrees."

This judgment has been referred to as one example of sufficient cause for non-appearance by SESHAGIRI AYYAR J., in the Full Bench case already referred to, where he says at page 104:—

"A suggestion was made that the default of a guardian of a minor defendant will not be covered by this clause (the clause relating to sufficiency of cause). There is no reason for limiting the language of the clause in that way. Further, there is the authority of *Kesho Pershad v. Hirday Narain*(1) against this suggestion."

I think accordingly that the finding of the learned District Munsif that the first defendant had betrayed his trust as guardian is sufficient to bring the case within the terms of Order IX, rule 13, of the Code of Civil Procedure, and that the order setting aside the decree can be justified on these grounds.

A further point is taken that the application is time-barred. This point does not seem to have been taken, and if at all taken, does not seem to have been pressed, in the lower Court. Having regard to the fact that section 5 of the Limitation

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Act applies to such petitions, I do not think that an order of this kind should be revised on this ground.

The order of the learned District Munsif appointing the mother as guardian in the place of the son necessarily follows from his finding of the existence of an adverse interest in the son. The civil revision petitions are accordingly dismissed with costs. One Vakil's fee.

K.W.R.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

1934,
January 30.

VATAKKETHALA THOTTUNGAL CHAKKU'S SON
MATHU (PLAINTIFF), APPELLANT,

v.

ACHU AND TWELVE OTHERS (DEPENDANTS 1 TO 10
AND LEGAL REPRESENTATIVE OF DEPENDANT 5),
RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 6 (e)—Debt—Assignment of—Exact amount of debt not mentioned—Data for ascertaining same available in document—Validity of assignment.

V had contracted with a railway company to execute certain works for them. He entered into a sub-contract in connexion with the same with three persons by which he agreed to retain ten per cent of the moneys paid to him by the railway company and pay the balance to them. M was the assignee of the right of the sub-contractors to recover their shares of the said amounts from V. Before the assignment the value of the works executed had been ascertained and the amounts had been received by V from the railway company. In a suit by

* Appeal No. 132 of 1932.

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M as assignee against the heirs of V and others to recover the amounts due to the sub-contractors, held that, inasmuch as the data to fix the definite amount due to the sub-contractors were available before the assignment, the mere fact that a calculation would have to be made before determining the exact amount would not make that amount any the less a debt due to the sub-contractors validly assignable in law and that such an assignment does not offend against the terms of section 6 (e) of the Transfer of Property Act.

APPEAL against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in Original Suit No. 7 of 1930.

Advocate-General (Sir A. Krishnaswami Ayyar)
with him *P. S. Raghavarama Sastri* for appellant.

T. R. Venkatarama Sastri with *N. Rama Ayyar*
for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The plaintiff is the appellant. Defendants 1 to 6 are the heirs of one Veeran Haji. The plaintiff's suit out of which this appeal arises was for rendition of accounts by defendants 1 to 6 and for recovery from them personally and from the assets of the deceased Veeran Haji the sum found due on taking accounts, which is estimated to be about Rupees twenty-five thousand. The plaintiff sued as the assignee of the rights of defendants 7 to 11.

The facts are these. The deceased Veeran Haji who died in 1927 was a railway contractor. He had entered into a contract with the South Indian Railway Company in 1924 for doing "earthwork in the Shoranur-Nilambur line". In connexion with this work he appointed as his sub-contractors defendants 7 and 8, and one

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Antony, the deceased husband of defendant 9 and father of defendants 10 and 11. Under the terms of the contract, Veeran Haji, after taking a commission of ten per cent on "earthwork" and two and a half per cent on "culvert work" on the amount of money paid by the railway company, had to give the whole of the balance amount to the sub-contractors. It is alleged in the plaint that, deducting the sum of Rs. 61,424-14-0 received on several occasions from the deceased Veeran Haji, a sum of Rs. 25,000-7-8 is still due to defendants 7, 8 and 9 to 11 for the work done by them.

In Original Suit No. 76 of 1927 eighth defendant sued defendants 7, 9, 10 and 11 for dissolution of the sub-contract partnership entered into between defendants 7 and 8 and the deceased Antony and for recovery of his share of the profits. The eighth defendant was appointed receiver by the Court. Under the orders of the Court, he sold the right of the sub-contractors to recover the amount of debt from Veeran Haji (i.e., due from his heirs and from his assets) in public auction. The plaintiff in the present suit purchased this right for Rupees eight thousand seven hundred and deposited the sale value in Court. After the confirmation of the sale the receiver under the orders of the Court executed an assignment deed to the plaintiff authorizing him to recover the debt. This assignment deed, referred to as Exhibit A in the judgment of the lower Court but not admitted by it in evidence, has been admitted by us for the purpose of this appeal subject to the proof of its genuineness. The plaintiff's suit to recover the amount claimed is based on this deed of assignment.

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Exhibit A, the assignment deed, after reciting the sub-contract between the deceased Veeran Haji and defendants 7, 8 and Antony and referring to Original Suit No. 76 of 1927, proceeds as follows :—

"In that suit I was appointed receiver for realizing the above amount from Veeran Haji as also for performing other duties regarding the partnership. On sale by auction after due advertisement within the Court premises, the amount thus due from Veeran Haji under orders from Court to sell it by public auction as a debt due to the partnership, you have bid for rupees eight thousand seven hundred and deposited the whole purchase money under orders from Court. Hereby also I empower you under orders from Court to recover the debt (Edavadu) sold under orders from Court by me as receiver and purchased by you in auction and assign to you the same. None of us but you alone have hereafter any right or voice in realizing the full amount as per accounts due to Anthappan, the heirs of the deceased Anthony and me as sub-contractors under Veeran Haji from Veeran Haji's heirs and assets or to alienate it in any way. This assignment deed is executed under orders from Court."

Defendants 1 to 6 contended, *inter alia*, that the assignment in favour of the plaintiff is not valid and that the plaintiff is not entitled to institute the suit. Issue 7 relates to this plea and it runs as follows :—

"Is the assignment relied upon by the plaintiff true and valid?"

Treating this as a preliminary issue, the validity of the assignment deed was attacked on the ground that it offended the provisions of section 6 (e) of the Transfer of Property Act which says that "a mere right to sue cannot be transferred." It was contended on behalf of defendants 1 to 6 that, having regard to the terms of Exhibit A, the suit is not to recover a debt or a liquidated sum, that the assignment of a right to

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recover an unliquidated sum is only an assignment of a bare right to sue, and is therefore invalid. On the contrary, the plaintiff contended that having regard to the facts of the case, there was clearly a debt due from the deceased Veeran Haji to defendants 7, 8 and 9 to 11, and that it was this debt that had accrued that was transferred under Exhibit A, and the suit does not therefore offend the terms of section 6 (e) of the Transfer of Property Act.

The learned Subordinate Judge held that it is clear from the assignment deed itself that what has been really sold is the right to recover the amount that might be found due by Veeran Haji on the taking of accounts and not merely rupees twenty-five thousand at which the amount due had been estimated, and being of that opinion he dismissed the suit accepting the contentions of defendants 1 to 6.

The arguments urged in the lower Court have again been urged before us. We may say that the arguments in support of the appeal advanced by the learned Counsel for the appellant, which we will presently refer to, do not help him. He referred us to two classes of cases—one of which relates to suits where the principal assigned his rights to recover moneys due to him by his agent on taking accounts; see *Ramiah v. Rukmani Ammal*(1), *Madho Das v. Ramji Patak*(2) and *Rajeswar Saha v. Sheikh Yadali*(3). Generally stated these cases may be said to proceed on the principle that “the right assigned is substantially a right to money belonging to the principal which

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is in the hands of the agent” and is therefore assignable though “it may be that, before it can be ascertained what sum is due, accounts may have to be taken, if necessary, but this fact would not by itself turn the transaction into a mere right to sue”; see observations of ABDUR RAHIM J. in *Ramiah v. Rukmani Ammal*(1). It is clear that the case before us does not fall within this principle. Having regard to the facts, on no reasoning can it be said that the position of defendants 7, 8 and 9 to 11 is that of principals who have assigned their rights to sue their agent for moneys due from him. The second class of cases relates to the principle now embodied in section 29 (2) of the Indian Partnership Act that

“if the firm be dissolved, or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner is entitled, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.”

The argument based on this principle was not advanced before the lower Court. However, it may be said that the facts do not show that the deceased Veeran Haji and defendants 7, 8 and 9 to 11 ever formed a partnership. The relation between them was not that of persons who have agreed to share the profits of a business carried on by all or any of them acting for all. There was no doubt a partnership between defendants 7, 8 and 9 to 11, but between them and the deceased Veeran Haji there was no partnership. Veeran Haji had simply employed them as sub-contractors to work under him.

(1) (1912) 24 M.L.J. 313

(2) (1894) I.L.R. 16 All 286.

(3) (1932) 57 C.L.J. 46.

(1) (1912) 24 M.L.J. 313.

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Though the above line of argument does not help the appellant we think he is entitled to succeed having regard to one admitted fact in the case, which in our opinion clearly shows that a debt had accrued to defendants 7, 8 and 9 to 11 by the time of the assignment deed, Exhibit A, and that such a debt being assignable in law, the plaintiff's suit is maintainable. It is not disputed, and the fact is referred to in the plaint also, that on the 12th April 1929, though by that time Veeran Haji had died, the final amount due to him was paid by the railway company. The assignment deed in favour of the plaintiff is dated 1930. Under the sub-contract, as already stated, Veeran Haji is entitled to take from the amount paid to him by the company a commission of ten per cent on earthwork and $2\frac{1}{2}$ per cent on culvert work and the whole of the balance should go to the sub-contractors (see paragraph 7 of the plaint). When the value of the work of Veeran Haji was ascertained and the amount due was paid to him, the sum due to the assignors by the plaintiff became definite as it could be found out by process of arithmetical calculation. If this view is correct, as we think it is, then at the time of the assignment it must be held that a liquidated amount had become due to the assignors of the plaintiff. If so, the assignment of rights under Exhibit A amounts to an assignment of what is more than a mere right to sue for accounts and does not therefore offend the provisions of section 6 (e) of the Transfer of Property Act. The data to fix the definite amount due to defendants 7, 8 and 9 to 11 being available, the mere fact that a calculation will have to be made before determining

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the exact amount will not make that amount any the less a debt due to defendants 7, 8 and 9 to 11 validly assignable in law. This reasoning finds support in the decision in the Court of Appeal reported as *O'Driscoll v. Manchester Insurance Committee*(1) brought to our notice by the learned Advocate-General at the end of the argument. In that case it was held that

“where a panel doctor has done work under his agreement with the insurance committee, and the committee have received funds in respect of medical benefit from the National Insurance Commissioners, there is a debt owing or accruing from the insurance committee to the panel doctor which may be attached under Order XLV, rule 1, notwithstanding that as a matter of calculation the exact share payable to him may not yet have been ascertained.”

It was there contended that “there cannot be a debt” until the amount has been ascertained. But this contention was repelled by SWINFEN EADY L.J. with the observation :

“Here there is a debt uncertain in amount which will become certain when the accounts are finally dealt with by the Insurance Committee.”

As in that case the insurance committee had admittedly “at all times ample funds in their hands for the purpose of paying what might be found due to Dr. Sweeny” and therefore there was in that learned Judge's opinion “a debt owing or accruing from the insurance committee to Dr. Sweeny”, so in this case after the admitted payment of the money to Veeran Haji (i.e., his heirs) by the railway company they had ample funds in their hands for the purpose of paying what might be found due to defendants 7, 8 and 9 to 11, and so there was in our opinion a debt owing

(1) [1915] 3 K.B. 499

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or accruing from Veeran Haji's heirs to the assignors of the plaintiff, and this debt they could validly assign to the plaintiff. If we are prepared to accept this reasoning, Mr. Venkatarama Sastri frankly admitted that he has nothing to say against it.

For the above reasons we set aside the decision of the lower Court on the preliminary issue and remand the case for disposal after considering the other issues. The respondents will pay the appellant his costs here and in the Court below.

The court-fee will be refunded.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

GOPALU PILLAI (FIRST DEFENDANT), APPELLANT,

v.

N. R. KOTHANDARAMA AYYAR AND TWO OTHERS
(PLAINTIFF AND DEFENDANTS 2 AND 3), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), ss. 39 and 40—Composition—Debt not included in—Later suit on the debt—Maintainability of—Presidency-towns Insolvency Act (III of 1909), ss. 30 and 8—Difference in language between the corresponding sections of the two Acts—Effect of—Promissory note in name of a member of a joint family—No endorsement of promissory note in favour of other members—Suit by all the members on the original debt—Maintainability of—Defendant not a joint promisee of a debt with plaintiff—Power of Court to pass a decree in favour of such defendant for his share of the debt after period of limitation.

N and K were brothers and members of a joint family. They were both entitled to a debt evidenced by a promissory

* Appeal No. 213 of 1929.

note executed in favour of N by G and M on 21st July 1925. After the death of N, an agreement and a partition were entered into on 6th June 1926 between K and A, N's widow, by which it was arranged, *inter alia*, that each should be entitled to receive half of the amount covered by the promissory note. G was adjudicated an insolvent on 16th July 1926 under the Provincial Insolvency Act. On 23rd March 1927 G put in a petition for composition, impleading K and A as respondents to the same but excluding the amount covered by the promissory note in the list of debts appended thereto stating that he was not liable to pay the same. K and A were given notice of the petition. They neither asserted their rights under the promissory note nor gave up the same. The inference that could be drawn from their conduct was that they agreed that the debt covered by the promissory note might be left out of consideration in the proposed composition and should not form an obstacle to it. The proposed composition was sanctioned by Court. Later on, K and A objected to the composition on the ground that provision ought to have been made for their promissory note debt also, but they were unsuccessful. Thereafter K filed a suit to recover his half-share of the promissory note debt against G and M, impleading A as the third defendant and praying that the other half-share might be paid to A. Before the expiry of the period of limitation A had not applied to be brought on the record as a co-plaintiff.

Held, (1) that, where a promissory note is taken in the name of a member of a joint family, the whole family existing at the time of suit can recover the amount of the loan on the allegation that the debt really belonged to the family and that in such a case the suit is really based on the debt and not on the instrument and as such K could institute the suit without an endorsement of the promissory note in his favour. *Subba Narayana Vathiar v. Ramaswami Aiyar*, (1906) I.L.R. 30 Mad. 88, distinguished,

(2) that, in view of the fact that A had not become a co-plaintiff at the material times and in view of the fact that the suit was not one by a joint promisee to recover the whole debt impleading the other joint promisee as a party, no decree could be passed in favour of A in respect of her half-share of the debt, and

(3) that, in view of the language of sections 39 and 40 of the Provincial Insolvency Act, K was not precluded from recovering the suit debt.

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The difference in the language of the corresponding sections 30 and 8 of the Presidency-towns Insolvency Act pointed out.

Semle: If the insolvency proceedings had been conducted under the Presidency-towns Insolvency Act the suit might be incompetent.

APPEAL against the decree of the Court of the Subordinate Judge of Mayavaram, dated 21st December 1928, in Original Suit No. 29 of 1928.

K. S. Jayarama Ayyar and S. Nagaraja Ayyar for appellant.

K. S. Venkataramani for respondents.

Cur. adv. vult.

JUDGMENT.

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RAMESAM J.—This appeal arises out of a suit brought by the plaintiff, Kothandarama Ayyar, to recover his half-share of a debt evidenced by a promissory note executed by the first and second defendants in favour of his deceased brother, Natesa Ayyar, and to get the other half-share paid to the third defendant, who is Natesa Ayyar's widow. The promissory note was executed on the 21st July 1925 for Rs. 3,945-8-10 according to the particulars given therein. The plaintiff alleged that, at the time of the execution of the suit note, the plaintiff and his brother were undivided. Natesa Ayyar died on the 22nd March 1926, leaving a widow, Avayambal Ammal, the present third defendant. The relative rights of the plaintiff and the third defendant in the properties of the family being the subject of doubt a partition deed and an agreement were executed between them on the 6th June 1926. The partition deed generally provides that the family properties not expressly mentioned in it should be taken equally

(Exhibit I). But the agreement (Exhibit E) expressly provides that "the amounts due to the family and mentioned in the list attached hereto shall be collected either in the ordinary course or through Court bearing the expenses in common and the amount realized shall from time to time be received equally." A schedule of debts was appended to it and the debt evidenced by the suit promissory note is included in it. The suit was filed on the 23rd July 1928 but it is admitted that the 21st and the 22nd July were holidays and the Court re-opened on the 23rd. No question of limitation was raised in the issues nor was any argued before us.

The first defendant pleaded that the suit debt belonged exclusively to the deceased Natesa Ayyar (paragraph 6) and that the partition deed was brought about fraudulently (paragraph 8). He also pleaded that the suit not being based on an assignment from the third defendant should be dismissed. The first issue is whether the plaintiff is entitled to maintain the suit. We may assume that the issue is intended to raise all possible technical objections to the maintainability of the suit. The third defendant remained *ex parte*. She was so declared on the 3rd September 1928. The trial of the suit began on the 26th November 1928 and arguments were partly heard on the 27th November. On the 30th November, on the plaintiff's request, the case was adjourned for the production of a succession certificate for third defendant's half-share. On the 12th December the plaintiff's pleader puts in a petition to set aside the *ex parte* order against the third defendant. This is somewhat extraordinary because one would

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expect that the third defendant would herself put in such a petition. On the same day a written statement was filed by the third defendant appearing through the plaintiffs' Vakil in which she prays for a decree in her favour for one half of the amount according to the plaint. She does not pray for her name being transferred as a plaintiff. The written statement was not accompanied by any affidavit of hers explaining her late appearance. On that date the order declaring her *ex parte* not being set aside she was not even entitled to file a written statement. The case was adjourned to the 18th December 1928 for the production of the succession certificate in respect of her share. On the 18th December the *ex parte* order against the third defendant was set aside and the case was adjourned for the production of the succession certificate. A succession certificate was ordered to be issued to her on the 20th December by the same Sub-Judge. It was produced on the 21st and exhibited as Exhibit VI and judgment was delivered on the same day giving a decree for the whole amount of the debt in favour of the plaintiff and the third defendant. The first defendant files this appeal.

The first of the points raised by the appellant which should be dealt with in their logical order is that the whole suit is barred and is not maintainable by reason of certain proceedings in the insolvency of the first defendant. The first defendant became very heavily indebted. He filed Insolvency Petition No. 15 of 1925 in the Subordinate Judge's Court of Mayavaram for being declared insolvent. It was transferred to the Official Receiver's Court of Negapatam and

numbered as Insolvency Petition No. 1 of 1926. He was adjudicated on the 16th July 1926. He then applied by a petition dated the 23rd March 1927 in the Subordinate Judge's Court of Mayavaram suggesting a private arrangement and praying for stay of further proceedings before the Official Receiver, Negapatam. In this petition Natesa Ayyar appears as the third respondent but it is also shown that he died and the present plaintiff and the third defendant were brought in as legal representatives and made the twenty-third and twenty-fourth respondents. In paragraph 4 of the petition it is alleged that the petitioner has debts to pay to the extent of Rs. 8,723-11-7. This figure excludes the amount due on the suit promissory note. A note was made at the end of the list of debts that, although he executed the suit promissory note in favour of Natesa Ayyar, the second defendant was liable to pay on it and that he (i.e., first defendant) is not liable. Notice was ordered on this petition on the 22nd April. Respondents 23 and 24, i.e., the present plaintiff and the third defendant were served by the 21st July. Finally permission was granted to the petitioner to raise the required amount by executing a usufructuary mortgage and to deposit Rs. 8,500 in Court for paying off the debts. This was on the 16th August 1927. On the 28th October 1927 the present plaintiff and the third defendant filed a memorandum in which they stated that they were willing to receive Rs. 1,453-1-3 in full satisfaction of another debt due to them on a mortgage mentioned in the insolvency schedule. This memorandum makes no reference to the suit debt. It does not say

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that they give up that debt. It does not raise any objection to the recognition of the proposed arrangement on account of the petitioner not offering to pay the suit promissory note, i.e., they agreed that the suit promissory note be left out of consideration in the settlement proposed and should not form an obstacle to it. But on the other hand they did not give up their rights in it. The proposal to pay off the debts with the money raised on the mortgage was sanctioned on the 28th October 1927. Presumably all the debts other than the suit promissory note debt were paid off. The present plaintiff and the third defendant filed an appeal against the above order dated the 28th October 1927 objecting to the arrangement on the ground that provision ought to have been made for the payment of the suit promissory note debt also. The appeal was dismissed by the District Judge of East Tanjore on the ground that they consented to the proposed arrangement (*vide* Exhibit V dated the 26th July 1928).

On these facts it is contended by the appellant that the plaintiff cannot recover the debt due under the suit promissory note. Either he and the third defendant must be taken to have given up their right to the defendants or steps to recover it must be taken in the insolvency proceedings which were not at an end by reason of the order of October 1927. It is true that the order recognising the arrangement does not put an end to the insolvency but continues the proceedings for the purpose of giving effect to the arrangement; see *Subramanyam v. Narasimham*(1). This is all the

(1) (1928) 56 M.L.J. 489.

effect of the decision. It is unnecessary to consider the correctness of every dictum of the learned Judges in that judgment. Under section 39 of the Provincial Insolvency Act it is provided that

"the Court shall frame a schedule in accordance with the provisions of section 33, the order of adjudication shall be annulled, and the composition or scheme shall be binding on all the creditors entered in the said schedule so far as relates to any debts entered therein."

This section is very clear and admits of no ambiguity. Its language differs from that of the analogous provision in section 30 of the Presidency-towns Insolvency Act which says that

"the composition or scheme shall be binding on all the creditors so far as relates to any debt due to them from the insolvent and provable in insolvency."

If the present case arises under section 30 of the Presidency-towns Insolvency Act, it may be that the suit debt cannot be recovered by any suit on the ground it is not provided for in the composition. (I do not wish to express any final opinion on the point.) The only remedy of the plaintiff may be to get it included in the composition by getting the order sanctioning the arrangement amended or revoked and getting a fresh order passed. Under section 8 of the Presidency-towns Insolvency Act the Court has very ample powers to do that. The analogous section in the Provincial Insolvency Act (section 40) does not enable a creditor in the position of the present plaintiff and the third defendant to get the scheme amended by the inclusion of their debt as they themselves agreed to it and it cannot be said that the scheme cannot proceed without injustice.

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am unable to agree with the observation of RUVENKATACHARI J. in *Subramanyam v. Adrasimham*(1) when he says that there does not seem to be sufficient reason for the composition having different results under the two Acts. The existence of the wide powers under section 8 of the Presidency-towns Insolvency Act and the absence of such powers in the Provincial Insolvency Act and the limited scope of section 40 of the Provincial Insolvency Act and the difference in the language of section 39 of the Provincial Insolvency Act and section 30 of the Presidency-towns Insolvency Act, which must have been deliberate, show that the policy of the two Acts is different in this matter. Apart from this, the Court not having prepared a schedule as required by section 39, that section strictly does not apply. But even if we look at the spirit of the proceedings and consider that the parties assumed that the schedule already filed may be regarded as the schedule prepared under section 39 still for the reasons given above I do not think that the plaintiff and the third defendant are precluded from recovering the suit debt. I agree with the decision of the Punjab High Court, *Khalil-Ul-Rahman v. Ram Sarup*(2). It is said that if a suit can be so filed such a suit and the proceedings under it derogate from the protection afforded by section 28 (3) of the Act. But, in the case of a scheme, section 28 has to be read with section 39 and the protection is taken away by section 39 in respect of debts not included in the scheme. I do not think therefore that there is anything in this contention.

(1) (1928) 56 M.L.J. 489.

(2) (1926) 95 I.C. 204.

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In the case of *Govindas Chaturbhujadas Ramadas*(1) the facts were somewhat different. It arose under the Presidency-towns Insolvency Act and section 30 of that Act governed the matter. I may also point out that the argument that the liability on the debt was denied by the first defendant—the denial being accepted by the creditor—proceeded on a misconception of the position taken up by the first defendant in the insolvency proceedings. Exhibit II, the petition suggesting the arrangement, was not the original petition for being declared an insolvent. That petition is not filed before us and we must assume that the suit debt was shown in that petition as a debt for which the petitioner was liable. As there was nothing to dispute, Natesa Ayyar did not appear. Afterwards he died. It is only in Exhibit II that the statement was made that the second defendant was liable for the suit note debt and therefore the petitioner had only debts to the extent of Rs. 8,723 to pay. The obvious meaning of this is that, though in law the petitioner was liable for the debt, as a matter of fact the second defendant was the person who received the money and who was looked to by the creditor for the payment. It might be he would pay the amount and the liability of the first defendant was extremely problematical. Though in law the first defendant was liable he may be never called upon to pay. I think this is the proper interpretation of his statement in Exhibit II in the absence of the main insolvency petition. Under such circumstances the effect of the insolvency proceedings is that not only the insolvent and the particular creditor but also all the other creditors

(1) (1924) I.L.R. 41 Mad. 521.

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agreed that the suit debt should be excluded for the time being. In such a case there is no irregularity and though the general object of the scheme was to pay off all the creditors there is nothing in the Act to show that a scheme may not by the consent of all parties interested exclude a particular debt or debts which are not urgent or the burden of which on the insolvent is very problematical and may never arise. The appeal of the present plaintiff and the third defendant in the insolvency proceedings in which they attempted to get the suit debt included was really an afterthought. They attempted to get behind their consent and the appeal was rightly dismissed. For all these reasons I think that the present suit is not barred by what happened in insolvency.

I now come to the second point in the case, viz., whether there is any other objection to the maintainability of the suit. *Subba Narayana Vathiyar v. Ramaswami Aiyar*(1) is relied on in this connection by the appellant. In that case it was held that a person cannot sue on a negotiable instrument on the ground that the payee was a benamidar for him. But this has nothing to do with the case of a joint family. Where a note is taken in the name of a member of a joint family, the whole family existing at the time of suit can certainly recover the amount of the loan on the allegation that the debt really belonged to the family. In such a case the suit is really based on the debt and not on the instrument in its character of a negotiable instrument.

The decision in *Gopala Aiyangar v. Venkatakrishna Aiyangar*(2) is not inconsistent with this

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last statement. In that case it was not found that the debt was due to the family but the finding was only that the note was taken for the joint benefit of the first plaintiff and the deceased. That is really a case of benami and falls within the scope of *Subba Narayana Vathiyar v. Ramaswami Aiyar*(1) and was not a case of joint family.

The decision in *Chandana Venkataadri v. Majati Laximinarasimma Row*(2) shows that when there was a partition by which the note fell to the share of a member of the family he can sue. The decision obviously means that such a suit is not based on the negotiable instrument but is one to recover the debt.

So early as *Muhammad Khumarali v. Ranga Rao*(3) it was held that, where there was no valid endorsement of a note as a negotiable instrument by reason of both the payees not joining in the endorsement, the endorsement may be regarded as an assignment in writing of the half-share of the endorser within the meaning of section 130 of the Transfer of Property Act. This case has never been dissented from and in my opinion is good law. In the present case no assignment is needed, for on the evidence afforded by Exhibits E and I we must now assume that originally the suit note was executed for a debt due to the joint family but afterwards the brothers became divided in status and as a result the plaintiff and Natesa Ayyar's widow became each entitled to a half-share. Exhibit E being a settlement of a doubtful claim must be regarded as conclusive as to the nature of the relations between the plaintiff and

(1) (1906) I.L.R. 30 Mad. 88.

(2) (1914) 26 M.L.J. 224.

(1) (1906) I.L.R. 30 Mad. 88.

(2) (1910) M.W.N. 824.

(3) (1901) I.L.R. 24 Mad. 654.

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the third defendant and we cannot go behind it ; vide *Kami Reddi Timmappa v. Devasi Harpal*(1) repeatedly followed and applied. The plaintiff was always the owner of a half-share of the debt and required no assignment. The third defendant inherits the other half-share as the heir of Natesa Ayyar.

The third point argued is that the third defendant cannot recover her half-share. She was not a plaintiff. She never applied for being made a co-plaintiff in the lower Court. Even if her written statement of the 12th December can be regarded as such an application, there is no order on that application by the lower Court. Her written statement was filed at a time when the *ex parte* order against her had not been set aside. In this part of the case there is some mystery. The refusal of the third defendant to join in the suit as a plaintiff and even her later movements are not clearly explained to us and the matter is shrouded in some suspicion. Perhaps she felt some moral compunction and did not wish to bring a suit for her half-share. It is unnecessary to speculate further on it. No affidavit is filed by her praying that she should be made a co-plaintiff and we do not see any reason why we should help her now. If she was made a co-plaintiff by the Court under section 22 of the Limitation Act the suit would not be barred. In her absence as a co-plaintiff the third defendant's claim cannot be decreed. It was open to her to apply for being transposed as a co-plaintiff within the time of limitation. She did not do so. There is no principle which enables one plaintiff to

(1) A.I.R. 1929 Mad. 157.

recover a debt on behalf of another ; vide *Meyappa Chetty v. Supramaniam Chetty*(1), at page 121.

Reliance was placed on *Siluvaimuthu Mudaliyar v. Muhammad Sahul*(2) and *Annapurnamma v. Akkayya*(3) to show that the suit is maintainable by the plaintiff on behalf of both. But they are cases where the suit was by one of two joint promisees. In such cases one of the joint promisees may sue to recover the whole debt making the other a party. But the present case is not one of joint promisees. It is a case where there is one promisee in the beginning but afterwards the right comes to reside in two persons as tenants in common. In such a case any one may sue to recover his own share but the other co-sharer must be made a party. For otherwise the debtor may be harassed by pleas which are inconsistent as to the share due to each claimant and the finding in one may not be binding on the other and the debtor may suffer by inconsistent judgments. To avoid such injustice to the debtor the other co-sharer must be made a party. In such a case the more prudent course for the other co-sharer would be to apply to be made a co-plaintiff or, if his share is given up, the actual plaintiff may recover his own share only and the suit is not liable to the objection of splitting up the debt, the other share being given up, as the debtor profits by a claim being made against him for a smaller amount. I think that the sentence, "the suit must be for the entire debt" at page 649 in *Siluvaimuthu Mudaliyar v. Muhammad Sahul*(2),

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(1) (1916) 43 I.A. 113.

(2) (1926) 51 M.L.J. 648.

(3) (1912) I.L.R. 36 Mad. 544.

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must be confined to a case of joint promisees from the beginning. Where there was originally a single promisee afterwards represented by more than one, the suits may be for the respective portions of the tenants in common but provided the others are made parties. I do not think that any argument based on these decisions helps the respondents.

The result is that the appeal against that portion of the decree which is in plaintiff's favour is dismissed with costs on his half-share, and the appeal against that portion of the decree which is in third defendant's favour is allowed with costs on her half-share to be paid by her. The costs of printed papers will be divided into two shares.

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CORNISH J.—I have come to the same conclusion. I think that the appellant can get no help from section 39 of the Provincial Insolvency Act as a bar to the plaintiff's suit. That section lays down that, if the Court approves the debtor's proposal of a composition, the Court shall frame a schedule in accordance with the provisions of section 33, the order of adjudication shall be annulled, and the composition shall be binding on all the creditors entered in the said schedule so far as relates to any debts entered therein. The reference to section 33 makes it clear that the purpose of the schedule required by section 39 is to furnish an authoritative list of the creditors who have proved their debts, which are the subject of the composition. Under section 39 of the Provincial Insolvency Act, as likewise under section 30 of the Presidency-towns Insolvency Act, a composition will not be effective in respect of a debt which is not provable.

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Unfortunately the Court in this instance neglected to follow the procedure required by section 39. Although the Court approved of the proposed composition, no schedule of the creditors and debts included in the approved composition was framed. The Court has no power to dispense with this formality. It is made by the Act a requisite part of the procedure for effectuating a composition. The importance of the schedule is that the section says that the creditors whose names and debts are entered in the schedule shall be bound by the composition. The meaning of this appears to me to be that a creditor whose debt is not entered in the schedule will not be bound by the composition arrangement. That was also the view taken by the Lahore High Court in *Khalil-Ul-Rahman v. Ram Sarup*(1).

In the present case we have not to consider the effect of the Court's failure to frame a schedule upon the validity of the composition; but the point is whether a debt which was not included in the composition can be enforced in a suit by the creditor against the debtor after the composition has been approved and the insolvency annulled.

The annulment of the adjudication, which by section 39 must follow the Court's approval of the composition, puts an end to the insolvency. It is a conditional discharge of the insolvent, because section 40 empowers the Court to re-adjudge him an insolvent if it appears to the Court that the composition cannot proceed without injustice or undue delay, or that the Court's approval of the composition was obtained by fraud. The result

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of the annulment is that the debtor's property which had on his adjudication become vested in the Official Receiver reverts to the debtor on payment of the composition, unless the Court has directed that the property shall vest in a trustee; *Flower v. Lyme Regis Corporation*(1), and see section 37, Provincial Insolvency Act. Thereafter, any claim against the debtor which is not covered by the composition can be pursued against him by the ordinary course of a suit. In *Ex parte Russell. In re Winn*(2) a proposal of composition approved by the Court expressly excepted from it three of the creditors who had agreed to make no claim on the debtor for three years from the date of the annulment of the adjudication. After the annulment the debtor continued to trade for some years, and then filed a liquidation petition. It was held that in that liquidation the three excepted creditors were entitled to prove for their debts and to receive a dividend *pari passu* with the new creditors.

"Besides the persons who were willing to accept the composition",

said BACON C.J.,

"there were three others who did not insist upon receiving the composition then, but gave the debtor three years' time to pay their debts, the object being plainly that their debts should be paid in full, at all events that their right to recover was to exist in full. The resolutions express that in plain terms, and they were entered into with the full knowledge and consent of all the other creditors, and received the confirmation of the Court. When they were passed the bankruptcy was annulled, and the rights of the three excepted creditors remained as they were."

(1) [1921] 1 K.B. 488.

(2) (1876) 2 Ch. D. 424.

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In the present case there was certainly no express exception of the suit debt from the composition arrangement. But I think that the principle of the above-mentioned case is applicable. In a schedule of liabilities filed by the debtor he included a mortgage-debt due to the plaintiff-creditor and he mentioned that he had executed the promissory note in question, but he denied any present liability in respect of the note. This gave notice to the creditors and to the Court of the debtor's standpoint with regard to this particular debt, that it was not included in the debts which he was proposing to settle. The plaintiff, the creditor concerned, took no steps to challenge it, nor did he object to the petition filed by the debtor to stay further proceedings in the insolvency and to grant the debtor leave to raise money on a mortgage to settle with his creditors, although the amount of indebtedness stated in that petition was exclusive of the amount due on the promissory note; and, further, the plaintiff accepted the composition in respect of the sum due to him by the debtor on the mortgage. It seems to me that there was in effect a tacit agreement between the plaintiff and the debtor that the suit debt should stand out of the composition. No fraud was committed on the Court, and no harm was done to the other creditors. Such being the position, I see no reason why the plaintiff should not be free to bring his suit to recover this debt.

If the plaintiff's suit could be regarded as a suit upon the promissory note I would agree with Mr. Jayarama Ayyar that, the plaintiff not being the indorsee or transferee of the note, nor the

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legal representative of the deceased payee, the suit could not be maintained by him; *Subba Narayana Vathiyar v. Ramaswami Aiyar*(1), *Arunachala Reddi v. Subba Reddi*(2) and *Ulagappa Chetty v. Ramanathan Chetty*(3). But I think that this suit cannot be regarded as upon the note. The plaint does not allege any right in the plaintiff to sue on the note. It states that the note was executed in favour of Natesa Ayyar, the plaintiff's undivided brother. It hints at a division in status between the plaintiff and Natesa Ayyar, and refers to an agreement between the plaintiff and Natesa Ayyar's widow to take the debt half and half; and the plaintiff prays that he may be decreed half of the amount due and that the other half may be decreed to the widow, who has been impleaded as third defendant because she would not join with him in the suit. In my opinion, the plaint, which is very obscurely drawn, must be understood as intending a claim on the debt. And inasmuch as the plaintiff only claims to be entitled to one-half of the amount due, that is all that the Court can decree. It cannot in this suit decree the other half to the third defendant. There is no allegation in the pleadings nor proof that plaintiff and third defendant were joint promisees; so that the ruling in *Siluvaimuthu Mudaliyar v. Muhammad Sahul*(4) has no application.

G.B.

(1) (1906) I.L.R. 30 Mad. 88.
(3) (1915) 3 L.W. 171.

(2) (1907) 17 M.L.J. 393.
(4) (1926) 51 M.L.J. 648.

APPELLATE CRIMINAL.

Before Mr. Justice Bardswell.

IN RE NAGU SERVAI (ACCUSED No. 2), PETITIONER.*

1934,
March 23.

Criminal Procedure Code (V of 1898), sec. 195 (1) (a)—Withdrawal of complaint—Petition for—Not by way of appeal but revision—Summary dismissal of, without notice to petitioner and without hearing him—Propriety of.

A petition by an accused to the District Magistrate for the withdrawal of a complaint made by a Joint Magistrate under section 195 (1) (a), Criminal Procedure Code (Act V of 1898), is not by way of appeal but is one by way of revision. An order summarily dismissing it without hearing the petitioner and without giving him notice is improper.

PETITIONS 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 Ramnad at Madura, dated 31st October 1933, and made in Criminal Miscellaneous Petition No. 78 of 1933 (Criminal Miscellaneous Petition No. 42 of 1933, Joint Magistrate's Court, Devakottah) and the judgment of the Court of Session of Ramnad Division at Madura in Criminal Appeal No. 71 of 1933 preferred against the order of the Court of the Joint Magistrate of Devakottah, dated 29th August 1933, and made in Criminal Miscellaneous Petition No. 42 of 1933.

K. S. Jayarama Ayyar and B. R. Seturaman for petitioner.

A. Narasimha Aiyar for Public Prosecutor (L. H. Bewes) for the Crown.

Cur. adv. vult.

* Criminal Revision Cases Nos. 1026 of 1933 and 245 of 1934.

ORDER.

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The Joint Magistrate of Devakottah made a complaint against two persons of an offence punishable under section 188, Indian Penal Code, for having disobeyed orders passed in proceedings under section 145, Criminal Procedure Code. The present petitioner, who is one of the two persons complained against, applied to the District Magistrate of Ramnad to have the complaint withdrawn, but the District Magistrate, without giving notice to the petitioner, dismissed his petition summarily. It is contended by Mr. Jayarama Ayyar on behalf of the petitioner that the application to the District Magistrate for the withdrawal of the complaint was an appeal and that under the proviso to clause (1) of section 421, Criminal Procedure Code, it should not have been summarily dismissed without giving the petitioner or his pleader an opportunity of being heard.

A number of decisions of this Court have been quoted with reference to clause (6) of section 195 of the Criminal Procedure Code of 1898. These decisions, however, do not apply and are not of great importance as the present Code has very much varied the law under section 195 and the connected sections from what it was formerly. Under section 195 of the old Code, no Court could take cognizance of certain offences committed against a public servant except with the previous sanction or on the complaint of the public servant concerned or of some public servant to whom he was subordinate. This was provided for by sub-section (1) (a). By sub-sections (1) (b) and (c) no Court could take cognizance of certain other offences except with the previous sanction or on

the complaint of a Court, and by sub-section (6) it was provided that any sanction given or refused under section 195 might be revoked or granted by any authority to which the authority giving or refusing it was subordinate. It was held in *Palaniappa Chetti v. Annamalai Chetti*(1) that under sub-section (6) a party had the right to put in a petition by way of appeal and in *Muthuswami Mudali v. Veeni Chetti*(2), a Full Bench case, the right of appeal in such a case was also declared though in another Full Bench case, *Bapu v. Bapu*(3), it was held that the powers under section 195, sub-section (6), were not part of the appellate and revisional jurisdiction conferred by Chapters XXXI and XXXII of the Criminal Procedure Code, but were by way of being a special power conferred by the sub-section. Under the present Code sanction to prosecute can no longer be given under section 195, but there can only be a complaint either by a public servant with reference to section 195 (1) (a) or by a Court in the case of offences referred to in section 195 (1) (b) and (c), the complaint having to be in writing in every case. In the case of complaints given under section 195 (1) (b) and (c) it is now specifically provided by section 476-B that there can be an appeal. Under the old Code in section 195 (6), which no longer exists, the word "appeal" was not at all used. Now a right which in definite language is a right of appeal is given in the case of a complaint made by a Court and the appeal has to be to the Court to which the Court that makes the complaint is subordinate within the meaning of section 195 (3), that is, the

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(1) (1903) I.L.R. 27 Mad. 223.

(2) (1907) I.L.R. 30 Mad. 382 (F.B.).

(3) (1912) I.L.R. 39 Mad. 750 (F.B.).

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Court to which appeals ordinarily lie. It has been held by a Full Bench of this Court in *Janardana Rao v. Lakshmi Narasamma*(1) that in dealing with appeals under section 476-B, the power of dismissal is derived from Chapter XXXI of the Criminal Procedure Code. In that decision section 423 was referred to, but it can equally be taken that there is a right of summary dismissal derived from section 421. Mr. Jayarama Ayyar has argued with reference to the old decisions as to section 195 (6) that even an application to a superior authority for the withdrawal of a complaint made in accordance with section 195 (1) (a) is an appeal, and that to it also must be applied the provisions of sections 421 and 423 in Chapter XXXI. As I have said, however, the position is now very different from what it used to be. Under section 195 (6) of the old Code, the superior authority might either grant a sanction or might refuse it, but now that sub-section no longer exists, and instead of it we have sub-section (5) which only allows the withdrawal of a complaint made by a public servant by another public servant to whom he is subordinate, and does not allow a complaint to be made by a superior authority when a lower authority has declined to make one. Not only then is the word "appeal" not used in sub-section (5) as it is used in section 476-B, but also the powers given to a superior public servant have been very much restricted. I have been referred to two authorities on this point. One of these is a decision of the Patna High Court in *Kantir Missir v. Emperor*(2), in which it was held that the withdrawal of a complaint under section

(1) (1933) I.L.R. 57 Mad. 177 (F.B.).

(2) (1929) 117 I.C. 37.

195 (5) was an administrative act and one which could not be interfered with by a judicial tribunal. In that particular case, however, the complaint had been made by a Police officer and his complaint could hardly be regarded as a judicial act. In the case now under notice the sanction was given for disobeying an order passed by a Court under section 145, and it has been held in *Arunachalam Pillai v. Ponnuswami Pillai*(1) in the case of a sanction to prosecute for disobeying an order passed under section 144, Criminal Procedure Code, that, as the order disobeyed was that of a Court, the sanction to prosecute for disobedience of it must proceed from a Court and was of the nature of a judicial act. Similarly in the case under notice I must take it that the filing of the complaint by the Joint Magistrate was a judicial act, and that any application to the District Magistrate to have the complaint withdrawn was asking the District Magistrate to exercise his judicial discretion. The view taken by the High Court of Rangoon in *P. J. Money v. King Emperor*(2) is that a petition for the withdrawal of a complaint made under section 195 (1) (a) is not by way of appeal but is one by way of revision. With this view I would with all respect agree. I take it then that the application by the petitioner to the District Magistrate was an application in revision. The dismissal of it was to the prejudice of the petitioner, one of the persons complained against, and, under section 439 (2), such an order should not have been passed to his prejudice without his being heard either personally or by pleader. The order of the District Magistrate summarily

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(1) (1918) I.L.R. 42 Mad. 64.

(2) (1928) I.L.R. 6 Rang. 529.

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dismissing the petition of the petitioner for withdrawal without giving notice was therefore improper. It is set aside and the District Magistrate will restore the petition to file and dispose of it after giving notice of it to the petitioner.

A question has been raised as to whether the petition for withdrawal should have been made to the Sessions Judge or to the District Magistrate. An appeal was presented to the Sessions Judge of Ramnad against the order of the Joint Magistrate that a complaint should be filed. The Sessions Judge dismissed the appeal holding that no appeal lay. In the light of what I have stated above, I am of opinion that the order of the Sessions Judge was correct and that the proper procedure was to petition the District Magistrate to make use of his powers in revision.

Criminal Revision Case No. 245 of 1934 against the decision of the Sessions Judge is therefore, dismissed.

K.W.R.
